Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?

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Abstract

Exemptions from international criminal jurisdiction are of particular importance for the ongoing dispute on the role and authority of the International Criminal Court. In this context, the application of Articles 16 and 98 ICCSt. has led to controversies. The author examines the relevance of Article 98 ICCSt. to agreements governing the legal status of visiting forces in a receiving state (Status of Forces Agreements: SOFAs). He concludes that as Article 98(2) is not applicable to standard SOFAs, no conflicts between such SOFAs and the ICC Statute should arise. As organs of their sending states, foreign servicemen enjoy functional immunity under general principles of international law recognized under Article 98(1); consequently, any act of detention or physical control by the receiving state would require cooperation with the sending state. The same conclusion is reached with regard to members of peacekeeping operations, as they are generally exempted from the jurisdiction of the receiving state.

1. Introduction

The present transatlantic dispute concerning the International Criminal Court (ICC) is not confined to possible abuses of international jurisdiction; rather it affects its merits altogether. Prominent personalities have expressed concerns that 'excessive reliance' on universal jurisdiction might 'undermine the political will to sustain the humane norms of international behaviour so necessary to temper the violent times in

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which we live'.[1] They advocate a changed system of international jurisdiction which, in contrast to the ICC Statute,[2] would be subject to Security Council decision with due process safeguards guaranteed by the Council, as is currently the case with the ad hoc Tribunals for the former Yugoslavia and Rwanda.

In view of these controversies, legal experts are challenged to provide an objective assessment of the law as it now stands and comment on the critical points raised, in a spirit of encouraging cooperation on both sides of the Atlantic and avoiding 'tendencies to seek identification via confrontation'.[3]

This contribution deals with immunity concepts under the ICC Statute. It examines in particular the provisions of Article 98 and its widely assumed relevance for agreements governing the legal status of visiting forces in a receiving state (Status of Forces Agreements: SOFAs). In this respect, standard SOFAs as well as specific solutions have to be considered. Also the status of peacekeeping personnel may be interesting in this context. Conclusions will be drawn as to the conditions under which a receiving state might be requested by the ICC to surrender a member of a visiting force.

2. Immunities under the ICC Statute

The ICC Statute refers to immunities in different contexts: Article 27 provides that immunities do not bar the ICC from exercising its jurisdiction, while Article 98 addresses the issue in the context of surrender to the Court, without which no trial could be conducted.

An important exemption has been authorized by the Security Council (SC) in its Resolution SC Res.1422 (2002).[4] It was adopted as a result of difficult and emotional negotiations following a US veto on 30 June 2002 of the renewal of the United Nations (UN) peacekeeping operation in Bosnia and Herzegovina. This was caused by the lack of SC agreement on the inclusion, in the renewal of that mandate, of the exemption from ICC jurisdiction requested by the US. The US had announced that it would veto further peacekeeping missions should the sought-for exemptions not be included in their mandates.[5] In SC Res. 1422 (2002), the SC, acting under Chapter VII of the Charter of the UN, requested,

> consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized

1 H. Kissinger, *Does America Need a Foreign Policy? Toward a Diplomacy for the 21st Century* (New York: Simon and Schuster, 2001), Chapter Seven.
2 Rome Statute of the International Criminal Court of 17 July 1998.
3 Kissinger, *supra* note 1, at Chapter Two.
4 SC Res. 1422, 12 July 2002, unanimously adopted.
5 C. Fritsche, 'Security Council Resolution 1422: Peacekeeping and the International Criminal Court', in J.A. Frowein, K. Scharioth, I. Winkelmann, and R. Wolfrum (eds), *Verhandeln für den Frieden* [*Negotiating for Peace*] (Berlin: Liber Amicorum Tono Eitel, 2003), 107–120.

> operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.

The Council also expressed its intention to renew this request 'under the same conditions each 1 July for further 12-month periods for as long as may be necessary'.

While this Resolution was severely criticized by the US,[6] academic experts,[7] and NGOs,[8] it was renewed on 12 June 2003 until 30 June 2004.[9]

The US has also tabled a proposal for bilateral agreements under which 'current or former Government officials, employees (including contractors), or military personnel or nationals of one Party . . . shall not, absent the expressed consent of the first Party, be surrendered . . . to the International Criminal Court for any purpose'.[10] As of today, 54 such bilateral agreements have already been signed and are now awaiting ratification,[11] a process that certainly requires careful scrutiny under both international and national law.

It would be less than fair and correct to say that the agreements proposed by the US were 'impunity agreements'. They would only exclude the international jurisdiction of the ICC, while the US has a convincing record of prosecuting crimes committed by its soldiers at the national level. The proposed agreements would, however, exclude cooperation with the ICC in this matter. They would prevent contracting parties from surrendering alleged offenders and providing assistance to the Court. By so doing they would retroactively limit existing obligations under the ICC Statute.

6 Furthermore, the UN Secretary-General Kofi A. Annan, in an unprecedented letter to the US Secretary of State dated 3 July 2002, stated that he was seriously concerned about the US proposal. He noted that Article 16 ICCSt. was 'meant for a completely different situation' and that an adoption of this proposal 'would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty', with 'the only real result . . . that the Council risks being discredited' [http://www.iccnow.org].

7 K. Ambos, 'International Criminal Law Has Lost Its Innocence', 3 *German Law Journal* (1 October 2002) No. 10, http://www.germanlawjournal.com; M. Byers, 'America in the Dock', *Independent on Sunday* (London), 9 March 2003; A. Zimmermann, '"Acting under Chapter VII (. . .)" – Resolution 1422 and Possible Limits of the Powers of the Security Council', in Frowein *et al., supra* note 5, 253–278.

