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The Scope of Jurisdiction Provisions in Status of Forces Agreements Related to Crisis Management Operations

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I. Introduction

In March 2012, an atrocity was committed in two villages in the Kandahar Province of Afghanistan. One night, an American soldier entered three houses and killed sixteen people, including women and children. In response to this violent outburst of one of its soldiers, the United States (US) authorities started a criminal investigation into the actions of Army Staff Sergeant Robert Bales.¹ Unfortunately, history has given us many examples of soldiers who behave in an unacceptable way towards the local population where they are conducting military operations.

In situations of patently obvious criminal offences, the national prosecution authorities will generally initiate a criminal investigation. Even if there is no domestic or international law² obligation to initiate an investigation, the failure to respond promptly and transparently to such behaviour could have a tremendous impact on ongoing operations. Similar considerations may apply for ordinary traffic accidents or for combat actions that involve civilian casualties, even where there may be no reasonable suspicion of an offence. Many countries will promptly investigate such incidents also because it is appropriate from a humanitarian point of view³ and/or because of obligations under domestic law or policy.⁴

It is common practice that States and alliances, such as the North Atlantic Treaty Organization (NATO), conclude agreements concerning the status of their forces that participate in crisis management operations. These Status of Forces Agreements (SOFAs) prescribe the exclusive right for the troop sending States to bring their soldiers to justice in their home country for offences committed on the territory of the receiving State.

¹ L.C. Baldor & D. Riechmann, 'Robert Bales, Afghanistan Shooting Suspect, Charged with 17 Murders', 23 March 2012, *The Huffington Post*, http://www.huffingtonpost.com/2012/03/23/robert-bales-afghanistan-_n_1375844.html. Unless indicated otherwise, all urls cited were last accessed on 30 January 2013.

² E.g. pursuant to Art. 49 GC I, Art. 146 GC IV, Arts. 85 and 87-89 AP I and Art. 9 of the 1997 Ottawa Convention. The ICRC asserts that the principles as set forth in these articles enjoy the status of customary international law (see Rule 158 in J.M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge, Cambridge University Press, 2005), Vol. 1).

³ E.g. Art. 2 ECHR.

⁴ The Netherlands Armed Forces, for example, are obliged to report any combat actions which involve civilian casualties to the Prosecution Service. As a matter of policy, the prosecutor will then investigate the incident, regardless of whether there is an actual suspicion of a criminal offence or not.

Do these agreements, however, authorize visiting military law enforcement officers to use investigative powers, and if so, to what extent? To our knowledge, these questions have not (yet) been a matter of legal dispute in regard to ongoing military operations. Furthermore, we observe no particular interest on this subject among scholars. So far, their attention seems to be focused only on the jurisdiction to adjudicate. As everyday practice in crisis management operations shows that criminal investigations with regard to incidents involving civilian casualties are not a rare phenomenon, we consider it worthwhile exploring this specific area in the field of military operational law.

This article aims at providing an insight in the legal basis for exercising the jurisdiction to enforce during crisis management operations and we hope it can serve as a stepping stone for further debate and policy making. We will first elaborate on some issues related to the concept of jurisdiction. In the second part of this article we will examine SOFAs concerning crisis management operations. Our focus will be on jurisdiction, and the particular arrangements regarding enforcement jurisdiction. Next, we will elaborate on these arrangements in more detail. This article will be concluded with a few remarks.

II. Jurisdiction

1. General

The sovereignty of a State is one of the fundamental principles of public international law and is reflected in the notion of jurisdiction.⁵ Jurisdiction, and the exercise thereof, encompasses the powers of the State as an essential feature of that sovereign State. It traditionally is comprised of the authority to prescribe and the authority to enforce. The former, also referred to as jurisdiction to legislate, is the power of a State to apply its laws to “the activities, relations or status of persons, or interests of persons in things, whether by legislation, by executive act, or by determination of a court”.⁶ Jurisdiction to enforce was considered to be exercised primarily by judicial bodies, and therefore, a distinction between enforcement and adjudication was not made initially. The 1935 Draft Convention on Jurisdiction with Respect to Crime defined the jurisdiction of a State as “its competence under international law to prosecute and punish for crime”.⁷ In a comment to this provision, it was

⁵ E.g. F.A. Mann, ‘The Doctrine of Jurisdiction in International Law’, Vol. 111 *Hague Academy Collected Courses* 1964, p. 30: “Jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the State’s sovereignty”.

⁶ American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States* (Washington, American Law Institute Publishers, 1986), p. 232.

⁷ Art. 1(a) of the Harvard Draft Convention on Jurisdiction with Respect to Crime, Vol. 29 *A.J.I.L. Supplement: Research in International Law* 1935, p. 439.

noted that “prosecute” included “all the stages in penal proceedings, from preliminary investigation, through trial, to final adjudication on appeal in the tribunal of last resort”.⁸

This particular view of jurisdiction, which equates jurisdiction to enforce with jurisdiction to adjudicate, proved to be too simple⁹ and a further distinction is now often made between enforcement and adjudication. Jurisdiction to enforce can be described as the authority of a State “to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action”.¹⁰ This type of jurisdiction includes the power of law enforcement officers to maintain public order, to investigate a criminal offence, to arrest a suspect, or to implement a judgment. Jurisdiction to adjudicate is the authority to: “subject persons or things to the process of its courts or administrative tribunal, whether in civil or criminal proceedings, whether or not the State is a party to the proceedings”.¹¹

2. Extraterritorial Jurisdiction

In principle, jurisdiction of a State is territorial.¹² Hence, a State cannot exercise its jurisdiction over persons or activities beyond its borders since extraterritorial exercise of jurisdiction impacts the sovereignty of foreign States.¹³ However, because of the increasing complexity of international relations, the growth of transnational activities, and technological developments, States felt the need to extend the applicability of some of their laws. Certain principles regarding the extraterritorial application of jurisdiction to prescribe, which were based on a nexus between the State exercising jurisdiction and the regulated persons or facts, could already be recognized early in the 20th century.

In addition to the territoriality principle, the introductory comment on the 1935 Draft Convention on Jurisdiction with Respect to Crime distinguishes four general principles on which a State can assert penal

⁸ *Id.*, p. 468.

⁹ *Restatement of the Law*, *supra* note 6, p. 230.

¹⁰ *Id.*, p. 232.

¹¹ *Id.*, p. 232.

¹² PCIJ, *S.S. Lotus (France v. Turkey)*, 7 September 1927, *P.C.I.J.* 1927, Ser. A, No. 10, pp. 18-19.

