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STATUS OF FORCES AND CRIMINAL JURISDICTION

by Joop Voetelink*

Abstract

This article examines the legal status of armed forces present in friendly foreign territory with a special focus on criminal jurisdiction. Traditionally, this issue has been considered from the perspective of public international law in which immunities play an important role. However, this perspective does not fully cover the criminal jurisdiction provisions in the international agreements dealing with the status of visiting forces (Status of Forces Agreements). This article introduces military operational law as an additional perspective to better understand this specific approach of Status of Forces Agreements.

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1. INTRODUCTION

At the Lisbon Summit in 2010, NATO agreed to gradually transfer security responsibilities from NATO to the Afghan National Security Forces (ANSF).[1] This process of transition will lead to the withdrawal of the majority of foreign combat forces from Afghanistan by 31 December 2014. Both NATO and the US intend to continue to provide support to Afghanistan and the ANSF beyond the completion of the transition. To this end, they have taken steps to reaffirm their long-term partnerships with Afghanistan.

Until now, the legal position of the foreign forces (hereafter: the status of forces) stationed on Afghan territory have been governed by two international agreements, which are generally referred to as Status of Forces Agreements (SOFAs). The first SOFA is a set of diplomatic notes between the US and the then Afghan Interim Authority on the status of US military and civilian personnel present in Afghanistan.[2] The second SOFA is a secret, non-disclosed exchange of letters between NATO and Afghanistan from 2004 that elaborate on the Arrangements Regarding the Status of the International Security Assistance Force (ISAF).[3]

The status of visiting foreign forces cannot be divorced from the legal basis for, and consequently, the character of the foreign military presence of these forces.[4] Therefore, as the legal basis for the continued military presence of NATO and US forces in Afghanistan will change,[5] the status of these forces must be reconsidered and renegotiated.

Even before the negotiation started, the intended SOFAs received a great deal of attention as Afghan President Karzai warned that the foreign forces might not be granted immunity.[6] Thus, the main focus was on the question of criminal jurisdiction over the visiting forces, which is indeed the key element of SOFAs. In the past, this question has often proved to be a crucial issue in such negotiations.

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1. 'Transition to Afghan Lead', *NATO Media Backgrounder*, October 2012, <www.nato.int/nato_static/assets/pdf/pdf_2012_10/20121008_media-backgrounder_inteqal_en.pdf>, visited June 2013.

2. Agreement Regarding the Status of United States Military and Civilian Personnel of the US 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, 6192 *Kavass Series* p. i.

3. These arrangements are annexed to the Military Technical Agreement (MTA) that the first ISAF Commander concluded with the Interim Authority on 4 January 2002: Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan; 4 January 2002, <psm.du.edu/media/documents/us_regulations/sofas/us_isaf_military_technical_agreement.pdf>, visited June 2013.

4. J. Voetelink, *Status of Forces, strafrechtsmacht over militairen in het buitenland* (Status of Forces, Criminal Jurisdiction over Military Personnel Abroad) (Nijmegen, Wolf Legal Publishers 2012) pp. 212-218.

5. Until now the US has conducted combat operations with the consent of the Afghan government, while ISAF is a crisis management operation under Chapter VII of the UN Charter.

6. 'President Karzai: People Condition Foreign Troops Immunity on Peace and Stability in Afghanistan', Press Release, 18 October 2012, <president.gov.af/en/news/13914>, visited June 2013.

The withdrawal of NATO and US troops from Iraq in 2011 is a case in point. On 17 November 2008 the US concluded an agreement with Iraq on the temporary presence of US forces in Iraq.[7] Although not a typical SOFA, the agreement did address the status of US forces including criminal jurisdiction over US personnel. The provisions of this agreement were applied *mutatis mutandis* to personnel of the NATO Training Mission in Iraq.[8] The agreement would be effective until 31 December 2011. Well before that date officials from Iraq and the US and NATO sat together to renew the agreement. At the end it became clear that the parties could not resolve the criminal jurisdiction issue, and, as a consequence, it was decided that US and NATO troops would leave the country.[9]

The Iraq scenario also shows that the conclusion of SOFAs can be a cumbersome process, seemingly leading to uncertain results. This article is not intended, however, to predict the possibilities of SOFAs governing the future status of US and NATO forces in the post-transition era. Instead, this article aims to provide an insight into SOFAs with a special focus on the provisions on criminal jurisdiction over visiting forces by explaining the present state of affairs in international law regarding the status of military forces stationed abroad with an emphasis on the military operational law perspective.

