

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

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Immunities of UN Peacekeepers in the Absence of a SOFA

- No SOFA
 - need to act quickly,
 - the inability to wait for negotiations,
 - lack of a functioning government with whom to negotiate
 - disagreement over issues (taxes, visas, etc.)
- Examples of no SOFA
 - Somalia I and II or “UNOSOM” I and II
 - Somalia Unified Task Force or (“UNITAF”)
 - Lebanon (the UN Interim Force in Lebanon or “UNIFIL”) (for the first twenty years of ops)
- Definitions:
 - “peacekeeping” - focused on military personnel carrying arms and authorized to use force.
 - Privileges and Immunity
 - Immunity - procedural bar against adjudicative or enforcement jurisdiction
 - Privilege - substantive bar against prescriptive jurisdiction

Consensual operations – state immunity

- Balance of sovereigns:
 - Each State has jurisdiction over all persons present in and activities arising within its territory
 - Each state immune from other states - sovereign equality
- The two primary theories for State immunity are the
 - “fundamental right” theory - the armed forces of a State are inherently immune from foreign State jurisdiction
 - the “State waiver” theory - one State’s armed forces receive a grant of immunity
- Generally peacekeepers are present with consent at the request of the state concerned, so the issue does not come up.

Consensual operations – state immunity

- How to balance sovereigns?
 - Prohibited to commence litigation against a State without its consent
 - States retain the right of exclusion of a foreign State's organs from their territory
 - No State is required to place its organs in the territory of another State
 - By willingly placing its troops within the territory of the other State, the State cannot be said to be subjected to the other State's jurisdiction against its will
 - Upon disagreement regarding the terms of immunity, may object by refusing to send or withdrawing its troops.
- Therefore, only accrue state immunity when host state consents to presence

Consensual operations – state immunity

- State practice appear to support this view
 - Cases in Australia, Brazil, Canada, Egypt, Panama, UK, and US, and at PCA
 - UK: Through WWII consistently asserted exclusive criminal jurisdiction over foreign troops within the territory of the UK
 - US: Practice reflected in several US court martial trials (e.g. troops stationed in Philippines, Italy, Japan, Korea)
 - And situations where SOFAs absent (e.g. troops stationed in Thailand, Yemen)
 - (ICJ case *Armed Activities on the Territory of the Congo* – must have consent of sovereign to be present lawfully)
 - Practice re SOFAs - vary in terms of protection
 - generally provide for immunity closely limited to the reasons for the consent to the presence of the troops
- Scholars of international law
 - Brownlie, Hackworth, Hyde, H. Lauterpacht, Plender, Sinclair, Starke, etc. supportive

Consensual operations – state immunity

- Challenge: “Hainan Island incident”
 - involving the emergency landing without consent of a US Navy aircraft on the territory of the People’s Republic of China
 - US claimed State immunity for the airplane and personnel, Chinese refused to recognize
 - Chicago Convention art 25. provides that states must provide assistance to the aircraft of other States in distress
 - Due to the emergency, the State organ does not have the ability to elect to remain outside the host State’s territory, thus it cannot be said to have consented to the immunity, or lack thereof, that the host State has granted

Consensual operations – state immunity

- For these reasons, the UN does not usually deploy armed peacekeeping forces into a state's territory without its consent
 - Even where “all necessary means” are authorized by UNSC – still request state consent
 - Haiti (MINUSTAH)
 - Burundi (ONUB)
 - Liberia (UNMIL)
 - Sudan (UNMIS and UNAMID)
 - DRC (MONUC)
 - Cote Divoire (UNOCI)
 - UNSC Res 929 (1994) re Rwanda authorized (French) operation Turquoise
 - And will withdraw when consent withdrawn
 - UNEF I withdrawn from Egypt in 1967, when that state withdrew its consent
 - UNMEE was ordered to withdraw from Eritrea in 2005, but UNSC resisted and only terminated mission in 2008 due to Eritrea's restrictions

Non-consensual operations

- Three trends-
 - 1. Development of responsibility to protect
 - UNSC Res 1674 (2006) and 1894 (2009)
 - 2. Migration of peacekeeping from Chapter VI to Chapter VII
 - UNSC Res 1270 (1999) re Sierra Leone - creation of UNAMSIL
 - 3. Development of non-consensual peacekeeping
 - UNSC Res 794 (1992) re Somalia
 - UNSC Res 940 (1994) re Haiti
 - UNSC Res 1031 (1995) re Bosnia
 - UNSC Res 1528 (2004) re Cote d'Ivoire?
 - UNSC Res 1973 (2011) re Libya

Non-consensual operations

- Possible sources of immunities:
 - International Humanitarian Law
 - United Nations Charter
 - Convention on the Privileges and Immunities of the United Nations
 - Convention on the Safety of United Nations and Associated Personnel
 - Security Council Resolutions
 - Customary International Law & Model UN SOFA

Non-consensual operations - IHL

- No immunities – combatant’s privilege
- Do UN peacekeepers qualify as engaging in armed conflict?
 - Greenwood
 - International Committee of the Red Cross
 - International Criminal Tribunal for the former Yugoslavia
 - UN Secretary-General
 - UN Security Council
- Is it wise to have IHL apply?
 - Combatant’s privilege
 - Reciprocity – POW treatment, limited weaponry, etc
 - Legal certainty (and one training regime)

Non-consensual operations – UN Charter

- Art. 105 only immunities for
 - “officials of the Organization”
 - And only “as are necessary for the independent exercise of their functions in connexion with the Organization”
- Peacekeepers have never been considered “officials” of the UN

