

# **Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement**

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## **Table of Contents**

I. INTRODUCTION.....	2
II. FORCES PRESENT WITH CONSENT.....	4
1. Balancing Two Sovereigns .....	5
2. Granting Immunity and Waiving Jurisdiction.....	15
3. Conclusion Regarding State Immunity .....	18
III. FORCES PRESENT WITHOUT CONSENT BUT WITH UN AUTHORISATION.....	19
1. International Humanitarian Law .....	20
2. The United Nations Charter .....	23
3. The Convention on the Privileges and Immunities of the United Nations.....	26
A. Officials and Experts Potentially Covered by the Immunities Convention.....	26
B. Designations by the Secretary-General .....	31
C. Secretary-General's Waiver of Immunity and Review of the Waiver.....	34
4. The Convention on the Safety of United Nations and Associated Personnel .....	37
A. Operations and Individuals Covered by the Safety Convention.....	37
B. Obligation to Conclude a SOFA.....	41
5. Security Council Resolutions.....	42
6. Customary International Law and the Model UN SOFA.....	47
IV. CONCLUSION .....	51
SUMMARY – RÉSUMÉ – SAMENVATTING – ZUSAMMENFASSUNG – RIASSUNTO - RESUMEN.....	52

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## **I. Introduction**

Whether due to a need to act quickly, the inability to wait for negotiations, or a lack of a functioning government with whom to negotiate, the United Nations often needs to authorize peacekeepers and other peace support personnel without the benefit of a Status-of-Forces Agreement (“SOFA”). For example, no SOFA was concluded with Somalia for the UN operations there (the UN Operation in Somalia I and II or “UNOSOM” I and II and the Unified Task Force or “UNITAF”)<sup>1</sup> or with Lebanon (the UN Interim Force in Lebanon or “UNIFIL”)<sup>2</sup> for the first twenty years of operations there.<sup>3</sup> However, a SOFA is a primary source of jurisdictional immunities for military personnel, among other matters. Sometimes this initial failure to have a SOFA can be later cured by conclusion of a SOFA, but the problem remains of what immunities UN peacekeeping forces may enjoy in the absence of a SOFA.

It goes without saying that the sovereignty of the State is one of the fundamental tenants of public international law and includes the right of the State to exercise jurisdiction over its territory to the exclusion of other States.<sup>4</sup> Thus any person, military or otherwise, present in the territory of a State, but claiming immunity from that jurisdiction, must be able to invoke a legitimate exception to the general rule.

In order to address the question of the privileges and immunities held by UN peace support operations, we must first consider what kinds of operations are meant by that term. For the purposes of this paper, “peace support” or “peacekeeping” operations will broadly encompass traditional peacekeeping, peace enforcement, peace-building and other similar but related terms and missions, though the issues of immunities will be focused on military personnel carrying arms and using force.<sup>5</sup> Although peacekeeping and peace enforcement missions are often based on differing legal regimes,<sup>6</sup> there is considerable debate over the applicability of differing legal regimes to missions to the extent that the terminology for the missions is largely unhelpful.<sup>7</sup>

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<sup>1</sup> See UNSC Res. 751, 24 April 1992 (establishing UNOSOM); UNSC Res. 794, 3 December 1992 (establishing UNITAF and authorising the use of all necessary means under Chapter VII); and UNSC Res. 814, 26 March 1993 (establishing UNOSOM II under Chapter VII).

<sup>2</sup> See UNSC Resolutions 425 and 426, both 19 March 1978.

<sup>3</sup> See R. Murphy, ‘United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?’, Vol. 14 *Crim. L. Forum* 2003, pp. 153–194; D. Fleck & M. Saalfeld, ‘Combining Efforts to Improve the Legal Status of United Nations Peacekeeping Forces and Their Effective Protection’, Vol. 1 No. 3 *International Peacekeeping* 1994, p. 82.

<sup>4</sup> See e.g. PCA, *Island of Palmas Case (Netherlands v. United States)*, Award of the Tribunal, 4 April 1928, Vol. 2 *U.N.R.I.A.A.*, p. 829; I. Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 1979, 3<sup>rd</sup> ed.), p. 287.

<sup>5</sup> See M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden, Martinus Nijhoff, 2005), pp. 11-34; A. Roberts & R. Guelff, ‘Prefatory Note’, in A. Roberts & R. Guelff (eds.), *Documents on the Laws of War* (Oxford, Oxford University Press, 2000, 3<sup>rd</sup> ed.), p. 721; and H. McCoubrey & N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Aldershot, Dartmouth, 1996), pp. 11-36.

<sup>6</sup> See generally G.T. Harris, ‘The Era of Multilateral Occupation’, Vol. 24 *Berkeley Journal of International Law* 2006, p. 1; A.E. Eckert, ‘United Nations Peacekeeping in Collapsed States’, Vol. 5 *Journal of International Law and Practice* 1996, p. 273. Also see generally Convention on the Safety of United Nations and Associated Personnel, New York, 9 December 1994, UNGA Res. 49/59 (hereinafter Safety Convention).

<sup>7</sup> See e.g. Roberts & Guelff, *supra* note 5, p. 721; Harris, *supra* note 6; J.P. Bialke, ‘United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict’, Vol. 50 *A.F.L. Rev.* 2001, p. 4;

This author will proceed with the position that the immunities of military personnel carrying arms and using force are identical regardless of terminology or legal basis for authorizing the mission.

Secondly, by “immunity”, this author means that failure of local courts to have adjudicative or enforcement jurisdiction, although the State potentially still largely retains prescriptive jurisdiction and thus the persons in question may be bound to local law although the courts cannot enforce compliance.<sup>8</sup> This should be opposed to “privilege”, which this author will take to mean that the State does not have prescriptive jurisdiction over the subject matter.<sup>9</sup>

UN peacekeeping operations have traditionally been present in host States with the consent of the State involved.<sup>10</sup> Initially in the history of the UN, these forces were not dispatched under the authority of Chapter VII of the UN Charter, but under what has been described as “Chapter VI ½,” *i.e.* not clearly under either Chapter VII, coercive measures, or Chapter VI, non-coercive measures, but somewhere in between.<sup>11</sup> “The forces may thus be described as ‘unchartered’”.<sup>12</sup> The lack of clarity of the legal basis for the presence of troops was to some degree obviated by the consent of the host State, as well as the judgment by the International Court of Justice (“ICJ”)

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and B.D. Tittmore, ‘Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations’, Vol. 33 *Stanford Journal of International Law* 1997, pp. 80-81.

<sup>8</sup> See e.g. French Supreme Court, *Epoux Martin v. Banque d’Espagne*, 3 November 1952, Vol. 19 *I.L.R.* 1957, p. 202; Vol. 80 No. 3 *Journal de droit international* 1953, p. 654, Vol. 42 *Revue critique de droit international privé* 1953, p. 425 (discussing as distinct “*immunité de juridiction*” and “*incompétence d’attribution*”); the Japanese judgment *The Empire v. Chang & others*, 1921, in J. Fischer Williams (ed.), *Annual Digest of International Public Law Cases 1919-1922* (Cambridge, Cambridge University Press, 1932), p. 288 (“an offence committed by such persons is not purged of its *prima facie* quality as an illegal act. Whilst they may not be tried in the territorial courts during the term of their office or employment, this may naturally be effected when they become divested of it”); High Court, Queen’s Bench Division (UK), *Arab Banking Corporation v. International Tin Council, et al.*, 15 January 1986, Vol. 77 *I.L.R.* 1994, p. 6 (“[i]mmunity from jurisdiction only refers to the adjudicative process”); H.G. Schermers & N.M. Blokker, *International Institutional Law* (Leiden, Martinus Nijhoff, 2003, 4<sup>th</sup> ed.), § 323 (“local courts cannot assess the applicability of the law in specific cases”); G. Von Glahn, *Law Among Nations* (New York, Macmillan, 1992, 6<sup>th</sup> ed.), pp. 225-226 (“forces that find themselves in another nation’s territory must comply with that nation’s laws”); A. Reinisch, ‘European Court Practice Concerning State Immunity from Enforcement Measures’, Vol. 17 No. 4 *E.J.I.L.* 2006, p. 804; E. Denza, ‘Diplomatic Agents and Missions, Privileges and Immunities’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (New York, Elsevier, 1992, 2<sup>nd</sup> ed.), Vol. 1, p. 1042; ILC, *Draft Articles on Jurisdictional Immunities of States and Their Property, Commentary to Article 1*, Vol. II-2 *Y.I.L.C.* 1991, p. 13, § 2 (hereinafter *Draft Articles*) (“the right of sovereign States to exemption from the exercise of the power to adjudicate [and] immunity of a State in respect of property from measures of constraint, such as attachment and execution in connection with a proceeding before a court of another State”); and H. Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’, Vol. 28 *B.Y.I.L.* 1951, p. 220.

<sup>9</sup> See Schermers & Blokker, *supra* note 8, § 323 (“where local legislation is not, or is differently, applicable”).

<sup>10</sup> See e.g. UN Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary-General on the Work of the Organization Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on Jan. 31, 1992, UN Doc. A/47/277 – S/24111, 17 June 1992 (hereinafter *An Agenda for Peace*). Also see UN Department of Public Information, *The Blue Helmets: A Review of United Nations Peace-Keeping*, UN Doc. DPI/1065 (New York, UN Department of Public Information, 1990, 2<sup>nd</sup> ed.), pp. 5-6 (hereinafter *The Blue Helmets*).

<sup>11</sup> See *The Blue Helmets*, *supra* note 10, p. 5 (citing Dag Hammarskjöld).

<sup>12</sup> R.C.R. Siekmann, *National Contingents in United Nations Peace-Keeping Forces* (Dordrecht, Martinus Nijhoff, 1991), p. 7.

in the *Certain Expenses* case<sup>13</sup> and the simple effectiveness of the forces in preventing the escalation of armed conflicts. The principal example of this early consensual deployment is the UN Emergency Force (“UNEF”) established by the General Assembly.<sup>14</sup>

The UN Security Council took the dramatic step of authorizing the constitution of a peacekeeping force specifically under Chapter VII and without the consent of the host State for the first time in 1992 in Resolution 794 regarding Somalia.<sup>15</sup> This action was followed by other uses of Chapter VII power to authorize the use of coercive force without the consent of the host State in Haiti<sup>16</sup> and Bosnia and Herzegovina.<sup>17</sup> Whereas an earlier report by the UN Secretary-General entitled *An Agenda for Peace*, reaffirmed the prior policy of securing the consent of the host State, the *Supplement to An Agenda for Peace* did not, and instead expressly endorsed the use of Chapter VII coercive force in the absence of host State consent.<sup>18</sup>

Considering this important development in non-consensual operations, this article will divide the question of immunities into two major categories of UN operations: (1) Those operations that are in country with the consent of the host State and (2) Those operations that are in country without State consent but with the sanction of the UN. Operations that are in country without consent and without the sanction of the UN will not be addressed specifically since those operations would likely be considered belligerent, although they might have some claim to lawfulness for humanitarian reasons or other bases in *jus ad bellum* rules. The conclusions of this paper might have some application to these situations regarding immunities, but this paper will not directly address them.

## **II. Forces Present with Consent**

The immunity of foreign forces, present in the host State, is well established in international law under the doctrine of State immunity; however there are two competing theories that underlie the doctrine and produce distinct differences when we move to the issue of non-consensual

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<sup>13</sup> ICJ, *Certain Expenses of the U.N. (Article 17, Paragraph 2, of the Charter)*, 20 July 1962, *I.C.J. Rep.* 1962, p. 151 (hereinafter *Certain Expenses* case).

<sup>14</sup> See UNGA Res. 1001, 7 November 1956. Also see *The Blue Helmets*, *supra* note 10, pp. 43-78.

<sup>15</sup> See UNSC Res. 794, 3 December 1992 (“Acting under Chapter VII of the Charter of the United Nations, [the Security Council] authorizes the Secretary-General and Member States cooperating ... to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia”). Also see UNSC Res. 814, 26 March 1993 (authorising UNOSOM II).

<sup>16</sup> See UNSC Res. 940, 31 July 1994 (“Acting under Chapter VII of the Charter of the United Nations, [the Security Council] [a]uthorizes Member States ... to use all necessary means to facilitate the departure from Haiti of the military leadership”).

<sup>17</sup> See UNSC Res. 1031, 13 December 1995 (“Acting under Chapter VII of the Charter of the United Nations, [the Security Council] ... [a]uthorizes the Member States acting through or in cooperation with the organization ... to establish a multinational implementation force (IFOR) ... [and] to take all necessary measures to effect the implementation of and to ensure compliance with ... the Peace Agreement”). Also see General Framework Agreement for Peace in Bosnia and Herzegovina, Paris, 14 December 1995, UN Doc. S/1995/999, Annex.

<sup>18</sup> See *An Agenda for Peace*, *supra* note 10; 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*, Report of the Secretary-General, UN Doc. A/50/60 – S/1995/1, 25 January 1995, p. 4 (hereinafter *Supplement to An Agenda for Peace*).

operations.<sup>19</sup> In most situations involving State consent and State immunity, the theoretical basis for the law is not an issue since the results will not differ, but when we turn to situations of lack of consent, the two theories may lead us to conflicting results. Therefore, we will discuss at the outset the theoretical foundation for State immunity.

The two primary theories for State immunity are the “fundamental right” theory and the “State waiver” theory. The “fundamental right” theory posits that the armed forces of a State are inherently immune from foreign State jurisdiction under international law and that they are accordingly immune when within the territory of a foreign State. The other theory, that of “State waiver,” argues that one State’s armed forces receive a grant of immunity, or, phrased a different way, a waiver of jurisdiction, from the host State out of concerns for comity and that this grant of immunity can be implied in the State’s consent to their admission.

The classic statement of the law in the situation of a foreign armed force present in a host State with the host State’s consent, as a basis for limiting the host State’s jurisdiction, is the United States case *The Schooner Exchange*.<sup>20</sup> In this case, the Chief Justice of the US Supreme Court, Justice Marshall, wrote:<sup>21</sup>

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him [...] The grant of a free passage [...] 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.

What this passage means in terms of an underlying theory of State immunity will be discussed in the sections to follow.

### 1. Balancing Two Sovereigns

Many authors trace the justification for State immunity to the sovereign independence of States, and the need to balance those attributes among the various States as equals.<sup>22</sup> “It has become an established rule that between two equals, one cannot exercise sovereign will or power over the other, ‘*Par in parem non habet imperium*.’”<sup>23</sup> The resulting obligation of comity among nations

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<sup>19</sup> UK House of Lords, *Holland v. Lampen-Wolfe*, [2000] 1 W.L.R. 1573, 20 July 2000 (L. Hope). (distinguishing between “granting of immunities under domestic law in circumstances that did not involve any international law obligation” and “granting immunity to a foreign state in accordance with its international law obligations”).

<sup>20</sup> See US Supreme Court, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (24 February 1812) (hereinafter *Schooner Exchange*).

<sup>21</sup> *Id.*

<sup>22</sup> See e.g. UK Court of Admiralty, *The Parlement Belge*, [1880] 5 P.D. 197, 217 (state immunity is a “consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state”) and *Holland v. Lampen-Wolfe*, *supra* note 19 (Millet, L.) (“State immunity, as I have explained, is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself”).

<sup>23</sup> H.E.S. Sucharitkul, ‘Immunities of Foreign States Before National Authorities’, Vol. 149-I *Recueil des Cours de l’Académie de Droit International de la Haye* 1976, p. 117.

demands a system of immunities.<sup>24</sup> Thus, international law requires immunity for organs of another State in foreign territory. However, the principle of sovereign equality is one of the capacity for rights, *i.e.* the ability to engage each other on the international plane.<sup>25</sup> As a capacity question, this notion does not necessarily lead to any specific normative solution for balancing two sovereigns' equality.

Although States may have the capacity for equal rights, each State has complete and absolute jurisdiction over all persons present in and activities arising within its territory, unless it provides otherwise or is restrained by international law.<sup>26</sup> Thus, a State may exclude a foreign State's organs at will or order their departure from its territory.<sup>27</sup>

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<sup>24</sup> *Id.*, p. 119 ("Reciprocity of treatment, comity of nations and courtoisie internationale are very closely allied notions, which may be said to have afforded a *subsidiary or additional basis* for the doctrine of sovereign immunity").

<sup>25</sup> See E.D. Dickinson, *The Equality of States in International Law* (Cambridge, Harvard University Press, 1920), p. 5 ("The meaning of equality as a legal principle is explained by a few modern writers in a way that approaches scientific precision. Some define it in terms that suggest equality of rights, and then proceed to explain it as equality of legal capacity"); J.L. Briery, *The Law of Nations* (New York, Oxford University Press, 1963, 6<sup>th</sup> ed., Humphrey Waldo (ed.)), pp. 130-132 (expressing a more reserved reading of sovereign equality).

<sup>26</sup> See PCIJ, *The Case of the S.S. "Lotus" (France v. Turkey)*, 7 September 1927, *P.C.I.J. Series A*, No. 10; US Supreme Court, *Wilson v. Girard*, 354 U.S. 524 (1957), pp. 529-530; *Reid v. Covert*, 354 U.S. 1 (1957), p. 15, n. 29, pp. 48-49 and *Schooner Exchange*, *supra* note 20, pp. 136, 144; as well as *Holmes v. Laird*, US District of Columbia Circuit Court, 459 F. 2d 1211 (1972), pp. 1216-1217, *cert. denied* US Supreme Court, 409 U.S. 869 (1972) ("We think it now fully established that the plenary criminal authority of a friendly host nation during peacetime is undiminished by the bare fact that the accused is a member of a military force stationed there. Certainly there is no immunity from local prosecution contrary to the explicit terms of an agreement-like NATO SOFA-purporting to define jurisdictional areas for host and visiting countries alike") and *Cozart v. Wilson*, US District of Columbia Circuit Court, 236 F. 2d 732 (1956), p. 733, *vacated as moot*, US Supreme Court, 352 U.S. 884 (1956); American Law Institute, *Restatement, Second, Foreign Relations Law of the United States* (St. Paul, American Law Institute, 1965), § 20 (hereinafter *Second Restatement*) ("A state has jurisdiction to enforce within its territory a rule of law validly prescribed by it") and R. Jennings, *The Place of the Jurisdictional Immunity of States in International and Municipal Law* (Saarbrücken, Universität des Saarlandes, Europa-Institut, 1987), p. 19 ("territorial jurisdiction is the dominating principle").

<sup>27</sup> See e.g. ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, *I.C.J. Rep.* 2005, p. 116 (discussing the requirement of consent for foreign troops to be present in the territory of another state); US Court of Claims, *Gallagher v. United States*, 191 Ct. Cl. 546, 423 F. 2d 1371 (1970), *cert. denied* US Supreme Court, 400 U.S. 849 (1970) ("a military contingent from one country can be present in a friendly foreign country only with the latter country's consent"); *Wilson v. Girard*, *supra* note 26 (holding that a state may prohibit foreign forces from entering its territory); R. Higgins, *Problems and Processes: International Law and How We Use It* (Oxford, Clarendon Press, 1993), pp. 78-94; *Second Restatement*, *supra* note 26, § 54 ("In time of peace, a state may not send a force into the territory of another state, or keep it there, without the consent of the territorial state"); X., 'Everything to Lose: The Expulsion of UN Troops From Eritrea Threatens a New War', *The Times* (London), 8 December 2005 (documenting Eritrea's order for UN peacekeepers to leave the country); and M. Lacey & W. Hoge, 'Eritrea expels U.N. peacekeepers, increasing tension with Ethiopia', *The New York Times* (New York), 8 December 2005 (same). But see Siekmann, *supra* note 12, p. 189 (adopting a less certain stance: "There is almost no practice available [on the position of host state with respect to withdrawal of troops]. There was a case in which the host state's wish to repatriate certain units was complied with, although the decision to withdraw the entire peace-keeping force had already been taken (Canada from UNEF 'I'). On another occasion, the host state (and other parties concerned) was consulted about the transfer of certain units (UNFICYP)"). Although Siekmann does note elsewhere that "According to the Secretary-General ... the consent of the host state was necessary in order to station UNEF on its territory" (*id.*, p. 3). In addition, Siekmann also argued that: "[H]ost state consent should apply only to the admission into the state's territory of peace-keeping forces as a whole; it cannot apply to the composition of the forces as such" (*id.*, p. 120). Also see Article 19 (c) United Nations Convention on

In the case of *The Schooner Exchange*, Chief Justice Marshall opined that any limitation on jurisdiction of the host State must be traced to the consent of the host State.<sup>28</sup> He further reasoned that the State waives its inherent jurisdiction as a result of admitting the foreign State's organs into its territory, but that, in the absence of express terms of the waiver, the act of consenting to the presence of the foreign organs implies recognition of State immunity.<sup>29</sup>

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation, not imposed by itself ... All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source [...] [A]ll exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed, and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it, must be supposed to act.

Furthermore, that grant of immunity was a matter of international courtesy rather than an inherent right under international law,<sup>30</sup> so that, lacking a waiver of jurisdiction, foreign armed forces would not be immune from local adjudicative and enforcement jurisdiction.

The precedent of *The Schooner Exchange* and the theoretical basis for State immunity that it announced has been followed rather consistently in the US.<sup>31</sup> The same reasoning has been

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the Law of the Sea, Montego Bay, 10 December 1982, 1833 *U.N.T.S.* 3 (hereinafter UNCLOS) (providing that a state may escort a foreign warship out of its territorial waters when it is there without consent). However, providing for state immunity in this convention does not necessarily mean that a ship present in another state's territory would have enjoyed such immunity without the Law of the Sea. In fact, the fact that the negotiators of the convention felt a need to require state immunity in such an instance suggests that it might not have.

<sup>28</sup> See *Schooner Exchange*, *supra* note 20, p. 143.

<sup>29</sup> *Id.*

<sup>30</sup> The author observes that the grant could be characterized as international comity but avoids that term because comity has been used in different contexts to suggest either discretionary courtesy or a non-discretionary requirement of law. See e.g. J.R. Paul, 'Comity in International Law', Vol. 32 *Harvard I.L.J.* 1991, p. 4; Compare UK House of Lords, *Compania Naviera Vascongado v. S.S. Cristina*, [1938] A.C. 485, 502 (Wright, L.) (State immunity "is sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of international law, accepted among the community of nations") with UK House of Lords, *Buttes Gas & Oil Co. v. Hammer*, [1980] 3 All E.R. 475, 482 (holding that state immunity is based on comity).

<sup>31</sup> See e.g. US Supreme Court, *Kinsella v. Krueger*, 351 U.S. 470 (1956), p. 479; *Mexico v. Hoffman*, 324 U.S. 30 (1945); *Tucker v. Alexandroff*, 183 U.S. 424 (1902), pp. 432-435; *Dow v. Johnson*, 100 U.S. 158 (1879) and *Coleman v. Tennessee*, 97 U.S. 509 (1878); *Holmes v. Laird*, *supra* note 26, p. 1216 ("We are advertent to the observation in *Schooner Exchange v. McFaddon* ... but read it in context as a proposition based on real, though not expressly-conferred, consent of the host nation emanating from the obvious necessities of the situation"); US N.D. Cal., *The Rogdai*, 278 F. 294 (1920); US D.C.N.Y., *Re Lo Dolce*, 106 F. Supp. 455 (1952); US D.C.N.Y., *The Janko*, 54 F. Supp. 241 (1944); US D.C.N.Y., *The Pampa*, 245 F. 137 (1917); US E.D. Pa., *United States v. Thierichens*, 243 F. 419 (1917) and US E.D. Pa., *The Luigi*, 230 F. 493 (1916). Also see A. King, 'Jurisdiction over Friendly Foreign Armed Forces', Vol. 36 No. 4 *A.J.I.L.* 1942, pp. 539-567. It appears that the US military may also agree with this interpretation. See e.g. W.A. Stafford, 'How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force', *Army Lawyer* Nov. 2000, pp. 10-11 ("Despite the regular United States military presence in Thailand, the United States does not have a SOFA with Thailand that retains criminal jurisdiction for official acts of Department of Defense personnel. Consequently, an American service person who takes action in compliance with the Standing ROE or Rules of Deadly Force could face charges in a Thai criminal court") (internal citations omitted) (also observing that some military personnel attached to American embassies are covered by diplomatic protections by agreement with the host state); *Id.*, pp. 13-14 ("Yemen has been frequented by US military ships and personnel on duty in the US Central Command area of responsibility. As in Thailand, military personnel are subject to local criminal process because the United States does not have an international agreement with Yemen retaining criminal jurisdiction") (internal citations omitted).

applied in US case law in cases where foreign States have asserted inherent adjudicative jurisdiction over US troops present in their territory, and would not concede that jurisdiction unless the US could point to a waiver of jurisdiction.<sup>32</sup> Lacking a waiver, Walter Gary Sharp cites numerous cases where officers were prosecuted under the host State laws.<sup>33</sup> In most of these situations, the host State argued that the troops had committed acts that went beyond their official duties.<sup>34</sup> The argument was not that international law on State immunity provided an exception for non-official acts but that the host State had not exempted those acts from its inherent jurisdiction.<sup>35</sup> It might follow from this argument that had the host State not exempted official acts from its jurisdiction, they might not be immune either.

In addition to other States arguing this theory in US courts, many of their own domestic courts have employed similar reasoning in domestic cases, as has at least one international tribunal.<sup>36</sup>

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<sup>32</sup> See US Court-Martial, *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969) (holding that the US had primary jurisdiction over the crime committed by its airman in the Philippines but only because the Philippines had waived its inherent jurisdiction over all persons in its territory) and *United States v. Hutcherson*, A.C.M. S.-18423, 29 C.M.R. 770 (1960) (holding that every sovereign state has the inherent right to exercise jurisdiction over its territory, including foreign forces in its territory, so that the terms of the NATO SOFA discussing the right of Italy to exercise its jurisdiction were merely declaratory of existing international law, although the serviceman was eventually tried in the US under the terms of the SOFA); *Williams v. Rogers*, US 8<sup>th</sup> Cir. (N.D.), 449 F. 2d 513 (1971), *cert. denied* US Supreme Court, 405 U.S. 926 (1971) (again, the Philippines); *Cozart v. Wilson*, *supra* note 26 (holding that trial of US serviceman by Japan for the crimes of death by negligence and rape was proper because Japan had inherent jurisdiction over all persons in its territory and had not waived its jurisdiction over those crimes); and US D.C. Col., *Smallwood v. Clifford*, 286 F. Supp. 97 (1968) (holding that, under international law, a host state, in this case Korea, had exclusive jurisdiction over all persons and offences within its territory unless it had consented otherwise, so the host state inherently had jurisdiction over crimes that fell outside any agreement).

