

# Keeping peacekeepers accountable: Assessing the obstacles to prosecution process



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## List of Abbreviations

UN	United Nations
SC	Security Council
PO/PKO	Peace Operations/Peacekeeping Operations
UNEF I	The First United Nations Emergency Force
UNTAC	The United Nations Transitional Authority in Cambodia
UNOSOM II	United Nations Operation in Somalia II
SOFA	Status of Force Agreement
MOU	Memorandum of Understanding between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations
ICC	The International Criminal Court
DPKO	Department of Peacekeeping Operations
DFS	Department of Field Support
SG	Secretary-General
IHL/HL	International Humanitarian law/ Humanitarian law
HRs	Human Rights
ICL	International Criminal Law
ROE	Rules of Engagement
NGOs	Non-governmental organizations

# 1 Chapter 1: Introduction

## 1.1 Introduction

As stated in its Charter, one of the most important purposes of the United Nations Organizations (UN) is to maintain international peace and security, to save the succeeding generations from "the scourge of war".<sup>1</sup> To carry out that purpose the UN, and the Security Council (SC) particularly is mandated to determine any existence of threats to the international peace and security and decide what measures should be taken including the use of force.<sup>2</sup> Peace operations are such measures that the Security Council recurses to.

The term "peace operations", however, was not mentioned concretely in the Charter. The concept has been developed from time to time in coping with the changing situations and context of the deployment.<sup>3</sup> In an UN Report released in 2000, peace operations were defined comprise of three principle activities that are: conflict prevention and peacemaking, peacekeeping and peace building.<sup>4</sup>

Conflict prevention addresses the structural sources of conflicts in order to build a solid foundation for peace. This is a low-profile activity and usually in the form of diplomatic initiatives.<sup>5</sup>

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<sup>1</sup> UN Charter: Preamble and article 1

<sup>2</sup> Chapter 7, UN Charter

<sup>3</sup> Marten Zwanenburg, "Accountability of Peace Support Operations", page 11

<sup>4</sup> UN Doc. A/55/305 – S/2000/809, also referred as Brahimi Report

<sup>5</sup> UN Doc A/55/305 – S/2000/809, par. 10

Peace-making addresses conflicts in progress, attempting to bring them to a halt, using the tools of diplomacy and mediation. This kind of peace operation can be carried out by envoys of governments, group(s) of states, regional organizations or the UN or even by a prominent personality.<sup>6</sup>

Peace-building is a recent term that are activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war. It may be activities such as reintegrating former combatants into civilian society, strengthening the rule of law, improving respect for human rights, development, etc.<sup>7</sup>

Peacekeeping is long time operation that has evolved rapidly in the past decade from a traditional, primarily military model of observing ceasefires and force separation after interstate wars (traditional peacekeeping operations, example of this kind can be cited is the UNEF I - the First United Nations Emergency Force, that was established in 1956 by the General Assembly's resolution<sup>8</sup> to secure and supervise the cessation of hostilities, including the withdrawal of the armed forces of France, Israel and the United Kingdom from Egyptian territory and, after the withdrawal, to serve as a buffer between the Egyptian and Israeli forces and to provide impartial supervision of the ceasefire), to incorporate a complex model of many elements, military and civilian, working together to build peace in the dangerous aftermath of civil wars (multi-dimensional peacekeeping operations, example is UNTAC – the UN Transitional Authority in Cambodia<sup>9</sup>).<sup>10</sup>

The end of the Cold War, the ongoing integration and globalization processes do not bring peace and security to all over the World. In contrast, ethnic cleansing, civil wars, regional conflicts have been taking place even in more numerous areas all around the globe.<sup>11</sup> To

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<sup>6</sup> UN Doc. A/55/305 – S/2000/809, par. 11

<sup>7</sup> UN Doc. A/55/305 – S/2000/809, par 13

<sup>8</sup> Resolution 998 (ES – I) dated 4 November 1956

<sup>9</sup> The operation was established by the Security Council Resolution 745 (1992). UN Doc. S/RES/745/(1992)

<sup>10</sup> UN Doc. A/55/305 – S/2000/809, par. 12

<sup>11</sup> UN Peacekeeping: A Documentary Introduction, page 31-32

stop those tragedies for mankind, the UN, the most credible and important international organization, has increased the deployment of its peace operations.<sup>12</sup> On the one hand the role of POs in ensuring peace and security is undeniable, but on the other hand there is growing reports about criminal violations committed by peacekeepers.<sup>13</sup> Should we stop deploying POs in order to stop those violations by the troops? the answer is obviously not. Can we on the one hand ensure world peace and security and on the other hand ensure justice for victims of violations committed by peacekeepers? The thesis will study this dilemma.

## **1.2 Research questions**

The thesis will examine the existing mechanism of holding peacekeepers accountable in order to find out the strengths and weaknesses of the current mechanism, and based on those finding it will study whether and how we can make up a more effective mechanism to hold peacekeepers accountable. The main research question is how to better holding peacekeepers accountable. This main question will be divided into sub-questions in order to get an answer more easily. That are why we need hold peacekeepers accountable? Why we need a better mechanism? There has been a mechanism in place but doesn't it work well? why doesn't it work well? what is the obstacle for it functioning effectively? Why there is that obstacle, where it comes from? Can we clear it? And How?

## **1.3 Scope and limitation of the thesis**

The meaning of notion of "accountable" or "accountability" is quite broad. In the document entitled "Accountability within Peace Operations", the International Forum for the Challenges of Peace Operations referred to a definition that is:

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<sup>12</sup> Fact and figures about PKOs at website: <http://www.un.org/Depts/dpko/dpko/bnote.htm>

<sup>13</sup> <http://www.peacewomen.org/un/pkwatch/aboutpkwatch.html>

”Being accountable means explaining one’s actions and inactions and being responsible for them. Individuals, organizations and states have to account for their actions. Accountability also means that individuals, organizations and states may safely and legitimately report concerns and complaints and receive redress where appropriate.”<sup>14</sup>

Accountability depends on stakeholders one is responsible to, stakeholders have rights to know the standards applied and should know the mechanisms so that they can report concerns and seek redress if any. Depending on particular peace keeping operations, but usually peacekeepers are accountable to the UN (including member states of UN), to their home states, the host states, the regional organizations and the general population.<sup>15</sup>

The Wikipedia Dictionary defines accountability as obligation to inform about (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct.<sup>16</sup> Accountability may have many senses, it can be political, administrative, judicial or professional accountability.

In summary, it can be understood that ”accountability” means to give explanation for your actions and to be responsible for, with ”responsible for” it means you will bear both the results and consequences of your acts, and in case of damages happen should remedies or reparations be available to compensate for the victims.

In this light, when talking about holding peacekeepers accountable it can be understood that we hold peacekeepers give explanation for their acts and eventually in case of their acts are violations of laws, they should be hold responsible or even criminally responsible, that is being prosecuted. So being accountable for is much more than being prosecuted for. However, because of time limit this thesis will examine the prosecution of peacekeepers

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<sup>14</sup> Accountability within Peace Operations, International Forum for the Challenges of Peace Operations, website: [www.challengesproject.net](http://www.challengesproject.net)

<sup>15</sup> Accountability within Peace Operations, International Forum for the Challenges of Peace Operations, website: [www.challengesproject.net](http://www.challengesproject.net)

<sup>16</sup> Wikipedia Dictionary



only, the "last stage" and the "highest extent" of being accountable, with a focus is on analysing the obstacles to the prosecution process with particular on exercising jurisdiction aspect, as if a court have no jurisdiction on the case, it is obviously no prosecution are taking place and we can not have further discussion on the matter, the obstacle may be both legal and factual. Why and where these obstacles come from, the advantage and disadvantages in prosecuting peacekeepers by each of them, from that to find out whether the existing prosecution systems of peacekeepers work well enough to contribute to the holding peacekeepers accountable, are there any loopholes that allow peacekeepers go unpunished for their violations and why. Base on those findings it will make recommendations for holding peacekeepers accountable more effectively.

With regard to "peacekeepers", this may include many kinds of persons such as civilian police, health workers, military members, etc those are all participate in peace operation, I would like to limit to military members only as they are the main component of peace operations and actually most of the allegations on peacekeepers is on the military members.<sup>17</sup>

However, when examining the prosecution of peacekeepers, sometimes the proceedings against a military members may relate to other kind of members as well so in such a case I will use the definition of UN personnel as stipulated in the article 1 of the UN Convention on the Safety of United Nations and Associated Personnel, that is:

" (i) persons engaged or deployed by the Secretary-General of the United Nations as members of military, police or civilian components of a United Nations operation;  
(ii) Other officials and experts on mission of the United Nations or its specialized agencies ... who are present in an official capacity in the area where a United Nations operation is being conducted;"<sup>18</sup>

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<sup>17</sup> Among 105 allegations on sexual abuses brought to the DPKO in 2004, 80 allegations against military members, 16 against civilian, and 9 against civilian police. UN Doc. A/59/710, paragraph 9.

<sup>18</sup> The UN Convention on the Safety of United Nations and Associated Personnel, article 1

As presented above in the Introduction section, there are different kinds of peace operations, so I would like to limit myself to the "peacekeeping operations" only, and peacekeeping operations which are established or authorized by the United Nations.

Regarding the violations by peacekeepers, there can be violations of acts within the ostensible mandate of the mission which are much more complicated for prosecute, acts that are disciplinary offences, or individual criminal acts. Individual criminal acts can be either: acts that are criminalized in the majority of States (rape, murder), acts that amount to international crimes. This study will focus on violations with a nature of individual criminal acts only.

#### **1.4 Structure of the thesis**

The thesis which will be an examination of the prosecution of peacekeeper with a focus on analysing obstacles to the prosecution process will be divided into four parts: Chapter 1 is The Introduction will give a reason why I choose this topic, it also draws out the analysis framework, the method to be used of the thesis. The second chapter will analyse legal framework applicable to PKOs with a focus on the law that will be legal ground for prosecution, it also give some feature about the violations of peacekeepers. The third chapter will present the prosecution of peacekeepers with concentration on analysing obstacles to the prosecution process. The last chapter is Conclusion and Recommendations for better keeping peacekeepers accountable.

#### **1.5 Methodology**

An examination of international laws's influence on the process of prosecuting peacekeepers will be the grounding of the thesis. The analyse of international laws will base on the current texts of the law and in light of the Vienna Convention on the Law of

Treaties. The examination of prosecution process will look into both domestic and international court system with focus on aspect of exercising jurisdiction. The examination and analysis base mainly on the current texts of international law, however some sources of information, critics from some academic works and UN reports also be used.

## **2 Chapter 2: Legal framework concerning PKOs. Violations committed by peacekeepers.**

### **2.1 Legal framework**

When examining whether a machine works well or not, we need to compare the quality of the outcome products with the sample one that that machine is expected to produce. When examining whether an organization works well or not, we need to see whether that organization discharge its tasks completely or not with "good quality" of course. But as the process that an organization carrying its tasks is different from a process that a machine producing a product, in which the working environment of that organization can not be omitted or even be taken into account seriously. What constitutes an working environment of an organization, one may name such as office, computer, furniture, staff .... in short what called as available resources, resources should be seen in a broad sense that is including what that organization can do and what it can not, that is the rules and regulations binding upon that organization. I think it is similar when we examining the functioning of the PKOs, we need to look into the working environment of the PKOs as well, nevertheless the "natural" working environment such as hard weather or intensity of hostilities where the PKOs deployed is more or less, in one sense or another is out of our control, what we can only do is to provide them some facilitation enabling them carry out their mandates better. Because of that thinking, and because of the fact that the prosecution of peacekeepers to certain extent affected by provisions in the laws facilitating peacekeepers's

work, therefore in this section I will present the laws that help peacekeepers to have a better working environment, that is giving them legitimacy and assisting, protecting them while carrying out the mandate in addition to the law that governing their conducts which will be the legal basis for prosecuting them which the topic of the thesis needs to address somewhat.

## **2.1.1 Laws giving legitimacy to PKOs**

### **2.1.1.1 The UN Charter**

In general, for a peacekeeping operation being legitimate, it should bear a mission mandated by the UN organization, put it in more practical term, it should be set up or authorized by the UN based on the provisions of the Organization's Charter, in order to protect and uphold the goals and objectives, which must not go against the purposes and principles set out in the Charter.

The Charter of the United Nations is the main legal document for the organization and functioning of the Organization. It is not only the legal ground for the UN to set up a peace operation, but also guiding principles for all member states' conducts in international relations. In other word, the Charter is not only giving legitimacy to the Security Council actions and to peace keeping operations, it is a framework for members states in their conducts in international relations and ultimately it is for every one (as constituents of members states) including peacekeepers to act in compliance with as well.

Under Chapter 6 "Pacific Settlement of Disputes", the SC shall call upon the parties to settle their dispute by peaceful means as negotiation, enquiry, mediation, conciliation, arbitration (article 33) or the SC can at any stage of a dispute recommend appropriate procedures or methods of adjustment (article 36) ... or it may recommend such terms of settlement as it may consider appropriate (article 37).

Under the Chapter 7 "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression", the SC shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... (article 39). Should the SC consider that measures provided for in article 41 would be inadequate or had proved to be inadequate, it may take action by air, sea, or land forces .... to maintain or restore international peace and security (article 42).

Under the Chapter 8 "Regional Arrangements", the SC shall, where appropriate, "utilize such regional arrangements or agencies for enforcement action under its authority..." (article 53).

