

UN Peacekeeping and The Model Status of Forces Agreement

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UNITED NATIONS PEACEKEEPING LAW REFORM PROJECT
SCHOOL OF LAW, UNIVERSITY OF ESSEX

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Executive Summary

The immense growth of United Nations (UN) peacekeeping in quantitative, qualitative and normative terms is one of the major developments of the post-Cold War era. Peacekeeping has become a key activity of the UN, despite the fact that it was not envisaged in the Charter. While UN peacekeeping reform has been a focus of intense discussion since the late 1980s, limited consideration has been given to how legal issues may impede or enhance the effectiveness of UN peacekeeping. The UN Peacekeeping Law Reform Project (the Project) was set up to identify these issues and, drawing heavily on a combination of practical and academic expertise, to recommend concrete ways to improve UN peacekeeping.

The Project is currently focussed on the preparation of two major reports for the UN peacekeeping community. The first concerns the Model UN Status of Forces Agreement (Model SOFA), and the second, the relevance of human rights standards for UN peacekeeping. The reports are being developed through a process of research and broad consultation. This is a reflection of the range of different expertise and experience that is required to form a full picture of the issues. The process commenced with initial consultations with UN Member States and others in New York in April 2010. The next stage of consultations will take place at the Experts' Workshop in London in August 2010. These background papers, which are being circulated for comment, have been prepared to form the basis for discussions at that workshop. The outcomes of the further consultations will inform the background papers, which will be built upon and developed into two final reports. These reports will be delivered to the UN peacekeeping community in early 2011.

The aim of the Project's work on the Model SOFA is to consider if revision of the Model SOFA is necessary due to the evolution of UN peacekeeping and the resulting changes in the body of UN practice since the Model SOFA was promulgated. To facilitate the effective execution of UN Security Council mandates and ensure that UN peacekeepers are appropriately protected and supported, it is essential that missions operate within a clear legal framework that reflects their mandate and activities.

The Model SOFA was promulgated by the UN Secretary-General in 1990. It is the model for the mission-specific SOFAs that are agreed between the UN and a host State following the mandating of a UN peacekeeping operation. The Model SOFA is often deemed by the Security Council to be legally in force until a mission-specific agreement is concluded. It governs the legal relationship between a UN peacekeeping operation and the host State, setting out the rights, obligations and duties as between the parties.

Since the promulgation of the Model SOFA, UN peacekeeping has undergone several significant developments that are not reflected in that document. Missions have become increasingly complex, robust and multidimensional. They have included military, police and civilian personnel as well as UN Volunteers and, in some instances have worked closely with civilian contractors. Since 1990, many UN peacekeeping operations have been authorised to use a greater spectrum of force in a greater range of situations. Many missions have been authorised to carry out sensitive early peacebuilding tasks relating to, for example, the promotion of human rights and security sector reform. Some have even been provided administrative and executive functions. More recently, one mission in particular has had to deal with difficult legal issues relating to the provision of support to local security services.

In response to the evolution of UN peacekeeping and the issues that have arisen, UN Member States and the Secretariat have undertaken a number of initiatives to address some of the challenges. These have been articulated in several agreements and documents which have altered the normative framework in which UN peacekeeping operations are conducted, but obviously are not reflected in the Model SOFA. The key initiatives with significant implications for UN peacekeeping operations are as follows:

- a) Development of the *Convention on the Safety of UN and Associated Personnel* (1994)
- b) Promulgation of the *Secretary-General's Bulletin on the Observance by UN Forces of International Humanitarian Law* (1999)
- c) Promulgation of the *Secretary-General's Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (2003)
- d) Publication of the *Zeid Report* on sexual exploitation and abuse (2003)
- e) Amendment of the *Model MOU between the UN and Troop Contributing Countries* (2007)
- f) Work on the criminal accountability of UN officials and Experts on Mission (2006-)
- g) Adoption of the General Assembly resolution 52/247 on limitation of liability (1998)
- h) Work on clarifying the Security Council mandated task of 'protection of civilians' (2009-)
- i) The conclusion of the *Relationship Agreement between the International Criminal Court and the United Nations* (2004)

Since the 1990s, a number of issues and challenges have arisen in relation to the application of the Model SOFA in contemporary peacekeeping contexts. Many of these issues have arisen from the developments in the nature and activities of UN peacekeeping since the promulgation of the Model SOFA and the lack of a clear legal framework. These issues and challenges have related to the following:

- a) Additional categories of UN peacekeeping personnel
- b) Third party claims and the limited liability of the UN
- c) Respect for International Humanitarian Law
- d) Respect for International Human Rights Law
- e) Respect for local laws and regulations
- f) UN communications, satellite and radio
- g) Facilities and premises for the UN
- h) Freedom of movement of UN personnel
- i) Standards of conduct and accountability of UN peacekeepers
- j) The use of force (in self-defence and to protect civilians)
- k) The activities of a UN peacekeeping mission and the work of the International Criminal Court

The shortcomings of the Model SOFA can cause unnecessary friction between a UN peacekeeping mission and a host State. The UN and host States are spending significant time and resources engaging on many of the elementary issues, which clearer a legal framework in the Model SOFA could assist to minimize. In some cases shortcomings in the Model SOFA may result in delays in mission start up and hamper operational effectiveness, with attention being diverted from implementing critical mandated tasks. In other cases shortcomings in the Model SOFA may result in the UN being seen as unaccountable for its actions. Of significant concern, shortcomings relating to the use of force by UN peacekeepers may leave troops and police unnecessarily exposed, or may inhibit them from acting when they otherwise might.

The Model SOFA is an important instrument, and crucial in establishing conditions for the efficient and effective functioning of a mission and providing appropriate protection for UN peacekeepers. However, the Model SOFA promulgated by the UN Secretary-General in 1990, and not updated

since, does not accurately reflect the current needs of UN peacekeeping. Change is required to remedy the current shortcomings and ensure that UN peacekeeping operations are deployed with the required legal protection to facilitate effective mandate implementation and a successful mission.

Revision of the Model SOFA would provide the opportunity to ensure that it is consistent with the UN agreements, decisions and internal documents that have legally binding character on peacekeepers. It would also provide the opportunity to ensure that it caters for the new tasks and approaches that have been developing in peacekeeping operations over the last 20 years. Updating the Model SOFA in this way would achieve several objectives: (1) it would provide improved protection to UN peacekeepers; (2) the contradiction between different sets of rules enshrined under different documents would be eliminated; (3) decisions of the UN would be implemented and reflected in the Model SOFA; (4) the SOFA would better serve as the key document for the legal relationship between the host State and UN; (5) when the Model SOFA is applied provisionally there would no longer be gaps of legal issues not addressed; (6) it would improve the quality and effectiveness of the SOFAs subsequently agreed by the UN with host States.

The Secretary-General promulgated the original Model SOFA and could be responsible for proposed updates to the Model based on practice and developments since 1990. Many of the possible changes are already implemented by the Secretary-General, as a matter of course, in mission-specific SOFAs.

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Acronyms and abbreviations

DDR	Disarmament, Demobilisation and Reintegration
DFS	Department of Field Support
DPKO	UN Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
EU	European Union
FARDC	Forces Armées de la République Démocratique du Congo / Armed Forces of the DRC
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
MINUGUA	UN Verification Mission in Guatemala
MINURCA	UN Mission in the Central African Republic
MINURCAT	UN Mission in the Central African Republic and Chad
MINURSO	UN Mission for the Referendum in the Western Sahara
MINUSTAH	UN Stabilization Mission in Haiti
MIPONUH	UN Civilian Police Mission in Haiti
MONUC	UN Mission in the DRC
MONUSCO	UN Organization Stabilization Mission in the DRC
MOU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization
OCHA	UN Office for the Coordination of Humanitarian Affairs
OLA	UN Office of Legal Affairs
ONUB	UN Operation in Burundi
ONUCA	UN Observer Group in Central America
ONUCI/UNOCI	UN Operation in Côte d'Ivoire
ONUMOZ	UN Operation in Mozambique
ONUSAL	UN Observer Mission in El Salvador
PCC	Police Contributing Country
POC	Protection of Civilians
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
SSR	Security sector reform
TCC	Troop Contributing Country
UN	United Nations
UNAMIC	UN Advance Mission in Cambodia
UNAMID	African Union-United Nations Hybrid Operation in Darfur
UNAMIR	UN Mission in Rwanda
UNAMSIL	UN Mission in Sierra Leone
UNAVEM I	UN Angola Verification Mission I
UNAVEM II	UN Angola Verification Mission II
UNDOF	United Nations Disengagement Observer Force
UNEF I	UN Emergency Force
UNEF II	UN Emergency Force II
UNFICYP	UN Force in Cyprus
UNGOMAP	UN Good Offices Mission in Afghanistan and Pakistan
UNIFIL	UN Interim Force in Lebanon
UNIIMOG	UN Iran-Iraq Military Observer Group

UNIKOM	UN Iraq-Kuwait Observation Mission
UNIPOM	UN India-Pakistan Observer Mission
UNMEE	UN Mission in Ethiopia and Eritrea
UNMIH	UN Mission in Haiti
UNMIK	UN Interim Administration Mission in Kosovo
UNMIL	UN Mission in Liberia
UNMIS	UN Mission in the Sudan
UNMISET	United Nations Mission of Support to East Timor
UNMOGIP	UN Military Observer Group in India and Pakistan
UNMOT	UN Mission of Observers in Tajikistan
UNOCI/ONUCI	UN Operation in Cote d'Ivoire
UNOGIL	UN Observation Group in Lebanon
UNOMIG	UN Observer Mission in Georgia
UNOMIL	UN Observer Mission in Liberia
UNOMUR	UN Observer Mission in Uganda-Rwanda
UNOSOM I	UN Operation in Somalia I
UNOSOM II	UN Operation in Somalia II
UNPROFOR	UN Protection Force (in the former Yugoslavia)
UNSCOB	UN Special Commission on the Balkans
UNTAC	UN Transitional Authority in Cambodia
UNTAES	UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
UNTAET	UN Transitional Administration in East Timor
UNTAG	UN Transition Assistance Group
UNTEA	UN Temporary Executive Authority
UNTSO	UN Truce Supervision Organisation
UNYOM	UN Yemen Observation Mission
UPR	Universal Periodic Review

1. Introduction

1 The immense growth of United Nations (UN) peacekeeping in quantitative, qualitative and normative terms is one of the major developments of the post-Cold War era. Peacekeeping has become a key activity of the UN despite the fact that it was not envisaged in the UN Charter.

2 The Secretary-General currently has command of around 124,000 UN peacekeeping personnel, at a cost of over US\$7 billion during the last financial year.¹ Since its inception, the demand for UN peacekeeping has grown dramatically, and the United Nations Security Council (UNSC) has mandated ever more robust and complex tasks for UN peacekeepers. With these greater demands, however, there have been significant and increasing challenges for the management of UN peacekeeping.

3 While UN peacekeeping reform has been a focus of intense discussion since the late 1980s, limited consideration has been given to how legal issues may impede or enhance the effectiveness of UN peacekeeping. The UN Peacekeeping Law Reform Project (the Project) was set up to identify these issues and, drawing heavily on a combination of practical and academic expertise, to recommend concrete ways to improve UN peacekeeping. The project is led by an academic with practitioner experience, and the University of Essex has a wealth of expertise to draw upon which is relevant to this work.

4 The Project is currently focussed on the preparation of two major reports for the UN peacekeeping community. The first concerns the Model UN Status of Forces Agreement (Model SOFA), and the second, the relevance of human rights standards for UN peacekeeping. The reports are being developed through a process of research and broad consultation. This is a reflection of the range of different expertise and experience that is required to form a full picture of the issues.

5 The process commenced with initial consultations in London and with UN Member States and others in New York in April 2010. In New York, the Project was presented to UN Member States at a briefing attended by over 90 representatives. The next stage of consultations will take place at an Experts' Workshop in London on 26 August 2010, which will be attended by government and UN Secretariat officials, military and police experts, academics, civil society and others. These background papers, which are being circulated for comment, have been prepared to form the basis for discussions at that workshop. The outcomes of these consultations will inform the background papers, which will be built upon and developed into two final reports, expected to be finalised in late 2010. The final reports will be substantive and comprehensive, setting out the impact of each issue on the effectiveness of UN peacekeeping, and any practical opportunities that may exist for positive change. The final reports will be presented to the UN peacekeeping community in New York in early 2011.

¹ UN Department of Peacekeeping Operations, "Background Note - United Nations Peacekeeping Operations," June 30, 2010, <http://www.un.org/en/peacekeeping/bnote.htm>.

6 The ultimate goal of the background papers is to facilitate the flow of information, views and feedback among a wide range of interested stakeholders. Both papers present initial analysis only, and further research is to be completed. The Project will continue to collect feedback from others, including members of various international and governmental organizations, non-governmental organizations (NGOs), and UN agencies. The work to date has led to preliminary findings and recommendations, and these will be tested by the further consultations and research.

7 The aim of this background paper is to review the Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs) concluded by the UN and to identify developments in the body of UN practice, particularly since 1990, that need to be reflected in the Model SOFA. A number of central aspects of today's UN peacekeeping efforts are not well addressed in the Model SOFA. Clear legal arrangements that support a mission's mandate and activities are essential for ensuring the effectiveness of an operation.

8 The Model SOFA (A/45/594) was prepared and promulgated by the UN Secretary-General in 1990. It sets out the rights, obligations and duties as between the UN and the host state of a UN peace operation. The Model SOFA is the starting point for discussions between the UN and a host State on conclusion of a mission-specific SOFA or SOMA. The Model SOFA is often deemed by the Security Council to be legally in force until an agreement specific to the mission is concluded - a process which can take some time.

9 When the Model was drafted in 1990, it reflected the existing practice of UN peacekeeping operations and was based on SOFAs concluded in earlier UN peacekeeping operations. However, 20 years have passed since the adoption of the Model SOFA and it no longer properly reflects the practice of UN peacekeeping. Since the promulgation of the Model SOFA, UN peacekeeping operations have undergone significant evolution.

10 The background paper aims to identify the areas of developing UN practice, both in agreed SOFAs and UN practice, which could warrant modifications to the Model SOFA to ensure that it reflects the current reality. The scope of the report does not cover the SOFAs concluded after 2006, which will be a part of further research.

11 The paper is also designed for a general and multidisciplinary audience and as such different readers will be familiar with different areas covered. The report is broken down into five sections:

- (1) This introduction which sets the nature and scope of the study and project;
- (2) A review of the context and background, which briefly addresses a number of issues including: evolution of UN peacekeeping operations; the UN legal position; the Model SOFA's history, purpose and content; the usage of the Model SOFA; and key UN developments since the Model SOFA's promulgation in 1990;
- (3) A preliminary analysis of the potential problems arising from the Model SOFA;
- (4) A general view of the potential approach to resolving the identified problems; and
- (5) A list of questions for discussion at the Experts' Workshop that will take place in London at the end of August 2010.

2. Context and background

2.1 Development/evolution of peacekeeping operations²

12 This section offers a summary of the evolution of UN peacekeeping prior to the promulgation of the Model SOFA in 1990, and from 1990 to the present. For the purposes of examining the Model SOFA it is important to understand the key developments that took place in UN peacekeeping practice prior, and subsequent to, the conclusion of that document.

a) UN peacekeeping prior to the promulgation of the Model SOFA in 1990

13 The collective security system articulated in the UN Charter failed to come into existence because of the escalating Cold War into which the Organisation was born. The five permanent members of the Security Council (P-5), particularly the US and Soviet Union, demonstrated a disinclination to cooperate on the maintenance of international peace and security, and with the existence of the veto power, the Council became paralysed. Although collective enforcement action was taken by the UN in defence of South Korea, 1950-53, this was an anomaly only made possible by the absence of the USSR from the Council when the relevant resolutions were passed.³

14 In an effort to overcome the paralysis of the Security Council and to maintain a relevant role for the UN in the maintenance of international peace and security the General Assembly mandated the first UN observer mission, the UN Special Commission on the Balkans (UNSCOB), 1947-1951. This was soon followed by the UN Truce Supervision Organisation (UNTSO), 1948-present, and the UN Military Observer Group in India and Pakistan (UNMOGIP), 1949-present. These early missions were fairly passive, and limited in their activities with tasks focussed on investigating and responding to complaints of the parties and providing information on troop movements.

15 The nature of UN peacekeeping underwent a significant development through the mandating of the UN Emergency Force (UNEF I)⁴, again by the General Assembly, in response to the 1956 Suez crisis. UNEF I was deployed to secure a cessation of hostilities, monitor the cease-fire and ensure the withdrawal of forces. This was a much more active role for the UN and the first time armed troops were deployed under UN command, creating a new international security tool falling somewhere between the diplomatic and the coercive enforcement roles envisaged in the Charter. This armed, interpositional cease-fire monitoring operation set the precedent for many missions to follow in what would come to be identified as ‘traditional’ peacekeeping.

16 The period 1956-1978 has been referred to as the ‘first golden age of UN peacekeeping’⁵ as there was a surge in the demand for UN peace operations. Ten operations⁶ were mandated during that time, before Cold War tensions were reawakened in the late 1970s. The operations mandated during this period were primarily of the traditional peacekeeping type, characterised by large

² This section draws heavily on the analysis of the evolution of UN peacekeeping in Haidi Wilmot, “The emerging role of the UN in the protection of civilians in peacekeeping operations,” *Forthcoming paper* (2010).

³ See UN Security Council Resolutions 82 (1950) 25 June 1950, 83 (1950) 27 June 1950, 84 (1950) 7 July 1950 and 85 (1950) 31 July 1950.

⁴ UN General Assembly Resolution 998, 4 November 1956.

⁵ M. Goulding, “The evolution of United Nations peacekeeping,” *International Affairs (Royal Institute of International Affairs 1944-)* 69, no. 3 (1993): 452.

⁶ UN Emergency Force (UNEF I), 1956-67; UN Observation Group in Lebanon (UNOGIL), 1958; UN Operation in the Congo (ONUC), 1960-64; UN Temporary Executive Authority (UNTEA), 1962-63; UN Yemen Observation Mission (UNYOM), 1963-64; UN Force in Cyprus (UNFICYP), 1964-present; UN India-Pakistan Observer Mission (UNIPOM), 1965-6; UN Emergency Force II (UNEF II), 1974-79; UN Disengagement Observer Force (UNDOF) 1974-present; and UN Interim Force in Lebanon (UNIFIL), 1978-present.

military deployments focussed on ceasefire monitoring and the supervision of the withdrawal of forces. One mission that stands in stark contrast others mandated during the Cold War is the UN Operation in the Congo (ONUC) deployed in 1960.