¹³ Mann, *supra* note 5, p. 30; ECtHR (Grand Chamber), *Banković and others v. Belgium and 16 others*, Appl. No. 52207/99, 12 December 2001, Decision as to the admissibility, § 59: “While international law does not exclude a State’s exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States”.

jurisdiction and which are still relevant today: nationality principle, protective principle, universality principle, and the passive personality principle.¹⁴ The nationality principle focuses on the nationality of the perpetrator of an offence and allows States to apply their laws to their nationals abroad. Nationality is also relevant for the passive personality principle. This principle, however, does not take into account the nationality of the perpetrator, but rather, the nationality of the victim. Thus, a State may protect its nationals abroad. Although the application of this principle nowadays seems less controversial,¹⁵ it mainly applies on a conventional basis.¹⁶ Further, it is without doubt that a State must be able to criminalize acts committed abroad that affect vital, national interests. The protection principle offers a basis for the safeguarding of these interests such as national security and the monetary system.

The principles mentioned above are based on a more or less direct linkage between the persons or facts and the State exercising extraterritorial jurisdiction. The universality principle does not necessarily require such a close tie since it focuses on the international legal order. It starts from the idea that the nature of certain criminal offences, or the circumstances under which they may take place, affect the international community as a whole and warrant the exercise of jurisdiction by any State. The classical example, of course, is piracy. Because of the threat of pirates to all seafaring nations and international trade, all States can exercise jurisdiction. Nowadays, universal jurisdiction is based on customary international law and international agreements.¹⁷

¹⁴ Harvard Draft Convention, *supra* note 7, p. 445. According to the comment, in 1935 the nationality principle was “universally accepted”, the protective principle was “claimed by most states”, the universality principle was “by no means universally accepted”, and the passive personality principle was at that time “asserted in some form by a considerable number of States”.

¹⁵ ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergerthal, *I.C.J. Rep.* 2002, § 47. Particularly because of terrorist attacks on certain persons because of their nationality the application of the passive personality principle, based on an explicit treaty provision (e.g. Art. 87(b) UN Safety Convention) became more accepted: O. Engdahl, *Protection of Personnel in Peace Operations: The Role of the ‘Safety Convention’ against the Background of General International Law* (Leiden, Martinus Nijhoff, 2007), pp. 33–34.

¹⁶ The principle was the basis for Italy’s attempt to prosecute an American soldier who killed an Italian national in Iraq in 2007. See Italy, Court of Cassation, *Lozano v. Italy*, 24 July 2008, Case No. 31171/2008, *International Law in Domestic Courts (ILDC)* 1085 (IT 2008).

¹⁷ *AU–EU Expert Report on the Principle of Universal Jurisdiction*, 16 April 2009, EU Council Doc. 8672/09 REV 1, §§ 15 and 23 (<http://register.consilium.europa.eu/pdf/en/09/st08/st08672.en09.pdf>).

A number of States, including common law States, which are generally reluctant to extend jurisdiction beyond their own borders, extraterritorially apply the jurisdiction to legislate with respect to military personnel serving abroad.¹⁸ This principle is often referred to as the “law of the flag”¹⁹ (*ubi signa et jurisdictio* or *la loi suit le drapeau*)²⁰ which is a phrase derived from Napoleon Bonaparte, who stated that the French army is never abroad because it operates under the national flag: “Il faut regarder le drapeau comme le domicile. Partout où est le drapeau, là est la France”.²¹ Jurisdiction over military personnel appears to be derived from the active personality principle, and supplemented with specific, intrinsic elements.²² Liivoja refers to this aspect as “service jurisdiction”, which could be viewed as a separate principle upon which a State can establish jurisdiction to prescribe with respect to military personnel.²³

Although the three types of jurisdiction are closely related, the extraterritorial application of national law does not automatically entail the authority to extraterritorially assert jurisdiction to enforce or adjudicate. Unlike the extraterritorial exercise of jurisdiction to prescribe, which does not necessarily impact the sovereignty of a foreign State, jurisdiction to adjudicate and especially jurisdiction to enforce do have an effect on the public order of the foreign State. Therefore, a State cannot, in principle, subject another sovereign State, which is its equal, to its jurisdiction to adjudicate or enforce as is reflected in the classic maxim *par in parem non habet iudicium*.²⁴ The extraterritorial

¹⁸ R. Liivoja, ‘Service Jurisdiction under International Law’, Vol. 11 *Melbourne Journal of International Law* 2010, p. 310 mentions *inter alia* Australia, Denmark, Germany, the United Kingdom and the United States. Other States, like Canada and Ireland, are more reticent: see M. Odello, ‘Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers’, Vol. 15 *J.C.S.L.* 2010, p. 377.

¹⁹ S. Lazareff, *Status of Military Forces under Current International Law* (Leiden, Sijthoff, 1971), p. 11.

²⁰ *Lozano v. Italy*, *supra* note 16, § 3.

²¹ P.A. Fenet, *Recueil complet des travaux préparatoires du Code Civil* (Paris, Impr. de Ducasso, 1827), Vol. 8, pp. 46–48 and *Addition au tome VIII*, p. 32 and A.C. Thibaudeau, *Mémoires sur le consulat. 1799 à 1804* (Paris, Ponthieu et Cie, 1827), pp. 427–428.

²² Liivoja, *supra* note 18, p. 331, citing I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot, Ashgate, 1994).

²³ R. Liivoja, *An Axiom of Military Law. Applicability of National Criminal Law to Military Personnel and Associated Civilians Abroad* (Helsinki, Centre of Excellence in Global Governance Research, 2011), pp. 238–245.

²⁴ J. Kokott, ‘States, Sovereign Equality’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law – Online Edition* (Oxford, Oxford University Press, 2008), <http://www.mpepil.com>, § 35. Also referred to as *par in parem non habet iudicium*.

exercise of these types of jurisdiction is, therefore, dependent on an explicit international rule or the consent of the State involved.²⁵

3. Immunity

As stated above, jurisdiction of a State is in principle territorial. Therefore, whenever a foreign citizen enters the territory of another State, he is subjected to the receiving State's jurisdiction to legislate, enforce, and adjudicate. At the same time, the jurisdictional powers of the State of origin over its citizen abroad cease to apply except, of course, if the State of origin has extended its jurisdiction to legislate extraterritorially. In that particular case, the person is subjected to the legislative jurisdiction of both the State of origin and the receiving State, and the receiving State's jurisdiction to adjudicate and to enforce.

The receiving State, however, having jurisdiction to adjudicate and to enforce, can refrain from exercising these powers with regard to visiting foreign State officials, if the officials are present in the receiving State with its consent. These State officials then enjoy immunity from the receiving State's jurisdiction to adjudicate and to enforce. Immunity essentially restricts the authority of the receiving State to exercise jurisdiction to enforce and adjudicate within its territory in respect of the person enjoying immunity and is an exception to the absolute territorial jurisdiction of that State. Immunity does not, however, affect the legislative jurisdiction of the receiving State so that national legislation continues to rule the conduct of a person enjoying immunity.²⁶ Therefore, immunity is not a material rule but a procedural one²⁷ unlike privileges, for instance tax exemptions, which are exemptions from the application of local law.