By way of an introduction, section 2 of this article will offer a primer on SOFAs in general. As jurisdiction over military personnel stationed abroad is the defining element of SOFAs, section 3 will then consider the jurisdiction of states, especially extraterritorial jurisdiction. The extraterritorial application of jurisdiction can lead to competing jurisdictional claims, which may be resolved under the doctrine of immunity. Section 4 will therefore explore the immunity of states and of state officials under public international law. The doctrine of immunities is not sufficient to fully understand the scope of jurisdiction over visiting armed forces. Another perspective is offered by military operational law. Section 5 will first introduce this specific discipline and then focus on jurisdiction and immunities from the military operational law perspective. Finally, section 6 will offer a synthesis and a conclusion.

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7. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of US Forces from Iraq and the Organisation of their Activities during their Temporary Presence in Iraq; 17 November 2008, <www.state.gov/documents/organization/122074.pdf>, visited June 2013.

8. M.D. Fink, 'De ontwikkeling van de strafrechtelijke rechtsmacht over het personeel van de NAVO-Trainingsmissie in Irak (NTM-I): een kleinschalige missie beëindigd' (The Development of Criminal Jurisdiction over the Personnel of the NATO Training Mission in Iraq (NTM-I): The Ending of a Small-scale Mission), *Militair Rechtelijk Tijdschrift* (Military Law Journal) (2013) p. 261 at p. 263.

9. Cf. R. Gutman, 'NATO Ends Iraq Mission as Drama Unfolds in Green Zone', <www.mcclatchydc.com/2011/12/17/133410/nato-ends-iraq-mission-as-drama.html>, visited June 2013.

2. STATUS OF FORCES

The ideas on the rights and obligations of visiting forces present on friendly foreign territory have evolved over a period of approximately 200 years. In that timeframe, states, and later international organizations, have developed the practice of concluding international agreements or to draft other international instruments to lay down the details on the status of visiting forces with a special focus on criminal jurisdiction over these forces. This section introduces the by now well settled practice with respect to visiting forces. Although reference will be made to the ideas and provisions on criminal jurisdiction, this subject will be analyzed in greater detail in sections 4 and 5.

Unlike today, two centuries ago the peacetime presence of military forces on the territory of a foreign state with the consent of that particular state was not a common event. Consequently, the legal position of military forces abroad was taken for granted, and it hardly received any attention in the literature and case law.[10] It was not until 1812 that a court touched upon this subject in *The Exchange* v. *McFaddon* case, and addressed the legal position of foreign forces present in another state.[11] Chief Justice Marshall noted that the jurisdiction of a state within its own territory is exclusive and absolute. Any external restrictions thereon would result in an abatement of sovereignty. Therefore, all exceptions to the jurisdiction must be traced to the express or implied consent of the state itself.

According to Marshall, the equality and independence of sovereigns have given rise to a class of cases in which every sovereign is understood to waive the exercise of part of the complete exclusive territorial jurisdiction. One of these cases is where the sovereign allows foreign forces to pass through his territory: 'The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require.'[12]

Marshall reasoned that if the host state would exercise its jurisdiction over the foreign forces

> 'the purpose for which the free passage was granted would be defeated and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force.'[13]

Marshall thus first emphasized that by agreeing to the foreign military presence, the host state acknowledges the purpose for which the foreign forces are present in its state. Secondly, he confirmed the nexus of a state and its armed forces, even

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10. W.E. Hall, *A Treatise on International Law* (Oxford, Stevens & Sons 1895) p. 193.
11. US Supreme Court 24 February 1812, *The Schooner Exchange* v. *McFaddon*, 11 US 116 (1812), <supreme.justia.com/us/11/116/case.html>, visited June 2013.
12. *Idem*, at p. 140.
13. *Idem*, at p. 139.

in the situation that the forces are deployed abroad for the protection of its interests there.