17 ONUC was mandated to assist in restoring law and order, to help quell the civil conflict and to supervise the withdrawal of Belgian troops. Unlike other deployments, there was no ceasefire to monitor, the UN force was sent into the middle of an active civil war with the authorisation to use force in a way that led many countries to protest that it had exceeded its mandate and gone beyond the appropriate confines of peacekeeping. The mission was not only very politically controversial, but proved a heavy financial burden on the Organisation. It set a precedent for the deployment of UN forces into civil conflicts and it was a precursor to the later inclusion of both the robust use of force and early peacebuilding tasks in UN operations. However, the political and financial trauma it caused the Organisation probably delayed the movement back towards such complex, robust operations.⁷

18 Due to the reawakening of Cold War tensions no new UN peace operations were deployed between 1979 and 1988. However, as the Cold War was coming to a close the UN experienced a surge in UN peacekeeping. Between 1988 and 1993 the Security Council mandated 20 peacekeeping operations, however only five of these missions were mandated prior to 1990⁸. Many of the operations deployed during this surge evidenced a qualitative transformation of the activities mandated (explored in further detail below). However, of the missions mandated before 1990 only one moved significantly beyond the traditional peacekeeping paradigm. In addition to more traditional peacekeeping roles relating to ensuring the withdrawal of forces and the end of hostilities, the UN Transition Assistance Group in Namibia (UNTAG) was mandated to assist in the supervision and control of elections, to ensure that all discriminatory laws were repealed, political prisoners were released, refugees were permitted to return and intimidation of any kind was prevented and to ensure that law and order were impartially maintained.⁹ The mission was also mandated to include military, police and civilian personnel.

19 In summary, the majority of UN peacekeeping operations deployed prior to the promulgation of the Model UN SOFA in 1990 conformed to the traditional peacekeeping paradigm. Many were interpositional, cease-fire monitoring, military deployments. Others somewhat stretched the paradigm including more intrusive tasks relating to the supervision of demobilisation processes and the return of refugees and internally displaced persons (IDPs). However, prior to the promulgation of the Model SOFA only two missions went significantly beyond the traditional peacekeeping paradigm, ONUC, with its robust use of force, and UNTAG, with its election supervision and rule of law responsibilities. Many of the complex multidimensional tasks that we have come to associate with modern UN peacekeeping operations, such as the promotion of human rights, security sector reform (SSR) and the protection of civilians had not yet been mandated, and were not, therefore reflected in the Model SOFA.

b) UN peacekeeping after the promulgation of the Model SOFA in 1990

20 There was a fundamental change in UN peacekeeping in the early 1990s. As noted above, as the Cold War came to a close the UN experienced both a surge in the number of peacekeeping operations mandated and a transformation in the types of activities authorised. This has been

⁷ W. J Dorsch, *The evolution of UN peacekeeping: case studies and comparative analysis* (Palgrave Macmillan, 1993), 8.

⁸ UN Good Offices Mission in Afghanistan and Pakistan (UNGOMAP), 1988-89; UN Iran-Iraq Military Observer Group (UNIIMOG), 1988-91; UN Angola Verification Mission I (UNAVEM I), 1988-91; UN Transition Assistance Group (UNTAG), 1989-90; UN Observer Mission in Central America (ONUCA), 1989-91.

⁹ UN Security Council Resolution 632 (1989), 16 February 1989.

attributed to a number of factors associated with the end of the Cold War including an increase in civil wars as the superpower pressure that had suppressed internal divisions was removed, active assertion of Western commitment to human rights and democracy and an increase in superpower cooperation in the Security Council.¹⁰

21 Between 1990 and 1993 the Security Council mandated 15 peace operations.¹¹ Where early peacekeeping operations had mainly sought to freeze a conflict, the new peace operations sought to address the root causes of conflict through early peacebuilding activity including: electoral assistance; the protection and promotion of human rights; mine action; disarmament, demobilisation and reintegration (DDR) of combatants; SSR and other rule of law-related activities¹². These missions were multidimensional, comprising military, police and civilian components, and intrusive, often involved in the internal workings of states. For example, the UN Transitional Authority in Cambodia (UNTAC), 1992-93, was mandated to assist the implementation of many aspects of the Cambodian peace agreements. Its mandate included activities related to the promotion of human rights, the organization and conduct of elections, military arrangements, civil administration, the maintenance of law and order, the repatriation and resettlement of refugees and IDPs and the rehabilitation of essential infrastructure. A year into the mandate, the mission assumed powers of arrest and detention and, through the newly established Office of the Special Prosecutor, it assumed the power to prosecute suspects in cases of serious violations of local law.¹³

22 Another trend that was also evident during this period was the mandating of robust, peace enforcement activity. In a number of missions the use of force was mandated to ensure a safe and secure environment, and to support the delivery of humanitarian assistance. This shift occurred primarily because of growing international concern with humanitarian situations, promoted by the 'CNN effect' - the broadcasting of images of suffering populations - which caused democratic constituencies to put pressure on their governments to 'do something'.¹⁴ This led to UN peacekeeping operations being deployed into less permissive environments responding to ongoing internal conflicts and humanitarian situations. Examples of these deployments include UN operations in Somalia (UNOSOM I and II), the former Yugoslavia (UNPROFOR) and Haiti (UNMIH).

23 The mandating of such robust tasks in the absence of appropriate resources, doctrine and command systems led to several critical events, which resulted in a retreat by the international community from UN peacekeeping. The first was the dramatic failure of peace enforcement activity by US personnel in support of the UN in Mogadishu in 1993. The second was the failure of the UN mission in Rwanda (UNAMIR) to halt or impede the 1994 genocide. And the third was the failure of UN peacekeepers to prevent the 1995 Srebrenica massacre. Following the failures of UN peacekeeping in Somalia, Rwanda and Bosnia, the utility of UN peacekeeping as a tool for the

¹⁰ For further analysis see S. R Ratner, *The new UN peacekeeping: building peace in lands of conflict after the Cold War* (Palgrave Macmillan, 1995), 14-15; A. J Bellamy, P. Williams, and S. Griffin, *Understanding peacekeeping* (Polity, 2009), 78-79.

¹¹ UN Angola Verification Mission II (UNAVEM II), 1991-95; UN Iraq-Kuwait Observation Mission (UNIKOM), 1991-2003; UN Mission for the Referendum in Western Sahara (MINURSO), 1991-present; UN Observer Mission in El Salvador (ONUSAL) 1991-95; UN Advance Mission in Cambodia (UNAMIC), 1991-92; UN Transitional Authority in Cambodia (UNTAC), 1992-93; UN Operation in Mozambique (ONUMOZ), 1992-94; UN Protection Force in Yugoslavia (UNPROFOR), 1992-95; UN Operation in Somalia I (UNOSOM I), 1992-93; UN Operation in Somalia II (UNSOM II), 1993-95; UN Mission in Haiti (UNMIH), 1993-96; UN Observer Mission in Liberia (UNOMIL), 1993-97; United Nations Observer Mission in Uganda/Rwanda (UNOMUR), 1993-94; UN Assistance Mission in Rwanda (UNAMIR), 1993-96; UN Observer Mission in Georgia (UNOMIG), 1993-2009

¹² UN Department of Peacekeeping Operations, "United Nations Peacekeeping Operations. Principles and Guidelines (Capstone Doctrine)" (United Nations Publications, January 2008), 26.

¹³ UN Security Council Resolution 745 (1992), 28 February 1992.

¹⁴ Bellamy, Williams, and Griffin, *Understanding peacekeeping*, 85.

maintenance of international peace and security was questioned and UN peacekeeping entered a period of retreat, while the international community reflected. During the period 1995 to 1999 few new missions were authorised in areas in which the UN was not already engaged.

24 The turn of the century witnessed a renaissance of UN peace operations with the mandating of a number of major missions and the release of the seminal *Report of the Panel on United Nations Peace Operations* (Brahimi Report)¹⁵. Key missions mandated during this time include the UN Interim Administration Mission in Kosovo (UNMIK), the UN Mission in Sierra Leone (UNAMSIL), the UN Transitional Administration in East Timor (UNTAET), and the UN Mission in the Democratic Republic of the Congo (MONUC). The mandates for all of these missions carried on trends of including early peacebuilding and peace enforcement tasks, and several exhibited further qualitative shifts. The missions in Kosovo and Timor Leste were given sweeping civil administration and institutional development functions. While UNAMSIL and MONUC were, for the first time, provided specific authorisation to use force to afford direct protection to civilians under threat of violence. This period also heralded an era of the UN working in close cooperation with external peace operations actors: the North Atlantic Treaty Organization (NATO) in Kosovo; an Australian-led force in Timor Leste; the United Kingdom in Sierra Leone; and the European Union (EU) in the Democratic Republic of the Congo (DRC).

25 The expansion and increased complexity of mission mandates was accompanied by a diversification of personnel to support them. In addition to UN military, police and civilian personnel there was an increase in the number of United Nations Volunteers (UNVs) and missions started engaging civilian contractors. The diversification of personnel carried with it challenges and uncertainties regarding the application of the UN's privileges and immunities.

26 Additional challenges were presented by the transitional administrations (UNMIK and UNTAET). The vesting of administrative and executive functions in the missions raised a raft of legal issues relating to the transfer and exercise of the associated powers.

27 Between 2003 and 2010 eight missions were mandated and a high operational tempo was maintained. Many of the missions deployed had complex, robust, multidimensional mandates, examples included UN missions in Liberia (UNMIL), Côte d'Ivoire (UNOCI), Sudan (UNMIS), Haiti (MINUSTAH), Darfur (UNAMID) and Chad and the Central African Republic (MINURCAT). This period also witnessed a continuation of the trend of the UN working closely with external peace operations actors, ECOMOG in Liberia, another Australian-led force in East Timor, the AU in Darfur and the EU in Chad. However, during this period UN peacekeeping was challenged by a number of issues concerning the misconduct of UN personnel, the failure of UN forces to protect civilians, and the provision of support to government security elements perpetrating human rights abuses.

28 Allegations of serious misconduct by UN peacekeepers date back to the early 1990s. UN peacekeepers in UNTAC were accused of committing sexual crimes and peacekeepers in Bosnia and Kosovo were alleged to have been involved in human trafficking and prostitution rackets. In the early 2000s allegations of sexual exploitation and abuse by UN peacekeepers burgeoned – including with respect to missions in Haiti, Liberia, Sierra Leone and East Timor. However, it was in response to reactions in 2004 regarding the horrific and widespread sexual exploitation and abuse committed by UN peacekeepers in the DRC that greater effort was made to address the problem. It became a high-profile political issue for the UN, undermining the Organisation's good work in many countries and threatening the reputation of UN peacekeeping.

¹⁵ Lakhdar Brahimi, *Report of the Panel on United Nations Peace Operations (Brahimi Report)*. UN Doc A/55/305-S/2000/809 (2000) (UN, August 21, 2000), http://www.un.org/peace/reports/peace_operations/.

29 The UN undertook a raft of measures to combat sexual exploitation and abuse in UN peacekeeping missions, including the appointment of HRH Prince Zeid Ra'ad Zeid Al-Hussein, at the time the Permanent Representative of Jordan to the UN, as the Secretary-General's adviser on the issue and the commissioning of a report. The 2005 report 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations'¹⁶, which came to be known as the 'Zeid Report' made a number of recommendations, which were acted upon by various parts of the UN. One of the recommendations resulted in amendments to the Model Memorandum of Understanding between the UN and Troop-Contributing Countries (Model MOU) (A/61/19 Part III), comprising the addition of provisions concerning the obligations and responsibilities relating to the serious misconduct of contingent personnel.

30 Issues regarding the legality and desirability of the use of force by UN peacekeepers have existed since the deployment of UNEF. While the Brahimi panel attempted to progress the issue with the introduction of the concept of *robust peacekeeping* the operational difficulties and absence of strategic clarity surrounding the use of force continue to be problematic. This issue was provided added salience with the increase of missions with robust mandates to support the delivery of humanitarian assistance. It became even more important after 1999 with the introduction of mandates authorising the use of force for the protection of civilians.¹⁷ The protection of civilians is currently mandated in ten UN peacekeeping missions. It is the centrepiece and one of, if not *the* primary purpose of (UNAMID)¹⁸ and (MINURCAT)¹⁹, and has also been explicitly identified by the Security Council as the highest priority for MONUC²⁰. The effective implementation of protection of civilians mandates has proven problematic, not least due to the lack of clarity regarding the accompanying use of force.²¹ MONUC, in particular has had mixed success implementing its protection mandate. It was the high profile failures of MONUC to implement its protection mandate²² that caused the UN Member States and the Secretariat to undertake work to address the issue – work that is currently underway. In the 2009 Department of Peacekeeping Operations (DPKO) publication on peacekeeping reform²³, the protection of civilians was identified as one of three key challenges for UN peacekeeping.

31 UN peacekeeping was confronted with a further challenge when it was revealed, in 2009, that MONUC had been providing support to elements of the Armed Forces of the DRC (FARDC) that were committing serious human rights abuses. The Mission was subject to high profile criticism from NGOs, and difficult legal issues were brought to light. In response, the UN Office of Legal Affairs provided advice that the mission could be held responsible for providing support to the FARDC units

¹⁶ UN General Assembly Resolution A/59/710 (2005), 24 March 2005.

¹⁷ For instance see the following missions MONUC/DRC (1999), ONUB (2004), UNOCI (2004), UNAMSIL (1999), UNMIL (2003), MINUSTAH (2004), UNMIS (2005), UNAMID (2007), MINURCAT (2007), MONUSCO (2010). List missions.

¹⁸ UN Security Council Resolution 1769 (2007), 31 July 2007, at OP15(a)(ii).

¹⁹ UN Security Council Resolution 1778 (2007), 25 September 2007, at OP2(a)-(d).

²⁰ UN Security Council Resolution 1856 (2008), 22 December 2008, at OP2.

²¹ Victoria Holt, Glyn Taylor, and Max with Kelly, *Protecting Civilians in the Context of UN Peacekeeping Operations. Successes, Setbacks and Remaining Challenges. Independent study jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs* (New York, USA: United Nations Publications, 2009),

<http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/FINAL%20Protecting%20Civilians%20in%20the%20Context%20of%20UN%20PKO.pdf>.

²² There were violent protests against MONUC following the mission's failure to protect civilians in Bukavu (2004) and Dungu (2008).

²³ UN Department of Peacekeeping Operations, "A New Partnership Agenda. Charting a New Horizon for UN Peacekeeping" (United Nations Publications, July 2009),
<http://www.un.org/en/peacekeeping/documents/newhorizon.pdf>.

committing the violations. This resulted in the development by the Mission of a conditionality policy for support to the Congolese Armed Forces.

32 In summary, since the promulgation of the UN Model SOFA in 1990, UN peacekeeping has undergone significant developments that are not reflected in that document. Missions have become increasingly complex, robust and multidimensional. Many UN peacekeeping operations are authorised to use a greater spectrum of force in a greater range of situations. Many missions are authorised to carry out sensitive early peacebuilding tasks relating to, for example, the promotion of human rights and security sector reform. Some have even been provided administrative and executive functions. UN missions since 1990 have included military, police and civilian personnel as well as UNVs and, in some instances have worked closely with civilian contractors. Amendments have been made to the Model MOU between the UN and Troop Contributing Countries (TCCs) to include provisions on conduct and discipline.

33 Missions have had to deal with some difficult legal issues regarding the provision of support to local security services. The UN community is working to bring some clarity to the protection of civilians mandate and deal with difficult questions regarding the associated use of force. All of these are important developments and have rendered the nature of UN peacekeeping significantly different from that which existed at the time of the promulgation of the Model SOFA. In order to facilitate the effective execution of UN Security Council mandates and to ensure that UN peacekeepers are appropriately protected and supported, it is essential that the Model SOFA reflects the nature of contemporary UN peacekeeping.

2.2 Legal position of the United Nations

34 Before turning to UN peacekeeping and human rights law, it is first necessary to set out a number of foundational points on the UN and international law.

a) Legal status of the UN

35 It is clear today that the UN possesses international rights and duties as a result of its own legal personality, which is separate and distinct from that of Member States.²⁴ The International Court of Justice (ICJ) has stated, however, that the UN's personality does not entail the "totality of rights and duties recognized by international law" of a State, but depends on "its purposes and functions as specified or implied in the Charter and developed in practice".²⁵ The attribution of this international personality is indispensable for the UN to achieve its purposes.²⁶ However, the UN's functions and practice are essential in determining its scope of rights and obligations.

36 As a corollary, the UN may enforce its rights by bringing claims against other subjects of international law (e.g. States) and, correspondingly, other subjects may enforce their rights against the Organization by bringing claims against it.²⁷

²⁴ Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge University Press, 2008), 46.

²⁵ ICJ, *Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion*, 1949 ICJ Reports 174, 180 (ICJ 1949).

²⁶ Ibid., 1949:178.

²⁷ Shaw, *International Law*, 1200; Scott P. Sheeran, "A Constitutional Moment: United Nations Peacekeeping in the Democratic Republic of Congo," *Pending publication*. (2010): 7.

b) UN and international law

37 It is clear that the Charter is legally binding on the UN as its constituent treaty. This means that organs of the UN, such as the General Assembly, the UNSC and the Secretariat, are bound to respect the Charter and their own competence under the Charter. Subsidiary organs established by the General Assembly and the UNSC are also bound by the Charter.²⁸ A peacekeeping operation constitutes a subsidiary organ of either the Council (e.g. MINUSTAH, UNMIS) or the Assembly (e.g. UNEF I).

38 The organization is bound by treaties it enters into with third parties, for example, Status of Forces agreements entered into with States hosting UN peacekeeping operations. It is also bound by multilateral treaties to which it is subject, such as the 1946 Convention on Privileges and Immunities of the United Nations, or a party to, such as the 2004 Relationship Agreement between the UN and the International Criminal Court (ICC).

39 It is accepted in the decisions of the international courts and amongst international lawyers, including the UN Office of Legal Affairs, that customary international law may also apply to the UN.²⁹ However, which international legal rules of a customary nature apply in a given situation may be subject to debate. Legal rules in treaties to which the UN is not a party – general human rights instruments and international humanitarian law – may also be applicable to the UN, as due to their wide adherence, they may have become recognized as customary international law.

i) Relevant rules of responsibility of international organizations

40 The International Law Commission's draft Articles on Responsibility of International Organizations (the draft Articles) are a progressive development and codification of rules of customary international law, and apply to the UN as an international organization. These draft Articles set out the framework rules, often called secondary rules, that describe how the responsibility of international organizations is engaged.

41 The draft Articles contain the basic principle that violations of international obligations trigger the responsibility of an international organisation.³⁰ They provide that every *internationally wrongful act* of an international organization engages the international responsibility of that organization.³¹ Internationally wrongful acts are defined as conduct consisting of an act or omission that is not only attributable to the organization, but constitutes a breach of the international obligations of that organization.

²⁸ Articles 7(2), 22 and 29 of the Charter.

²⁹ ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion.*, 1980 ICJ Reports 73, 89 and 90 (ICJ 1980). See Jeffrey Gettleman, "U.N. Told Not to Join Congo Army in Operation," *The New York Times*, December 10, 2009, sec. International / Africa, <http://www.nytimes.com/2009/12/10/world/africa/10congo.html>. This last article has a link to UN internal legal advice leaked to the press available at: <http://documents.nytimes.com/united-nations-correspondence-on-peacekeeping-in-the-democratic-republic-of-the-congo#p=1>.

³⁰ Articles 3 and 4.

³¹ Article 3.