The Security Council, based on those three chapters of the Charter and specific provisions mentioned above will decide to take necessary measures which deem appropriate and necessary to maintain international peace and security. When the SC decides that a peace operation is appropriate and necessary, it will adopt a resolution to set up an operation or to give authorization to an operation, this resolution will specify a mandate for that operation as well. Therefore, with each of PKO established or authorized by the UN there is a resolution adopted by the Security Council accordingly.<sup>19</sup> Because of being set up (or authorized) by the Security Council, a principal organ of the United Nations, PKOs are "subsidiary" organ of the UN.<sup>20</sup> This legal status, on the one hand makes PKOs legitimate and credible, on the other hand will bring difficulties to the prosecution process as they are accorded immunities and privileges consequently.<sup>21</sup>

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<sup>19</sup> In 1956, the General Assembly adopted a resolution - resolution 998 (ES - I) dated 4 November 1956 to establish UNEF I (the First United Nations Emergency Force) to secure and supervise the cessation of hostilities, including the withdrawal of the armed forces of France, Israel and the United Kingdom from Egyptian territory and, after the withdrawal, to serve as a buffer between the Egyptian and Israeli forces and to provide impartial supervision of the ceasefire. But now, this function belongs to the Security Council as stipulated in the article 24 of the UN Charter.

<sup>20</sup> Article 29 of the UN Charter states that the SC may establish such subsidiary organs as it deems necessary or the performance of its functions.

<sup>21</sup> I will analyse this issue through sections in this thesis.

### **2.1.1.2 The Security Council resolutions**

As required by the UN, those resolutions mentioned above must be supported by at least 9 out of 15 members of the Security Council and without veto by any P5 country (the United States, the United Kingdom, France, Russian Federation and the People's Republic of China).<sup>22</sup> With this kind of resolutions from the Security Council of the UN, a peacekeeping operation have its legitimacy, the mission and mandate specified in these operation will guide operations of all personnel concerned.

The UN Charter and an authorizing resolution by the Security Council make a peacekeeping operation legitimate. In addition to that, to ensure the legitimacy of operations, the UN deploys its PKOs in accordance with following principles: consent of the parties (parties to the conflict); impartiality, UN force must treat all sides to a conflict equally, this principle helps the UN force to have consent of all parties (the first principle); non-use of force except in self-defence and defence of the mandate. *Consent, impartiality and non-use of force* are the basic principles of UN peacekeeping operations which in turn help the peacekeeping operation further upholding its legitimacy.

### **2.1.2 Laws facilitating peacekeepers' work**

#### **2.1.2.1 The Convention on the Privileges and Immunities of the United Nations**

To facilitate the functioning of the Organization in general, the UN Charter provides that the Organization and its officials shall enjoy privileges and immunities as are necessary to the independent exercise of their functions (article 105 UN Charter). Stemming from this article, the UN General Assembly proposed a draft Convention on the Privileges and Immunities of the UN. It was adopted on 13 February 1946 and entered into force on

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<sup>22</sup> Article 27 of the UN Charter

September 17 the same year. As PKOs are subsidiary organs of the UN, peacekeeping operations personnel can enjoy the provisions of this Convention accordingly.

According to this Convention, UN officials and UN experts on Missions shall be given immunities that are:

The United Nations officials shall enjoy immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity.<sup>23</sup> The UN experts shall be accorded immunity from personal arrest or detention and from seizure of their personal baggage. In respect of words spoken and written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.<sup>24</sup>

Those immunities are granted in the interests of the United Nations, for the ease and convenience of functioning of the Organization's mandates, not for personal benefit of the individuals themselves, so it may be waived. The Secretary-General has the right and the duty to waive the immunity in case where it impedes the course of justice and it can be waived without prejudice to the interests of the United Nations (Section 20 article 5 and Section 23 article 6 of the Convention).

Like other international conventions, this Convention are binding on state parties to the Convention only. However, this Convention is a basis for further elaboration and specification of privileges and immunities of peacekeepers which will be agreed upon between the UN and the host state in Status of Force Agreement SOFA.<sup>25</sup>

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<sup>23</sup> Article V, Section 18, Privileges and Immunities Convention.

<sup>24</sup> Article VI, Section 22, Privileges and Immunities Convention.

<sup>25</sup> A model SOFA is issued in UN Doc A/45/594, Annex I of the thesis, there will be more mentioning on SOFA in section of prosecution by the ICC later on.

### **2.1.2.2 The United Nations Convention on the Safety of UN and Associated Personnel**

The objective of this Convention is to ensure the safety and security of United Nations and associated personnel which certainly will help peacekeepers have a better working environment. The Convention as considered by Jaume Saura is expansion and update the privileges and immunities of UN agents,<sup>26</sup> was adopted in 1994 and came into force in 1999. It specifies crimes against United Nations and associated personnel, that are murder, kidnapping, attack on the person or property of the UN, threat to commit attack or attempt to commit attack. It calls upon State Party to make those crimes punishable by appropriate penalties. The Convention defines the duties of the state: (i) to ensure safety of UN personnel; (ii) to release detained personnel and treat consistent with Geneva Convention until release; (iii) to prosecute or extradite offenders (articles 13, 14, 15).

The Convention also specifies responsibilities of States Parties to cooperate in the prevention of the crimes against United Nations and associated personnel (article 11, 16), to establish jurisdiction over those crimes (article 10) as well as provides that a Status of Force Agreement (SOFA) should soon be concluded between the host state and the UN with provisions on privileges and immunities for military and police components of the operation (article 4).

The adoption of the Convention proves a complexity of the UN peacekeeping operations, it requires law to facilitate the personnel who participating in those operations to work, that is the Convention on Immunities and Privileges, but that seems not enough, a law to protect them is needed as well.

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<sup>26</sup> Jaume Saura, “ Lawful Peacekeeping: Applicability of IHL to UN PKOs”, *Hastings Law Journal*, Vol 58, 495 2006 - 2007



The Convention shall not apply to the peace enforcement operation where the personnel are engaged as combatants and to which the law of international armed conflicts applies.<sup>27</sup> However the article 6 of the Convention states that the UN and associated personnel shall respect the laws and regulations of the host States ...<sup>28</sup> and article 20 said that nothing in this Convention shall affect the applicability of IHL and universally recognized standards of human rights ....<sup>29</sup>. This create an ambiguity about whether the IHL may be applicable when the Convention itself applies.<sup>30</sup>

### **2.1.3 Laws regulating conducts of peacekeepers**

This third component will also be legal basis for prosecuting peacekeepers

#### **2.1.3.1 International Human Rights law**

The UN (the Department of Peacekeeping Operations - DPKO) has set out Norms of Conduct for peacekeeping personnel, and recently they have published "The United Nations Peacekeeping Operations: Principles and Guidelines" to provide guidelines for its personnel.<sup>31</sup> According to those principles and guidelines, "the UN PKOs should be conducted in full respect of human rights and should advance human rights through implementation of their mandates", "the UN peacekeeping personnel - whether military, police or civilian – should act in accordance with international human rights law and ...

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<sup>27</sup> Article 2, paragraph 2 of the Convention on the Safety of the United Nations and Associated Personnel

<sup>28</sup> Article 6, paragraph 1 (a) of the Convention on the Safety of the United Nations and Associated Personnel

<sup>29</sup> Article 20, Savings Clauses, of the Convention on the Safety of the United Nations and Associated Personnel.

<sup>30</sup> Jaume Saura, " Lawful Peacekeeping: Applicability of IHL to UN PKOs", Hastings Law Journal, Vol 58, 2006 - 2007

<sup>31</sup> Available at [http://pbpu.unlb.org/pbps/Library/Capstone\\_Doctrine\\_ENG.pdf](http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf)

peacekeeping personnel should strive to ensure that they do not become perpetrators of human rights abuses..... when they comit abuses, they should be held accountable”.<sup>32</sup>

In fact, there is difference between laws, rules and guidelines, principles. While laws and rules are legally binding, it means if you violate laws and rules, you will be prosecuted or held accountable in other word. Guidelines and principles are in fact not binding, they are close to recommended behaviours, and generally one can not be prosecuted for not following the recommended behaviours. Human rights law has a special character that is obligations are binding on states (states are duty bearers) not on individuals. When we talk about violations or human rights violations in particular, generally it means there are violations of relating laws. When we say that there is violation of laws, usually it implies that there is something prohibited or not allowed by the laws has happened. However, in fact human rights are usually expressed in the form of entitlement, not in the form of prohibition. So in case of human rights violations in particular, there are two scenarios: (i) the rights holders' entitlement do not exist, in this case the State will be accounted for; (ii) the entitlement of the rights holders do exist but is violated, not 100% but usually in this case there is a crime has been committed, and those crimes we can see being stipulated in other laws such as criminal law, in this case the State discharges its duty by bringing the perpetrator to the court. For example, the right to life is a human right. But this right is expressed in the form of entitlement, that is "Every human being has the inherent right to life"<sup>33</sup>. When there is a murder, we can say there is violation of the right to life. Killing, murder are prohibited or punishable under the criminal law.<sup>34</sup> So when talking about violations of human rights law, especially in the context of this thesis, I would mean the second scenario, that there is a commission of crime and that crime violates a right or rights of human being, and that might also be the meaning of the "human rights abuses" in the above quotation of the UN guidelines and principles I guess. With that sense, the perpetrator should be punishable accordingly under the (criminal) laws. In summary,

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<sup>32</sup> UN publication in 2008 "The United Nations Peacekeeping Operations: Principles and Guidelines", page 14 -15

<sup>33</sup> The article 6 of the ICCPR

<sup>34</sup> Articles 6,7,8 of the ICC Statute all specify that killing, murder are acts of crimes

human rights obligations are binding upon states, they also have binding effects on non-state actors.<sup>35</sup>

In peace operations, the significance of human rights obligations may be seen under three different aspects:

”Ideally, there would be an express mandate by the Security Council and/or a regional organization requesting not only all parties to the conflict, but also the peacekeeping force to protect human rights.

Even where such commitment has not been expressly stated, peace operations are to respect the law of the receiving state including its obligations under international law of which human rights are important part.

Finally, the human rights obligations of the sending state apply extraterritorially for acts committed within their jurisdiction”.<sup>36</sup>

To conclude about applicability of human rights law to peacekeeping operations, I want to make a quotation, that is” whether or not international humanitarian law applies to peacekeeping operations, such operations have a continuing duty to respect the general international law of human rights.”<sup>37</sup> that means whenever and wherever possible, peacekeeping operations are abind by human rights law.

### **2.1.3.2 International humanitarian law (IHL)**

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<sup>35</sup> The Handbook of International Humanitarian Law, Second Edition, 2008, Oxford University Press, Section 258

<sup>36</sup> The Handbook of International Humanitarian Law, Second Edition, 2008, Oxford University Press, Section 1307

<sup>37</sup> Jaume Saura, “ Lawful Peacekeeping: Applicability of IHL to UN PKOs”, Hastings Law Journal, Vol 58, 488 2006 - 2007

There has been for a long time discussion about the applicability of the IHL to the UN forces.<sup>38</sup> With the issuance of the Secretary-General's Bulletin on 6 August 1999 entitled: "Observance by United Nations forces of international humanitarian law"<sup>39</sup>, the question have a clear answer already, that is yes the IHL applies to the UN forces. Now the question is that how and to what extent the IHL is applied to the UN forces, the degree of responsibility etc.

With the length of about 3 pages, the Bulletin surely does not and can not mention all aspects of the applicability of the IHL to the UN forces. The Section 1 of this Bulletin reaffirmed that "the fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to ...", this affirmation gives an idea that the UN forces will be bound by international humanitarian law, at least to those rules stated in the Bulletin.

Section 3 of the Bulletin provides that "the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel". "The obligation to respect these principles shall be applicable even in the absence of a status of forces agreement. The UN is also to undertake to ensure members of military personnel of the force are fully acquainted with the principles and rules of those international instruments". In the context that international organizations are not parties to international conventions and whether international conventions are binding upon them is still under discussion with different points of views, it can be said that the Secretary-General's Bulletin is a "strong" affirmation that the IHL will bind on UN forces.<sup>40</sup>

In sections 5,6,7,8,9 of the Bulletin, the Secretary-General sets out responsibilities of the UN force in more specific.

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<sup>38</sup> Marten Zwanenburg, "Accountability of Peace Support Operations", page 159 - 165

<sup>39</sup> UN Doc. ST/SGB/1999/13

<sup>40</sup> Marten Zwanenburg in "Accountability of Peace Support Operations" even quoted that the Bulletin signal "formal recognition of the applicability of International Humanitarian Law to United Nations peace operations". Marten Zwanenburg, "Accountability of Peace Support Operations", page 173.

Section 5 is about the responsibility regarding protection of the civilian population, whereby attacks on civilians or civilian objects are prohibited (section 5, par 1). The UN force shall take all feasible precautions to avoid, minimize, incidental loss of civilian life, injury to civilians or damage to civilian property (section 5, par.3). The UN force shall not engage in reprisals against civilians or civilian objects (section 5, par.6).

Section 6 is about means and methods of combat. It stipulates that the UN force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law (section 6, par 2). The UN force is prohibited from employing methods of warfare, weapons or methods of combat that may cause superfluous injury or unnecessary suffering (section 6, par 3, 4). Other paragraphs of the section prohibit the UN force from attacking or destroying cultural objects or objects that are essential to the survival of civilian population such as foodstuff, crops, drinking-water installations... the UN force shall not engage in reprisals against those objects. Relating to this section, there is another UN Convention regulating the means of warfare, that is the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to be Excessively injurious or to Have Indiscriminate Effects (1980). In the spirit of this Bulletin, the UN force also abides itself to the Convention.

Section 7 is about treatment of civilians and persons *hors de combat*. Paragraph 2 of this section clearly states that " the following acts against any of the persons mentioned in par.1 are prohibited at any time and in any place: violence to life or physical integrity; murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishment; reprisals; the taking of hostage; rape; enforced prostitution; any form of sexual assaults and humiliation and degrading treatment; enslavement; and pillage." (section 7, par.2).

Section 8 and 9 is about responsibilities of the UN force in treatment of detained persons and protection of the wounded, the sick, and medical and relief personnel.

The Bulletin also specifies the jurisdiction in case violation of international humanitarian law happens. In section 4, it said: "In case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts." This regulation on jurisdiction is reiterated in the Memorandum of Understanding between Troops Contributing Country and the UN.<sup>41</sup>

One negative point of the Bulletin is that it specifies a very narrow scope of application of the IHL to the UN forces, that is "in situations of armed conflict they (the UN forces) are actively engaged therein as combatants, to the extent and for the duration of their engagement"<sup>42</sup> Does this mean in other situations when the UN forces are not active combatants they will not be bound by the IHL?