In later cases the US Supreme Court built on this line of reasoning regarding the jurisdiction of foreign visiting forces with the consent of the host state as expressed in *The Exchange* v. *McFaddon* case.[14] It seems that the Court recognized as a basic rule of law that the consent of the host state to the presence of visiting armed forces implied a waiver of the exercise of, especially, criminal jurisdiction by the host state over these forces with the understanding that the foreign state could exercise that jurisdiction of its forces.

Although the 19th century practice between states gave the impression of an absolute application of this basic rule, in the literature a more balanced, although not completely unambiguous, approach was apparent. Authors took the consideration in *The Exchange* v. *McFaddon* as a starting point for their research, but at the same time downplayed the scope of the basic rule to the extent that the rule was applicable to military units while the troops were on duty or within a military place. When a soldier committed a crime off-duty, outside a military place the rule did not apply and the host state could assert its jurisdiction over the soldier in question.[15]

Thus, the scope of the basic rule was far from clear. This situation did not necessarily need to be addressed in 19th century practice as the local impact of the foreign forces was relatively modest, because of the limited number of troops that were only present abroad for a short period of time.

In that sense, World War I posed a new challenge. From 1914 onwards, states sent vast numbers of troops to the territory of their allies who were struggling against their enemies.[16] The long-term presence of hundreds of thousands of foreign troops had an impact on the war-torn states and gave rise to the need for unequivocal arrangements regarding criminal jurisdiction over the visiting foreign forces. Therefore, during the War the Allied Powers concluded a number of agreements covering the exercise of criminal jurisdiction over visiting forces.[17] These

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14. E.g., US Supreme Court October 1878, *Coleman* v. *Tennessee*, 97 US 509 (1878), <supreme.justia.com/us/97/509/case.html>, visited June 2013.

15. E.g., T.J. Lawrence, *A Handbook of Public International Law* (Cambridge, Deighton, Bell and Co. 1885) p. 47; Hall, *supra* n. 10, at p. 206; L. Oppenheim, *International Law, a Treatise*, Vol. I Peace (London, Longmans, Green and Co 1905) pp. 482 and 483 and J.B. Moore, *A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and other International Agreements, International Awards, the Decision of Municipal Courts, and the Writings of Jurists*, Vol. II (Washington, Government Printing Office 1906) p. 560.

16. For the record, the status of the troops present on foreign territory as an occupation force is governed by the law of armed conflict. These forces are not subjected to the criminal jurisdiction of the local courts but remain subjected to the exclusive criminal jurisdiction of their respective states, e.g., Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge, Cambridge University Press 2009) p. 136.

17. France-United Kingdom (UK) 15 December 1915; Belgium-France 29 January 1916; Belgium-UK 15 April 1916; France-Serbia 14 December 1916; France-Italy 4 July/13 August 1917; France-Portugal 15 October 1917; France-US 3/14 January 1918; France-Siam 24 May 1918 and Belgium-US 5 July/6 September 1918. An exception was the Agreement between Belgium and

agreements can be considered as the first real SOFAs, although this term was not used until after the Second World War.

The agreements recognized the exclusive jurisdiction of the sending states over their forces by formulating provisions similar to the 1915 agreement between France and the United Kingdom in which both states agreed 'to recognize during the present war the exclusive competence of the tribunals of their respective Armies with regard to persons belonging to these Armies, in whatever territory and whatever nationality the accused may be'.

During World War II SOFAs became more elaborate documents covering a wider range of subjects than just criminal jurisdiction over the visiting armed forces. More importantly, the jurisdiction of the sending states over their forces was not always exclusive, as will be discussed later.

After World War II the differences in the political views between the US and the Soviet Union (SU) saw a widening of the ideological division between both powers. Both the US and its allies and the SU maintained an unprecedented level of forces on foreign, friendly territory in their efforts to contain the other side's sphere of influence. The stationing of forces abroad became a common and well accepted practice between befriended states. Moreover, the character of the foreign military presence shifted as well. Not only were at times enormous amounts of troops involved, but these forces were often accompanied by their family members and were not confined to military installations like camps or barracks and could freely interact with the local population.

