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Status of Forces: Criminal Jurisdiction over Military Personnel Abroad

Joop Voetelink

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Abbreviations

AAP	Allied Administrative Publication
ACT	Allied Command Transformation
ADCON	Administrative Control
ADMCON	Administrative Control
AJIL	American Journal of International Law
AMIB	Inter-African Mission to Monitor the Bangui Agreements
AMIS	African Mission in Sudan
AMISOM	African Union Mission to Somalia
ATS	Australian Treaty Series
AU	African Union
BGBl	Bundesgesetzblatt
CAEMC	Central African Economic and Monetary Community
CAR	Central African Republic
CFSP	Common Foreign and Security Policy
CIS	Commonwealth of Independent States
CMF	Commonwealth Monitoring Force
CPA	Coalition Provisional Authority
CSDP	Common Security and Defence Policy
CSTO	Collective Security Treaty Organization
DRC	Democratic Republic of the Congo
EADRU	Euro-Atlantic Disaster Response Unit
EAG	European Air Group
EAS	Executive Agreements Series
EASBRICOM	Eastern Africa Standby Brigade Coordination Mechanism
EC	European Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EDC	European Defense Community
EEAW	European Participating Air Forces' Expeditionary Air Wing
EGF	European Gendarmerie Force

EJIL	European Journal of International Law
EU	European Union
EUF	European Union Force
EUFOR	European Union Force
EUMM	European Union Monitoring Mission
FOMUC	Multinational Force Central African Republic
FRG	Republic of Germany
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
FSIA	Foreign Sovereign Immunities Act
FULLCOM	Full Command
GDR	German Democratic Republic
HQ	Headquarters
HQ ACT	Headquarters Allied Command Transformation
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IFOR	Implementation Force
IGO	International Governmental Organisations
ILC	International Law Commission
ILDC	International Law in Domestic Courts
ILR	International Law Reports
INTERFET	International Force in East Timor
IPKF	Indian Peacekeeping Force
IPMT	International Peace Monitoring Team
ISAF	International Security Assistance Force
ISF	International Stabilization Force
JFC	Joint Force Command
JMBl	Justizministerialblatt
KAV	Kavass Series
KFOR	Kosovo Force
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
MAAG	Military Assistance Advisory Group
MCDA	Military and Civil Defence Assets
MFO	Multinational Force and Observers
MICOPAX	Mission for the Consolidation of Peace
MIF	Multinational Interim Force
MinBl	Ministerialblatt
MINURCA	UN Mission in the Central African Republic
MINURCAT	UN Mission in the Central African Republic and Chad
MINUSMA	UN Multidimensional Integrated Stabilization Mission in Mali
MINUSTAH	UN Stabilization Mission in Haiti
MNF	Multinational Force
MNF-I	Multinational Force Iraq

MONUC	Mission de l'Organisation des Nations Unies en République Démocratique du Congo
MOPEP	Military Observer Mission Ecuador-Peru
MOU	Memorandum of Understanding
MStGB	Militärstrafgesetzbuch
MTA	Military Technical Agreement
NA5CRO	Non-Article 5 Crisis Response Operations
NATO	North Atlantic Treaty Organization
NC3A	NATO Consultation, Command and Control Agency
NGO	Non-governmental Organisation
NTM-I	NATO Training Mission Iraq
OAS	Organization of American States
OAU	Organisation of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
OECS	Organization of Eastern Caribbean States
OEF	Operation Enduring Freedom
OJ	Official Journal of the European Union
OLA	Office of Legal Affairs
ONUC	UN Mission in the Congo
OPCOM	Operational Command
OPCON	Operational Control
OSCE	Organisation for Security and Cooperation in Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PfP	Partnership for Peace
PITSE	Pacific Islands Treaty Series
PSC	Peace and Security Council
RAMSI	Regional Assistance Mission to Solomon Islands
ROE	Rules of Engagement
RSS	Regional Security System
SADC	Southern African Development Community
SBA	Sovereign Base Areas
SCO	Shanghai Cooperation Organisation
SFOR	Stabilization Force
SHAPE	Supreme Headquarters Allied Powers in Europe
Shirbrig	Stand-By Forces High Readiness Brigade
SIA	State Immunity Act
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
SPPKF	South Pacific Peacekeeping Force
SSD	Security Sector Development
SSR	Security Sector Reform
SU	Soviet Union
TACOM	Tactical Command
TACON	Tactical Control

TEU	Treaty on European Union
TIAS	Treaties and other International Acts Series
TMG	Truce Monitoring Group for Bougainville
TOA	Transfer of Authority
TTP	Tactics, Techniques and Procedures
UAE	United Arab Emirates
UK	United Kingdom
UKTS	United Kingdom Treaty Series
UNAMSIL	UN Assistance Mission in Sierra Leone
UNCLOS	UN Convention on the Law of the Sea
UNDOF	UN Disengagement Observer Force
UNEF	UN Emergency Force
UNIFIL	UN Interim Force in Lebanon
UNIIMOG	United Nations Iran–Iraq Military Observer Group
UNITAF	United Task Force
UNMEE	UN Mission in Ethiopia and Eritrea
UNMIL	UN Mission in Liberia
UNMIS	UN Mission in the Sudan
UNMIT	UN Integrated Mission in Timor-Leste
UNOSOM	UN Operation in Somalia
UNPROFOR	UN Protection Force
UNSC	United Nations Security Council
UNSCOB	UN Special Committee on the Balkans
UNTAET	UN Transitional Administration in East Timor
UNTAG	UN Transition Assistance Group
UNTS	UN Treaty Series
UNTSO	UN Truce Supervision Organization
US	United States

