

UN Peacekeeping and The Model Status of Forces Agreement

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

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2011

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Financial Supporters of the United Nations Peacekeeping Law Reform Project

New Zealand Ministry of Foreign Affairs and Trade
University of Essex, School of Law and Human Rights Centre

The Project would like to thank all those that have assisted and particularly Ambassador Jim McLay, Sir Nigel Rodley and Mr Ben Steele for their helpful support.

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February 2011

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Project Overview

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 broad ranging discussions 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.

One of the Project's primary areas of work is the preparation of a report on the Model UN Status of Forces Agreement (Model SOFA) (A/45/594). The report is being developed through a process of research and broad consultation. This is a reflection of the range of 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. A following stage of consultations took place at an Experts' Workshop held in London in August 2010. A background paper was prepared to form the basis for discussions at that workshop. The executive summary of that background paper, as well as a summary of the workshop discussions, are below. Drawing upon the ongoing consultations and the discussions at the Experts' Workshop, the background paper is being built upon and developed into a final report, which will be provided to the UN peacekeeping community in 2011.

The aim of the Project's work on the Model SOFA is to consider whether updating the Model SOFA is necessary due to the evolution of UN peacekeeping and the resulting changes in the body of UN peacekeeping and legal 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 should support and not hinder the important work of UN peacekeepers.

Background Paper - Executive Summary

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, which can be months after deployment. 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. Importantly, it often serves to evidence and articulate the consent of the host State for the deployment and activities of the UN operation. The Model SOFA has been a positive and central part of UN peacekeeping for the last 20 years.

Since the promulgation of the Model SOFA, however, UN peacekeeping has undergone several significant developments that are not reflected in that document. Missions have become increasingly complex and multidimensional, and have moved beyond the tasks of traditional peacekeeping. 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 practical challenges have arisen in relation to the application of the Model SOFA in contemporary peacekeeping contexts. Many of these issues have arisen from developments in the nature and activities of UN peacekeeping since the promulgation of the Model SOFA and the lack of a clear legal framework. This has included issues and challenges relating 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. They can also result in UN peacekeepers being exposed, as it has become customary for the Security Council to apply the Model SFOA provisionally during the critical start-up phase of peacekeeping operations. While it was not originally intended, the Model SOFA has often been applied for extended periods of time, in situations where the negotiation and conclusion of the bilateral SOFA has been slow or difficult.

The Project has reviewed approximately 70 mission-specific SOFAs, to see what issues there were and how these had been dealt with. 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 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 legal gaps that potentially expose UN peacekeepers and the operation; and (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. This could be done in consultation with Member States and stakeholders. Many of the possible changes are already implemented by the Secretary-General, as a matter of course, in mission-specific SOFAs.

Experts' Workshop – Summary of Discussions

The Experts' Workshop was held in London in August 2010. It was co-chaired by Professor Sir Nigel Rodley and Scott Sheeran of the University of Essex. The international experts that participated were drawn from a spectrum of countries and had a broad range of expertise and backgrounds. They included senior military and police officers, UN and government officials, academics and NGO representatives, many of whom had experience working in UN peacekeeping operations. The Workshop was conducted under the Chatham House Rule.

Discussion of the Model SOFA at the Workshop was geared toward addressing the following issues:

- Issue 1: Generally, does the Model SOFA promulgated in 1990 still reflect the requirements of UN peacekeeping and the purpose of a model?
- Issue 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) Safety of UN personnel and the Convention
 - c) Respect for International Humanitarian Law
 - d) Respect for International Human Rights Law
 - e) UN communications, satellite and radio
 - f) Facilities and premises for the UN
 - g) Freedom of movement of UN personnel
 - h) Use of force (in self-defence and to protect civilians)
 - i) The activities of a UN peacekeeping mission and the work of the ICC
 - j) Third party claims and the limited liability of the UN
- Issue 3: Are there other issues in the Model SOFA, in light of UN practices and developments, that need to be considered?
- Issue 4: Is there a case for considering an update to the Model SOFA and if so, how should this be done?

There was a general recognition among the group that the nature of UN peacekeeping had changed significantly since promulgation of the Model SOFA in 1990. Several participants indicated that, in their view, as a result of these changes the Model UN SOFA no longer reflected the requirements of UN peacekeeping and required review. Other participants cautioned that the fundamental elements of the SOFA should not be reopened.

The problem of the interim application of the Model SOFA was raised. It was highlighted that the appropriateness of the content and coverage of the Model SOFA is particularly important during the period of interim application, so as to assist the start-up of the operation and not to leave the UN exposed. There was broad recognition that the Model SOFA was often applied provisionally for a much longer period than intended by the Security Council. In the view of several participants, a stronger Model SOFA may reduce the opportunities for tension and protracted negotiations, and thereby hasten the agreement of an effective SOFA.

Several participants noted the difficulty of crafting a Model SOFA that would cover the spectrum of UN peace operations. One participant suggested that it might be possible for a revised Model SOFA to take the form of a menu, with provisions that could be included/excluded based on the particular situation.

There was general agreement that the spectrum of personnel employed was an important feature of UN peacekeeping operations, but one which was inadequately addressed in the Model SOFA. Certain categories of personnel, such as UN Volunteers (UNVs) and the different types of contractors are not addressed in the Model SOFA. It was noted that this issue had been dealt with in different ways in several mission-specific SOFAs. There was consensus that different categories of personnel needed to be covered by the Model SOFA, but that there were significant concerns with regard to generally extending immunities to certain categories of personnel such as contractors.