<sup>33</sup> See W.G. Sharp, Sr., 'Protecting the Avatars of International Peace and Security', Vol. 7 *Duke Journal of Comparative and International Law* 1996, p. 93.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See e.g. PCA, *Deserters of Casablanca (France v. Germany)*, 22 May 1909, Vol. 3 *A.J.I.L.* 1909, pp. 755-760; the Australian judgment *Wright v. Cantrell*, 44 N.S.W.S.R. 45 (1943) (New South Wales), *Ann. Dig.* 1943-5, Case No. 37 (finding that foreign troops were not immune from civil charges for slander because the individuals were only immune insofar as the host state had consented to their presence and conditioned that immunity for purposes related to the free exercise of military operations; since a suit for slander did not impair the military activities of the sending state's forces, the individual was not immune); Supreme Court of Brazil, *In re Gilbert*, 22 November 1944, *Ann. Dig.* 1946, Case No. 86; Canadian Supreme Court, *In the Matter of a Reference as to Criminal Proceedings*, [1943] Can. Sup. Ct. 483 as well as the Canadian case *Municipality of Saint John v. Fraser-Brace Overseas Corp.*, [1958] 13 D.L.R. (2d) 177, Vol. 26 *I.L.R.* 165; Court of Cassation of Egypt, *Ministère Public v. Triandafilou*, 29 June 1942, *Ann. Dig.* 1919-1942 Supplement, Case No. 165; Civil Tribunal of Alexandria, Egypt, *Amrane v. John*, 1934, Vol. 6 *I.L.R.* 174, Vol. 62 *Journal du droit international* 194; Privy Council for Hong Kong *Cheung (Chung Chi) v. R.*, [1939] AC 160, 1938, (1938) 62 Ll. L. Rep. 151, [1939] 1 W.W.R. 232; the Panamanian case *Panama v. Schwartzfiger*, 11 August 1925, 24 Off. Jud. Reg., Panama, pp. 772-775, Vol. 21 *A.J.I.L.* 1927, pp. 182-187 and UK House of Lords, *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379, 394 (Simonds, V.) (interpreting the rule of state immunity as a rule of municipal law). Also see Reinisch, *supra* note 8, pp. 813-814 (discussing the policy of certain States to refuse immunity from execution on state assets on the authorisation of the host state executive or judiciary, suggesting that international law may permit a host state to also refuse enforcement immunity; citing e.g. Areiopagos, Full Court, *Prefecture of Boeteia v. Germany*, Judgments Nos. 36, 37/2002, 28 June 2002 (permitting enforcement against foreign state assets); Bundesgerichtshof, 26 June 2003, III ZR 245/98, [2003] *Neue Juristische Wochenschrift* 3488 (refusing to enforce the Greek judgement in German territory because it violated international law); and ECtHR, *Kalogeropoulou and others v. Greece and Germany*, Appl. No. 59021/00, 12 December 2002 (Admissibility) (refusing the application)).



For example, in the Australian case of *Wright v. Cantrell*,<sup>37</sup> the court held that foreign troops were not immune from civil charges for slander because the individuals were only immune insofar as the host State had consented to their presence and conditioned their immunity. The immunity it had necessarily granted was limited to purposes related to the free exercise of military operations. Since a suit for slander did not impair the military activities of the sending State's forces, and accordingly fall within the terms of the immunity granted by the State, the individual was not immune from suit.

In addition, scholars of international law appear to endorse the State waiver theory.<sup>38</sup> In the eighth edition of Oppenheim's, edited by Lauterpacht, the author states that: "the view which has the support of the bulk of practice is that in principle, members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle require specific agreement of the local State or otherwise".<sup>39</sup> Although it could be argued that this quote does not contemplate adjudicative jurisdiction but only prescriptive jurisdiction, other authors may go so far.

Ian Sinclair writes that:<sup>40</sup>

[O]ne does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified. One starts from the assumption of nonimmunity, qualified by reference to the

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<sup>37</sup> *Wright v. Cantrell*, *supra* note 36.

<sup>38</sup> See e.g. R. Plender, *International Migration Law* (Dordrecht, Martinus Nijhoff, 1988, 2<sup>nd</sup> ed.), pp. 176-177 ("Not infrequently, States find it necessary or appropriate to exempt from the main or substantial provisions of their immigration laws members of the armed forces of other countries, or of international organizations. A legal obligation to exempt members of those forces from certain provisions of immigration control may derive from an agreement between the receiving State and the sending State; or, in the case of an international organization, such an obligation may derive from the organization's powers, expressed or implied in its charter"); Brownlie, *supra* note 4, p. 321 ("By licence the agents of one state may enter the territory of another and there act in their official capacity") (footnote omitted); J.G. Starke, *An Introduction to International Law* (London, Butterworth & Company, 1977, 8<sup>th</sup> ed.) (arguing that immunity is granted by the host country and may be conditioned in agreement with the sending state, and that, in the absence of an agreement but when the host state consents to the presence of the organs, it grants state immunity under international law only insofar as the individual was performing official acts); *Draft Articles*, *supra* note 8, p. 13 ("Legal theories abound as to the exact nature and basis of immunity ..."), *Commentary to Article 6*, p. 24, § 3 (arguing that immunity presupposes that jurisdiction exists and that only once a state has established jurisdiction do the rules of state immunity preclude jurisdiction), *Commentary to Article 7*, p. 25, § 1, note 70 ("The territorial or receiving State is sometimes said to have consented to the presence of friendly foreign forces passing through its territory and to have waived its normal jurisdiction over such forces"); and G.P. Barton, 'Foreign Armed Forces: Qualified Jurisdictional Immunity', Vol. 31 *B.Y.I.L.* 1954, p. 370 (arguing that although immunity has been granted, it is not mandated by international law). Also see Siekmann, *supra* note 12, p. 135 (internal citations omitted) (although Siekmann argues elsewhere that customary international law demands immunity for UN peacekeepers, he also notes that "the host state's waiver of jurisdiction should not result in a vacuum, in which crime is not subject to prosecution either by the host state or by the troop-contributing country in question" (author's emphasis) which suggests that the host state has considerable discretion in granting or withholding immunity, notwithstanding international law).

<sup>39</sup> H. Lauterpacht (ed.), *Oppenheim's International Law* (London, Longmans, Green and Co., 1967, 8<sup>th</sup> ed.), Vol. 1, pp. 848-849. Also see Lauterpacht, *supra* note 8, p. 229 (the language of *Schooner Exchange* clearly indicates that "the governing, the basic, principle is not the immunity of the foreign state but the full jurisdiction of the territorial state and that any immunity of the foreign state must be traced to a waiver—express or implied—of its jurisdiction on the part of the territorial state").

<sup>40</sup> I. Sinclair, *The Law of Sovereign Immunity: Recent Developments*, Vol. 167-II *Recueil des Cours de l'Académie de Droit International de la Haye* 1980, p. 215.

functional need (operating by way of express or implied licence) to protect the sovereign rights of foreign States operating or present in the territory.

G.H. Hackworth concludes that:<sup>41</sup>

The principle that, generally speaking, each sovereign state is supreme within its own territory and that its jurisdiction extends to all persons and things within that territory is, under certain circumstances, subject to exceptions in favour particularly of foreign friendly sovereigns, their accredited diplomatic representatives ... and their public vessels and public property in the possession of and devoted to the service of the state. These exemptions from the local jurisdiction are theoretically based upon the *consent*, express or implied, of the local state, upon the principle of *equality of states* in the eyes of international law, and upon the necessity of yielding the local jurisdiction in these respects as an indispensable factor in the conduct of friendly intercourse between members of the family of nations.

Charles Hyde similarly argues:<sup>42</sup>

Because the exercise of exclusive jurisdiction throughout the national domain is essential to the maintenance of the supremacy of the territorial sovereign, the most solid grounds of international necessity must be shown in order to justify a demand that a State consent to an exemption ... It becomes important, therefore, to examine the reasons urged in behalf of exemptions habitually demanded ... [and] also to observe the nature and purpose of particular exemptions.

In all of these examples we see the premise that the territorial State's jurisdiction is absolute, without any reason that such jurisdiction should be limited to only prescriptive jurisdiction, and that any immunity enjoyed by another State's organs is by grant or consent of the territorial sovereign.

Furthermore, some have observed that human rights law might implicitly apply the waiver theory of State immunity.<sup>43</sup> If State immunity is an inherent attribute of a State's organs, exempting it from any and all foreign jurisdiction, then it is a hard argument to make that human rights obligations establish jurisdiction where it did not previously exist. The alternative, more in keeping with most readings of human rights obligations, is that those obligations do not establish jurisdiction but preclude a State from granting or claiming immunity from jurisdiction.<sup>44</sup>

The prerogative of the host State to grant, or apparently withhold State immunity, does not sit well with the sovereign equality of States, albeit an equality of capacity. This need to balance the sovereign equality of both States, however, may be resolved if we consider that the sending State has consenting to the immunity regime provided by the host State when sending its troops into foreign territory. The law on State immunity seeks to prohibit suit against States or otherwise

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<sup>41</sup> G.H. Hackworth, *Digest of International Law* (Washington, D.C., US Government Printing Office, 1941), Vol. 2, p. 393, § 169.

<sup>42</sup> C.C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (Boston, Little Brown and Company, 1947, 2<sup>nd</sup> ed.), pp. 815-816.

<sup>43</sup> See e.g. L.M. Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory', Vol. 97 *A.J.I.L.* 2003, pp. 743-744 ("... state immunity ... theory thus assumes that state immunity in cases of human rights violations is an entitlement rooted in international law, by virtue of either a fundamental state right or customary international law. However, both assumptions are false. State immunity is not an absolute state right under the international legal order. Rather, as a fundamental matter, state immunity operates as an exception to the principle of adjudicatory jurisdiction. Moreover, while the practice of granting immunity to foreign states has given rise to a customary international law of state immunity, this body of law does not protect state conduct that amounts to a human rights violation. These realities yield the important conclusion—one that the normative hierarchy theory ignores—that, with respect to human rights violations, the forum state, not the foreign state defendant, enjoys ultimate authority, by operation of its domestic legal system, to modify a foreign state's privileges of immunity").

<sup>44</sup> *Id.*

affecting their sovereign interests without their consent, due to their sovereign independence.<sup>45</sup> Certainly reaching out to sue a foreign State extra-territorially<sup>46</sup> or asserting jurisdiction over a case involving sovereign State issues<sup>47</sup> would infringe the other State's sovereignty without its consent. However, we might consider that States retain the right of exclusion of a foreign State's organs from their territory and no State is required to place its organs in the territory of another State.<sup>48</sup> By willingly placing its organs or troops within the territory of the other State, on notice of the immunities those organs or troops would receive, the State cannot be said to be subjected to the other State's jurisdiction against its will,<sup>49</sup> thus preserving its sovereign equality.

States appear to accept this mutual agreement as a valid basis for State immunity, as most clearly demonstrated in SOFAs. SOFAs and other similar international agreements for the presence of foreign troops generally provide for immunity closely drawn to the reasons for the consent to the presence of the troops, suggesting that the negotiating parties understood that the immunities were based on the parameters of mutual consent.<sup>50</sup> Even as recently as World War II, the United Kingdom asserted exclusive criminal jurisdiction over foreign troops and their offences within the territory of the UK.<sup>51</sup> It was only by treaty that the UK waived these claims,<sup>52</sup> and even then the UK argued that this waiver of exclusive jurisdiction must be viewed as exceptional.<sup>53</sup> Other

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<sup>45</sup> See *Holland v. Lampen-Wolfe*, *supra* note 19 (L. Millet) ("It is an established rule of customary international law that one state cannot be sued in the courts of another for acts performed iure imperii. ... It derives from the sovereign nature of the exercise of the state's adjudicative powers and the basic principle of international law that all states are equal").

<sup>46</sup> See e.g. ECtHR, *Al-Adsani v. United Kingdom* (Grand Chamber), Appl. No. 35763/97, 21 November 2001, Judgment.

<sup>47</sup> See e.g. *Buttes Gas & Oil Co. v. Hammer*, *supra* note 30, p. 482 (holding that the court would violate the comity of state immunity by adjudicating the appeal because the case involved the disputed boundary between two States).

<sup>48</sup> See generally *supra* note 27.

<sup>49</sup> See D. Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent', Vol. 7 *Duke Journal of Comparative and International Law* 1996, p. 209 (discussing the crucial role of "intervention against the will of the state"). Also see *Schooner Exchange*, *supra* note 20 (emphasizing the fact that the State's organs were voluntarily sent into another State: "One sovereign ... by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license...").

<sup>50</sup> See e.g. Article 299 Bustamante Code (Annex to Pan American Convention on Private International Law), Havana, 20 February 1928, 86 *L.N.T.S.* 332 (providing for immunity of foreign troops in a host state only for official acts; the host state retained exclusive jurisdiction for non-official acts); Article VII, § 2 Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, London, 19 June 1951, 199 *U.N.T.S.* 67 (providing for exclusive jurisdiction of the sending state) and § 1, 3 (providing for concurrent jurisdiction with primary jurisdiction granted to one of the States) (hereinafter NATO SOFA). Also see X., 'Criminal Jurisdiction Over American Armed Forces Abroad', Vol. 70 *Harvard Law Review* 1957, p. 1043.

<sup>51</sup> See Allied Forces Act, 1940, 3 & 4 Geo. 6, c. 51, [1942] 1 Stat. Rules & Orders 844 (No. 966).

<sup>52</sup> See Agreement Between the United States of America and the United Kingdom of Great Britain and Northern Ireland Respecting Criminal Jurisdiction Over Criminal Offenses Committed by Armed Forces, London, 27 July 1942, 57 Stat. 1193, *E.A.S.* No. 355; United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. 6, c. 31. Also see Service Courts of Friendly Foreign Forces Act, 58 Stat. 643, *codified at* 22 U.S.C. §§ 701-706 (1952) (providing for a reciprocal US waiver of jurisdiction over UK troops present in the US, but the waiver was limited by Presidential finding that the waiver was necessary); Proclamation No. 2626, Vol. 9 *Federal Register* 1944, p. 12403 (finding a waiver necessary for UK and Canadian troops present in the US); and Proclamation No. 3107, Vol. 20 *Federal Register* 1955, p. 5805 (revoking the waiver due to the conclusion of the NATO SOFA).

<sup>53</sup> See Note From British Foreign Minister to the Government of the United States of America, 57 Stat. 1193 (1942). Also see Agreement Between the United States of America and Egypt Respecting Jurisdiction Over Criminal Offenses Committed by the Armed Forces of the United States in Egypt, Cairo, 2 March 1943, 57 Stat. 1197, *E.A.S.*

agreements provided for immunities tailored for the particular circumstances on the ground, suggesting that immunity, absolute or restricted, was not an automatically applicable norm under international customary law but rather an affirmative grant by the host State.<sup>54</sup> Further evidence that State immunity is not an inherent lack of jurisdiction, but rather a waiver of jurisdiction comes from civil suits where State immunity was claimed.<sup>55</sup>

Furthermore, it appears that States, when they do so expressly, may dictate the terms of the immunity they are granting to the foreign State's organs when they admit those organs to their territory.<sup>56</sup> The numerous cases of host States exercising their jurisdiction to adjudicate

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No. 356; Note in the English, French, and Arabic Languages From the Minister of America to the Egyptian Prime Minister and Minister of Foreign Affairs, 1943, 57 Stat. 1204 (where the US and Egypt agreed to reciprocal waivers of criminal jurisdiction, but each acknowledged the exceptional nature of the waiver as a deviation from standard practice).

<sup>54</sup> See e.g. Visiting Forces Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 67, § 11(1) (providing that the courts of the UK have competence to assess whether the act was performed in the line of duty and thus whether the sending state, the US, retains jurisdiction over the matter, although they will presume that the acts are immune); Agreed Official Minutes Regarding Protocol To Amend Article XVII of the Administrative Agreement Between the United States of America and Japan, Tokyo, 29 September 1953, 4 U.S.T. 1851, T.I.A.S. No. 2848 (similar provision in the US-Japan agreement); Article VII, § 3(a)(ii) NATO SOFA, *supra* note 50 (providing for primary jurisdiction of the sending state only for acts in the line of duty and secondary jurisdiction of the host state) (discussed in US Air Force Board of Review, *United States v. Wolverson*, 10 C.M.R. 641, 1953; *United States v. Hughes*, 7 C.M.R. 803, 1953 and *United States v. Freeman*, 15 C.M.R. 639, 643, 1954 (holding that violations of the host state's laws by US troops do not necessarily amount to violations of the US Uniform Code of Military Justice, and thus the US may not have a basis on which to prosecute the individuals)); Status of Members of the Armed Forces of the Brussels Treaty Powers, 1949, C.M.D. No. 7868 (providing for exclusive jurisdiction of the host state); Act Respecting Visiting Forces of the United States in Canada, 1947, 11 & 12 Geo. 6, c. 47 (Canada only provided for concurrent jurisdiction); and Article IV Agreement and Exchanges of Notes Between the United States of America and Great Britain Respecting Leased Naval and Air Bases, and Protocol Between the United States of America, Great Britain, and Canada Concerning the Defense of Newfoundland, London, 27 March 1941, 55 Stat. 1559, E.A.S. No. 235, 12 Bevans 560, 204 L.N.T.S. 70 (US and UK provided for reciprocal exclusive jurisdiction). Also see G.P. Barton, 'Foreign Armed Forces: Immunity From Criminal Jurisdiction', Vol. 27 *B.Y.I.L.* 1950, pp. 194-204; and Barton, *supra* note 38, p. 364 (reporting, although the US and UK granted reciprocal exclusive jurisdiction to each other's armed forces, they did not receive exclusive jurisdictional immunity from other States. Barton argues that although the US asserted that providing for the exclusive jurisdiction of the sending state over its troops on foreign territory was "merely declaratory of international law", it did not succeed in securing such jurisdiction in negotiations, suggesting that the U.K. did not agree).

<sup>55</sup> See *Petrol Shipping Corp. v. Greece*, US 2d Cir. (N.Y.), 360 F. 2d 103 (1966), *cert. denied* US Supreme Court, 385 U.S. 931 (holding that state immunity was not a jurisdictional bar, as for example improper service of process might be, but rather the refusal of the State to exercise jurisdiction); *Chemical Natural Resources, Inc. v. Venezuela*, 420 Pa. 134 (1966), *cert. denied* US Supreme Court, 385 U.S. 822 (holding that state immunity was not a jurisdictional bar but a defence to jurisdiction; the fact that the foreign state could waive its immunity and that a state cannot acquire jurisdiction merely by consent, proved that adjudicative and enforcement jurisdiction must already exist in order for a waiver of immunity to be effective). Also compare civil suits where the court held that immunity was a matter of discretionary comity, not an inherent lack of jurisdiction; *Victory Transports, Inc. v. Comisaria General de Abastecimientos y Transportes*, US 2d Cir. (N.Y.), 336 F. 2d 354 (1964), *cert. denied* US Supreme Court, 381 U.S. 934; *The Carlo Poma*, US 2d Cir. (N.Y.), 259 F. 369 (1919), *vacated on other grounds* US Supreme Court, 255 U.S. 219; US 4th Cir. (Va.), *The Attualita*, 238 F. 909 (1916); US 3d Cir. (Pa.), *The Adriatic*, 258 F. 902 (1919); US 9th Cir., *Altmann v. Austria*, 317 F. 3d 954 (2002); *Loomis v. Rogers*, 254 F. 2d 941 (1958), *cert. denied* US Supreme Court, 359 U.S. 928; US D.D.C., *Malewicz v. Amsterdam*, 362 F. Supp. 2d 298 (2005) and *The Luigi*, *supra* note 31.

<sup>56</sup> See *Gallagher v. United States*, *supra* note 27 ("a military contingent from one country can be present in a friendly foreign country only with the latter country's consent, and that if the host country can entirely exclude a military contingent from its nation, then it can certainly condition admission or retention of it with whatever

violations of local criminal law when committed in the individual's private capacity demonstrates both that States routinely refuse to consent to a waiver of jurisdiction for non-official acts and that international law does not require them to do otherwise.<sup>57</sup> Again returning to *The Schooner Exchange*, Marshall's discussion of immunities included a comparison of State immunity to diplomatic immunity where he argued that:<sup>58</sup>

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the *conditions under which he was received* as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

Here Marshall clearly contemplates that immunities may be granted with conditions. Since he reasoned above that the waiver was granted by the State, then it follows that the conditions could also be set by the host State. It would appear that Marshall did indeed view immunities as a conditional grant of immunity by the host State, not an absolute one by international law, as an implied consequence of consenting to the presence of the foreign troops on its territory.

When troops are stationed in a host State with whom they are not engaged in hostilities and not occupying, the same questions arise regarding balancing the two sovereignties.<sup>59</sup> However, the interpretation of *The Schooner Exchange* and perspective on State immunity also applies. As noted above, during World War I and II, the US maintained that its troops stationed in Europe enjoyed absolute immunity, whereas the UK objected to this expansive reading of immunity.<sup>60</sup>

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stipulation it pleases as to jurisdiction, and can change these stipulations at will on proper notice"); *Wilson v. Girard*, *supra* note 26 (on the attempt of Japan to assert adjudicative and enforcement jurisdiction, holding that (1) a state may exclude a foreign state's organs from its territory; (2) a state has exclusive jurisdiction within its territory, including over foreign forces, unless it expressly or impliedly consents to waive jurisdiction; (3) a state may condition admission of foreign forces on any terms it chooses; and (4) that such a waiver was expressed in the protocol agreement with Japan, so that for non-official acts, trial by Japan is proper).

<sup>57</sup> See US 4<sup>th</sup> Cir. (Va.), *Bell v. Clark*, 437 F. 2d 200 (1971) (holding that the prosecution of serviceman for rape by the German authorities was appropriate because he committed the crime while off duty and the crime was an offence under German law); US 10<sup>th</sup> Cir. (Kan.), *Puhl v. United States*, 376 F. 2d 194 (1967) (holding the same although the German authorities waived jurisdiction and the serviceman was tried by the US); *Holmes v. Laird*, *supra* note 26; US D.C. Wis., *Starks v. Seaman*, 339 F. Supp. 1200 (1972) (holding that an airman could be convicted and imprisoned by a court in Taiwan when the drugs charges stemmed from his non-official actions); US D.C. Ark., *Marymont v. Joyce*, 352 F. Supp. 547 (1972) (holding in dicta that the serviceman could have been tried by British courts for the crime of murder committed outside of his official duties but that the UK had waived its right by granting the US primary jurisdiction); and US Court Martial, *United States v. Sinigar*, 6 U.S.C.M.A. 330, 20 C.M.R. 46 (1955) (holding that a Canadian court could order an American serviceman imprisoned for contempt of court when the serviceman committed the offence in this private capacity).

<sup>58</sup> *Schooner Exchange*, *supra* note 20, p. 139.

<sup>59</sup> See D.W. Bowett, 'Military Forces Abroad', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, Elsevier, 1997), Vol. 3, p. 388 ("Where military forces are in belligerent occupation of territory, their powers are regulated by the laws of war. Where such forces are engaged in belligerent activity, but are fighting on friendly allied territory, they will customarily enjoy complete exemption from the jurisdiction of the territorial sovereignty. However, in situations where such forces are in the territory of another State with its consent, and not actively engaged in hostilities, problems arise from reconciling the jurisdictions of the 'sending' State and the 'territorial' State where the acts of the forces of the sending State are delictual under the territorial State").

<sup>60</sup> See S. Lazareff, *Status of Military Forces Under Current International Law* (Leiden, Sijthoff, 1971), pp. 21-28; *Second Restatement*, *supra* note 26, § 59 (Reporter's Note) (observing that the British practice is not to presume waiver of jurisdiction from consent alone and, lacking express waiver of immunity, to hold foreign forces subject to

Subsequently, the UK then granted immunity to US troops through subsequent agreements and did not do so for the other allied powers.<sup>61</sup> In the wake of the US Civil War, the US Supreme Court had already extended the reasoning of *The Schooner Exchange* to cover situations of troops stationed in a foreign State<sup>62</sup> and lower US courts reaffirmed that position after the war.<sup>63</sup> Sharp argues that troops stationed in a foreign State are therefore immune for acts of self-defence and acts within their official duties.<sup>64</sup> We presume that he believes they necessarily have a functional immunity in customary international law because of the implied terms of the waiver of jurisdiction flowing from the consent to admit them. Self-defence is an arguable position since troops engaged in non-official duties, unless otherwise provided in a SOFA, are subject to the usual criminal jurisdiction of the State,<sup>65</sup> including rules on self-defence. Insofar as the individual is defending himself, the protection would not be an immunity *per se* but a defence or justification under criminal law. Since any immunity he might accrue would be immunity from adjudicative and enforcement jurisdiction, not prescriptive jurisdiction, the validity and terms of the criminal defence would be assessed by reference to host State law. Insofar as the individual was defending the mission, his acts could be considered official duties and thus immune from local law as provided in the waiver of jurisdiction. Thus, the basis for immunity of the troops in

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UK jurisdiction); District Court of Haifa, Israel, *Israel v. Papa Coli Ben Dista Saar*, 10 May 1979, UN Juridical Yearbook 1979, pp. 205-206 (hereinafter *PLO* case) (“regarding American troops stationed in English soil during World War I, after long drawn out negotiations between England and the United States over judicial authority, the British Government issued a defense regulation which granted *limited* judicial authority to American military courts, even though she never implemented her judicial authority in regard to American soldiers stationed on her soil”). Also note that France and Australia also apparently reserved the right to decide for themselves whether to grant any immunity. See *id.* (noting that “When American troops landed on French soil in 1917, there was necessity of exchanging letters between the American Secretary of State for Foreign Affairs and the French Ambassador in Washington D.C. in order to grant judicial authority to American military courts over American soldiers in France ... When there was necessity to station American military divisions on Australian territory, the Australian Government issued a regulation by whose right American military courts would bear authority regarding disciplinary and internal administrative matters, while reserving for herself the judicial authority to bring American military personnel to trial. At a later stage, in 1942, a law was passed which stated that, in the event of the arrest of an American military person in Australia who had broken Australian law, notification would be given to the American military authorities and, if requested, the individual would be transferred to them for trial by American military law”).

<sup>61</sup> *Id.* Also see Allied Forces Act, *supra* note 51.

