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**'Status of forces': Strafrechtsmacht over militairen vanuit internationaalrechtelijk & militair-operationeelrechtelijk perspectief**

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## Summary

**‘Status of Forces’.** The International Law and Military Operational Law Perspective on Criminal Jurisdiction over Military Personnel.

This study focuses on the criminal jurisdiction over armed forces stationed abroad. The primary objective is to contribute to the theory that underlies the criminal jurisdiction over these forces, within the international law and military operational law framework. The secondary objective of the study is to propose a practical application of that theory. Therefore, the central research question focuses on the theory that underlies the contemporary status of forces arrangements from the perspective of international law and military operational law.

The central research question is broken down into three questions. The first question relates to the historical development of criminal jurisdiction over armed forces of the sending state in the state of stay and reads: How has the criminal jurisdiction over military personnel stationed abroad developed and can that development be explained from the specific context of foreign stationing? The status of military personnel stationed abroad and in particular the exercise of criminal jurisdiction over them, is closely linked to the position of the sovereign state and to related issues under international law. This leads to the second question: What is the position within international law of criminal jurisdiction over military personnel stationed abroad and how has that jurisdiction evolved under the influence of international law developments? In order to answer the central research question the law of military operations is also of importance. This discipline is part of the law that specifically focuses on military operations, in which operational legal aspects are applied in conjunction with each other within the specific operational context. The third question is based on this field of law and reads: What is the position within the law of military operations of criminal jurisdiction over military personnel stationed abroad and how has that jurisdiction evolved under the influence of developments in military operational law?

The starting point for this study and to answer the first question is the part of *The Exchange v. McFaddon*-case in which the United States Supreme Court considered the legal position of armed forces passing through the territory of a foreign state. From these considerations the basic rule is deduced that the state of stay wholly or in part waives its right to exercise criminal jurisdiction over armed forces of the sending state that are under command of the sending state and are present in the territory of the state of stay with the latter’s consent, based on which the sending state can exercise its criminal jurisdiction. Application of the basic rule leads to immunity from local jurisdiction in criminal matters for the sending state’s troops.

Although the basic rule was initially understood to be of an exclusive character, it was soon recognized in legal literature and in case-law that the rule was applicable only under certain conditions and asked for a nuanced explanation. For example, the troops had to be present in the foreign state as an organized unit and the troops had to be present in agreed locations, like military camps. Outside these locations the basic rule only applied when the troops were on duty. The exact limits of the basic rule, however, were not fully established, which may have contributed to the practice of recording status arrangements in formal agreements and decisions that started at the beginning of the 20<sup>th</sup> century.

The further development of status arrangements can be best understood by examining the context of the foreign military presence. This study distinguishes three situations: presence of armed forces in allied territory during an armed conflict, participation in a crisis management operation and international military cooperation under peace conditions. The study shows that visiting forces are subject to the exclusive jurisdiction of the sending state and the state of stay as a rule fully waives its right to exercise its criminal jurisdiction over the visiting foreign forces when these forces participate in a crisismanagement operation taking place in the state of stay or when they support the state of stay in an armed conflict. In this context the armed forces serve under the authority of the sending state and under the command of their military commander, independently from the state of stay. However, when states cooperate in military matters there is no need to deny the state of stay all criminal jurisdiction over the visiting forces. Furthermore, the extent and duration of the foreign military presence can have an impact on the state of stay. A more balanced interests of the states involved allows for the exercise of jurisdiction by the state of stay.

Criminal jurisdiction over military personnel is closely connected with the position of the sovereign state under international law. This leads to the second question about the position and development under international law of criminal jurisdiction over military personnel stationed abroad. Basically, jurisdiction of a sovereign state is territorial, but in the course of time, states have expanded their legislative powers to conduct outside their own territory. This extension of legislative jurisdiction is without prejudice to the state of stay's jurisdiction to legislate in respect of its own territory.

As both the sending state and the state of stay have jurisdiction to legislate there is concurrence of jurisdiction that may cause a conflict when states want to adjudicate a case. That conflict can be partly addressed by the law of state immunity. Based on the principles of international law sovereign states and state officials enjoy immunity from the courts of foreign states. The immunity of most of these officials is limited to their official functions.

The armed forces are, without any doubt, a state organ that the sending state can deploy abroad under national authority and command. The study shows that

under these circumstances military personnel are entitled to further reaching immunities than other state officials. During crisismanagement operation in particular the rule of customary international has formed that the armed forces are subjected to the exclusive criminal jurisdiction of the troop contributing states and are therefore entitled to full criminal immunity from the criminal courts of the state of stay. In the case of international military cooperation states of stay retain a certain level of criminal jurisdiction over the foreign forces, for which the functional immunity of the member of the armed forces forms the basis. International practice shows that many status arrangements offer military personnel more protection from the foreign criminal law system than can solely be explained from the international law perspective.

A further explanation is offered by the law of military operations. The third question focuses on the position and development of criminal jurisdiction over military personnel stationed abroad from the perspective of this field of law. The law of visiting forces constitutes one of the core elements of the law of military operations and consists of the right of armed forces to enter the territory of another state and the rights and obligations of those forces during their foreign stay.

Viewed from the perspective of the law of visiting forces status arrangement elaborate on the consent of the states of stay to and the general and specific legal bases for the foreign military presence. Within this broad military operational law framework status arrangements and the provisions regarding criminal jurisdiction are part of the instruments of a commander to execute his mission by accelerating the entrance of his forces in a foreign state and by facilitating the stay and accomplishment of required tasks and duties.

From this perspective additional arguments can be raised justifying the exercise of criminal jurisdiction by the sending state over its troops abroad. A general point may be made of the need to protect the troops against deviating, imperfect or non-functioning legal systems of the states of stay. When troops are deployed to execute combat functions or to support those functions, they need to be able to operate independently from the state of stay and the state of stay must not exercise criminal jurisdiction over the troops. In the case of international military cooperation the functional immunity of the armed forces will be sufficient from the military operational law perspective. Nowadays, besides provisions on criminal jurisdiction status arrangements include other rights, like procedures for the processing of claims and arrangement concerning the use of force. These provisions can influence the final arrangements regarding the exercise of criminal jurisdiction and, therefore, must be assessed in their interrelationship.

Under the influence of shrinking defense budgets states will intensify international military cooperation resulting in continuation of their foreign military presence for which status arrangement will be needed. The drafting of these arrangements,

however, requires a considerable investment in time and capacity of the states concerned. This study proposes, based on the theory outlined above, the development of a "Status-of-Forces Compendium" containing "best practices" in the field of status arrangements. Based on the Compendium, states and international organizations can prepare a balanced status arrangement that does justice to the nature of the international cooperation and the interest of the parties involved.