8 Amnesty International, *International Criminal Court: Security Council must refuse to renew unlawful Resolution 1422*, May 2003, AI Index: IOR 40/008/2003, [http://www.iccnow.org]; Amnesty International, *International Criminal Court. The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice*, May 2003, AI Index: IOR 40/006/2003, Distr: SC/CO/PG/PO; American Non-Governmental Organizations Coalition for the International Criminal Court, *AMICC Response to the US Administration International Court Policy*, May 2002 [http://www.amicc.org].

9 SC Res. 1487, 12 June 2003, adopted with 12 votes in favour and three abstentions. The UN Secretary-General stated that 'in addition to my concern about its conformity with Article 16 of the Rome Statute, I do not believe this request is necessary'. He also expressed his 'hope that this does not become an annual routine. If it did so, I fear the world would interpret it as meaning that this Council wished to claim absolute and permanent immunity for people serving in the operations it establishes or authorizes. And if that were to happen, it would undermine not only the authority of the ICC but also the authority of this Council, and the legitimacy of United Nations peacekeeping' [http://www.iccnow.org].

10 Full text in S. Zappalà, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements', 1 *Journal of International Criminal Justice* (2003) 114–134, at 123, note 30.

11 http://www.iccnow.org, accessed September 2003.

In response to the US initiative, the Council of the European Union has developed a set of principles to serve as guidelines for member states when considering their obligation to cooperate fully with the ICC.[12] Under these guiding principles, existing agreements, such as SOFAs and agreements on legal cooperation on criminal matters, including extradition, should be taken into account, whereas new agreements limiting surrender to the ICC would be inconsistent with ICC States Parties' obligations and could also be inconsistent with other international agreements. Any arrangement excluding surrender of persons to the ICC should include appropriate provisions ensuring that persons who have allegedly committed crimes falling under the jurisdiction of the Court do not enjoy impunity; it should furthermore be limited to persons who are not nationals of an ICC State Party, and should contain a 'sunset clause', i.e. a termination or revision clause limiting the period in which the arrangement is in force. Thus the European Union (EU) did not fully exclude new agreements limiting surrender to the Court, given that this matter was controversial among EU member states; it rather issued recommendations to limit their conclusion. It remains to be seen how this will influence state practice at a regional and perhaps even global level.

New agreements excluding surrender to the ICC might raise problems in view of existing national legislation of States Parties to the ICC. For instance, they would run counter to the German ICC Cooperation Act,[13] which, like the earlier ICC Statute Act,[14] was adopted unanimously by the German *Bundestag*. Section 2(1) and (2) of the ICC Cooperation Act presumes that there is a duty to surrender, if a request has been made by the ICC. In order to comply with an agreement such as that proposed by the US Administration, it would be necessary to first amend the ICC Cooperation Act. This would, however, require new legislation that the *Bundestag* might not pass.

3. Article 98 ICCSt. and Status of Forces Agreements

A. *General*

The question of whether and to what extent *new* agreements under Article 98 ICCSt. would be consistent with international treaty law is a matter of dispute.

Article 98 constitutes an exception to the general obligation under the Statute to surrender persons to the ICC. Paragraph 1 refers to existing 'obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State' and provides that in such a case the Court may not proceed

12 2450th Council meeting (Brussels, 30 September 2002), see http://europa.eu.int/abc/doc/off/bull/en/200209/p102003.htm

13 Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof – IStGH-Gesetz – IStGHG (Artikel 1 des Gesetzes zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofs vom 17. Juli 1998 (BGBl 2002 I 2144)).

14 Gesetz zum Römischen Statut des Internationalen Strafgerichtshofs vom 17. Juli 1998 (BGBl 2000 II 1393).

with a request for surrender or assistance, 'unless it can first obtain the cooperation of that third State for the waiver of the immunity'.

Paragraph 2 refers to 'agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court', provided that where such agreements apply, the Court may not proceed with a request for surrender, 'unless it can first obtain the cooperation of the sending State for the giving of consent for the surrender'. There is a widely shared opinion that Article 98(2) was intended to prevent legal conflicts which might arise because of existing agreements, but that it was not intended to allow the conclusion of new agreements limiting the international jurisdiction of the Court. However, the text of this provision does not clearly exclude future agreements and this was expressly intended by the US.[15]

Under general rules of international law, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[16] The object and purpose of the ICC Statute is to provide that the most serious crimes do not go unpunished, and to ensure their effective prosecution by taking measures at the national level and by enhancing international cooperation.[17] It is a further principle of interpretation that exceptions to a general obligation (here the obligation to surrender to the Court) have to be interpreted and implemented narrowly. It would certainly run counter to the obligation to provide the international cooperation and judicial assistance required under the ICC Statute if agreements were concluded making surrender to the ICC dependent on the approval of another state.

Where such agreements are concluded between *Parties* to the Statute, there is no danger that the perpetrator will ever escape the jurisdiction of the ICC. If the state that has claimed immunity does not itself properly try the perpetrator, the ICC may put a request for surrender directly to that state which would then be obliged under the Statute to comply.

A problem arises only with agreements concluded between parties to the Statute and *other* states. In such cases the state not party to the Statute, if it exercises its jurisdiction, is under no obligation to assist in implementing orders of the ICC and it might be difficult to ensure that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity if state or diplomatic immunity of those persons is invoked. The Council of the EU, in an effort to limit misuse of Article 98, has recommended that any arrangement excluding a surrender of persons to the ICC should only apply to persons who are not nationals of an ICC State Party.[18] But possible misuse in the latter case is exactly the matter of concern. The Council has obviously seen this problem and has tried to limit it by suggesting that any such arrangement should contain a termination or revision clause limiting the period in which the arrangement is in force.