42 To demonstrate responsibility under international law, it is therefore necessary to demonstrate that a given act or omission is not only attributable to the UN, but also constitutes a violation of an international obligation. In this context, it is important to identify those rules of international law that bind the UN, i.e. often called the primary rules.

43 The general rule on attribution provides that the conduct of an organ/agent of an international organization in the performance of their functions is considered as an act of that organization.³² This is regardless of the position the organ/agent holds in respect of the organization. The determination of the functions of organs/agents is made pursuant to the rules of the respective organization.

44 A major legal issue in UN peacekeeping operations is the attribution of responsibility in connection to organs and agents placed at the disposal of the UN by a Member State (e.g. military contingents). The most widely accepted approach, reflected in the draft Articles, is that the conduct of an organ of a State that is placed at the disposal of an international organization shall be considered an act of the international organisation if the organization exercises *effective control* over the conduct of that organ. Generally, that means where the Secretary-General assumes the command and control of military forces, the Organization is responsible under international law for the acts of those forces.

45 Attribution to the UN does not preclude the ‘parallel responsibility’ of States for the activities of national military or police contingents part of UN peacekeeping operations.³³ It is possible for responsibility to be attributed both to the Organization and a contributing State.³⁴ As a matter of practice however, conduct of UN peacekeeping forces has tended to be attributed to the Organization only and UN immunities asserted, rather than also attributed to the contributing State of contingent members.³⁵

³² Article 5.

³³ Andrew Clapham, “Human Rights Obligations of Non-State Actors,” in *The Collected Courses of the Academy of European Law*, vol. 1 (New York, USA: Oxford University Press, n.d.), 135-136, <http://iheid.ch/faculty/clapham/NSAlecture/HR%20obligations%20of%20non-State%20actors.pdf>.

³⁴ For a detailed discussion and categorisation of parallel attribution of wrong acts, see P. Klein, “The Attribution of Acts to International Organizations,” in *The Law of International Responsibility* (USA: Oxford University Press, 2010), 306-314; A. Orakhelashvili, “Division of Reparation between Responsible Entities,” in *The Law of International Responsibility* (USA: Oxford University Press, 2010), 653-656; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (USA: Oxford University Press, 1995), 47.

³⁵ For example, see *Behrami and Behrami v France, Samarat v France, Germany and Norway*, App Nos 71412/01 & 78166/01 (2 May 2007) and consequent ECtHR cases; *Mothers of Srebrenica v. Netherlands and the United Nations*, Appeal Judgment (May 30, 2010), Case number: 200.022.151/01, English translation available at http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf; <

for a precedent in favour of national responsibility in the context of British forces part of the UN peacekeeping operation in Cyprus, see *Attorney-General v Nissan* [1970] AC 179; 44 ILR 360, 375-376; for discussion, see P. Klein and P. Sands, *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001), 525-527; F. Seyersted, *United Nations forces in the law of peace and war* (AW Sijthoff, 1966), 119; UN Secretary-General, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations. UN Doc. A/51/389* (UN, 1966), 16-17.

ii) UN peacekeeping and international law

46 UN peacekeeping operations were not envisaged by the founders of the Organization and accordingly are not explicitly provided for in the Charter. Falling somewhere between the pacific settlement of disputes (Ch VI) and the more coercive measures (Ch VII) provided for in the Charter, their specific legal basis was somewhat unclear. In 1962 the ICJ provided an advisory opinion in the *Certain Expenses* case³⁶ which asserted that the UNSC had the implied power not only to establish peacekeeping operations, but also to delegate such powers to the Secretary-General. The Council over time has developed the practice of articulating that certain parts of peacekeeping mission mandates are based on Chapter VII of the Charter (e.g. use of force). There is much more that could be said on this issue, but it is not required at this point.

47 The ‘Guiding Principles’ of UN peacekeeping - consent, impartiality and non-use of force except in self-defence and defence of the mandate - were developed during the UNEF I deployment and expanded upon during UNEF II and UNFICYP. The three principles were initially intended to guide the deployment and activity of UN interpositional cease-fire monitoring missions in interstate conflicts. As UN peacekeeping evolved to meet the needs of the changing international security environment, and missions were often deployed into complex intrastate conflicts, the principles were stretched and constantly reinterpreted. Notwithstanding, each year the UN Special Committee on Peacekeeping Operations (C-34) reaffirms the principles in its annual report and the Secretariat publication, ‘UN Peacekeeping Operations, Principles and Guidelines’ (the Capstone Doctrine), also includes an evolving interpretation of the three principles. While the principles may provide guidance for ensuring a successful UN peacekeeping operation, they do not have any formal legal status, nor have they been explicitly adopted by the UNSC.

48 The key legal instruments that define the rights and responsibilities of a UN peacekeeping operation are the UNSC mandate and the Status of Forces Agreement (SOFA). A mission’s mandate is set out in a resolution of the UNSC. That resolution is the legal authority for the establishment and activity of a mission. The SOFA, which is discussed in further detail below, regulates the legal relationship between the UN peacekeeping mission and the host State. The Model SOFA may be provisionally applied, by a decision of the UNSC, until a mission-specific SOFA is concluded.

49 For the most part, and from a legal perspective, the UN is present in the host State on the basis of their consent, in addition to the UNSC mandate. This consent is reflected in the conclusion of a SOFA between the host State and the UN. It appears that the provisional application of the Model SOFA occurs only on the basis of a decision of the Council acting under Ch VII, which may be considered necessary until the host State’s formal consent for the mission’s presence and activity is apparent through the conclusion of a SOFA. The right for a UN mission to use force while deployed in the host State may also be provided for in the UNSC mandate, again with the Council acting under

³⁶ ICJ, *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 1962 ICJ Reports 151, 177 (ICJ 1962).

Chapter VII. Where it is not made explicit, it has been generally accepted that the UN force will have a right to use force in self-defence, including in defence of the mandate.³⁷

iii) Privileges and immunities

50 The Charter, at Article 105, provides that “The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes”. It also provides that “Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization”.

51 These Charter obligations were developed and expanded in a separate treaty, the 1946 Convention on Privileges and Immunities of the UN (the Convention). The Convention provides that the Organization “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity”.³⁸

52 The Convention also provides for a regime of full immunity for the Secretary-General and Assistant Secretaries-General,³⁹ as well as functional immunity for UN officials⁴⁰ and ‘experts on mission’.⁴¹ Noting that “privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves”, the Convention provides that the Secretary-General has “the right and the duty to waive the immunity of any official or expert in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations”.⁴²

53 While the Convention provides immunities from legal process, this is separate from the UN’s responsibility for damages or compensation. As the ICJ has stated:

[T]he question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "the United Nations shall make provisions for" pursuant to Section 29.⁴³

³⁷ See UN Department of Peacekeeping Operations, “Capstone Doctrine,” 34-35; UN Secretary-General, *Report of the Secretary-General on the Implementation of Security Council resolution 340 (1973)*. S/11052/Rev.1 (New York, USA: UN, October 27, 1973), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N73/229/60/pdf/N7322960.pdf?OpenElement>.

³⁸ Article II, section 2.

³⁹ Article V, section 19.

⁴⁰ Article V, section 18.

⁴¹ Article VI, section 22.

⁴² Article V, section 20 and Article VI, section 23.

⁴³ ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, 1999 ICJ Reports 62, 88 and 89 (ICJ 1999).

54 Section 29 of the Convention provides for the settlement of disputes, and is covered immediately below.

iv) Claims and reparations regimes (Convention, SOFA)

55 Article VIII, section 29 of the Convention requires that the UN establish mechanisms for the settlement of:

- (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; and
- (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

56 The 1990 Model SOFA reiterates that the immunities from legal proceedings provided in the Convention apply to UN peacekeeping operations and personnel. In accordance with the requirement for a dispute settlement mechanism, the Model SOFA creates a 'standing claims commission' to deal with claims of a 'private law character' against the Organization or members of the peacekeeping mission.⁴⁴ The Model SOFA also provides that disputes between the UN peacekeeping operation and the host State, unless otherwise agreed, are to be settled by arbitration in accordance with the provisions of the Model SOFA.

57 Finally, it should be noted that General Assembly resolution 52/247 of 1997 established several conditions and limits on UN liability. These included: exclusion of damage caused by acts of 'operational necessity'; limitation of the UN's responsibility in instances of gross negligence or wilful misconduct of troop contributing countries/ police contributing countries (TCCs/PCCs); a six-month limitation period for claims; restriction of damages to economic loss only, precluding non-economic loss such as suffering; limitation of the maximum damages award to US\$50,000 subject to local standards; and verification of claims.

2.3 History and purpose of the Model SOFA

a) History of the Model SOFA

58 The modern origins of a model SOFA can be traced to the NATO Model SOFA of 1951 used, in particular, for visiting forces in Europe after World War II. In the atmosphere conducive to cooperation on the maintenance of international peace and security that prevailed at the end of the Cold War, and in recognition of the growing demand for UN peacekeeping and the inability of the Organisation to effectively meet and manage that demand within the existing frame work, on 8 December 1989, the General Assembly adopted resolution A/44/49 requesting the Secretary-General to take a number of actions to improve UN peacekeeping operations. One of the tasks given to the Secretary-General was the development of a Model SOFA. Paragraphs 10 and 11 of the resolution read:

The General Assembly,

10. Considers that status-of-forces agreements should be concluded between host countries of any United Nations peace-keeping operation and the United Nations and, to this end,

⁴⁴ Paragraph 51, *supra* n. Error! Bookmark not defined..

urges host countries of any United Nations peace-keeping operation to conclude status-of-forces agreements with the United Nations as soon as possible after the establishment of the operation;

11. Requests the Secretary-General to prepare a model status-of-forces agreement between the United Nations and host countries, while maintaining the flexibility needed to encompass different possible operations, and to make the model agreement available to Member States;

59 In the 1990 Report of the Secretary-General on the Comprehensive Review of the Whole Question of Peace-keeping Operations in All their Aspects (Model Status-of Forces Agreement for Peace-keeping Operations), A/45/594, the Secretary-General presented to the General Assembly a Model SOFA. The report states:

Basing itself upon established practice and drawing extensively upon earlier and current agreements, the Secretariat has prepared a model status-of-forces agreement annexed to the present report. The model is intended to serve as a basis for drafting 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.

b) The purpose of the Model SOFA

60 A SOFA regulates the legal relationship between a UN peacekeeping mission and the host State. It sets the basic legal framework for the operation and its status including for personnel. While principally concerned with privileges and immunities, the SOFA also serves as an additional layer of consent to the presence of the UN mission.⁴⁵

61 Concluding a SOFA is often a key focus following the adoption of a Security Council mandate establishing a UN peacekeeping operation. In its resolutions establishing peacekeeping missions, the Security Council often stipulates the timeline within which the UN and the host state are expected to conclude a SOFA.⁴⁶ The Model SOFA is often deemed by the Security Council to be legally in force until an agreement specific to the mission is concluded. This was not foreseen as one of the main purposes of the Model SOFA when it was promulgated in 1990.⁴⁷

62 The Model SOFA accordingly provides not only a starting point for negotiations but also a provisional legal framework for the UN peacekeeping operation and host State relationship before the mission-specific SOFA is concluded, often during the crucial start-up phase of a mission. It is common, especially in large peacekeeping operations, for the UN to deploy to the field and begin its mission while SOFA negotiations are still ongoing (e.g. UNAMID in Darfur) relying on coverage provided by the Model SOFA. The absence of a model SOFA would be highly problematic for the UN.

⁴⁵ Ratner, *The new UN peacekeeping*, 28.

⁴⁶ See UNAMID for example.

⁴⁷ The cover letter from the Secretary-General and preamble to the Model SOFA does not mention the provisional application of the Model SOFA. However, the Security Council has mentioned in majority of its post-1990 resolutions establishing peacekeeping operations that the Model SOFA provisionally does apply. See for example UN Security Council resolution S/RES/1159 establishing MINURCA, Op Para 19 (27 March 1998), S/RES/1320 establishing UNMEE Op Para 6 (15 September 2000); S/RES/1270 establishing UNAMSIL, Op Para 16 (22 October 1999); S/RES/1291 establishing MONUC, Op Para 10 (24 February 2000); S/RES/1542 establishing MINUSTAH, Op Para 11 (30 April 2004), S/RES/1528 establishing ONUCI/Ivory Coast, Op Para 9 (27 February 2004), S/RES/1590 establishing UNMIS, Op Para 16 (ii) (24 March 2005), S/RES/1545 establishing ONUB, Op Para 10 (21 May 2004), S/RES/1769 establishing UNAMID, Op Para 15 (b) (2007).

63 From the point of view of the General Assembly's central responsibilities, which include the budgetary authority, important provisions of a SOFA are the financial provisions dealing with such issues as facilities, taxes, duties and charges. These financial aspects have frequently been the subject of intense negotiations between the UN and host States. For TCCs/PCCs, the important provisions will be those dealing with the status, privileges and immunities of UN personnel including military and police contingents. For the senior mission leadership the important provisions of a SOFA will be those that address a wide range of issues essential to the effective running of the operation.

2.4 Content of the Model SOFA

64 SOFAs for UN peacekeeping operations can take two different forms: a treaty signed by the UN Secretary-General and an appropriate representative of the host State; or a letter of exchange between the two parties. Both of the forms constitute a valid and legally binding SOFA. The Model SOFA addresses a wide range of issues that may arise in the course of a UN peacekeeping operation. A brief overview of the key provisions of the Model SOFA is provided below.

a) Scope and status

65 The Model SOFA defines the scope of its application. It applies to the UN peacekeeping operation and the host State subject to additional provisions, such as definitions of parties, that might be added in the mission-specific agreed SOFA.

66 Under the section on the *Status of the Peacekeeping Operation*, the Model SOFA requires that the UN peacekeeping operation and its members respect all local laws and regulations. The same section regulates issues relating to the use of the UN flag, vehicle markings, setting up of the communications system, and arranging travel and transportation in the host State - including freedom of movement. This section often becomes the subject of difficult negotiations in drafting of mission-specific SOFAs particularly due to the freedom of movement clause. Not all host States welcome the idea of granting a UN mission unrestricted access to its entire territory.⁴⁸

67 The section on the *Privileges and Immunities of the United Nations Peacekeeping Operation* provides that the operation enjoys the privileges and immunities granted to the UN under the Convention on Privileges and Immunities of the UN. The host State *inter alia* recognizes the right of the mission to import goods free of duty or without other restrictions, for the exclusive and official use of the UN peacekeeping operation.

b) Facilities and supplies

68 Within the section on *Facilities for the United Nations Peacekeeping Operation* the host State undertakes to provide, without cost to the UN, the areas needed for UN headquarters, camps and other premises as necessary for the administration of the peacekeeping operation. It provides that these premises shall be inviolable and subject to the exclusive control and authority of the UN. The host state also undertakes to assist the UN operation in obtaining and making available water, electricity and other facilities free of charge. But the obligation is not absolute; for example, the host State is only obliged to assist 'as far as possible' with obtaining water, electricity and other facilities.

69 In relation to *Provisions, Supplies, Services and Sanitary Arrangements* the host State undertakes to assist the UN peacekeeping operation 'as far as possible' in obtaining equipment, provisions, supplies and other goods that are required for its subsistence and operations. If requested by the Special Representative/Force Commander of the UN peacekeeping operation, the host State is also required to facilitate the *recruitment of local personnel*. The Model SOFA does not impose any restrictions on the UN in relation to hiring local personnel.

⁴⁸ See UNAMID for example.

70 Under the *Currency* section the host State undertakes to make available to the UN, against reimbursement in mutually acceptable currency, local currency required for the use of the UN peacekeeping operation.

c) Privileges and immunities of personnel

71 The section on *Status of the Members of the United Nations Peacekeeping Operation* provides detailed provisions on the privileges and immunities granted to different categories of UN personnel. The Model SOFA distinguishes and designates three categories of international personnel: UN officials, experts on mission, and members of formed military contingents.

72 The first two categories of personnel, comprising UN staff and 'experts on mission' (e.g. UN military observers and UN police), enjoy the legal status provided for in the Convention on Privileges and Immunities.⁴⁹ This means that they fall under the umbrella of the immunity for official acts which can be waived by the Secretary-General.

73 Military members of national contingents are subject to the exclusive criminal jurisdiction of their sending State. This means they are completely exempt from the criminal jurisdiction of the host State. This immunity cannot be waived by the Secretary General since the jurisdiction is exclusive to the sending State. On the other hand, the Secretary-General must obtain assurances from troop-contributing countries that they will be prepared to exercise jurisdiction in such cases. Prior to the amendments made in 2007 to the Model MOU between the UN and TCCs, such assurances had not been requested.⁵⁰

74 Members of the UN peacekeeping operation are immune from legal process for civil/private law claims in respect of their official acts if so certified by the Special Representative/Commander. The Model SOFA provides that in this case, civil/private claims will be settled by a standing claims commission to be established for that purpose.⁵¹

75 The section on *Entry, Residence and Departure* provides the Secretary-General's Special Representative, Force Commander and members of the peacekeeping operation with the right, whenever so required, to enter into, reside in and depart from the host State territory. For that purpose, the host State undertakes to exempt them from passport and visa regulations as well as immigration inspections.

76 The issue of uniforms worn by different categories of UN personnel is regulated under the section *Uniforms and Arms*. Military and police members of the UN peacekeeping operation and UN Security Officers are authorized to carry arms while on duty.

77 Under the *Permits and Licenses* section the host government undertakes to accept as valid, without tax or fee, a permit or license issued by the Secretary-General's Special Representative or Force Commander, of any transport or communication equipment, and for the practice of any profession or occupation related to functioning of the UN peacekeeping operation. At the same

⁴⁹ *Convention on the Privileges And Immunities of the United Nations*, adopted by UN General Assembly on 13 February 1946, Articles 5 and 6, at <[http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/C8297DB1DE8566F2C1256F2600348A73/\\$file/Convention%20P%20&%20I%20%281946%29%20-%20E.pdf](http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/C8297DB1DE8566F2C1256F2600348A73/$file/Convention%20P%20&%20I%20%281946%29%20-%20E.pdf)>, (Last Visited 11 August 2010).

⁵⁰ E. F Defeis, "UN Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity," *Wash. U. Global Stud. L. Rev.* 7 (2008): 207.

⁵¹ The Model SOFA, *supra* note 44, Para 49 (a) and 51.

time, if a person does not already possess an appropriate and valid license, no license to drive a vehicle or pilot an aircraft shall be issued to that person.

d) Discipline and mutual assistance

78 The section on *Military Police, Arrest and Transfer of Custody, and Mutual Assistance* provides that personnel designated to police the UN premises may take into custody any other person on the premises. Such person shall be delivered immediately to the closest appropriate Government body.

79 The host State may take into custody any member of the UN peacekeeping operation: (i) when so requested by the Special Representative/Commander; and (ii) when the member of the UN peacekeeping operation is apprehended in the commission or attempted commission of a criminal offence. In such situations the person shall be delivered immediately to the nearest appropriate representation of UN peacekeeping operations, where the status of his/her immunity will be determined in accordance with the Model SOFA.