Under these circumstances the need for clear arrangements on the legal position of these forces was greater than ever. Therefore, it was a logical step for states to conclude sometimes comprehensive SOFAs dealing with a variety of issues like host nation law, passport and visa requirements, claims, tax and customs exemptions, and, of course, criminal jurisdiction. Especially the NATO SOFA,[18] concluded by NATO member states, played a pivotal role as the drafters of the agreement adopted an almost revolutionary approach to criminal jurisdiction over visiting forces by balancing the interest of both sending and host states. The use of SOFAs did not cease to exist after the end of the Cold War era as new threats to international peace and security stressed the continued importance of the forward stationing of troops in befriended states, albeit on another, more moderate scale.

Another post-World War II development relevant to the status of forces issue is the emergence of crisis management operations.[19] When in 1956 the UN estab-

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France on 14 Augustus 1914. The Central Powers took a slightly different approach as agreements ('*besondere Vereinbarungen*') were concluded at the executive level, e.g., as military agreements between General Staffs; W. Mettgenberg, *Freies Geleit und Exterritorialität* (Berlin, Ferd. Dümmlers Verlagsbuchhandlung 1929) p. 26. No records of these military agreements are available.

18. 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.

19. In this article, the term crisis management operation is used as a generic reference to a variety of military operations that take place with the consent of the host state.

lished its first mission consisting of international troops,[20] it also concluded a mission-specific SOFA.[21] The paragraph on criminal jurisdiction over the members of the force was repeated in similar terms in the mission-specific SOFAs which the UN concluded as a legal framework for later UN crisis management operations. In 1990 it was included in the Secretary-General's UN Model UN SOFA: 'Military members of the military component of the United Nations peacekeeping operation shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offense which may be committed by them in [host country/territory].'[22] Ever since, this Model SOFA constitutes the basis and the framework for consultations between the UN and the host state on the SOFA for a forthcoming mission.[23]

As organizations like the EU and NATO, and coalitions of states, started to play a role in the field of crisis management operations, they basically adopted the same approach with regard to the status of troops as the UN.[24] The status of the troops involved was laid down in formal agreements and these SOFAs in general provided for the exercise of criminal jurisdiction by the respective sending states.

In sum, it has become common practice for states to deploy their armed forces to other states with the consent of these host states, either in support of an ally during an armed conflict, in the context of international military co-operation or as part of a crisis management operation. As the character of the foreign military presence changed over time, the legal status of these forces received increasing interest by the states involved with a special focus on criminal jurisdiction over the forces. The basic rule as derived from *The Exchange* v. *McFaddon* case and subsequent US Supreme Court cases developed in explicit SOFA provisions as the scope of the basic rule was far from clear. However, conventional jurisdictional provisions are not always unambiguous either. Before addressing the criminal jurisdiction over visiting forces in greater detail, it is necessary to take a closer look at the concept of jurisdiction in general.

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20. The United Nations Emergency Force (UNEF) was tasked to secure and supervise the cessation of hostilities, including the withdrawal of the armed forces of France, Israel and the UK from Egypt; UN Doc. A/3354, Resolutions Adopted by the General Assembly during its First Emergency Special Session from 1 to 10 November 1956; Resolution 1000 (ES-1) of the General Assembly of the UN.

21. Israel did not allow the stationing of UN forces on its territory, so a SOFA was only needed with Egypt: Exchange of Letters Constituting an Agreement between the United Nations and the Government of Egypt Concerning the Status of the United Nations Emergency Force in Egypt; New York, 8 February 1957, Vol. 260 *UNTS* 1957, No. 3704.

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

23. *Implementation of the Recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General*, UN Doc. A/54/670, 6 January 2000, para. 50.

24. The EU also drafted a Model SOFA: Revised Draft Model Agreement on the Status of the European Union Led Forces between the European Union and a Host State, EU Doc. 12616/07, 6 September 2007 in conjunction with EU Doc. 11894/07, 20 July 2007 and EU Doc. 11894/07 COR 1, 5 September 2007.