Many of the SOFAs we will discuss in the next paragraph do not focus on the immunity of military personnel, but instead emphasize the sending State's exclusive jurisdiction, implicating that the sending State can exercise its jurisdiction to adjudicate and to enforce with regard to its

²⁵ Mann, *supra* note 5, pp. 129-131 and 138; I. Brownlie, *Principles of Public International Law* (Oxford, Oxford University Press, 2008, 7th ed.), p. 309 and B.H. Oxman, 'Jurisdiction of States', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law – Online Edition* (Oxford, Oxford University Press, 2008), <http://www.mpepil.com>, § 4.

²⁶ ILC, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/601, 29 May 2008, § 64.

²⁷ J. Wouters & F. Naert, *Internationale Immuniteiten in de Belgische Rechtspraak* (Working Paper No. 34, KU Leuven – Institute for International Law, October 2002), p. 5. In this context, the ECtHR considered that "The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right" (ECtHR (Grand Chamber), *McElhinney v. Ireland*, Appl. No. 31253/96, 21 November 2001, Judgment, § 25).

military personnel with exclusion of the receiving State. The receiving State, by agreeing to the SOFA, is thus barred from exercising its jurisdiction to adjudicate and to enforce with respect to these soldiers, who as a result, enjoy immunity in the receiving State.

In this context, jurisdiction and immunity are intertwined.²⁸ Pursuant to a study on the United Nations Emergency Force (UNEF), members of UN forces should be immune from the criminal jurisdiction of the receiving State and, therefore, should be under the exclusive jurisdiction of their respective national States.²⁹ In 2004, the UN Office of Legal Affairs stated that forces participating in a UN operation: “are subject to the exclusive criminal jurisdiction of their respective national authorities, and enjoy absolute and complete immunity from legal criminal process in States hosting peacekeeping operations”.³⁰

4. Legal Assistance

Altogether, a State has to refrain from exercising its enforcement powers on the territory of another State. If a State recognizes the need to carry out investigations outside its own borders, this can only be done with the consent of the State concerned. For this reason, many States have signed bilateral or multilateral mutual legal assistance treaties.³¹ Despite the fact that States recognize that internationalization of criminality requires internationalization of criminal justice, the internationalization of investigation, sovereignty, and national identity still seem to dominate the expansion of mutual assistance in practice.

In general, cooperation does not include the right of law enforcement agencies to conduct investigations on the territory of another State. It merely requires a State to respond to a request for assistance by executing the required investigative measures and report the results

²⁸ The terms jurisdiction and immunity are thus 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” (*Arrest Warrant of 11 April 2000*, *supra* note 15, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, § 3).

²⁹ *Summary Study of the Experiences derived from the Establishment and Operation of the Force*, Report of the Secretary-General, UN Doc. A/3943, 9 October 1958, § 136. This study is one of the first documents that emphasize this connection with respect to the status of troops.

³⁰ UN 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, p. 325.

³¹ M.C. Bassiouni, ‘The Modalities of International Cooperation in Penal Matters’, in M.C. Bassiouni (ed.), *International Criminal Law, Volume II: Multilateral and Bilateral Enforcement Mechanisms* (Leiden, Martinus Nijhoff, 2008, 3rd ed.), pp. 7–30.

to the requesting authorities. In general, this traditional attitude still governs international cooperation, but it is sometimes set aside. The Schengen Convention, for example, permits member States to conduct cross-border surveillances and cross-border pursuits under detailed conditions and restrictions.³²

The European Union (EU) has brought a significant contribution to the present state of international cooperation in criminal matters by emphasizing the importance of mutual trust and mutual recognition of certain decisions rendered by the authorities of its Member States.³³ The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Framework Decision on Joint Investigation Teams illustrate this more progressive attitude. These instruments allow national members of an investigation team to operate on the territory of another member State in order to carry out investigative measures with the consent of the competent local authorities.³⁴

States go further in the case of participation in a military operation. Several States send investigative officers to mission areas along with their troops. These officers will start an investigation immediately if circumstances require it. Next we will elaborate on the legal bases for this practice.

III. Status of Forces

1. General

Apart from a situation where a State has occupied parts of another State, or is operating on hostile foreign territory in an armed conflict,³⁵ the rights and obligations of military personnel who are temporarily stationed abroad with that State's consent, are typically contained in international agreements between the States sending the troops (sending State) and the States receiving them (receiving State³⁶). These SOFAs are also part of the international legal framework for crisis management

³² See Arts. 40–41 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Schengen, 19 June 1990, *O.J. L* 239, 22 September 2000, pp. 19–62 and B. Swart, 'The European Union and the Schengen Agreement', in Bassiouni, *supra* note 31, p. 256.

³³ M. Plachta, 'Cooperation in Criminal Matters in Europe: Different Models and Approaches', in Bassiouni, *supra* note 31, p. 456.

³⁴ Council Framework Decision of 13 June 2002 on Joint Investigation Teams (2002/45/JHA), *O.J. L* 162, 20 June 2002, pp. 1–3 and Swart, *supra* note 32, p. 256.

³⁵ In this situation, rights and obligations of the armed forces are governed by the law of armed conflict.

³⁶ Sometimes referred to as "host State" or "host nation".

operations and deal with a wide array of subjects to facilitate the entry and stay of the forces in the receiving State. The provisions dealing with criminal jurisdiction over military forces participating in the operations are characteristic of SOFAs³⁷ and can provide the sending States with the international legal justification for the extraterritorial exercise of the jurisdiction to adjudicate and to enforce with regard to their forces.

Crisis management operations are generally established and carried out under a mandate issued by a competent international organization. In some cases, where the operation is carried out at the invitation of the State where the operation is conducted, one or more States carry out the operation on the basis of consent on the part of the receiving State. The exercise of actual command authority is, however, usually a question of delegation, or partial transfer of elements of command and control over the participating forces to the relevant international organization, or in the case of an ad-hoc coalition operating on invitation, to a lead nation that supplies the bulk of the forces. The element of command and control subject to delegation or transfer is usually at the level of operational control,³⁸ while other aspects of command authority, including criminal jurisdiction, are retained by the sending States.

The international organizations, or Lead Nations as the case may be, never acquire jurisdiction to adjudicate or to enforce with respect to the forces. These powers remain a responsibility of the States involved, subject to customary international law and the provisions of the mission specific SOFA.

In practice, the sending States will not individually conclude these SOFAs. Instead, the international organizations, or the Lead Nations, take up this task and conclude a SOFA with the receiving State. As the negotiations to arrive at a SOFA are often a cumbersome proceeding, possibly resulting in delays and obstruction of the preparation and

³⁷ One of the first agreements that can be labeled a SOFA was concluded in the first weeks of the First World War between Belgium and France and exclusively dealt with criminal jurisdiction (Agreement between Belgium and France relative for the Better Prosecution of Acts Prejudicial to the Armed Forces, Brussels, 14 Augustus 1914, Vol. 220 *Consolidated Treaty Series* 1914–1915, p. 274). States continued this practice and over the years further developed provisions on other rights and obligations of the visiting armed forces.