15 S. Zappalà, *supra* note 10, at 123.

16 Art. 31 Vienna Convention on the Law of Treaties of 23 May 1969, UNTS 1155, 331.

17 Preamble, para. 4 ICCSt.

18 *Supra* note 12.

Article 98(2), which had been negotiated with active US participation, is designed to address potential discrepancies that may arise as a result of existing agreements, and still permit cooperation with the ICC. It has been widely assumed that the well-known NATO SOFA,[19] and also the Partnership for Peace Status of Forces Agreement (PfP SOFA)[20] which makes the provisions of NATO SOFA applicable to new partners of the North Atlantic Alliance (NAA), were taken as key examples in this context.[21] This assumption, however, is not supported by the object and purpose of SOFAs, or by the specific contents of their relevant provisions, or by existing practice.

The purpose of SOFAs and their practical effect is to limit, and not extend, the functional immunity of foreign armed forces as the result of a balance between the law of the sending state and the law of the receiving state.[22] State immunity pertaining to armed forces of a sending state is an important exception to the general rules of international law applicable to territorial jurisdiction. SOFA provisions recognize this exception, but they adjust recourse to functional immunity to the requirements of the receiving state. SOFAs thus serve a shared interest in confidence building and good cooperation between the participating states. This is particularly true for clauses on jurisdiction over visiting forces.

In short, SOFAs and Article 98(2) ICCSt. deal with different matters. The relevant provisions of SOFAs lay down the conditions under which the sending and the receiving state respectively may exercise their jurisdiction over offences allegedly perpetrated by members of the armed forces of the sending state. Article 98(2) ICCSt. deals with international agreements pursuant to which the consent of the sending state is required to surrender a person of that state to the ICC, a matter which is not dealt with in standard SOFAs. Hence no contradiction arises between Article 98(2) and SOFAs. In principle, such a contradiction might have arisen between the request for surrender by the ICC and the immunity pertaining to state officials duly authorized to operate abroad. However, this conflict was anticipated and solved in Article 98(1) ICCSt., which requires the Court to respect immunities under international law.

19 Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces (NATO SOFA), London, 19 June 1951, 199 UNTS 67.

20 Agreement among the States Parties to the North Atlantic Treaty and the other States Participating in the Partnership for Peace Regarding the Status of Their Forces signed in Brussels on 19 June 1995 (PfP SOFA).

21 O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999), 1133; S. Zappalà, *supra* note 10, at 122.

22 D. Fleck, 'Introduction', in D. Fleck (ed.), *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001), 5.

B. *The NATO SOFA*

The relevant provision of NATO SOFA, Article VII[23] on Jurisdiction and Military Police, which is widely used as a model even beyond the NAA, is limited to issues of

23 Article VII [Jurisdiction, Military Police]:

1. Subject to the provisions of this Article,
a. the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;
b. the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependants with respect to offences committed within the territory of the receiving State and punishable by the law of that State.
2. a. The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
b. The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependants with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.
c. For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include:
(i) . . . treason against the State;
(ii) . . . sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.
3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
a. The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
(i) . . . offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependant;
(ii) . . . offences arising out of any act or omission done in the performance of official duty.
b. In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.
c. If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.
4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.
5. a. The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependants in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.
b. The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependant.
c. The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.

national rather than international jurisdiction and it neither restricts nor excludes a surrender to the ICC.

As far as the NATO SOFA deals with *exclusive jurisdiction*, this conclusion follows from the textual definition of exclusive jurisdiction in Article VII(2), which refers to offences punishable by the law of one of the states involved, but not by the law of the other state. Crimes falling under the international jurisdiction of the ICC are of such a severe nature that it would be unrealistic to conceive of a case in which punishment under the law of one of the two states involved would not be possible.

By far the greatest number of cases under Article VII NATO SOFA are those of *concurrent jurisdiction*. Under Article VII(3)(a) either the sending state or the receiving state has a primary right to exercise jurisdiction. Primary jurisdiction of the *sending state* applies to

(i) offences solely against the property or security of that state, or offences solely against the person or property of another member of the force or civilian component of that state or of a dependent;
(ii) offences arising out of any act or omission done in the performance of official duty.

In the case of any other offence the authorities of the *receiving state* shall have the primary right to exercise jurisdiction.

> 6. a. The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.
> b. The authorities of the Contracting Parties shall notify one another of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.
> . . .
> 9.Whenever a member of a force or civilian component of a dependant is prosecuted under the jurisdiction of a receiving State he shall be entitled:
> a. to a prompt and speedy trial;
> b. to be informed, in advance of trial, of the specific charge or charges made against him;
> c. to be confronted with the witnesses against him;
> d. to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
> e. to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
> f. if he considers it necessary, to have the services of a competent interpreter; and
> g. to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.
> 10.a. Regularly constituted military units or formations of a force shall have the right to police any camps, establishments or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises.
> b. Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.
> . . .

War crimes, genocide and crimes against humanity could hardly fall under Article VII(3)(a) NATO SOFA. Such crimes, committed by a member of the force of a sending state would not solely be directed against the person or property of another member of that force or civilian component. It would also seem difficult to argue that they may be committed 'in the performance of official duty', as will be shown below.