Another negative point of the Bulletin is it states only few norms that applied to the UN forces. There are many other important norms that it does not mention for example: concerning treatment of war prisoners, rules of occupation, duty to ensure respect, norms applied in non-international armed conflicts ...<sup>43</sup>

In discussing about that two negative points, I want to give an example: a peacekeeping operation is deployed in a country, a ceasefire has been reached between belligerent parties in that country, there sometimes may have breaches of the ceasefire but the general atmosphere is "peaceful" in other words, there is not many chances for peacekeepers become "active combatants". A peacekeeper of that operation attacking a local civilian. Does the IHL applied in this case or not? is it allowed for that peacekeeper attacking local civilian in case the IHL does not apply? I raise this example because as I stated in the section on scope of the thesis that I will focus on violations of individual peacekeeper

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<sup>41</sup> A model of MOU is in Annex II, UN Doc. A/46/185 (23 May 1991)

<sup>42</sup> The SG's Bulletin, Section 1, paragraph 1

<sup>43</sup> For more discussion on these, see Jaume Saura, "Lawful Peacekeeping: Applicability of IHL to UN PKOs", *Hastings Law Journal*, Vol 58, 2006 - 2007

which are of criminal nature only. I will not discuss circumstances that the responsibility is attribute to the UN as a whole.

We may hear some people call humanitarian law is the law of armed conflicts. To me I prefer to look at humanitarian law in relation to human kind, that is if human rights law is the law governing the treatment of human beings in general, humanitarian law is the law governing the treatment of non-combatants. Regarding the binding nature I can revoke to the customary nature of international humanitarian law as well as opinions of many scholars.<sup>44</sup> In summary, the fact that one country is not party to HRs conventions or HL conventions does not mean that country can mal-treat human beings or non-combatants. Whenever and wherever you mal-treat a human being, you violate human rights law, whenever and whenever you mal-treat a non-combatant, you violate humanitarian law, and you should be held accountable for that breach of the law.

In conclusion, the norms of humanitarian law should be applied whenever and whenever possible to the UN forces,<sup>45</sup> and I think we can see that spirit in the Bulletin if we see what is stated in the Section 3, that is ” the UN undertakes to ensure that those force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel”,<sup>46</sup> and the affirmation by the Bulletin that some norms will apply ”at any time and in any place”.<sup>47</sup>

### **2.1.3.3 International Criminal Law (ICL)**

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<sup>44</sup> Jaume Saura, “ Lawful Peacekeeping: Applicability of IHL to UN PKOs”, *Hastings Law Journal*, Vol 58, 499-500 2006 - 2007

<sup>45</sup> Jaume Saura in “ Lawful Peacekeeping: Applicability of IHL to UN PKOs”, *Hastings Law Journal*, Vol 58, 530 2006 – 2007 said that “ Blue helmets must respect and ensure respect IHL norms in every situation that calls for its application” “the only limitation on the UN’s obligations lies in those areas where the Organization is truly materially impossible to discharge...”

<sup>46</sup> The SG’s Bulletin. UN Doc. ST/SBG/1999/13, Section 3.

<sup>47</sup> The SG’s Bulletin. UN Doc. ST/SBG/1999/13, Section 7. paragraph 7.2

The international human rights law and international humanitarian law on the one hand give rights to rights-holders and on the other hand setting obligations (norms and standards that duty-bearers must apply and respect) for duty-bearers, they provide rules and principles regulating conducts of actors involved and in case of this thesis are peacekeepers.<sup>48</sup> The International Criminal Law is to proscribe international crimes and impose obligations on States to prosecute and punish perpetrators of those crimes, regulating the proceedings of the prosecution and trial.<sup>49</sup> Therefore, by its nature, ICL is mechanism to enforce international human rights and humanitarian laws. ICL does not set norms and standards for peacekeepers' conducts but it may get peacekeepers involved in cases where violations of peacekeepers amounting to "international crimes"<sup>50</sup>.

#### **2.1.3.4 Mission mandate, Norms of Conducts for peacekeeping personnel, Rules of Engagement, Laws of host country**

The UN Charter, human rights, humanitarian laws are common things that all peacekeepers of all operations should have to observe during their terms of duty. They are embodied in the form of guidelines, directives, bulletines, resolutions, rules of the UN and the Secretary-General. In addition, each peackeping operation is deployed in a particular environment with particular ends, those particularities are reflected in the operation's mission and mandate,<sup>51</sup> and peacekeepers are supposed to know, understand and discharge the mission mandate of the operation that they are participating in.

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<sup>48</sup> Some may argue that duty-bearers of international human rights law are states, however in case violations committed by non-state actors, states will exercise its "protect" obligation, so in one sense or another other non-state actors also have to bear the duty of human rights law that is to respect human rights of others. With regards to IHL, the same token can be applied as the common article 1 states that the High Contracting Parties undertake "to respect" and to "ensure respect"....

<sup>49</sup> Antonio Cassese, International Criminal Law (2003) page 15

<sup>50</sup> international crimes are crimes are the most serious crimes which concern the whole international community and universally recognized as criminal and can not be left exclusively to jurisdiction of one state. Cassese (2003) page 23-24

<sup>51</sup> Mission mandate is usually stated in the SC resolution setting up or authorizing the operation.



Further more, according to "Norms of Conducts for peacekeeping personnel", peacekeepers are required not only respect human rights and humanitarian norms, they are supposed to "respect the law of the land of the host country, their local culture, traditions, customs and practices" as well.<sup>52</sup>

There are other rules that peacekeepers shall have to follow, that is Rules of Engagement (ROE), ROE provides guidance for peacekeeper to use force, normally it is restricted to self-defence only. Self-defence should ensure the proportionality, that is the minimum use of force and to minimize the potential damage.

#### **2.1.3.5 Domestic laws (laws of the host state, laws of home states or third states)**

As mentioned in previous part, peacekeepers are required to respect the laws of host country. They are also subject to the national laws of their own country during his tour of duty (criminal, military laws ....) as they are considered still remain in their national service.<sup>53</sup>

In conclusion, the legal framework regulating conducts of peacekeepers is quite rich and complete but how the prosecution process be undertaken? I will touch on this problem in following parts.

## **2.2 Violations committed by peacekeepers**

Violations can be in many kinds such as disproportionate use of force that is in one way or another and to some extent relating to mandate of the PKO in question, individual's

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<sup>52</sup> Rule 2, Ten Rules Code of Personal Conduct for Blue Helmets available at [http://www.un.org/Depts/dpko/dpko/Conduct/ten\\_in.pdf](http://www.un.org/Depts/dpko/dpko/Conduct/ten_in.pdf)

<sup>53</sup> MOU between the UN and the troops contributing countries. UN Doc. A/46/185, part V, par. 7

misconduct (ex. Rape, murder, torture, smuggling) that might be of criminal in character or at least of disciplinary character. In fact, from different sources so far, allegations of violations of all kinds by peacekeepers have been revealed .

On Wednesday, 23 May 2007, the BBC released article about Pakistani peacekeepers involved in traded gold and sold weapons and sold weapons to Congolese militia groups they were meant to disarm.

In 1997, the media reported on alleged allegations of torture by UN peacekeepers in Somali. In a photograph, two Belgian soldiers holding a Somali child over an open flame. In other cases, UN soldiers kicking and stabbing a Somalian, another shows a Somalian child being forced to drink salt water, vomit and worms. There were allegations that a Somalian child was placed in a metal container and withheld water for two days, afterward the child died.<sup>54</sup>

Another case is about Canadian soldiers beating death a 16-year-old Somalian boy named Shidane Arone, three peacekeepers had been photographed smiling beside the bloody corpse of the boy, whose hand had been bound.<sup>55</sup>

Drunkenness, black marketeering, involving prostitution including child prostitution are among other allegations on peacekeepers.<sup>56</sup> Allegations about sexual abuses by peacekeepers is so widespread and serious such as situation in the Democratic Republic of the Congo as the Secretary-General has to request his Special Adviser on Sexual Exploitation and Abuse in United Nations Peacekeeping Operation to make report on the matter and recommend measures to stop the phenomena.

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<sup>54</sup> "Beasts in Blue Berets" available at <http://www.whatreallyhappened.com/RANCHO/POLITICS/UN/peace.html>

<sup>55</sup> "Beasts in Blue Berets" available at <http://www.whatreallyhappened.com/RANCHO/POLITICS/UN/peace.html>

<sup>56</sup> Information at: <http://www.peacewomen.org/un/pkwatch/pknews.html>

And most recently on 27 May 2008, BBC and Save Children of UK reported a case that 10 peacekeepers had gang-raped a 13 year old girl in Ivory Coast.

So the cause of stopping violations of peacekeepers seems not easy and far-reaching, we are surely in urgent need of a more effective mechanism to held peacekeepers accountable. How the current mechanism works? Specifically about the prosecution mechanism of violated peacekeepers will be the content of the next part.

### **3 Chapter 3: Prosecution process**

Keeping peacekeepers accountable means we keep them giving explanation for their acts and eventually in case of their acts are violations of laws, they should be hold responsible for those acts. The responsibility may be administrative (being disciplined or remove from positions), financial (paying a fine, compensation...) or criminal if the acts constituted a crime in accordance to applicable laws, that is being prosecuted by a court. So prosecution is a measure to keep peacekeepers accountable criminally. In this chapter I will examine that measure. However, I will not go into details about technique of the prosecution that are how to investigate, collect evidence, proof, interview witnesses, stages of proceedings, ... instead, as mentioned earlier in chapter 1, I will discuss on the difficulties of prosecution of peacekeepers by national and international courts that is national courts of host countries, national courts of home countries and the International Criminal Court (ICC), why and where these difficulties come from, with a focus on how does the legal framework around the PKOs mentioned above affect the prosecution process. My reason for doing so is that we can only improve the current mechanism or set up a more effective mechanism if we know well about whether the current mechanisms work, the flaws and weaknesses of the current mechanism, and the reason why and from where that flaws and weaknesses come from. The reason of my focus on impacts of applicable laws on the prosecution is that laws

is an area that changes from time to time, we have witnessed the codification process since the beginning of human society, and we have witnessed the development of how laws are interpreted and applied in reality as well, that development helps laws become more and more instrumental in governing society and in safeguarding human rights in the end. The community we are living in is a loving peace and justice community, will definitely bring those who violate the rights of others to trial regardless of their nationalities and the place of crimes (but when?), with that determination, mechanisms for prosecution of perpetrators in general and peacekeepers in particular have in place already, that prosecution mechanisms comprise of namely: national courts (of the host states and of home states (troops contributing states) and the International Criminal Court. The question now is whether the existing mechanisms work well and effectively enough to ensure that all those who violated the laws be held accountable criminally. I hope a clear answer will be found at the end of this chapter.

I will go from one to another of these courts in the following part.

### **3.1 Prosecution by national courts**

The United Nations is not a sovereign state, its personnel come from member countries. As mentioned in previous sections, the troops of the UN PKOs come from different member states of the UN and they are remain under purview of their home state and when a peacekeeper committed an acts of violation of the law, usually his home state will be the first and primary party to exercise jurisdiction over the case.

#### **3.1.1 National courts of home country**

In fact, there are many instances where allegations of violations by peacekeeper have been investigated and prosecuted by courts of their home countries. The basis for national courts of home state to exercise jurisdiction on peacekeepers is very favourable. It is all stated in the Secretary-General's Bulletin, in the SOFA, in the MOU that the home country will

exercise jurisdiction over offences of its contributing troops, especially the members of military contingent. To analyse the difficulties for courts of home state in prosecuting peacekeepers, I would like to take example as cases Canadian soldiers mentioned in the part on violations of peacekeepers.

In that case, after the revelation of the Canadian soldiers' violations in Somalia by public media, at first the Minister of National Defence of Canada ordered a military board of inquiry to deal with the cases but as the work of the military board was undertaken behind closed door, it had been criticized by public opinion. Therefore, later on the Government of Canada set up the Canadian Commission of Inquiry into Deployment of Canadian Forces to Somalia. In facts, the case was transferred from military court to civilian court for adjudication. In its letter sent to the United Nations Independent Expert on the situation of human rights in Somalia Ms. Mona Rishmawi of 10 December 1997, the Government of Canada provided that "nine Forces members ranging in rank from private to lieutenant-colonel were charged for a variety of offences from murder and torture to negligent performance of military duty. Four Forces members were convicted of offences related to the incident in Somalia, three of whom served time in prison. Five members were released from the Canadian Force and ten others were subject to other administrative career action."<sup>57</sup>

The Commission of Inquiry had carried out inquiring work of not only the disciplinary of violated soldiers, it undertook a broad examination of the operations, actions and decisions of the Canadian forces and the actions and decisions of the Department of National Defence in respect of the Canadian forces' deployment to Somalia, in July 1997 it released a report of about 2000 pages<sup>58</sup> with many recommendations of which two are relevant to be noted here that are: (i) To reform the military justice system by, inter alia, excluding military police from the chain of command and substituting civilian judges for military judges and (ii) To keep close watch on possible racist influences in the forces.