80 The Government of the host State and the UN peacekeeping operation shall assist each other in investigating the offences in respect of which either or both have an interest.

81 In the section on *Deceased Members* the appropriate UN procedures apply to disposing the body of a deceased member of the UN peacekeeping operation who dies in the host country.

e) Settlement of disputes

82 One of the key provisions of the Model SOFA is enshrined in the *Settlement of Disputes* section. In this section the UN undertakes to settle claims of a ‘private law’ character to which the UN peacekeeping operation, or any of its members, is a party, by means of a standing claims commission. The rules of composition of the commission, selection and decision making procedures are prescribed in this section.

2.5 Usage of the Model SOFA

a) Usage of the Model as provisional SOFA

83 As mentioned above, one of the key benefits of the Model SOFA has been its provisional application to UN peacekeeping operations while the UN negotiates the mission-specific SOFA with the host State. The significance of the Model SOFA becomes evident when examining the frequency and duration of its provisional application to a number of large and important UN peacekeeping operations. The most obvious examples of this are Timor Leste and Sudan.

84 The UN Transitional Administration in East Timor (UNTAET) provided an interim civil administration in Timor Leste from the mission’s establishment in October 1999 until the country’s independence in May 2002.⁵² UNTAET was replaced in 2002 by the UN Mission of Support to East Timor (UNMISSET). However, the mission specific SOFA for UNTAET was never concluded. The US and other foreign military personnel in East Timor were covered by SOFAs between their governments and the UN, and UN peacekeepers were covered by the Model SOFA. It was not until end of May of 2002, two and half years after UN peacekeepers were first deployed to East Timor, that an agreed mission-specific SOFA was concluded. The delayed conclusion of a mission-specific SOFA was mainly due to the delay in the formation of the Government of Timor Leste.

⁵² UN Security Council Resolution 1272, S/RES/1272 (1999).

85 In the case of UNAMID a mission-specific SOFA was concluded, but with significant delay. UNAMID was established by the Security Council on 31 July 2007 through the adoption of resolution 1769. In the same resolution, the Council requested a SOFA be concluded between the UN and the Sudanese Government within 30 days.⁵³ However, the mission-specific SOFA for UNAMID was only signed on 9 February 2008 - more than six months later. Consequently the full deployment of UNAMID was delayed. The prolonging of the SOFA negotiations was due to a lack of cooperation from the Government of Sudan. Other obstacles also impeded swift deployment of the mission including delays in the readiness of troop and police contributions and the immense logistical challenges posed by the operational environment.⁵⁴ In the absence of a mission-specific SOFA, the Model SOFA applied during the first six months of the UNAMID deployment.

86 Similarly, in the case of MONUC, there was also a significant period at the start of the operation during which only the Model SOFA applied. The Model SOFA was provisionally applicable to MONUC for more than five months – from the date of adoption of the initial resolution establishing MONUC on 30 November 1999, until the conclusion of the mission-specific SOFA on 8 May 2000.

87 In a more extreme case, a mission-specific SOFA between the UN and Eritrea was never concluded for the UN Mission in Ethiopia and Eritrea (UNMEE). Despite the fact that UN Security Council resolution 1320 (2000) requested that the governments of Ethiopia and Eritrea conclude SOFAs with the UN within 30 days, the Eritrean government never concluded a SOFA.⁵⁵ Therefore, in accordance with the resolution,⁵⁶ the Model SOFA was the only legally binding document applicable to the UNMEE mission in Eritrea from 2000 until 2008, when the operation was terminated. The coverage provided by the Model SOFA in this case was an issue as the mission experienced obstruction in carrying out its mandate.⁵⁷

88 On a few occasions, SOFAs have failed to be concluded due to the disputed signing authority of the host State. This was the case for several UN peacekeeping forces in the Middle East, since the issue regarding whether the signing authority resided with Israel or the Occupied Palestinian Territories, was highly disputed.⁵⁸ In cases where a military occupation exists, as in the case of the United Nations Disengagement Observer Force (UNDOF) in the Middle East, the conclusion of a SOFA might be considered as a *de jure* recognition of a *de facto* situation of occupation of specific territories⁵⁹.

89 Even where a mission-specific SOFA has been concluded between the UN and a host State, the difference between the specific SOFA and the Model SOFA can be quite significant. Differences can be observed both in the extent which the basic structure, content and format of Model SOFA is followed, and the extent of departure from individual provisions and clauses.

⁵³ UN Security Council Resolution 1769, S/RES/1769 (2007), OP 15 (b).

⁵⁴ Joint NGO Report, *UNAMID Deployment on the Brink. The Road to Security in Darfur Blocked by Government Obstructions*, December 2007.

⁵⁵ UN Security Council Resolution 1320, S/RES/1320 (2000), OP 6.

⁵⁶ *Ibid*, OP 6.

⁵⁷ "AFP: Security Council censures Eritrea for obstructing UN force," n.d., http://afp.google.com/article/ALeqM5gMLpYdn6aXKG_RaqbXB-NexIV8yg.

⁵⁸ B. Simma et al., *The Charter of the United Nations: a commentary* (Oxford University Press, 2002). See the case of the United Nations Disengagement Observer Force (UNDOF) in the Middle East.

⁵⁹ M. Bothe and T. Dorschel, "The UN Peacekeeping Experience," in *The Handbook of The Law of Visiting Forces* (UK: Oxford University Press, 2001), 493.

90 Within the scope of this project, more than sixty SOFAs concluded by the UN with host States from 1957 to 2006⁶⁰ were reviewed. The list of the SOFAs reviewed is provided in Annex 3. The operations covered were broad, ranging from traditional peacekeeping operations to robust, complex multidimensional operations. The analysis revealed a number of preliminary findings and issues which form a part of this report.

91 At the larger structural level, it appears that more than half of the SOFAs concluded by the UN did not follow the basic structure and content of the Model SOFA. Exchange of letters have tended to depart from the Model SOFA more significantly than mission-specific SOFAs concluded as a treaty.⁶¹ Those operations in which the mission-specific SOFA have significantly departed from the Model SOFA have tended to be observer missions, rather than missions associated with significant deployments of UN peacekeepers including military forces. The operations that depart completely from the Model SOFA for example include: ONUSAL in El Salvador, UNOMIG in Georgia, UNOA in Angola, and UNOMUR in Uganda.

92 By contrast, mission-specific SOFAs concluded in the major UN peacekeeping operations tended to closely follow the structure and content of the Model SOFA. These operations included: MINUSTAH in Haiti, UNAMISL in Sierra Leone, UNMIS and UNAMID in Sudan, UNIFIL in Lebanon, UNMISSET in Timor Leste, UNTAC in Cambodia, and UNPROFOR in the former Yugoslavia. An overview table of the analysis is provided in Annex 2 of this report.

93 In cases in which the mission-specific SOFA was consistent with the structure and content of the Model SOFA, there were still variations in particular provisions and clauses. In this respect, the SOFAs departed from the Model in areas such as: new categories of personnel; third party liability; safety and security of UN and associated personnel; applicability of IHL; freedom of movement; respect for local law; and operation of UN communications. These issues are considered in more detail below.

2.6 Developments in the UN since the promulgation of the Model SOFA

94 As set out in the section above on the evolution of UN peacekeeping, there have been a number of developments in practice since the adoption of the Model SOFA. This is one of the reasons why the SOFAs concluded after 1990 often differ from the Model. In response to the evolution, over the past 20 years the UN has created several internal documents and agreements that have a significant impact on UN peacekeeping and are obviously not reflected in the Model SOFA. Below is a brief review of a number of the key developments with significant implications for UN peacekeeping operations and the Model SOFA that have arisen since 1990.

a) Convention on the Safety of United Nations and Associated Personnel (Safety Convention)

95 In the early 1990s there was not only a dramatic increase in UN peacekeeping operations, but also a growing number of attacks upon UN peacekeepers, some resulting in severe casualties. The need to afford adequate protection to UN personnel engaged in life-threatening circumstances was increasing. The issue was raised by the Secretary-General in his report to the Security Council 'An Agenda for Peace'⁶² in 1992. The situation led to an initiative to improve the safety of UN

⁶⁰ As an exception, the SOMA for the United Nations Peace-building Office in the Central African Republic (BINUCA) from 2010 has been reviewed as well.

⁶¹ See for example MINUGUA (1994), MIPONUH (1998), UNOMUR (1993), UNAMI (2004).

⁶² Secretary-General, "An Agenda for Peace - Preventive diplomacy, peacemaking and peace-keeping. A/47/277-S/24111" (United Nations Publications, June 17, 1992), para. 66-68.

personnel through the development and adoption of a new multilateral convention, the 1994 Convention on the Safety of United Nations and Associated Personnel.

96 The Safety Convention applies “in respect of United Nations and associated personnel and United Nations operations”.⁶³ The key notion of ‘United Nations operations’ is defined in Article 1(c) of the Convention:

‘United Nations operation’ means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:

- (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or
- (ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.

97 The Safety Convention explicitly provides that its provisions do not apply to UN operations authorized by the Security Council as an enforcement action under Chapter VII, in which UN personnel are engaged as combatants to which the law of international armed conflicts applies. In 2007, the Optional Protocol to the Safety Convention was adopted, the effect of which was to extend the scope of coverage of the Convention. The Optional Protocol will enter into force on 20 August 2010, thirty days after the threshold for entry into force was reached through the ratification of the United Kingdom on 21 July 2010.⁶⁴

98 Pursuant to the Safety Convention, host States are obliged to take “all appropriate measures to ensure the safety and security” of UN and associated personnel, and to make certain attacks against UN and associated personnel punishable acts under their national legislation.⁶⁵ In essence, the Optional Protocol expands the scope of the Convention to additional categories of personnel. It extends coverage to personnel in UN operations conducted for the purposes of “[d]elivering humanitarian, political or development assistance in Peacebuilding”, or ‘[d]elivering emergency humanitarian assistance’.⁶⁶

99 The Safety Convention establishes an obligation on host States to conclude a SOFA with the UN in respect of an operation in their territory as soon as possible.⁶⁷ The General Assembly in an annual resolution requests the Secretary-General to seek inclusion of the applicable conditions of the Safety Convention into mission agreements.⁶⁸ The General Assembly has also called on States to become party to the Optional Protocol and urged them “to put in place appropriate national legislation, as necessary, to enable its effective implementation”.⁶⁹

⁶³ The Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, Article 2 (1).

⁶⁴ UN Daily News, Issue DH/5697, 21 July 2010, at <

<http://unclef.com/news/dh/pdf/english/2010/21072010.pdf> > (last accessed 11 August 2010).

⁶⁵ The Safety Convention, *supra* note 62, Articles 7 (2) and 9.

⁶⁶ Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, 8 December 2005, Article 1 (a) (b).

⁶⁷ *Ibid*, Article 4.

⁶⁸ GA Res. 64/77 (8 February 2010), para 14.

⁶⁹ *Ibid*, para 7.

b) Bulletin of the Secretary-General relating to the Observance by United Nations Forces of International Humanitarian Law

100 The Secretary-General's Bulletin was adopted as a result of a growing number of UN peacekeeping operations recognizing the applicability of the IHL in mission-specific SOFAs during the early 1990s.

101 For almost half a century the UN had been reluctant to recognize the applicability of IHL to UN forces and to formally abide by its provisions. While the UN never denied the application of IHL, its position was that the Organization would follow the 'principles and spirit' of IHL rather than the actual 'rules'. During UNPROFOR and UNSOM, challenges arose concerning the legal status of UN forces taken hostage; the situation of combatants or other detainees held by UN forces; the use of certain types of weapons; and the misuse of the UN emblem and military insignia.⁷⁰

102 In 1995 the International Committee of the Red Cross (ICRC) initiated a series of meetings to elaborate the applicable rules of IHL to UN forces. The report from those meetings was then sent to the UN Secretariat Office of Legal Affairs and the recommendations were adopted, with modifications, as the Secretary-General's Bulletin on IHL in 1999. The Bulletin has the status of an internal UN document. It has legally binding power on members of UN forces in the same way as all other instructions issued by the Secretary-General in his capacity as 'commander in chief'.⁷¹

103 The provisions of the Bulletin reflect the most fundamental principles of the laws and customs of war enshrined in the Geneva Conventions of 1949 and their Additional Protocols of 1997, as well as the 1954 Convention on the Protection of Cultural Property. It applies to UN peacekeeping operations conducted under UN command and control,⁷² but is not applicable to UN-authorized operations conducted under regional or national command and control. The Bulletin is "applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement".⁷³ The provisions of the Bulletin "are accordingly applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence".⁷⁴ Section 3 of the Bulletin is important for determining the legally binding character of the obligations as well as to the present study on SOFAs:

In the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure 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 United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments. The obligation to respect the said principles and rules is applicable to United Nations forces even in the absence of a status-of-forces agreement.

104 Accordingly, the UN accepts that provision should be made in SOFAs for the recognition of the obligation of UN forces to conduct their operations in accordance with principles and rules of the

⁷⁰ Daphna Shrava, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage," *The American Journal of International Law* 94, no. 2 (April 2000): 407.

⁷¹ *Ibid.* at 409.

⁷² UN Secretary-General, "Secretary-General's Bulletin. Observance by United Nations forces of international humanitarian law. ST/SGB/1999/13," August 6, 1999, sec. 1, <http://www1.umn.edu/humanrts/instrctn/unobservance1999.pdf>.

⁷³ *Ibid.* Section 1.

⁷⁴ *Ibid.* Section 1.

IHL conventions. The UN also accepts that the rules of the Bulletin are applicable even in the absence of a SOFA.

c) Secretary General's Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse

105 In an effort to prevent and address cases of sexual exploitation and abuse by UN peacekeepers, in 2003 Secretary-General Annan adopted the Secretary-General's Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse.

106 The Bulletin defines acts of 'sexual exploitation' as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from sexual exploitation of another". It defines 'sexual abuse' as "the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal coercive conditions".⁷⁵ The Bulletin sets out standards of behaviour for 'all UN staff' and notes that UN forces conducting operations under UN command are prohibited from committing acts of sexual exploitation and abuse pursuant to the application of the Secretary-General's Bulletin on IHL. The Bulletin imposes special obligations on Heads of Departments, Offices and Missions and provides for investigative and prosecution arrangements. The Bulletin also provides that when the UN enters into a cooperative arrangement with a non-UN entity, that they must inform them of the standards of behaviour required by the Bulletin and receive a written undertaking from the non-UN entity that they accept those standards.

107 The Special Committee on Peacekeeping Operations welcomed the standards set out in the Secretary-General's Bulletin in its 2004 Report (A/58/19), endorsed by the General Assembly in resolution A/58/315. In its adoption of the Zeid Report, the Special Committee requested that the standards set out in the Secretary-General's Bulletin be extended to all UN personnel (A/59/19/Add.1). The standards were eventually incorporated in the revised Model MOU between the UN and TCCs in 2007.⁷⁶ The Model MOU includes 'sexual exploitation abuse' as part of 'serious misconduct'.⁷⁷

d) The Zeid Report

108 Despite the efforts of the General Assembly, the Secretary-General and UN peacekeepers, sexual exploitation and abuse in UN peacekeeping operations continued to be a significant problem. In response to allegations of sexual exploitation and abuse by UN peacekeepers in MONUC in 2004, the Secretary General tasked Prince Zeid Ra'ad Zeid Al-Hussein, to prepare a report examining potential ways of addressing and resolving the problem of sexual exploitation and abuse.

109 The Zeid Report (A/59/710) made recommendations in four general areas: (i) adoption of a common set of rules; (ii) creation of a professional investigation capability; (iii) implementation of specific measures to ensure organizational, managerial, and command responsibility; and (iv) introduction of procedures to ensure individual disciplinary, financial and criminal accountability.

110 The Secretary General presented the Zeid Report to the General Assembly in March 2005. The recommendations of the Zeid Report were adopted by the Special Committee on Peacekeeping

⁷⁵ UN Secretary-General, "Special measures for protection from sexual exploitation and sexual abuse. ST/SGB/2003/13" (UN, October 9, 2003), sec. 1, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/550/40/pdf/N0355040.pdf?OpenElement>.

⁷⁶ UN General Assembly Resolution A/RES/61/267 B, 24 August 2007.

⁷⁷ UN General Assembly, *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session. A/61/19 (Part III)* (New York, USA: UN, June 12, 2007), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/380/34/pdf/N0738034.pdf?OpenElement>. Annex F, Section 30.

Operations in April, 2005,⁷⁸ and by the General Assembly⁷⁹ in June the same year. Several developments that have taken place at the UN since then are strongly linked with the Zeid Report and its recommendations. These have included the addition of amendments to the Model MOU between the UN and TCCs (discussed in further detail below); work by the GA Sixth Committee on criminal accountability of UN officials and experts on mission; the development of a strategy on the provision, by the UN, of assistance to victims of sexual exploitation and abuse by UN peacekeepers; and development of a policy on welfare and recreation of UN peacekeepers.

e) Model Memorandum of Understanding between the United Nations and Troop Contributing Countries

111 One of the recommendations of the Zeid Report was the inclusion of standards of conduct in the body of the draft Model MOU between the UN and TCCs, contained in chapter 9 of the ‘Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)’ (A/C.5/60/26 annex).

112 The MOU is a legal agreement signed between the UN and a TCC/ PCC setting out the conditions that govern the States’ contribution of contingent personnel. In 1997 the Secretary-General presented to the General Assembly the Model MOU, which set out standard terms and conditions, based on previous UN practice. The Model MOU is used as the basis for specific MOUs negotiated with TCCs/PCCs.

113 In accordance with the recommendations of the Zeid Report, the Model MOU was revised in 2007 to include provisions relating to the conduct and discipline of contingent personnel. As part of the revision, the publications ‘Ten Rules: Code of Personal Conduct for Blue Helmets (Ten Rules)’⁸⁰ and ‘We Are United Nations Peacekeeping Personnel’ promulgated by DPKO in 1996, were incorporated into the Model.

114 According to the Zeid Report, importance should be attached to ensuring that the applicable standards of conduct, even if accepted by all parties as a matter of practice, are legally binding. That is the reason why the Report recommended including ‘Ten Rules’, ‘We Are United Nations Peacekeeping Personnel’ and specific prohibitions from the 2003 Bulletin on Sexual Exploitation and Abuse in the Model MOU, to ensure that the rules were binding on contributing States and their personnel, and that contributing States would be obliged to make these standards of conduct legally applicable to their contingents.⁸¹ The revised Model MOU was endorsed by the Special Committee on Peacekeeping Operations in June, 2007 (A/61/19 (Part III)), and ultimately by the General Assembly.⁸²

115 The amendments to the Model MOU were intended to improve accountability. They attempted to do so as follows: by incorporating relevant standards of conduct (e.g. on IHL, IHRL, sexual exploitation and abuse); by making those standards binding on TCCs/PCCs and their

⁷⁸ UN General Assembly, *Report of the Special Committee on Peacekeeping Operations and Its Working Group on the 2005 Resumed Session*. A/59/19/Add.1 (New York, USA: UN, April 11, 2005), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/303/06/pdf/N0530306.pdf?OpenElement>.

⁷⁹ UN General Assembly Resolution A/RES/59/300, adopted on 30 June 2005.