1. Offences Committed in the Performance of Official Duty

When the NATO SOFA was negotiated, there was not much discussion about what could be considered as being part of 'the performance of official duty'. France had maintained that offences requiring specific intent could not arise out of the performance of official duty.[24] No firm definition was agreed on this issue in the negotiations on the NATO SOFA. It was pointed out, however, that the military authorities of the sending state, not those of the receiving state, were alone capable of deciding whether or not an official duty was being carried out at the time.[25] In the course of negotiations, the reference to 'any act done in the performance of official duty' was supplemented by the words 'or pursuant to a lawful order issued by the competent authorities of the sending State',[26] but this phrase was later bracketed[27] and finally deleted.[28]

In the implementation of NATO SOFA there is wide consensus that it would be difficult to arrive at a common but precise definition of 'performance of official duty'.[29] It is also worth noting that certain supplementary agreements, such as that applicable to the armed forces of the six sending states (Belgium, Canada, France, the Netherlands, the UK, and the US) stationed in the Federal Republic of Germany, contain a specific provision confirming close cooperation between the receiving state and the sending state in this respect. Article 18(2) of the Supplementary Agreement for the six sending states in Germany provides that the determination shall be made in accordance with the law of the sending state and that the German court or authority 'shall make its decision in conformity with' the certificate of the military authority of the sending state. 'In exceptional cases, however, such a certificate may, at the request of the German court or authority, be made the subject of review through discussions

24 US Department of Army Pamphlet 27–161–1, International Law 126–127 (1964), p. 126. It is in line with this argument that later agreements, such as the Korean SOFA, confirm that substantial deviations from acts a person is required to perform would fall outside his official duty, see P.J. Conderman in Fleck (ed.), *supra* note 22, at 111, with reference to the Agreed Minutes to the Korean SOFA. The Agreed Minutes provide in a pertinent part that 'a substantial departure from the acts a person is required to perform in a particular duty usually will indicate an act outside of his official duty'.

25 J.M. Snee, SJ (ed.), *NATO Agreements on Status: Travaux Préparatoires* (Washington: US Govt. Printing Office, 1966), 172.

26 *Ibid.*, at 347, 363, 373, 389.

27 *Ibid.*, at 398, 412, 434.

28 *Ibid.*, at 465.

29 S. Lazareff, *Status of Military Forces under Current International Law* (Leyden: Sijthoff, 1971), 171.

between the Federal Government and the diplomatic mission in the Federal Republic of the sending State.'[30]

It may be interesting in this context, that in the German-Soviet Agreement on the Conditions of Stay of Soviet Forces in and the Modalities of Their Withdrawal from Germany, which was concluded soon after German reunification,[31] the performance of official duty clause was phrased in a slightly more precise manner, thus excluding misunderstandings on the question whether it could be part of official duties to commit a crime: under Article 18(2) of this Agreement, the primary jurisdiction of the sending state applies to 'criminal acts committed in the performance of official obligations'.[32]

2. Contemporary Limitations of Immunity for Acts Performed in an Official Capacity

While there is hardly any state practice relating to disputes concerning the question of whether an act performed by a member of a visiting force was done in the performance of official duty, other areas of state immunity have led to progressive developments which might affect the interpretation of SOFA provisions today. In this respect, three high profile cases have recently given rise to discussions on limitations of state immunity for acts performed in an official capacity.

In its final decision of 24 March 1999 on an extradition request by Spain, the House of Lords denied immunity to Senator Augusto Pinochet,[33] former President of the Republic of Chile, for crimes of torture committed in an official capacity. However, this denial of immunity was explicitly and exclusively based on a specific treaty, the

30 Agreement to Supplement the Agreement between the Parties of the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Supplementary Agreement to NATO SOFA) of 3 August 1959, amended by the Agreements of 21 October 1971 and 18 March 1993 (481 UNTS 262; BGBl 1961 II 1218, 73 II 1022, 94 II 2594; TIAS 5351; 14 UST 531).

31 Vertrag zwischen der Bundesrepublik Deutschland und der Union der Sozialistischen Sowjetrepubliken über die Bedingungen des befristeten Aufenthalts und die Modalitäten des planmäßigen Abzugs der sowjetischen Truppen aus dem Gebiet der Bundesrepublik Deutschland vom 12. Oktober 1991 (BGB 1991 II 256); see C.J. Duisberg, *Der Abzug der russischen Truppen aus Deutschland. Eine politische und militärische Erfolgsbilanz*, Europa-Archiv, 16 [1994], 461–469, English version: 'Germany: the Russians Go', *The World Today*, October 1994, 190–194.

32 German original: 'strafbare Handlungen oder Ordnungswidrigkeiten in Ausübung dienstlicher Obliegenheiten'. Russian original: 'наказуемые деяния или нарушения общественного порятка при исполнении служебных обязанностей'.

33 *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, ex Parte Pinochet* 38 *ILM* (1999), 581, http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm; see http://www.flyingfish.org.uk/articles/pinochet/badcase.htm; *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)* [1999] 2 All ER 97; Ahlbrecht/Ambos (Hrsg.), *Der Fall Pinochet(s)*, 1999, p. 148; A. Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *European Journal of International Law* (*EJIL*) (1999) 237–277.

Convention on Torture of 1984[34] and it is not likely that the same decision could have been taken in a case against an acting head of state.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) in its 24 March 1999 decision to indict Mr Slobodan Milošević, then still President of the Federal Republic of Yugoslavia,[35] also set an interesting precedent for lifting immunity from prosecution for crimes against humanity and violation of laws and customs of war. The decision was based on Security Council authority in accordance with Chapter VII UN Charter, and no reference was made to considerations of immunity. The question of whether this case might lead to a further limitation on immunity from prosecution for international crimes committed in an official capacity will deserve critical consideration in light of future developments. But in the case at issue, the obligation to implement Security Council decisions taken under Chapter VII was indisputable. In accordance with Article 103 of the UN Charter this obligation prevails in the event of a conflict with other legal obligations.