Chapter 1
Introduction

Abstract The legal status of armed forces stationed abroad is an important issue to all States and international organisations involved. Today the status of forces is often set out in Status of Forces Agreements (SOFAs) defining the rights and obligations of the deployed forces. Key in these agreements is immunity of military personnel from criminal jurisdiction of host State courts, as follows from the doctrine of immunity of States. Moreover, international military operational practice shows that the exercise of criminal jurisdiction over deployed military personnel is even more important to States deploying their troops.

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1.1 An Example: Afghanistan, 2001–2014

The 2001 attacks on the Twin Towers in New York and the Pentagon in Washington D.C. gave rise to Operation Enduring Freedom (OEF) within the framework of the global War on Terror of the United States (US) against terrorism.[1] The first military operations against Al-Qaeda and the Taliban regime in Afghanistan started on 7 October 2001. Within a short period of time an international coalition of states under US command and with support of local armed militias united in the North Alliance gained control over a large part of the country.

On 5 December 2001 the *Bonn-Agreement* was signed establishing the Interim Administration for Afghanistan,[2] which formally ended the regime of the Taliban. In Annex I to the *Bonn-Agreement*, the United Nations Security Council (UNSC) was requested to consider sending an international security force. The UNSC followed up on this request by authorising the establishment of the International Security Assistance Force (ISAF) for Afghanistan.[3]

Although operating simultaneously in the same geographic area, OEF and ISAF have different legal bases, which entails differences in their tasks. Also, the legal status of the forces participating in OEF and ISAF differs. After the Interim Administration had come into being and had formally taken over authority in Afghanistan, the US and the new Afghan government concluded an international agreement on the status of the US armed forces.[4] Some States, such as Canada and the United Kingdom, followed this procedure,[5] while other States that had deployed armed forces to Afghanistan in support of OEF in any period of time refrained from doing so. In view of the particular circumstances under which their forces operated the latter group of States probably considered the law of armed conflict to be sufficient to cover the status of their forces.

The status of members of ISAF is covered by the *Military Technical Agreement* (MTA), concluded by the ISAF Commander and the Interim Administration on 4 January 2002.[6] In Annex A of the MTA, *Arrangements regarding the status of the*

---

[1] As from 2009 the term ‘War on Terror’ is officially not in use any more, as the preferred term is now the more neutral wording ‘overseas contingency operations’; Wilson and Kamen 2009.

[2] *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*; Bonn, 5 December 2001. www.un.org/news/dh/latest/afghan/afghan-agree.htm. Accessed November 2014.

[3] *UN Doc* S/RES/1386 (2001) of 20 December 2001, establishing ISAF.

[4] *Agreement regarding the status of United States military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities*; 26 September and 12 December 2002 and 28 May 2003; 28 May 2003 (6192 *KAV* i).

[5] These agreements have not been published.

[6] *Military Technical Agreement between the International Security Assistance Force* (ISAF) *and the Interim Administration of Afghanistan*; 4 January 2002. www.operations.mod.uk/isafmta.pdf. Accessed 13 November 2014.

International Security Assistance Force, both parties agreed that ISAF personnel remained subject to the exclusive criminal jurisdiction of the sending States.[7]

Several States support both OEF and ISAF directly or indirectly by granting foreign forces basing rights and overflight and landing rights. Agreements on the status of military units were also concluded with these States.[8] For reasons of national security many of these agreements are classified as secret and, consequently, have not been published.

1.2 Status of Forces

1.2.1 Status of Forces vis-à-vis Military Operations and International Military Cooperation

The agreements mentioned above, related to the operations in and around Afghanistan, are indicative of the importance that States and international organisations attach to the legal position, or status, of military personnel stationed on the territory of other States.[9] For States deploying armed forces abroad (sending States), as well as States receiving those forces on their territory (host States), status of forces is a continuous point of attention.[10] Sending States often cooperate in multinational forces under the authority of international organisations, such as the United Nations (UN) or NATO, or are part of a coalition of States.[11] For the most part they operate in one State, while using facilities in other States to make the operations possible. In the framework of this book, those third countries giving, for instance, logistic and operational support, are also regarded as host States.

---

[7] When NATO assumed leadership of ISAF operations in August 2003, it concluded a supplementary agreement with Afghanistan on the status of NATO forces; *Exchange of letters between NATO and Afghanistan regarding the status of NATO and its personnel when present on the territory of Afghanistan in the execution of ISAF*; 5 September 2004 and 22 November 2004 (this classified agreement has not been published).