<sup>62</sup> See *United States v. Sinigar*, *supra* note 57 (recognizing rule); *Dow v. Johnson*, *supra* note 31; *Coleman v. Tennessee*, *supra* note 31 (“a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of that place”); and *Re Lo Dolce*, *supra* note 31.

<sup>63</sup> See *Wilson v. Girard*, *supra* note 26 (stating in dictum that the state must be found to have expressly or impliedly waived its jurisdiction and in the case at hand that Japan had done so); *Holmes v. Laird*, *supra* note 26 (affirming the same: “Thus, had appellants been present in West Germany as militarily-unattached civilians, an exercise of West German criminal jurisdiction over them would indubitably have been appropriate. It seems equally clear that, absent some countervailing international agreement, such an exertion remained unaffected by their status as American soldiers stationed there” meaning that their status as soldiers, and thus organs of the US, did not in itself result in immunity unless the host state had agreed to a grant of immunity).

<sup>64</sup> See Sharp, *supra* note 33 (citing Lazareff, *supra* note 60, pp. 57-58).

<sup>65</sup> See *Second Restatement*, *supra* note 26, § 57 (“... a state's consent to the presence of a foreign force within its territory does not of itself imply that the state waives its right to exercise enforcement jurisdiction over members of the force for violations of the criminal law of the territorial state”); Lazareff, *supra* note 60, pp. 7-8; and J. Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law* (Leiden, Martinus Nijhoff Publishers, 1992), p. 11.

country must be traced back to the waiver of jurisdiction, possibly implied through the act of consent to their presence. If the State consents to the presence of foreign troops, then whether the troops are present under UN administration or pursuant to a UN mandate appears to be irrelevant, unless the terms of the consent condition this aspect in some way.

## 2. Granting Immunity and Waiving Jurisdiction

Before turning to consider situations of lack of consent, we will examine the form of State waiver and cases where the State may establish a unique regime of immunity differently tailored for local needs. Consent and waiver may be express or implied, and States appear to be able to limit the waiver to those immunities the State thinks fit to grant, such as mere functional immunity.

Express consent to the presence of troops and waiver of jurisdiction over them is usually expressed through a SOFA.<sup>66</sup> The opposite also appears to be true that a State may caution another State in advance that if its organs enter the State's territory, State immunity will not be granted.<sup>67</sup> In addition, if consent and waiver are expressly granted, then the State sending its troops will be on notice of the terms of the immunities their troops will enjoy. Upon disagreement regarding the terms of immunity, the State may object by refusing to send or withdrawing its troops.<sup>68</sup>

We have seen from *The Schooner Exchange* that consent to the presence of foreign troops has been understood to imply a waiver of jurisdiction: “[A]ll exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed”.<sup>69</sup> That waiver of jurisdiction could be implied and where implied would

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<sup>66</sup> See generally P. Diehl, *International Peacekeeping* (Baltimore, The Johns Hopkins University Press, 1993), p. 9 (“peacekeeping operations recognize and respect the sovereignty of states and assign a role for the implementing agency commensurate with the authority granted by the states involved”); Woodliffe, *supra* note 65, p. 11; and Sharp, *supra* note 33 (citing Lazareff, *supra* note 60, pp. 7-8).

<sup>67</sup> See *Second Restatement*, *supra* note 26, § 49, b, c, d, f (stating that State immunity does not apply and that jurisdiction may be exercised over the foreign state's ship where the coastal state gives notice that, although consenting to the ship's presence, it intends to exercise jurisdiction; where necessary to prevent imminent injury to persons not connected to the ship's operations; or where foreign troops disembark from the ship).

<sup>68</sup> See Siekmann, *supra* note 12, p. 193 (discussing the right of the troop contributing nation to withdraw at will: “practice ... clearly points towards the existence of a rule of customary international law regarding withdrawal, i.e., an absolute right of withdrawal of national contingents by the troop-contributing countries”).

<sup>69</sup> *Schooner Exchange*, *supra* note 20, p. 143 (author's emphasis). Also see *Second Restatement*, *supra* note 26, § 49 (“Except as otherwise expressly indicated by the coastal state, its consent to the entry of a foreign naval or other military vessel into its internal waters implies that the coastal state (a) waives the right to exercise aboard the vessel its enforcement jurisdiction ... except to the extent necessary to prevent imminent injury to persons or property not involved in the operation of the vessel ...”), § 55 (“(1) Except as otherwise expressly indicated by the territorial state, its consent to the presence of a foreign force within its territory implies, with respect to the members of the force ... that it (a) waives its right to exercise its enforcement jurisdiction ... (2) The waiver indicated in Subsection (1)(a) may not be withdrawn without reasonable notice”) and § 58 (“Except as otherwise expressly indicated by the territorial state, its consent to the passage of a foreign force through its territory implies that it waives its right to exercise enforcement jurisdiction over the members of the force for violations of the criminal law of the territorial state during the passage”).

be regulated by “the nature of the case”.<sup>70</sup> This language is vague but may be understood to be functional immunity.

The last scenario to be discussed is the situation where the sending State is not able to consent to the immunity regime that the host State has offered because the foreign forces must enter the State due to an accident or emergency. A good example of this problem is the “Hainan Island incident” involving the emergency landing of a US Navy aircraft, allegedly used for spying, on the territory of the People’s Republic of China.<sup>71</sup> It appears to be unsettled whether the aircraft was indeed spying and whether it had entered the twelve-mile Chinese territorial zone or merely its exclusive economic zone instead.<sup>72</sup> The airplane experienced a midair collision with a Chinese aircraft. There is a lack of clarity whether the US aircraft caused the collision.<sup>73</sup> Subsequently, it was forced to make an emergency landing without receiving the consent of the Chinese authorities to land.<sup>74</sup>

Once on the ground, the US claimed State immunity for the airplane and personnel, which the Chinese refused to recognize.<sup>75</sup> They seized the aircraft, detained its personnel, and, according to the US, removed sensitive information.<sup>76</sup> China argued that the aircraft was spying within its designated prohibited area, an unlawful act.<sup>77</sup> China also argued that the aircraft was prohibited from landing under Article 3 of the Convention on International Civil Aviation (the “Chicago Convention”) without express permission.<sup>78</sup> The difficulty with the Chinese argument is that the Chicago Convention also provides in Article 25 that States Parties must provide assistance to the aircraft of other States in distress,<sup>79</sup> as does the Consular Convention between China and the US.<sup>80</sup> Comparable obligations for ships at sea may also be found in several treaties<sup>81</sup> that oblige States Parties to assist ships in distress to which we can draw analogies. In any event, even if the

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<sup>70</sup> See *Schooner Exchange*, *supra* note 20, p. 143 (“this consent may be implied or expressed, and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it, must be supposed to act”).

<sup>71</sup> See BBC News, ‘Spy plane might not fly home’, 20 May 2001, <http://news.bbc.co.uk/2/hi/americas/1341332.stm>; BBC News, ‘Spy plane back in US’, 6 July 2001, <http://news.bbc.co.uk/2/hi/americas/1425318.stm>. The author is grateful to Aurel Sari for drawing his attention to this case.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* Also see Convention on International Civil Aviation, Chicago, 7 December 1944, 15 *U.N.T.S.* 295.

<sup>79</sup> But note that this is expressly for civil aircraft, not non-commercial state aircraft.

<sup>80</sup> See Article 39 (1) Consular Convention Between the United States and the People’s Republic of China, Washington, D.C., 17 September 1980, 33 *U.S.T.* 2973.

<sup>81</sup> See Article 98 UNCLOS, *supra* note 27; Article VI Agreement on Maritime Transport Between China and the United States, Washington, D.C., 15 December 1988, *T.I.A.S.* No. 12026, 1992 WL 714934 (Treaty) (as amended by Exchange of Letters and Notes, Beijing, 22 September 1992, State Dept. No. 92-267, 1992 WL 466496 (Treaty)) (extended by Agreement Between the United States and China Extending the Agreement of December 15, 1988, as Amended and Extended, on Maritime Transport, Beijing, 22 June – 20 July 1998, State Dept. No. 89-28, K.A.V. No. 304, 1988 WL 404672 (Treaty)); and Article 14 Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, 516 *U.N.T.S.* 205 (providing that ships may enter ports of other States when in distress).



Chinese argument was correct, any wrongfulness of the failure to secure permission to cross an international frontier in order to land would be precluded by the need to save lives.<sup>82</sup>

The next question would whether any wrongfulness of the act or the lack of consent means that the aircraft and personnel did not accrue immunity as a consequence. We can recall here that the US Supreme Court in *The Schooner Exchange* was considering just such a case since the ship had only entered the US port in order to take refuge from a storm at sea.<sup>83</sup> While State immunity may impliedly flow from the permission to enter the State's territory, States also impliedly consent to the landing of the ships of other States in distress and, as a result, State immunity may flow from that implied consent.<sup>84</sup> Even if the emergency landing was wrongful because the aircraft had supposedly contributed to the situation of distress, it does not necessarily follow that the wrongfulness of the landing alone would negate the fact that lives were at stake and that the State nonetheless impliedly consented to the emergency landing, and hence, State immunity resulted. In fact, the very point of immunity is to preclude the host State from adjudicating or enforcing its laws on State actors when they have acted wrongfully; it is not revoked by the host State as a consequence of a wrongful act.<sup>85</sup> In such a case, the State would owe compensation to the host State for damages, but its organs would remain immune. Indeed, in this case, the US later compensated the Chinese for the expenses involved in the emergency landing, but still objected to the violation of State immunity.<sup>86</sup>

We can note that the Chinese cautioned the US airplane not to land, but did not caution the plane that State immunity would not be respected if it did. Again we are confronted with the problem of silence on the part of the host State regarding immunities, and yet again, we must read silence to mean that the host State will grant State immunity. However, even if the host State did caution the other State that State immunity will not be granted in such a situation of emergency, such a denial of State immunity may upset the balance of the two States' sovereignties. Due to the emergency, the State organ does not have the ability to elect to remain outside the host State's territory, thus it cannot be said to have consented to the immunity, or lack thereof, that the host State has granted. In such a case where consent to the immunity regime granted cannot be accepted freely, yet consent to the presence of the foreign organ must be granted, we can conclude that the host State is precluded from denying the usually applicable rules of State

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<sup>82</sup> See e.g. ILC, Article 25 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Vol. II *Y.I.L.C.* 2001, p. 80. But see *id.*, Article 25 (2) (requiring that the state seeking excuse from the wrongfulness not have contributed to the situation of distress. Thus, the ship or aircraft must still be permitted to land, but the transgression will be deemed unlawful).

<sup>83</sup> *Schooner Exchange*, *supra* note 20.

<sup>84</sup> *Id.* We can draw an analogy to the situation of aircraft landing in a foreign state but not to troops crossing an international border because the Supreme Court explicitly stated that the latter could not experience the same conditions of distress as a ship at sea.

<sup>85</sup> By way of comparison, we can look to Article 31 Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, 500 *U.N.T.S.* 95 (hereinafter VCDR), which provides for immunity of diplomats for acts that might be judged wrongful. The only consequence of the wrongful act can be expulsion. Also see Article 19 (c) UNCLOS, *supra* note 27, which provides that ships may not conduct surveillance of another state from within that state's territorial waters; however, under Articles 30 and 32, the remedy for violating Article 19 (c) is, similar to diplomatic immunity, the expulsion of the ship from territorial waters, not seizure, boarding, or other violations of state immunity. In these cases, the host state has already expressly consented to these treaty requirements prior to the entry of the diplomat or ship, and the ship continues to enjoy immunity from boarding.

<sup>86</sup> See BBC News, 'China paid \$34,000 over spy plane', 9 August 2001, <http://news.bbc.co.uk/2/hi/asia-pacific/1483201.stm>.

immunity. The US, which appears to subscribe to the State waiver theory, provides for just this exception,<sup>87</sup> but limits the State immunity granted in such cases to “acts aboard [the] foreign vessel or aircraft necessary to effectuate entry in distress” and “property aboard a foreign vessel or aircraft entering in distress, bona fide and without intent to evade the customs and anti smuggling laws of the coastal state, except in so far as such regulation may reasonably be necessary for reasons of health or safety of the coastal state”.<sup>88</sup>

### 3. Conclusion Regarding State Immunity

There does not appear to be universal agreement on the theoretical basis for immunity and how it is to be balanced between the two sovereigns. Although this author finds the State waiver theory more convincing and more frequently applied in practice, he is reluctant to conclude that it has entirely supplanted the fundamental right theory. The important conclusion to reach from this problem is that foreign troops cannot presume that the host State will subscribe to the fundamental right theory. In either case, if the host State has consented to the presence of the foreign troops, whether the host State subscribes to the fundamental right theory or State waiver theory is irrelevant. However, if consent is lacking and the State does not subscribe to the fundamental right theory, then foreign troops may be vulnerable. The problems above are rarely a result of silence on the subject of State immunity which can be easily remedied in many cases by inquiring as to the immunities that will be granted. Thus, the debate between the two theories of State immunity is, to a large degree, irrelevant from a pragmatic perspective.

It must be acknowledged that we should consider whether the consistent practice of granting immunity under a State waiver theory has produced a rule of customary international law requiring immunities,<sup>89</sup> although some commentators have rejected this conclusion.<sup>90</sup> To some degree, these differing conclusions are based on interpretations of the notion of comity between sovereigns and whether it is discretionary or mandatory rule of international law.<sup>91</sup> After examining the expressions of *opinio juris* noted above, even if there was a custom, it would be narrower than the fundamental right theory. The custom expressed would be that, when silent regarding the terms of the waiver granted, consent to the presence of foreign troops and the consent of the sending State to placing its State organs in another State’s territory, must imply a waiver of immunity over official acts until such time as the host State gives notice that it is

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<sup>87</sup> See e.g. *Second Restatement*, *supra* note 26, § 48 (“(1) A foreign vessel or aircraft has the right to enter the territory of a state when such entry is necessary for the safety of the vessel, aircraft or persons aboard, and to leave the territory once the conditions that made the entry necessary have ceased to exist. (2) The territorial state may not exercise its jurisdiction ... to enforce rules prescribed by it with respect to (a) acts aboard a foreign vessel or aircraft necessary to effectuate entry in distress, (b) the possession or carriage of property aboard a foreign vessel or aircraft entering in distress, bona fide and without intent to evade the customs and antismuggling laws of the coastal state, except in so far as such regulation may reasonably be necessary for reasons of health or safety of the coastal state”)

<sup>88</sup> *Id.*

<sup>89</sup> See D.P. O’Connell, *International Law* (London, Stevens, 1965), Vol. 2, p. 915 (“Originally the waiver may have been *ex gratia*, but probably the universal practice of granting immunity has produced a rule of positive law”).

<sup>90</sup> See e.g. Barton, *supra* note 38, p. 370 (arguing that although immunity has been granted, it is not mandated by international law).

<sup>91</sup> See generally Paul, *supra* note 30, pp. 31, 42 (citing e.g. Judgment, 2 November 1971, Cass civ. 1re, Arrêt no. 521 (holding that a court cannot attach sovereign assets of another state due to *courtoisie internationale*); Judgment, 4 February 1986, Cass civ. 1re, Arrêt no. 20 (court cannot attach ship owned by foreign State due to *courtoisie internationale*); and *The Parlement Belge*, *supra* note 22 (holding that sovereign immunity is based on comity)).

withdrawing the immunity and the sending State has had an opportunity to withdraw its organs. Even if customary international law demands State immunity, it also appears to provide host States with the discretion to vary it at will, with the consent of the sending State to those terms expressed by ordering troops into the country.

Consent and State waiver of jurisdiction are therefore crucial, whether they be expressed through a SOFA or through some other statement or implication of waiver of jurisdiction. In fact it has been argued, “[t]hat consent may validate an otherwise wrongful military intervention into the territory of the consenting state”<sup>92</sup> and, in addition to forgiving the sending State from an infringement of its territorial sovereignty, might also provide for an immunity regime. If a State has effectively consented to the presence of foreign forces on its soil, not necessarily in the form of a SOFA but in a clear form, then immunities may apply and reference to other sources of immunities, such as UN law, is not necessary.<sup>93</sup> If a SOFA is not in place, then the forces present in the host State must be able to point to some other expression or implication of consent<sup>94</sup> by the host State that has not been retracted, in order to escape jurisdiction.

### **III. Forces Present Without Consent but with UN Authorisation**

Now we turn to the situation of the forces present without the consent of the territorial State but with the authorization of the UN. Forces under a UN umbrella could be present with the consent of the host State or without. Since the existence of consent provides some degree of immunity, any protection that the UN mandate would provide to a consensual operation would be cumulative.<sup>95</sup> The difficulty is when consent is not express or implied or is otherwise lacking because there are questions of the voluntary nature of the consent, or the government actor may not have the capacity to consent or does not adequately embody the will of the State due to loss of control of the State or loss of international legitimacy.<sup>96</sup> Peter Rowe states:<sup>97</sup>

Where there is no status of forces agreement in place prior to deployment peacekeeping forces may face unacceptable legal difficulties in carrying out their mission ... The potential liability of members of the peacekeeping force to the criminal jurisdiction of the state, not only when they are present on the territory but also after they have left it in respect of crimes committed against the local law while present, is the most significant risk. It may be that if the receiving state is unable to act effectively in its territory so as to enter

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<sup>92</sup> Wippman, *supra* note 49.

<sup>93</sup> See *id.*

<sup>94</sup> See Articles 7, 51 and 52 1969 VCLT (discussing consent to treaty). Also see Wippman, *supra* note 49 (citing e.g. Roberto Ago, Special Rapporteur, ILC, 8<sup>th</sup> Report on State Responsibility, UN Doc. A/CN.4/318, Vol. II-1 *Y.I.L.C.* 1979, pp. 35-36 (“consent may be *expressed* or *tacit*, *explicit* or *implicit*, provided however that it is *clearly established*” and is not “vitiating by ‘defects’ such as error, fraud, corruption or violence ... [and is] internationally attributable to the State ... issue[s] from a person whose will is considered, at the international level, to be the will of the State and, in addition, ... [is] competent to manifest that will in the particular case involved”)); and J.L. Hargrove, ‘Intervention by Invitation and the Politics of the New World Order’, in L.F. Damrosch and D.J. Scheffer (eds.), *Law and Force in the New International Order* (Boulder, Colorado, Westview Press, 1991), p. 119.

<sup>95</sup> See Sharp, *supra* note 33.

<sup>96</sup> See Wippman, *supra* note 49.

<sup>97</sup> See P. Rowe, ‘Maintaining Discipline in United Nations Peace Support Operations’, Vol. 5 No. 1 *J.C.S.L.* 2000, p. 45 (citing J. Simpson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Ministry of Public Works and Government Services, Canada, *Law Applicable to Canadian Forces in Somalia 1992/93*, 1997, p. 47 (determining that forces present in a state without consent, even a collapsed state such as Somalia, would most likely be subject to jurisdiction of the state regardless of the fact that the state could not enforce its jurisdiction at the time)).

into a status of forces agreement, members of the contingents of peace operations forces will run little risk of local criminal jurisdiction when carrying out their operations, but the risk may change dramatically once an effective government establishes control and seeks the extradition of former peacekeepers as alleged criminals.

It is therefore necessary to determine if there are any other sources of international law that might provide immunities for troops in the absence of state waiver of jurisdiction. Thus it becomes necessary to address non-consensual sources of immunities under international law.

### 1. International Humanitarian Law

International humanitarian law does not provide immunities *per se*, but it does provide, in the “combatant’s privilege”, an excuse for engaging in hostilities which could otherwise be considered violations of municipal criminal law.<sup>98</sup> This privilege precludes domestic courts from adjudicating violations of municipal criminal law for participation in hostilities, although the courts could adjudicate criminal violations not connected to participation in hostilities.<sup>99</sup>

A preliminary question is whether troops under a UN mandate that engage in armed conflict may be considered combatants. When a State has not consented to the presence of peacekeeping troops in its territory, but does not attack them when they enter its territory, we might find that the State has implicitly consented to, or at least tolerated, the presence of the troops and that the rules on State immunity must apply. Perhaps the state might choose not to attack but instead register its refusal of consent through diplomatic channels, in which case consent could not be implied. However, when the State enforces its refusal to consent to the presence of the peacekeeping troops by engaging in armed hostilities with them, or the peacekeeping troops themselves attack and invade a State at the outset, it is important to know whether the troops are considered combatants. If the territorial State is attacking the peacekeeping troops or responding to an attack by those troops, it is mostly likely that there is no consent to their presence and, thus, no implied State immunity and waiver of jurisdiction.<sup>100</sup> The troops, however, would benefit from the combatant’s privilege in lieu of immunity. If they were not considered combatants even though engaged in armed conflict, then their participation in hostilities could arguably be

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<sup>98</sup> See Articles 4 (A), 87 Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 *U.N.T.S.* 135 (providing that “[p]risoners of war may not be sentenced [...] to any penalties except those provided for in respect of members of the armed forces of the said power who have committed the same acts”); *United States v. List* (“*The Hostage Case*”), Case No. 47, United Nations War Crimes Commission, Vol. 8 *Law Reports of Trials of War Criminals* 1949 (finding that “[i]t cannot be questioned that acts done in times of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war”); IACoMHR, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, § 68 (“the combatant’s privilege ... is in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives”). Of course, this privilege also means that the troops may be legitimately targeted as enemy forces. The combatant’s privilege is not truly a form of immunity in the sense that it only covers the individual combatant, not the state organs generally. See e.g. US Supreme Court, *Herrera v. United States*, 222 U.S. 558, 573–574 (1911); *Ribas y Hijo v. United States*, 194 U.S. 315, 323 (1903) and *Miller v. United States*, 78 U.S. 268, 268–69 (1870) (holding that a host state may seize the property of a foreign state located in the host state when the foreign state engages in hostilities with the host state) and US Claims Court, *Deutsch-Australische Dampfschiffs Gesellschaft v. United States*, 59 Ct. Cl. 450 (1924).

<sup>99</sup> See Sharp, *supra* note 33 (citing Lazareff, *supra* note 60, p. 13).

<sup>100</sup> See *Holmes v. Laird*, *supra* note 26, pp. 1216–1217 (“troops occupying hostile or conquered territory, where obviously there can be no question of implying waivers of jurisdiction from consent to the presence of the forces”); *Dow v. Johnson*, *supra* note 31, p. 165; *Coleman v. Tennessee*, *supra* note 31, p. 515.

considered a violation of municipal criminal law,<sup>101</sup> which in turn leads to a need to find a substitute source of immunities if the troops are to be protected. Some have argued that an enforcement action under a UN mandate does not amount to belligerency because the purposes of collective action are fundamentally different from an aggressive attack on an enemy.<sup>102</sup> However, the assertion that UN peacekeepers are not combatants is, at best, unclear in international law.<sup>103</sup> Grant Harris opines that:<sup>104</sup>

The law of occupation would presumably apply to UN peace enforcement missions and peacekeeping missions that have lost their noncombatant status through application of the laws of war. However, there is ambiguity as to the application of the laws of war to UN forces because of the unique legal personality of the UN and the fact that the UN is not a party to the primary conventions on international humanitarian law.

If we conclude that, even though the States contributing the troops are bound to international humanitarian law, the UN is not, and we conclude that the fact that the UN is not bound somehow means that the States' troops are not, then a further conclusion may be that the troops are also not subject to the law of international humanitarian law and do not enjoy the combatant's privilege. This is a lengthy series of unclear conclusions. Furthermore, this conclusion would mean that the troops' participation in hostilities could be considered a violation of municipal criminal law, although perhaps not international humanitarian law, to the degree that the territorial State's UN obligations do not preclude the application of municipal criminal law.

On the other hand, there is a very good argument that troops operating under a UN mandate may be classified as combatants when they engage in armed conflict.<sup>105</sup> Bowett, for one, believes that

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<sup>101</sup> See Harris, *supra* note 6 (citing T. Pfanner, 'Application of International Humanitarian Law and Military Operations Undertaken Under the United Nations Charter', in Umesh Palwankar (ed.), *International Committee of the Red Cross Symposium on Humanitarian Action and Peace-keeping Operations* (Geneva, International Committee of the Red Cross, 1994), pp. 57-58 ('[T]he United Nations, as an international organization, is bound by customary rules and its forces, as subsidiary organs, are bound in particular by the customary rules of international humanitarian law')); and D. Shruga & R. Zacklin, 'The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues', in *id.*, p. 47 ('The Geneva Conventions which have by now been widely recognized as part of customary international law are binding upon all states, and, therefore, also upon the United Nations, irrespective of any formal accession').

<sup>102</sup> See e.g. B. Simma (ed.), *The Charter of the United Nations: A Commentary* (New York, Oxford University Press, 1994), p. 600; I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), p. 400.

<sup>103</sup> See D.W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (London, Stevens, 1964), pp. 490-491; Rowe, *supra* note 97; and Sharp, *supra* note 33.

<sup>104</sup> Harris, *supra* note 6 (citing S. Vité, 'Applicability of the International Law of Military Occupation to the Activities of International Organizations', Vol. 853 I.R.R.C./R.I.C.R. 2004, pp. 19-22 (arguing that the law of occupation never applies to the UN because the motives of the international forces are different than those of occupants)).

<sup>105</sup> Note that Jennings and Watts do not seem to contemplate a non-belligerent occupation, although they do limit their inquiry to situations of "war" which probably excludes action under a UN mandate: "During war a state's armed forces will often be on the territory of a foreign state, whether while conducting military operations, or in belligerent occupation of foreign territory or as a co-belligerent force on the territory of an allied state in furtherance of the common task of repelling or expelling enemy forces. These occasions are subject to special considerations related to the existence of a war..." R. Jennings & A. Watts, *Oppenheim's International Law* (London, Longmans, 1992, 9th ed.), Vol. 1, p. 1155.

UN forces could be considered as such within the meaning of humanitarian law.<sup>106</sup> Sharp also notes the test for combatant status, specifically in the context of the Safety Convention.<sup>107</sup>

The test for the application of the law of international armed conflict is a de facto, subjective threshold codified by [Geneva Conventions] common Article 2 that is intentionally set very low to capture all differences between the armed forces of two states in order to afford maximum protection to noncombatants and combatants. This intentionally low threshold for the application of the law of international armed conflict is antithetical to the very notion of maximizing protections for U.N. and associated personnel.