The International Court of Justice (ICJ), in its judgment of 14 February 2002 concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), has confirmed in an important *obiter dictum* that the immunity of Mr Abdulaye Yerodia Ndombasi, Foreign Minister of the Democratic Republic of Congo, neither applied to acts performed prior or subsequent to his period of office nor in respect of acts committed during that period of office 'in a private capacity'.[36] The Court also pointed out that immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts; immunity does not mean impunity with respect to any crime a person might have committed; jurisdictional immunity might bar prosecution for a certain period of time for certain offences, but it cannot exonerate the person to whom it applies from all criminal responsibility.[37]

34 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; reprinted in *Human Rights, A Compilation of International Instruments*, Vol. I (First Part), UN Doc. ST/HR/1/Rev. 5, 1994, at 293; www.umn.edu/humanrts/instree/h2catoc.htm; Art. 1 para. 1: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

35 http://www.un.org/icty/indictment/english/mil-ii990524e.htm

36 ICJ, *Democratic Republic of Congo v. Belgium*, judgment of 14 February 2002 (General List No. 121), paras 60 and 61 [www.icj-cij.org].

37 For a critical assessment of the limitations of immunity *ratione personae* and *ratione materiae* under this judgment see A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13 *EJIL* (2002) 853–875; C. Kreß, 'Der Internationale Gerichtshof im Spannungsfeld von Völkerstrafrecht und Immunitätsschutz. Besprechung von IGH, Urteil vom 14.2.2002 *(Demokratische Republik Kongo gegen Belgien)*', *Goltdammer's Archiv für Strafrecht* (2003), 24–43.

All three decisions refer to crimes committed by state officials *in their own territories* rather than by members of visiting forces in a receiving state. In each case the decision on jurisdiction was taken within a very different legal framework. However, it is fair to conclude that these cases mark a development making it more questionable than ever before to argue that crimes falling under the jurisdiction of the ICC, namely war crimes, genocide or crimes against humanity, could be perpetrated in the performance of official duty. Hence a sending state would have difficulties claiming, pursuant to Article VII(3)(a)(ii), a *primary right* to exercise jurisdiction under the NATO SOFA in such cases.

3. The Role of the Receiving State

Where a receiving state has a primary right to exercise jurisdiction, it will make arrangements under Article VII(5), (6), (9) and (10) NATO SOFA in close cooperation with the authorities of the sending state for arrest, custody and legal representation for the defendant. The trial will be conducted by a competent court of the receiving state. A request of surrender to the ICC cannot be expected as long as national jurisdiction is exercised.[38]

The same applies where the sending state has notified the receiving state that it has decided not to exercise its primary right of (concurrent) jurisdiction, as provided in Article VII(3)(c) NATO SOFA. But before such notification has been made to the receiving state, the sending state may still exercise its national jurisdiction, thus having a considerable degree of control over whether a request for surrender is likely to be made.

It is only in cases where the sending state would be unwilling or unable to exercise its primary jurisdiction and genuinely investigate the case at hand that a request for surrender to the Court is envisaged in the Statute. In such a case, however, any request for surrender *would have to be addressed to the sending state*, as the receiving state has no primary control over members of foreign visiting forces and could not be expected to take them into custody. This is due to the fact that as organs of their sending states, foreign military forces enjoy functional immunity under general principles of international law and, absent an armed conflict between the sending state and the receiving state, any act of detention or physical control would require cooperation between the two states involved.[39]

The functional immunity of foreign military forces stationed in a receiving state has often been discussed, seldom challenged, and never fully disputed. Lazareff, in his seminal treatise on the status of military forces, was reluctant to confirm an unqualified principle of immunity of the sending state, but he supported the 'theory of the restricted territorial sovereignty which is precisely applied by [the NATO] SOFA'. He expressly maintained that there are limits to territorial sovereignty, 'precisely when a serviceman is acting in the performance of his duty'.[40] Sinclair, devoting his

38 *Supra* note 20.
39 Fleck, *supra* note 22, at 3–6.
40 Lazareff, *supra* note 29, at 17.

Hague lecture in 1980 exclusively to the law of sovereign immunity, has provided abundant material on state practice which reveals that there is barely a single criminal case where a receiving state had claimed criminal jurisdiction over a member of visiting forces outside agreed SOFA provisions. He also refers to a continuing trend 'in the direction of recognising and applying the restrictive theory' on state immunity, considering 'a functional need to maintain a measure of jurisdictional immunity for foreign States'.[41] In the absence of state practice, however, it remains difficult to confirm and precisely define the scope of such a trend. It has been observed by Brownlie that '[r]ecent writers emphasize that there is a *trend* in the practice of states towards the restrictive doctrine of immunity but avoid firm and precise prescriptions as to the present state of the law'.[42] Still doubts prevail over whether, and to what extent, limitations of immunity could have developed by custom. Even NATO SOFA rules, though they are widely acceptable as a model for a balanced and convincing solution even beyond the NAA, cannot be seen as being customary law today *in toto*. In many situations a new assessment of the given situation and the national interests involved remains necessary. This is particularly true for cooperation in jurisdiction, where NATO SOFA rules have been supplemented by additional agreements.[43] Hence in the absence of clear limitations by treaty law, core rules of functional immunity continue to apply to members of sending states' forces.

The functional immunity of foreign military forces is important to ensure unimpeded cooperation between sovereign states. As states are independent and free to direct their affairs, no state is obliged to accept outside interference with respect to its own organs by another state. Sovereign state functions are protected under international law, in order to exclude harassment or interference from the receiving state. Organs of a sending state abusing their immunity may be required to leave, but the immunity itself will not be narrowed.[44] This applies to members of armed forces in the same way as it does to members of governments or diplomats. Where persons enjoying such immunities *ratione materiae* commit crimes they may not be prosecuted by a foreign state, except under agreed rules or with the consent of their sending state.