[8] An example is the basing in Qatar of Dutch military personnel and an aircraft in support of the operations in Afghanistan, for which the Netherlands and Qatar concluded a special agreement on the status of the Dutch forces: *Status of forces Agreement for military personnel and equipment for the forces between the Kingdom of the Netherlands and the State of Qatar*; Doha, 11 March 2002 (Vol. 2204 *UNTS* 2004, No. 39128).

[9] The Dutch government, for instance, has repeatedly underlined the importance of SOFAs, which are one of the key topics of the memorandum on legal aspects of deployment of armed forces; *Dutch Parliamentary Papers I* 2003/04, 29 200 X, C, pp. 3–4 and *Dutch Parliamentary Papers I* 2005/2006, 30 300 X, A, p. 5.

[10] In the literature and international practice, terms like ‘receiving States’, ‘host Nations’ or ‘receiving Member States’ are also used.

[11] The term ‘coalition’ denotes an ad hoc arrangement of two or more States conducting combined military action, sometimes described as coalition of the willing; see Cathcart 2010, p. 236.

The interest of States in status of forces issues is not limited to situations of armed conflict or crisis-management operations. Also within the framework of peacetime international military cooperation, the status of forces is part of legal considerations. Defining that status is of increasing importance in a period of time when worldwide contacts are growing continuously and international relations have become more intense and complex over the past decades. This development also applies to the military, as States have committed themselves to cooperating in military matters based on a wide range of defence and security agreements, and support arrangements. As a consequence, visiting forces agreements have been concluded facilitating the entry and stay of significant numbers of military personnel, sometimes accompanied by their families, on the territory of other States for an extended period of time.

1.2.2 Criminal Jurisdiction and Immunity

The importance of the status of forces stems from the special position of the armed forces as an inherent part of sovereign States even when deployed abroad. This means that military personnel are not present in another State in a personal capacity, but in their capacity as servicemen acting under the military command and political authority of the sending States' authorities. Often, they are allowed to wear their national uniform and to carry arms. Consequently, their position is quite different from, for instance, international businessmen or tourists. Therefore, military personnel enjoy immunity in host States; moreover, sending States need to exercise jurisdiction over them (see for an explanation of the concepts of immunity and jurisdiction Sect. 1.4.4). Immunity and jurisdiction are key issues for the States involved and are generally laid down in so-called Status of Forces Agreements (SOFAs) that define the rights and obligations of the sending States' armed forces while present on the territory of host States.

The focal point of SOFAs is the exercise of criminal jurisdiction over visiting foreign forces.[12] In other words, SOFAs answer the question which State has jurisdiction to actually prosecute a serviceman of the sending State who has committed a criminal offence in the host State. Generally, sending States prefer to be able to exercise criminal jurisdiction over their forces deployed abroad at all times. However, years of international practice made it clear that in specific situations host States have their own interests in exercising criminal jurisdiction over visiting

[12] Moreover, criminal jurisdiction is often a controversial topic in SOFA negotiations, leading to lengthy discussions and often claiming most of the attention; e.g., Rouse and Baldwin 1957; Snee 1961, pp. 3 and 29; Conderman 2013, para 15; Liivoja 2011, p. 132. Furthermore, in cases where parties do not reach agreement on the exercise of criminal jurisdiction, this could lead to cancellation of planned foreign deployment of armed forces; Munoz-Mosquera 2011, pp. 2–3.

forces[13] based on legal considerations, also taking into account the circumstances under which the foreign forces are present in their countries and their relationship with the sending States. Notwithstanding the focus on criminal jurisdiction, contemporary SOFAs cover a wide range of other topics as well. What issues are dealt with exactly and the level of detail depend on the situation at hand.

1.3 Structure

1.3.1 General

In the course of time, criminal jurisdiction over armed forces stationed in other States has been the subject of many studies. In the literature about military operational law researchers have often put much emphasis on particular SOFA issues, like, of course, criminal jurisdiction, but also on matters like claims-procedures and tax issues, or have focused on analysing specific agreements, like the *NAVO-SOFA*.[14] The position of SOFAs in the broader context of international law has not yet received much attention, however, neither has the relationship between SOFAs and military operational practice.

Conversely, international law has not revealed much interest in criminal jurisdiction over deployed armed forces,[15] mostly briefly referring to the current international practice to deal with the matter by international agreements based on international law. Although within specific fields of international law, such as international criminal law,[16] the position of visiting forces on occasion receives more attention, in general it seems to be a somewhat neglected or, perhaps, forgotten issue in international law.[17]

Neither of these two approaches does justice to the issue. As relations between the legal arguments and other relevant factors remain obscure, a patchy picture emerges that does not really cover the full scope of the criminal jurisdiction issue and cannot explain

---

[13] The final evaluation of the Dutch contribution to Operation Enduring Freedom (*Dutch Parliamentary Papers II* 2003/04, 27 925, nr. 135) is a good example. It mentions that during the negotiations on the status of Dutch armed forces especially States from the Gulf region held on to their sovereignty, resulting in SOFAs that limited criminal jurisdiction of Dutch authorities over their forces deployed to these states, p. 33.