Christopher Greenwood has argued that: “this body of international humanitarian law is today applicable to any armed conflict between two or more States, irrespective of whether there is a formal state of war; it is the fact of hostilities, not the existence of a formal legal condition which brings the law into operation”.<sup>108</sup> In reaching his conclusion that the existence of an armed conflict is one of fact, not legal classification, he cites the interpretation of international humanitarian law by the International Committee of the Red Cross<sup>109</sup> and the International Criminal Tribunal for the former Yugoslavia (“ICTY”).<sup>110</sup> In the case of the actions in Somalia, the Security Council implicitly found the injuries suffered by peacekeepers to have been part of an armed conflict,<sup>111</sup> so the Security Council appears to have acknowledged the existence of the fact. Greenwood also argues that international humanitarian law can apply to non-State actors, if States’ troops operating pursuant to a UN mandate could be considered non-State actors. He argues that, although the parties that must comply with international humanitarian obligations are States, there is no requirement that States be involved before hostilities are considered as such.<sup>112</sup> Thus, regardless of whether the UN has issued a mandate for a particular operation, and therefore excused the operation from the general prohibition on the use of armed force, such determination does not control international humanitarian law which only looks to the existence of an armed conflict in order to trigger its obligations.<sup>113</sup>

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<sup>106</sup> See Bowett, *supra* note 103, pp. 490-491. But see Rowe, *supra* note 97 (arguing that if the UN forces are not in opposition to the government of the state occupied then they cannot be belligerents, however he also admits that the forces must assume many of the effective powers that a belligerent occupying force normally would regardless of formal characterization); Sharp, *supra* note 33 (citing Lazareff, *supra* note 60, p. 13).

<sup>107</sup> Sharp, *supra* note 33.

<sup>108</sup> C. Greenwood, ‘International Humanitarian Law and the United Nations Military Operations’, Vol. 1 *Y.I.H.L.* 1998, p. 6.

<sup>109</sup> See J.S. Pictet (ed.), *Commentary on Geneva Convention III* (Geneva, International Committee of the Red Cross, 1960), p. 23 (“Any difference between two States leading to the intervention of members of the armed forces is an armed conflict with the meaning of Article 2 [of the Geneva Convention]”). Also see Resolution XXV, Application of the Geneva Conventions by the United Nations Emergency Force, adopted by the 20th International Red Cross Conference (Vienna, 1965), §§ 1 and 3 (resolving that IHL applied to UN forces).

<sup>110</sup> See ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 70 (“an armed conflict exists whenever there is a resort to armed force between States”).

<sup>111</sup> See UNSC Res. 837, 6 June 1993 (reaffirming the authority “to take all measures necessary against all those responsible for the armed attacks”).

<sup>112</sup> See Greenwood, *supra* note 108, p. 11 (“it is not a precondition of the existence of an international armed conflict that all the parties must be states”).

<sup>113</sup> See *id.*, p. 7 (“If, therefore, IHL can apply to the United Nations at all ..., whether or not it is applicable to a particular operation will be dependent upon the existence of an armed conflict to which the relevant United Nations force is a party, not on how the United Nations operation is classified for other United Nations purposes”).

The UN itself has not agreed with this interpretation, although it has agreed at least that the “principles and spirit” of the Geneva Conventions apply to UN authorized operations.<sup>114</sup> However, the Safety Convention appears to contemplate that forces authorized by the UN could be considered combatants. The Safety Convention will be discussed in more detail below. One must wonder if in any armed conflicts prior to the formation of the UN at least one of the parties or alliances regarded itself as enforcing law or peace rather than acting as a belligerent, even going so far as to classify it as such under its own legal regime. Even if the States were arguably permitted to engage in hostilities under *jus ad bellum*, the States were nonetheless arguably still held to whatever *jus in bello* existed at the time.

Furthermore, although the troop sending States, and thus the UN in a sense, would be bound to apply the law of international humanitarian law when engaged in armed conflict, as opposed to merely its principles, the troops themselves would clearly be combatants and benefit from the combatant’s privilege. If arrested and detained by the State in which the operation is occurring, they would be prisoners of war and could not be tried under municipal criminal law for engaging in hostilities. Lacking this clear subordination to international humanitarian law, an argument could be made that the troops themselves would be vulnerable to local criminal law for engaging in combat. Therefore, it is actually in the interest of States concerned to ensure that UN mandated operations that are present in a State without its consent and engaging in hostilities be held to comply with international humanitarian law so that their troops will be privileged to fight and receive POW status. In a case where the territorial State attacked the peacekeepers first, it could be argued that by attacking the peacekeepers, the territorial State has created the armed conflict and would be precluded from not following its Geneva Convention obligations regarding POW status, but such determinations regarding who attacked whom are hard to make in the fog of war and it would be better for both sides to simply acknowledge the application of international humanitarian law from the outset.

Regardless of the combatant classification, we must consider other sources of immunity. If international humanitarian law does not apply, then we need to determine if other sources of immunity can fill the gap. Even if international humanitarian law applied to UN mandated operations, it would not serve as a blanket excuse for all potentially criminal acts, as the immunity from jurisdiction in some SOFAs does, since the criminality of at least some acts, committed beyond the parameters of the participation in hostilities and possibly in violation of international criminal law, could still be adjudicated by domestic courts. We will turn next to the following sources of potential privileges and immunities for UN peacekeepers in the situation of non-consensual operations: the UN Charter, the Convention on Privileges and Immunities (“Immunities Convention”), the Safety Convention, Security Council Resolutions, and customary international law.

## 2. The United Nations Charter

As is often said, the purpose of immunities for personnel connected to international organisations is to protect the organisation from interference from host State governments and allow them to operate independently.<sup>115</sup> Although remaining independent is critical for much of the work of

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<sup>114</sup> See *Model Agreement between the United Nations and Members States contributing Personnel and Equipment to United Nations Peacekeeping Operations*, UN Doc. A/46/185, 23 May 1991, § 28.

<sup>115</sup> See e.g. F. Rawski, ‘To Waive or not to Waive: Immunity and Accountability in UN Peacekeeping Operations’, Vol. 18 No. 1 *Connecticut Journal of International Law* 2002, p. 103.

international organisations, it seems particularly so for the work of peacekeeping where the State organs may have collapsed.<sup>116</sup>

In Article 105, the UN Charter<sup>117</sup> provides for immunities “as are necessary for the fulfillment of its purposes”, and the “officials of the Organization ... as are necessary for the independent exercise of their functions in connexion with the Organization”.<sup>118</sup> Immunities are not for the benefit of the particular person involved.<sup>119</sup> It has been noted that this level of immunity was specifically limited to functional necessity to distinguish it from diplomatic immunity<sup>120</sup> and better balance the interests of host States and the organisation.<sup>121</sup> Importantly for this discussion, where peacekeeping activities may take place in a failed State or non-recognized State, it is alleged that this functional immunity even applies as per States that are not Member States of the UN.<sup>122</sup>

Some have argued that this provision in the Charter is sufficient to provide immunities to UN officials even without the need for the Immunities Convention or other agreements.<sup>123</sup> “These provisions apply uncontrovertibly to troops working under the command and control of the

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<sup>116</sup> See *id.*

<sup>117</sup> See Article 105 UN Charter.

<sup>118</sup> See *id.*, Article 105, §§ 1-2. Also see P.C. Szasz & T. Ingadottir, ‘The UN and the ICC: The Immunity of the UN and Its Officials’, Vol. 14 *Leiden J.I.L.* 2001, pp. 867–885; Rawski, *supra* note 115 (discussing the applicable paragraphs of the Charter). This limitation on immunities is closely linked to the ICJ’s observation in the *Reparation for Injuries* case that organisations have personality different in nature than States and only existent insofar as is necessary and effective. See ICJ, *Reparation for Injuries Suffered in the Service of the U.N.*, 11 April 1949, *I.C.J. Rep.* 1949, p. 174 (hereinafter *Reparation* case). Also see J. Alvarez, ‘International Organizations: Then and Now’, Vol. 100 *A.J.I.L.* 2006, p. 324 (arguing that the *Reparation* case established a “principle of effectiveness”).

<sup>119</sup> See e.g. Preamble VCDR, *supra* note 85 (“Realizing 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...”); Preamble Vienna Convention on Consular Relations, Vienna, 24 April 1963, 596 *U.N.T.S.* 261 (“Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts”).

<sup>120</sup> See A. Reinisch, *International Organizations Before National Courts* (Cambridge, Cambridge University Press, 2000), p. 364, note 177 (detailing the discussions of the Fourth Committee on the matter).

<sup>121</sup> See Simma, *supra* note 102, p. 1139; Rawski, *supra* note 115, p. 108; and Sharp, *supra* note 33, p. 127. For the sake of comparison, we can note that other international organisations have statements of similar functionally necessary immunities in their respective constitutional instruments. See e.g. Article 40 (1) Constitution of the International Labour Organization, Versailles, 28 June 1919, 15 *U.N.T.S.* 35; Article 67 (a) Constitution of the World Health Organization, New York, 22 July 1946, 14 *U.N.T.S.* 185; Article XV Statute of the International Atomic Energy Agency, New York, 23 October 1956, 276 *U.N.T.S.* 3; Article 139 Charter of the Organization of American States, Bogotá, 30 April 1938, 119 *U.N.T.S.* 3, as amended by the Protocol of Amendment to the Charter of the Organization of American States, Buenos Aires, Argentina, 27 February 1967, the Protocol of Amendment to the Charter of the Organization of American States, Cartagena de Indias, 5 December 1985, the Protocol of Amendment to the Charter of the Organization of American States, Washington, D.C., 14 December 1992, and the Protocol of Amendment to the Charter of the Organization of American States, Managua, 10 June 1993.

<sup>122</sup> See *Reparation* case, *supra* note 118; Sharp, *supra* note 33; UN Secretary-General, *Annual Report 1968*, 23 U.N.G.A.O.R. Supp. No. 1, 1968, pp. 208-209 (hereinafter *UN Annual Report 1968*); and American Law Institute, *Restatement, Third, Foreign Relations Law of the United States* (St. Paul, American Law Institute, 1987), § 467, (a), (b) (hereinafter *Third Restatement*).

<sup>123</sup> See Rawski, *supra* note 115, pp. 106-107.



United Nations in what observers often refer to as a ‘blue-helmet’ operation”.<sup>124</sup> Of course, the act for which immunity is claimed must have been functionally necessary for the independent operation of the organisation,<sup>125</sup> so it is more restrictive than the immunities that may be granted through other instruments,<sup>126</sup> although the *Third Restatement of the Foreign Relations Law of the United States* holds that the “privileges and immunities [that] are necessary for the fulfillment of the purposes of the organisation, [include] immunity from legal process, and from financial controls, taxes, and duties”.<sup>127</sup> The reasoning is that all of their duties are *per se* official acts in furtherance of the necessary operations of the UN,<sup>128</sup> which is supported by the *ad hoc* nature of the development of the peacekeeping function itself.<sup>129</sup>

This argument is not fully convincing since it would omit peacekeeping operations where the UN is not in command and control of the forces, but additionally, the Charter only provides for immunities that are “necessary” for UN officials to perform their functions, not necessarily for all official acts. We must wonder if all official acts are also necessary.<sup>130</sup> Robert Siekmann argues that absolute criminal immunities cannot be a logical consequence of the Charter provision:<sup>131</sup>

[a] Dutch official memorandum ... contains, among others, the following provisos: ‘The provisions of the Charter of the United Nations determine that the Organization shall enjoy in the territory of a member state such privileges and immunities as are necessary for the fulfillment of its purposes. It is therefore the understanding of the Netherlands Government that the members of the Netherlands forces shall be exclusively subject to the criminal and disciplinary jurisdiction of the Netherlands’ ... This is incorrect in as much as it implies that the latter (absolute criminal immunity) must be a consequence of the former (the Charter provision), because this is not the case.

Based on the above, we cannot conclude that the Charter alone provides immunities for peacekeeping troops. Furthermore, peacekeepers have never been considered officials of the UN, but that argument will be discussed in more detail below.

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<sup>124</sup> See C.J. Tan, Jr., ‘The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court’, Vol. 19 *American University International Law Review* 2004, p. 1144 (citing Rawski, *supra* note 115, p. 110).

<sup>125</sup> See *id.*; Rawski, *supra* note 115, pp. 111-112 (commenting on the interpretation of whether a function is “official” and noting how a narrow construction provides more limited protection).

<sup>126</sup> See Rawski, *supra* note 115, pp. 106-107; Sharp, *supra* note 33, p. 128 (claiming that the Immunities Convention is necessary to provide for absolute immunity of UN property, funds, and assets).

<sup>127</sup> *Third Restatement*, *supra* note 122, § 467, (b).

<sup>128</sup> See *id.*

<sup>129</sup> See C. Bongiorno, ‘A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor’, Vol. 33 *Columbia Human Rights Law Review* 2002, p. 623 (citing *An Agenda for Peace*, *supra* note 10, pp. 56-59; and *Supplement to An Agenda for Peace*, *supra* note 18, p. 10).

<sup>130</sup> Consider, for example, the case of Trygve Lie’s chauffeur in which Article 105 of the Charter alone was relied on to support the immunity of the driver. See US, New Rochelle City Ct., New York, *Westchester County v. Ranollo*, 67 N.Y.S. 2d 31, 35, 187 Misc. 777 (1946) (on the basis of the UN Charter alone, applying a narrow reading of “necessary” and finding that a chauffeur or servant was not performing duties necessary for the UN, though they may have been official).

<sup>131</sup> Siekmann, *supra* note 12, p. 140 (internal citations omitted).

### 3. The Convention on the Privileges and Immunities of the United Nations

The Immunities Convention<sup>132</sup> grants immunities to certain designated classes of persons connected to the UN. A Convention was thought to be a better vehicle for more specifically detailing the terms of Article 105 of the Charter. Its terms are so widely accepted that they are now considered customary international law by some,<sup>133</sup> even though not all Member States of the UN have acceded to the treaty.<sup>134</sup> Some Force Regulations have subsequently specifically provided that peacekeepers benefit from the immunities in the UN Immunities Convention<sup>135</sup> and the UN appears to have accepted the conclusion, on at least one occasion, that a national contingent of troops was immune from local jurisdiction due to the Immunities Convention.<sup>136</sup>

#### **A. Officials and Experts Potentially Covered by the Immunities Convention**

The first observation regarding peacekeeping forces is that they are not specifically included or even referred to in the terms of the Immunities Convention, so there is no clear statement of whether they are covered. Some commentators assert, “it is reasonable, and consistent with the Charter provision, to assert that these immunities too are functional [within the terms of the Convention]”.<sup>137</sup> Additionally, Paul C. Szasz and Thordis Ingadottir observe that “it is by no means clear that the ... term [“officials”] is used in precisely the same sense in both [the Charter, Article 105(2), and Immunities Convention, Article V,] provisions”,<sup>138</sup> so the term might be wider in the Immunities Convention and thus cover peacekeepers, though it did not for the Charter. We will therefore need to assess whether peacekeepers are or could be considered covered by the Immunities Convention.

The Convention addresses several classes of immunities: those of the UN as an organisation,<sup>139</sup> representatives of UN members,<sup>140</sup> senior level and lower levels officials of the UN,<sup>141</sup> and

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<sup>132</sup> See Convention on the Privileges and Immunities of the United Nations, New York, 13 February 1946, 1 *U.N.T.S.* 15 (corrigendum: 90 *U.N.T.S.* 327) (hereinafter Immunities Convention).

<sup>133</sup> See Simma, *supra* note 102, p. 589.

<sup>134</sup> See UN, *Multilateral Treaties Deposited with the Secretary-General*, Chapter III.1, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-1.en.pdf>.

<sup>135</sup> See Siekmann, *supra* note 12, p. 7 (“The UNEF ‘I’ and UNFICYP ... Force Regulations (Articles 10) provide that the peace-keeping force, as a subsidiary organ of the UN, enjoys the status, privileges and immunities of the Organization provided in the [Immunities Convention]”).

<sup>136</sup> See *id.*, pp. 140-141 (“On 24 and 25 July 1979 the Army Mobile Court Martial Abroad held court in Lebanon to settle 19 criminal cases which concerned mainly so-called guard-duty offenses ... With respect to the international law aspect, [the Dutch Minister of Defence stated that] the Dutch battalion as made available to the UN on the express condition that it would remain under Dutch jurisdiction. The UN accepted this condition ... Moreover, it should be noted that, pursuant to the Convention on the Privileges and Immunities of the United Nations, members of the UN peace-keeping forces are not subject to the Lebanese jurisdiction ... The UN had declared its agreement with the dispatch of the Mobile Court Martial and informed the Netherlands that a satisfactory arrangement concerning it existed with Lebanon”) (internal citations omitted).

<sup>137</sup> Szasz & Ingadottir, *supra* note 118.

<sup>138</sup> *Id.*

<sup>139</sup> See Articles II-III, §§ 2-10 Immunities Convention, *supra* note 132.

<sup>140</sup> See Article IV, §§ 11-16 Immunities Convention, *supra* note 132. Also see *UN Annual Report 1968*, *supra* note 122, pp. 208-209 (stating that this category includes representatives of non-Member States).

<sup>141</sup> See Article V, §§ 17-21 Immunities Convention, *supra* note 132. Also see e.g. Article V, §§ 15-6 Interim Agreement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the

“Experts on Mission”.<sup>142</sup> The Convention provides for absolute immunity for the organisation’s property and assets<sup>143</sup> to ensure the “proper functioning of such organisations free from unilateral interference by individual governments”.<sup>144</sup> The representatives of Member States to the UN are also accorded immunities since they do not accrue that status by being accredited to a State. For purposes of this discussion only the two categories of immunities for officials of the UN and experts on mission are relevant.

Regarding officials, they are divided into two classes for purposes of immunities: senior level, *i.e.* the Secretary-General, Assistant Secretaries-General, and Special-Representatives of the Secretary-General; and lower level, which includes all other officials. Senior level officials and their families receive full diplomatic immunity.<sup>145</sup> As such, they are “inviolable [and] not be liable to any form of arrest or detention”<sup>146</sup> while they serve in that capacity.<sup>147</sup> In addition, the Secretary-General may extend full diplomatic immunity to other UN officials on a case-by-case basis at his discretion.<sup>148</sup> Lower level officials of the UN enjoy only “functional” immunity.<sup>149</sup>

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United Nations and the Swiss Federal Council, Berne, 11 June 1946, and New York, 1 July 1946, 1 *U.N.T.S.* 163 (providing for the same distinction in immunities between senior and lower level officials); but see Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, New York, 26 June 1947, 11 *U.N.T.S.* 11; Supplemental Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, New York, 9 February 1966, 554 *U.N.T.S.* 308, amended 8 December 1966, 581 *U.N.T.S.* 362; Second Supplemental Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, New York, 28 August 1969, 687 *U.N.T.S.* 408; Third Supplemental Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, New York, 10 December 1980, 1207 *U.N.T.S.* 304 (where an agreement similar to the UN-Switzerland one does not make such a distinction, since the US preferred to provide for immunities through domestic legislation, specifically the International Organizations Immunities Act, Pub. L. No. 291-79 (29 December 1945), 59 Stat. 669, *codified at* 22 U.S.C. § 288 (2008)); and B. Conforti, *The Law and Practice of the United Nations* (The Hague, Kluwer, 1996), pp. 110-111 (discussing this distinction between ranks of officials).

<sup>142</sup> See Article VI, §§ 22-23 Immunities Convention, *supra* note 132.

<sup>143</sup> See Articles II, §§ 2-8 Immunities Convention, *supra* note 132. Also see Simma, *supra* note 102, p. 1140; and Sharp, *supra* note 33.

<sup>144</sup> ECtHR (Grand Chamber), *Waite & Kennedy v. Germany*, Appl. No. 26083/94, 18 February 1999, Judgment, ECHR 1999-I, §§ 61, 63 (discussing immunities of international organisations generally). Also see M.A. Nowicki, Ombudsman Institution in Kosovo, *Special Report No. 1 on the Compatibility with Recognized International Standards of UNMIK Reg. No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 Aug. 2000) and on the Implementation of the Above Regulation*, 26 April 2001, § 23 (hereinafter *Kosovo Ombuds. Special Report No. 1*) (stating that “the main purpose of granting immunity to international organizations is to protect them against the unilateral interference by the individual government of the state in which they are located [which] does not apply ... in Kosovo, where the interim civilian administration ... acts as a surrogate state”); *Second Restatement*, *supra* note 26, § 83; Rawski, *supra* note 115; and Bongiorno, *supra* note 129.

<sup>145</sup> See Article V, § 19 Immunities Convention, *supra* note 132. Also see *Askir v. Boutros-Ghali*, No. 95 Civ. 11008 (JGK), 933 F. Supp. 368, 371 (S.D.N.Y., U.S., 29 June 1996) (holding that, lacking a waiver of immunity, officials of the UN are immune under the Immunities Convention).

<sup>146</sup> Compare with VCDR, *supra* note 85; ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium)*, 14 February 2002, *I.C.J. Rep.* 2002, p. 121, § 52 (hereinafter *Arrest Warrant case*).

<sup>147</sup> See Szasz & Ingadottir, *supra* note 118.

<sup>148</sup> See Article V, § 17 Immunities Convention, *supra* note 132. Also see § 3.2 UNMIK Reg. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, UNMIK Doc. UNMIK/REG/2000/47, 18 August 2000, <http://www.unmikonline.org/regulations/2000/reg47-00.htm> (hereinafter

The parameters of this kind of immunity will be discussed in more detail below, but the first inquiry is whether the individual is an official of the organisation.

Szasz and Ingadottir frame the debate on the question: “Experts on Mission are not mentioned in the Charter. Thus either “the term ‘officials’ is used in the same sense in both the Charter and in [Convention] [or] the term ‘officials’ in the Charter is broader than that in the [Convention]”.<sup>150</sup> In the first case, “‘Experts on Mission’ [would be] a category not dealt with or protected by the Charter, but only by the [Convention], and members of UN forces are not covered by either instrument” whereas in the latter case, “officials” would “[encompass] all persons who perform functions for the organization, including members of the Secretariat, certain other appointees of the General Assembly, Experts on Mission, and probably also members of UN forces”.<sup>151</sup> In paragraph 3 of Article 105, the Charter states that the General Assembly “may propose conventions to the Members of the United Nations” with a view to determining the details of the application of paragraphs 1 and 2.<sup>152</sup> The Immunities Convention could be seen as simply an effort to clarify in more detail the immunities already inherently granted by the Charter<sup>153</sup> and not granting any additional immunity. For example, some have argued, “the provisions of [the Convention on Immunities] are recognized as constituting an authoritative *interpretation* of Article 105(1) as to what privileges and immunities the organization requires in order to be able to fulfil its purposes”.<sup>154</sup> Szasz and Ingadottir conclude that:<sup>155</sup>

[considering] the evidently broad purpose of Charter Article 105(2) that is to ensure that all persons connected with the United Nations should be able to carry out their functions independently of outside pressures ... it would seem that the second alternative presented above offers the better interpretation. To this should be added the consideration that it seems unlikely that the drafters of the Charter would have had in mind the precise narrow interpretation of the term ‘officials’ that the General Assembly later used in drafting the [Convention] and in implementing Section 17 thereof.

Thus, this broad category of individuals, including armed forces, would be considered officials within the meaning of Article 105(2) of the Charter.

This argument is not convincing. Charles Brower argues that Article 105, paragraph 3, only provides the organisation with the “bare minimum” immunities, whereas it is the Convention that “implements the functional necessity doctrine”,<sup>156</sup> suggesting that the Immunities Convention is not a mere interpretation of the immunities granted by the Charter but a grant of immunities separate and in addition to those granted by the Charter. Practice determining whether personnel

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UNMIK Reg. 2000/47) (providing for the Special-Representative of the Secretary-General to also extend full diplomatic immunity to other UN officials).

<sup>149</sup> See Article V, § 18 Immunities Convention, *supra* note 132.

<sup>150</sup> Szasz & Ingadottir, *supra* note 118.

<sup>151</sup> *Id.*

<sup>152</sup> Article 105 UN Charter. Also see ICJ, *Application of Article VI, § 22, of the Convention on the Privileges and Immunities of the United Nations*, 14 December 1989, *I.C.J. Rep.* 1989, p. 177, § 41 (hereinafter *Mazilu* case).

<sup>153</sup> See Sharp, *supra* note 33 (citing M. Gerster, ‘Study of Article 105’, in Simma, *supra* note 102, p. 1138).

<sup>154</sup> Gerster, *supra* note 153, p. 1138, § 2 (emphasis added). Also see Szasz & Ingadottir, *supra* note 118; and P. Cahier, ‘Study of Article 105’, in J.-P. Cot & A. Pellet (eds.), *La Charte des Nations Unies: Commentaire article par article* (Paris, Economica, 1985), p. 1398.

<sup>155</sup> Szasz & Ingadottir, *supra* note 118.

<sup>156</sup> C.H. Brower, II, ‘International Immunities: Some Dissident Views on the Role of Municipal Courts’, Vol. 41 *Virginia J.I.L.* 2000, p. 1.

are officials is also difficult to understand. For example, volunteers under the UN Volunteers Program of the UN Development Program are considered officials of the organisation.<sup>157</sup> The General Assembly has attempted to define officials more precisely as only the employees of the UN Secretariat and a few other incidental persons serving on appointment.<sup>158</sup> These would be personnel whose letters of appointment subject them to the UN Staff Regulations,<sup>159</sup> except for UN interns. Some local UN administrative offices define the distinction between those with and without immunities even more narrowly due to particular local needs.<sup>160</sup> According to the above, and contrary to the argument of Szasz and Ingadottir, this category would not cover *ad hoc* peacekeeping forces unless directly employed by the UN, subject to the UN Staff Regulations, and not otherwise excluded. Bowett has concluded that:<sup>161</sup>

The members of the Force who are at the same time members of the national contingents serving with UNEF in Egypt are not entitled to the privileges and immunities from jurisdiction contained in the Charter of the United Nations, since, although they are, for the purposes of the Regulations of the Force, 'international personnel under the authority of the United Nations and subject to the instructions of the Commander through the chain of command,' they are not agents or officials of the Organization.

Thus, peacekeeping troops fielded by a troop-contributing nation would not qualify as officials.

The Immunities Convention also establishes the category of experts<sup>162</sup> that is not a category specified in the Charter.<sup>163</sup> Similar to the immunities provided to lower-level officials, the immunities granted to experts are functional, that is to say they are immune from host State jurisdiction "in respect of words spoken or written",<sup>164</sup> but only insofar as those "acts [are] done by them in the course of ... their mission"<sup>165</sup> and those "privileges and immunities ... are necessary for the independent exercise of their functions".<sup>166</sup> Interpreting this provision, the ICJ stated that "[t]he purpose of Section 22 is . . . evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organisation, and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of

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<sup>157</sup> See UNGA Res. 2659 (XXV), 7 December 1970 (establishing the UN Volunteer Program); UNGA Res. 59/300, 22 June 2005 (mandating compliance of volunteers with the Staff Regulations).