The principle of functional immunity is expressly confirmed in Article 98(1) ICCSt. While the point has been made that functional immunity in the case of *former* military officers accused of international crimes is nowadays lifted by custom, there is neither sufficient legal opinion nor applicable state practice for a similar presumption in the case of *acting* military officers. Case law comprising foreign and international judgments in the wider context of defendants claiming functional immunity is related to former rather than acting state officials and to former military officers of occupied

41 I. Sinclair, 'The Law of Sovereign Immunity: Recent Developments', *Recueil des cours* (1980, II), 113–284, at 216–217.

42 I. Brownlie, *Principles of Public International Law* (5th edn, Oxford: Clarendon Press, 1998), 325–348, 371–383 [332].

43 Fleck, *supra* note 22, at 6–7.

44 R. Higgins, *Problems and Process. International Law and How We Use It* (Oxford: Clarendon Press, 1993), 78–94; see especially at 94.

states defeated in an armed conflict.[45] It does not apply to the normal situation of sovereign states sending their military forces abroad or receiving foreign visiting forces on their territory.

Hence, in accordance with Article 98(1) ICCSt., the ICC would have to first obtain the cooperation of the sending state for a waiver of its immunity before the receiving state could execute the request for surrender.

If this evaluation is accepted, and I suggest it is in line with well-established procedures within the NAA, the NATO SOFA itself cannot serve as a relevant example for agreements referred to under Article 98(2) ICCSt.[46] Other agreements, however, could be relevant in this context.[47]

4. The Forthcoming EU SOFA

The forthcoming EU SOFA[48] also addresses the question of jurisdiction with the aim of offering a solution for the exercise of competing national jurisdictions. Like the NATO SOFA, it does not provide any limit for international jurisdiction, but is confined to a balanced regulation for the exercise of national jurisdiction.[49]

Nevertheless, a disclaimer clause is foreseen for the preamble of the EU SOFA to the effect that

45 Cassese, *supra* note 37, 870–873.

46 This assessment, which may have been neglected during and after the negotiations over the ICC Statute, has meanwhile been confirmed in the literature: see J.J. Paust, 'The Reach of ICC Jurisdiction over Non-signatory Nationals', 33 *Vanderbilt Journal of Transnational Law* (2000) 14; C. Kress, in Grützner/Pötz, *Internationaler Rechtshilfeverkehr in Strafsachen. Vorbemerkungen zu dem Römischen Statut des Internationalen Strafgerichtshofes* (Heidelberg, 2003), 132.

47 The German-US Extradition Treaty of 20 June 1978 (BGBl 1980 II 646) provides for an obligation on the part of Germany to extradite, inter alia, US citizens to the USA, whether or not the offence of which they stand accused has been committed inside or outside US territory. The US would therefore be in a position to request extradition of US citizens suspected of core crimes under the Rome Statute. Extradition may be refused if the offence in question carries the death penalty, unless the requesting country furnishes sufficient assurances that the death penalty will not be imposed or will not be executed. Extradition may also be refused if German authorities wish to prosecute the person in question for the same offence for which the extradition is requested. Should a US request for extradition under this Treaty coincide with a request by the ICC for surrender of the same person for the same conduct, German authorities would have to decide on the application of Article 90(6) Rome Statute, which of the two requests to grant. This provision allows for consideration to be given to all the relevant factors, among them the interests of the requesting state.

48 Draft Agreement between the Member States of the European Union concerning the status of military and civilian staff on secondment to the Military Staff of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), EU-doc. SN 4438/10/01 Rev. 10 (4 July 2003).

49 Draft Article 17 [Jurisdiction]:

> (1) The authorities of the sending State shall have the right to exercise all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over military as well as over civilian staff where those civilian staff are subject to the law governing all or any of the armed forces of the sending State, by reason of their deployment with those forces.

> under the provisions of the present Agreement, the rights and obligations of the parties under international agreements and other international instruments establishing international tribunals, including the Rome Statute of the International Criminal Court, will remain unaffected.[50]

This provision will be declaratory rather than constitutive in nature, considering the contents of draft Article 17 and, in particular, the fact that the EU SOFA will be concluded between States Parties to the ICC Statute. In this situation there is no danger that a perpetrator will ever escape the appropriate national jurisdiction or the jurisdiction of the ICC.

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(2) The authorities of the receiving State shall have the right to exercise jurisdiction over military and civilian staff and their dependants, with respect to offences committed within the territory of the receiving State and punishable by the laws of that State.
(3) The authorities of the sending State shall have the right to exercise exclusive jurisdiction over military as well as over civilian staff where those civilian staff are subject to the law governing all or any of the armed forces of the sending State, by reason of their deployment with those forces, with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
(4) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over military and civilian staff and their dependants with respect to offences, including offences relating to its security, punishable by its law but not by the law of the sending State.
(5) For the purposes of paragraphs 3, 4 and 6, a security offence against a State shall include:
(a) treason against the State;
(b)sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.
(6) In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
(a) The competent authorities of the sending State shall have the primary right to exercise jurisdiction over military as well as over civilian staff where those civilian staff are subject to the law governing all or any of the armed forces of the sending State, by reason of their deployment with those forces, in relation to:
(i) offences solely against the property or security of that State, or offences solely against the person or property of military or civilian staff of that State or of a dependant;
(ii) offences arising out of any act or omission done in the performance of official duty.
(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.
(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.
7. The provisions of this Article shall not imply any right for the authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.

50 Preamble, para. 4.

5. Specific Agreements Supplementing Standard SOFAs

Standard SOFAs may be supplemented by specific provisions,[51] but the normal experience is that a conflict between such supplementing provisions and the ICC Statute is not to be expected. Supplementing provisions on the exercise of jurisdiction are rather facilitating cooperation in criminal matters by conferring authority on that state which will be most involved in the case for practical matters. For this purpose close cooperation of both states is established, to ensure confidence-building and transparency. A typical clause on jurisdiction, supplementing the provisions of Article VII NATO SOFA, may be found in the recent German-Polish Visiting Forces Agreement of 23 August 2000.[52] Article 6 of this Agreement facilitates extensive waivers of jurisdiction of the receiving state and makes legal assistance and information mutually mandatory.[53] However no provision of this Agreement excludes or limits cooperation with the ICC.