³⁸ Operational control is “The authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control”; AAP-6 (2011), *NATO Glossary of terms and definitions 2011* (on file with author; AAP-6 (2012) is available at <http://nsa.nato.int/nsa/zPublic/ap/aap6/AAP-6.pdf>).

execution of operations,³⁹ some organizations developed model SOFAs that form the starting point for the negotiations.⁴⁰

2. International Practice

The scope of the provisions in SOFAs relating to criminal jurisdiction differs. This paragraph examines the practice of the NATO, UN, EU, and some of the Lead Nations in coalition operations.

A. NATO

i. Jurisdiction within the Allied Territory: The NATO SOFA

NATO's primary objective of collective defence requires the Alliance to move and station troops, without hindrance, throughout the territory of its member States whenever and wherever necessary. Consequently, NATO recognized the importance of an agreement on the status of the respective Allied Forces, and already in 1951, its member States concluded the NATO SOFA.⁴¹ This treaty is one of the few multilateral SOFAs.⁴² Its multilateral nature is considered one of the strengths of the agreement, since absent such multilateral agreement, all States of the Alliance would have had to conclude bilateral agreements amongst each other, creating all kinds of practical difficulties.⁴³ Notably, the NATO SOFA remains in force in the event of hostilities to which the North Atlantic Treaty applies, except for some particular exceptions and subject to possible modifications to, and possible suspension of, certain provisions.⁴⁴

³⁹ See, for example, the evaluation of Operation Enduring Freedom (Attachment to the Letter of the Ministers of Defence and Foreign Affairs to Parliament, 2 July 2004 (Dutch Parliamentary History, TK 2003–2004, 27.925, nr. 135, p. 33)).

⁴⁰ An example is the Model Status-of-Forces Agreement for Peace-Keeping Operations, Report of the Secretary-General, UN Doc. A/45/594, 9 October 1990.

⁴¹ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, Washington, 19 June 1951, 199 *U.N.T.S.* 67 (NATO SOFA).

⁴² Others examples are the Agreement on the Status of the Members of the Armed Forces of the Signatory Powers of the Brussels Treaty, 21 December 1949 (Command paper 7.868, London, Her Majesty's Stationary Office) (never entered into force); the Agreement regarding the Status of the United Nations Forces in Japan, Tokyo, 19 February 1954, 214 *U.N.T.S.* 51 and the EU SOFA (Brussels, 16 November 2003, *O.J. C* 321, 31 December 2003, p. 6; not yet entered into force). Notably, the so-called Warsaw Pact (Treaty of Friendship, Co-operation and Mutual Assistance, Warsaw, 14 May 1955, 219 *U.N.T.S.* 3) did not constitute, nor contain, a SOFA; instead, the USSR concluded bilateral non-reciprocal SOFAs with four States where Soviet troops were stationed. See G.S. Prugh, 'The Soviet Status of Forces Agreements: Legal Limitations or Political Devices?', 20 *Mil. L. Rev.* 1963, pp. 2–3.

⁴³ Cf. Lazareff, *supra* note 19, p. 64.

⁴⁴ Art. XV NATO SOFA, *supra* note 41.

As a compromise between the principle of the “law of the flag” and the territorial sovereignty of the receiving State, Article VII of the NATO SOFA provides for shared (“concurrent”) jurisdiction over members of the forces. Notably, the term “jurisdiction” is not further defined. Under the framework of shared jurisdiction, both the sending and receiving State have primary jurisdiction in regard to specific offences, while the State not entitled to primary jurisdiction can request the State with primary jurisdiction to waive this right. If an offence is only punishable by the laws of one State, this State retains exclusive jurisdiction.⁴⁵

With respect to enforcement, Article XII(10)(a) of the NATO SOFA provides that:

Regularly constituted military units or formations of a force shall have the right to police any camps, establishment 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.

The provision continues, however, stipulating that *outside* these premises, military police can only operate: “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”.⁴⁶ Arguably, this provision rules out any independent enforcement power outside military installations, unless specifically approved by the receiving State.⁴⁷ Moreover, such powers only extend over members of the sending State and thus eliminate, for example, the possibility to arrest and detain material witnesses of other nationalities for questioning.⁴⁸

ii. Jurisdiction outside Allied Territory: Operation-specific SOFAs

The NATO SOFA only applies to the (metropolitan) territories of the NATO Member States.⁴⁹ In case of crisis management operations *outside* of the Allied territory, NATO must therefore conclude separate SOFAs with receiving States. Since its first operations outside of the Allied territory in Bosnia-Herzegovina in 1995,⁵⁰ several SOFAs

⁴⁵ Art. VII (2)(a)-(c) NATO SOFA, *supra* note 41.

⁴⁶ Art. XII(10)(b) NATO SOFA, *supra* note 41.

⁴⁷ Cf. Lazareff, *supra* note 19, pp. 254–255.

⁴⁸ *Id.*, p. 255.

⁴⁹ Art. XX NATO SOFA, *supra* note 41.

⁵⁰ The SOFA for the NATO (IFOR/SFOR) forces operating in Bosnia-Herzegovina (BiH-NATO SOFA) was bilaterally agreed upon between NATO and the Republic of Bosnia and Herzegovina during the peace negotiations at Wright-Patterson Air Force Base in Ohio on 21 November 1995 and was attached as Appendix B to Annex 1A of the General Framework Agreement for Peace (GFAP) in Bosnia and

were concluded for operations in, for example, Kosovo,⁵¹ Albania,⁵² the Former Yugoslav Republic of Macedonia (FYROM),⁵³ Iraq,⁵⁴ and Afghanistan.⁵⁵ Lacking a standardized SOFA template, the shape and scope of these documents vary from operation to operation.

Although NATO has not developed a standard SOFA in view of crisis management operations outside of its territory, NATO's common