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<sup>57</sup> Quoted in UN document E/CN.4/1998/96

<sup>58</sup> Available at website: <http://www.forces.gc.ca/somalia/>

The Government of Canada confirmed that the Minister of National Defence of Canada agreed with most of the recommendations and the Department of National Defence has implemented or is planning to implement a large number of changes.”<sup>59</sup>

The Government of Canada was commended for its efforts to deal with the violations of its soldiers in operation in Somalia, making public of the report. However, there are still concerns and questions that are, the Inquiry Commission was given very short time to finish a heavy workload so could it could make a fully and properly careful investigation of the cases? some even say that the report is a ”strategy of calculated deception”.<sup>60</sup>

Taking into consideration all those contradictory opinions on the efforts of the Canadian Government in assure justice for the Somalian victims, I want to make some remarks about prosecution of peacekeepers by courts of home country, that are:

- (i) The case of Somalia is so serious and attracted great attention from mass media, especially in this case the home country is Canada where the civil society is quite active and they put hard pressure on the Canadian Government. So both the UN and the home country are under pressure to give answer to the public about the measures undertaken against the perpetrators. What about other cases? In facts, the number of allegations reported by NGOs on peacekeepers’ violations are much more higher than the number of cases disciplined or prosecuted by the UN and home states, we can easily hear that information from mass media.
- (ii) In this case, it can be said that the Canadian Government had dealt with its seriousness, at first it was handled by military then it was transfered to civil court. The victims were interviewed and could participate in the prosecution. However, in fact if the trials are undertaken in the home states, expenses for the

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<sup>59</sup> Quoted at UN doc. E/CN.4/1998/96

<sup>60</sup> UN doc. E/CN.4/1998/96

victims to travel to the home country of peacekeepers to participate in the trial is a problem, the linguistic, cultural differences between the two countries, all of these factors will make difficult for victim's participation in the prosecution undertaken by courts of the home country of peacekeepers. In addition, the prosecution of peacekeepers at home country are usually carried out by military courts where the information of prosecution process is not easy accessible for the public.

- (iii) As the victims's country and the country of trial are not the same, given the geographical distance, the linguistic differences, are the victims informed about the punishment that the perpetrators were given?
- (iv) Theoretically and factually, there are differences in legal systems between countries. An act can be a crime punishable in one country but not in the others. The procedures for prosecution may also vary from country to country. The different systems will surely create difficulties for the investigation agencies of the home country to do their job properly.

From those remarks, I want to sum up the difficulties for national courts of the home country in prosecuting peacekeepers that are: (i) the difficulty in collecting evidence, interviewing witnesses, enabling witness participating in trial .... this difficulty comes from the geographical distance, from linguistic differences or it may be categorized as difficulty because of financial restraint; (ii) difficulty because of differences of legal system between countries, this technical difficulty can be solved in certain circumstances by legal cooperation between countries, for example in investigation. But in other circumstances it is quite difficult as in case an acts is considered a crime in one country but not in others, this required a uniformity in penal codes of countries and to me it is a far-reaching future; (iii) difficulty because of lack of willingness from the home state, this political difficulty can be solved by requesting the troops contributing country to make an commitment when contributing troops or even the UN make the discipline and prosecution of violated peacekeepers as an obligation to the troops contributing countries.

### 3.1.2 National courts of the host country

In addition to national courts of home country, as peacekeeping operations are deployed in a country rather than home country of peacekeepers. Peacekeepers are required to observe the laws of the host country as well.<sup>61</sup> So in case peacekeepers violate the law of the host state, he/she can be prosecuted by national courts of the host states as well.

However, according to provisions in the SOFA, the host country can initiate a civil proceeding against a member of the UN peace-keeping operation if that the Special Representative/Commander certified that the proceeding is not related to official duties.<sup>62</sup> For example a peacekeeper when driving a truck making an accident that killed one civilian of the host state, and this is a crime under the law of the host state. If the host state wants to initiate a proceedings against that peacekeeper driver, it must inform the Head of Mission (Special Representative/ Commander) with the evidence of the case. If the Special Representative/Commander certifies that as the peacekeeper was on duty when he driving the truck, carrying goods of the UN for example, the host state can not continue with the proceedings, but if the Special Representative/ Commander after making an inquiry upon information provided by the host country, certifies that the peacekeeper at the time of making accident was off duty, the proceeding may be instituted against that peacekeeper with agreement of the Head of Mission.

Regarding to military members, the jurisdiction is exclusive to the courts of home states. This is stated in the Secretary-General Bulletin on Observance of IHL by UN peacekeeping personnel, in SOFA and MOU.<sup>63</sup>

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<sup>61</sup> As previously mentioned in section on legal framework

<sup>62</sup> Par.49, model of SOFA

<sup>63</sup> Analyse on provisions on jurisdiction in SOFA, MOU, SG's Bulletin in sections on applicable laws and prosecution by the ICC.



In short, the jurisdiction of the host state' national courts on peacekeepers in general is limited because of the procedure mentioned above in the SOFA, and absolutely excluded with regard to military members.

### **3.2 Prosecution by the International Criminal Court**

With determination to put an end to impunity of perpetrators of those crimes, the international community agreed to set up a permanent court, that is International Criminal Court.<sup>64</sup> However, the Court serves as complementary to national courts only (only in cases where national court is unable or unwilling to do the prosecution job),<sup>65</sup> therefore for the ICC to have jurisdiction over peacekeepers, there must be: (i) first of all, crime committed must be amounting to international crimes and taking place after the entry into force of the ICC Statute; (ii) the concerned countries (host countries, troop contributing countries, the countries where crimes taking place) are States Parties of the Court Statute; (iii) the national court in those cases are not able or willing to prosecute the perpetrator genuinely. Given all those requirements are met, however there are still impediments for the ICC to exercise jurisdiction over peacekeepers both legally and technically because of the result of legal status of the PKOs, the immunities given to peacekeepers consequently as well as some special characteristics of an UN operation. To be more specific, that impediments may arise from the immunities accorded to the UN forces, that are stipulated in the SOFA, provisions on jurisdiction in the Memorandum of Understanding between Troops contributing country and the UN (MOU), or it may arise from the Security Council resolutions ( I will refer to and analyse resolutions 1422 and 1487 specifically), or from the special characteristics of the chain of command of UN PKOs. In addition to the such impediments, there may also be some limitations on the ICC's jurisdiction over peacekeepers as a result of the crimes under the ICC's jurisdiction are not so numerous as

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<sup>64</sup> The Statute of the International Criminal Court, Preamble paragraph

<sup>65</sup> The Statute of the International Criminal Court, Preamble paragraph

stipulated by the Rome Statute. In the following I will go through those impediments and limitations one by one.

### **3.2.1 The Status of Forces Agreement (SOFA), Memorandum of Understanding (MOU) and their impacts on the ICC's jurisdiction over peacekeepers**

#### **3.2.1.1 The Status of Forces Agreement (SOFA)**

SOFA is a legal document between the UN and the host country which defines the status of a peacekeeping operation and its members. A standard form of SOFA issued by the UN is in Annex I. A real SOFA may have some modification as a result of negotiation process between the UN and the host state, and in case that a SOFA has not been concluded, the model would apply provisionally.<sup>66</sup> One of important parts of SOFA is provisions on the immunities and privileges which will be accorded to the peacekeeping operation personnel, usually the Special Representative of the Secretary-General or head of mission, the Force Commander and some other high-ranking members of the operation are given privileges and immunities as of diplomatic envoys as stipulated in article V, Section 18 of the General Convention on Immunities and Privileges.<sup>67</sup> In addition, model SOFA provides "functional immunity" to the operation's personnel, that is immunity accorded to peacekeepers provisionally with respect to their words or acts in performance of their mission.<sup>68</sup> In essence, the UN forces will be given immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

In addition to provisions on privileges and immunities accorded to the operation's personnel, the SOFA also provides legal framework for jurisdiction concerning members of the UN PKO (from par.46 to par.50 of the model of SOFA).

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<sup>66</sup> General Assembly Resolution 52/12 B of 9 January 1998, UN Doc. A/RES/52/12 b, par.7

<sup>67</sup> Par.24 of model SOFA

<sup>68</sup> Par. 26 of model SOFA and its reference to article VI of the Convention.

According to paragraph 49, any civil proceeding is instituted against a member of the United Nations peace-keeping operation before any court of (host country/territory), should be notified to the Special Representative/Force Commander immediately, and he shall certify to the court whether or not the proceeding is related to the official duties of such member. If the proceeding is related to official duties, such proceeding shall be discontinued. SOFA also set out a mechanism to settle disputes between the UN and the host state (paragraph 51), whereby a standing claims commission shall be set up with one member from UN, one member from the host state, and co-chaired by the Secretary-General and the Government, ... in fact this is a time consuming mechanism and of little help.

Further more, the article 47 requires the Government (of the host state) to inform and present evidence of criminal offence when it considers that any member of the United Nations peace-keeping operations has committed a criminal offence. Based on that information, the Special Representative/Commander will conduct inquiry of the case and agree with the Government about should the proceeding be initiated.

The immunities stipulated in the SOFA and the procedures for initiating a proceedings mentioned above obviously will hinder the ICC and national courts as well (national courts of the host state) from prosecuting peacekeepers.

### **3.2.1.2 Memorandum of Understanding between the UN and troops contributing countries (MOU)**

As the UN does not have a force of itself, so whenever an peace operation to be set up, the UN will request member state to contribute personnel for that operation. MOU is an agreement concluded between the UN and the contributing countries about the category and number of personnel that countries will contribute. It specifies the duties of both sides (the UN and the contributing countries) with regard to the contribution. A model of this agreement is in UN document A/46/185 dated 23 May 1991 (Annex 2)

In MOU, there is provision on jurisdiction, that:

”Question relating to allegations of criminal offence and civil liability of personnel provided by (the Participating State) shall be settled in accordance with the procedures provided for in the Status Agreement.

(The Participating State) agrees to exercise jurisdiction with respect to crimes or offences which may be committed by its military personnel serving with (the United Nations peace-keeping operation). (The Participating State) shall keep the Head of Mission informed regarding the outcome of such exercise of jurisdiction.”<sup>69</sup>

Even though a real MOU between the UN and a troops contributing country may have modifications as from the above model, but the provision on jurisdiction is almost be kept the same. It means the troops contributing state will exercise jurisdiction in case of criminal offence of military personnel provided by it. It means jurisdiction of the ICC on cases of criminal offence by military personnel of an UN PKOs is excluded by MOU.

### **3.2.2 The Security Resolutions 1422 and 1487 and their impacts on the ICC’s jurisdiction over peacekeepers**

Right after entry into force of the Rome Statute on 1 July 2002, on 12 July 2002 the Security Council, at its 4572th meeting adopted Resolution 1422 under the Chapter VII of the Charter (which means the resolution had binding effects), with the main content, as stipulated in the operative par.1:

”1. *Request*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State

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<sup>69</sup> UN Doc. A/46/185 dated 23 May 1991, Part VIII, par. 24, 25.

not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;”<sup>70</sup>

One year after, on 12 June 2003, the Security Council adopted the Resolution 1487 that is the renewal of the resolution 1422.

With the adoption of those two resolution, obviously the SC had bound the hands of the ICC in relation to cases concerning individuals from contributing states participating in UN operations. . . In fact, right after the adoption of those resolution, there have been contronversy and challeges about the legitimacy of the two resolutions, some of the opinions is that the resolutions are *ultra-vires* acts of the Security Council and therefore should be *null et void*.<sup>71</sup> However, as the ”suspension” period mentioned in those resolutions was only 12 months, and if there is no renewal of those resolutions, there are no longer effects directly from the resolutions on the ICC. But the adoption of those resolutions are the proof of a fact that some countries do not want their citizens participating in UN operations are prosecuted by the ICC, this ”do not want” still exists, we can see its existance through provisions in following enabling resolutions of the Security Council (resolution deciding to set up or authorize an operation), for example the Security Council 1497 dated 1 August 2003 setting up a Multinational Force in Liberia provided that:

”*Decides* that current or former officials or personnel from a contributing state, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or ommissions arising out of or related to the Multinational Force or United Nations Stabilization Force in

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<sup>70</sup> UN Doc. S/RES/1422 (2002), par. 1

<sup>71</sup> For more discussion on resolution 1422 and 1487, see “The prosecution and Defense of peacekeepers under international criminal law”, Geert-Jan Alexander Knoops, Transnational Publisheers, 2004

Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing state;”<sup>72</sup>

In fact, the wording in the Resolution 1497 is even stronger than those in Resolutions 1422 and 1487 in term of excluding the ICC’s jurisdiction on cases of peacekeeper, it valids permanently unless the troop contributing state expressed waive of its exclusive jurisdiction.

### **3.2.3 The special characteristic of chain of command of UN peacekeeping operations, a technical impediment for the ICC in exercising jurisdiction over some peacekeepers**

(Even though I present this obstacle in the section on prosecution by the ICC, but it is the obstacle for national courts as well.)

The Rome Statute provides general principles of criminal law that are namely *inter alia*: nullum crimen sine lege ( a person shall not be criminally responsible ... unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court)<sup>73</sup>, the individual criminal responsibility ( a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute)<sup>74</sup>, Responsibility of commanders and other superiors ( A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control),<sup>75</sup> mental element and grounds for excluding criminal responsibility...

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<sup>72</sup> UN Doc. S/RES/1497 (2003), Operative par.7

<sup>73</sup> Article 22 of the Rome Statute

<sup>74</sup> Article 25 of the Rome Statute

<sup>75</sup> Article 28 of the Rome Statute

In short, there is a general principle is that a person shall be prosecuted by the court individually only if he/she have committed actus reus (guilty acts) with a mens rea (guilty mind) and no defence for those guilty acts. It's the same for a peacekeeper.

For individual peacekeepers who has committed a guilty acts, the ICC faces impediments in exercising jurisdiction because of SOFA, MOU ... as analysed above already, so I do not want to repeat here, what I want to analyse more here is that the ICC's jurisdiction over peacekeepers' superiors if it is the case.

The article 28 of the Rome Statute specifies the criminal responsibility of commanders and superiors who have "effective command and control" over their subordinates, however, what does it mean by " effective command and control", especially in the context of peacekeeping operations. I will examine this question in the following:

In general, command is "the authority of a commander to lawfully exercise over his/her subordinates by virtue of the rank or appointment held"<sup>76</sup>. Command provides the authority and responsibility for effectively planning and executing the employment of assigned resources to achieve the mission. In military context, there are may: (i) "full command" that are the authority and responsibility of a superior officer to issue orders to subordinates, it covers every aspect of military operations and administration. This kind of command exist only in national context; (ii) operational command, that is the authority of a commander to assign missions or tasks, redeploy forces, and reassign forces. It does not include responsibility for administration or logistics; (iii) Tactical command, that is the authority of commander to assign tasks to forces under their command. It has narrower scope to operational command.<sup>77</sup>

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<sup>76</sup> Command and Control, in "Legal Framework of UN Forces and Issues of Command and Control of Canadian can Irish Forces" by Ray Murphy

<sup>77</sup> Command and Control in "Legal Framework of UN Forces and Issues of Command and Control of Canadian can Irish Forces" by Ray Murphy

In a national army, the chain of command is unified and concerted from the top down to the bottom (From the Head of State to the Defence Minister to the Army Commander in Chief to .... to lowest ranking soldiers).