[14] *Agreement between the parties to the North Atlantic Treaty regarding the status of their forces*; London, 19 June 1951 (Vol. 199 *UNTS* 1954, No. 2678); see Chap. 5, Sect. 5.2.2 of this book.

[15] E.g., the Dutch advisory report to the government on immunity of foreign State officials ignores the issue completely; Advisory Committee on Issues of Public International Law 2001.

[16] E.g., see van Sliedregt et al. 2008, paras 2.12.4, 6.1.4 and 7.1.5.

[17] E.g., Brownlie, in Principles of Public International Law, discusses status of forces in a brief section, Brownlie 2008, pp. 372–375 and Fox defines in a concise manner the special position of foreign visiting forces, Fox 2008, pp. 717–724. However, often the position of the forces is not taken into consideration; e.g., Horbach and Lefeber 2007.

current practice nor does it offer any guidance for future developments. This book brings together the international law and military operational law perspectives contributing to the theory on which criminal jurisdiction over armed forces stationed abroad builds and, in the final chapter, will propose to develop a Status-of-Forces Compendium as a practical tool for drafting and using SOFAs.

Since the beginning of the nineteenth century the armed forces can be considered an instrument and organ of the State.[18] At the same time, the position of the armed forces in their extraterritorial execution of sovereign tasks also started to find a place in case law and the literature. Therefore, this book takes the beginning of the nineteenth century as point of departure.

As extraterritorial operations are intertwined with the vital interests and security of the States involved, information can be classified and, therefore, is not always in the public domain.[19] Moreover, some agreements on the status of forces have been concluded as arrangements that are not considered as treaties under international law and, subsequently, do not have to be published.[20] In addition, many agreements on the status of forces are indeed freely accessible, but the parties involved are less open about the drafting process.[21] Consequently, the background of some agreements sometimes remains obscure.

Part I of this book provides a historical overview of the development of the sending States' exercise of criminal jurisdiction, taking three frameworks for stationing forces abroad as point of departure: the consensual stationing of allied forces on co-belligerent territory during armed conflict, participation in crisis management operations, and participation in international military cooperation. Part II concentrates on SOFAs from the perspective of international law, establishing the relation between the State and its armed forces and analysing State immunity and immunities of State officials. Furthermore, it briefly touches upon the functions of international organisations. Part III, finally, elaborates on criminal jurisdiction as part of the law of visiting forces, from the perspective of military operational law. After detailing some specific military terms, this Part analyses criminal jurisdiction from the legal bases that are related to the three frameworks for stationing forces abroad as described in Part I.

1.3.2 Part I: Historical Analysis

The Afghanistan example illustrates that States take different approaches when it comes to the status of their forces stationed abroad. Interest in the subject has a long history and came to a climax in 1812, when the American Supreme Court

---

[18] This development varies from State to State.

[19] E.g., the US are party to more than 100 SOFAs, at least ten of which are classified due to security reasons; Mason 2011.

[20] E.g., Aust 2007, p. 43. These documents do not have to be registered with the UN in accordance with Article 102 *UN Charter*.

[21] Engdahl 2007, p. 152.

touched upon the matter for the first time in the *The Schooner Exchange v. McFaddon*-case,[22] considering that when a State approves the transit of foreign military forces, it has implicitly waived its jurisdiction over these forces.

In the following period, a modest number of court cases building on *The Schooner Exchange v. McFaddon*-case were published and, also, experts in the field of international law started to address the status of forces issue. Since the beginning of the twentieth century it has become part of specific international agreements.[23] Between both World Wars, the League of Nations adopted a resolution on the status of forces participating in the organisation's international force, as the first of its kind.[24] Since World War II, the issue developed rapidly and the content and form of the agreements changed during that post-war period.

At first sight, it might be hard to detect a clear line in the development of SOFAs over the past two centuries. Many researchers concentrate on the period as a whole or focus on certain elements of the development often as part of a broader discussion. As a result, several aspects relating to the status of forces, such as the interests of the States involved, remain largely unexplored. This book is based on the belief that analysing criminal jurisdiction over visiting foreign forces within a specific framework will give insight in the background of the development of SOFAs and will help explaining current practice. In this regard, aspects of international law and military operational law are of particular interest and will be discussed in the following two sections.

1.3.3 Part II: International Law Perspective

The literature and case law frequently refer to existing practices and customs with respect to the status of forces suggesting that the law relating to visiting foreign forces is a specific part of international law: the law of visiting forces.[25] However, this does not mean that the status of military forces is a self-contained regime. It cannot be separated from some of the basic tenets of international law, such as the jurisdiction of States and State immunity. In 1648, the Peace of Westphalia formally introduced the principle of sovereignty of States as the modern foundation of the political order between States. To defend their sovereignty, States disposed of armed forces to protect their vital interests. Since the nineteenth century, the

[22] U.S. Supreme Court 24 February 1812, *The Schooner Exchange v McFaddon* 11 U.S. 116 (1812). supreme.justia.com/us/11/116/case.html. Accessed November 2014.