While similar supplements may also be useful under any multilateral SOFA, many situations remain where a SOFA cannot be concluded because participating states

51 In the Protocol of Signature to the Supplementary Agreement to the NATO SOFA (*supra* note 30), Germany stated with respect to Art. VII NATO SOFA that it does not consider itself competent to decide on requests for extradition concerning the persons covered by the NATO SOFA. While Art.102 ICCSt. makes it clear that surrender and extradition are two different notions, this new distinction is *res inter alios acta* where non-States Parties are concerned, whose rights and obligations the Rome Statute cannot affect. The term 'extradition' in the Protocol of Signature may therefore be taken to include surrender to the ICC.

52 Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Polen über den vorübergehenden Aufenthalt von Mitgliedern der Streitkräfte der Bundesrepublik Deutschland und der Streitkräfte der Republik Polen auf dem Gebiet des jeweils anderen Staats vom 23. August 2000 (BGBl 2001 II S. 179).

53 Art. 6 (English Translation): Criminal Jurisdiction and Coercive Measures

> (1) Insofar as the receiving State has the right to exercise criminal jurisdiction over members of the armed forces of the sending State and their civilian component it will waive it unless major interests of the receiving State's administration of justice make imperative such exercise of jurisdiction. Major interests of administration of justice may make imperative the exercise of criminal jurisdiction in particular in the following cases: offences causing the death of a human being, robbery and rape, except where these offences are directed against a member of the armed forces of the sending State, as well as offences of significant importance directed against the security interests of the receiving State, including the preparation of, the attempt to commit and the participation in such offences, insofar as these acts are punishable by the law of the receiving State. If the exercise of criminal jurisdiction is waived, the sending State shall, at the request of the receiving State, remove the offender from the territory of the receiving State without delay and submit the case to its competent authorities for a decision on the institution of criminal proceedings.
>
> (2) The courts and authorities of the sending State shall not exercise their criminal jurisdiction in the receiving State.
>
> (3) The competent courts and authorities of the two States shall render each other, within the limits imposed by their respective national law and obligations under international contracts, legal assistance in criminal proceedings. If the receiving State does not waive the exercise of criminal jurisdiction, the sending State shall use its influence, to the extent that its legal system permits, to induce members of its armed forces suspected of having committed a criminal offence while staying in the receiving State, to turn themselves in to the courts and authorities of the receiving State, insofar as the law of the receiving State obliges them to do so.

cannot easily agree on its content or there is not sufficient time to put agreed provisions legally into force. In such situations any possible dispute will be solved on the basis of an unrestricted concept of state immunity, and sending states will insist on respect for their rights under Article 98(1) ICCSt.

6. Status Provisions for Peacekeeping Operations

For peacekeeping operations in third states the NATO SOFA, the PfP SOFA or the forthcoming EU SOFA are not relevant. For peacekeeping operations specific status of forces provisions are often not available, but there is a widely accepted practice of states which are hosting a peacekeeping operation waiving their right to enforce their law with respect to peacekeepers.[54] The UN Model SOFA[55] provides in paragraph 47 for exclusive jurisdiction of troop-contributing states in respect of any criminal offences that may be committed by military members of their contingent, and for joint decisions of the commander and the local government on any matter concerning civilian members.

This was confirmed by recent specific agreements. The members of the Implementation/Stabilization Force (IFOR/SFOR) in Bosnia Herzegovina enjoy privileges and immunities under the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 concerning experts on mission,[56] and military personnel 'under all circumstances and at all times shall be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them in the Republic of Bosnia and Herzegovina.[57] In Kosovo, immunity from legal process applies to the personnel of the UN Administration Mission (UNMIK) and the International Security Force (KFOR) including their

(4) The courts and authorities of the receiving State shall have the right, within the limits of their jurisdiction and competence, to order and carry out coercive measures against members of the armed forces of the sending State during their stay in the receiving State.

(5) When a member of the armed forces of the sending State has been arrested by the authorities of the receiving State or other coercive measures are taken resulting in detention, the competent authority of the receiving State shall notify the diplomatic mission of the sending State without delay. This notification shall state which court or authority has jurisdiction over the further proceedings.

(6) Paragraphs 1 to 5 above shall also apply in cases where members of the armed forces of the sending State are staying on the territory of the receiving State for official purposes other than those stated in Article 1, paragraph 1 above.

The purposes stated in Art. 1(1) are 'joint exercises, training of units and transit as well as ... carrying out humanitarian relief actions and search and rescue operations'.

54 M. Bothe and T. Dörschel, 'The UN Peacekeeping Experience', in Fleck, *supra* note 22, at 505.

55 *Model Status-of-Forces Agreement for Peacekeeping Operations* (UN doc.: A/45/594, 9 October 1990), reprinted in Fleck, *supra* note 22, 603–620.