3. JURISDICTION

The previous section on the development of the rights and obligations of visiting forces emphasized the criminal jurisdiction over these forces as this issue is pivotal to the status of military personnel serving abroad. Also, the role of the sending state in exercising its jurisdictional powers received more attention than the role of the host state, which can be explained by the need for the sending state to retain 'the exclusive command and disposition of this force' as Chief Justice Marshall was quoted above in *The Exchange* v. *McFaddon* case. Of course, jurisdiction over the visiting force is of equal importance to the host state as well. Moreover, the concept of jurisdiction is not just relevant for the law of visiting forces as it plays a central role in public international law as a whole, as it is an essential aspect of the sovereign state.[25] Therefore, this section will consider the concept of criminal jurisdiction under public international law more closely, especially the extraterritorial application thereof.

Sovereignty is an elemental characteristic of modern states and literally means the highest powers (*suprema potestas*) of a state. In the relations between states, sovereignty implies that a state cannot be subordinate to another state as, in a legal sense, states are all equal.[26] Therefore, a state cannot exercise authority over another state as is expressed in the maxim *par in parem non habet imperium*' (an equal has no power over an equal). In other respects, states are, of course, far from equal and one state can have an enormous influence over other states in political, military or economic terms. The actual balance of power may thus have an impact on legal relations and can have an effect on treaty terms, e.g., the jurisdiction provisions in a SOFA, as will be discussed below.

The authority of a state to prescribe its laws, to enforce these laws and to subject persons and things to judicial procedures before its courts are the essential functions of a sovereign state and are often described in terms of jurisdiction: prescriptive, enforcement, and adjudicative jurisdiction. Thus, in the concept of jurisdiction the sovereignty of a state is reflected.

Prescriptive or legislative jurisdiction 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'.[27] Enforcement jurisdiction is 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 nonjudicial action'.[28] Adjudicative jurisdiction is the authority to 'subject persons or

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25. E.g., F.A. Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des cours* (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.'

26. See Art. 2(1) UN Charter: 'The Organization is based on the principle of the sovereign equality of all its Members.'

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

28. *Idem*, at p. 232.

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'.[29]

In principle, the jurisdiction of a state and the exercise thereof is territorial.[30] A state thus has unlimited jurisdiction within its own territory[31] insofar as public international law does not impose any restrictions thereon. In contrast, the extra-territorial exercise of enforcement and adjudicative jurisdiction is dependent on the consent of the states concerned or an explicit international legal basis.[32] As an unlimited exercise of its jurisdiction could bring a state into conflict with the sovereign rights of other states[33] a state cannot, in principle, subject another sovereign state to its enforcement and adjudicative jurisdiction. On the other hand, a state may use its legislative powers beyond its own territory provided it is based on internationally recognized principles of jurisdiction.[34] The principles express the nexus between the state asserting jurisdiction and the regulated persons or facts, based on territory, nationality, the protection of the interests of a state and universality:[35] the nationality principle, the passive personality principle, the protection principle, and the universality principle.

The previous section stressed the role of sending states in exercising criminal jurisdiction over their forces serving abroad. This position assumes that the sending state's laws are applicable to the troops. Indeed, a number of states have made their criminal law applicable to their forces serving abroad.[36] Jurisdictional provisions like this appear to be derived from the active personality principle, and may

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29. Ibid.

30. PCIJ, *The case of the S.S. 'Lotus'*, Judgment, 7 September 1927, Series A, No. 10, pp. 18-19.

31. For an overview of the ideas on this matter, see Mann, *supra* n. 25, at pp. 26 et seq.

32. Mann, *supra* n. 25, at pp. 129-131 and 138, regarding enforcement jurisdiction; I. Brownlie, *Principles of Public International Law* (Oxford, Oxford University Press 2008) p. 309; B.H. Oxman, 'Jurisdiction of States', in *Max Planck Encyclopedia of Public International Law*, <www.mpepil.com> (updated November 2007) para. 4; visited June 2013.

33. Mann, *supra* n. 25, at p. 30.

34. In the *Lotus* case the idea was expressed that a state, 'failing the existence of a permissive rule to the contrary' may 'not exercise its power in any form in the territory of another State'. At present, it seems that a restrictive approach is favoured, whereby 'States are generally prohibited from extending the scope of their laws to cover extraterritorial activities, although international law may permit doing so under specific circumstances'; 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. 55 et seq.

35. ECtHR, *Banković and others* v. *Belgium and 16 others*, Application No. 52207/99, para. 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.'