[23] The first agreements were concluded at the beginning of the First World War; e.g. *Agreement between Belgium and France relative for the better prosecution of acts prejudicial to the armed forces;* Brussels, 14 August 1914 (*The Consolidated Treaty Series,* edited and annotated by Clive Parry, Vol. 220, 1914–1915, p. 274).

[24] Resolution of the Council of 11 December 1934, *League of Nations Official Journal*, December 1934, pp. 1762–1763.

[25] Fleck 2003, p. 12.

existence and actions of armed forces became inextricably linked to the State,[26] explaining the States' interest in exercising jurisdiction over their armed forces.

The possibility to exercise criminal jurisdiction over armed forces stationed on foreign territory implies the servicemen's immunity from the criminal jurisdiction of local courts. Immunity can be based on customary law and international agreements and is closely connected to the sovereign position of the State. Therefore, any analysis of the status of visiting forces requires an understanding of the position of the State and its organs in their relations with other States under international law.

In those relations, sovereign States are equal and independent from other States and have the exclusive power to execute the functions of the State within their territory[27]: to prescribe and enforce the rules and administer justice. From this principle of sovereignty the status of armed forces on foreign territory has been derived. Viewed from an international law perspective, warships and their crews even have a special position for which specific rules and practices have developed that today are partly laid down in treaties and general arrangements.

The sovereignty of States has been a key concept in the development of international law. Initially, international law regulated the co-existence of States and delimited their competences. As States started to cooperate to jointly address cross-border problems they delegated part of their powers to institutions they had established together and which, as international organisations, acquired a place of their own under international law. Important international organisations, in particular the UN, play their own unique role in the development with respect to status of forces.

1.3.4 Part III: Military Operational Law Perspective

SOFAs are one of the main topics of military operational law, which itself is a sub discipline of military law. The latter is a hybrid discipline of law, which is difficult to define, and is sometimes described as: "all parts of law related to military personnel and the military".[28] In contrast to military law, which has a really broad scope, addressing the relation between law and military personnel, military operational law concentrates on the actual deployment of armed forces in military operations and can be described as:

> the various bodies of national and international law which are applicable to and regulate the planning and conduct of military operations.[29]

Military operational law has its origin in the aftermath of the Vietnam War. In response to serious crimes committed by US servicemen during the conflict, the US

[26] Ducheine 2008, p. 12.

[27] PCA 4 April 1928, *The Island of Palmas case (or Miangas)*, *United States v the Netherlands*, Award of the Tribunal, p. 8. www.pca-cpa.org. Accessed November 2014.

[28] Gill 2006, p. 184.

[29] Gill and Fleck 2010, p. 3.

armed forces improved education and training in the law of armed conflict.[30] More important with respect to operational law, legal review of the operational plans was introduced, which integrated law in the preparation and the execution of military operations. This interrelation became known as military operational law.

From a military operational law perspective, SOFAs are to be considered in the larger context of the law of visiting forces. Within this context, SOFAs do not stand alone, but build on the legal bases for the foreign stationing of forces. From those bases follow the operational objectives of the forces' foreign presence which, to a large extent, determine the status of the forces, in particular, the exercise of criminal jurisdiction over the forces.

Today, SOFAs not only deal with criminal jurisdiction, but can cover a wide range of subjects, such as immunities from civil jurisdiction, procedures for entering the host States, freedom of movement in the host States and the right to carry arms. The contents of SOFAs affect the commander's ability to execute his mission. For instance, in practice during the deployment of sizeable military units, damage, for example, because of traffic accidents is unfortunately unavoidable. SOFAs that allow for a flexible and expedient process to solve these matters contribute to the local population's acceptance of the visiting forces.[31] Furthermore, during crisis management operations, that today also aim to restore the rule of law in the aftermath of an armed conflict, this type of process helps to restore confidence in the local legal order.[32] A SOFA tailor-made for a specific mission contributes to the successful accomplishment of the mission.

1.4 Terminology

1.4.1 Consent

This book deals with the consensual stationing of armed forces abroad only. Therefore, situations where host States have refrained from giving their consent to the foreign military's presence have not been taken into consideration. Armed conflict, especially the hostile occupation of a State,[33] is clearly a situation in which

[30] Id., pp. 26 et seq.

[31] E.g., Borch 2001, pp. 25 and 73.

[32] ECHR 31 May 2007, *Behrami v France and Saramati v France and others*, Application no. 71412/01, para 48.

[33] In a situation of occupation, parts of the territory of a State fall de facto under the authority of the hostile army (Article 42 *Regulations Respecting the Laws and Customs of war on Land,* Annex to the *Hague Convention IV Respecting the Laws and Customs of War on Land*; The Hague, 18 October 1907; see also ICJ 19 December 2005, *Case concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, paras 173–178). This rule also applies if the occupation did not meet armed resistance (Common Article 2 to the Geneva Conventions of 1949) and to the extent that no valid agreement had been concluded with the occupied State (Roberts 2009, para 4).

consent is lacking. In that particular situation, the status of forces follows from the law of armed conflict. Consequently, local courts in occupied territory do not have criminal jurisdiction over the occupying hostile armed forces,[34] which remain subject to the exclusive criminal jurisdiction of the authorities of the sending State. To this end, the occupying powers can establish military tribunals on the basis of Article 66 of the *Fourth Geneva Convention*.[35]