56 Convention on the Privileges and Immunities of the United Nations of 13 February 1946, UNTS 1,15.

57 Agreement between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organization Concerning the Status of NATO and its Personnel (Dayton Accords, paras 2 and 7 of Appendix B to Annex 1-A, Wright-Patterson Air Force Base, Dayton, Ohio, 21 November 1995 and Brussels, 23 November 1995, 35 ILM 1 (1996) 102; Fleck, *supra* note 22, 585–589.

locally-recruited personnel as well as contractors, their employers and subcontractors.[58]

For the International Security Assistance Force (ISAF) in Afghanistan, established under Security Council Resolution 1386 (2001) and extended for a period of one year beyond 20 December 2002 under Security Council Resolution 1444 (2002), status arrangements were concluded with the Interim Administration of Afghanistan, providing for the exclusive jurisdiction of the respective sending state on ISAF and supporting personnel, including associated liaison personnel in respect of any criminal offence which may be committed by them on the territory of Afghanistan.[59] Paragraph 4 of this Agreement also provides that personnel 'will be immune from personal arrest or detention' and 'may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation'. This clause was subject to certain discussions in retrospect and it is not likely that it will be used in the future. From a legal point of view, the question should be raised here of what practical effect such an immunity clause could have in cases where exclusive jurisdiction of the sending state applies and is even expressly confirmed. The appropriate answer is that there is no legal effect of such a clause other than confirming the situation existing under Article 98(1) ICCSt.

Peacekeeping forces often operate without a SOFA. But as explained above, their exemption from jurisdiction of the receiving state is both common practice and a well-established principle. Inclusion of this principle in a SOFA would only be declaratory in nature. In no case has a receiving state been authorized to exercise jurisdiction over a member of a peacekeeping force. Hence Article 98(2) ICCSt. is not relevant for peacekeepers and Article 98(1) fully applies, with the result that the Court may not proceed with a request for surrender or assistance of a receiving state unless it can first obtain the cooperation of the sending state for the waiver of immunity.

Recent debates on Security Council Resolutions 1422 (2002) and 1487 (2003)[60] have obscured the consequences of state immunity under Article 98(1) ICCSt. This immunity is neither absolute nor permanent, as legal procedures remain possible in cooperation with the sending state, and may be possible even without such cooperation against *former* members of a sending state's force. The core effects of state immunity, however, remain essential for the success of any peacekeeping operation. The ICC, as an institution designed to prevent impunity, should not be misunderstood as an impediment to peacekeeping. The Court is rather a safeguard for respecting the

58 Military Technical Agreement between the International Security Force ('KFOR') and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia of 6 June 1999; UNMIK/KFOR Joint Declaration CJ(00)0320 of 17 August 2000; Regulation No. 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo of 18 August 2000 (UNMIK/REG/2000/47), reprinted in Fleck, *supra* note 22, 591–601.

59 Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan of 4 January 2002, Annex A: Arrangements Regarding the Status of the International Security Assistance Force, para. 3.

60 *Supra* notes 4 and 9.

rule of law. It can play an important role in protecting peacekeepers in the execution of their missions and in creating confidence among the population in the development of a just and lawful process of peace building.

7. Conditions Under Which a Receiving State Might be Requested by the ICC to Surrender a Member of a Visiting Force

The foregoing assessment shows that, although under the law of visiting forces the immunity of sending states' forces is restricted rather than extended, no single case could be conceived in which a receiving state would be entitled to seize and surrender members of a sending state's force without full consent of, and cooperation with, the latter. There is no gap between this situation and the obligation of states under the ICC Statute, as the functional immunity of military forces as organs of their sending states is fully protected under Article 98(1).

As for the very unrealistic assumption that a member of a sending state's military forces is the object of a request for surrender to the ICC, it should be considered that crimes falling under the jurisdiction of the Court have an element which is completely unaffected by SOFA rules. Genocide, as a crime calculated to bring about the physical destruction of a group (Article 6 ICCSt.), crimes against humanity, as part of a widespread or systematic attack directed against the civilian population (Article 7 ICCSt.), and war crimes committed as part of a plan or as part of a large-scale commission of such crimes (Article 8 paragraph 1 ICCSt.) would not fall under any category excluding the concurrent jurisdiction of the receiving state under SOFA rules. However, the Court may not proceed with a request for surrender by the receiving state, unless it can first obtain the cooperation of the sending state under Article 98(1).

8. Concluding Remarks

No conflict between standard SOFAs and Article 98 ICCSt. arises. Article 98(2) only refers to surrender of alleged authors of international crimes to the ICC, whereas the relevant provisions of SOFAs concern the respective exercise of civil or criminal jurisdiction by the sending and the receiving state. Even when the receiving state enjoys primary jurisdiction over the alleged author of an offence, it may not unilaterally arrest and place in custody a member of the armed forces of the sending state: for this purpose it must request the cooperation of the sending state, since foreign military personnel enjoy immunity under international law. The surrender of foreign military personnel stationed on the territory of a receiving state is thus covered by Article 98(1) ICCSt. Pursuant to this provision the ICC must respect the functional immunities pertaining to acting members of armed forces stationed on foreign territory. Consequently the ICC may not issue to the receiving state a request for

assistance or surrender unless the Court can first obtain the cooperation of the sending state for a waiver of immunity.

The same holds true for members of peacekeeping operations. It should also be borne in mind that the issue of indictments against members of military forces will remain remote, as long as the statement made by UN Secretary-General Kofi A. Annan on 3 July 2002 with reference to peacekeepers holds true: 'I think that I can state confidently that in the history of the United Nations, and certainly during the period that I have worked for the Organization, no peacekeeper or any other mission personnel have been anywhere near the kind of crimes that fall under the jurisdiction of the ICC.'[61]

States Parties to the ICC Statute need not be concerned about the effect of SOFAs in this context. They may, however, use the conclusion of new SOFAs as an opportunity for declaratory statements underlining their existing commitment to the ICC Statute.

A long-term solution should not fall short of convincing all states, including the US, of the benefits of fair and unbiased international jurisdiction to be exercised by the Court and the long-term national interest in fully cooperating with it. This perspective should be shared and upheld by the international community, including those states still refraining from ratification.

61 *Supra* note 6.