<sup>158</sup> See UNGA Res. 76 (I), 7 December 1946. Also see Gerster, *supra* note 153, p. 1142, § 23; and Szasz & Ingadottir, *supra* note 118 (giving the example of the Chairman of the Advisory Committee on Administrative and Budgetary Questions of a covered individual who is not a member of the Secretariat).

<sup>159</sup> See UN Secretariat, *Secretary-General's Bulletin – Staff Rules: Staff Regulations of the United Nations and Staff Rules*, UN Doc. ST/SGB/2002/1, 1 January 2002, amended by UN Doc. ST/SGB/2003/1, 1 January 2003, UN Doc. ST/SGB/2004/1, 1 January 2004, and UN Doc. ST/SGB/2005/1, 1 January 2005. Also see K. Annan, UN Secretary-General, *Letter to Harri Holkeri, President of the UN General Assembly*, UN Doc. A/59/710, 24 March 2005, pp. 77-78 (annexing Prince Zeid, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, UN Doc. A/59/710, 24 March 2005 (hereinafter Zeid Rep.)).

<sup>160</sup> See e.g. UNMIK Reg. 2000/47, *supra* note 148, §§ 2.3, 3.3.

<sup>161</sup> Bowett, *supra* note 103, p. 131.

<sup>162</sup> See Article VI, §§ 22-23 Immunities Convention, *supra* note 132.

<sup>163</sup> See *Mazilu* case, *supra* note 152.

<sup>164</sup> Article VI, § 22 (b) Immunities Convention, *supra* note 132. Also see ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 29 April 1999, *I.C.J. Rep.* 1999, p. 62 (hereinafter *Cumaraswamy* case); *Mazilu* case, *supra* note 152.

<sup>165</sup> Article VI, § 22 (b) Immunities Convention, *supra* note 132. Also see *Cumaraswamy* case, *supra* note 164; *Mazilu* case, *supra* note 152.

<sup>166</sup> *Id.*

their functions”<sup>167</sup>. Importantly, the immunity covers the individual’s acts both while acting in UN service and after the service is concluded.<sup>168</sup> While this kind of protection following service is only implied for lower level officials of the UN, it is express for experts.<sup>169</sup>

Some authorities believe that this category of experts covers peacekeeping forces. In general terms, the argument is that the “United Nations has had occasion to entrust [them with] missions” and they are not clearly covered by the other categories in the Convention.<sup>170</sup> Some authors would even go so far as to say that “any person through whom [the UN] acts” is an expert.<sup>171</sup> Because UN peacekeepers are subsidiary organs of a UN organ,<sup>172</sup> they must have some sort of immunities. Thus, “it is [at least] reasonable, and consistent with the Charter provision, to assert that ... immunities [for UN forces] too are functional [despite the lack of any provision specifying them]”.<sup>173</sup>

This is reminiscent of the argument above that any person connected to the UN is covered by the immunities under the Charter, and the argument is similarly weak here. Simply because we might want peacekeepers to enjoy immunities does not make it so. Henry Schermers and Niels Blokker note: “the Convention’s provisions concerning privileges and immunities of United Nations personnel [do not] contemplate employment of thousands of locally recruited staff”.<sup>174</sup> Ray Murphy opines that where the troop sending State retains control over the forces, the acts of the troops cannot be imputed to the UN since they do not become organs of the UN.<sup>175</sup> In any event, the individuals serving the subsidiary organ must acquire immunities by force of the same law governing any person serving the UN, not some special regime that we might wish would exist.<sup>176</sup>

Furthermore, if the troops are already covered by immunities through the force of the Immunities Convention and possibly the Charter as well, these authors do not then address why immunity

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<sup>167</sup> *Mazilu case*, *supra* note 152; *Cumaraswamy case*, *supra* note 164. Also, based on a broad reading of the ICJ’s holding in the *Arrest Warrant case*, immunities could protect against the mere threat of prosecution. See *Arrest Warrant case*, *supra* note 146, §§ 51-55.

<sup>168</sup> See Article VI, § 22 (b) Immunities Convention, *supra* note 132. Also see Szasz & Ingadottir, *supra* note 118 (“[t]his is explicitly stated in respect of experts in [the Immunities Convention], Sec. 22(b), but implicitly applies also to officials since the immunity is related solely to the fact that at the time the words in question were uttered or the acts performed the person was acting in an official capacity, and not to the person’s status at the time the immunity is asserted”).

<sup>169</sup> Szasz & Ingadottir, *supra* note 118.

<sup>170</sup> See *id.* Also see J. Saura, ‘Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations’, Vol. 58 *Hastings Law Journal* 2007, p. 479; C. Stahn, ‘The Ambiguities of Security Council Resolution 1422 (2002)’, Vol. 14 No. 1 *E.J.I.L.* 2003, pp. 85-103 (“[a]lthough peacekeepers are not formally listed as persons with ‘official capacity’ in Article 27(1) sentence 2 [of the International Criminal Court statute], they obviously fall under this category”); Rawski, *supra* note 115; and Szasz & Ingadottir, *supra* note 118.

<sup>171</sup> Saura, *supra* note 170 (citing *Reparation case*, *supra* note 118).

<sup>172</sup> Usually the organ is the Security Council, although this is not necessarily so. See Saura, *supra* note 170; M. Bothe, ‘Peacekeeping’, in Simma, *supra* note 102, p. 686 (noting that peacekeeping operations are hybrid organs also subsidiary to the Secretariat Department of Peacekeeping Operations).

<sup>173</sup> Szasz & Ingadottir, *supra* note 118.

<sup>174</sup> Schermers & Blokker, *supra* note 8, § 326 (citing E.H. Buehrig, *The UN and the Palestinian Refugees* (Bloomington, Indiana University Press, 1971), p. 66).

<sup>175</sup> See Murphy, *supra* note 3.

<sup>176</sup> See *id.*; Saura, *supra* note 170.

terms in a SOFA are then considered necessary.<sup>177</sup> Jaume Saura states, “[t]he legal status of peacekeeping forces as subsidiary organs of the UN does not preclude the UN’s need to reach agreements in order to establish the forces [and provide] for a specific arrangement relating to the privileges and immunities of the troops on the ground”,<sup>178</sup> but does not explain why this is the case. In addition to the argument over coverage, even among authors who agree on coverage, many disagree on the breadth of the Convention.<sup>179</sup>

## B. Designations by the Secretary-General

The reason we cannot so comfortably state that the Immunities Convention automatically covers peacekeeping troops is because there is no automatic application of the definition of expert. The status of expert requires specific designation by the Secretary-General. It does not, as alleged by some above, automatically accrue based on whether certain duties appear “official” or not. We must be able to identify a positive act by the Secretary-General designated the person as an expert, as well as a designation that the acts are official.<sup>180</sup>

The Secretary-General has designated many actors as experts: Special Rapporteurs,<sup>181</sup> members of the International Law Commission,<sup>182</sup> the International Civil Service Commission,<sup>183</sup> and the Human Rights Committee (and other similar committees),<sup>184</sup> as well as other personnel serving under certain UN mandates,<sup>185</sup> including the US airmen<sup>186</sup> and technical logistics experts<sup>187</sup> serving under the UN Protective Force in Yugoslavia (“UNPROFOR”).

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<sup>177</sup> See Murphy, *supra* note 3 (mentioning that a SOFA is usually concluded but not addressing why it is concluded if the forces are already immune from jurisdiction); Fleck & Saalfeld, *supra* note 3.

<sup>178</sup> Saura, *supra* note 170. Also see e.g. UN Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects: Model Status-of-Forces Agreement for Peacekeeping Operations*, UN Doc. A/45/594, 9 October 1990 (hereinafter Model UN SOFA), § 47 (b) (providing for troop contributing nations to retain exclusive jurisdiction over its own troops); UNMIK Reg. 2000/47, *supra* note 148, § 2.4 (providing for immunity of KFOR forces).

<sup>179</sup> See e.g. K.S. Freeman, ‘Punishing Attacks on United Nations Peacekeepers: A Case Study of Somalia’, Vol. 8 *Emory International Law Review* 1994, p. 845 (“[a]bsent a Status-Of-Forces Agreement, however, the Privileges and Immunities Convention only applies to ‘officials’ of the United Nations ... [so] it does not appear that [peacekeeping troops] are currently protected under the Privileges and Immunities Convention”).

<sup>180</sup> See *Cumaraswamy* case, *supra* note 164, p. 87, § 61; Tan, *supra* note 124 (“Of course, because the Secretary-General may only confer this status with a positive act, whether or not there exists a grant of protection depends upon a case-by-case basis”); and Szasz & Ingadottir, *supra* note 118. But see *Mazilu* case, *supra* note 152 (suggesting that the Immunities Convention covered all “tasks entrusted to the person” regardless of whether they occurred on an official mission).

<sup>181</sup> See generally *Cumaraswamy* case, *supra* note 164; *Mazilu* case, *supra* note 152.

<sup>182</sup> See *Mazilu* case, *supra* note 152; Schermers & Blokker, *supra* note 8, § 326 (citing e.g. *UN Juridical Yearbook* 1992, pp. 479-480 (on the status of UN Guards as Experts on Mission), pp. 481-483 (on the status of members of UN Volunteers); and *UN Juridical Yearbook* 1991, pp. 305-307). Also see *UN Juridical Yearbook* 1992, pp. 480-481 (on the distinction between officials and Experts on Mission).

<sup>183</sup> See *id.*

<sup>184</sup> See *id.*

<sup>185</sup> See Sharp, *supra* note 33, p. 127.

<sup>186</sup> See *id.* (citing R. Zacklin, Director and Deputy to the Under-Secretary-General for Legal Affairs of the UN, *Letter to R.B. Rosenstock, Minister Counsellor, US Mission to the UN*, 4 March 1994 (“Zacklin to Rosenstock Letter”)).

It is unclear whether another UN organ may designate an expert as such instead of the Secretary-General. There is practice in support of this approach. As a substitute for the designation by the Secretary-General, Article VI, Section 26 of the Model UN SOFA designates military observers, UN civilian police, and other civilian peacekeeping personnel as experts, but not military peacekeeping personnel.<sup>188</sup> There is some debate over whether US troops dispatched to Somalia<sup>189</sup> and Bosnia<sup>190</sup> were specifically designated experts or were otherwise extended immunities by the Security Council. Although the US maintained that the Security Council resolution was sufficient to provide for immunities for US troops as experts under the Immunities Convention,<sup>191</sup> the Convention appears to be limited to forces established and employed by the UN, not the troop-contributing nation under the overall authority of the UN so such an act would go beyond the terms of the Immunities Convention.<sup>192</sup> In at least one instance, a US court has found that peacekeeping acts are official acts within the meaning of immunities, but it is unclear if that court based its finding on the immunities of the peacekeeping troops as experts, the diplomatic immunity of the Secretary-General, or the immunity of the organisation as a whole from suit.<sup>193</sup> The ICJ decisions in the *Cumaraswamy* and *Mazilu* cases (also known as the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* Advisory Opinion and the *Application of Article VI, § 22, of the Convention on the Privileges and Immunities of the United Nations* Advisory Opinion, respectively) could be read to imply that the designation as an expert is in the exclusive

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<sup>187</sup> See *id.* (citing R. Zacklin, Director and Deputy to the Under-Secretary-General for Legal Affairs of the UN, *Letter to C. Wilson, Counsellor, US Mission to the UN*, 12 July 1995).

<sup>188</sup> See Article VI, § 26 Model UN SOFA, *supra* note 178 (“Military Observers, United Nations civilian police and civilian personnel other than United Nations officials whose names are for the purpose notified to the Government by the Special Representative/Commander shall be considered as experts on mission within the meaning of article VI of the Convention”). Also see Zeid Rep., *supra* note 159, p. 16; A.J. Miller, ‘Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations’, Vol. 39 *Cornell I.L.J.* 2006, p. 71.

<sup>189</sup> See UNSC Res. 767, 27 July 1992, § 15 (providing immunities for all officials of the UN and experts on mission); UNSC Res. 794, 3 December 1992, § 3 (providing “that all parties, movements and factions in Somalia take all measures necessary to ensure the safety of United Nations and of all other personnel engaged in the delivery of humanitarian assistance, including the military forces to be established”).

<sup>190</sup> See UNSC Res. 1031, 15 December 1995, § 37 (stating that the Security Council “calls upon the parties to ensure the safety and security of UNPROFOR and confirms that UNPROFOR will continue to enjoy all existing privileges and immunities, including during the period of withdrawal”). Also see *The General Framework Agreement for Peace in Bosnia and Herzegovina*, UN Doc. S/1995/999, 14 December 1995, Appendix B to Annex 1-A, § 2 (hereinafter Dayton Peace Agreement) (wherein the parties explicitly agreed to consider IFOR troops as experts on mission within the meaning of the Immunities Convention).

<sup>191</sup> See S.J. Lepper, ‘The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate’s Analysis’, Vol. 18 *Houston Journal of International Law* 1996, p. 359 (citing Presidential Decision Directive No. 25 (PDD-25), *Key Elements of the Clinton Administration’s Policy on Reforming Multilateral Peace Operations*, in *The Clinton Administration’s Policy on Reforming Multilateral Peace Operations*, 3 May 1994, p. 11 (“The U.S. believes that individuals captured while performing UN peacekeeping or UN peace enforcement activities, whether as members of a UN force or a U.S. force executing a UN Security Council mandate, should, as a matter of policy, be immediately released to UN officials ... In appropriate cases, the U.S. would seek assurances that U.S. forces assisting the UN are treated as experts on mission for the United Nations, and thus are entitled to appropriate privileges and immunities and are subject to immediate release when captured”).

<sup>192</sup> See H.H. Perritt, Jr., ‘Policing International Peace and Security: International Police Forces’, Vol. 17 *Wisconsin International Law Journal* 1999, p. 281.

<sup>193</sup> See *Askir v. Boutros-Ghali*, *supra* note 145, p. 372 (declining jurisdiction over a claim against the UN involving peacekeeping and noting that the UN enjoyed immunity from suit for official action).



competence of the Secretary-General and may not be exercised by another organ such as the Security Council. In any event, those case-by-case designations of peacekeeping troops may have been isolated situations since the UN has expressed reluctance for future designations of expert status for armed military personnel for fear of diminishing the status when extended to civilian personnel.<sup>194</sup>

Even if the Secretary-General has determined that the individual is an expert, in line with functional immunity, the Secretary-General must also separately determine that the acts in question are “official” acts.<sup>195</sup> The Immunities Convention does not state with specificity that it is the office of the Secretary-General that is charged with making this determination, but the ICJ has found that implicitly it is the Secretary-General who must do so.<sup>196</sup> In addition, there is some question whether the Secretary-General must also declare the acts not only official, but also necessary for the exercise of the expert’s function. In neither of these cases is it clear whether these designations may also be performed by the Security Council or another organ, or by agreement such as a SOFA.

Practice has not supported any clear understanding regarding the degree to which the Secretary-General’s determinations may be reviewed.<sup>197</sup> The ICJ has found that the Secretary-General “has the *primary* responsibility and authority to assess whether its agents ... acted within the scope of their functions”.<sup>198</sup> The Secretary-General’s determination is “pivotal”<sup>199</sup> and may only be set aside by a national court “for the most compelling reasons”.<sup>200</sup> Therefore, designation of official acts, and perhaps even expert status generally, might be subject to forms of judicial, or perhaps political, review. Such an assessment would presumably entail an examination of whether the reasons for review are compelling, as might be the case in situations of, for example, serious violations of international humanitarian law, human rights law, or international criminal law.<sup>201</sup>

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<sup>194</sup> See generally Lepper, *supra* note 191 (“The reluctance of some UN members to extend diplomatic protection to persons engaged in military rather than diplomatic activity makes the use of the [Immunities Convention] an unsatisfactory long-term solution. Using diplomatic immunity as a legal shield for persons who may be engaged in the application of armed force is not only unusual, if overused it has the potential to undermine the protections accorded diplomats”), footnote 37 (“it has long been standard United States practice to distinguish the status accorded military personnel from that enjoyed by diplomats. ... Although the distinction is without practical difference (both afford identical protection), it is a difference strictly adhered to in practice”) (citing *Report of the Ad Hoc Committee on the Work Carried Out During the Period from 28 March to 8 April 1994*, UN Doc. A/AC.242/2, 13 April 1994, § 48). But see Lepper, *supra* note 191 (citing Zacklin to Rosenstock Letter, *supra* note 186) (expressing the “view of the United Nations” that US aircrews flying missions in support of UNPROFOR are Experts on Mission and confirmation from the UN that US personnel should be accorded “diplomatic status” [*sic*] and that one aspect of that status is treatment in accordance with “the principles and spirit” of the Immunities Convention. The US announced that it will seek expert designation for troops contributed to UN operations in non-international armed conflicts in the future).

<sup>195</sup> See *Cumaraswamy case*, *supra* note 164.

<sup>196</sup> See *id.*, p. 87, § 61; Szasz & Ingadottir, *supra* note 118.

<sup>197</sup> See Brower, *supra* note 156.

<sup>198</sup> See *Cumaraswamy case*, *supra* note 164 (author’s emphasis).

<sup>199</sup> See *id.*, §§ 50, 61.

<sup>200</sup> See *id.*

<sup>201</sup> See UK House of Lords, *R. v. Bow St. Metropolitan Stipendiary Magistrate & others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No. 3), [2000] AC 147 [1999] 2 All ER 97, 24 March 1999 and *R. v. Bartle and the Commissioner of Police for the Metro. And others, ex parte Pinochet*, 38 I.L.M. 1999, p. 581 (hereinafter *Pinochet case*). Also see D. Fleck, ‘Are Foreign Military Personnel Exempt from International Criminal

A second line of inquiry when reviewing the Secretary-General's determinations might be whether the immunity is necessary as required by the Charter.<sup>202</sup> In the *Cumaraswamy* case, the ICJ did not specifically state that setting aside a finding of necessity may only be done "for the most compelling reasons",<sup>203</sup> so the question on this point is open.

We should also note that the deference to the Secretary-General's determination that is required for States might not apply to other international legal actors. The Immunities Convention only specifically binds States, so some have argued that other intergovernmental organisations, such as the International Criminal Court ("ICC") might not be required to give the Secretary-General's designation any deference whether there were compelling reasons or not, although it might choose to.<sup>204</sup> The approach taken by the International Criminal Tribunals for Rwanda ("ICTR") and ICTY was based on an analogy to the practice of States<sup>205</sup> and more or less full cooperation was given,<sup>206</sup> although these two tribunals may be special cases in that they were established by the Security Council itself.<sup>207</sup>

### C. Secretary-General's Waiver of Immunity and Review of the Waiver

If we conclude that the Secretary-General has positively designated the peacekeeping forces as experts and that the particular acts at issue are necessary official acts, then we must next consider whether the Secretary-General has waived the immunity of the individual in question for the acts in question. The Immunities Convention provides for this possibility: "The Secretary-General shall have the right and the duty to waive the immunity of any expert 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".<sup>208</sup> The person in question does not hold this power of

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Jurisdiction Under Status of Forces Agreements?', Vol. 1 *J. Int. Crim. Justice* 2003, p. 651; A. Bianchi, 'Immunity versus Human Rights: The Pinochet Case', Vol. 10 *E.J.I.L.* 1999, pp. 237-277. Furthermore, for some cases of serious violations, even the absolute immunity of sitting Heads of State can be waived by international criminal courts. See e.g. Articles 27 (1), (2) ICC Statute; Article 6 (2) ICTR Statute; Article 27 (2) ICTY Statute; Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, § 52; ICTY, Trial Chamber, *Prosecutor v. Milošević*, IT-02-54, Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999, § 20. But see *Arrest Warrant* case, *supra* note 146, §§ 60-61 (upholding immunity for serving Foreign Minister when arrest warrant issued by a national court); A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', Vol. 13 *E.J.I.L.* 2002, pp. 853-875.

<sup>202</sup> See generally Schermers & Blokker, *supra* note 8, § 1611. See e.g. *Kosovo Ombuds. Special Report No. 1*, *supra* note 144, § 23 (finding that "the main purpose of granting immunity... does not apply to the circumstances prevailing in Kosovo, where the interim civilian administration ... acts as a surrogate state"). Also see Schermers & Blokker, *supra* note 8, § 1608 ("privileges must be interpreted restrictively ... When they are not necessary, they should not be granted").

<sup>203</sup> See *Cumaraswamy* case, *supra* note 164.

<sup>204</sup> See Szasz & Ingadottir, *supra* note 118.

<sup>205</sup> See P. Szasz, 'UN Forces and International Humanitarian Law', in M.N. Schmitt (ed.), *International Law Across the Spectrum* (Newport, Naval War College, 2000), pp. 507-537.

<sup>206</sup> See Szasz & Ingadottir, *supra* note 118 (note that Szasz states that he basis this assertion on personal conversations during his work in the UN Office of Legal Affairs and that the information has not been published though it is not confidential).

<sup>207</sup> See UNSC Res. 827, 25 May 1993 (establishing the ICTY); UNSC Res. 955, 8 November 1994 (establishing the ICTR); and Szasz & Ingadottir, *supra* note 118.

<sup>208</sup> Article VI, § 23 Immunities Convention, *supra* note 132; P.H.F. Bekker, 'International Decision (Legality of Use of Force)', Vol. 93 *A.J.I.L.* 1999, p. 921.

waiver because “[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves”.<sup>209</sup> Again it is helpful to recall that “the *raison d’être* of privileges and immunities of international organizations is their *functional necessity*: their existence is necessary for the independent exercise of its functions by an international organization”.<sup>210</sup>

Perhaps it goes without saying, but the waiver of immunities must be express and voluntary,<sup>211</sup> despite that fact that the Immunities Convention does not specifically require these conditions. One author argues that “[i]t is not clear exactly what would constitute an express waiver of immunity by an international organization under international law, though an implied waiver, inferred from conduct, may never be maintained against the U.N., or most international organizations, in a municipal court”.<sup>212</sup>

In addition, it is important to note that the authority to waive immunity of an expert, for whom the underlying immunity is accepted, is in the exclusive competence of the Secretary-General “in his opinion” since that power is specifically reserved for him under the Immunities Convention.<sup>213</sup> Thus, there is the potential for a strange situation where the Security Council or a SOFA orders immunities and the Secretary-General potentially waives them.

If the Secretary-General makes a determination that the acts are “official” and thus immune, then the Secretary-General has the further exclusive “right and duty” to determine whether the immunity should be waived based on weighing the importance of not impeding the course of justice<sup>214</sup> and not prejudicing the interests of the United Nations.<sup>215</sup>

In terms of the “duty” to waive, the Secretary-General may not have discretion in some cases. The Government of Costa Rica in the *Cumaraswamy* case submitted that the duty of waiver is not enforceable because of the subjective nature of the language of the Convention.<sup>216</sup> However, some authorities believe that the Secretary-General has a duty, perhaps a binding duty, not only

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<sup>209</sup> § 23 Immunities Convention, *supra* note 132; Szasz & Ingadottir, *supra* note 118. See Bongiorno, *supra* note 129 (arguing that the immunity is that of the organisation to waive or not, it is not an immunity of an individual) (citing Brower, *supra* note 156, p. 26). Note that the diplomatic immunity of the Secretary-General himself is also not for his personal benefit and may be waived by resolution of the Security Council. See § 20 Immunities Convention, *supra* note 132.

<sup>210</sup> Schermers & Blokker, *supra* note 8, § 324 (citing *Mazilu* case, *supra* note 152, §§ 44-55); ECJ, Case C-2/88, *Zwartveld and others*, Order of the Court, 13 July 1990, §§ 19-23.

<sup>211</sup> See Bongiorno, *supra* note 129.

<sup>212</sup> *Id.* (also discussing the unclear nature of general appearances, agreements to arbitrate, estoppel, and insurance policies against certain claims, as per international organisations appearing in lawsuits). Also see e.g. *Mendaro v. World Bank*, 717 F. 2d 610, 617 (D.C. Cir., US, 1983) (noting that “[u]nder national and international law, [an international organisation’s] waivers of immunity must generally be expressly stated ... The requirement of an express waiver suggests that courts should be reluctant to find that an international organization has inadvertently waived immunity”).

<sup>213</sup> See Article VI, § 23 Immunities Convention, *supra* note 132.

<sup>214</sup> See Articles V-VI, §§ 20, 23 Immunities Convention, *supra* note 132. It is interesting to note that the authority to waive immunity is similarly phrased as a “duty” in Article V, § 16 of the Convention on the Privileges and Immunities of the Specialized Agencies, New York, 21 November 1947, 33 *U.N.T.S.* 261. Also see Szasz & Ingadottir, *supra* note 118.

<sup>215</sup> See Articles V-VI, §§ 20, 23 Immunities Convention, *supra* note 132. Also see Tan, *supra* note 124.

<sup>216</sup> See *Cumaraswamy* case, *supra* note 164, Written Comments of the Government of Costa Rica, p. 8 (arguing that the application of a subjective standard rendered the Secretary-General’s waiver decisions non-justiciable).

to consider a waiver but also to actually grant a waiver in some cases,<sup>217</sup> despite the Secretary-General's exclusive competence in the area. Even if we do not accept the argument that serious violations of international law could potentially qualify as official acts, there is discussion that a grave violation of this nature might require the Secretary-General to waive immunities.<sup>218</sup> Examples of such cases might be serious violations of human rights, humanitarian law, international criminal law, or *jus cogens* peremptory rules of international law, as mentioned above,<sup>219</sup> but there is no reason to believe that this list is exhaustive. Frederick Rawski notes that a refusal to waive immunities might be a violation of international law itself since this very situation was mentioned in the Working Paper submitted by Japan during the discussions of the Chemical Weapons Convention.<sup>220</sup> Rawski also notes that the refusal of many nations to extend blanket immunity to UN peacekeeping troops from the jurisdiction of the ICC also shows a lack of willingness to grant immunities when there are serious violations.<sup>221</sup> He concludes that even though there is no specific statement from the Secretary-General that a waiver would ever be mandatory, statements by the Secretary-General and General Assembly suggest that refusal to waive immunities covering serious breaches of international law would violate Sections 20 and 23 of the Immunities Convention.<sup>222</sup> Furthermore, Brower believes that, notwithstanding the above, the UN would have a moral duty to act in good faith and waive immunity if it was not necessary for the independent exercise of the UN's functions.<sup>223</sup>

Just as we can question whether the Secretary-General's determinations are subject to review, we can also question whether the refusal to waive immunities is similarly subject to review. The UN Office of Legal Affairs has found that in its opinion the ICJ may review waiver decisions.<sup>224</sup> However, Rawski opines that reversal by the ICJ is unlikely given the Court's holding in the *Cumaraswamy* case.<sup>225</sup> Szasz and Ingadottir also argue that the General Assembly could limit the authority of the Secretary-General to either find immunities applicable or waive those immunities, since the General Assembly was the author of the Immunities Convention.<sup>226</sup> If we do find that the Secretary-General has a duty to waive immunities in certain cases, then we might

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<sup>217</sup> See Brower, *supra* note 156; Rawski, *supra* note 115.