Differently from a national army, in UN PKOs there are three levels of command : the Security Council is in charge of overall political direction, the Secretary General is in charge of executive direction and control, and the command in the field is carried out by the head of mission (Special Representative of the Secretary-General or the Force Commander or Chief Military Observer).<sup>78</sup> With regards to low-ranking members, as the troops come from many different countries and come in contingents, military member of contingents are under the UN's operational control only,<sup>79</sup> that is "It evolves the full authority to issue operational directives within the limits of (1) a specific mandate of the Security Council; (2) an agreed period of time, with the stipulation that an earlier withdrawal requires adequate prior notification; and (3) a specific geographical range (the mission area as a whole)".<sup>80</sup> An additional limitation is that the Organization does not discipline or promote individual members of military contingents, functions which remain under the purview of their national authorities.<sup>81</sup>

To assist the Security Council and the Secretary-General, there are several bodies within the UN Secretariat, the functions and working mechanisms of these bodies are also complicated. While the Department of Peace Keeping Operation (DPKO) is responsible for providing with policy guidance and strategic direction, the Department of Field Support (DFS) is responsible for providing logistical and administrative support. Under-Secretary-General for Field Support reports to the Under-Secretary-General for Peacekeeping Operation on all peacekeeping related matters, while the Standing Integrated Operations, located within DPKO, provides integrated policy advice and guidance for senior DPKO

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<sup>78</sup> UN Doc. A/49/681 par.4

<sup>79</sup> UN Doc. A/49/681, par.6

<sup>80</sup> UN Doc. A/49/681, par.6

<sup>81</sup> UN Doc. A/49/861 par.6



and DFS staff.<sup>82</sup> In short, there is no clear-cut in PKOs' chain of command and decisions making as in a national military apparatus.

In fact, different PKO has different chain of command, and Head of Mission/ Force Commanders not all the time have effective control over their subordinates, take the case of operation in Somali as example (UNOSOM II)<sup>83</sup>, in this operation, orders from the UN affecting United States forces were transmitted from the UN Force Commander to the United States troops through the UNOSOM II Deputy Commander, Major General Montgomery, a US army general and the Commander of US Forces in Somalia. The General Montgomery then reported directly to the Commander in Chief of United States Central Command. The Deputy Commander of UNOSOM II even could have tactical control of the force delegated to him if the situation within Somalia so required. This in fact likes a parallel chain of command to the one of the UN.<sup>84</sup>

The special characteristics of chain of command of the UN PKOs as analysed above, that are there is no full command or even command in conventional meaning but only "operational control", the complicated and not efficient reporting and coordinating systems, the status of military members of national contingents lead to the fact that superiors in PKOs not always have "effective authority and control" over their subordinates, the other possibility is that subordinates might or might not obey UN orders or, they might obey not only UN orders but also carry out orders from their own government, will create difficulty for the ICC to identify criminal responsibilities of superiors in cases of subordinates' violation according to the article 28, par.1 of the Rome Statute.

Both Brahimi Report and the Guidelines and Principles of the UN on PKOs call for a unified and concerted chain of command in UN operations, but this is not the case of all

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<sup>82</sup> Authority, Command and Control in Multi-dimensional UN PKO, UN Peacekeeping Operations: Principles and Guidelines

<sup>83</sup> This case is also mentioned in A/49/681 under the Part: Forces not under direct United Nations Command. Para.21

<sup>84</sup> "The command and control of United Nations Forces in Somalia" in Article " Legal framework of UN Forces and Issues of Command and Control of Canadian and Irish Forces by Ray Murphy

UN PKOs. This problem to some extent and in theory can be solved by stipulation in the Memorandum of Understanding signed between the UN and troops contributing countries, but surely it depends on the willingness of the parties, and in case the troops contributing countries want to influence an operation, it is difficult for the UN to have real "effective command or control" on the forces in the operation.

The second difficulty for the ICC is to identify the mental element of crime because of the chain of command of PKOs. The article 30 of the Rome Statute states that a person means to have intent where: " ... is aware that it will occur in the ordinary course of events"<sup>85</sup>. It means if there is a commission of acts of crimes, and there is a person who was aware that acts would happen, that person may be prosecuted anyway. This provision when we read in line with the provision in article 28 of the Rome Statute that is the commanders and superiors is responsible for acts of their subordinates if they "either knew or, owing to the circumstances at the time, should have known"<sup>86</sup> surely will bring difficulties for the ICC in identifying whether the superior of peacekeepers "knew" or "should have known" or "aware" in order to keep them responsible criminally. This difficulty becomes even more complex as in reality the UN troops may still keep contacts with their own governments during term of operation,<sup>87</sup> so sometimes the governments are aware of the situation but not the UN or they have the information in the field earlier than UN officials. Furthermore, the UN Force is allowed to act only in accordance with mandates set by the Security Council Resolution, so it's not always possible for superiors of UN Forces to take "all necessary and reasonable measures" as provided in the article 28. 1 (b) and 28.2 (b) of the Rome Statute.

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<sup>85</sup> Article 30, par. 2 (b) of the Rome Statute.

<sup>86</sup> Par. 2. (a) article 28 of the Rome Statute

<sup>87</sup> Jaume Saura, "Each national contingent, however, remains under the authority of a national commander, and most countries never actually relinquish control over their troops" in *Lawful Peacekeeping: Applicability of IHL to UN PKOs*, *Hastings Law Journal*; Vol 58: 479 2006 - 2007

### **3.2.4 Limitation on the ICC's jurisdiction over peacekeepers as a result of the fact that crimes under the ICC's jurisdiction are not numerous**

In previous sections I mentioned some impediments to jurisdiction of the ICC over peacekeepers and for those impediments I would like to use the term "objective" impediments that is the impediments come from outside factors rather than from the ICC itself. In addition to those objective impediments, there are "subjective" impediments that I want to note in this section that is the limitation on the ICC's jurisdiction over peacekeepers arising from the limited number of crimes falling under the ICC as stated in the Rome Statute.

As stipulated in the article 5 of the Rome Statute, those crimes are: crime of genocide, crimes against humanity; war crimes and the crime of aggression. In fact, not much of violations by peacekeepers fall in these crimes, the reasons are as follows:

With regards to the crime of aggression, that is " planning, preparation, initiation or waging a war of aggression ..." <sup>88</sup> with the acts of aggression such as: invasion or attack by armed forces, bombardment of armed forces, attack by the armed forces, blockade of ports or coasts, illegal use of one state's armed forces being situated in another state, sending armed bands, groups etc, which carry out acts of armed forces of serious gravity. <sup>89</sup> Put it in more practical, aggression is acts of violating territorial sovereignty and integrity of a state without consent of that state. I may say that it's hardly if not to say it's impossible that peacekeepers would commit acts of aggression. Firstly, because PKOs by its nature are collective security actions of the UN, they are deployed to keep peace and security, their deployment or presence in a country have authorization from the UN (by resolution of the Security Council), their presence even have consent of the host states (as there is always a Status of Forces Agreement is agreed upon between the UN and the host state). Secondly, peacekeepers when participating in an UN PKOs, they work for the international

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<sup>88</sup> The Charter of the International Military Tribunal

<sup>89</sup> International Criminal Law, Cassese, page 114

community as a whole, with mission and mandate from the UN, and their violations individually (as this study focuses on) is hardly qualified as acts of armed forces that fall on the list mentioned above, therefore it can be said that it is not likely that peacekeepers will commit the crime of aggression.

With regard to the crime of genocide, there are possibility for peacekeepers commit this crime is that they may knew or should have known about a plan to commit genocide and did not take necessary steps to prevent the crime happening, as some critics say about the role of UN Force in Srebrenica in case of genocide of Muslim there, as according to article 30 of the Rome Statute, a person has intent where, " in relation to a consequence, .... is aware that it will occur ..." <sup>90</sup>, but as I have analysed previously the chain of command in the UN PKOs is different from that in a national army and an UN force is allowed to act within a given mandate only, in addition to that communication between field offices and UN headquarters is not always smooth. This will lead to a question that should UN forces act beyond their mandate in order to prevent the crime of genocide happening or should they respect the Rule of Engagement and mandates given to them? Who, at which level (UN headquarter, ex. the Security Council, the Secretary-General or Head of the Mission) will make that kind of decision in a very pressing moment? Given all these aspects, ethnically or morally, it is easy for us to say that UN forces or peacekeepers committing the crime of genocide, but it is not easy for courts to sentence peacekeepers for the crime of genocide legally.

With regard war crimes, that are "grave breaches of the Geneva Conventions of 12 August 1949" <sup>91</sup>. According to the Secretary-General Bulletin on Observance by UN Forces on international humanitarian law, members of the military personnel of a United Nation force are subject to prosecution in their national courts, in case of violations of international humanitarian law. <sup>92</sup> So for ordinary violations of IHL, the national courts of troops

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<sup>90</sup> Article 30, par.2 (b) of the Rome Statute

<sup>91</sup> Article 8, the Rome Statute

<sup>92</sup> Section 4 SG's Bulletin on Observance by United Nations forces of international humanitarian law. ST/SGB/1999/13 dated 6 August 1999

contributing countries will have jurisdiction over the peacekeepers. What about serious or grave violations, which will qualify as war crimes? Actually, paragraph 1 of the article 8 of the ICC Statute saying that the Court shall have jurisdiction on war crimes, particular when committed "as a part of a plan or policy or as part of large-scale commission".<sup>93</sup> With that condition set by the Rome Statute, we can deduce that even in case of violations of IHL amounting to war crimes, it is likely that national courts will still have jurisdiction over the cases as there is no plan or policy of the United Nations to make such acts of crimes happen.

With regard to crimes against humanity, paragraph 1 of the article 7 of the Rome Statute sets out one contextual element of the crimes is that the acts of violations committed as "part of a widespread or systematic attack" directed against any civilian population. Paragraph 2 of that article gives more explanation on that, it states that: "attack directed against any civilian population" means "a course of conduct involving the multiple commission of acts ....., pursuant to or in furtherance of a State or organizational policy to commit such attack;". In case of UN PKOs it means the organization must have a policy to attack against any civilian population. If consider the organization's policy is the policy at the highest level of the organization, in case of UN that is the General Assembly, I can say for sure that the Organization does not have a policy to attack against any civilian population. Therefore, in my personal point of view, even though there are widespread violations committed by peacekeepers (as the case of Somalia or sexual violations in the Democratic Republic of Congo), but those violations committed are not "pursuant to or in furtherance of the Organization's policy" because there is no such a policy for peacekeepers to further or act in pursuance to.

Personally, I'm of the view that the ICC is not the most appropriate and effective for prosecuting peacekeepers. However, I also support the idea of those who initiate the complimentary role of the ICC, especially the positive complimentary role, that is the Court will step in if national courts do not discharge their job well (unwilling to prosecute

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<sup>93</sup> Par.1 article 8 of the Rome Statute

”genuinely” is the word of the Rome Statute) or in case national courts are unable to carry out their job, there is the ICC to share the burden. For the ICC to play that positive complimentary role, it must have jurisdiction over peacekeepers in principle. With the obstacles to the ICC’s jurisdiction as mentioned above, in most of the cases the jurisdiction of the ICC is excluded by provisions in SOFA, MOU, SG’s Bulletin, by immunities that peacekeepers are given, can the ICC play the positive complimentary role effectively? One may argue that the ICC can as if the home state or the host state which are state party to the ICC Statute waive their jurisdiction over peacekeepers and refer the case to the ICC. Yes, it can, but this puts the ICC into a passive position to play its role. Why dont’ we put things in an opposit order that is because peacekeepers are different from other kind of perpetrators, they have a special status, a status of subsidiary organ of the UN, they are UN personnel, they are international personnel, and immunities accorded to them is to facilitate their job, not to hinder the cause of justice, so as international personnel or personnel of the UN in other words, first and foremost they should be accountable before the UN and subject to the UN’s jurisdiction, that is if they committed a grave violation of substantive law (human rights law, humanitarian law) that amount to international crime, shocking the whole international community, they will be first and foremost subject to jurisdiction by the international court, and if the UN at its disposal decides to repatriate that peacekeepers to his home country for prosecution, it can do it, and the home state can carry the prosecution job consequently. I think this may make the status of ”international personnel” of peacekeepers more sense than currently is. Of course this is another story and beyond the scope of this thesis.

#### **4 Chapter 4: Conclusion**

In summary, the existing prosecution process of peacekeepers have many flaws. The ICC has difficulties in exercizing jurisdiction, the courts of home countries are favourable in term of exercising jurisdiction will face financial difficulties because of the geographical

distances and difficulties in investigating because of differences in legal systems between countries, the courts of the host countries have the advantages in term of undertaking investigation face difficulties because of provisions on immunities and jurisdiction and procedures for initiating proceedings against peacekeepers in the SOFA which limit and exclude its jurisdiction possibility. All of these difficulties together with the not strong enough determinations of all parties involved (troops contributing countries do not want to try their soldiers because of a crimes committed in a land far away, the UN hesitates to oppose the troops contributing countries on the matter as that may lead to difficulty in mobilizing forces for future operations) make the prosecution have not been effective yet.

The other flaw is that, as we can see from agreements between the UN and the host states (SOFA), between UN and home states (MOU), the current procedures to deal with the alleged peacekeepers is that, the host country/victims report the case to the UN (the UN Force in the field), base on that information the UN will make an inquiry of the case, if it found that there was convincing evidence of crime committed, the UN can agree for the host country to initiate proceeding against the peacekeeper,<sup>94</sup> or it may undertake some kind of disciplinary measures with that peacekeeper internally,<sup>95</sup> or it may repatriate that peacekeeper to home country for punishment.<sup>96</sup> This is in fact time consuming procedure. It makes difficult for investigation agencies as a long time will have passed from the time the crime is committed until the time the prosecution can start.