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- Herzegovina, Paris, 14 December 1995, 35 *I.L.M.* 75, <http://www.nato.int/ifor/gfa/gfa-ap1a.htm>. In addition, NATO simultaneously concluded a separate SOFA for SFOR personnel performing IFOR/SFOR operations in Croatia, as well as a separate transit agreement with the Former Republic of Yugoslavia, containing similar provisions in regard to jurisdiction and immunity for arrest and detention.
- ⁵¹ On 9 June 1999, KFOR concluded a Military-Technical Agreement (MTA) with the authorities of the Federal Republic of Yugoslavia (FRY) and the Republic of Serbia, providing that "the parties will agree a status of forces agreement (SOFA) as soon as possible"; Military Technical Agreement Between the International Security Force («KFOR») and the Governments of Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999, <http://www.nato.int/kosovo/docu/a990609a.htm>. However, such specific agreement was never concluded. Instead, pursuant to his mandate as found in UNSC Res. 1244, 10 June 1999, the Special Representative of the Secretary-General in Kosovo promulgated a regulation on 18 August 2000 – so more than one year later – specifying the special status of KFOR and UNMIK and their personnel: Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, 18 August 2000, <http://www.unmikonline.org/regulations/2000/reg47-00.htm> (KFOR SOFA).
- ⁵² Agreement between the Government of the Republic of Albania and NATO concerning the Status of NATO and its Personnel Present on the Territory of the Republic of Albania, 25 June 1999, NATO Doc. SG(99)1003 (Albania SOFA).
- ⁵³ Basic Agreement between the Former Yugoslav Republic of Macedonia and NATO on the Status of Forces, 23–24 December 1998, <http://faq.macedonia.org/politics/basic.agreement.nato.pdf> (FYROM SOFA).
- ⁵⁴ NATO's operation in Iraq consisted of the Training Mission-Iraq (NTM-I), established in mid-2004 upon a specific request of the Iraqi Interim Government. NATO took no part in the operations of the Multi-National Force-Iraq (MNF-I) and was not involved in the creation of the Coalition Provisional Authority (CPA) that was formed after the fall of Saddam Hussein's Government in the Spring of 2003 until its dissolution on 30 June 2004. However, by virtue of UNSC Res. 1546, 8 June 2004, mandating NATO to establish the training mission, the status of NTM-I forces was derived from CPA Order 17 (Revised) – Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 June 2004/17, http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.
- ⁵⁵ Arrangements regarding the Status of the International Security Assistance Force (ISAF SOFA), which was attached as Annex A to the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, 4 January 2002, <http://www.operations.mod.uk/isafmta.pdf> (ISAF-Interim Administration MTA).

approach is that it strives for exclusive jurisdiction for its member States over their personnel.

Together with this, the SOFAs that NATO concludes generally contain a provision regarding assistance in the execution of jurisdiction. The specific content of this provision, however, varies between SOFAs. For example, during the NATO operations in Bosnia-Herzegovina a mutual requirement to assist one another in the exercise of one's respective jurisdiction applied,⁵⁶ while during NATO operations in Albania and Afghanistan, the requirement to assist was (is) only imposed on the receiving State. In addition, most SOFAs provide that NATO personnel are immune from personal arrest or detention by the receiving State.⁵⁷ Remarkably, the Albania SOFA provides that this immunity also extends to investigations by the authorities in the Republic of Albania. This specific reference to immunity in relation to investigation is, however, not included in any of the other referenced SOFAs that NATO concluded.

B. United Nations (UN)

In 1990, based on extensive experience, the UN drafted a Model SOFA for its operations. Paragraph 47(b) of this Model reads: "Military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in [host country/territory]". Furthermore, paragraph 44 of the Model SOFA requires the operation and the receiving State to assist each other in carrying out: "all necessary investigations into offences in respect of which either or both have an interest, in the production of evidence, including the seizure of and, if appropriate, the handing over of items connected with an offence". These provisions are elaborated upon in the Model Memorandum of Understanding (MOU) the UN concludes with troop contributing States.⁵⁸ Article 7 *quater*, § 7.17 of this MOU stipulates that access to local victims and witnesses and collection and securing of evidence not under the ownership and control of the national contingents is subject to prior authorization from the receiving State authorities. Provisions in mission-specific SOFAs and MOUs are identical to the provisions in the Model SOFA and MOU.⁵⁹

⁵⁶ BiH-NATO SOFA, *supra* note 50, Section 7.

⁵⁷ E.g. BiH-NATO SOFA, *supra* note 50, Section 8; KFOR SOFA, *supra* note 51, Section 2.4; Albania SOFA, *supra* note 52, Section 7; FYROM SOFA, *supra* note 53, Section 3; CPA Order 17 (Revised), *supra* note 54, Section 2.3 and ISAF SOFA, *supra* note 55, Section 4.

⁵⁸ Model Memorandum of Understanding between the United Nations and [participating State] contributing Resources to [the United Nations Peacekeeping Operation], UN Doc. A/C.5/63/18, pp. 161-224.

⁵⁹ Cf. B. Oswald, H. Durham & A. Bates, *Documents on the Law of Peace Operations*

C. EU

EU activities in the field of crisis management started in 1993 with operations in the Balkans and have later been extended to other parts of the world where the EU has conducted operations. In 2005, the EU followed the example of the UN and drafted a Model SOFA.⁶⁰ The jurisdiction provisions are slightly different from the UN Model SOFA. Article 6(3) of the EU Model SOFA reads: “EUFOR personnel shall enjoy immunity from the criminal jurisdiction of the Host State under all circumstances”. Furthermore, the competent authorities of the visiting forces have, under Article 8, “the right to exercise on the territory of the Host State all the criminal jurisdiction and disciplinary powers conferred on them by the law of the Sending State with regard to all EUFOR personnel subject to the relevant law of the Sending State”. In the SOFA between the EU and the Republic of Seychelles, the following sentence was added: “Wherever possible, the Host State shall endeavour to facilitate the exercise of jurisdiction by the competent authorities of the Sending State”.⁶¹ Based on Article 13 (3)(4), a military police unit may maintain order in EUFOR facilities and may also, in consultation and cooperation with the military police or the police of the Host State, act outside those facilities to ensure the maintenance of good order and discipline among EUFOR personnel. The Draft Model Agreement between the EU and third States on the participation of a third State in an EU crisis management operation does not make any further reference to the jurisdiction to enforce.⁶²

D. Coalitions

Crisis management operations could also be initiated by a State or a coalition of States. It is common practice in regard to such operations that a SOFA is negotiated. With respect to jurisdiction, these agreements either provide for a status equivalent to the status accorded to the administrative and technical staff of a diplomatic mission under the Vienna Convention on Diplomatic Relations of 18 April 1961⁶³ or state

(Oxford, Oxford University Press, 2010), pp. 39–66.

⁶⁰ Approved by the Council on 23 May 2005: Draft Model Agreement on the Status of the European Union-led Forces between the European Union and a Host State, Council Doc. 8720/05, revised on 5 September 2007, in Council Doc. 11894/07.

⁶¹ Agreement between the European Union and the Republic of Seychelles on the Status of the European Union-led Forces in the Republic of Seychelles in the Framework of the EU Military Operation Atalanta, Victoria, Seychelles, 10 November 2009, *O.J. L* 323, 10 December 2009, p. 14.

⁶² Draft Model Agreement between the European Union and a Third State on the Participation of a Third State in an European Union Military Crisis Management Operation, Council Doc. 12047/04, 3 September 2004, approved 7 September 2004, Council Doc. 12044/04.