36. R. Liivoja, 'Service Jurisdiction under International Law', 11 *Melbourne JIL* (2010) p. 309 at p. 310 mentions, *inter alia*, Australia, Denmark, Germany, the UK and the US. Other states like Canada and Ireland are more reticent: M. Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers', 15 *Journal of Conflict and Security Law* (2010) p. 347 at p. 377.

be supplemented with specific, intrinsic elements.[37] Liivoja uses the phrase 'service jurisdiction' for this form of jurisdiction, which could be viewed as being based on a separate principle upon which a state can establish prescriptive jurisdiction with respect to military personnel.[38]

4. IMMUNITY

The mere fact that a sending state has stipulated that its own laws will continue to apply to military personnel serving abroad does not necessarily imply that a soldier who is suspected of committing an offence abroad under the law of the sending state can stand trial before the sending state's criminal courts. As stated above, the jurisdiction of a state is, in principle, territorial. Therefore, whenever a foreign citizen enters the territory of another state, he is subjected to that other state's prescriptive, enforcement, and adjudicative jurisdiction. At the same time, the jurisdictional powers of the sending state cease to apply except, of course, if the state of origin has extended its prescriptive jurisdiction extraterritorially. In that situation, the person is subjected to both the state of origin's and the host state's prescriptive jurisdiction and the receiving state's enforcement and adjudicative jurisdiction. So, when an act is punishable under both sending state law and host state law the prescriptive jurisdiction of both the sending state and the host state is concurrent.

These competing claims are not restricted to military personnel and may arise with respect to other state officials as well. Under public international law this type of conflict is often resolved under the doctrine of immunities. In short, the host state, having enforcement and adjudicative jurisdiction, can be obliged or agree to refrain from exercising these powers with regard to visiting foreign state officials. Those state officials then enjoy immunity from the host state's enforcement and adjudicative jurisdiction. As immunity does not affect the legislative jurisdiction of the host state, national legislation continues to rule the conduct of a person enjoying immunity.[39] This section first briefly addresses the immunity of the state before setting out the immunities of state officials from the jurisdiction of foreign criminal courts.

State immunity is a concept that has its origin in the independence, sovereign equality, and dignity of states[40] and enables states to carry out their functions ef-

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37. Liivoja, *supra* n. 36, at p. 331, citing I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot, Dartmouth 1994). As foreigners can be part of the armed forces of a state, the extraterritorial application of the sending state's law to military personnel cannot be based solely on the nationality principle.

38. Liivoja, *supra* n. 34, at pp. 238 et seq.

39. *ILC Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/601, 29 May 2008, para. 64. Therefore, immunity is not a material rule but a procedural one.

40. I.M. Sinclair, 'The Law of Sovereign Immunity: Recent Developments', 167 *Recueil des cours* (1980) p. 121.

fectively.[41] Basically, immunity is an exception to the rule that a state has complete jurisdiction within its own territory and precludes its exercise of enforcement and adjudicative jurisdiction over another state within the territory of the state. Thus, immunity from jurisdiction protects the equality of states in accordance with the maxim *par in parem non habet imperium*.

In the early 19th century the sovereign equality of states was shaped in the doctrine of the absolute immunity of states. In this theory a state enjoys complete immunity from foreign jurisdiction. Over time, the doctrine of absolute state immunity was increasingly felt as a constraint on the protection of individuals who had entered into a legal relationship with a foreign state and who could not commence legal actions against that state in their home courts.[42] A rule of restrictive sovereign immunity developed, only granting states immunity as regards governmental activities of a non-commercial nature (*acta jure imperii*). Non-sovereign activities of a commercial nature carried out by a state (*acta jure gestionis*), however, are not shielded from foreign jurisdiction and the process of local courts.

Currently, the theory of restrictive state immunity is widely accepted in the context of non-criminal matters. In respect of criminal matters states continue to enjoy complete immunity from the enforcement and adjudicative jurisdiction of the foreign state.[43] However, a state is an abstraction that can only act through its organs, such as heads of state, heads of government, ministers and diplomats. These officials enjoy immunity in a foreign state and are thus shielded from the enforcement and adjudicative jurisdiction of that state. The level of protection they enjoy may depend on the position of the official and the nature of the activities.