The other problem which is not particular for prosecution of peacekeepers is that, the coordination and cooperation between parties concerned. The coordination within the UN in dealing with allegations of peacekeepers' violations, the UN Forces in the field are not always cooperative with the UN Inquiry Commission from the UN Head quarter. The coordination between the UN and the troops contributing countries in ensuring that the violated peacekeepers will be punished back home. The coordination and cooperation

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<sup>94</sup> Procedures for initiating a proceeding against peacekeepers by the host state, par. 47 of model SOFA

<sup>95</sup> There is internal disciplinary mechanism within the UN.

<sup>96</sup> As provided in MOU between the UN and the contributing country and relevant provisions in UN documents concerned, mentioned previously.

between the host country and the home country in investigating and trial. Lack of this coordination and cooperation create loopholes for peacekeepers go unpunished for their violations.

To clear these loopholes there should be measures undertaken. That may namely:

At political level, in addition to SOFA signed between the UN and the host state, MOU signed between the UN and the home states, there should be an agreement on judiciary cooperation between the home state and the host state in legal proceedings relating to peacekeepers. This judiciary cooperation agreement on the one hand will help facilitate the investigation work, on the other hand it may provide possibility for the host state to prosecute violated peacekeepers on behalf of the troops contributing state (with consent from the contributing state of course) or possibility for the troops contributing state to undertake the trial on the territory of the host state. This will have much positive effects on the credibility of the justice system and of the UN peacekeeping operations as well, as the local community and the victims can easily see how the perpetrators have to pay for their violated acts.

There should be clear and strong provision on obligation to discipline and prosecute violated peacekeeper in relevant documents. The obligation should be stated concretely with regard to the UN, the Troops Contributing Country.

Strengthening the monitoring mechanism, the responsibility to monitor and early aware of violations should be clearly assigned to specific persons, for example heads of contingent are responsible for monitoring members of contingent under his control. Together with strengthening monitoring mechanism there should be concrete disciplinary forms for those who hide or tolerate violations.

Set up Claim Units in PKO for the victims to reports about misconducts of peacekeepers, these units are charged with investigating the allegations and complaints, cooperate with



investigation and prosecution of the host state and home states if required. They should be independent from the chain of command of PKO. The functioning of these units will require the awareness, knowledge and cooperation from local people. So Claim Units should also be responsible for disseminating information on norms and conducts of peacekeepers to local population as well as other relevant information. Each PKO has a Claim unit and this unit should belong to a permanent Claim Commission of the UN system as a whole. This will help the work of inquiry being done more professionally than currently carried out by Inquiry commissions which set up and work on ad hoc basis.

And as preventing crimes happening is always better than processing committed crimes, so training and educating peacekeepers not to commit crimes should be prioritized. The troops contributing countries should be responsible for training in advance the troops that they contribute. The UN again has responsibility for training the troops when they become personnel of UN and especially when deployed in the field. It must be sure that 100 % of peacekeepers understand norms and conducts they should follow, the relating laws and regulations when they participate in a peacekeeping operation. In addition, the material and spiritual life of peacekeepers should receive due attention as they are working in difficult environment ( far away from family, lack of recreational facilities in the field of operation).<sup>97</sup>

Lastly is the perennial problem of coordination and strong commitment of all actors in international community in bringing perpetrators to justice, to ensure rights of the victims. When a violation happen, it should be dealt with as quick as possible, the victims should be able to receive legal aid as well as other necessary assistance available.

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<sup>97</sup> For more discussion, see UN Doc. A/59/710

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## Annex

### Annex 1: A standard form of Status of Forces Agreement (SOFA) (UN DocA/45/594 dated 9 October 1990)

UNITED  
NATIONS



General Assembly

**A**

Distr.  
GENERAL

A/45/594  
9 October 1990

ORIGINAL: ENGLISH

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Forty-fifth session  
Agenda item 76

COMPREHENSIVE REVIEW OF THE WHOLE QUESTION OF PEACE-KEEPING  
OPERATIONS IN ALL THEIR ASPECTS

Model status-of-forces agreement for peace-keeping operations

Report of the Secretary-General

1. In paragraph 11 of its resolution 44/49 of 8 December 1989, the General Assembly requested the Secretary-General to prepare a model status-of-forces agreement between the United Nations and host countries and to make that model available to Member States. Basing itself upon established practice and drawing extensively upon earlier and current agreements, the Secretariat has prepared the model status-of-forces agreement annexed to the present report. The model is intended to serve as a basis for the drafting of individual agreements to be concluded between the United Nations and countries on whose territory peace-keeping operations are deployed. As such it is subject to modifications that may be agreed upon between the parties in each case.

2. The attached model, *mutatis mutandis*, will also serve as the basis for an agreement with a host country in operations where no United Nations military personnel are deployed.

ANNEX

Draft model status-of-forces agreement between the United Nations  
and host countries a/

I. DEFINITIONS

1. For the purpose of the present Agreement the following definitions shall apply: b/

II. APPLICATION OF THE PRESENT AGREEMENT

2. Unless specifically provided otherwise, the provisions of the present Agreement and any obligation undertaken by [Government] c/ or any privilege, immunity, facility or concession granted to the United Nations peace-keeping operation or any member thereof apply in [the area of operations/territory] only.

III. APPLICATION OF THE CONVENTION

3. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the United Nations peace-keeping operation subject to the provisions specified in the present Agreement. d/

or

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a/ This title corresponds to the terminology used in paragraph 11 of General Assembly resolution 44/49 dated 8 December 1989. While it has been used for working purposes, the precise character of the agreement of course will vary according to the type of United Nations peace-keeping operation concerned.

b/ This section will contain definitions of the main terms used in the agreement such as:

"Participating State" means a State contributing personnel to the military and/or civilian components of the United Nations peace keeping operation.

"Convention" means the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946.

c/ The term Government as used in the present Agreement will be defined to mean the Government of the host country or Administration having *de facto* authority over the territory and/or area of operations in question.

d/ As a general rule, the basic privileges and immunities of a United Nations peace-keeping operation consist of provisions that flow from the Convention on the Privileges and Immunities of the United Nations adopted by the General

/...

4. The United Nations peace-keeping operation, its property, funds and assets, and its members, including the Special Representative/Commander, shall enjoy the privileges and immunities specified in the present Agreement as well as those provided for in the Convention, to which [host country] is a Party. e/

5. Article II of the Convention, which applies to the United Nations peace-keeping operation, shall also apply to the property, funds and assets of participating States used in connection with the United Nations peace-keeping operation.

#### IV. STATUS OF THE PEACE-KEEPING OPERATION

6. The United Nations peace-keeping operation and its members shall refrain from any action or activity incompatible with the impartial and international nature of their duties or inconsistent with the spirit of the present arrangements. The United Nations peace-keeping operation and its members shall respect all local laws and regulations. The Special Representative/Commander shall take all appropriate measures to ensure the observance of those obligations.

7. The Government undertakes to respect the exclusively international nature of the United Nations peace-keeping operation.

##### United Nations flag and vehicle markings

8. The Government recognizes the right of the United Nations peace-keeping operation to display within [host country/territory] the United Nations flag on its headquarters, camps or other premises, vehicles, vessels and otherwise as decided by the Special Representative/Commander. Other flags or pennants may be displayed only in exceptional cases. In these cases, the United Nations peace-keeping operation shall give sympathetic consideration to observations or requests of the Government of [host country].

9. Vehicles, vessels and aircraft of the United Nations peace-keeping operation shall carry a distinctive United Nations identification, which shall be notified to the Government.

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(continued)

Assembly on 13 February 1946. However, while the Convention is in force with respect to 124 Member States, there are a number of States that are not a party to it and there may also be United Nations operations involving relations with entities other than States. Thus, in such cases, the Status Agreement itself must provide specifically for the application of the Convention.

e/ Provision to be used where the host country is a party to the said Convention.

/...

Communications

10. The United Nations peace-keeping operation shall enjoy the facilities in respect to communications provided in article III of the Convention and shall, in co-ordination with the Government, use such facilities as may be required for the performance of its task. Issues with respect to communications which may arise and which are not specifically provided for in the present Agreement shall be dealt with pursuant to the relevant provisions of the Convention.

11. Subject to the provisions of paragraph 10:

(a) The United Nations peace-keeping operation shall have authority to install and operate radio sending and receiving stations as well as satellite systems to connect appropriate points within the territory of [host country/territory] with each other and with United Nations offices in other countries, and to exchange traffic with the United Nations global telecommunications network. The telecommunication services shall be operated in accordance with the International Telecommunication Convention and Regulations and the frequencies on which any such station may be operated shall be decided upon in co-operation with the Government and shall be communicated by the United Nations to the International Frequency Registration Board.

(b) The United Nations peace-keeping operation shall enjoy, within the territory of [host country/territory], the right to unrestricted communication by radio (including satellite, mobile and hand-held radio), telephone, telegraph, facsimile or any other means, and of establishing the necessary facilities for maintaining such communications within and between premises of the United Nations peace-keeping operation, including the laying of cables and land lines and the establishment of fixed and mobile radio sending, receiving and repeater stations. The frequencies on which the radio will operate shall be decided upon in co-operation with the Government. It is understood that connections with the local system of telegraphs, telex and telephones may be made only after consultation and in accordance with arrangements with the Government, it being further understood that the use of the local system of telegraphs, telex and telephones will be charged at the most favourable rate.

(c) The United Nations peace-keeping operation may make arrangements through its own facilities for the processing and transport of private mail addressed to or emanating from members of the United Nations peace-keeping operation. The Government shall be informed of the nature of such arrangements and shall not interfere with or apply censorship to the mail of the United Nations peace-keeping operation or its members. In the event that postal arrangements applying to private mail of members of the United Nations peace-keeping operation are extended to transfer of currency or the transport of packages and parcels, the conditions under which such operations are conducted shall be agreed with the Government.

/...

Travel and transport

12. The United Nations peace-keeping operation and its members shall enjoy, together with its vehicles, vessels, aircraft and equipment, freedom of movement throughout the [host country/territory]. That freedom shall, with respect to large movements of personnel, stores or vehicles through airports or on railways or roads used for general traffic within the [host country/territory], be co-ordinated with the Government. The Government undertakes to supply the United Nations peace-keeping operation, where necessary, with maps and other information, including locations of mine fields and other dangers and impediments, which may be useful in facilitating its movements.

13. Vehicles, including all military vehicles, vessels and aircraft of the United Nations peace-keeping operation shall not be subject to registration or licensing by the Government provided that all such vehicles shall carry the third party insurance required by relevant legislation.

14. The United Nations peace-keeping operation may use roads, bridges, canals and other waters, port facilities and airfields without the payment of dues, tolls or charges, including wharfage charges. However, the United Nations peace-keeping operation will not claim exemption from charges which are in fact charges for services rendered.

Privileges and immunities of the United Nations peace-keeping operation

15. The United Nations peace-keeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations [as provided for in the present Agreement] f/ [in accordance with the Convention]. g/ The provision of article II of the Convention which applies to the United Nations peace-keeping operation shall also apply to the property, funds and assets of participating States used in [host country/territory] in connection with the national contingents serving in the United Nations peace-keeping operation, as provided for in paragraph 5 of the present Agreement. The Government recognizes the right of the United Nations peace-keeping operation in particular:

(a) To import, free of duty or other restrictions, equipment, provisions, supplies and other goods which are for the exclusive and official use of the United Nations peace-keeping operation or for resale in the commissaries provided for hereinafter;

(b) To establish, maintain and operate commissaries at its headquarters, camps and posts for the benefit of the members of the United Nations peace-keeping operation, but not of locally recruited personnel. Such commissaries may provide goods of a consumable nature and other articles to be specified in advance. The

f/ In case the other party is not party to the Convention.

g/ In case the other party is a party to the Convention.

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Special Representative/Commander shall take all necessary measures to prevent abuse of such commissaries and the sale or resale of such goods to persons other than members of the United Nations peace-keeping operation, and he shall give sympathetic consideration to observations or requests of the Government concerning the operation of the commissaries;

(c) To clear ex customs and excise warehouse, free of duty or other restrictions, equipment, provisions, supplies and other goods which are for the exclusive and official use of the United Nations peace-keeping operation or for resale in the commissaries provided for above;

(d) To re-export or otherwise dispose of such equipment, as far as it is still usable, all unconsumed provisions, supplies and other goods so imported or cleared ex customs and excise warehouse which are not transferred, or otherwise disposed of, on terms and conditions to be agreed upon, to the competent local authorities of the [host country/territory] or to an entity nominated by them.

To the end that such importation, clearances, transfer or exportation may be effected with the least possible delay, a mutually satisfactory procedure, including documentation, shall be agreed between the United Nations peace-keeping operation and the Government at the earliest possible date.

#### V. FACILITIES FOR THE UNITED NATIONS PEACE-KEEPING OPERATION

Premises required for conducting the operational and administrative activities of the United Nations peace-keeping operation and for accommodating members of the peace-keeping operation

16. The Government of [host country] shall provide without cost to the United Nations peace-keeping operation and in agreement with the Special Representative/Commander such areas for headquarters, camps or other premises as may be necessary for the conduct of the operational and administrative activities of the United Nations peace-keeping operation and for the accommodation of the members of the United Nations peace-keeping operation. Without prejudice to the fact that all such premises remain [host country] territory, they shall be inviolable and subject to the exclusive control and authority of the United Nations. Where United Nations troops are co-located with military personnel of the host country, a permanent, direct and immediate access by the United Nations peace-keeping operation to those premises shall be guaranteed.