⁶³ See as an example, Art. 2, Annex A, Arrangements concerning the Status of

that they shall be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal offence that may have been committed.⁶⁴ With respect to military personnel participating in the Regional Assistance Mission to the Solomon Islands, it was agreed that their immunity was only covering actions that were taken in the course of, or were incidental to, official duties.⁶⁵

The agreements we have examined contain a provision that closely corresponds with Article 44 of the UN Model SOFA. For example,

Visiting Personnel in Timor-Leste, Exchange of notes between the Government of Australia and the Government of the Democratic Republic of Timor-Leste concerning the Deployment, Dili, 26 May 2006, <http://www.laohamutuk.org/reports/UN/06SOFAs.html#Australia>; Art. I of the Status of Forces Agreement between the Government of the Democratic Republic of Timor-Leste and the Government of the United States of America, Washington, 1 October 2002, *Treaties and Other International Acts Series (T.I.A.S.)* 02-1001 and Art. 2 of the Agreement between the Government of the Central African Republic and the Governments of Burkina Faso, the Republic of Chad, the Gabonese Republic, the Republic of Mali, the Republic of Senegal and the Togolese Republic on the Status of the Forces of the Inter-African Mission to Monitor Bangui Agreements, Bangui, 25 January 1997, UN Doc. S/1997/561. See also, Exchange of Notes constituting an Agreement on United States Participation in a Multinational Force in Beirut, Beirut, 18 and 20 August 1982, 1751 *U.N.T.S.* 1993.

⁶⁴ § 11 of the Protocol relating to the Establishment and Maintenance of a Multinational Force and Observers, Washington, 3 August 1981, 1335 *U.N.T.S.* 1983; § 43 of the Agreement between the Governments Participating in the Multinational Force (“MNF”) Authorized pursuant to Security Council Resolution 940 and the Republic of Haiti on the Status of MNF in Haiti, Miami, 8 December 1994, and Washington, 22 December 1994 (Law and Military Operations in Haiti 1994-1995, Lessons Learned for Judges Advocates, Center for Law and Military Operations, The Judge Advocate General’s School United States Army Charlottesville, Virginia, 11 December 1995, Appendix O); Art. III of the Agreement between the Government of the Republic of Albania and the Governments of the Nations Contributing to the Multi-national Protection Force Bearing on the Status of the Said Force, Rome, 21 April 1997, <http://nomoi.info/%CE%A6%CE%95%CE%9A-%CE%91-9-1998-%CF%83%CE%B5%CE%BB-2.html>; Art. 9 of the Agreement between Papua New Guinea and Fiji, Tonga, Solomon Islands, Vanuatu, Australia and New Zealand, concerning the Status of Elements of the Defence Forces of those Countries Deployed in North Solomon’s Province of Papua New Guinea as Part of the South Pacific Peacekeeping Force, Suva, 28 September 1994, 1994 *Pacific Islands Treaty Series* 18 and Art. 10 of the Agreement between Australia, Papua New Guinea, New Zealand, Fiji and Vanuatu concerning the Neutral Truce Monitoring Group for Bougainville, Port Moresby, 5 December 1997, 1997 *Australian Treaty Series* 30.

⁶⁵ Art. 10 of the Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the Operations and Status of the Police and Armed Forces and Other Personnel to Solomon Islands to Assist in the Restoration of Law and Order and Security, Townsville, 24 July 2003, 2003 *Pacific Islands Treaty Series* 12.

Article 10, Section 5 of the Agreement between Papua New Guinea and Fiji, Tonga, Solomon Islands, Vanuatu, Australia, and New Zealand provides:

The Commander and the Papua New Guinea authorities shall assist each other in the carrying out of all necessary investigations into offences in respect of which either or both have an interest, in the production of witnesses, and in the collection and production of evidence, including the seizure of and, in proper cases and where practicable, the delivery of items constituting evidence of an offence.⁶⁶

At the start of the ISAF-mission in Afghanistan in 2003, ISAF and the Interim Administration agreed that the latter would assist the ISAF contributing nations in the exercise of their respective jurisdiction.⁶⁷ A similar clause was used in the SOFA between the US and the Government of the Democratic Republic of Timor-Leste.⁶⁸ Although the wording is different, the nations participating in the Regional Assistance Mission to the Solomon Islands also held on to the exclusive exercise of jurisdiction without any referral to assistance by the receiving State. If the sending State would decide to waive the criminal immunity or assert its jurisdiction, it would be obliged to assist the Solomon Islands authorities in carrying out all necessary investigations.⁶⁹

Concerning the temporary assistance of the US Forces to the Iraqi Government, both Governments agreed to assist each other in the investigation of incidents and the collection and exchange of evidence to ensure due course of justice.⁷⁰

States also negotiate agreements that do not refer to any clause concerning the exercise of jurisdiction and assistance in that respect.⁷¹

⁶⁶ Art. 10, Section 5 of the Agreement between Papua New Guinea and Fiji, Tonga, Solomon Islands, Vanuatu, Australia and New Zealand, *supra* note 64.

⁶⁷ See Section 1, § 3 of the ISAF SOFA, *supra* note 55.

⁶⁸ Art. VI of the Status of Forces Agreement, *supra* note 63.

⁶⁹ Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga, *supra* note 65.

⁷⁰ Art. 12 of the Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of US Forces from Iraq and the Organization of their Activities during Their Temporary Presence in Iraq, Baghdad, 17 November 2008, *Kavass Agreements (KAV)* 8551.

⁷¹ Agreement between the Government of the Central African Republic and the Governments of Burkina Faso, the Republic of Chad, the Gabonese Republic, the Republic of Mali, the Republic of Senegal and the Togolese Republic on the Status of the Forces of the Inter-African Mission to Monitor the Implementation of the Bangui Agreements, (without place and date of conclusion), UN Doc. S/1997/561, 22 July 1997; Protocol of Agreement between the Government of the Portuguese Republic and the Government of the Democratic Republic of Timor-Leste on the Deployment and Period of Stay of a Contingent of the

IV. Jurisdiction to Enforce, Investigative Powers

Many treaties covering the law of armed conflict contain provisions that require States to actively pursue prosecution of war crimes. The ICRC even asserts that the duty to investigate and, if appropriate, prosecute suspects is part of customary international humanitarian law. The ECHR requires its contracting States to, amongst other things, secure to everyone within their jurisdiction the right to life. This duty requires by implication that there should be some form of effective official investigation when persons have been killed as a result of the use of force by, *inter alia*, agents of the State. This duty to investigate exists even if the breach of the right to life as such could not directly be regarded as unlawful.⁷² In domestic law, most often a reasonable suspicion that a criminal offence has been committed will be the threshold to start a criminal investigation.

The question now is how a duty to investigate and pursue prosecution of criminal offences that have been committed during crisis management operations relates to the limitations set by international law for States to exercise their jurisdiction to enforce beyond their borders. While keeping UN practice in the back of our minds, one can assume that the international principle whereby sending States must refrain from exercising their enforcement powers extraterritorially without the receiving State's consent also applies during crisis management operations.

Still, many troop sending States send investigative officers to mission areas along with their troops or have them ready on a notice to move after an incident has occurred which requires their investigative expertise. From an international law perspective one would, therefore, expect that SOFAs would be loud and clear about the investigative powers of the sending State. The opposite is true.

All of the SOFAs we studied, without any discernible exception, provide for troop sending States having the exclusive jurisdiction over their troops who are part of a crisis management operation. The SOFAs concerned do not provide for a definition of jurisdiction, but clearly focus on the jurisdiction to adjudicate. Sending States simply do not want to subject their military personnel to host State criminal procedures for any misconduct.