There are other situations in which military personnel is deployed abroad without host State consent. In principle, operations in the context of Chapter VII of the Charter of the United Nations[36] do not require host States' approval, but the UN will attempt to obtain their consent.[37] In peacetime host States will have jurisdiction over illegal military activities conducted on their territory by foreign State officials present without their consent.[38] An example is the 1985 attack on the Greenpeace vessel 'Rainbow Warrior'. Agents of the French intelligence service sank the 'Rainbow Warrior' when it was berthed in the port town of Auckland, New Zealand, killing a Dutch photographer. Two French servicemen involved in the action, and operating without the consent of the government of New Zealand, were arrested and convicted by the local court.[39]

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[34] This aspect is not explicitly mentioned in treaties such as the *Hague IV Convention relating to the Laws and Customs of War on Land* and the *Geneva Conventions*. However, this situation is in accordance with the actual balance of power; Schneider 1964, p. 1. In general, see: JAGS Text No. 11 1944, p. 238; von Glahn 1957, p. 340; Dinstein 2009, p. 136. According to Robin, this results from Article 43 of the *Hague IV Convention relating to the Laws and Customs of War on Land*; Robin 1913, p. 141.

[35] Pictet 1958, p. 340. In 1947, on the question whether Dutch courts had jurisdiction over hostile forces, the court in the *Ahlbrecht* case considered that an army occupying foreign territory brings its own criminal codes, courts martial and criminal proceeding; Special Council of Cassation, 17 February 1947, *Ahlbrecht*, NJ 1947, 87. In the case *In re Verhulsdonck* the Belgian judge concluded that Belgian criminal law was not applicable to the German occupation forces during the Second World War; Court of Cassation 12 February 1951, *In re Verhulsdonck*, ILR 18, p. 532. Prisoners of war are an exception. They are subject to the law of the State that has imprisoned them (e.g., Article 82 *Third Convention relative to the Treatment of Prisoners of War;* Geneva, 12 August 1949). Another exception are the war crime trials after the armed conflict has ended; see Liivoja 2011, p. 146. In these cases, the homes States of the prosecuted officials had never invoked immunity; see *UN Doc* A/CN.4/631 (2010), ILC Second report on immunity of State officials from foreign criminal jurisdiction, 10 June 2010, para 69.

[36] *Charter of the United Nations*; San Francisco, 26 June 1945 (*S.* 1945, F 253).

[37] *United Nations Peacekeeping Operations. Principles and guidelines*, New York: United Nations, 18 January 2008, p. 31. In case of so called 'enforcement operation' consent may be lacking and the law of armed conflict will apply.

[38] See *UN Doc* A/CN.4/631 (2010), ILC Second report on immunity of State officials from foreign criminal jurisdiction, 10 June 2010, para 85.

[39] For more details on this topic, see Ruling by the Secretary-General of the United Nations, 6 July 1986, *Case concerning the differences between New Zealand and France arising from the Rainbow Warrior affair*, United Nations Reports of International Arbitral Awards, Vol. XIX, pp. 199–221.

1.4.2 Internal Order and Discipline

The armed forces are a hierarchal organisation, in which the command structure is clearly defined. With a view to the sometimes exceptional circumstances under which the servicemen must operate, military criminal, disciplinary and administrative law emphasise the military command relationships, authorising the commander to issue orders and service regulations, which all servicemen under his command are obliged to follow.[40] The commander can enforce his orders and regulations, if necessary, by taking disciplinary or administrative action.

Military criminal, disciplinary and administrative law are an inherent part of an effective force and must, therefore, continue to apply when the forces are deployed abroad.[41] This cannot be regarded as a serious obstacle by the host State as long as the rules concern the internal order of the visiting forces and do not affect host State public order. In general, it is accepted that sending States have the exclusive authority over the internal order of their forces. However, legal systems of states vary and the question of whether the public order of the host State is concerned will have to be answered on a case-to-case basis. Unless indicated otherwise, this book does not address internal disciplinary and administrative law.

1.4.3 Crisis Management Operations

The terminology related to military operations does not have a legal basis and is quite ambiguous. The UN include in the description of peace operations several related and partly overlapping activities, such as conflict prevention, peacemaking, peace enforcement, peacekeeping and post-conflict peacebuilding.[42] Peacekeeping operations are an important tool for the UN with a highly diverse character, varying from traditional observation missions to the modern multi-dimensional peacekeeping operations that include military, police and civilian elements.[43]

NATO distinguishes between collective self-defence operations on the basis of Article 5 of the *NATO-Treaty*,[44] on the one hand, and operations that are not based on this article (the Non-Article 5 Crisis Response Operations, NA5CRO), on the other. This term has a rather broad scope and includes a wide variety of military

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[40] Ducheine 2010, pp. 145–154.

[41] In this context, reference has been made to the concept of organic jurisdiction, Sari 2008, pp. 77 et seq; Liivoja 2011, p. 239, in which the specific relation between the State and its organs is solely subject to national law; Seyersted 2008, p. 84.