17. The Government undertakes to assist the United Nations peace-keeping operation as far as possible in obtaining and making available, where applicable, water, electricity and other facilities free of charge, or, where this is not possible, at the most favourable rate, and in the case of interruption or threatened interruption of service, to give as far as is within its powers the same priority to the needs of the United Nations peace-keeping operation as to essential government services. Where such utilities or facilities are not provided free of charge, payment shall be made by the United Nations peace-keeping operation on

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terms to be agreed with the competent authority. The United Nations peace-keeping operation shall be responsible for the maintenance and upkeep of facilities so provided.

18. The United Nations peace-keeping operation shall have the right, where necessary, to generate, within its premises, electricity for its use and to transmit and distribute such electricity.

19. The United Nations alone may consent to the entry of any government officials or of any other person not member of the United Nations peace-keeping operation to such premises.

Provisions, supplies and services, and sanitary arrangements

20. The Government undertakes to assist the United Nations peace-keeping operation as far as possible in obtaining equipment, provisions, supplies and other goods and services from local sources required for its subsistence and operations. In making purchases on the local market, the United Nations peace-keeping operation shall, on the basis of observations made and information provided by the Government in that respect, avoid any adverse effect on the local economy. The Government shall exempt the United Nations peace-keeping operation from general sales taxes in respect of all official local purchases.

21. The United Nations peace-keeping operation and the Government shall co-operate with respect to sanitary services and shall extend to each other the fullest co-operation in matters concerning health, particularly with respect to the control of communicable diseases, in accordance with international conventions.

Recruitment of local personnel

22. The United Nations peace-keeping operation may recruit locally such personnel as it requires. Upon the request of the Special Representative/Commander, the Government undertakes to facilitate the recruitment of qualified local staff by the United Nations peace-keeping operation and to accelerate the process of such recruitment.

Currency

23. The Government undertakes to make available to the United Nations peace-keeping operation, against reimbursement in mutually acceptable currency, [local] currency required for the use of the United Nations peace-keeping operation, including the pay of its members, at the rate of exchange most favourable to the United Nations peace-keeping operation.

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VI. STATUS OF THE MEMBERS OF THE UNITED NATIONS PEACE-KEEPING  
OPERATION

Privileges and immunities

24. The Special Representative, the Commander of the military component of the United Nations peace-keeping operation, the head of the United Nations civilian police, and such high-ranking members of the Special Representative/Commander's staff as may be agreed upon with the Government shall have the status specified in sections 19 and 27 of the Convention, provided that the privileges and immunities therein referred to shall be those accorded to diplomatic envoys by [national or international] law.

25. Members of the United Nations Secretariat assigned to the civilian component to serve with the United Nations peace-keeping operation remain officials of the United Nations entitled to the privileges and immunities of articles V and VII of the Convention.

26. 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.

27. Military personnel of national contingents assigned to the military component of the United Nations peace-keeping operation shall have the privileges and immunities specifically provided for in the present Agreement.

28. Unless otherwise specified in the present Agreement, locally recruited members of the United Nations peace-keeping operation shall enjoy the immunities concerning official acts and exemption from taxation and national service obligations provided for in sections 18 (a), (b) and (c) of the Convention.

29. Members of the United Nations peace-keeping operation shall be exempt from taxation on the pay and emoluments received from the United Nations or from a participating State and any income received from outside [host country/territory]. They shall also be exempt from all other direct taxes, except municipal rates for services enjoyed, and from all registration fees and charges.

30. Members of the United Nations peace-keeping operation shall have the right to import free of duty their personal effects in connection with their arrival in [host country/territory]. They shall be subject to the laws and regulations of [host country/territory] governing customs and foreign exchange with respect to personal property not required by them by reason of their presence in [host country/territory] with the United Nations peace-keeping operation. Special facilities will be granted by the Government for the speedy processing of entry and exit formalities for all members of the United Nations peace-keeping operation, including the military component, upon prior written notification. On departure from [host country/territory], members of the United Nations peace-keeping operation may, notwithstanding the above-mentioned exchange regulations, take with them such funds as the Special Representative/Commander certifies were received in

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pay and emoluments from the United Nations or from a participating State and are a reasonable residue thereof. Special arrangements shall be made for the implementation of the present provisions in the interests of the Government and the members of the United Nations peace-keeping operation.

31. The Special Representative/Commander shall co-operate with the Government and shall render all assistance within his power in ensuring the observance of the customs and fiscal laws and regulations of [host country/territory] by the members of the United Nations peace-keeping operation, in accordance with the present Agreement.

#### Entry, residence and departure

32. The Special Representative/Commander and members of the United Nations peace-keeping operation shall, whenever so required by the Special Representative/Commander, have the right to enter into, reside in and depart from [host country/territory].

33. The Government of [host country/territory] undertakes to facilitate the entry into and departure from [host country/territory] of the Special Representative/Commander and members of the United Nations peace-keeping operation and shall be kept informed of such movement. For that purpose, the Special Representative/Commander and members of the United Nations peace-keeping operation shall be exempt from passport and visa regulations and immigration inspection and restrictions on entering into or departing from [host country/territory]. They shall also be exempt from any regulations governing the residence of aliens in [host country/territory], including registration, but shall not be considered as acquiring any right to permanent residence or domicile in [host country/territory].

34. For the purpose of such entry or departure, members of the United Nations peace-keeping operation shall only be required to have: (a) an individual or collective movement order issued by or under the authority of the Special Representative/Commander or any appropriate authority of a participating State; and (b) a personal identity card issued in accordance with paragraph 35 of the present Agreement, except in the case of first entry, when the personal identity card issued by the appropriate authorities of a participating State shall be accepted in lieu of the said identity card.

#### Identification

35. The Special Representative/Commander shall issue to each member of the United Nations peace-keeping operation before or as soon as possible after such member's first entry into [host country/territory], as well as to all locally recruited personnel, a numbered identity card, which shall show full name, date of birth, title or rank, service (if appropriate) and photograph. Except as provided for in paragraph 34 of the present Agreement, such identity card shall be the only document required of a member of the United Nations peace-keeping operation.

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36. Members of the United Nations peace-keeping operation as well as locally recruited personnel shall be required to present, but not to surrender, their [United Nations peace-keeping operation] identity cards upon demand of an appropriate official of the Government.

Uniform and arms

37. Military members and the United Nations civilian police of the United Nations peace-keeping operation shall wear, while performing official duties, the national military or police uniform of their respective States with standard United Nations accoutrements. United Nations Security Officers and Field Service Officers may wear the United Nations uniform. The wearing of civilian dress by the above-mentioned members of the United Nations peace-keeping operation may be authorized by the Special Representative/Commander at other times. Military members and civilian police of the United Nations peace-keeping operation and United Nations Security Officers designated by the Special Representative/Commander may possess and carry arms while on duty in accordance with their orders.

Permits and licences

38. The Government agrees to accept as valid, without tax or fee, a permit or licence issued by the Special Representative/Commander for the operation by any member of the United Nations peace-keeping operation, including locally recruited personnel, of any [United Nations peace-keeping operation] transport or communication equipment and for the practice of any profession or occupation in connection with the functioning of the United Nations peace-keeping operation, provided that no licence to drive a vehicle or pilot an aircraft shall be issued to any person who is not already in possession of an appropriate and valid licence.

39. Without prejudice to the provisions of paragraph 37, the Government further agrees to accept as valid, without tax or fee, a permit or licence issued by the Special Representative/Commander to a member of the United Nations peace-keeping operation for the carrying or use of firearms or ammunition in connection with the functioning of the United Nations peace-keeping operation.

Military police, arrest and transfer of custody, and mutual assistance

40. The Special Representative shall take all appropriate measures to ensure the maintenance of discipline and good order among members of the United Nations peace-keeping operation, as well as locally recruited personnel. To this end personnel designated by the Special Representative/Commander shall police the premises of the United Nations peace-keeping operation and such areas where its members are deployed. Elsewhere such personnel shall be employed only subject to arrangements with the Government and in liaison with it in so far as such employment is necessary to maintain discipline and order among members of the United Nations peace-keeping operation.

41. The military police of the United Nations peace-keeping operation shall have the power of arrest over the military members of the United Nations peace-keeping operation. Military personnel placed under arrest outside their own contingent

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areas shall be transferred to their contingent Commander for appropriate disciplinary action. The personnel mentioned in paragraph 40 above may take into custody any other person on the premises of the United Nations peace-keeping operation. Such other person shall be delivered immediately to the nearest appropriate official of the Government for the purpose of dealing with any offence or disturbance on such premises.

42. Subject to the provisions of paragraphs 24 and 26, officials of the Government may take into custody any member of the United Nations peace-keeping operation:

(a) When so requested by the Special Representative/Commander; or

(b) When such a member of the United Nations peace-keeping operation is apprehended in the commission or attempted commission of a criminal offence. Such person shall be delivered immediately, together with any weapons or other items seized, to the nearest appropriate representative of the United Nations peace-keeping operation, whereafter the provisions of paragraph 47 shall apply mutatis mutandis.

43. When a person is taken into custody under paragraph 41 or paragraph 42 (b), the United Nations peace-keeping operation or the Government, as the case may be, may make a preliminary interrogation but may not delay the transfer of custody. Following such transfer, the person concerned shall be made available upon request to the arresting authority for further interrogation.

44. The United Nations peace-keeping operation and the Government shall assist each other in carrying out all necessary investigations into offences in respect of which either or both have an interest, in the production of witnesses and in the collection and production of evidence, including the seizure of and, if appropriate, the handing over of items connected with an offence. The handing over of any such items may be made subject to their return within the terms specified by the authority delivering them. Each shall notify the other of the disposition of any case in the outcome of which the other may have an interest or in which there has been a transfer of custody under the provisions of paragraphs 41-43.

45. The Government shall ensure the prosecution of persons subject to its criminal jurisdiction who are accused of acts in relation to the United Nations peace-keeping operation or its members which, if committed in relation to the forces of the Government, would have rendered such acts liable to prosecution.

#### Jurisdiction

46. All members of the United Nations peace-keeping operation including locally recruited personnel shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue even after they cease to be members of or employed by the United Nations peace-keeping operation and after the expiration of the other provisions of the present Agreement.

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47. Should the Government consider that any member of the United Nations peace-keeping operation has committed a criminal offence, it shall promptly inform the Special Representative/Commander and present to him any evidence available to it. Subject to the provisions of paragraph 24:

(a) If the accused person is a member of the civilian component or a civilian member of the military component, the Special Representative/Commander shall conduct any necessary supplementary inquiry and then agree with the Government whether or not criminal proceedings should be instituted. Failing such agreement, the question shall be resolved as provided in paragraph 53 of the present Agreement.

(b) Military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in [host country/territory].

48. The Secretary-General of the United Nations will obtain assurances from Governments of participating States that they will be prepared to exercise jurisdiction with respect to crimes or offences which may be committed by members of their national contingents serving with the peace-keeping operation. <sup>h/</sup>

49. If any civil proceeding is instituted against a member of the United Nations peace-keeping operation before any court of [host country/territory], the Special Representative/Commander shall be notified immediately, and he shall certify to the court whether or not the proceeding is related to the official duties of such member:

(a) If the Special Representative/Commander certifies that the proceeding is related to official duties, such proceeding shall be discontinued and the provisions of paragraph 51 of the present Agreement shall apply.

(b) If the Special Representative certifies that the proceeding is not related to official duties, the proceeding may continue. If the Special Representative/Commander certifies that a member of the United Nations peace-keeping operation is unable because of official duties or authorized absence to protect his interests in the proceeding, the court shall at the defendant's request suspend the proceeding until the elimination of the disability, but for not more than ninety days. Property of a member of the United Nations peace-keeping operation that is certified by the Special Representative/Commander to be needed by the defendant for the fulfilment of his official duties shall be free from seizure for the satisfaction of a judgement, decision or order. The personal liberty of a member of the United Nations peace-keeping operation shall not be restricted in a

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<sup>h/</sup> This provision has been inserted in the model agreement in order that all issues pertaining to this section be covered. Upon conclusion of a specific agreement, the provision in question could instead be inserted in a memorandum of understanding where further clarifications on the terms of an agreement are usually provided.

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civil proceeding, whether to enforce a judgement, decision or order, to compel an oath or for any other reason.

Deceased members

50. The Special Representative/Commander shall have the right to take charge of and dispose of the body of a member of the United Nations peace-keeping operation who dies in [host country/territory], as well as that member's personal property located within [host country/territory], in accordance with United Nations procedures.

VII. SETTLEMENT OF DISPUTES

51. Except as provided in paragraph 53, any dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party and over which the courts of [host country/territory] do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claims commission to be established for that purpose. One member of the commission shall be appointed by the Secretary-General of the United Nations, one member by the Government and a chairman jointly by the Secretary-General and the Government. If no agreement as to the chairman is reached within thirty days of the appointment of the first member of the commission, the President of the International Court of Justice may, at the request of either the Secretary-General of the United Nations or the Government, appoint the chairman. Any vacancy on the commission shall be filled by the same method prescribed for the original appointment, provided that the thirty-day period there prescribed shall start as soon as there is a vacancy in the chairmanship. The commission shall determine its own procedures, provided that any two members shall constitute a quorum for all purposes (except for a period of thirty days after the creation of a vacancy) and all decisions shall require the approval of any two members. The awards of the commission shall be final and binding, unless the Secretary-General of the United Nations and the Government permit an appeal to a tribunal established in accordance with paragraph 53. The awards of the commission shall be notified to the parties and, if against a member of the United Nations peace-keeping operation, the Special Representative/Commander or the Secretary-General of the United Nations shall use his best endeavours to ensure compliance.

52. Disputes concerning the terms of employment and conditions of service of locally recruited personnel shall be settled by the administrative procedures to be established by the Special Representative/Commander.

53. Any other dispute between the United Nations peace-keeping operation and the Government, and any appeal that both of them agree to allow from the award of the claims commission established pursuant to paragraph 51 shall, unless otherwise agreed by the parties, be submitted to a tribunal of three arbitrators. The provisions relating to the establishment and procedures of the claims commission shall apply, *mutatis mutandis*, to the establishment and procedures of the tribunal. The decisions of the tribunal shall be final and binding on both parties.