<sup>218</sup> See Rawski, *supra* note 115.

<sup>219</sup> See *id.*, p. 111. There is however one instance of a blanket waiver of the immunities accruing under the Immunities Convention, apparently removed from the Secretary-General's discretion, where the International Criminal Court seeks to assert jurisdiction over an individual alleged to be criminally responsible for one of the crimes over which the ICC has jurisdiction but would be immune under the Immunities Convention. See Article 19 Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, New York, 4 October 2004, ICC Doc. ICC-ASP/3/Res.1.

<sup>220</sup> See Rawski, *supra* note 115 (citing Japan, *Privileges and Immunities of the Organization and Inspectors*, working paper, UN Doc. BWC/AD HOC GROUP/WP.52, 27 November – 8 December 1995).

<sup>221</sup> See *id.* (citing J. Dao, 'Solitaire: One Nation Plays the Great Game Alone', *New York Times*, 7 July 2002, § 4, p. 1).

<sup>222</sup> See *id.*, p. 114.

<sup>223</sup> See Brower, *supra* note 156.

<sup>224</sup> See *Cumaraswamy* case, *supra* note 164, Oral Statement of the UN, § 59, and Written Statement of the Government of the Federal Republic of Germany (implying the ICJ's power to review); Rawski, *supra* note 115, p. 112; and Brower, *supra* note 156, pp. 30-31.

<sup>225</sup> See Rawski, *supra* note 115.

<sup>226</sup> See Szasz & Ingadottir, *supra* note 118.

consider that some review mechanism must exist to enforce this duty to elevate it from a moral duty to an enforceable one.

In sum, we have seen that the accrual of immunities to armed peace support personnel based on expert status is by no means as clear or automatic as many have suggested. It depends on deliberate and specific designations and findings, which are themselves subject to forms of review.

#### 4. The Convention on the Safety of United Nations and Associated Personnel

In addition to the Immunities Convention, UN personnel also benefit from the Safety Convention to a limited degree.<sup>227</sup> The intention of this Convention was to provide for protections for troops from attack or other mistreatment by criminalizing such treatment. Originally, attacks on UN personnel were accidental, whereas increasingly they are intentional.<sup>228</sup> The underlying problem is the perceived gap in international humanitarian law between belligerents engaging in armed conflict and UN personnel attempting to resolve a situation, and the need to ensure Geneva Conventions protection for UN personnel.<sup>229</sup> As observed previously, due to the existence of armed conflict, non-consensual UN peacekeeping activities could be understood to be belligerent and as such the troops would be privileged to fight and entitled to POW status upon capture. However, as the UN maintains that forces under a mandate are not belligerents, and with the increase in UN operations in number and in scope of competence, it was felt that a convention providing for some protections was necessary.<sup>230</sup> Without such a convention, there are two possible approaches to prosecution for attacks on UN personnel: prosecution by the local courts (although the very reason for the UN troop presence might be the failure of State institutions) or prosecution by an international criminal court (which did not exist at the time so having now been established might allay some fears for the need).<sup>231</sup> The Safety Convention does not, in specific terms, address immunities, but, similar to the discussion in the section above in international humanitarian law, suggests comparable protections that provide for a similar status. Many of the Member States of the UN have acceded to the Safety Convention, although far fewer than have signed the Immunities Convention.<sup>232</sup>

##### **A. Operations and Individuals Covered by the Safety Convention**

In order to fall under the Convention, the operation must have been “established by the competent organ of the United Nations in accordance with the Charter of the United Nations and

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<sup>227</sup> See Safety Convention, *supra* note 6.

<sup>228</sup> See *id.*

<sup>229</sup> See E.T. Bloom, ‘Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel’, Vol. 89 *A.J.I.L.* 1995, p. 621. Note that Bloom was Attorney-Advisor for UN Affairs in the US Department of State, Office of the Legal Advisor, and member of the US delegation that negotiated the Safety Convention.

<sup>230</sup> See A. Bouvier, ‘Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis’, Vol. 309 *I.R.R.C./R.I.C.R.* 1995, pp. 638-666.

<sup>231</sup> See Sharp, *supra* note 33.

<sup>232</sup> UN, *Multilateral Treaties Deposited with the Secretary-General*, Chapter XVIII.1,

<http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-8.en.pdf> (43 signatories and 86 parties).

conducted under United Nations authority and control”.<sup>233</sup> The precise language thus “specifically excludes protection for personnel participating in U.N. authorized operations, i.e., not under U.N. authority and control, that are conducted by Member States independent of directed operations”.<sup>234</sup> Additionally, operations conducted by “groups of member states, or by regional organizations, are [similarly] excluded”.<sup>235</sup> This provision excludes quite a number of important operations. “Since the U.N. does not have its own military force, it is likely in a crisis situation – when protection is needed the most – that the Security Council may chose the option of authorized multinational operations to precede directed operations”<sup>236</sup> and such troops would not be covered by the Safety Convention. Greenwood notes:<sup>237</sup>

Had the Safety Convention been in force at the time, the coalition operation in Kuwait and the French operation in Rwanda, both of which were authorized by the United Nations Security Council but operated under the control of national authorities, would have fallen outside its scope. The same is true of the operation conducted in Liberia by the regional organization ECOWAS.

However others have argued that:<sup>238</sup>

The Convention would also cover operations such as that undertaken by the U.S.-led Multinational Force (MNF) in Haiti because that force was *authorized* under a Security Council mandate, and the *linkage* between the MNF and the UN personnel who were part of the UNMIH is established in relevant resolutions of the Council, such as SCRes. 940 (July 31, 1994).

This latter interpretation seems difficult to sustain. An operation with “authorisation” by and “linkage” to the UN seems on its face a far more attenuated relationship than an operation “conducted under United Nations *authority and control*”.<sup>239</sup> The former suggests that the action is excused from the general prohibition on the use of force and has some coordination with the UN, whereas the latter suggests something altogether different, the ability of the UN to command and direct. Thus, operations without the ability of the UN to command and direct appear to fall outside the Safety Convention.

In addition to this significant limitation, a qualifying operation must have been established “for the purpose of maintaining or restoring international peace and security”.<sup>240</sup> This requirement appears to be a way of invoking the Security Council’s competence, though the General Assembly is also similarly competent. However, without a direct reference to a resolution by the Security Council, we are left to wonder if the Safety Convention purposefully or literally contemplates a different standard. Perhaps it even provides some review of whether an operation was indeed established for the purpose of maintaining or restoring international peace and security. Some authors have flatly stated that “[a]s maintenance of international peace and security is the jurisdictional basis of all actions by the Security Council, this means that *all*

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<sup>233</sup> Article I (c) Safety Convention, *supra* note 6.

<sup>234</sup> Sharp, *supra* note 33.

<sup>235</sup> C. Greenwood, ‘Protection of Peacekeepers: The Legal Regime’, Vol. 7 *Duke Journal of Comparative and International Law* 1996, p. 185.

<sup>236</sup> Sharp, *supra* note 33.

<sup>237</sup> Greenwood, *supra* note 235 (citing UNSC Res. 929, 22 June 1994 (authorising the French operation in Rwanda which was conducted under national command and was entirely separate from the UN operation); UNSC Res. 678, 29 November 1990 (authorising the coalition operation in Kuwait)).

<sup>238</sup> Bloom, *supra* note 229, footnote 10 (emphasis added).

<sup>239</sup> Article I (c) Safety Convention, *supra* note 6 (emphasis added).

<sup>240</sup> Article I (c) (i) Safety Convention, *supra* note 6.

operations authorized by the Security Council are automatically covered, including peacekeeping and peace enforcement operations”.<sup>241</sup> This is not so easy a statement to make without a direct reference. Sharp proposes a more restricted reading by arguing that the reference to maintaining or restoring international peace and security means that “[b]y its own terms, the Safety Convention clearly does not offer any protection to a U.N. humanitarian operation authorized by the Security Council under its Chapter VI authority or by the General Assembly”,<sup>242</sup> but covers Chapter VII actions. This statement cannot be accepted because the distinction between Chapters VI and VII is not the maintenance or restoration of international peace and security, but the type of measures used, non-coercive or coercive. The Security Council could, in the interests of international peace and security, invoke non-coercive, humanitarian, peace support measures under Chapter VI. It is difficult to accept that the drafters of the Convention deliberately failed to provide protections for potentially unarmed missions. It would seem that the only certain way to ensure coverage under this Convention would be for the organ authorizing the operation to invoke international peace and security as the justification for its action, have some legal basis for acting on this issue, and have an arguable legal position that international peace and justice are at stake.

Operations that are not established for the purpose of maintaining or restoring international peace and security might still qualify if “the Security Council or the General Assembly ... [declares], for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation”.<sup>243</sup> Important to note is that a positive declaration of risk is required.<sup>244</sup> One difficulty though is that the Safety Convention does not clearly address operations that integrate several functions, peacemaking, peace-keeping, as well as nation building and rule of law consulting, and so on.<sup>245</sup> As this article is concerned with the immunities of armed troops participating in the full spectrum of peace support operations including the use of force, we may be facing a situation in which differing actors within a single, integrated operation might benefit from differing degrees of immunity depending on their mandate, mission, and operating procedures.

A further confusion is that the Convention excludes any “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”.<sup>246</sup> As an initial aside, this provision lends support to the argument that forces under a UN mandate could qualify as combatants and be held to international humanitarian law, a position the UN rejects. Sharp has observed that this provision effectively “excludes the application of the Safety Convention for most modern Chapter VII operations”.<sup>247</sup> Two questions arise from this provision: the nature of “enforcement

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<sup>241</sup> Bloom, *supra* note 229 (emphasis added).

<sup>242</sup> Sharp, *supra* note 33, p. 147.

<sup>243</sup> Article I (c) (ii) Safety Convention, *supra* note 6.

<sup>244</sup> See Bloom, *supra* note 229.

<sup>245</sup> See Bouvier, *supra* note 230 (discussing the examples of operations in Somalia and the former Yugoslavia).

<sup>246</sup> Article II (2) Safety Convention, *supra* note 6.

<sup>247</sup> Sharp, *supra* note 33.

actions” and “combatant status”.<sup>248</sup> The latter has already been discussed generally. Regarding the former, Sharp has noted:<sup>249</sup>

An Agenda for Peace defines situations where the Security Council authorizes military action in response to outright aggression, imminent or actual, with forces made available to it on a permanent basis under Article 43 of the Charter as peace-enforcement. Due to the lack of standardized terminology in the international community, however, the term ‘enforcement action’ has been applied to Security Council decisions that authorize coercive peace-keeping. For example, even the Secretary-General of the United Nations referred to Chapter VII actions ‘to create conditions for humanitarian relief operations in Somalia and Rwanda’ as enforcement actions. In practice, therefore, what constitutes an enforcement action is not clear.

Such designation thus may not contemplate all Chapter VII operations.

In sum, the operations covered do not appear to be all Security Council Chapter VII actions or even limited to any Chapter VII actions. The scope that is potentially wide, though, is narrowed by the other conditions. First, the UN must be in authority and control the troops. Second, the operation must have a peace and security objective. Third, the personnel cannot be enforcement personnel or combatants. We are left to wonder what operations are covered. In addition to these problems, the Safety Convention has even further additional limitations.

Moving from the type of operation to the particular individuals covered, the Safety Convention covers a wide variety of persons, including “[p]ersons engaged or deployed ... as members of the military, police or civilian components of a United Nations operation”,<sup>250</sup> such as “members of [UNPROFOR], the United Nations Mission in Haiti (UNMIH) and the United Nations Assistance Mission for Rwanda (UNAMIR)”,<sup>251</sup> and “[o]ther officials and Experts on Mission of the United Nations ... who are present in an official capacity”.<sup>252</sup>

It also covers “Associated Personnel” who are “[p]ersons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations”,<sup>253</sup> “[p]ersons engaged by the Secretary-General of the United Nations or by a specialized agency”,<sup>254</sup> and “[p]ersons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General”,<sup>255</sup> such as “forces of the North Atlantic Treaty Organization (NATO) asked to assist UNPROFOR in Bosnia-Herzegovina, the Multinational Force assisting UNMIH, and US assistance under [UNITAF]”.<sup>256</sup> The last of these is questionable since the US, though having signed the Safety Convention and

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Article I (a) (i) Safety Convention, *supra* note 6.

<sup>251</sup> Bloom, *supra* note 229. Also see Sharp, *supra* note 33.

<sup>252</sup> Article I (a) (ii) Safety Convention, *supra* note 6.

<sup>253</sup> Article I (b) (i) Safety Convention, *supra* note 6.

<sup>254</sup> Article I (b) (ii) Safety Convention, *supra* note 6.

<sup>255</sup> Article I (b) (iii) Safety Convention, *supra* note 6.

<sup>256</sup> Bloom, *supra* note 229. Also see Sharp, *supra* note 33.



submitted it to the Senate, has never ratified it and adopted it into US law.<sup>257</sup> Christopher Greenwood, though, clarifies that:<sup>258</sup>

NATO air crews involved in support of [UNPROFOR] [would be covered], as they were persons assigned by a government with the agreement of the competent organ of the United Nations to carry out activities and support the fulfillment of UNPROFOR's mandate, notwithstanding that they operated under NATO command and control. In contrast, the personnel of the Multi-National Implementation Force (IFOR), which took over responsibility from UNPROFOR in Bosnia-Herzegovina under the terms of the Dayton Peace Agreement, would not be covered, because IFOR does not operate under United Nations' control.

During the drafting process, the US had proposed to cover US military personnel merely serving in connection with the UN rather than serving under UN command and control, but this suggestion was rejected, so we may consider interpreting the Safety Convention as not contemplating such a wide scope and perhaps more literally requiring UN command and control.<sup>259</sup>

## **B. Obligation to Conclude a SOFA**

Article IV of the Safety Convention requires the United Nations to conclude a SOFA with the host State specifying the particular “privileges and immunities for military and police components of the operation” as soon as possible,<sup>260</sup> but does not then provide for the exercise of jurisdiction in the absence of a SOFA. The Safety Convention does require the immediate release of any personnel captured,<sup>261</sup> suggesting that the host State does not exercise adjudicative or enforcement jurisdiction; however, the Convention also requires the personnel to “respect” the laws of host and transit States,<sup>262</sup> a possible provision of prescriptive jurisdiction for the host State, but neither is explicitly so.

We can look to the drafting history of the Safety Convention for some insight into this silence. Steven J. Lepper, one of the members of the United States Delegation to the United Nations Ad Hoc Conference on the Protection of United Nations Personnel has written extensively about the drafting history of the Safety Convention.<sup>263</sup> Lepper writes that:<sup>264</sup>

[t]o deal with that probability [that a SOFA would not be in place], Canada proposed in the final hours of negotiations a provision to be included as a second paragraph in Article 4 that would provide interim protection for members of the military component of a UN operation ... Although it attracted broad support, this provision was not adopted ... Not only was it lost among the flurry of last minute proposals that had to be rejected only because there was not sufficient time remaining to consider them fully, it also encountered some opposition from delegations that considered such a proposal an assault on their sovereignty ... The issue of nonsending State jurisdiction, particularly in the absence of a SOFA, is an issue the United States

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<sup>257</sup> See Senate Treaty Doc. 107-1 (signed by the US on 19 December 1994, submitted to the Senate on 3 January 2001).

<sup>258</sup> Greenwood, *supra* note 235. Also see UNSC Res. 958, 19 November 1994; UNSC Res. 836, 4 June 1993; and UNSC Res. 1031, 15 December 1995, § 14 (authorising Member States, acting through NATO, or in cooperation with NATO, to establish the IFOR). The States concerned had already agreed to establish and deploy IFOR when they concluded the Dayton Peace Agreement. See Dayton Peace Agreement, *supra* note 190.

<sup>259</sup> See Lepper, *supra* note 191.

<sup>260</sup> Article IV Safety Convention, *supra* note 6.

<sup>261</sup> Article VIII Safety Convention, *supra* note 6. Also see Perritt, *supra* note 192.

<sup>262</sup> See *id.*

<sup>263</sup> See Lepper, *supra* note 191.

<sup>264</sup> *Id.*

and other like-minded troop contributors ought to consider addressing in an understanding or other statement at ratification.

In the end, the parties to the Safety Convention did not supplement it with an understanding at ratification, thus the result is unclear. First, since the Canadian delegation proposed the provisions, it must have believed that such a provision was necessary in order for the Convention to have that effect. Second, since the Canadian proposal was not adopted, we might understand that the other negotiating parties did not agree that the sending State should retain exclusive jurisdiction, at least insofar as this Convention provides. At the very least, the omission of the provision might have been unintentional in which case we are still left with the vague language we have. Subsequent State practice might clarify matters under customary international law but not necessarily under the Convention. As stated in the discussion above, the State waiver of its jurisdiction should be either in explicit, unambiguous treaty language or very clearly implied by consent, for example, by permitting foreign troops to enter the State's territory. If a clear statement of consent to waive jurisdiction is lacking, then we must be especially careful against presuming it.

## 5. Security Council Resolutions

Some authors have argued that, for example, when a State refuses to waive its jurisdiction or is incapable of waiving its jurisdiction, Chapter VII provides a suitable alternative for imposing the Model UN SOFA<sup>265</sup> pending conclusion of a permanent SOFA or otherwise ordering immunities.<sup>266</sup> The difficulties with this argument are whether the Security Council has these powers, whether an agreement imposed in this fashion would be enforceable, and what the consequences of violating this Security Council order would be.

Essentially the argument in favour of the power of the Security Council is that under Article 25 of the Charter, the Member States have agreed to "accept and carry out the decisions of the Security Council".<sup>267</sup> The ICJ has ruled that the UN "must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties",<sup>268</sup> including, for example, the implied power to create and organize peacekeeping forces, and require the Member States to contribute to their expenses.<sup>269</sup> Since immunities are necessary for the successful use of force, then the Security Council must be deemed to have the power to grant them. Under Article 105, the Member States must accept this grant and carry out the decision of the Security Council by recognizing the immunities even for peacekeepers operating without consent of the host State.<sup>270</sup>

First, the argument above presents a few difficulties regarding necessity and its implications. Finding implied powers is an accepted method but we must wonder if implied powers can flow from other implied powers. The *Certain Expenses* case could be read to suggest that implied powers might flow from other implied powers; however, in that case, the expenses were not a question of an implied power but rather whether the expenses incurred could be considered

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<sup>265</sup> See Model UN SOFA, *supra* note 178.

<sup>266</sup> See Eckert, *supra* note 6.

<sup>267</sup> Article 25 UN Charter.

<sup>268</sup> *Reparation* case, *supra* note 118.

<sup>269</sup> See *Certain Expenses* case, *supra* note 13.

<sup>270</sup> See Sharp, *supra* note 33.

expenses of the UN and thus payable by the Member States. If the UN has the implied power to authorize peacekeepers, it is not a further implied power that UN expenses are payable by the membership. Whether the Security Council has the implied power to order immunities because it has the implied power to create peacekeepers is entirely different. We are not arguing whether immunities are an implied consequence of authorising peacekeepers, but rather whether the Security Council has the implied power to order immunities because it has the implied power to authorize peacekeepers. Such a conclusion that doubly-implied powers are permissible might then lead us to conclude that if no State agreed to contribute forces to an action, the Security Council must have the implied power to order contribution or conscription because it was necessary to accomplish the goal.

Also the argument about necessity implying the power assumes that immunities granted by the Security Council are necessary and essential to the performance of a peace support operation. We can differ over the degree of necessity for an implied power in close cases, but it is difficult to see how a blanket power to grant immunity from legal process is always essential or necessary.<sup>271</sup> We might consider that there could be situations in which immunities (or comparable protections) were not necessary, either because they were available from other legal sources such as State immunity or international humanitarian law, or because the circumstances of the operation did not demand immunities in order to avoid interference, such as a failed State lacking in any government organs able to prosecute. Phrased another way, could the Security Council authorize and conduct a peace support operation without the troops being immune from legal process in addition to protections already existing based on State immunity or international humanitarian law?

The most common argument in favour of the necessity of immunities is generally made as follows: “In order to ensure the independent exercise of the functions of a peace-keeping force, it is essential that its members enjoy immunity from the jurisdiction of the host State. Such a policy makes easier a decision by UN Member States to supply troops”.<sup>272</sup> It is a very weak argument that the degree of difficulty in securing troops to serve provides a legal source of authority for the Security Council to unilaterally order immunities. Surely many operations of the UN might be made significantly easier if the Security Council had enhanced powers, such as the authority to order increased contributions from the Member States, but we would hesitate to conclude as such. Based on the above, we could argue that the powers of the Security Council do not include a necessary and implied power to grant special immunities but rather a narrow necessary and implied power to authorize what would otherwise be an unlawful use of force.<sup>273</sup>

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<sup>271</sup> In interpreting the term “necessary” here, we might consider the case of Trgyve Lie’s chauffeur, see *Westchester County v. Ranollo*, *supra* note 130, and the policy observation by Schermers & Blokker that grants of immunities, from an entity that does have power to grant an immunity, should be interpreted very narrowly and, even more so in the case of large scale operations, see Schermers & Blokker, *supra* note 8, § 323.

<sup>272</sup> Siekmann, *supra* note 12, p. 135 (internal citations omitted).

<sup>273</sup> Article 2 (7) UN Charter; Permanent Representative of Cyprus, *Letter to the UN Secretary-General*, UN Doc. A/55/782, S/2001/133, 13 February 2001, p. 2 (citing Sir Burke Trend, Cabinet Secretary, *Minute to British Prime Minister*, PREM 11/4704-4708, 5 February 1964) (“If the international force is not to constitute an illegal invasion of the island, it must not merely be invited by the local Government (which is, rightly, our first objective) but must also be given by that Government authority to do whatever is necessary to fulfil its purposes”); D. Bowett, *supra* note 103, p. 553; and S. Talmon, ‘Impediments to Peacekeeping: The Case of Cyprus’, Vol. 8 *International Peacekeeping: The Yearbook of International Peace Operations 2002*, p. 37 (“Consent required by law, which may also be termed legal consent, is closely linked with the legal basis for the peacekeeping force. All measures taken on

However, if we concluded that the Security Council did have a necessary power to order immunities, there are some important considerations. One objection is that, if it is correct, the power of the Security Council to order immunities, as an implied and necessary power under the Charter, might only apply to UN officials since they are the only persons mentioned under the Charter as holding immunity, and, as discussed above, peacekeepers authorized by the UN have never been considered UN officials. If they could be considered officials, the third paragraph of Article 105 contemplates that the General Assembly of the UN “may propose conventions to the Members of the United Nations” that would specify the nature of the necessary immunities UN officials enjoy.<sup>274</sup> Since the General Assembly has proposed a convention that details immunities, specifically the Immunities Convention discussed above, and that Convention omits mention of peacekeepers, we might conclude that the Charter provision remains applicable and that the lack of a convention on point prevents us from finding immunities in analogies, notwithstanding the fact that peacekeeping actions had not yet evolved at the time of the Convention. It has been observed that the Immunities Convention was the General Assembly’s effort to detail the extent of Article 105.<sup>275</sup> It seems unlikely that this provision requires that we find that there are no immunities without a convention, but it might negatively pre-empt a finding of immunities, *i.e.* require us to conclude that it is simply unsettled unless and until the General Assembly proposes a treaty providing for the immunities of peacekeeping personnel. Again, Schermers’ and Blokker’s words presuming against immunities come to mind. In the case of the immunities of peacekeepers, it is suggested that the Charter provision might demand that immunities, as distinct from other topics, can only be found in the four corners of a convention or SOFA.<sup>276</sup>

In the alternative, the Security Council could attempt to order the application of a SOFA. The difficulty with this argument is that if the Security Council can force consent of the State to a SOFA against its will, then it renders “constructive consent” farcical. The Vienna Convention on Treaties very clearly demands that State consent to international agreement while under threat of force is always rendered void.<sup>277</sup> It is unclear whether Security Council Resolutions must comply with the Vienna Convention. However, in the case of imposing a SOFA, the SOFA itself would be interpreted according to the rules expressed in the Vienna Convention, and accordingly it could not be applicable. Thus, this cannot be an example of consent to treaty and considerations of sovereignty seem to argue against a forcible demand for immunities.

On the other hand, if we conclude that there is an implied and necessary power to grant immunities or order the interim application of the Model UN SOFA, we must wonder why there is need for a permanent SOFA. It is interesting to note that the Security Council itself has

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the territory of a member State by the United Nations such as the stationing of a peacekeeping force or the establishment of an office for the protection and promotion of human rights constitute a violation of the State’s sovereignty unless it has been authorized by the Security Council acting under Chapter VII of the Charter of the United Nations (UN Charter) or it is taken with the consent of the State concerned”).

<sup>274</sup> Article 105 (3) UN Charter.

<sup>275</sup> See Simma, *supra* note 102, p. 1138; Sharp, *supra* note 33 (arguing “[t]he Privileges and Immunities Convention was the result of the General Assembly’s efforts to detail the general protections afforded by Article 105”).

<sup>276</sup> See Schermers & Blokker, *supra* note 8, § 323.

<sup>277</sup> Articles 7, 51, 52 1969 VCLT. Also see Ago, *supra* note 94, pp. 35-36 (“consent may be *expressed* or *tacit*, *explicit* or *implicit*, provided however that it is *clearly established*” and is not “vitiating by ‘defects’ such as error, fraud, corruption or violence”).

requested the Secretary-General to conclude SOFAs that contain provisions from the Safety Convention to protect peace support personnel.<sup>278</sup> If indeed, the Security Council could order the application of immunities, this act suggests that the Security Council itself may not regard its prior and future resolutions as alone providing comparable protections. It is acknowledged that SOFAs contain more provisions than only immunities, but then the Security Council would order the conclusion of a SOFA without specifically needing such terms.