⁸⁰ UN Department of Peacekeeping Operations, “Ten Rules: Code of Personal Conduct For Blue Helmets,” 1998, <http://cdi.unlb.org/UNStandardsofConduct/TenRulesCodeofPersonalConductForBlueHelmets.aspx>, Rule 4.

⁸¹ A. J Miller, “Legal Aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations,” *Cornell Int'l LJ* 39 (2006): 82.

⁸² UN General Assembly Resolution, *supra* note 75.

personnel; by making clear that a TCC/PCC must satisfactorily investigate and resolve allegations, and where it does not that the UN must conduct an administrative investigation; by setting out arrangements for the complex issues relating to facilitation of investigations and mutual assistance.⁸³

f) Criminal Accountability of United Nations officials and 'experts on mission'

116 In 2006, pursuant to the recommendations of the Zeid Report, a Group of Experts was established by the Secretary-General to examine and report on the accountability of UN staff and experts on mission. The Group issued a report addressing the issue of ensuring that UN staff and experts on mission would be held responsible for all criminal acts committed by them.

117 As explained above, UN officials and experts on mission are immune from the criminal jurisdiction of the host state for acts performed within their official capacity, unless such immunity is waived by the Secretary-General. While there is little publicly available data, in practice, it appears to be uncommon for the Secretary-General to waive the immunity of such personnel. It is even less likely to occur in instances where the host State's legal system is not functioning well, or its human rights record is not consistent with international standards.

118 In its report, the Group of Experts recommended the adoption of a new international convention to ensure the cooperation of Member States in ensuring the legal accountability of UN staff.⁸⁴ They annexed a draft convention to their report. In 2007, the draft convention was discussed by the Ad Hoc Committee on Criminal Accountability of UN Officials and Experts on Mission (the Ad Hoc Committee). The issues of quasi-universal jurisdiction and extradition or prosecution regimes introduced by the Convention were disputed. There were also questions raised regarding the scope of the Convention – both as to the crimes and the personnel subject to the convention.

119 The Secretary-General issued a report A/63/260 supporting the proposed Convention and incorporating the feedback of the Ad Hoc Committee on expanding the scope of the Convention with respect to both crimes and personnel. Furthermore, the UN Secretariat proposed that all personnel of UN operations, including contractors and consultants, should become subjects of the Convention. However, the established principle of military members of national contingents being subject to the exclusive criminal jurisdiction of the contributing State was reaffirmed.⁸⁵ The discussions in the Ad Hoc Committee have not taken the issue of a convention any further.

120 The Ad Hoc Committee has not reached resolution of these issues and a convention has not been concluded.

g) UN General Assembly resolution on limitation of liability

121 As UN peacekeeping operations expanded in the early 1990s in terms of size, scope and diversity of tasks, the number, amount and complexity of third party claims against such operations also increased. The UN was short of financial and human resources and the General Assembly called upon the Secretary-General to develop an instrument for limiting the third party liability of the UN. Consequently the Secretary-General presented a two-stage report outlining the guidance for implementing temporal and financial limitations on UN liability. The General Assembly adopted these recommendations in its resolution 52/247 in 1998.

122 The regime provides that if damage is caused by gross negligence or wilful misconduct, the UN assumes responsibility *vis-a-vis* the third party and bears its liability for the full compensation. Financial limitations are not applicable to these types of acts. However, the Organisation retains the

⁸³ Model MOU, *supra* note 76, Articles 7 bis, 7 ter, 7 quater.

⁸⁴ A/60/980.

⁸⁵ Defeis, *supra* note 50, 203-204.

right to request reimbursement from the staff member, the member of a contingent or his/her TCC/PCC. The regime provides that in cases of 'operational necessity' the UN bears no liability for damage caused "from the necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandate."

123 The temporal limitations for a claimant to submit a claim against the UN were established as six months from the time of the damage, or from when it was known or could have been known to the claimant, and in any case not later than one year after the mandate of the operation has terminated.

124 The Secretary-General also proposed a range of financial limitations by reference to categories of injury or loss, maximum ceiling amounts, or relevant criteria given the diversity of potential damage. The compensation for personal injury, illness, or death was limited to economic loss (such as medical expenses, loss of earnings, and financial support), measured by local standards and not to exceed a ceiling of US\$50,000. Non-pecuniary damages such as pain and suffering were excluded.

125 In order to ensure that the financial and temporal limitations were legally binding in the relationship between the UN and the host State, and between the UN and third party claimants, they were incorporated in a General Assembly resolution, a liability clause in most subsequent SOFAs, and in the terms of reference of claims review boards.⁸⁶ A General Assembly resolution is recommendatory for Member States, but mandatory for the UN. When incorporated by reference in a SOFA, the resolution also constitutes the legal basis for the parties' consent to abide by the limitations.

h) Protection of civilians

126 Another significant development since the adoption of the Model SOFA is work within the UN on the issue of the protection of civilians. From 1999 issues of civilian protection increasingly gained the attention of the Security Council. Momentum on the issue started rising when, in 1999, under the Canadian Presidency, the Council issued a Presidential Statement requesting the Secretary-General to prepare a report providing recommendations on how the Council could improve the physical and legal protection of civilians in situations of armed conflict.⁸⁷ Since that time the Security Council has issued a series of statements and resolutions, and the Secretary-General has provided regular reports on the protection of civilians in armed conflict.⁸⁸

127 As described in the section above on the evolution of UN peacekeeping, UN peacekeeping operations have undergone a number of significant developments since the promulgation of the Model SOFA in 1990. One of the most significant has been the increasing inclusion of provision for the protection of civilians in peacekeeping mission mandates. The first mission that was mandated *inter alia* "to afford protection of civilians under imminent threat of physical violence"⁸⁹ was UNAMSIL in 1999. Since then, ten peacekeeping missions have been explicitly mandated to protect civilians. However, the increased mandating of the protection of civilians has not necessarily

⁸⁶ UN General Assembly Resolution A/RES/52/247, 17 July 1998; also see for example SOFAs for UNAMSIL (2000), UNMIS (2005), MINUSTAH (2004), ONUCI (2004), MINURSO/Morocco (1999), MINURSO/Algeria (1998), MINURSO/Mauritania (1998).

⁸⁷ Statement by the President of the Security Council S/PRST/1999/6, 12 February 1999.

⁸⁸ Holt, *supra* note 21. For the UN Security Council statements, Secretary General reports and other activities related to POC see

<<http://ochaonline.un.org/HumanitarianIssues/ProtectionofCiviliansinArmedConflict/ChronologyofProtectionofCivilians/tabcid/1198/language/en-US/Default.aspx>>.

⁸⁹ UN Security Council Resolution S/RES/1270, 22 October 1999.

translated into consistent and effective civilian protection on the ground. UN peacekeepers and other actors still struggle to deliver the promised protection to civilians.

128 Realising that UN peacekeeping is at crossroads, the UN Secretariat and Member States have recently been making efforts to identify the operational, legal and political challenges faced by peacekeeping today and to develop solutions. In 2009 DPKO and the Department of Field Support (DFS) delivered a publication on UN peacekeeping reform ‘A New Partnership Agenda, Charting a New Horizon for UN Peacekeeping’. The New Horizon publication identified three key challenges for UN peacekeeping: protection of civilians, robust operations and peacebuilding tasks. In recognition of the need to better implement protection of civilians mandates, DPKO and DFS undertook to use the findings of an independent study on the issue jointly-commissioned by DPKO and Office for the Coordination of Humanitarian Affairs (OCHA), together with lessons learned, to develop a clear and comprehensive concept and appropriate training guidance; and to identify required capacities, equipment and training.

129 In late 2009 the independent study team jointly-commissioned by OCHA and DPKO issued their report ‘Protecting Civilians in the Context of UN Peacekeeping Operations’. The report analyzed the creation, interpretation and implementation of protection of civilians mandates, and provided recommendations on how the UN might improve implementation of those mandates.

130 Based on the findings of the study, in early 2010, DPKO and DFS, developed the ‘Lessons Learned Note on the Protection of Civilians in UN Peacekeeping Operations: Dilemmas, Emerging Practices and Lessons Learned’⁹⁰, and the draft ‘Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations’⁹¹.

i) International Criminal Court and UN peacekeeping

131 The ICC was established in 2002 and represented a major achievement. There are currently 112 States party to the Rome Statute of the ICC⁹² and this figure is expected to increase over time. The ICC has commenced cases in four countries⁹³, three of which also host a UN peacekeeping operation.⁹⁴ The work of the ICC thus has implications for, and has required the involvement of a number of UN peacekeeping operations.

132 Many of the issues that could arise concerning the ICC and the host State or UN peacekeeping operations are beyond the scope of this paper. However, recent work of the ICC has had implications for a number of UN peacekeeping operations (UNMIS, UNAMID and MONUC), which are relevant to this study. For example, issues have been raised in MONUC regarding how the mission, with a mandate to support the Congolese army, is to deal with the head of an army unit,

⁹⁰ UN Department of Peacekeeping Operations and UN Department of Field Support, “Lessons Learned Note on the Protection of Civilians in UN Peacekeeping Operations: Dilemmas, Emerging Practices and Lessons Learned, internal UN Secretariat document,” 2010.

⁹¹ UN Department of Peacekeeping Operations and UN Department of Field Support, “Draft Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations, internal UN Secretariat document,” 2010.

⁹² As of 10 August 2010, at <<http://www.icc-cpi.int/Menu/ASP/states+parties/>> (last accessed 11 August 2010).

⁹³ Democratic Republic of the Congo, The Central African Republic, Uganda, and Sudan. See the cases at the Office of the Prosecutor’s web site at <<http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Cases/>> (last accessed 11 August 2010).

⁹⁴ MONUSCO in the DRC, MINURCAT in the Central African Republic and Chad, UNAMID in Darfur/Sudan. See the UN missions at <<http://www.un.org/en/peacekeeping/currentops.shtml#africa>> (last accessed 11 August 2010).

Bosco Ntaganda, who is subject to an arrest warrant of the ICC (and is also subject to targeted sanctions of the Security Council).⁹⁵

3. Issues and Challenges

133 This section will examine the issues and challenges that arise in relation to the application of the Model SOFA in UN peacekeeping operations. Many of these issues arise from the *ad hoc* nature of UN peacekeeping; the lack of a clear and agreed legal framework governing UN operations; the evolution of UN peacekeeping since the promulgation of the Model SOFA; and the accompanying institutional and legal developments.

List of issues and challenges

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3.1. Additional categories of personnel

134 An issue often raised in the context of SOFAs is the personnel covered by the agreement. As UN peacekeeping operations have developed, the roles of various personnel have expanded and developed, and the categories of personnel have increased. The Model SOFA is a source of legal protection (e.g. immunities), privileges (e.g. freedom of movement, freedom from taxes and charges) and duties (e.g. to respect all local laws and regulations) and must appropriately cover personnel working in a peacekeeping operation and in support of that operation. Two important categories of personnel not covered by the Model SOFA are UN Volunteers (UNVs) and civilian contractors.

a) UN Volunteers

135 There are currently over 2,500 UNVs deployed in UN peacekeeping operations.⁹⁶ UNVs may be members of a UN peacekeeping operation, but are not officials or staff members for UN purposes, due to their relationship with the Organization. UNVs work alongside UN officials in UN peacekeeping operations and often perform similar tasks to junior officials. The minimum age for a UNV is 25 years, and despite being called ‘volunteers’ they are paid by the Organisation. They are recruited on a competitive basis, based on qualifications and experience. UNVs make a significant and cost-effective contribution to UN peacekeeping operations.

⁹⁵ International Criminal Court, Warrant of Arrest, *Case The Prosecutor v. Bosco Ntaganda*, Aug. 22, 2006 (ICC-01/04-02/06). Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo, *List of Individuals and Entities Subject to the Measures Imposed by paragraphs 13 and 15 of SC Res. 1596 (2005), as renewed by paragraphs 9, 11 and 14 of resolution 1807 (2008)*, Mar. 3, 2009, at < http://www.un.org/sc/committees/1533/pdf/1533_list.pdf > (last accessed 11 August 2010).

⁹⁶ UN Background Note, *supra* note 1.

136 However, UNVs are not accorded privileges and immunities under the Convention, as they are not UN officials or experts on mission. References throughout the mission-specific SOFAs to 'members' of a UN peacekeeping operation would appear to include UNVs, for example, in the section setting out a duty to respect local laws and regulations. However the application of the Convention's privileges and immunities under the Model SOFA does not extend to cover UNVs, but is restricted to Members of the UN Secretariat, experts on mission and military personnel on national contingents assigned to the military component of the operation.⁹⁷

137 There are problems associated with UNVs not being subject to the same full range of privileges, immunities and duties as UN officials in a peacekeeping operation. A key issue is that, unlike other UN officials, they have no immunity from the legal process of the host State for their official acts. This means a violation of the local criminal legislation by a UNV, even through carrying out an official act, could lead to their prosecution by the local judiciary and potentially to the infringement of their human rights depending on the human rights record of the host state. This issue has been recognised in a number of mission-specific SOFAs, which have remedied the problem by minor amendments to ensure that UNVs are covered with the same framework of privileges and immunities as UN officials. Specifically, UNVs have been listed as officials of the UN for the purposes of privileges and immunities (e.g. see Para 27 UNMISSET; Para 27 UNMIS; Para 25 UNCRO; Para 23 UNTAC; Para 3 (B) of the Letter of the Minister of External Relations of the Republic of Angola to the UN (UNOA)).

138 The issue surrounding the protection of UNVs can and has been remedied during the agreement of mission-specific SOFAs, and should not be particularly controversial. However the lack of inclusion of appropriate protection for UNVs in the Model SOFA may render it risky to deploy UNVs as a part of a UN peacekeeping operation until such time as a mission-specific SOFA is concluded, as the UNVs would have no legal protections for acts carried out in their official capacity.

b) Contractors to the UN

139 Contractors are a key part of contemporary UN peacekeeping operations. The category of persons under consideration includes persons or companies engaged by the UN to perform services, and provide equipment, materials and goods in support of a UN peacekeeping operation. This does not include contractors in general, only those with which the Organization forms a contractual relationship for such services. Contractors to the UN perform a wide and diverse range of activities, for example: air and ground transport of staff, supplies and humanitarian aid, engineering, communications and information technology, and building maintenance and construction. The growth in the UN's use of contractors has been driven by the increased logistics burden on the Organisation due to the massive expansion and change in the nature of UN peacekeeping. The role of contractors has become much more significant since 1990. This has included a shift in many logistics and support tasks from UN operations to contractors, partly to create greater efficiency and cost-effectiveness and to access specialised expertise.

140 Under the Model SOFA contractors are not covered by any of the provisions. A UN peacekeeping operation is not responsible for the conduct of its contractors, and contractors do not have any privileges and immunities associated with the UN operation (there are very limited exceptions where contractors are listed as 'experts on mission' and are therefore covered by the mission-specific SOFA). In cases where UN contractors have been accused of misconduct, such as sexual exploitation and abuse they may be subject to the local laws and judicial systems, both criminal and civil, for their actions.

⁹⁷ The Model SOFA, *supra* note 44, Paragraphs 15-27.

141 As contractors have become a more significant part of UN peacekeeping operations, their ability to carry out their tasks without undue interference has become more important to an operation's success. While components of a UN operation have privileges (e.g. freedom of movement, freedom from taxation, import/export facilitation) essential to carrying out support tasks, these are not extended to UN contractors carrying out the same tasks. This can lead to restrictions on operational effectiveness (e.g. limitation of movement of contractors to supply an operation) and greater costliness of contractors.

142 This issue has been addressed in some of the mission-specific SOFAs through a number of additions and modifications. In several SOFAs, UN contractors have been recognized within the scope of the SOFA agreement and defined as follows:⁹⁸

‘contractors’ means persons other than members of [the mission], engaged by the United Nations, including juridical as well as natural persons and their employees and sub-contractors, to perform services and/or supply equipment, provisions, materials, supplies and other goods, in support of [the mission] activities. Such contractors shall not be considered third party beneficiaries to this agreement.

143 Specific provisions of the SOFA that are relevant to contractors to the UN have been extended to cover those contractors. These provisions have included for example:

- a) Freedom of movement⁹⁹;
- b) Use of transport facilities (e.g. roads, airports, ports) without tolls and charges unless for services rendered¹⁰⁰;
- c) Facilitation of import/export of equipment and supplies, free of restrictions including taxes and charges¹⁰¹
- d) Provision of facilities for entry and departure, including visas¹⁰²

144 Exposure of UN contractors to local laws and legal processes has also been remedied in a number of mission-specific SOFAs. However, the lack of inclusion of provision for such coverage in the Model SOFA may make it difficult or risky for contractors to carry out their work in support of a UN peacekeeping operation until such time as the mission-specific SOFA is concluded. This is particularly problematic when contractors are essential to support the start-up phase of the mission, as they were, for instance, in case of UNAMID in assisting with the provision of basic services such as water.¹⁰³

3.2 UN communications, satellite and radio (including local media)

145 The set up and operation of UN communications is an issue that has been the subject of significant modification in the mission-specific SOFAs. The ability to communicate effectively and confidentially within the operation and with UN Headquarters is essential to a mission's success.

⁹⁸ UNMIS (1, g, 2), UNAMSIL(1, g, 2), UNMIS (1,g, 2), ONUB (1,g, 2), MINURSO/Morocco.

⁹⁹ UNMIS, para 12; UNMIS, para. 12; MINURSO/Morocco, para. 13; UNCRO, para. 12; MINURSO/Algeria, para. 13.

¹⁰⁰ UNMIS, para. 13-14; UNMIS, para. 14; MINURSO/Morocco, para 15; MINURSO/Algeria, para.15.

¹⁰¹ UNMIS, para. 20; UNMIS, para. 15, 20; MINURSO/Morocco; UNCRO, para. 31; MINURSO/Algeria, para. 22.

¹⁰² UNMIS, para. 22; UNMIS, para. 22; UNCRO, para. 33-34; MINURSO/Morocco, para. 24; MINURSO/Algeria, para. 24.

¹⁰³ Security Council Report, Darfur/Sudan, June 2007,

www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.2776081/k.599B/June_2007BRDarfurSudan.htm.

Since 1990 there have been several advances in the telecommunications technology that the UN utilises. In addition, the public communications component of a UN peacekeeping operation has become much more important. It has been recognized that media may contribute significantly to a conflict, as the radio stations *Radio Rwanda* and *Radio Télévision Libre des Mille Collines* did in the Rwandan genocide.

146 Model SOFA paragraphs 10 and 11 establish the conditions for the peacekeeping operation to use communications facilities in the host State. This includes setting up the logistics necessary to establish the UN communications system. Paragraph 10 of the Model SOFA sets out generally that the UN peacekeeping operation will use communication facilities “in coordination with the Government” of the host State. This implies the requirement for a degree of cooperation and consent by the host State. This broad requirement of coordination may not be realistic and may provide a means for an uncooperative host State to obstruct an important part of the mission. It may also not be required as particular issues on which coordination and consent will be necessary (e.g. agreement on a radio frequency) are dealt with in specific provisions in the SOFA. While the language of the Model SOFA is usually repeated in mission-specific SOFAs, there are examples where the general ‘coordination’ requirement has been deleted (e.g. UNMOT (1995), UNOMIG (1994), UNOMUR (1993)).