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54. All differences between the United Nations and the Government of [host country/territory] arising out of the interpretation or application of the present arrangements which involve a question of principle concerning the Convention shall be dealt with in accordance with the procedure of section 30 of the Convention. i/

#### VIII. SUPPLEMENTAL ARRANGEMENTS

55. The Special Representative/Commander and the Government may conclude supplemental arrangements to the present Agreement.

#### IX. LIAISON

56. The Special Representative/Commander and the Government shall take appropriate measures to ensure close and reciprocal liaison at every appropriate level.

#### X. MISCELLANEOUS PROVISIONS

57. Wherever the present Agreement refers to the privileges, immunities and rights of the United Nations peace-keeping operation and to the facilities the [host country/territory] undertakes to provide to the United Nations peace-keeping operation, the Government shall have the ultimate responsibility for the implementation and fulfilment of such privileges, immunities, rights and facilities by the appropriate local [host country/territory] authorities.

58. The present Agreement is concluded for the sole purpose of assisting in the implementation of Security Council/General Assembly resolution [number and date of resolution] and has no bearing upon the respective positions of the parties concerning the status of [territory]. j/

59. The present Agreement shall enter into force on ...

60. The present Agreement shall remain in force until the departure of the final element of the United Nations peace-keeping operation from [host country/territory] except that:

(a) The provisions of paragraphs 46 and 53 [and 54] k/ shall remain in force.

i/ In case the other party to the present Agreement is a party to the Convention.

j/ The insertion of this provision in an agreement is subject to its relevancy.

k/ See footnote i.

/...

(b) The provisions of paragraph 51 shall remain in force until all claims have been settled that arose prior to the termination of the present Agreement and were submitted prior to or within three months of such termination.

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**Annex II: Model of Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations. UN Doc. A/46/185 (23 May 1991)**



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Forty-sixth session  
Item 74 of the preliminary list\*

COMPREHENSIVE REVIEW OF THE WHOLE QUESTION OF PEACE-KEEPING  
OPERATIONS IN ALL THEIR ASPECTS

Model agreement between the United Nations and Member States  
contributing personnel and equipment to United Nations  
peace-keeping operations

Report of the Secretary-General

1. In paragraph 10 of its resolution 45/75 of 11 December 1990, the General Assembly welcomed "the initiative of the Secretary-General in preparing a model agreement between the United Nations and Member States contributing personnel to peace-keeping operations, while maintaining the flexibility needed to encompass different possible circumstances". Basing itself upon established practice and drawing extensively upon current agreements with countries contributing personnel, the Secretariat has prepared the model agreement annexed to the present report. The model is intended to serve as a basis for the drafting of individual agreements to be concluded between the United Nations and countries contributing personnel and equipment to a United Nations peace-keeping or similar operation. As such it is subject to modifications that may be agreed upon between the parties in each case.

2. The attached model, mutatis mutandis, will also serve as the basis for an agreement with a country not a Member State of the United Nations which may wish to contribute personnel and equipment to a United Nations peace-keeping operation.

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ANNEX

Draft model agreement between the United Nations and Member  
States contributing personnel and equipment to the United  
Nations peace-keeping operations

I. DEFINITIONS

1. For the purpose of the present agreement the following definitions shall apply: a/

II. ESTABLISHMENT OF THE UNITED NATIONS PEACE-KEEPING  
OPERATION

2. In the implementation of Security Council resolution [...] approving the report of the Secretary-General which contains the terms of reference of [the United Nations peace-keeping operation], an agreement is hereby concluded between the United Nations and the Government of [Participating State].

III. CONTRIBUTION

3. In accordance with the request of the Secretary-General, [the Participating State] shall contribute to [the United Nations peace-keeping operation] the following:

- [- type and number of personnel
- general description of equipment]

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a/ This section will contain definitions of the main terms used in the agreement such as:

"Participating State" means a State contributing military and/or civilian personnel to the United Nations peace-keeping operation.

"Head of Mission" means the Special Representative/Commander appointed by the Secretary-General with the consent of the Security Council.

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IV. APPLICATION OF THE STATUS AGREEMENT <sup>b/</sup>

4. The status agreement affirms the international nature of [the United Nations peace-keeping operation] as a subsidiary organ of the United Nations and defines the privileges and immunities, rights and facilities as well as the duties of [the United Nations peace-keeping operation] and its members.
5. Accordingly, the military and/or civilian personnel provided by [the Participating State] shall enjoy the privileges and immunities, rights and facilities and comply with the obligations provided for in the status agreement.
6. Pending the conclusion of such an agreement, the United Nations shall apply the customary principles and practices which are embodied in the model status-of-forces agreement.

V. AUTHORITY

7. During the period of their assignment to [the United Nations peace-keeping operation], the personnel made available by [the Participating State] shall remain in their national service but shall be under the command of the United Nations, vested in the Secretary-General, under the authority of the Security Council. Accordingly, the Secretary-General of the United Nations shall have full authority over the deployment, organization, conduct and direction of [the United Nations peace-keeping operation], including the personnel made available by [the Participating State]. In the field, such authority shall be exercised by the Head of Mission, who shall be responsible to the Secretary-General. The Head of Mission shall regulate the further delegation of authority.
8. The Head of Mission shall have general responsibility for the good order and discipline of [the United Nations peace-keeping operation]. Responsibility for disciplinary action with respect to military personnel made available by [the Participating State] shall rest with an officer designated by the Government of [Participating State] for that purpose.

VI. INTERNATIONAL CHARACTER

9. The functions of [the United Nations peace-keeping operation] are exclusively international and the personnel made available by [the Participating State] shall regulate their conduct with the interests of the United Nations only in view. Except on national administrative matters, they shall not seek or accept instructions in respect of the performance of their duties from any authority external to the United Nations, nor shall the Government of [Participating State] give such instructions to them.

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<sup>b/</sup> See model status-of-forces agreement for peace-keeping operations (A/45/594).

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10. The Government of [Participating State] may raise with the Secretary-General any matter relating to its personnel serving with [the United Nations peace-keeping operation].

#### VII. ADMINISTRATIVE AND FINANCIAL MATTERS

##### (a) Personnel

11. The Government of [Participating State] shall ensure that the personnel it provides meet the standards established by the United Nations for service with [the United Nations peace-keeping operation], *inter alia*, with respect to rank, experience, physical fitness, specialization, and knowledge of languages, and shall comply with whatever policies and procedures may be laid down by the United Nations regarding medical or other clearances, vaccinations, travel, shipping, leave or other entitlements.

12. During the period of their assignment to [the United Nations peace-keeping operation], the Government of [Participating State] shall be responsible for payment of whatever emoluments, allowances and benefits may be due to its personnel under national arrangements.

13. The United Nations shall convey to the Government of [Participating State] all pertinent information relating to the provision of the personnel mentioned in article III above, including matters of liability for loss or damage to United Nations property and compensation claims in respect of death, injury or illness attributable to United Nations service and/or loss of personal property.

##### (i) Military personnel

14. The general administrative and financial arrangements applicable to the provision of military personnel shall be those set forth in the Aide-mémoire for troop-contributing countries, the standard provisions applicable to military observers and other military personnel and/or the Notes for guidance of military observers applicable to [the United Nations peace-keeping operation], which are annexed hereto.

15. In the case of military observers, the United Nations shall meet the cost of travel to and from [the United Nations peace-keeping operation] and shall also pay a travel subsistence allowance while they are in official travel status. A mission subsistence allowance shall be payable for the duration of their assignment to [the United Nations peace-keeping operation] at a rate to be established by the Secretary-General, which may be subject to change. The mission subsistence allowance shall be deemed to constitute the total contribution of the United Nations towards the cost of meals, lodging, local transportation and other incidental expenses.

16. In the case of formed bodies of troops, the United Nations, in consultation with the Government of [Participating State], shall make

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arrangements for the transportation of troop contingents and their baggage to and from [the United Nations peace-keeping operation]. It shall reimburse the Government of [Participating State] at the standard rate(s) established by the General Assembly in respect of pay and allowances, supplementary payment for specialists, usage factor for personal clothing, gear and equipment, and personal weaponry, including ammunition. c/ It shall also provide an allowance of \$1.28 per person per day, payable in [appropriate local currency], to cover personal incidental expenses. d/ Appropriate accommodation and mess facilities shall be provided by the United Nations. Where the United Nations deems that the provision of such facilities is not possible or feasible, a mission subsistence allowance will be paid.

(ii) Civilian personnel

17. Civilian personnel provided by the Government of [Participating State] who are serving as part of a formed body of troops shall be assimilated to military members of formed bodies of troops for the purposes of this agreement.

18. Unless otherwise stated in writing, election observers, civilian police or other civilian personnel provided by the Government of [Participating State] and holding the status of experts on mission, shall be covered, mutatis mutandis, by the provisions of this agreement and of the Standard provisions and/or Notes for guidance applicable to military observers.

(b) Equipment/supplies/aircraft/vessels/services

19. The equipment/supplies/aircraft/vessel(s)/services described in article III above, shall remain the property of the Government of [Participating State]. Such equipment/supplies/aircraft/vessels/services shall not be substituted/withdrawn/curtailed/discontinued without the prior approval of the United Nations.

20. The value of all Government/contingent-owned equipment and other supplies made available to the United Nations shall be determined upon their arrival in and departure from [the United Nations peace-keeping operation]. The United Nations shall reimburse the Government of [Participating State] as compensation for usage of the equipment in the amount of the difference between the value of the equipment at the time it is brought in and the residual value when it is repatriated, in the case of short-term missions, or,

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c/ From July 1991, \$988 per person per month for pay and allowances (all ranks); \$291 per person per month supplementary payment for specialists, for up to a minimum of 25 per cent of logistic units and up to 10 per cent of other units; \$65 per person per month for the usage factor for personal clothing, gear and equipment (all ranks)/\$5 per person per month for personal weaponry, including ammunition (all ranks).

d/ This allowance may be phased out shortly.

/...



in the case of missions extending over several years, at rates of 30 per cent, 30 per cent, 20 per cent and 20 per cent per annum respectively over a four-year period. In the case that the full incoming value of the equipment is reimbursed to the Government of [Participating State], the residual value of outgoing equipment at the completion of an operation shall be credited to the United Nations.

21. The aforementioned aircraft/vessel(s) shall retain its/their national registration but when so requested by the United Nations, and at its expense, the Government of [Participating State] shall arrange to affix United Nations insignia and to paint the aircraft/vessel(s) in United Nations livery.

22. The United Nations shall reimburse to the Government of [Participating State] the costs of preparation and deployment. In addition, the costs of operation, maintenance and depreciation of the aircraft/vessel(s), including crew rotation costs, shall be reimbursed at a fixed monthly rate of [amount]. Other crew costs shall be reimbursed according to standard rates for troop reimbursement where the United Nations provides accommodation and mess facilities. Where the United Nations considers that the provision of such facilities is not possible or feasible, a mission subsistence allowance will be paid. In the case of aircraft, spare parts, repairs, overhaul and maintenance and depreciation costs shall be reimbursed at a standard hourly rate of [amount] up to a maximum of [number] flying hours per month, including training or test flights.

23. The United Nations shall arrange appropriate third-party insurance. Any claim by the Government of [Participating State] in respect of loss of aircraft/vessel(s) while in service with the United Nations, shall be settled by negotiation, based on the residual value of the aircraft/vessel(s) at the time of the loss. The United Nations shall also entertain claims for extraordinary repair costs when such costs may result from a major operational incident occurring while the aircraft/vessel(s) remain in service with [the United Nations peace-keeping operation].

#### VIII. JURISDICTION

24. Questions relating to allegations of criminal offence and civil liability of personnel provided by [the Participating State] shall be settled in accordance with the procedures provided for in the Status Agreement.

25. [The Participating State] agrees to exercise jurisdiction with respect to crimes or offences which may be committed by its military personnel serving with [the United Nations peace-keeping operation]. [The Participating State] shall keep the Head of Mission informed regarding the outcome of such exercise of jurisdiction.

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IX. NOTIFICATION OF WITHDRAWAL

26. The Government of [Participating State] shall not withdraw its personnel from [the United Nations peace-keeping operation] without giving adequate prior notification to the Secretary-General of the United Nations.

27. Should the services of any or all of the personnel provided by [the Participating State] no longer be required, the Secretary-General of the United Nations shall give adequate prior notification to the Government of [Participating State] for its withdrawal.

X. APPLICABILITY OF INTERNATIONAL CONVENTIONS

28. [The United Nations peace-keeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict. [The Participating State] shall therefore ensure that the members of its national contingent serving with [the United Nations peace-keeping operation] be fully acquainted with the principles and spirit of these Conventions.

XI. SETTLEMENT OF DISPUTES

29. Disputes between the United Nations and [the Participating State] concerning the interpretation or application of this agreement which are not settled by negotiation or other agreed mode of settlement shall be submitted to arbitration at the request of either party. Each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the Chairman. If within thirty days of the request for arbitration either party has not appointed an arbitrator or if within fifteen days of the appointment of two arbitrators the third arbitrator has not been appointed, either party may request the President of the International Court of Justice to appoint an arbitrator. The procedure of the arbitration shall be fixed by the arbitrators, and the expenses of the arbitration shall be borne by the parties as assessed by the arbitrators. The arbitral award shall contain a statement of the reasons on which it is based and shall be accepted by the parties as the final adjudication of the dispute.

XII. SUPPLEMENTAL ARRANGEMENTS

30. The Secretary-General of the United Nations and the Government of [the Participating State] may conclude supplemental arrangements to the present agreement.

/...

XIII. MISCELLANEOUS PROVISIONS

31. The present agreement shall enter into force on ..., the date that the personnel provided by [the Participating State] assumes duties with [the United Nations peace-keeping operation].

32. The present agreement shall remain in force until the departure of the personnel provided by [the Participating State] from [host country/territory] either in accordance with the terms of paragraphs 26 or 27 or upon termination of [the United Nations peace-keeping operation] except that the provisions of paragraph 29 above shall remain in force until all outstanding claims have been settled.

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