All agreed that the safety and security of peacekeepers was centrally important. Some participants felt that relevant aspects of the 1994 Convention on the Safety of United Nations and Associated Personnel could be sensibly included in the Model SOFA, in line with practice and the request of the Special Committee on Peacekeeping Operations.

The Model SOFA includes nothing on International Humanitarian Law (IHL) or International Human Rights Law (IHRL). While mission-specific SOFAs concluded after the adoption of the 1999 Secretary-General's Bulletin on IHL contained references to the Bulletin, none include a reference to IHRL, although it is recognised in UN instruments that IHRL may apply to UN peacekeeping operations. References to IHL in mission-specific SOFAs do not explain the scope of the rules, just that the body of law applies. There was general agreement that the incorporation of a reference to the application of IHL in the Model SOFA would be welcomed. Several participants indicated that such a reference should be general and minimal. Most participants indicated their support for the inclusion of a provision that affirmed the application of IHRL in the Model SOFA, and it was suggested that a similar approach might be taken as with IHL – not explaining the scope of the rules, rather just confirming that parts of the body of law may be applicable. A participant questioned the necessity for articulating applicable bodies of law. It was acknowledged that one of the purposes of reviewing the SOFA was to make clearer the regulatory framework that already exists, and that while a SOFA might not necessarily provide operational clarity on the application of the different bodies of law, it could provide a more coherent picture of the existing framework, and guidance on where to turn for further detail.

It was asserted that in practice the issue of appropriate detention procedures needed to be addressed at the beginning of a peacekeeping operation. To do so required consideration of the mission's legal powers of policing, detention, review and the power to transfer to national authorities. To do this one could not avoid consideration the application of IHRL.

It was noted that many complications arise with the use of different types of communications equipment in UN peacekeeping operations, and that the relevant provisions of the Model SOFA require clarification. On the issue of freedom of movement, it was noted that in reviewing recent mission-specific SOFAs, it became evident that the language on freedom of movement has been strengthened in a number of instances e.g. 'freedom of movement without delay'. Several participants highlighted the importance of UN peacekeepers having freedom of movement by air, ground and sea, in order to carry out their mission and that this should be reflected in the SOFA.

Some mission-specific SOFAs concluded by the UN had not included the Model SOFA provision regarding respecting local law. There was extended discussion on the language used in the Model SOFA. The general feeling was that the provision was an important one for the UN to follow, and although the language in the Model SOFA may not be the perfect formulation of the concept, opening that particular language might create more problems than it would solve.

It was agreed that there is a huge expectation for UN accountability in peacekeeping operations. It is important for justice to be done and to be seen to be done by those concerned, in order to strengthen relations between the mission and the local population. This was an important part of the UN's 'zero tolerance' policy towards sexual exploitation and abuse. There was recognition by participants that accountability was a complicated and multifaceted issue for UN peacekeeping, and that there exists a multitude of accountability mechanisms that needed to be implemented. One aspect was that the Model SOFA should be consistent with the MOU between the UN and troop contributing States. On the issue of third party claims and the limited liability of the UN, it was noted that there is a need for an improved compliance mechanism in the Model SOFA, otherwise the UN's accountability is undermined.

There was support in the Workshop for including a reference to the UN's relationship agreement with the ICC in the Model SOFA. However, some questioned whether this was necessary as the law and practice in this area is dynamic and still developing.

There is recognition across UN organs that UN peacekeepers have the right to use force in self-defence and in defence of the mandate. However, there is a gap of sorts in that the Model SOFA does not speak of any right to use force, for example, in self-defence. While this might not be a legal issue when there is a Ch VII mandate setting out the right to use force, in non-Ch VII mandated missions there may be nothing in the mandate or the SOFA regarding the use of force. In these situations, the Rules of Engagement (RoE) will reflect a mission's legal and/or policy settings to use force in such circumstances. However, the question remains whether the right to use force should be set out in the agreement between the UN and the host State rather than implied. There was broad ranging discussion on the use of force. Several participants thought that use of force issues should always be dealt with in the mandate by the Council, while others sought explicit legal coverage for the use of force by UN peacekeepers in the SOFA. It was recognised that this was a difficult issue, which may be challenging to reduce to a formulation for inclusion in the Model SOFA.

Several additional issues, not identified in the Background Paper were raised. A number of participants suggested that there is a need for a provision in the Model SOFA to protect against degradation of the host State's environment and unsustainable absorption of natural resources by the UN operation. Separately, several participants indicated they were in favour of including a general statement on the applicability of international law. Others supported reference to the inclusion of internationally agreed instruments particularly in the areas of IHRL. The role of Non-State Actors was also raised, however, it was noted that it would be very difficult to reference them in the SOFA, as the SOFA is agreed between the host State Government and UN. It was noted that the UN and host government officials often had little awareness of the SOFA and its provisions. A proposal was well supported that there should be an undertaking in the Model SOFA on both sides to disseminate knowledge of the SOFA arrangements to relevant UN and host government officials.

The general feeling of the participants was to support a review of the Model SOFA along the lines set out in the Background Paper and discussions in the Workshop. It was recognised that the essence of the Model SOFA was very good, but that particular areas would benefit from being updated or revised. Several participants expressed the view that the Model SOFA is a template, and should be an ideal, representing best practices. It was recognised that in reviewing the Model SOFA it would be important to always keep in mind the purpose of the instrument. It should be to act as a guide in negotiations and be complete enough for provisional application. For these reasons it should not start at a point less than what was expected and needed for the effective functioning of a UN peacekeeping operation.