147 A few missions-specific SOFAs (UNMIS, paragraph 11(a), UNMSET, paragraph 11(a)) depart from the Model SOFA by introducing a right for the UN peacekeeping operation to disseminate information to the public by radio regarding the mission’s mandate and work. In the case of UNMIS, the SOFA also made clear that the UN radio broadcasting was under the exclusive editorial control of the UN and not subject to censorship of the Sudanese Government.

148 Paragraph 10(b) of the Model SOFA sets out the mission’s right of unrestricted communication within the territory of the host State by phone, mobile, facsimile and other means, and the right to establish the necessary facilities for those communications. In the case of UNMSET (paragraph 10(b)), the SOFA included the right of the UN mission to lay cables and conduct various other activities to establish communications. This reflected the fact that little communications infrastructure existed in Timor Leste after independence due to destruction and low levels of development.

149 In other cases, mission-specific SOFAs have provided for free access to television broadcasting slots which could be used by the UN operation to disseminate information relating to their official activities (UNCRO-Croatia (1995)¹⁰⁴ and MINUGUA-Guatemala (1994)¹⁰⁵).

150 While many of these additions can be negotiated into mission-specific SOFAs, the lack of provisional application of such measures through the Model SOFA may cause significant problems for an operation during the crucial start-up phase.

3.3. Safety and Security of UN and Associated Personnel

151 The Convention on the Safety and Security of the UN and Associated Personnel (1994) is another instrument that has been in mission-specific SOFAs. While the Convention concerns the UN it is not a party and therefore inclusion in the SOFA clarifies the UN’s interest in observance of the

¹⁰⁴ Para 11(a).

¹⁰⁵ Section VI (e).

obligations. This seems to have been particularly the case in UN peacekeeping operations with higher risks to mission personnel.

152 The Safety Convention is very important to the effectiveness of a UN peacekeeping operation and the protection of its personnel. As discussed in a section above, the benefits of applying the Convention in the Model SOFA can be significant, particularly during the initial phase of the deployment when the mission is being set up. The Safety Convention attempts to protect UN personnel, including by preventing and criminalising attacks against UN personnel, and to facilitate their work without hindrances.

153 The key aspects of the Convention have been applied in some mission-specific SOFAs.¹⁰⁶ These agreements oblige the host States to take all appropriate means to ensure the safety, security and freedom of movement of the peacekeeping missions. The host State shall also take all appropriate measures to protect the UN peacekeeping missions, its premises and personnel from attacks. The host States undertook to criminalize certain acts committed against UN peacekeepers or the peacekeeping missions according to the domestic legislation. At the same time, host States made a commitment to exercise criminal jurisdiction over these acts provided that certain preconditions are met.

154 These SOFAs also provide that if any member of the UN peacekeeping mission or its associated personnel is captured or detained in the course of the performance of their duties and they have been identified, they shall not be interrogated and shall be returned be transferred promptly to UN or other appropriate authorities. Furthermore, the SOFA for UNMIS even provides that the host State undertakes to treat detained or captured members of UNMIS or its associated personnel in accordance with universally recognized standards of human rights and the Geneva Conventions of 1949 during the detention.¹⁰⁷ In some of the recent SOFAs the reference is made to the Safety Convention stating that it is applicable to this particular UN peacekeeping operation without further elaboration (e.g. see UNAMI/Kuwait (para 9)).

155 The UNSC has specifically requested the Secretary-General and host State governments to conclude the mission-specific SOFAs taking into account General Assembly resolution 58/82 on the legal protection under the Convention on the Safety of United Nations and Associated Personnel.¹⁰⁸ In the UNMIS case, for example, the host Sudan was not a State Party to the Safety Convention. However this was consistent with the Convention, which provides the Council may activate the Convention's application in an operation of exceptional risk, and more generally with the Council's powers acting under Chapter VII. A problem though was this did not apply during the lengthy start-up phases under the provisional application of the Model SOFA. On other occasions, the Security Council requested the SOFA to be concluded taking into account the same General Assembly resolution 58/82 even when the host State was party to the Safety Convention.¹⁰⁹

156 In light of the recent practice, it may be appropriate to include the Safety Convention or basic aspects thereof in the Model SOFA. Given that the Safety Convention is a treaty that does not

¹⁰⁶ See for example SOFAs for UNMIS (Para 48),UNAMI/Iraq (Art.V, para 7.a to 7.e), UNAMI/Jordan (Para 9-12), UNAMIS (Article VI, Para 2).

¹⁰⁷ The UNMIS SOFA, para 48 (ii).

¹⁰⁸ See for example the UN Security Council Resolution S/RES/1590 (2005), Op para 16 (ii) establishing UNMIS and UN Security Council Resolution S/RES/1769 (2007), Op para 15 (b) establishing UNAMID; Sudan is not a State Party to the Safety Convention. See also the UN Security Council Resolution S/RES/1545 (2004), Op para 10 establishing ONUB; Burundi is not a State Party to the Safety Convention either.

¹⁰⁹ See for example the UN Security Council Resolution S/RES/1528 (2004) Op para 9 establishing ONUCI; Ivory Coast became the State Party to the Safety Convention in 2002.

formally bind all UN Member States, these new amendments may be included as an option rather than as the main body of the Model SOFA. In case of an operation in a State Party to the Convention, the Convention could be included by cross-reference in the Model SOFA (even for provisional application by the Security Council). This could also apply for States party to the Optional Protocol to the Convention. The inclusion would also have to reflect the Security Council's competence and practice to apply the provisions to an operation in a host State which is not party to the Convention.

157 In practical terms, this could mean two square bracketed alternate options in the Model SOFA. First, a cross reference to the Convention as relevant for host States that are party, and which is part of the Model SOFA to be provisionally applied. Second, a reference to the safety provisions (as included in previous SOFAs), to be applied where the Security Council indicates as such in the mandating resolution. Reflecting minimum standards of the Safety Convention in the Model SOFA would play an important role in ensuring the effective start up of more dangerous peacekeeping operations until the mission-specific SOFA is concluded.

3.4 Freedom of movement

158 Freedom of movement is a key aspect of UN peacekeeping operations and has been an issue in some missions. Paragraph 12 of the Model SOFA, which relates to travel and transport, provides that the UN peacekeeping operations shall enjoy freedom of movement throughout the territory of the host State. However this freedom of movement has been controversial at times, and some governments have sought to restrict it, for example the Government of Sudan in respect of UNAMID (e.g. see Joint NGO report 'UNAMID Deployment on the Brink: The Road to Security in Darfur Blocked by Government Obstructions' (2007))¹¹⁰.

159 Many of the agreed SOFAs depart from the wording of the Model SOFA in order to make the obligation clearer and limit non-compliance. Examples of this include: "freedom of movement *without delay*" (UNMIS¹¹¹, UNMEE¹¹² and UNAMIS¹¹³); "complete freedom of movement" (UNAVEM II/Angola¹¹⁴), "unrestricted freedom of movement" (UNMOT/Tajikistan,¹¹⁵ UNOMIG/Georgia¹¹⁶, UNMIBH/Bosnia Herzegovina¹¹⁷).

160 The most significant departure from the Model SOFA is the UNMIS SOFA (2005),¹¹⁸ which refers to "full and unrestricted freedom of movement without delay ... by the most direct route possible without the need of travel permits or prior authorization or notification ...". In the case of Sudan, this may have been a response to problems encountered in obtaining approval for various flights as a part of civil aviation and safety regulations.

161 It is important that the undertakings in SOFAs on freedom of movement leave little room for legal disagreement, to prevent, to the greatest extent possible, the obstruction of the mission mandate to the detriment of the mission's effectiveness.

¹¹⁰ Joint NGO Report, *UNAMID Deployment on the Brink. The Road to Security in Darfur Blocked by Government Obstructions*.

¹¹¹ Section VI (e).

¹¹² Para 12.

¹¹³ Para 12.

¹¹⁴ P 2.

¹¹⁵ P 4 (ii).

¹¹⁶ The Secretary General's letter to Minister for Foreign Affairs of Georgia, 27 September 1994, p3 (ii).

¹¹⁷ The letter of the Ministry of Foreign Affairs of Bosnia-Herzegovina to the Secretary General, 5 September 1996, p2 (ii).

¹¹⁸ Para 12.

3.5 Respect for International Humanitarian Law

162 The Model SOFA does not provide for the application of IHL to UN peacekeepers. However many of the mission-specific SOFAs concluded since 1990 have included a provision requiring UN peacekeeping forces to take note of the ‘principles and spirit’ of the Geneva Conventions. As mentioned above, the position of the UN on the application of IHL to UN peacekeeping forces has become clearer in recent years. This occurred primarily through the promulgation of the Secretary-General’s Bulletin on Observance of IHL by UN Forces in 1999.

163 However, the UN had already started making references to the applicability of IHL in mission specific SOFAs- well before the adoption of the Bulletin but after the promulgation of the Model SOFA. The 1993 UNAMIR SOFA was the first to introduce such a clause¹¹⁹. In that SOFA the UN undertook to ensure that UN forces would conduct their operations with full respect for the “principles and spirit” of the general conventions applicable to the conduct of military personnel. The SOFA also included a provision stating that the UN peacekeeping operation would ensure that their forces were familiar with the relevant standards. Other SOFAs were subsequently concluded with the same references (e.g. UNCRO/Croatia (1995),¹²⁰ UNIFIL/Lebanon (1995),¹²¹ MONUC/Uganda (2003),¹²² ONUB/Burundi (2005)¹²³ and UNAVEM III/Angola (1995)¹²⁴). All undertook to conduct operations with full respect for the “principles and spirit” of the relevant IHL treaties. From 1999, and consistent with the Secretary-General’s Bulletin, SOFA references to IHL were amended to respect the “principles and rules” of the relevant IHL conventions.

164 In more recent missions, such as UNMIS (2004) Para 6(a)(b), MONUC/DRC (2000) Para 6(a)(b), UNMISSET (2002), para 6(a) and (b), the following provision has appeared:

“Without prejudice to the mandate of [name of mission] and its international status:

(a) The United Nations shall ensure that [name of mission] shall conduct its operations in the territory with full respect for the principles and *rules* of the general conventions applicable to the conduct of military personnel. These international conventions include the Four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict;

(b) The Government undertakes to treat at all times the military personnel of [name of mission] with full respect for the principles and *rules* of the general international conventions applicable to the treatment of military personnel. These international conventions include the Four Geneva Conventions of 12 April 1949 and their additional Protocols of 8 June 1977”.¹²⁵

165 Even though the Secretary General’s Bulletin establishes internal, legally binding rules of IHL applicable to the UN peacekeeping operations which is supported by the practice of some of the recent SOFAs, the Model SOFA does not reflect these developments. Therefore, it is crucial that the Model SOFA is in line with UN’s internal rules as well as in consistency with the practice.

¹¹⁹ The UNAMIR SOFA, Para. 7.

¹²⁰ Para 7(a).

¹²¹ Para 7(a).

¹²² Art 4, Para 1 (a).

¹²³ Para 6 (1).

¹²⁴ Para 6(a).

¹²⁵ Sample taken from SOFA Agreement between the United Nations and Sudan concerning the Status of the United Nations Mission in Sudan. UNMIS-Sudan (2004) p2 Para 6(a)(b). Emphasis added.

3.6 Respect for international human rights law

166 International human rights law is relevant to UN peacekeeping operations. This has been acknowledged in a variety of UN fora. The Model SOFA however does not recognize that a UN peacekeeping operation may have human rights obligations in respect of the local population.

167 The UN, TCCs/PCCs and all individual peacekeepers have accepted that UN peacekeepers must comply with human rights standards. This acceptance is set out in the ‘Code of Personal Conduct for Blue Helmets’¹²⁶ and the ‘We are United Nations Peacekeeping Personnel’¹²⁷ documents, which were prepared by the UN Secretariat. Although these documents do not go into detail about what standards are specifically binding on the UN, they are unequivocal in stating that peacekeepers must comply with human rights. All UN peacekeepers undertake to adhere to these two documents as a matter of course.¹²⁸ The documents also form a key part of the Model MOU between the UN and TCCs/PCCs and, when incorporated into concluded MOUs, are binding upon TCCs/PCCs and their contributed personnel.¹²⁹

168 Accordingly, all TCCs and PCCs commit to the application of human rights law when they conclude an MOU with the UN to provide forces to a UN peacekeeping operation. Further, the UN Office of Legal Affairs in internal advice for UN peacekeeping has referred to “the Organization’s obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international IHL and refugee law”.¹³⁰

169 The Capstone Doctrine also includes recognition of the application of international human rights law when discussing the ‘legal framework’ of UN peacekeeping operations. DPKO has developed a number of training modules on international human rights law. The UN Standard General Training Module on ‘Human Rights in Peacekeeping’, which is distributed to Member States peacekeeping training institutions, provides that “[p]eace operations must be conducted with full respect for principles, norms, spirit of human rights conventions.”¹³¹

170 Finally, the instances in which the UN has exercised territorial control and jurisdiction made clear that human rights applied.¹³² In this regard, in both UNMIK and UNTAET early legal regulations passed by the missions required all persons (including UN personnel) undertaking public duties or holding public office to observe the standards of the major human rights instruments.¹³³ The international instruments referred to included:

¹²⁶ UN Department of Peacekeeping Operations Training Unit, “Ten Rules: Code of Personal Conduct for Blue Helmets”.

¹²⁷ UN Doc. A/61/645, Annex III.

¹²⁸ Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly attaching A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations, UN Doc. A/59/710, §A.18.

¹²⁹ *Supra* n.76.

¹³⁰ *New York Times* article and leaked UN legal advice, *supra* n. 29.

¹³¹ SGTM 8.

¹³² J. E Alvarez, *International organizations as law-makers* (Oxford University Press, 2005), 179; E. De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004), 322-326; Clapham, “Human Rights Obligations of Non-State Actors,” 128.

¹³³ The instruments are listed in UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (Dec. 12, 1999) included those listed as well as the European Convention of the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols. The instruments listed in UNTAET Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor (Dec. 27, 1999) those listed.

- The Universal Declaration on Human Rights;
- The International Covenant on Civil and Political Rights and the Protocols thereto;
- The International Covenant on Economic, Social and Cultural Rights;
- The Convention on the Elimination of All Forms of Racial Discrimination;
- The Convention on Elimination of All Forms of Discrimination Against Women;
- The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; and
- The International Convention on the Rights of the Child.

171 It essential for the Model SOFA to include a reference to the applicable international human rights law for three main reasons. First, as a matter of fact it is clear and agreed that international human rights law applies to UN peacekeeping operations. Second, it is acknowledged that human rights have an important role to play in the effectiveness of UN peacekeeping. Third, as a matter of host State sovereignty, the UN needs to acknowledge these obligations which impact on its relationship with the host State population.

172 An obvious approach would be to include in the Model SOFA a provision that the UN will ensure that it complies with ‘applicable’ international human rights law as reflected in the relevant conventions. This would represent a similar approach to that taken in the Model SOFA in respect of the application of IHL. As with IHL, this would make clear that international human rights law applies, but would leave the scope (i.e. elaborating what is ‘applicable’) to be defined by other more appropriate instruments and means.

173 Finally, it should be noted that other non-UN SOFAs and model SOFAs, including the ‘Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces’¹³⁴ (the model NATO SOFA), deal with particular human rights. For example the most recent US-Iraq SOFA, makes provision for specific human rights issues including those related to detention.¹³⁵

174 Differences in the obligations to respect human rights law as articulated in UN and non-UN SOFAs potentially pose difficulties when the UN works in close cooperation with external peace operations actors, as it has increasingly done over the past 20 years.

3.7 Facilities and premises for the UN

175 The provision of land and facilities is a key element for a UN peacekeeping operation, in particular during its commencement phase. Section V of the Model SOFA paragraphs 16-19 provide that the host State shall provide the UN with premises for the UN peacekeeping operation and with electricity and water.

176 Paragraph 16 of the Model SOFA allows for some flexibility in the requirements of the mission: “The Government shall provide ... to the United Nations peace-keeping operation ... areas for headquarters, camps or other premises”. However, certain operations have required a more precise description of appropriate facilities for that operation. In a number of agreed SOFAs, there was additional provision that the host State would provide ‘buildings’ or ‘office spaces’ (e.g. –

¹³⁴ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces http://www.nato.int/cps/en/natolive/official_texts_17265.htm (last visited 15 July 2010).

¹³⁵ Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, article 22, <http://www.globalsecurity.org/military/library/policy/dod/iraq-sofa.htm> (last visited 15 July 2010)

UNCRO/Croatia (1995),¹³⁶ UNAVEM II/Angola (1991),¹³⁷ (UNPROFOR/Bosnia Herzegovina (1993),¹³⁸ UNOGIL/Lebanon (1958)¹³⁹.

177 The provision of inadequate premises and facilities, including water and electricity, or significant delays thereto, may impact negatively on a UN peacekeeping operation. In this respect, there was one key modification made in a number of agreed SOFAs. Where the Model SOFA provides that the host State will assist the UN peacekeeping operation in obtaining and making available electricity, water and other facilities (Model SOFA, paragraph 17) “as far as possible”, in several of the agreed SOFAs the qualification was removed and replaced with the phrase “where applicable”.¹⁴⁰ This meant first, that the host State only needed to provide the facility where it was required (usually a decision of the UN peacekeeping operation); and second, that the duty on the host State to assist was clearer.

178 It appears that some missions, UNAMID for example, have experienced problems securing premises and facilities in a timely manner. One way to assist in this regard would be to introduce, into the requirement relating to the provision of premises and facilities, wording such as “and without delay”. This would introduce a sense of timeliness to the obligation but without providing an arbitrary period of days, which may not be appropriate given the range of possible missions and circumstances of the host State.

3.8 Third party claims and limited liability

179 In accordance with the Convention on Privileges and Immunities, the UN has undertaken, in the Model SOFA, to settle claims of a ‘private law’ character to which the UN peacekeeping operation or any of its members is a party, by means of a standing claims commission.

180 The settlement of disputes provisions in the Model SOFA set out the processes for private law claims by individuals against the UN and claims by the host State against the UN. There are three main issues that may arise relating to claims against UN peacekeeping operations: (a) inconsistencies between the provisions providing for a claims mechanism in the Model SOFA and the practice of the claims process; (b) the lack of a process for public law or human rights complaints against the UN; and (c) the inclusion of the General Assembly limitations on liability and their consistency with some basic human rights obligations of the Organization.

181 Para 51 of the Model SOFAs states: “any dispute or claims of a private law character to which the United Nations Peacekeeping operation [...] is a party shall be settled by the standing claims commission to be established for that purpose.” The analysis of mission-specific SOFAs revealed that the majority of them contained this or a similar provision. However in practice, a standing claims commission has never been established within a UN peacekeeping operation. Instead, in almost all instances, UN-based claims review boards (differing from the standing claims commission by the absence of a host State representative) have been formed to settle third-party claims for personal injury, property loss or damage attributable to activities of members of the force

¹³⁶ Para. 16.