[42] *United Nations Peacekeeping Operations. Principles and Guidelines*, New York: United Nations, 18 January 2008, pp. 18–19 and Fig. 1.

[43] Ibid, p. 22.

[44] *North Atlantic Treaty*; Washington, 4 April 1949 (Vol. 34 *UNTS* 1949, No. 541).

activities, such as peacekeeping activities, humanitarian assistance and evacuation of non-combatants. Since 2003, the EU has undertaken military operations and civilian missions in the context of the Common Security and Defence Policy (CSDP).[45] The organisation uses the term crisis management to include all activities undertaken in this context.[46] This book follows the latter terminology using crisis management operation as a generic term for any military operation taking place with host State consent.

1.4.4 Jurisdiction and Immunity

Although distinct concepts, jurisdiction and immunity are closely related[47] and are central in the discussion on the status of forces. When addressing the status of State officials abroad international law generally focuses on the concept of immunity, while from the military operational law perspective jurisdiction is equally, if not more, important. Therefore, in anticipation of a more detailed analysis in Part II, Chaps. 6 and 7, it is useful to briefly discuss both concepts.

Jurisdiction refers to the powers of sovereign States to prescribe, adjudicate and enforce their national laws.[48] In principle, jurisdiction and the State's exercise thereof is territorial by nature (see Fig. 1.1).

On the basis of generally accepted principles of jurisdiction under international law, a State can extend its law to apply to persons or activities outside its own territory. In this way, the State extends its legislative jurisdiction beyond its borders. As a consequence, that State can prosecute acts committed by its nationals abroad, or which have an effect on its territory or legal order within certain generally accepted parameters. In that case, State A can prosecute a suspect when he is within its territory or when a court of State A renders a decision *in absentia*.

State A can lay down by law the authority of its courts to sit outside its own territory. However, this authority does not imply that those courts have the right to actually operate in State B and can, for example, conduct a criminal investigation. The extraterritorial exercise of the powers to adjudicate and enforce requires either the consent of the States involved, or a legal basis under international law.

[45] Before the *Treaty of Lisbon* came into effect, CSDP was called the European Security and Defence Policy; *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*; Lisbon, 13 December 2007 (*OJ* 2007, C 306).

[46] Naert 2010, p. 204, footnote 1025.

[47] The concepts of jurisdiction and immunity are inextricably linked: "If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise"; ICJ 14 February 2002, *Arrest warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002, p. 3, separate opinion of Judges Higgins, Kooijmans and Buergenthal para 3. As a result, immunity is the exception to jurisdiction and can only be invoked if there is jurisdiction. (ibid, para 70).

[48] Restatement of the Law (1987) pp. 230 et seq.

Fig. 1.1 State jurisdiction

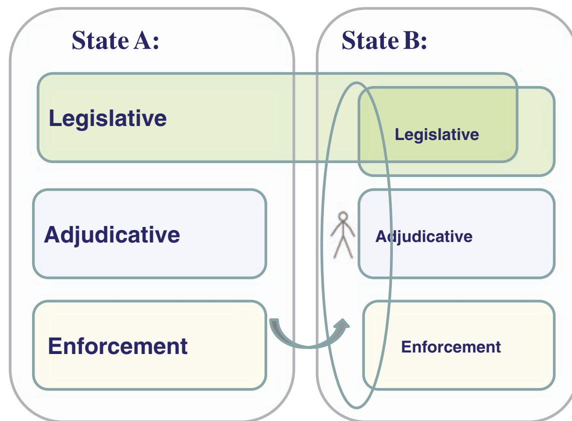

Fig. 1.2 State jurisdiction; State A's national abroad

In case a national of State A visits State B, he falls under the legislative, adjudicative, and enforcement jurisdiction of the latter State notwithstanding any possible extraterritorial legislative jurisdiction of his home State. If State A made use of its power to exercise extraterritorial legislative jurisdiction, this would result in the possibility that a particular act could constitute an offence under the laws of both States A and B, implying a degree of concurrent jurisdiction (see Fig. 1.2). No specific rules of precedence apply in situations like these and normally the State that is in the best position to act, for example the State, where the offence was committed and the perpetrator apprehended, will initiate criminal proceedings.

State B has, *inter alia*, adjudicative and enforcement jurisdiction over the visiting national from State A, except when that person is a foreign State official, like a diplomat or serviceman, present on State B's territory with its consent (see Fig. 1.3), who enjoys immunity from the adjudicative and enforcement jurisdiction of State B.[49] Officials enjoying immunity remain, however, subject to the legislative jurisdiction of both State B and State A, if the latter has extended its legislative jurisdiction beyond its borders. In cases of State officials this will virtually always be the case.

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49 Staff members of international organisations can also enjoy immunity (see Chap. 9).