Even if we concluded contrary to the above that the Security Council had these powers, we might however find that the implied and necessary power that does exist to order the application of the Model UN SOFA or immunities was more limited than may be supposed: that it is an implied and necessary power to order interim immunities or only the temporary application of the Model UN SOFA. This interpretation would be consistent with practice and the apparent opinion of the Security Council regarding its own powers. However, in cases where either the State objects at the outset to the presence of troops or there is no government or authority with whom to negotiate a SOFA, we cannot argue that, at the time that the Security Council adopted its resolution, the immunities or SOFA were meant to be applied purely on an interim basis pending final negotiations on a SOFA. No permanent negotiation on a SOFA could have been contemplated at that time, so the Security Council would not be acting within the narrow powers it had.

Regardless of the doubtful legal basis, the Security Council has nonetheless unilaterally legislated immunities or the application of a SOFA in a number of cases. Chet Tan has observed as much in Resolution 1487 regarding the provision for immunities of peacekeeping forces as per the Rome Statute of the ICC<sup>279</sup> and UN Mission in Kosovo (“UNMIK”), exercising powers delegated by the Security Council, also ordered immunities, in the form of a *de facto* SOFA for armed personnel.<sup>280</sup> In addition, the Security Council has specifically ordered that actors within a State may not harm UN personnel.<sup>281</sup> Though not a form of immunity *per se*, it is a similar assertion of protection.

Even if we agree that the Security Council has the power to order the application of the Model UN SOFA on a, more or less, permanent basis, the difficulty with the application of the Model UN SOFA is that it does not necessarily provide for immunities for peacekeepers. One must recall from the discussion above that the Model UN SOFA only grants expert on mission status

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<sup>278</sup> See § 5 (a) UNSC Res. 1502, 26 August 1993 (“*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 ... 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”).

<sup>279</sup> See Tan, *supra* note 124. Also see UNSC Res. 1422, 12 July 2002.

<sup>280</sup> See UNSC Res. 1244, 10 June 1999 (requesting the Secretary-General to act through his Special Representative to coordinate an international presence in Kosovo); UNMIK Reg. No. 2000/47, *supra* note 148; and Rawski, *supra* note 115. Also note the cases of EUFOR in the Democratic Republic of the Congo in 2006, see UNSC Res. 1671, 25 April 2006, where the UNSC ordered the application of the MONUC SOFA and EUFOR Althea in Bosnia where it ordered the application of the Dayton SOFA, see UNSC Res. 1575, 22 November 2004. The author is grateful to Dieter Fleck for bringing these cases to his attention.

<sup>281</sup> See e.g. UNSC Res. 794, 3 December 1992 (“[T]hat all parties, movements and factions in Somalia take all measures necessary to ensure the safety of U.N. and all other personnel engaged in the delivery of humanitarian assistance, including the military forces . . .” and affirmed that individuals will be held accountable for all violations of international humanitarian law); Sharp, *supra* note 33.

to a limited group of individuals, not including armed military personnel. It would need to be accompanied by an additional order that peacekeepers are experts on mission. However, these orders would be subject to the conditions discussed above in the section on experts on mission, namely, the weakness of the designations of expert status not coming from the Secretary-General, the need for the Secretary-General to designate the acts as official and possibly also necessary, the Secretary-General's authority and perhaps obligation to waive immunity in some cases, and the ability of States to disregard the Secretary-General's designations for compelling reasons.

Following the hurdles discussed above, we might conclude that the Security Council cannot order immunities or the application of the Model UN SOFA, but if we concluded the opposite, we are faced with a final difficulty: the relevant State must honour that resolution and waive its jurisdiction, or violate its UN obligations.<sup>282</sup> Again, we must recall *The Schooner Exchange*, and the many sources of international law reflecting the same reasoning, which held that immunity for foreign troops is in the grant of the State. If the State refused to do so, for example because it was not consenting to the presence of the troops and expressly stated that it would not accord them immunity, then the State would be acting unlawfully in violation of its obligations to the UN. Although the State may have breached its international obligations, that fact does not then mean that the troops would necessarily be immune from adjudicative jurisdiction.<sup>283</sup> We can draw a comparison to the recent cases of *Yusuf* and *Kadi* before the European Court of Justice ("ECJ").<sup>284</sup> In the decision, the ECJ held that although the Security Council resolution

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<sup>282</sup> We will omit discussion of the theoretical, but unrealistic, option that the State may have to withdraw from the UN. But see Subandrio, First Deputy Prime Minister of Indonesia, *Letter to UN Secretary-General*, 20 January 1965 (stating that Indonesia was withdrawing from the UN); UN Secretary-General, *Letter to Subandrio, First Deputy Prime Minister of Indonesia*, 26 February 1965 (acknowledging the withdrawal); L.N. Palar, Ambassador of Indonesia to the US, *Telegram to the UN Secretary-General*, 19 September 1966 (stating resumption of participation); summarized at UN, *Note on Indonesia*, <http://www.un.org/members/notes/indonesia.htm>.

<sup>283</sup> Compare to cases where municipal criminal jurisdiction was upheld even though the process for the acquisition of custody may have violated international law: France, Court of Cassation, Criminal Chamber, *Re Argoud*, 4 June 1964, 45 *I.L.R.* 90; Israel, District Court of Jerusalem, *Attorney General of the Government of Israel v. Eichmann*, 1961 36 *I.L.R.* 5, affirmed 1962, Supreme Court of Israel, 36 *I.L.R.* 277; UK, King's Bench, *R. v. O/C Depot Battalion, RASC Colchester ex parte Elliott*, [1949] 1 All E.R. 373, 376-377, UK, *Ex parte Susanna Scott*, (1829) 9 B. & C. 446, 109 E.R. 106; US Supreme Court, *United States v. Alvarez-Machain*, 119 L. Ed. 2d 441 (1992) and *Kerr v. Illinois*, 119 U.S. 436 (1886); US D.C. Cir., *United States v. Yunis (No. 2)*, 924 F. 2d 1086 (29 January 1991). Also see recognition of the rule at the international level: Extraordinary Chambers in the Courts of Cambodia, *In re Kaing Guek Eav, alias Duch*, 002/14-08-2006, Order of Provisional Detention, 31 July 2007; ICTR, Trial Chamber II, *The Prosecutor v. Rwamakuba*, 98-44-T, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, 12 December 2000, § 30. Also see PCA, *Savarkar Case (Great Britain v. France)*, 24 February 1911, *Reports of International Arbitral Awards* XI, pp. 243-255 (holding that, in case of a mistaken handing over of a fugitive, there is no rule of international law requiring return of the fugitive and loss of the State's jurisdiction over him); "*Lawler Incident*", 1860 reported in A.D. McNair, *International Law Opinions* (Cambridge, Cambridge University Press, 1956), Vol. 1, p. 78. But see Vol. 78 *A.J.I.L.* 1984, p. 207 (reporting Canadian protest to US kidnapping of fugitive in Canada and return to the US); UK House of Lords, *R. v. Horseferry Road Magistrates Court ex parte Bennett*, [1994] 1 AC 42 (holding the opposite: no jurisdiction when abduction unlawful); New Zealand Court of Appeal, *R. v. Hartley* [1978] 2 N.Z.L.R. 199 (same); South African Court of Appeal, *S. v. Ebrahim*, 1991 (2) SA 553 (same).

<sup>284</sup> See ECJ, Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council, et al.*, Judgment, 3 September 2008, §§ 285-330. Also see ECJ, Court of First Instance, Case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council, et al.*, Judgment, 21 September 2005 and Case T-315/01, *Kadi v. EU Council, et al.*, Judgment, 21 September 2005; ECJ, Case C-402/05 P, *Kadi v. Council, et al.*, Opinion of the

established a binding international obligation of the Member States to the UN, the municipal law measures implemented to put the resolution into effect internally could not violate European human rights norms.<sup>285</sup> Thus, the effect of the Security Council resolution in municipal law was stricken because it violated European norms.<sup>286</sup> Although it remains to be seen whether the Security Council will formally find that this judgment is a breach of European obligations to the UN, if such a breach is found, it cannot mean that municipal law measures governing immunities have been enacted by the Security Council directly in municipal law.<sup>287</sup>

## 6. Customary International Law and the Model UN SOFA

We might also consider whether the consistent practice of granting immunity to forces under a UN mandate, including the application of the terms of the Model UN SOFA even when no SOFA has been undertaken, and *opinio juris* on point, has established a customary norm of international law such that, notwithstanding consent, foreign forces under a UN mandate are immune from local jurisdiction. Some authorities, including the UN, naturally, have asserted that the Model UN SOFA is a part of customary international law.<sup>288</sup> Of course, the UN's opinion on the matter may amount to an expression of *opinio juris* but not State practice.<sup>289</sup>

The first difficulty in assessing whether the Model UN SOFA applies under customary international law is the lack of practice and reliable expressions of *opinio juris*. Although there is considerable practice of the negotiation and agreement on a SOFA with substantial similarities to the Model UN SOFA, those cases are primarily ones in which the State has consented to the

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Advocate General, 16 January 2008; ECJ, Case C-415/05 P, *Al Barakaat International Foundation v. Council, et al.*, Opinion of the Advocate General, 23 January 2008.

<sup>285</sup> See *id.*

<sup>286</sup> See *id.*

<sup>287</sup> In addition to this interpretation that violating a rule of the UN only results in responsibility to that organisation, not the automatic enactment of the rule at issue in municipal law, we must also remind ourselves that the immunities of UN peacekeepers, if any, are the immunities of the UN not of the individuals concerned. See Bongiorno, *supra* note 129 (citing Brower, *supra* note 156, p. 26). As such, prosecution of the individuals would result in a violation of the right, if any, of the UN, not the rights of the individuals. See ICJ, *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, 31 March 2004, *I.C.J. Rep.* 2004, p. 12 (holding that the Vienna Convention on Consular Relations created a right between States for consular notification when nationals were detained, or review and reconsideration of individual cases where consular notification was not given).

<sup>288</sup> See UN Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Operations*, UN Doc. A/46/185, 23 May 1991; L. Sucharipa-Behrmann, 'Peace-Keeping Operations of the United Nations', in F. Cede & L. Sucharipa-Behrmann (eds.), *The United Nations: Law and Practice* (The Hague, Kluwer Law International, 2001), p. 100; Sharp, *supra* note 33; and Bowett, *supra* note 103, p. 437 ("It now seems to be accepted, despite occasional statements to the contrary, that visiting forces generally are subject to the exercise of concurrent criminal jurisdiction not only of the authorities of the forces to which they belong but also of the host State ... On the other hand, however, agreements concluded by the United Nations with Egypt, Lebanon, and the Congo provided that the members of the Force are subject to the exclusive criminal jurisdiction of the participating State"). Also see Lepper, *supra* note 191, pp. 415-416 (noting the US perspective that troop-contributing nations to a Chapter VII action retain exclusive jurisdiction over their troops abroad, even in the absence of a SOFA; noting that in Chapter VI operations concurrent jurisdiction may be more appropriate).

<sup>289</sup> See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, *I.C.J. Rep.* 1996, p. 226, § 73 (but note that the ICJ only considered that a UN General Assembly Resolution might express *opinio juris*, it did not rule on a Secretariat report).

presence of troops under a UN mandate. Situations where there is no consent are, however, a very different situation. It is crucial that we only consider cases for expressions of *opinio juris* where there is a lack of consent because of the unique nature of the legal opinion that the obligation to grant immunities is binding. The situation of granting immunities to individuals present without consent is so unusual that *opinio juris* would be similarly unique and cannot be found in analogy. We will need evidence that States, which had either refused to consent to the presence of troops or were unable to consent to their presence, nonetheless treated the troops in their territories under the terms of the Model UN SOFA or as otherwise immune, as if they were under a binding international obligation to do so.

The first difficulty is that the cases of non-consensual operations are very few in number to date and only very recently undertaken.<sup>290</sup> Although there is no established time frame necessary for custom to form,<sup>291</sup> there is agreement that the practice and *opinio juris* must be “widespread and consistent”.<sup>292</sup> This lack of practice alone may be determinative.

Secondly, if we could find evidence that a State has provided some protections to troops under a UN mandate who were present on its territory without its consent, we must take care not to confuse expressions of *opinio juris* of the applicability of the Model UN SOFA or other immunities unique to peacekeepers with the normal application of international humanitarian law obligations. This interpretation of *opinio juris* is a particularly difficult task in these cases since a State that has not consented to the presence of troops most likely consequentially classifies those troops as belligerents and probably attacks them. Given that there is no clear determination under international law that such troops are not to be classified as such, we cannot argue that the State is precluded from classifying them as such. Such classification most likely obscures our ability to find *opinio juris* on point. In fact, our analysis might consider that the only widespread and consistent practice in existence is that States against which non-consensual operations were undertaken generally react by undertaking military action against the troops authorized by the UN. They clearly do not regard the troops as protected and also clearly regard the troops as engaging in armed conflict.

Furthermore, it seems difficult to find *opinio juris* that the designation of expert on mission provided in the Model UN SOFA, without the affirmative act of the Secretary-General, exists under customary international law when the UN has expressed reluctance to use the expert designation method for granting immunities for peacekeeping troops in the future.<sup>293</sup> The custom that may have developed, if at all, might be in favour of the application of the Model UN SOFA, absent the provisions on designation of expert on mission status. It also bears repeating that, even

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<sup>290</sup> See UNSC Res. 794, 3 December 1992 (regarding Somalia); UNSC Res. 814, 26 March 1993 (same); UNSC Res. 940, 31 July 1994 (regarding Haiti); and UNSC Res. 1031, 13 December 1995 (regarding Bosnia and Herzegovina).

<sup>291</sup> See ICJ, *North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark)*, 20 February 1969, *I.C.J. Rep.* 1969, p. 13, § 27; ICJ, *Case concerning the Continental Shelf (Libya v. Malta)*, 3 June 1985, *I.C.J. Rep.* 1985, p. 13, § 27; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, Judgment, 27 June 1986, *I.C.J. Rep.* 1986, p. 14, §§ 183, 207 (hereinafter *Nicaragua case*).

<sup>292</sup> See e.g. H. Thirlway, ‘The Sources of International Law’, in M. Evans (ed.), *International Law* (Oxford, Oxford University Press, 2006), p. 122 (also noting that “[t]he position appears to be that in a field of activity in which there has not yet been any opportunity for State practice, there is no customary law in existence”). Also see *Nicaragua case*, *supra* note 291, p. 14, §§ 184, 188 (implicitly rejecting the “instant” custom theory).

<sup>293</sup> See Lepper, *supra* note 191.



if the Model UN SOFA terms on expert status are binding as a matter of customary international law, then any immunities granted are subject to the weaknesses of that provision, including the fact that military personnel are not covered,<sup>294</sup> the need to designate the acts as official and necessary, the authority and obligation to waive immunity, and the ability of States to disregard immunity for compelling reasons.

In the numerous cases discussed above in the section on State immunity, the conclusion was reached that even in cases where the State consented to the presence of foreign troops on its soil, but retained jurisdiction for certain classes of crimes, troops could be charged with crimes under local law. It seems to be a hard argument that in cases where the State has not consented to the presence of troops in its territory, that they could be entirely immune for their acts; however, we must discuss the particular case of when those troops put on the blue helmet and whether that changes the situation under international customary law. Turning to customary international law generally as a source of immunities, here we also find consistent practice lacking. One notable case where a State has found that there is no customary international norm obliging it to provide immunities of the kind that would be found in a SOFA is the so-called “PLO case”.<sup>295</sup> In this case, an officer of the armed forces of Senegal who was participating in the United Nations Interim Force in Lebanon (“UNIFIL”) operation was tried on suspicion of providing arms to the Palestine Liberation Organization. The District Court of Haifa found that Israel had admitted the individual to its territory as a tourist, not a privileged member of forces.<sup>296</sup> The individual argued that there was a customary norm of international law requiring immunity for members of peacekeeping forces, but the court disagreed that such a norm could be found.<sup>297</sup> Among other sources, it relied on the statement by Ian Brownlie:<sup>298</sup>

By analogy with the privileges and immunities accorded to diplomats, the requisite privileges and immunities in respect of the territorial jurisdiction of host states are provided for but in this context on the basis of treaty and not customary law. There is as yet no customary rule supporting international immunities.

Lacking an international agreement by Israel to grant immunity, or at least an “invitation or consent” to enter the State on such terms, the court held that the officer was not immune.<sup>299</sup>

Robert Siekmann has disagreed with the court’s finding, arguing that:<sup>300</sup>

In view of the fact that absolute criminal immunity also applied in the case of UNEF ‘II’ and UNIFIL, the practice must be regarded as sufficiently uniform. The question remains whether it is also ‘accepted as law’. The UN itself has always proceeded on this assumption. As for the host states, the conclusion reached in the ‘PLO case’ that the existence of a customary law rule which accords absolute immunity to members of the

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<sup>294</sup> See Article VI, § 26 Model UN SOFA, *supra* note 178. Also see Zeid Rep., *supra* note 159, p. 16; Miller, *supra* note 188.

<sup>295</sup> See *PLO Case*, *supra* note 60 (citing *Schooner Exchange*, *supra* note 20; *Cheung (Chung Chi) v. R.*, *supra* note 36). But see Siekmann, *supra* note 12, pp. 138-139 (criticising the decision as not correctly assessing international custom on the matter).

<sup>296</sup> *Id.* The courts also found that, in any event, he acted in an off duty capacity.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*, p. 208.

<sup>299</sup> *Id.*, pp. 206-207 (“the defendant was not a soldier in a military division stationed within the territory of the State of Israel with the State’s permission. This rule is not of universal relevance in international law — the customs of a country conceding judicial authority over crimes committed on her soil are dependent upon agreements between the host country and the visiting army’s country of origin”).

<sup>300</sup> Siekmann, *supra* note 12, p. 153 (internal citations omitted).

national contingents of UN peace-keeping forces cannot (yet) be assumed would seem to be unjustified. The reasons that no SOFA's could be concluded with respect to UNEF 'II', UNDOF and UNIFIL had nothing to do with the question of criminal jurisdiction of the status of the UN Forces in the host state in general: they were of a purely political character. In the case of UNEF 'II', after all, the UN and the host state had agreed to be guided by the UNEF 'I' SOFA and in that of UNIFIL the administration of justice by the home country was at least tolerated by Lebanon (it did not even protect against the judgments *in situ* of the Dutch Army Mobile Court Martial). The UNTAG SOFA confirms this trend. Absolute criminal immunity would therefore 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).

Siekmann's argument is ultimately unconvincing. As for the cases of failure to reach an agreement for UNEF II and UNDOF, the "political" reasons he claims that prevented an agreement being reached are stated as follows:<sup>301</sup>

The UN tried, in the case of UNEF 'II', to conclude SOFA's with both parties concerned ... Elaraby says that Egypt refused further negotiations in order to prevent Israel from concluding a SOFA with the UN concerning Egypt's own territory ... Comay says, on the other hand, with regard to SOFA's for UNEF 'II' and UNDOF, that no agreement could be reached on, among other things, the application of Israeli legislation. Egypt and Syria (UNDOF) did not, according to Comay, wish to conclude a SOFA because they wished to emphasize the temporary nature of the peace-keeping forces.

The reason for the failure of those States to conclude a SOFA is speculative, but even if we can accept the report as correctly stating the intent of the parties in not concluding a SOFA, it does not follow that the States would have agreed to the SOFA if those concerns were absent. If the State chooses not to conclude agreements, then it is difficult to imagine how this act can express *opinio juris* for the very obligation the State refused to undertake.

In addition, since we are limiting our discussion to non-consensual operations, Siekmann's argument is largely inapplicable and possibly explained by State immunity, not a special immunity regime for peacekeepers. He himself noted that he was restricting his observations to operations where the host State had consented to the presence of troops on its territory.<sup>302</sup> It has already been acknowledged that consensual operations could very well result in immunities for peacekeepers, though under the doctrine of State immunity. As noted above, the restriction to consensual operations in Siekmann's analysis severely limits the conclusions we can draw for non-consensual operations. Regarding the case of the tolerance of Lebanon for the Dutch Army Mobile Court Martial, it could very well have been an implied consensual waiver of immunity in the practice of State immunity and accordingly not an expression of *opinio juris* regarding any customary immunity of non-consensual peacekeeping forces. Important to note is also that the Netherlands was prosecuting its own troops under its own system of internal military discipline and justice. The facts certainly suggest that Lebanon may have regarded the situation as one of State immunity. Silence without any expressed reason for the silence is a difficult source of *opinio juris*. While we had a difficulty separating *opinio juris* in cases with possible parallel international humanitarian law concerns, we also have a difficulty separating *opinio juris* in cases of parallel issues of State immunity.

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<sup>301</sup> *Id.*, p. 124, footnote 358 (citing N.A. Elaraby, 'UN Peacekeeping: The Egyptian Experience', in H. Wiseman (ed.), *Peacekeeping: Appraisals and Proposals* (Elmsford, Pergamon Press, 1983), pp. 81-82 and M. Comay, 'The Israeli Experience', in *id.*, pp. 109-110).

<sup>302</sup> *Id.*, p. 6 ("The research upon which this book is based was concerned with UN peace-keeping forces ... The UN action in Korea was excluded, as it constituted enforcement action").

#### **IV. Conclusion**

The first general consideration for determining the immunities that UN peacekeepers enjoy in the absence of a SOFA is the consent of the host State and waiver of its jurisdiction under the terms of State immunity. Although other immunities might supplement that consent and waiver, it remains the most important source. If the waiver is explicit, then we can look to the terms of the waiver for any conditions narrower than the terms usually established by customary international law, *i.e.* acts in the course of duty. If the waiver is implied or only based on the overriding needs of emergency without explicit terms, then the usual terms established by customary international law should apply.

If there is no consent to the operation, then State immunity does not apply and we must look to other sources of immunity or comparable protection. The first source would be international humanitarian law. If a State refuses to consent to the presence of peacekeepers, but does not clearly object or enforce that refusal with hostilities, then we can find that the State has effectively consented to the presence of the troops, and the rules of State immunity apply. However, if the peacekeeping troops are attacking a State for purposes approved by the UN or responding to an armed attack by the territorial State in an effort to resist the entry or presence of the troops, then certainly there is no consent to their presence and they are engaged in armed conflict. UN-mandated peacekeepers deployed without the consent of the host State and engaged in armed conflict should be regarded as combatants because the fact of an armed conflict exists. Therefore, the peacekeepers, although they may be targeted, cannot be charged with crimes for participating in hostilities (aside from war crimes). They are thus “immune” in that sense.

The next consideration, where the UN is involved, is UN law. The UN Charter sets out the basic principles of immunities for officials but is vague and it is difficult to derive specific immunities from it. Furthermore, UN peacekeepers are generally not regarded as UN officials.

The Immunities Convention is far more precise, but it does not apply automatic, blanket immunity. The Secretary-General must determine that the person is an expert on mission and that the acts in question are “official acts” and perhaps even that the acts are also necessary. It is unclear whether the Security Council could act for the Secretary-General in this regard. However, even if those conclusions are incorrect, the determination of expert status, official acts, and necessity of those acts is subject to judicial review, including a limited form of judicial review by the host State. In a situation of non-consensual operations, surely the host State will regard judicial review of any claimed immunity a compelling reason to overlook the determination of immunity by the Secretary-General or any other body or instrument acting in his stead. In addition, the Secretary-General could waive the immunity granted through either means and might be required to waive the immunity in certain circumstances, and this determination may also be subject to judicial review.

The Safety Convention is another source, but a far less practical one for peacekeepers. First, the only operations that are covered are those where the UN is in authority and control of the troops, has a peace and security objective, and the personnel are not enforcement personnel or combatants. In any event, the Convention requires the conclusion of a SOFA but omits provision for the exercise of jurisdiction in the absence of a SOFA, an omission that is difficult to overcome considering the negotiating history.

In addition to ordering the application of the expert on mission status, the Security Council could simply order immunities. However, such an act appears to be beyond the Security Council's competence as immunities may not be necessary and essential to the performance of peace support operations, in addition to the existing protections of State immunity and international humanitarian law. Even if it was, the Security Council's authority to order immunities might only extend to UN officials. Furthermore, a refusal of a State to comply with an order to waive its jurisdiction results in a violation of the State's UN obligations, but does not necessarily mean that the peacekeepers are immune.

As for the Model UN SOFA, it designates peacekeepers as experts on mission, but it would not appear to apply to situations where the State had not agreed to the treaty. It is unclear whether the Security Council could order the application of the Model UN SOFA unilaterally. The SOFA is a treaty based on the consent of the host State and, without the consent of the host State, the Vienna Convention would undoubtedly render it void. In addition, it is unclear whether the Model UN SOFA is a part of customary international law and, if so, could alternatively apply its provision by force of custom rather than the Secretary-General's or Security Council's positive act. There is a particular difficulty in assessing whether the Model UN SOFA is a part of customary international law in situations of non-consensual operations because expressions of *opinio juris* on point are both rare and generally obscured by the application of international humanitarian law. Lastly, even if the Model UN SOFA could apply, it only grants expert on mission status and thus suffers from the same weaknesses as the Immunities Convention discussed above.

Finally, there does not appear to be any international customary law that generally obliges States to grant immunities to peacekeepers specifically, if they have refused to do so. Although this conclusion could be disputed for consensual operations, it cannot for non-consensual operations.

Through this morass, the immunities of UN personnel, in the absence of a SOFA, can be found in parts. Clearly, a SOFA is therefore a practical and recommended step to ensure that personnel are not detained and forced to argue custom, waiver, implication, and the discretion of the Secretary-General in order to escape prosecution in the local jurisdiction. However, in situations where a SOFA cannot be undertaken due to emergency needs or resistance by the host State, the unpleasant conclusion is that troop protection comes in a patchwork of pieces.

## **Summary – Résumé – Samenvatting – Zusammenfassung – Riassunto - Resumen**

### **Summary - Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement**

Whether due to a need to act quickly or a lack of a functioning government with whom to negotiate, the UN often needs to authorize the deployment of peacekeepers and other peace support personnel without the benefit of a Status-of-Forces Agreement ("SOFA"). Unless or until this initial failure to have a SOFA is later cured by the conclusion of a SOFA, the problem arises what immunities UN-mandated peacekeeping forces may enjoy in the absence of a SOFA.

UN-mandated peacekeeping operations have traditionally been present in host States with the consent of the State involved. The consent of the host State can act as a waiver of its jurisdiction under the terms of State immunity. If the waiver is explicit, then we can look to the terms of the waiver for any limitations. If the waiver is implied or based on the overriding needs of an emergency situation, then the usual terms established by customary international law should apply.