¹³⁷ The Secretary General’s letter to Minister of External Relations of the People’s Republic of Angola, 31 May 1991, at 2.

¹³⁸ Para 15.

¹³⁹ The Secretary General’s letter to Minister for Foreign Affairs of Lebanon, 13 June 1958.

¹⁴⁰ See for example SOFAs for the following missions: UNMIS-Sudan (2004) para 17; UNPROFOR-Bosnia Herzegovina (1993) Para16; UNCRO-Croatia Para 17; and UNMISSET, para 17.

in the performance of their official duties.¹⁴¹ The Secretary-General acknowledged this situation in his 1997 Report on Administrative and Budgetary Aspects of the Financing of UN Peacekeeping Operations (A/51/903) delivered in advance of the adoption of the General Assembly resolution ‘Third-party liability: temporal and financial limitations’.¹⁴² The Model SOFA could be amended to reflect the practice on this issue, even if the standing claims commission were still included as a possible option, activated upon request of the host State.

182 The restriction of the claims process to ‘private law’ claims excludes a range of potential human rights-related claims against a UN peacekeeping operation. As mentioned above, the General Assembly Resolution A/52/247 provides that the claims process does not cover non-economic loss, such as pain and suffering. It therefore would not cover a claim for sexual abuse for example. In non-UN peacekeeping operations individuals would usually have the right to partition relevant treaty bodies in respect of human rights breaches committed by personnel of States who are parties to the Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR).¹⁴³ The Optional Protocol recognizes the competence of the UN Human Rights Committee to receive and review complaints submitted by individuals who claim to be victims of violations of any ICCPR rights by a State party to the Optional Protocol.¹⁴⁴ In these circumstances there may also be forums where issues of human rights breaches can be raised: e.g. periodic reporting to UN human rights treaty bodies or the Universal Periodic Review (UPR) of States in the UN Human Rights Council. However, in a UN peacekeeping operation no such avenues exist. The UN is not a party to any of the UN human rights treaties, and there is no tribunal or committee within the international human rights system with the competence to consider complaints against a UN peacekeeping operation.

183 One context in which this issue was partly addressed was UNMIK. In that mission the Ombudsperson Institution was established to oversee any such complaints against the mission.¹⁴⁵ (Also in the case of UNMIK, quite unusually, the mission reported on Kosovo (Serbia)¹⁴⁶ to the Human Rights Committee. UNMIK’s compliance with human rights was an issue in that reporting.) Where allegations exist and there is no such process, this can have a significant impact on the reputation of the mission and its relationship of trust with the local population.

184 While there are clear processes for civil claims to be made against the UN, it is not clear why no parallel or similar process exists for human rights claims. Some human rights claims might overlap with private law claims, examples include sexual abuse and arbitrary detention. However the human rights aspects of these claims would be subject to different considerations. The absence of a recourse mechanism for allegations of human rights offences committed by UN personnel may be considered an unacceptable impingement upon the sovereignty of the host State and the rights of its population, and may be inconsistent with the human rights obligations of the UN. While the creation of a recourse mechanism for such offences within the framework of the mission would not be ideal, considerations of efficiency may recommend this approach, in the same way they do the civil claims process. The UN has established similar mechanisms in other areas, such as the Ombudsperson for the Security Council targeted sanctions regimes in relation to the sanctions imposed upon individuals related to the Taliban and Al-Qaida.¹⁴⁷ While the creation of this type of recourse mechanism for

¹⁴¹ Shraga, “UN Peacekeeping Operations,” 409.

¹⁴² UN General Assembly Resolution, *supra* note 85.

¹⁴³ The Optional Protocol of the International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S.

¹⁴⁴ *Ibid*, Article 1.

¹⁴⁵ UNMIK/REG/2006/6.

¹⁴⁶ CCPR/C/UNK/Co/1, Concluding observations of the Human Rights Committee, Kosovo (Serbia), 14 August 2006.

¹⁴⁷ UN Security Council Resolution 1904 S/RES/1904, 17 December 2009.

human rights claims against the UN peacekeeping mission would not solve all the associated issues, it should be considered whether a more independent process could be established within the mission to deal with human rights-related complaints.

185 The limitations on liability contained in General Assembly resolution A/52/247 are now routinely included by reference in mission-specific SOFAs. Examples have included SOFAs concluded in relation to UNAMI, MONUC, UNMISSET, UNMIS; UNAMSIL and MINUSTAH.¹⁴⁸ The abovementioned resolution excludes liability for claims arising from the following: an act undertaken in the performance of official duties; an act of ‘operational necessity’; and gross negligence or wilful misconduct by TCCs. It also imposes a 6-month time limit on making a claim following the occurrence or discovery of the loss or injury. In any event a claim may not be submitted more than one year after the termination of the mission mandate. The resolution excludes damages for non-economic loss, such as suffering, and limits an award of damages to US\$50,000, subject to local standards. It also requires verification of all claims.¹⁴⁹ Many mission-specific SOFAs add the condition that the liability must be directly attributable to the UN peacekeeping mission.

186 In many situations the application of the General Assembly prescribed limitations could lead to unfair results, which may be inconsistent with the UN’s human rights obligations. For example, if damage or loss amounting to more than US\$50,000 were to occur due to UN forces acting within their ‘official capacity’ *even if negligent* (rather than grossly negligent) there would be no basis for a claim. If a State were to put similar limits on its liability in a national setting, it would likely not be compliant with international human rights law, in particular, the obligation to provide an effective remedy.¹⁵⁰

3.9 Respect for local laws and regulations

187 As mentioned above, section VI of the Model SOFA provides that a UN peacekeeping operation and its members “shall respect all local laws and regulations”. This commitment is also found in the Model MOU entered into between the UN and a TCC,¹⁵¹ and in the Safety Convention.¹⁵² This provision recognizes a complex reality and a delicate balance, in particular through the use of the term ‘respect’ rather than ‘comply with’. This is a very important provision especially given the immunities regime enjoyed by UN peacekeepers. Nevertheless, quite a few mission-specific SOFAs seem to have omitted the provision regarding respect of local laws. For example, UNTAES (1996), UNMOT (1995), UNOMIG (1994), UNOMUR (1993).

188 On the one hand, UN peacekeepers should do their very best to observe the local laws and regulations. On the other hand, it is recognized that UN peacekeepers may not always be able to strictly comply with local laws and regulations, for a variety of reasons. For example, acts done in the course of official duties may be contrary to some local laws (e.g. carrying a weapon, or an act of detention). In respect of minor offences, UN peacekeepers may not be aware of the local laws, which may differ from other countries. In addition, the laws may not be seen as fully compliant with the standards of human rights which the Organization upholds or those by which it is bound. All members of the UN peacekeeping operation have immunity from legal process for their official acts

¹⁴⁸ UNAMI SOMA Article X; MONUC/Uganda Article V; MONUC/Tanzania Article IV; UNMISSET para. 58; UNMIS para. 54; MONUC/DRC Art.VII; UNAMSIL para 54; MINUSTAH/Haiti Article VII.

¹⁴⁹ General Assembly Resolution 52/247, *supra* note 85.1.

¹⁵⁰ Article 2(3), ICCPR.

¹⁵¹ Model MOU, *supra* note 76..

¹⁵² The Safety Convention, *supra* note 62, Article 6.

(Model SOFA, para 46), and furthermore, members of military contingents are subject to the exclusive criminal jurisdiction of their sending State (Model SOFA, para 47 (b)).

189 Not all provisions of the Model SOFA will be applicable to every operation, and therefore not all provisions will be (or have been) incorporated into mission-specific SOFAs. However, it needs to be made clear that while some elements of the Model SOFA may be optionally incorporated into or excluded from a mission specific SOFA, some provisions must be included. The requirement for an operation to respect all local laws and regulations should not be optional.

3.10 Standards of conduct and accountability

190 When considering updating the Model SOFA, standards of conduct and the accountability of UN peacekeepers are important considerations as they are clearly linked to the jurisdiction provisions existing in the Model SOFA, to new UN materials and to General Assembly resolutions approved after the creation of the Model SOFA. Since 1990, there has been much UN effort directed at ensuring accountability for the most serious and on-going human rights violations occurring at the ground level during peace operations.

191 Paragraphs 46-49 of the Model SOFA establishes the basis for jurisdiction in relation to criminal and civil proceedings for acts committed by all members of the UN peacekeeping operations including locally recruited personnel. However, it is clearly acknowledged that the UN itself does not have a direct recourse for criminal actions against any of the categories of employees who commit crimes while serving as part of the peace operations.¹⁵³ Jurisdiction is dependent upon the type of individual involved (UN official and expert on mission, or contingent member). In the case of contingent members, jurisdiction over criminal proceedings will be the exclusive responsibility of the contributing country. If the individual is a UN official or military or police ‘expert on mission’, jurisdiction is then the responsibility of either the host State¹⁵⁴ or, in practice, the State of nationality of the individual.

192 While functional immunities can be waived at the discretion of the Secretary General¹⁵⁵, in reality, the UN is often not in a position to waive immunity by definitely determining an act was not in the UN official or expert on mission’s ‘official capacity’. In some cases immunity may not be waived because the standards of the criminal justice system of the host State may not meet the standards required of international human rights law. This becomes very delicate for the UN since if it waives immunity to allow the criminal prosecution in the host State, then it may jeopardize the human rights of the accused individual, and possibly the morale of UN staff members. Yet on the other hand, if it upholds immunity that may result in the impunity or perceived impunity of the accused individual.

193 As already mentioned above, a number of amendments were made to the Model MOU between the UN and TCCs in 2007. The key amendments included incorporation of ‘We Are United Nations Peacekeeping Personnel’ thus reinforcing once again its legally binding character. The MOU once again reaffirmed that the Government of the TCC has the primary responsibility for investigating any acts of misconduct or serious misconduct committed by a member of its national contingent (Article 7 of the MOU). However, if the Government of the TCC does not notify the UN

¹⁵³ William J. Dorsch et al., *Improving Criminal Accountability in United Nations Peace Operations*, Stimson Center Report (Washington, USA: The Henry L. Stimson Center, June 2009), http://www.stimson.org/fopo/pdf/Improving_Criminal_Accountability_June2009.pdf.

¹⁵⁴ The Model SOFA, *supra* note 44, Para 47

¹⁵⁵ Convention on the Privileges And Immunities, *supra* note 49, sections 20 and 23.

that it will start an investigation within 10 day from the notification by the UN of an incident, the Government is considered unwilling or unable to conduct such investigation and the UN may, as appropriate, initiate an administrative investigation of alleged serious misconduct without delay. The Model MOU also obliges the TCC to inform the UN of the findings of investigations into possible misconduct or serious misconduct by any member of its national contingent. This provision however is subject to the national law and regulations of the TCC. The Model MOU also provides the framework for cooperation between the UN and TCCs in carrying out investigations. It provides the TCCs assurances to the UN to carry out criminal and/or administrative investigations. Finally, it provides an overarching umbrella for ensuring the accountability of the members of national contingents.

194 These amendments to the Model MOU introduced an improvement in the overall process to investigate, either by the UN or the contingent member's Government, allegations of misconduct by UN peacekeepers.

195 When UN peacekeepers commit acts of misconduct against the civilian population of a host State, this impinges the sovereignty of the host State and can undermine the relationship between the mission, the community and the host State. A number of modifications could be made to the Model SOFA to reflect the amendments made to the Model MOU. A minimum requirement would be for a UN peacekeeping operation to forward to a host State the results of any investigation into allegations of serious misconduct committed by a member of the UN peacekeeping operation against a member of the host State population. These results could be the results of an investigation carried out either by the UN or the competent authorities of the State of nationality of the alleged perpetrator.

196 In light of the objective of the revision of the MOU, namely introducing uniform standards of conduct and making those binding,¹⁵⁶ it would be appropriate to consider reflecting this in the Model SOFA. This might be achieved simply by making an addition to the section on respect for local laws providing that peacekeepers will 'comply' with the UN standards of conduct in the MOU.

197 On the other hand, one related aspect of the Model SOFA is not reflected in current practice nor incorporated into mission-specific SOFAs. Article 48 of the Model SOFA obliges the Secretary-General to obtain assurances from TCCs 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 peacekeeping operation. In practice, this provision is very rarely included within the mission-specific SOFAs. This commitment is, however, a part of the Model MOU¹⁵⁷ and should be reflected in all SOFAs.

3.11 Self-defence and non-use of force

198 The use of force in UN peacekeeping operations is a difficult and politically sensitive issue. The legal position is one issue among a number that makes the use of force issue challenging in practice. It is often unclear in what circumstances and what level of force peacekeepers may legally use. This lack of clarity can have a significant impact on an operation. Any use of force beyond self-defence requires a mandate from the Security Council. The Security Council resolution mandating an operation will often indicate the purpose of the authorisation of the use of force (e.g. the protection of civilians). In such cases, the authority to use force is provided in the resolution, and will apply at

¹⁵⁶ Model MOU, *supra* 76, Article 7 bis (7.2).

¹⁵⁷ *Ibid*, Article 7 quinquiens (7.22, 7.23).

the stage of provisional application of the Model SOFA, and once a SOFA is concluded. However, what is less clear is the legal right of UN peacekeepers to use force in circumstances in which the use of force is not specifically authorised by the Security Council. The following analysis is focussed on that issue.

a) Use of force in self-defence and in defence of the mandate

199 In UN peacekeeping operations it is accepted that peacekeepers have the right to use force in self-defence. The right to use force in self-defence has been consistently provided for in the rules of engagement established for each peacekeeping operation since their inception. However the concept of self-defence has been significantly expanded over time.

200 Peacekeeping has generally been viewed as a consensual activity, falling somewhere between the diplomatic and coercive dispute settlement mechanisms provided for in the Charter. As noted above, because UN peacekeeping was not envisaged by the founders of the Organisation the enterprise is not governed by a clear legal framework in the Charter or elsewhere. Because of this, over the years efforts have been made to articulate agreed principles that would guide the deployment and activities of a mission. The principles articulated by Secretary-General Hammarskjöld to guide the UNEF I deployment, namely consent, impartiality and non-use of force except in self defence, have remained the three key ‘guiding principles’ of UN peacekeeping, although they have been subject to increasingly progressive interpretations over the years.

201 While the principles do not have any legal status, and the Council has never indicated an intention to be bound by them, they do represent the closest thing to a generally agreed approach to peacekeeping that is available. The General Assembly has reaffirmed the principles in each annual report of the Special Committee on Peacekeeping Operations,¹⁵⁸ the Secretariat included progressive interpretations of the principles in the Capstone Doctrine, and the Security Council has in practice, more or less been guided by the principles in the determination of mandates.

202 The principle regarding the use of force was, with the approval of the Security Council, expanded during the deployments of UNFICYP and UNEF II to encompass the non-use of force except in self defence *and in defence of the mandate*. In the Cyprus operation Secretary-General U Thant attempted to clarify the UN’s use of force doctrine and issued an *aide memoire* setting out instances in which UN troops were authorised to use force.¹⁵⁹ The Secretary-General essentially articulated that troops were authorised to use force to ensure the ability to carry out their mandated tasks. In 1973 the Security Council approved Secretary-General Waldheim’s proposal for UNEF II, that “Self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council”.¹⁶⁰

203 Force Commanders have also used the expanded self-defence precept in UN peacekeeping operations. For example, the justification was used by General Sanderson in UNTAC to deploy his forces to protect the electoral process, and General Dallaire proposed to use it to protect civilians in

¹⁵⁸“The Special Committee believes that respect for the basic principles of peacekeeping, such as the consent of the parties, impartiality and the non-use of force except in self-defence and in the defence of a mandate authorized by the Security Council, is essential to its success”, see UN General Assembly, *Report of the Special Committee on Peacekeeping Operations and its Working Group. 2009 substantive session. A/63/19* (New York, USA: UN, 2009), para. 23, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/279/26/PDF/N0927926.pdf?OpenElement>.

¹⁵⁹ Note by Secretary-General, *Aide memoire concerning some questions relating to the function and operation of the United Nations Peace-keeping Force in Cyprus*, UN doc. S/5653, 11 April 1964

¹⁶⁰ UN Secretary-General, *Report of the Secretary-General on the Implementation of Security Council resolution 340 (1973)*. S/11052/Rev.1.

Rwanda.¹⁶¹ While significant restrictions were imposed (primarily for political reasons) on UNAMIR's use of force in Rwanda as a non-Chapter VII operation, the Security Council later recognized a broad right of 'self defence' in resolution 918 (1994):

The Security Council,

Recognizes that UNAMIR may be required to take action in self-defence against persons or groups who threaten protected sites and populations, United Nations and other humanitarian personnel or the means of delivery and distribution of humanitarian relief;

204 While the UNSC has included specific reference to the right of self-defence in the operative part of the occasional peacekeeping mission mandate (e.g. UNFIL, Security Council resolution 467), it is not generally considered necessary to do so. Yet the Model SOFA does not provide any basis for the use of force in self-defence nor has it been provided for in mission-specific SOFAs. In fact, there is no legal agreement or authoritative document that ascribes this right to UN peacekeepers. It can only be assumed that is an 'inherent right' of UN peacekeepers and an 'implied' legal term of UN-host State relationship. By contrast, the right to use force *including in self defence* is a key provision of many SOFAs concluded in non-UN peacekeeping operations.¹⁶² In the absence of a similar provision in the UN Model SOFA, there has been a lack of clarity regarding when UN peacekeepers may use force.

205 As mentioned above, the expansion of the self defence concept to include the prohibition of the use of force except in self-defence *and in defence of the mandate* has been generally supported by the General Assembly, the Security Council, the Secretary-General and also found support in the Brahimi Report. The broad interpretation is also endorsed by the commentaries to the ILC's draft Articles on Responsibility of International Organizations.¹⁶³ However, within the expanded concept the scope of the acceptable use of force will vary, as it is dependent on an operation's mandate, not on any clear and fixed rules as to when and what level of force may or may not be used. If UN peacekeepers are to use force, pursuant to the laws of armed conflict it must be both necessary and proportionate in the circumstances.

206 It is important to note that this analysis concerns the *right* to use force, not the *duty*, and is focussed upon the authority to use force, not a mandated obligation to do so. The legal authority should not be confused with mission tasks or UN policy, which are reflected in *inter alia* mission mandates, Secretary-General's directives, concepts of operation and mission ROEs. The UN Secretariat is very cautious about resort to force in peacekeeping operations and will seek to first

¹⁶¹ T. Findlay, *The use of force in UN peace operations* (SIPRI, 2002), 358.

¹⁶² E.g. see Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan ('Interim Administration') (January 2002), Article IV(2) provides: "The Interim Administration understands and agrees that the ISAF Commander will have the authority, without interference or permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission." <http://webarchive.nationalarchives.gov.uk/+http://www.operations.mod.uk/isafmta.pdf>; *Dayton Peace Agreement documents initialed in Dayton, Ohio on November 21, 1995*, Annex 1A: Agreement on the Military Aspects of the Peace Settlement, Article VI(5), provides that: "The Parties understand and agree that the IFOR Commander shall have the authority, without interference or permission of any Party, to do all that the Commander judges necessary and proper, including the use of military force, to protect the IFOR and to carry out the responsibilities listed above in paragraphs 2, 3 and 4, and they shall comply in all respects with the IFOR requirements", <http://www1.umn.edu/humanrts/icty/dayton/daytonannex1A.html>; US-Iraq SOFA, *supra* n. 135, Article 4(5) provides: "The Parties retain the right to legitimate self defense within Iraq, as defined in applicable international law."