As adjudication and enforcement constitute distinct powers, we have examined how this is reflected in the SOFAs. It turns out that SOFAs generally do not differentiate between adjudication and enforcement.

National Republican Guard in Timor-Leste, <http://www.laohamutuk.org/reports/UN/06SOFAs.html#Portugal>.

⁷² ECtHR (Grand Chamber), *Al Skeini and others v. The United Kingdom*, Appl. No. 55721/07, 7 July 2011, Judgment, § 163.

This does not mean that the latter power does not exist and, therefore, the required international legal basis is missing.

The SOFAs provide for assistance in exercising exclusive jurisdiction. The UN Model SOFA requires both the sending and receiving State to assist each other in carrying out all necessary investigations into offences in respect of which both have an interest. Coalition SOFAs provide for similar arrangements. These SOFAs also contain a non-exhaustive list of investigative measures that fall within the scope of assistance. SOFAs concluded by NATO, however, merely provide for the duty to assist in the exercise of jurisdiction. We, for that matter, regard the reference to mandatory legal assistance in the UN Model SOFA as a confirmation that the sending State has investigative powers to a certain extent.

We assume that the clause “exclusive jurisdiction” is intended to cover both the jurisdiction to adjudicate and to enforce. The exclusive jurisdiction to adjudicate ensures that the sending State can fulfil its mission independent from the receiving State. If the sending State would not be given the authority to conduct the necessary investigative measures with regard to incidents that fall under its exclusive jurisdiction to adjudicate, the latter would be an empty shell. We argue, therefore, that investigative powers are inherent to exclusive jurisdiction.

Sending States have exclusive jurisdiction to adjudicate and to enforce, but this does not automatically imply an unlimited authorization to investigate. The investigative powers are, of course, limited by the extent to which the SOFAs can be applied. For example, the investigative authority is limited to the legal persons that fall under the agreed terms of the exclusive jurisdiction, e.g., the soldiers and members of the civilian component from the respective sending States. The investigative powers do not extend to individuals not under the control of the sending State. This means, for instance, that the interviewing of host nation victims or witnesses, and the seizure of evidence not owned by the sending States can only be achieved through cooperation with the receiving State. This point of view is confirmed by UN practice. The MOU that the UN concludes with sending States emphasizes that these specific powers require the approval of the receiving State. The other SOFAs we reviewed lack such explicit provisions and only refer, in general terms, to the provision of legal assistance.

Furthermore, the fact that the sending State has exclusive jurisdiction to enforce and investigate criminal offences allegedly committed by its personnel, does not deprive the receiving State of its right to start an investigation as well. The exclusivity clause only prevents the receiving State’s authorities from claiming an opportunity to subject the sending State’s personnel to investigative measures, such as interviews, the collection of forensic evidence and the confiscation of documents.

The limited scope of the exclusive jurisdiction to enforce is not an issue in regard to alleged criminal offences that only infringe the legal order of the sending State, like theft or abuse among its soldiers. The investigation will then be internally focused and no investigative measures may have to be conducted outside the military organization.

The limited scope, however, will affect investigations into criminal offences which – in order to be effective – require for instance the recovery of bodies for autopsy, interviewing of witnesses among local civilians, search of local civilians, vehicles and buildings, or the confiscation of vehicles, weapons and other relevant items. These investigative measures encroach upon the rights of local citizens and, therefore, intrude on the receiving State's sovereignty. Consequently, the sending State has to involve the receiving State authorities.

This brings up the question of how and to what extent local authorities have to be involved. As previously pointed out, the SOFAs concluded by NATO and the EU SOFA cover the matter of legal assistance only in general unspecified terms. The UN Model MOU is more specific in regard to these types of investigation and provides that the sending State: "shall ensure that prior authorization for access to any victim or witness who is not a member of the national contingent, as well as for the collection or securing of evidence not under the ownership and control of the national contingent, is obtained from the host nation competent authorities".⁷³ For this purpose, the UN commits itself to: "take all possible measures to obtain consent from the host authorities".⁷⁴

It is up to the sending State to determine whether its investigation requires support by the receiving State authorities and if so, what kind of support. The former has to bear in mind that investigations in mission areas are no mean achievement and many practical impediments could arise especially when local civilians need to be involved. Experiences of the Netherlands Armed Forces during the ISAF operation in the Afghan provinces of Uruzgan and Kunduz teach us, for example, that direct hearing of witnesses repeatedly proved to be close to impossible. Often, tribal chiefs or other persons with a certain status appointed themselves as their spokesmen. Also, the identity of the witnesses could not be sufficiently established. In addition, it cannot be ruled out that statements of witnesses, or surviving relatives, is coloured as a result of political motives, tribal interests, their potential claim for damages from the troop sending State, or as a result of fear of retaliation by local militants. The availability of interpreters in the homeland is a continuing issue in military operations and for that reason locally acquired interpreters must often be employed. These people do not always have sufficient

⁷³ Art. 7 quarter, § 7.17 of the Model Memorandum of Understanding, *supra* note 58.

⁷⁴ *Id.*

command of the English language and/or local dialects to be able to interpret at an adequate level during interviews.

From the sending State's perspective cooperation does not necessarily have to be regarded as a downside or a threat to exclusive jurisdiction. In fact, cooperation can contribute to the effectiveness of the investigation and the operation as a whole. Local authorities are aware of, and sensitive to, local customs, culture, and habits, and can therefore act as intermediary between the local population and the investigating authorities. The involvement of local authorities in an investigation, whenever appropriate, can also serve the cause of the operation such as strengthening the position and power of the local government, which is one of the desired effects of the ISAF mission. It goes without saying that the extent to which such cooperation is necessary, or even possible, depends on the circumstances on the ground. Clearly, cooperation will be out of the question if the receiving State completely lacks any functioning and trustworthy police force or judicial apparatus.

V. Concluding Remarks

All the SOFAs we have studied provide for exclusive jurisdiction and often arrangements regarding assistance in executing the jurisdiction. Looking at these jurisdictional and assistance provisions together, it is our opinion that the question whether these SOFAs authorize investigative officers of the sending State to use their investigative powers on the territory of the receiving State can be answered in the affirmative.

These investigative powers, however, are limited as they can only be used with regard to the personnel of the sending State. This caveat heavily affects investigations regarding incidents which require access to local victims, witnesses or the collection of evidence which is not under the ownership of the sending State. According to the UN, such investigative measures require the receiving State's prior consent. The EU Model SOFA and the SOFAs concluded by NATO lack such provisions. Perhaps the EU and NATO take the view that consent is implied in the unilateral obligation of the receiving State to assist the sending State authorities executing their exclusive jurisdiction. We are in favour of both organizations providing a clear view on this subject, so all States involved know what they have signed up to.