Non-consensual operations - Convention on Privileges & Immunities

- The Convention addresses several classes of immunities:
 - those of the UN as an organization,
 - representatives of UN members,
 - senior level and lower levels officials of the UN,
 - and “Experts on Mission”
- Officials
 - Employees of the UN, subject to UN Staff Regs
 - Peacekeepers have never been considered “officials”

Non-consensual operations - Convention on Privileges & Immunities

- “Experts on Mission”
 - Functional immunity - “acts [are] done by them in the course of ... their mission”
 - Must be designated as such – not automatic because of role
- Previously many experts have been designated
 - Special Rapporteurs
 - Members of the International Law Commission
 - International Civil Service Commission
 - Human Rights Committee (and other similar committees)
 - **Including military forces**
 - e.g. US airmen and technical logistics experts serving under the UN Protective Force in Yugoslavia (“UNPROFOR”)

Non-consensual operations - Convention on Privileges & Immunities

- Designated authority
 - ICJ *Cumaraswamy* case - designation is in the exclusive competence of the SG
 - Not for UN Security Council
 - Unclear if this could be delegated to e.g. Head of UN Department of Peacekeeping (DPKO) (Under-SG)
 - Unclear if SOFA can designate when supposed to be in SG competence
 - But see ICTR *Erlinder* case - MOU in place between Rwanda and ICTR designating “other persons” as experts (including defense counsel)
- UN Model SOFA
 - Art. VI designates military observers, UN civilian police, and other civilian peacekeeping personnel
 - Not military peacekeeping personnel
- UN now generally opposed to designating military personnel

Non-consensual operations - Convention on Privileges & Immunities

- Designating acts
 - SG must also separately determine that the acts in question are “official” acts.
 - But see ICTR *Erlinder* case – Registry and Appeals Chamber held that acts were official
 - Question whether the Secretary-General must also declare the acts necessary
- Review of SG actions
 - ICJ *Cumaraswamy* case – SG’s determination may only be set aside by a national court “for the most compelling reasons”
 - Required for non-states parties to UN, e.g. International Criminal Court?

Non-consensual operations - Convention on Privileges & Immunities

- Obligation to waive immunity
 - Immunities Convention: SG “shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations”.
 - Exclusive competence of the Secretary-General “in his opinion”
 - “Duty” to waive?
 - Refusal to waive, subject to review?

Non-consensual operations - Convention on Safety of UN Personnel

- Not immunities, but protections
- Covers
 - operations “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”
 - established “for the purpose of maintaining or restoring international peace and security”
- Excludes
 - any “United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies”
 - (Supports argument that UN peacekeepers subject to IHL)

Non-consensual operations – UN SC Resolutions

- UN SC Resolutions either ordering the application of the Model UN SOFA or immunities generally
 - UNSC Res 1487 re immunities of peacekeeping forces as provided under Rome Statute of the ICC
 - UN Mission in Kosovo (“UNMIK”) ordered *de facto* SOFA for armed personnel (powers delegated by the UNSC)
 - UNSC has specifically ordered that actors within a State may not harm UN personnel
- Difficulties
 - whether the UNSC has these powers,
 - whether an agreement imposed in this fashion would be enforceable,
 - and what the consequences of violating this order would be.

Non-consensual operations – UN SC Resolutions

- Order immunities-
 - Does the UNSC have this power?
 - Presumption of *intra vires* – *Certain Expenses* case
 - Implied powers doctrine
 - Can implied powers (re immunities) flow from other implied powers (re authorizing peacekeeping)?
 - Based on necessity argument - are immunities “necessary”?
 - » Needed to conclude mission?
 - » Modern trend away from expansive reading of implied powers?
 - » Combatant privilege available under IHL
 - Even if OK – limited by necessity
 - What is necessary to achieve objective? interim immunities
 - If permanent immunities/SOFA will never be possible, then no power?

Non-consensual operations – UN SC Resolutions

- Order SOFA -
 - Vienna Convention on Treaties art 52 – “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”
 - What are the principles of international law in the Charter?
 - Are Chapter VII Res automatically OK? Or are they tested against principles?
 - Are these Chapter VII Res in harmony with the principles?
- Limitations of the Model SOFA
 - Designates as experts, but excludes military personnel
 - Need designation of acts as official
 - Designating authority
 - Duty to waive
 - Review of designation

Non-consensual operations – Customary international law

- State practice and *opinio juris*
 - Need evidence of consistent application of immunities/Model SOFA when not otherwise bound to it
 - Difficult to separate from state immunity practice
 - Difficult to separate from IHL practice
 - Little to no evidence that authorities rely on customary international law for immunities of peacekeepers

Conclusion

- So what should states seek in order to assure immunities for the troops?
 - Consent of the host State and waiver of its jurisdiction
 - Explicit consent/waiver is preferable – does not need to be a SOFA, but could be quicker interim diplomatic note
 - If there is no consent to the operation, then
 - 1. Look to IHL – issue express declaration that IHL applies to the situation
 - 2. Request UNSC Res re interim extension of immunities for the troops
 - Not just order the interim application of the UN Model SOFA
 - 3. Avoid “expert on mission” – but if no other choice, seek clear determination from the UNSG (avoid Under-SG at UNDPKO) that
 - the person is an “expert on mission “
 - that the acts in question (peace enforcement, carrying arms, etc.) are “official acts”
 - and perhaps also that the acts are “necessary” for the purposes of the mission
 - MOU with the UNSG re situations where might waive immunities
 - Acknowledge that designation may be subject to limited judicial review by the host State
 - 4. Do not rely on customary international law
 - 5. Conclude a SOFA as soon as possible!