However, the UN Security Council has taken the dramatic step of authorizing the constitution of peacekeeping forces without the consent of the host State. If there is no consent, then State immunity does not apply and we must look to other sources of immunity or comparable protection. The first source would be international humanitarian law. If a State refuses to consent to the presence of peacekeepers, but does not clearly object or enforce that refusal with hostilities, then we can find that the State has effectively consented to the presence of the troops, and the rules of State immunity apply. However, if the peacekeeping troops are attacking a State for purposes approved by the UN or responding to an armed attack by the territorial State in an effort to resist the entry or presence of the troops, then certainly there is no consent to their presence and they are engaged in armed conflict. UN-mandated peacekeepers deployed without the consent of the host State and engaged in fighting with the State should be regarded as combatants because of the fact that an armed conflict exists, and thus the law of armed conflict must be applied. The peacekeepers, although they may be targeted, cannot be arrested and charged with common crimes for participating in hostilities. The second source of protection is UN law. The UN Immunities Convention provides a wider scope of immunities than the UN Charter, including protections for experts on mission, but those protections do not apply automatically. The Secretary-General must determine that the person and acts in question are immune, but those determinations may be subject to limited forms of judicial review, including judicial review by the host State. The UN Safety Convention is another source of protection, but a far less useful one in the case of non-consensual operations because the UN must be in control of the personnel in order for the Convention to apply and the personnel covered may not be combatants. A further source of protection would be a resolution by the Security Council ordering the application of expert on mission status specifically or immunities generally, but it is arguable whether such an act is within the Security Council's competence. The last source of immunities would be customary international law. However, it is unclear whether any source of immunities exists in customary international law for non-consensual operations.

Clearly, a SOFA is therefore a practical and recommended step to ensure that personnel are not detained and forced to argue custom, waiver (explicit or implicit), and the exercise of a discretionary power by the Secretary-General in order to escape prosecution in the local jurisdiction. However, in situations where a SOFA cannot be undertaken due to emergency needs or resistance by the host State, the unpleasant conclusion is that troop protection comes in a patchwork of pieces.

### **Résumé – Immunités des forces de maintien de la paix de l'ONU en l'absence d'un accord sur leur statut**

La nécessité d'intervenir rapidement ou l'absence d'une autorité compétente avec qui négocier amène fréquemment l'ONU à autoriser un déploiement de forces de maintien de la paix (*peacekeepers*) et d'autres membres du personnel en appui de missions de paix, sans accord sur le statut de leurs forces (SOFA). Dans de telles circonstances se pose donc le problème des immunités dont peuvent bénéficier les forces mandatées par l'ONU, à moins (ou jusqu'à ce) qu'un SOFA puisse être signé par la suite avec l'Etat hôte, de manière à remédier à cette lacune initiale.

Les opérations de maintien de la paix sous le mandat de l'ONU sont traditionnellement menées avec le consentement des Etats hôtes où elles se déroulent. Cette approbation peut confirmer la volonté de l'état hôte de renoncer à exercer sa juridiction appliquant ainsi les règles de l'immunité de l'Etat. Si cette renonciation est explicite, il importe d'en examiner les modalités afin d'en identifier les limites. Si la renonciation est implicite ou fondée sur les conditions d'une situation d'urgence qui ont la primauté, il faudrait alors appliquer les modalités en vigueur telles que définies par le droit coutumier.

Cependant le Conseil de Sécurité des Nations Unies a franchi une étape importante en autorisant le déploiement de troupes de maintien de la paix sans le consentement d'un Etat hôte. En l'absence de cet accord, le principe de l'immunité de l'état ne peut être invoqué et il faut donc chercher d'autres sources d'immunité ou de protection comparable. Une première source pourrait être le droit international humanitaire. Lorsqu'un état refuse d'autoriser la présence sur son territoire de forces armées de ce type mais omet de protester ouvertement contre leur déploiement ou de conforter son refus par les armes, cet état peut être présumé consentant et les règles relatives à l'immunité de l'état sont, a fortiori, applicables. Toutefois, lorsque de telles forces de maintien de paix attaquent un état sous le mandat de l'ONU ou en riposte à une attaque armée menée par l'état hôte afin de tenter de leur interdire l'accès à son territoire, l'absence de consentement est alors manifeste et les forces de maintien de la paix se retrouvent dès lors impliquées dans un conflit armé. Les forces sous le mandat de l'ONU, déployées sans l'accord de l'état hôte, et impliquées dans un conflit armé avec ce même état, devraient être considérées comme des combattants par le fait même du conflit armé et, par conséquent, il faut appliquer le droit des conflits armés. Cependant, si ces militaires de l'ONU peuvent faire l'objet d'une attaque, par contre ils ne peuvent être arrêtés ni même poursuivis en justice pour des délits de droit commun résultant du seul fait de leur participation aux hostilités. Une deuxième source de

protection est le droit des Nations Unies. La Convention de l'ONU sur les immunités des états prévoit des immunités plus larges que la Charte des Nations Unies, y compris la protection des experts en mission, même si cette protection n'est pas automatique. Il incombe au Secrétaire général de déterminer que la personne et les actes accomplis bénéficient des immunités requises. Toutefois cette décision peut faire l'objet de formes restreintes de contrôle judiciaire, notamment de la part de l'état hôte. La Convention sur la sécurité du personnel de l'ONU représente une troisième source de protection, en dépit de son insuffisance dans le cas d'opérations non consensuelles. En effet pour qu'elle soit applicable, l'ONU doit exercer un contrôle sur le personnel déployé et ce personnel ne peut pas intervenir en tant que combattant. Une résolution du Conseil de sécurité de l'ONU qui impose l'application du statut spécifique d'expert en mission ou d'immunités plus générales, constituerait une meilleure forme de protection, mais il est contestable qu'une telle résolution relève réellement de la compétence du Conseil de Sécurité. La dernière source d'immunité pourrait être le droit international coutumier. Cependant, l'immunité offerte par le droit international coutumier dans le cas d'opérations non consensuelles reste encore incertaine.

Pour toutes ces raisons, un SOFA constitue manifestement une solution pratique et recommandée pour éviter que le personnel puisse être arrêté et, afin d'échapper à la juridiction locale, il soit contraint d'invoquer le droit coutumier, de renoncer (de manière explicite ou implicite) à l'immunité juridictionnelle et l'exercice du pouvoir discrétionnaire du Secrétaire général. Dans les cas où un accord sur le SOFA n'a pu être conclu en raison de l'urgence ou de l'opposition de l'Etat hôte, il faut malheureusement tirer la conclusion que la protection des forces ressemble plutôt à un patchwork de normes diverses.

### **Samenvatting – Immuniteten van VN-vredestroepen bij afwezigheid van een akkoord over hun status**

De VN moeten vaak de ontplooiing van vredestroepen (peacekeepers) en ander personeel van vredesoperaties toestaan zonder dat er een akkoord over het statuut van deze strijdkrachten (SOFA) is gesloten, o.a. omwille van de nood om snel te handelen of het gebrek aan een functionerende overheid waarmee kan worden onderhandeld. Hoewel de initiële afwezigheid van een SOFA soms later kan worden geredieerd door alsnog een SOFA te sluiten, blijft de vraag welke immuniteten door de VN gemandateerde vredestroepen genieten als er geen SOFA is.

Door de VN gemandateerde vredesoperaties zijn traditioneel aanwezig in een gaststaat met diens instemming. Deze instemming kan tot gevolg hebben dat de gaststaat afstand doet van zijn jurisdictie onder de regels inzake staatsimmunitet. Als de afstand expliciet is, kunnen we naar de modaliteiten ervan kijken om beperkingen te identificeren. Als de afstand impliciet is of gebaseerd is op vereisten van een noodsituatie die primieren, dan zouden de gebruikelijke modaliteiten die gewoonterechtelijk zijn bepaald, van toepassing moeten zijn.

De VN-Veiligheidsraad heeft evenwel de dramatische stap gezet om de oprichting van vredestroepen toe te staan zonder de instemming van de gaststaat. Als er geen instemming is, dan is er geen staatsimmunitet en moeten we naar andere bronnen van immunitet of gelijkaardige bescherming zoeken. Het internationaal humanitair recht zou de eerste andere bron zijn. Wanneer een Staat weigert in te stemmen met de aanwezigheid van dergelijke troepen maar daar niet duidelijk tegen protesteert en evenmin deze weigering afdwingt door middel van vijandelijkheden, dan moet die Staat geacht worden toch te hebben ingestemd en zijn de regels inzake staatsimmunitet van toepassing. Wanneer dergelijke vredestroepen evenwel een Staat aanvallen omwille van een door de VN goedgekeurd doel of zijn zich verzetten tegen een gewapende aanval van de gaststaat om hun gewapenderhand de toegang tot diens grondgebied te ontzeggen, is er duidelijk geen instemming en zijn ze betrokken bij een gewapend conflict. Door de VN gemandateerde troepen ontplooid zonder instemming van het gastland die een gewapend conflict uitvechten met dit land, zouden moeten worden beschouwd als strijders omwille van het feit dat er een gewapend conflict bestaat en het recht der gewapende conflicten dus moet worden toegepast. Hoewel deze troepen mogen worden aangevallen, mogen zij niet worden aangehouden en evenmin worden vervolgd voor gemeenrechtelijke misdrijven voor hun deelname aan de vijandelijkheden. De tweede bron van bescherming is VN-recht. Het verdrag inzake VN-immuniteten voorziet in ruimere immuniteten dan het VN-Handvest, inclusief bescherming voor experts op zending, maar deze bescherming is niet automatisch van toepassing. De Secretaris-Generaal moet bepalen dat de persoon en de handelingen in kwestie immuun zijn, maar dit oordeel kan het voorwerp zijn van beperkte vormen van rechterlijke controle, inclusief rechterlijke controle door de gaststaat. Het verdrag inzake de veiligheid van VN-personeel is een andere bron van bescherming, maar een veel minder nuttige in het geval van niet consensuele operaties omdat de VN de controle moet hebben over het personeel opdat het verdrag van toepassing kan zijn en de personeelsleden geen strijders mogen zijn. Een resolutie van de VN-Veiligheidsraad die de toepassing van het statuut van expert op zending of immuniteten meer algemeen oplegt, zou een verdere bron van bescherming zijn, maar het is omstreden of een dergelijk besluit binnen zijn bevoegdheid valt. Internationaal

gewoonterecht zou de laatste bron van immuniteiten zijn. Het is echter onduidelijk of hierin enige basis voor immuniteiten voor niet consensuele operaties bestaat.

Een SOFA is daarom duidelijk een praktische en aanbevolen stap om te waarborgen dat personeel niet vastgehouden wordt en geen beroep moet doen op gewoonterecht, (expliciete of impliciete) afstand van jurisdictie en het oordeel van de Secretaris-Generaal om aan vervolging voor lokale rechtbanken te ontsnappen. In gevallen waarin geen SOFA kan worden gesloten, omwille van dringende noodzaak of het verzet van de gaststaat, is de onaangename conclusie echter dat de bescherming van strijdkrachten bestaat uit een lappendeken van verschillende stukken.

### **Zusammenfassung: Immunitäten des Personals von VN-Friedensmissionen, für die kein Truppenstatut besteht**

Die Vereinten Nationen sehen sich häufig dazu genötigt, die Entsendung von militärischem und zivilem Personal von Friedensmissionen ohne vorherigen Abschluß eines Truppenstatuts (Status of Forces Agreement –SOFA) zu autorisieren, weil schnelles Handeln geboten ist oder keine handlungsfähige Regierung als geeigneter Verhandlungspartner zur Verfügung steht. Sofern und soweit nicht dieses anfängliche Fehlen eines SOFA später durch Abschluß eines derartigen Übereinkommens behoben wird, ist die Frage zu stellen, welche Immunitäten von den Vereinten Nationen mandatierten Friedenstruppen unabhängig vom Abschluß eines SOFA zukommen.

Von den Vereinten Nationen mandatierten Friedensmissionen waren üblicherweise mit Zustimmung des Aufnahmestaats in diesem präsent. Diese Zustimmung kann als Verzicht auf seine Jurisdiktionsgewalt im Rahmen der Regeln betreffend die Staatenimmunität begriffen werden. Ist ein solcher Verzicht ausdrücklich erklärt, kann er zur Herleitung etwaiger Grenzen herangezogen werden. Ergibt sich der Verzicht demgegenüber konkludent oder fußt er in den zwingenden Notwendigkeiten einer dringenden Notlage, sollten die zu Völkergewohnheitsrecht erwachsenen gewöhnlichen Maßgaben angewendet werden.

Der Sicherheitsrat hat allerdings den dramatischen Schritt unternommen, die Etablierung von Friedenstruppen ohne Zustimmung des aufnahmestaats zu autorisieren. Fehlt es an einer Zustimmung, findet auch das Recht der Staatenimmunität keine Anwendung; dies begründet die Notwendigkeit, eine andere Rechtsquelle von Immunität oder vergleichbarem Schutz zu bestimmen. Sofern ein Staat der Anwesenheit von Angehörigen einer Friedenstruppe nicht zustimmt aber entweder keinen klaren Widerspruch hiergegen formuliert oder seine Weigerung, zuzustimmen, mit Feindseligkeiten durchzusetzen versucht, rechtfertigt dies den Schluß, daß der betreffende Staat im Ergebnis der Anwesenheit der Truppen doch noch zugestimmt hat; das Recht der Staatenimmunität wird hierdurch anwendbar. Greifen indessen die Friedenstruppen einen Staat an, sei es in Verfolgung von den Vereinten Nationen gebilligter Zwecke, sei es in Reaktion auf einen bewaffneten Angriff des gebietsverantwortlichen Staats, der den Zugang oder die Anwesenheit dieser Truppen gewaltsam abwehren will, kann eine Zustimmung zu ihrer Anwesenheit ausgeschlossen werden; die betreffenden Friedenstruppen befinden sich dann in einem bewaffneten Konflikt. Ohne die Zustimmung des Aufnahmestaats entsandte und in Kampfhandlungen mit diesem Staat verwickelte Friedenstruppen sollten, weil ein bewaffneter Konflikt besteht, als Kombattanten angesehen werden, daher muß das Recht des bewaffneten Konflikts angewendet werden. Die Angehörigen der Friedenstruppe dürfen zwar angegriffen werden, jedoch dürfen sie aufgrund ihrer Teilnahme an Feindseligkeiten nicht wegen gewöhnlicher Straftaten verhaftet und vor Gericht gestellt werden. Die zweite Rechtsquelle von Schutz ergibt sich aus dem Recht der Vereinten Nationen. Das Übereinkommen über die Vorrechte und Immunitäten der Vereinten Nationen sieht über das Recht der VN-Charta hinausgehende Immunitäten – einschließlich derer für Sondergesandte (Experts on Mission) – vor, aber diese Schutzbestimmungen sind nicht automatisch anwendbar. Der VN-Generalsekretär muß entscheiden, daß die betreffende Person und ihre Handlungen Immunitätsschutz genießen sollen; selbst diese Entscheidungen sind freilich in gewissem Umfang richterlicher Überprüfung, auch im Empfangsstaat, unterworfen. Die Konvention über die Sicherheit von Personal der Vereinten Nationen und beigeordnetem Personal ist eine weitere Rechtsquelle für Schutz; bei nicht konsentierten Friedensmissionen hat sie freilich deutlich geringeren praktischen Nutzen, da zu ihrer Anwendbarkeit die Vereinten Nationen Kontrolle über das Personal ausüben müssen und dieses Personal nicht den Status eines Kombattanten haben darf. Weitere mögliche Rechtsquelle sind Resolutionen des Sicherheitsrats, mit denen die Anwendung der Regelungen für Sondergesandte oder von Immunitäten allgemein angeordnet wird; indessen ist zweifelhaft, ob es sich im Rahmen der Kompetenzen des Sicherheitsrats verhielte, eine solche Entscheidung zu treffen. Schließlich käme Völkergewohnheitsrecht als anwendbare Rechtsquelle in Betracht. Allerdings ist unklar, ob es eine derartige völkergewohnheitsrechtliche Rechtsquelle für Immunitäten bei nicht konsentierten Friedensmissionen wirklich gibt.

Aus diesen Gründen liegt auf der Hand, daß der Abschluß eines SOFA der praktikabelste und auch anzurathende Schritt ist, um sicherzugehen, daß das Personal einer Friedensmission nicht in Gewahrsam genommen und

gezwungen wird, sich auf Völkergewohnheitsrecht, impliziten oder ausdrücklichen Verzicht, oder die Anwendung einer von ermessen geprägten Kompetenz des VN-Generalsekretärs berufen zu müssen, um eine Strafverfolgung im Rahmen der Jurisdiktionsgewalt des Aufnahmestaats abwenden zu können. Kann demgegenüber in einer drängenden Notlage oder wegen des Widerstands des Aufnahmestaats ein SOFA nicht abgeschlossen werden, ergibt sich die unerfreuliche Bewertung, daß der Schutz von Friedenstruppen sich aus einem Patchwork von Einzelteilen ergibt.

### **Riassunto - Le immunità dei *peacekeepers* ONU in assenza di uno *Status of Forces Agreement***

Per ragioni di tempestività, ovvero per l'assenza di un governo effettivo con cui negoziare, spesso le Nazioni Unite si trovano a dover autorizzare il dispiegamento di *peacekeepers* e di altro personale di supporto alla missione in mancanza di un accordo sullo status giuridico delle proprie forze (*Status-of-Forces Agreement* - SOFA). In tali circostanze, pertanto, si pone il problema di quali immunità siano da attribuire alle forze di pace, in attesa che (o fino a quando non) venga effettivamente siglato un SOFA con la *host nation*.

Tradizionalmente, le operazioni di *peacekeeping* eseguite su mandato delle Nazioni Unite si svolgono con il consenso dello Stato territoriale coinvolto. Proprio tale consenso può confermare la volontà dello Stato territoriale di rinunciare ad esercitare la propria giurisdizione sugli appartenenti alla missione di pace, applicandosi, nel caso, le regole proprie dell'immunità degli Stati. Se la rinuncia è esplicita, ma sottoposta a condizioni, l'immunità medesima presenterà chiare limitazioni. Se la rinuncia è, al contrario, implicita, ovvero basata sulle esigenze derogatorie imposte dalla situazione di emergenza, dovrebbero trovare applicazione le condizioni stabilite dal diritto internazionale consuetudinario.

Il Consiglio di sicurezza delle Nazioni Unite ha tuttavia spesso autorizzato la costituzione di forze di pace senza il consenso dello Stato territoriale. In assenza del consenso in parola, la disciplina sull'immunità degli Stati non troverà applicazione, dovendosi, se del caso, fare riferimento ad altre fonti normative che garantiscano l'immunità medesima ovvero una protezione affine. In primis, potrebbe farsi appello al diritto internazionale umanitario. Nel caso poi in cui uno Stato non presti il proprio consenso alla presenza di *peacekeepers*, ma, nel contempo, non si opponga chiaramente al loro spiegamento o non faccia valere il proprio rifiuto con le armi, si potrebbe affermare che lo Stato in questione abbia acconsentito, di fatto, alla presenza delle truppe straniere, e che, *a fortiori*, trovino applicazione le regole proprie dell'immunità degli Stati. All'opposto, qualora le forze di pace attacchino un paese su mandato ONU, ovvero rispondano ad un attacco armato sferrato dallo Stato territoriale nel tentativo di opporsi all'ingresso dei militari ONU nel proprio territorio, dovendosi considerare escluso ogni consenso, si parlerà dell'esistenza di un vero e proprio conflitto armato. Qui, i *peacekeepers* delle Nazioni Unite, dispiegati senza il consenso dello Stato territoriale e impegnati contro di esso in combattimento, dovrebbero essere considerati quali meri combattenti, essendo in corso un conflitto armato e trovando applicazione, per l'appunto, il diritto dei conflitti armati. I militari ONU, pertanto, potranno essere oggetto di attacchi, ma non potranno essere arrestati e imputati di reati comuni per il solo fatto di aver preso parte alle ostilità. In via secondaria, un'ulteriore fonte di protezione è "il diritto delle Nazioni Unite". La Convenzione sulle immunità del personale ONU prevede una gamma più vasta di immunità rispetto alla Carta delle Nazioni Unite, introducendo una protezione *ad hoc* per gli "esperti in missione", nonostante tale protezione non si applichi automaticamente. Sebbene infatti, da un lato, il Segretario Generale possa discrezionalmente determinare che taluni soggetti e atti siano coperti da immunità, dall'altro tali decisioni sono sottoposte a limitate forme di controllo giudiziario, incluso quello dello Stato territoriale. La Convenzione sulla sicurezza del personale ONU rappresenta una fonte aggiuntiva di protezione, nonostante la scarsa utilità della medesima in caso di operazioni non consensuali: per poter essere applicata, difatti, le Nazioni Unite dovrebbero controllare direttamente i militari impegnati e questi ultimi non potrebbero figurare quali combattenti. Un'altra fonte di protezione per le forze ONU potrebbe essere rappresentata da una risoluzione del Consiglio di sicurezza, che imponga l'applicazione, nello specifico, dello status di "esperto in missione", ovvero, in via generale, dell'immunità, ai partecipanti all'operazione, sebbene sia controverso se l'atto in questione ricada o meno nell'ambito di competenza del medesimo Consiglio di sicurezza. L'ultima fonte di immunità potrebbe essere costituita dal diritto internazionale consuetudinario. Tuttavia, vi è ancora incertezza sull'esistenza di una consuetudine, riguardante l'immunità in parola, nel caso di operazioni non consensuali.

Ciò detto, un SOFA rappresenta la soluzione più pratica e raccomandabile per evitare che il personale impiegato possa essere arrestato, ovvero, per scampare alla giurisdizione locale, essere costretto a districarsi tra consuetudini, rinunciare all'immunità (implicita o esplicita), e decisioni Segretario Generale. Nondimeno, in situazioni dove un SOFA non possa comunque essere stipulato, si voglia per la situazione di emergenza o per le resistenze manifestate dallo Stato territoriale, la protezione delle truppe finisce purtroppo per essere affidata ad un *patchwork* normativo.



## **Resumen – Inmunities de las fuerzas de mantenimiento de la paz en ausencia de un acuerdo sobre su estatuto**

Por la necesidad de una acción inmediata o ante la ausencia de una autoridad competente con que negociar, las Naciones Unidas se ven regularmente obligadas a autorizar un despliegue de fuerzas de mantenimiento de la paz (*peacekeepers*) y de otras personas desplegadas en apoyo de misiones de paz, sin que exista un acuerdo sobre el estatuto de sus fuerzas (SOFA). En tales circunstancias, se plantea el problema de las inmunities de que gozan las fuerzas de la ONU, a menos o hasta que pueda llegarse ulteriormente a un acuerdo SOFA.

Tradicionalmente las operaciones de mantenimiento de la paz de las Naciones Unidas se realizan con la aprobación de los Estados huéspedes en cuyo territorio se desarrollan. Este consentimiento puede significar que el Estado huésped renuncie a ejercer su jurisdicción propia, aplicando en este caso las reglas de la inmunidad del Estado. Si esta renuncia es explícita, cabe analizar sus modalidades para identificar sus limitaciones. Si la renuncia es implícita o si se basa en las necesidades prioritarias de una situación de emergencia, hay que aplicar las modalidades vigentes tales como se definen en el derecho consuetudinario.

Sin embargo, el Consejo de Seguridad de las Naciones Unidas ha dado un paso clave al autorizar el despliegue de tropas de mantenimiento de la paz sin el consentimiento de un Estado receptor. Sin este acuerdo, no se puede invocar el principio de la inmunidad del estado y hay que buscar otras fuentes de inmunidad o de protección comparables. En una primera instancia se puede recurrir al derecho internacional humanitario. Cuando un Estado rechaza la presencia sobre su territorio de fuerzas armadas de este tipo pero no se opone abiertamente a su despliegue ni confirma su negativa tomando las armas, se podría presumir que este Estado consiente efectivamente a la presencia de tropas extranjeras y, con más razón, se aplican las reglas relativas a la inmunidad del estado. Al contrario, cuando tales fuerzas de paz atacan un Estado bajo el mandato de la ONU o responden a un ataque armado por parte del Estado huésped, en un intento de prohibirles el acceso a su territorio, la ausencia de consentimiento es entonces manifiesta y se puede hablar de un verdadero conflicto armado. Las fuerzas bajo el mandato de la ONU, desplegadas sin el acuerdo del Estado huésped, e involucradas en un conflicto armado con este Estado huésped, deberían ser consideradas como combatientes por el hecho mismo que hay un conflicto armado y, por lo tanto, habría que aplicar el derecho de los conflictos armados. Si estos militares de la ONU pueden sufrir un ataque, en cambio no pueden ser detenidos ni tampoco perseguidos para delitos de derecho común resultando del simple hecho de su participación en las hostilidades. Una segunda vía de protección es el derecho de las Naciones Unidas. La Convención de la ONU sobre las inmunities de los Estados extiende las inmunities definidas por la Carta de las Naciones Unidas, introduciendo una protección ad hoc para los expertos en misión, aunque no se aplica automáticamente. Corresponde al Secretario general determinar las personas y los actos cumplidos que gozan de las inmunities necesarias. Sin embargo esta decisión está sometida a formas limitadas de control judicial, más particularmente por parte del Estado huésped. La Convención sobre la seguridad del personal de la ONU constituye una tercera forma de protección, pese a su escasa utilidad en el caso de operaciones no consensuales. En efecto, para que sea aplicable, la ONU debería controlar directamente al personal desplegado que por otra parte no puede intervenir como combatiente. Otra forma de protección avanzada reside en una resolución del Consejo de Seguridad de la ONU que impone la aplicación del estatuto específico de experto en misión o de inmunities más generales, aunque sea discutible que tal resolución dependa realmente de la competencia del Consejo de Seguridad. Por último, el derecho internacional consuetudinario puede también proporcionar una fuente de inmunidad, no siendo aún totalmente seguro que se aplique en el caso de operaciones no consensuales.

Por todas estas razones un SOFÁ constituye con toda claridad una solución práctica y recomendada para proteger al personal contra una detención e impedir que, sólo con el fin de escapar de la jurisdicción local, sea forzado de invocar el derecho consuetudinario, de renunciar (de manera explícita o implícita) a la inmunidad judicial y al ejercicio del poder discrecional del Secretario general. En los casos en que no se puede concluir un acuerdo sobre un SOFÁ, debido a la urgencia o a la oposición del Estado huésped, hemos de sacar la desagradable conclusión de que la protección de las fuerzas parece más bien a un “patchwork” de normas diversas.