Summary – Résumé – Samenvatting – Zusammenfassung – Riassunto – Resumen

Summary – The Scope of Jurisdiction Provisions in Status of Forces Agreements Related to Crisis Management Operations

Status of Forces Agreements (SOFAs) for crisis management operations generally provide for the exclusive criminal jurisdiction by the sending State over its soldiers for offences committed on the territory of the receiving State. The issue of whether SOFAs authorize the sending State to have their military law enforcement officers use investigative powers in the receiving State, however, has been under-addressed. This article discusses the legal basis for sending States to exercise their jurisdiction to enforce during crisis management operations, by elaborating the concept of jurisdiction and examining the particular arrangements regarding enforcement jurisdiction of a number of crisis management operation SOFAs from the past and present. Based on their research, the authors identify a constraint that, in their opinion, calls for further discussion and policymaking.

Résumé – L'étendue des dispositions de compétence dans les accords sur le statut des forces relatifs aux opérations de gestion de crise

Les accords sur le statut des forces (ASFs) pour les opérations de gestion de crise prévoient généralement la compétence pénale exclusive de l'Etat d'envoi sur ses soldats pour des infractions commises sur le territoire de l'Etat d'accueil. Cependant, la question de savoir si les ASFs autorise les Etats d'envoi à disposer de leurs policiers militaires pour utiliser leurs pouvoirs d'enquête dans l'Etat d'accueil, a été traitée que sommairement. Cet article traite du fondement juridique pour que les Etats d'envoi puissent exercer et mettre en oeuvre leur compétence au cours des opérations de gestion de crise, en élaborant le concept de juridiction et en examinant les arrangements particuliers relatifs à la mise en oeuvre de la compétence d'un certain nombre d'opérations de gestion ASFs pour le passé et le présent. En se fondant sur leur recherche, les auteurs identifient la contrainte qui, selon eux, nécessiterait davantage de discussion et d'élaboration de politiques.

Samenvatting – De reikwijdte van rechtsmacht bepalingen in statusovereenkomsten voor crisisbeheersingsoperaties

Op grond van de zogeheten Status of Forces Agreements (SOFA's) die gewoonlijk bij crisisbeheersingsoperaties worden gesloten met de verblijfsstaten, genieten de staten die troepen sturen over het algemeen het exclusieve recht om hun militairen te berechten, wanneer zij een vergrijp hebben begaan in de verblijfsstaat. De vraag echter of, en in voorkomend geval, tot op welke hoogte SOFA's ook de bevoegdheid verlenen aan opsporingsambtenaren uit de zendstaten om hun

onderzoeksbevoegdheden in de verblijfsstaat uit te oefenen, is een onderwerp dat onderbelicht is. Dit artikel bespreekt de rechtsgrondslag voor zendstaten om tijdens crisisbeheersingsoperaties daadwerkelijk hun uitvoerende rechtsmacht in de verblijfsstaat te doen gelden. Hiervoor wordt het begrip rechtsmacht verder uitgewerkt en worden aan de hand van een aantal recente SOFA's de regelingen onderzocht over uitvoerende rechtsmacht zoals deze die in die missie specifieke SOFA's zijn uitgewerkt. Op basis van hun onderzoek signaleren de auteurs een beperkende factor die, naar hun mening, om verdere beschouwing en beleidsvorming vraagt.

Zusammenfassung – Der Anwendungsbereich von Gerichtsbarkeitsbestimmungen in Truppenabkommen im Rahmen von Einsätzen zum Krisenmanagement

Truppenabkommen ('Status of Forces Agreements', SOFAs) für Einsätze zum Krisenmanagement sehen generell die ausschließliche strafrechtliche Zuständigkeit des Entsendestaates bezüglich der von dessen Soldaten auf dem Gebiet des Empfangsstaates begangenen kriminellen Handlungen vor. Die Frage, ob Truppenabkommen den Entsendestaats dazu ermächtigen, dass seine Vollzugsbeamten Untersuchungsmaßnahmen im Empfangsstaat durchführen, wurde bislang jedoch kaum behandelt. Der vorliegende Beitrag untersucht die rechtliche Grundlage, derzufolge die Entsendestaaten ihre Vollstreckungsgerichtsbarkeit während Einsätzen zum Krisenmanagement ausüben. Dabei wird das Konzept der Gerichtsbarkeit näher erläutert und die besonderen Abkommen hinsichtlich der Vollstreckung in einigen Truppenabkommen zum Krisenmanagement werden genauer untersucht. Die Autoren arbeiten dabei eine Einschränkung heraus, die Anlass für eine tiefere Auseinandersetzung in Theorie und Praxis gibt.

Riassunto – La portata delle disposizioni in materia di giurisdizione degli Status of Forces Agreements riguardanti le Operazioni di Gestione delle Crisi

Generalmente gli *Status of Forces Agreements* (SOFA) per le operazioni di gestione delle crisi prevedono la competenza penale esclusiva dello Stato di invio sui propri soldati per i crimini commessi nel territorio dello Stato ricevente. La questione se i SOFA autorizzano lo Stato di invio ad avere delle proprie forze dell'ordine militari con poteri investigativi sul territorio dello Stato ricevente è, tuttavia, scarsamente approfondita. Il presente articolo discute il fondamento giuridico sulla base del quale gli Stati di invio esercitano la loro competenza a far rispettare la legge durante le operazioni di gestione delle crisi, attraverso l'elaborazione del concetto di giurisdizione, ed esaminando gli accordi specifici in merito alla competenza in materia di *enforcement* di una serie di SOFA per operazioni di gestione di crisi del passato e del presente. Sulla base

della loro ricerca, gli autori identificano un vincolo che, a loro parere, richiede un'ulteriore discussione e produzione normativa.

Resumen – Alcance de las normas sobre aspectos jurisdiccionales previstas en los Acuerdos sobre el Estatuto de la Fuerza aplicables en operaciones de gestión de crisis

Los Acuerdos sobre el Estatuto de la Fuerza (“SOFAs” en terminología al uso) aplicables en operaciones de gestión de crisis reconocen generalmente la jurisdicción penal exclusiva del Estado visitante sobre sus propias tropas por los delitos cometidos en el territorio del Estado receptor. La cuestión relativa a si este tipo acuerdos permiten que las fuerzas del Estado visitante lleven a cabo también labores de investigación o policía judicial en averiguación de esos mismos delitos ha recibido, no obstante, escasa atención. El presente artículo aborda el fundamento legal que permite al Estado visitante ejercer su potestad de jurisdicción y, en consecuencia, también la de investigación durante el desarrollo de las operaciones de gestión de crisis. Se elabora un concepto de jurisdicción y se estudian casos particulares relativos al ejercicio pleno de jurisdicción en varios acuerdos “SOFA” establecidos para operaciones de gestión de crisis, tanto del pasado como del presente. Partiendo de la base del resultado de la investigación, los autores identifican una serie de limitaciones que aconsejan, en su opinión, la necesidad de debatir la cuestión con más profundidad y de llevar a cabo una política al respecto mucho más detallada y específica.