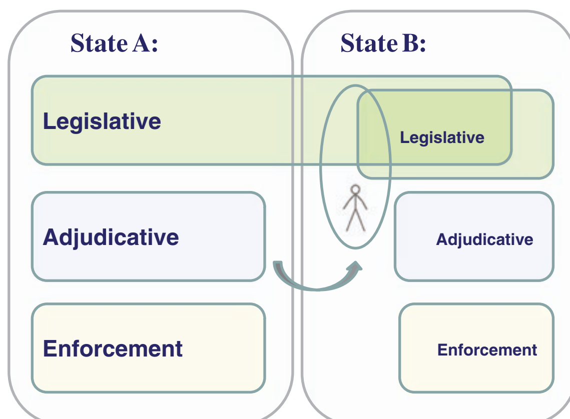

Fig. 1.3 Immunity from adjudicative and enforcement jurisdiction

If a State official commits an offence abroad he will almost always be subject to the legislative jurisdiction of both States A and B. State B, however, cannot exercise enforcement and adjudicative jurisdiction vis-à-vis the official acts of the official because of immunity. In such a case it would fall to State A to do so once the official is back home.

Immunity is attached regardless whether or not State A decides to exercise its adjudicative jurisdiction over the official upon his return to State A or *in absentia*. In other words, immunity does not have the primary aim to enable State A to exercise its adjudicative and enforcement jurisdiction extraterritorially vis-à-vis its official abroad. However, its aim is to prevent State B from exercising those powers over the foreign official.

With regard to visiting forces present on another State's territory the situation is different. Many SOFAs put more emphasis on the sending States' possibility to exercise their criminal jurisdiction than on immunities granted by host States. For instance, several SOFAs state that members of the armed forces deployed abroad are subject to the exclusive jurisdiction of their respective sending States,[50] thereby expressing the parties' understanding that State A, as sending State, to the exclusion of State B, as host State, may exercise its adjudicative and enforcement jurisdiction over the servicemen. State B, therefore, refrains from exercising its adjudicative and enforcement jurisdiction over the servicemen, who thus enjoys immunity in State B (see Fig. 1.4).

In this context, jurisdiction and immunity are closely interlinked as the report resulting from the experiences of the United Nations Emergency Force (UNEF) in Egypt shows (see Sect. 4.3.2). In the report, the Secretary-General of the UN stated that the members of the force "should be immune from the criminal jurisdiction of the host State" and that the SOFA "accordingly provided that members of the Force should be under the exclusive jurisdiction of their respective national.

[50] A well-known example is para 47 (b) *Model Status-of-Forces Agreement for Peace-Keeping Operations*, Report of the Secretary-General, *UN Doc* A/45/594 of 9 October 1990.

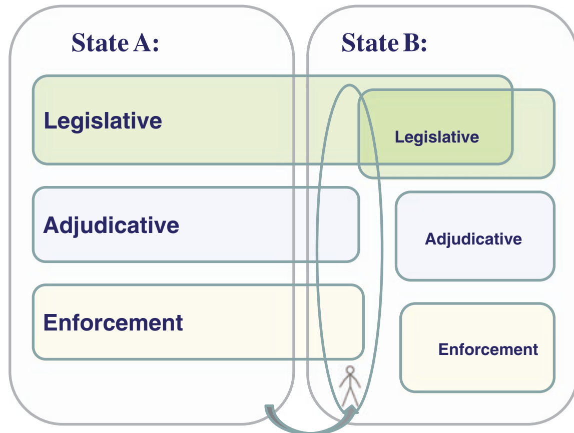

Fig. 1.4 Exclusive jurisdiction in relation to immunity

States with regard to any criminal offences committed by them in Egypt".[51] In 2004 the Office of Legal Affairs stated that forces participating in UN operations:

> are … subject to the exclusive criminal jurisdiction of their respective national authorities, and so enjoy absolute and complete immunity from legal criminal process in States hosting peacekeeping operations.[52]

In the literature the relation between jurisdiction and immunity vis-à-vis military forces is not subject to debate and often the exclusive criminal jurisdiction of the sending States over their armed forces is almost naturally equated with the criminal immunity of these forces.[53]

In my opinion, emphasising the sending States' jurisdiction rather than the immunity granted by host States highlights the special relation between sending States, on the one hand, and their armed forces in the execution of their mission abroad, on the other. The military force functioning as an organised entity under single military command is a necessity for mission accomplishment. This means that sending States must be able to exert their authority and command over the forces without host State interference, which requires the forces' immunity from the jurisdiction of the host States and, above all, that sending States can exercise their jurisdiction over servicemen who have violated sending State and host State law. In other words, the military function requires that forces deployed abroad remain to a certain extent subject to the jurisdiction of the sending States and that the host States partly refrain from the exercise of these powers.

[51] See *UN Doc* A/3943 (1958), Summary study of the experiences derived from the establishment and operation of the Force, Report of the Secretary General, 9 October 1958, para 136.

[52] Office of Legal Affairs, 'Letter to the Acting Chair of the Special Committee on Peacekeeping Operations, United Nations, regarding immunities of civilian police and military personnel', 14 April 2004, *United Nations Juridical Yearbook 2004*, New-York: United Nations, Office of Legal Affairs 2004, p. 325.

[53] See for example Siekman 1988, p. 170; Bothe and Dörschel 2003, p. 505; Liivoja 2011, p. 250.