¹⁶³ International Law Commission, *ILC Report, A/64/10*, 2009, para. 72 (a).

use other tools to achieve its goals. The 1995 DPKO ‘General Guidelines for Peacekeeping Operations’ stated: “[i]n practice, commanders in the field have been reluctant to use their authority in this way, for well-founded reasons relating to the need for a peace-keeping operation to maintain the active cooperation of the parties”.¹⁶⁴

207 While some aspects of the use of force in UN peacekeeping operations are somewhat controversial amongst the UN Membership and various organs, the right to self-defence of UN peacekeepers largely is not. The failure to recognise the right and its parameters in the legal relationship between the UN and the host State may lead to uncertainty, indecision and ineffectiveness. This is a problem faced most often by members of military and police contingents, who wish to be certain that particular uses of force would be legal in the absence of express provision in the Security Council mandate. The lack of certainty may impact operational effectiveness, and leaves members of military and police contingents open to criticism for failing to act or acting contrary to the legal limitations on the use of force. To provide in the Model SOFA for the use of force in self-defence (including in defence of the mandate) would make explicit what otherwise is already implied, and would provide a greater degree of certainty for UN peacekeepers and missions.

b) Protection of civilians

208 In the context of use of force, it may also be necessary to make clearer the rights of UN peacekeepers in relation to the prevention of serious human rights violations of civilians. Very simply, the right of a UN peacekeeper to intervene using force if s/he is confronted with a civilian being attacked or tortured should be clear. While this issue is related to the Security Council mandated task of the protection of civilians, the right of a UN peacekeeper to intervene to prevent violence against civilians *in the absence of* a specific Security Council mandate is quite distinct. One of the key issues is whether such a right is included in the self-defence concept upon which there is general consensus.

209 The issue is linked to the UN experience in Rwanda and Srebrenica. The Brahimi report in 2000 stated the following:

Finally, the desire on the part of the Secretary-General to extend additional protection to civilians in armed conflicts and the actions of the Security Council to give United Nations peacekeepers explicit authority to protect civilians in conflict situations are positive developments. Indeed, peacekeepers — troops or police — who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles and, as stated in the report of the Independent Inquiry on Rwanda, consistent with “the perception and the expectation of protection created by [an operation’s] very presence” (see S/1999/1257, para 62).

210 This view is reflected in the 2002 UN Master List of Rules of Engagement that provides a rule for the use of force to defend civilians, which unlike some of the other rules in that Master List does not depend on the individual peacekeeping operation’s mandate.¹⁶⁵ Rule No. 1.8 provides:

¹⁶⁴ UN Department of Peacekeeping Operations, “General Guidelines for Peace-Keeping Operations” (International Training Centre of the ILO, Turin, Italy, 1995), 335, [http://ocha-gwapps1.unog.ch/w/lib.nsf/db900SID/LGEL-5SYHEK/\\$FILE/un-peacekeeping-1995.pdf?OpenElement](http://ocha-gwapps1.unog.ch/w/lib.nsf/db900SID/LGEL-5SYHEK/$FILE/un-peacekeeping-1995.pdf?OpenElement).

¹⁶⁵ The UN master list of numbered rules of engagement, (provisional May 2002), from United Nations, Guidelines for the development of ROE for UNPKO, MD/FGS/0220.001, attachment 1 (May 2002), in Findlay,

Use of force, excluding deadly force, to defend any civilian person who is in need of protection against a hostile act or hostile intent, when competent local authorities are not in a position to render immediate assistance, is authorised. When and where possible permission to use force should be sought from the immediate superior.

211 Clarifying the right of a UN peacekeeper to intervene in this way may be particularly important in the case of UN police who are deployed to carry out policing duties often without a clear Chapter VII mandate. In some cases, such as Timor Leste, a specific ‘police agreement’ has been concluded between the UN and host State,¹⁶⁶ in order to clarify the right of UN police to use force, however, in the absence of such an agreement, including during the start-up phase of a mission, the position *vis-a-vis* the use of force by a UN police officer to intervene to prevent serious violations of human rights may be unclear.

212 Again, this issue is about establishing the *rights not duties* of UN peacekeepers and is about setting the legal parameters, rather than the policy parameters, of a UN operation. In substance, it would mean that acting to protect civilians under imminent threat of physical violence would not be unlawful for UN peacekeepers. UN peacekeepers would clearly be provided legal coverage for acting in this way. It is inconceivable that it would be illegal for a soldier or police officer in any UN peacekeeping operation to intervene to save the life of a civilian being attacked in front of their eyes. This was, in effect, confirmed by the Security Council in resolution 918 (1994) on the Rwandan genocide, in which (as set out above) they expanded the self-defence concept to include the protection of civilians.

213 The right of UN peacekeepers to use force to protect civilians is part of the inherent rights of a UN peacekeeping operation, consistent with the purposes and principles of the UN Charter, and as a matter of the implied consent of the host State including through its membership of the Charter. It may also be considered an element of UN peacekeepers right of self-defence. Including language in the Model SOFA explicitly acknowledging a broad concept of the right to self defence, which includes UN peacekeepers right to protect civilians under imminent threat of physical violence, would provide clear protection for UN peacekeepers exercising such a right and in doing so enhance operational effectiveness.

3.12 International Criminal Court

214 The legal issues faced by UN peacekeeping operations *vis-a-vis* the ICC generally relate to the 2004 Relationship Agreement between the International Criminal Court and the United Nations, approved by the General Assembly in resolution 58/318. This agreement sets out the obligations that regulate the relationship between the two international organizations.

215 Under the Agreement, and subject to confidentiality protections, information (for example on conflict situations and accused personnel) is forwarded by the UN to the ICC (Article 18 (3)). The collection and transmission of information may involve a UN peacekeeping operation which routinely gathers significant amounts of information in order to fulfil its mandate. Such information has been important in the *Lubanga* case (for his alleged activities in the DRC), in which the Trial

The use of force in UN peace operations, 425. Some of the other rules state: “This rule can only be included ... if consistent with the mandate of the UNPKO.”

¹⁶⁶ See for example Supplemental Arrangement between the United Nations and Mission of Support in East Timor (UNMISET) and the Government of the Democratic Republic of East Timor on the transfer of Police Responsibilities to the East Timor Police Service, 2002.

Chamber ordered the release of the accused in part as a result of the disclosure limitations on the ICC Prosecutor pursuant to the UN-ICC Agreement.¹⁶⁷

216 The Security Council may take actions in respect of criminal justice that impact or impose obligations upon a UN peacekeeping mission. Examples have included the referral of the Darfur situation to the ICC Prosecutor¹⁶⁸ and provision of tasks to UNMIK and UNTAES to assist in the apprehension of individuals subject to Security Council warrants.¹⁶⁹ However, these issues are not directly relevant to the SOFA activity, as they will usually be authorised under a Chapter VII resolution, which therefore provides the required legal basis for the activity even in the absence of an agreed SOFA.

217 There is arguably a need for the SOFA to reference the relationship agreement, which is recognized by the General Assembly and binds the UN as a matter of law. This should be done in both the Model and mission-specific SOFAs. For example, a provision could be added to the effect that the host Government undertakes to respect that the UN has entered into a relationship agreement with the ICC and has obligations pursuant to that agreement.

¹⁶⁷The ICC press release 15 July 2010, ICC-CPI-20100715-PR559.

¹⁶⁸ The UN Security Council Resolution S/RES/1593 (2005), 31 March 2005.

¹⁶⁹ Both missions where transitional administrations, see SC Res. 1037 (1996) which established the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES); and SC Res 1244 (1999) which established UNMIK.

4. Preliminary conclusions and recommendations

218 The Model SOFA is an important instrument that assists UN peacekeeping missions to establish the conditions for their effective operation in the host State. The foregoing analysis suggests that the Model SOFA, promulgated by the UN Secretary-General in 1990 and not updated since then, does not accurately reflect the current needs of UN peacekeeping missions.

219 The shortcomings of the Model SOFA can cause unnecessary friction between a UN peacekeeping mission and host State, and can become an unnecessary focus of attention and effort of both parties. UN peacekeepers are spending significant time and resources engaging on many of the elementary issues, which a clearer legal basis in the Model SOFA could assist to minimize. In some cases shortcomings in the Model SOFA may result in the UN being seen as unaccountable for its actions, governments are having their populations exposed to mistreatment and human rights abuses inflicted by members of UN peacekeeping operations, then enduring the perpetrator's immunity from punishment. In other cases shortcoming in the Model SOFA may result in delays in mission start up and may impede operational effectiveness with attention being diverted from implementing essential mandated tasks. Of significant concern, shortcomings relating to the use of force by UN peacekeepers may leave UN peacekeepers unnecessarily exposed or inhibit them from acting when they otherwise might. Change is required to remedy these shortcomings in order to ensure that UN peacekeeping operations are deployed with the required legal protection to facilitate effective mandate implementation and a successful mission.

Recommendations

220 Revising the Model SOFA would provide an opportunity to perfect the shortcomings of the dated document and address unacceptable practices. It would allow for the incorporation of developments in a number of key UN instruments that have significant implications for peacekeeping operations. It could also reinforce other initiatives that the peacekeeping policy community is progressing, including some related to recommendations of the Brahimi Report¹⁷⁰.

221 In light of the developments that have taken place in UN peacekeeping since the promulgation of the SOFA it is crucial the instrument be revised to ensure that: (a) it is consistent with the UN agreements, decisions and internal documents that have a legally binding character on peacekeepers; and (b) it takes into account the new tasks and approaches that have been developing in peacekeeping operations since the adoption of the Model SOFA (e.g. the growth in policing, increase in the categories of UN personnel, and expansion of the use of force in self-defence concept).

222 Updating the Model SOFA in this way would achieve several objectives: (1) it would provide improved protection to UN peacekeepers; (2) the contradiction between different sets of rules enshrined under different documents would be eliminated; (3) decisions of the UN would be implemented and reflected in the Model SOFA; (4) the SOFA would better serve as the key document for the legal relationship between the host State and UN; (5) when the Model SOFA is applied provisionally there would no longer be gaps of legal issues not addressed; and (6) it would improve the quality and effectiveness of the SOFAs subsequently agreed by the UN with host States.

¹⁷⁰ Brahimi, *The Brahimi Report*.

223 The Secretary-General promulgated the original Model SOFA and could be responsible for proposed updates to the Model based on practice and developments since 1990. Many of the possible changes are already implemented by the Secretary-General as a matter of course in mission-specific SOFAs.

5. Questions for consultation

224 A goal for the consultations, including the Experts' Workshop, is to test the analysis and preliminary findings of this background paper. It is intended to draw upon the wide range of different expertise required, and to benefit from the experiences of those who have worked in UN peacekeeping operations. The following represents a list of key questions for the consultations:

1. Generally, does the Model SOFA promulgated in 1990 still reflect the requirements of UN peacekeeping and the purpose of a model?
2. For each of the issues identified in the paper, and in light of UN practice and developments, does the Model SOFA still reflect the requirements of UN peacekeeping?
 - (a) Additional categories of UN peacekeeping personnel
 - (b) UN communications, satellite and radio
 - (c) Safety of UN personnel and the Convention
 - (d) Freedom of movement of UN personnel
 - (e) Respect for International Humanitarian Law
 - (f) Respect for International Human Rights Law
 - (g) Facilities and premises for the UN
 - (h) Third party claims and the limited liability of the UN
 - (i) Respect for local laws and regulations
 - (j) Standards of conduct and accountability of UN peacekeepers
 - (k) The use of force (in self-defence and to protect civilians)
 - (l) The activities of a UN peacekeeping mission and the work of the ICC
3. Are there any other issues in the Model SOFA, in light of UN practice and developments, that need to be considered?
4. Is there a case for considering an update to the Model SOFA and if so how should this be done?

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ANNEX 1

Mission-specific SOFAs compliance with the structure of the Model SOFA

Categories of SOFAs	Number	Missions
Treaties that do not follow the Model SOFA structure – post 1990	9	MINUCI /Ivory Coast (2003), MONUC/Tanzania (2003), MONUC/Uganda (2003), UNAMI/Iraq (2005), UNAMIS/Sudan (2004), UNIOSIL/Sierra Leone SOMA(2005), UNIOSIL/Sierra Leone SOMA supp (2006), UNMIT SOMA/Timor Leste (2006), UNOTIL/Timor Leste (2005)
Exchange of letters that do not follow the Model SOFA structure – post 1990	18	MINUGUA/Guatemala (1994), MIPONUH /Haiti(1998), ONUSAL/EI Salvador (1992), UNAMA/Afghanistan (2002), UNAMI/Kuwait (2004), UNAMIC/Cambodia (1992), UNAVEM II/Angola (1992), UNMIBH/Bosnia and Herzegovina (1996), UNMIK (2001) UNMOT/Tajikistan (1995), UNOA/Angola (2000), UNOMIG/Georgia (1994), UNOMIL (1993) UNOMUR/Uganda (1993), UNAMI/Jordan (2004), UNSMIH/Haiti (1996), UNTAES/Croatia (1996), UNTMIH/Haiti (1997)
Treaties that do not follow the Model SOFA structure – pre 1990	1	UNSF (1962, transitional administration)
Exchange of letters that do not follow the Model SOFA structure – pre 1990	8	ONUCA/Costa Rica (1989), ONUCA/Guatemala (1990, January), ONUCA/Honduras (1990, July), ONUCA/Nicaragua (1990, August), UNAVEM I/Angola (1989), UNIIMOG/Iran (1998), UNOGIL/Lebanon (1958), UNYOM/Saudi Arabia (1963)
Total number of SOFAs that do not follow the Model structure	36	
Treaties that follow the Model SOFA structure – post 1990	19	MINUCRA/Central African Republic (1998), MINURSO/Algeria (1998), MINUSTAH (2004), MINURSO/Mauritania (1998), MINURSO/Morocco (1999), MONUC/DRC (2000), ONUB/Burundi (2005), ONUCI/Ivory Coast (2004), ONUMOZ/Mozambique (1993), UNAMIR/Rwanda (1993), UNAMIS/Sierra Leone (2000), UNMIS/Sudan (2005), UNAVEM III/Angola (1995), UNCRO/Croatia (1995), UNIFIL/Lebanon (1995), UNMEE/Ethiopia (2001), UNMISSET/East Timor (2002), UNPROFOR/Bosnia and Herzegovina (1993), UNTAC/Cambodia (1992)
Exchange of letters that follow the Model SOFA structure – post 1990	1	UNPREDEP/Macedonia (1994)
Treaties that follow the Model	3	ONUC/Congo (1961), UNEF I/Egypt (1957), UNTAG/South Africa (1989)

SOFA structure – pre 1990		
Exchange of letters that follow the Model SOFA structure – pre 1990	1	UNFCYP/Cyprus (1964)
Total number of SOFAs that follow the Model structure	24	

ANNEX 2

List of SOFAs/SOMAs reviewed within the Peacekeeping Law Reform Project

N.	SOFAs Name	Country	SOFAs Language
1	MINUCI.F.	Ivory Coast	French
2	MINUGUA	Guatemala	Spanish
3	MINURCA	Central Africa	French
4	MINURSO.Algeria.E.	Algeria (West Sahara) Mauritania (West	English
5	MINURSO.Mauritania.F.	Sahara) Morocco (West	French
6	MINURSO.Morocco.E.	Sahara)	English
7	MINUSTAH	Haiti	French
8	MIPONUH	Haiti	French
9	MONUC.Congo.F.	DRC	French
10	MONUC.Tanzania.E.	Tanzania	English
11	MONUC.Uganda.E.	Uganda	English
12	ONUB - Burundi.	Burundi	English
13	ONUC	Congo (Leopoldville) Costa Rica (Central America)	English
14	ONUCA.Costa Rica	Guatemala (Central America)	Spanish
15	ONUCA.Guatemala	Honduras (Central America)	Spanish
16	ONUCA.Honduras	Nicaragua (Central America)	Spanish
17	ONUCA.Nicaragua I-26962 ONUCA.	Nicaragua (Central America)	Spanish
18	Nicaragua	America)	Spanish
19	ONUCI	Ivory Coast	French
20	ONUMOZ	Mozambique	English
21	ONUSAL	Salvador	Spanish
22	UNAMA	Afghanistan	English
23	UNAMI - SOMA	Iraq	English
24	I-45615 UN - USA - Iraq	USA (Iraq Mission)	English
25	UNAMI.Jordan	Jordan (Iraq Mission)	English
26	UNAMI.Kuwait	Kuwait (Iraq Mission)	English
27	UNAMIC	Cambodia	French
28	UNAMIR	Rwanda	French
29	UNAMIS	Sudan	English
30	UNAMSIL	Sierra Leone	English

31	UNAVEM I.	Angola (Verification Mission)	English
32	UNAVEM II.	Angola (Verification Mission)	English
33	UNAVEM III.	Angola (Verification Mission)	English
34	UNCRO	Croatia	English
35	UNEF I.	Egypt	English
36	UNFICYP I-8131 UNFICYP	Cyprus	English
37	(Austria)	Cyprus	English
38	I-18184 UNFICYP (UK)	Cyprus	English
39	UNIFIL	Lebanon	English
40	I-3827 UNEF	Lebanon	English
41	I-4166 UNEF	Lebanon	English
42	UNIMOG	Iran-Iraq Border	English
43	I-26126 UNIMOG	Iran-Iraq Border	English
44	UNIOSIL SOMA - supp.	Sierra Leone	English
45	UNIOSIL SOMA.	Sierra Leone	English
46	UNMEE	Ethiopia + Eritrea	English
47	UNMIBH	Bosnia-Herzegovina	English
48	UNMIH	Haiti	French
49	UNMIK	Kosovo	English
50	I-43434 UNMIK	Kosovo	English
51	I-43437 UNMIK	Kosovo	English
52	UNMIS	Sudan	English
53	UNMISET	East Timor	English
54	UNMIT SOMA 2006	Timor-Leste	English
55	UNMOT	Tajikistan	English
56	UNOA	Angola	Portuguese
57	UNOGIL	Lebanon	English
58	UNOMIG	Georgia	English
59	UNOMIL	Benin	French
60	UNOMUR	Uganda	English
61	UNOTIL	Timor-Leste	English
62	UNPREDEP	Macedonia	English
63	UNPROFOR	Bosnia-Herzegovina	English
		Indonesia/Netherlands	
64	UNSF	West New Guinea	English
65	UNSMIH	Haiti	French
66	UNTAC	Cambodia	English
67	UNTAES	Croatia	English
68	UNTAG	South Africa	English
69	UNTMIH	Haiti	English
70	UNYOM	Saudi Arabia	English
71	BINUCA	Central Africa	French