State officials are entitled to immunities with respect to acts performed in an official capacity.[44] This type of immunity is generally referred to as functional immunity or immunity *ratione materiae*. As a state can only act through its officials, these agents, organs, and servants can be regarded as instruments of the state to whom the acts of the state officials must be attributed.[45] State officials act in the name of the state and in that capacity cannot be held accountable for these acts in

41. H. Fox, *The Law of State Immunity* (Oxford, Oxford University Press 2008) p. 1.

42. J. Kokott, 'States, Sovereign Equality', in *Max Planck Encyclopedia of Public International Law*, <www.mpepil.com> (updated April 2011) p. 6, para. 35; visited June 2013.

43. Fox, *supra* n. 41, at pp. 33 and 84.

44. An act can be attributed to the state if an official 'acts in an apparently official capacity, or under a colour of authority'; *ILC Report on the Work of Its Fifty-third Session*, UN Doc. A/56/10 (2001), ch. IV, State Responsibility, comment on Art. 14, para. 13.

45. Cf. *ILC Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/631, 10 June 2010, para. 26; ICTY Appeals Chamber 29 October 1997, *Prosecutor* v. *Blaskić*, IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, para. 41, <www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>, visited June 2013 and ICJ 29 April 1999, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (*Cumaraswamy case*), Advisory Opinion, *ICJ Reports* (1999) p. 62, para. 62.

foreign courts.[46] Every state official thus enjoys functional immunity[47] from the enforcement and adjudicative jurisdiction of the courts of the foreign state. Because the immunity they enjoy is in fact the immunity of the state, functional immunity remains in effect after the official has vacated his official position.[48]

Furthermore, certain high-ranking state officials, e.g., a head of state or a minister of foreign affairs, can also enjoy immunity for other than official acts while serving in office. Immunity is then attached to the status or position of the official and is therefore described as personal immunity or immunity *ratione personae*. Personal immunity has an absolute nature as it applies in cases involving the acts of officials in their official capacity as well as private acts and acts carried out before entering office. This type of immunity continues to apply as long as the official remains in office. After vacating his office, however, personal immunity ends,[49] but the official will still be entitled to functional immunity for official acts.[50] Its purpose is primarily based on the idea of functional necessity.[51] Immunity is necessary for these officials to secure the orderly conduct of international relations[52] and to 'to permit the effective performance of the functions of persons who act on behalf of States'.[53] Personal immunity is recognized under customary international law as enjoyed by heads of state and government and ministers of foreign affairs.[54] Under customary international law and conventional law, members of the diplomatic staff of a diplomatic mission enjoy personal immunity as well.

In the course of the past decade the question was raised as to whether personal immunity can be upheld with respect to international crimes.[55] In the *Jurisdictional Immunities of the State* case the ICJ concluded that 'under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human

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46. R. van Alebeek, 'Staatsimmuniteit' (State Immunity), in N. Horbach, et al., eds., *Handboek internationaal recht* (Handbook International Law) (The Hague, T.M.C. Asser Press 2007) p. 251.

47. A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', 13 *EJIL* (2002) p. 853 at pp. 862 et seq.; Memorandum by the Secretariat, Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/596 + Corr.1 (2008), 31 March 2008, para. 166; I. Roberts, ed., *Satow's Diplomatic Practice* (Oxford, Oxford University Press 2009) p. 185 and UN Doc. A/CN.4/631 (2010), *supra* n. 45, at para. 18.

48. UN Doc. A/CN.4/601 (2008), *supra* n. 39, at para. 88.

49. ICJ 14 February 2002, *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo* v. *Belgium*), Judgment, *ICJ Reports* (2002) p. 3, paras. 54 and 61.

50. Memorandum by the Secretariat, Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/596, 31 March 2008, para. 90.

51. *Idem*, at paras. 22-23.

52. Fox, *supra* n. 41, at p. 1.

53. Art. II(1), Immunity from Jurisdiction of the State and Persons Who Act on Behalf of the State in Case of International Crimes; Resolution of the *Institut de Droit International*, Napels 2009.

54. *Arrest Warrant* case, *supra* n. 49, at para. 51.

55. For an overview and discussion of the arguments see: UN Doc. A/CN.4/631 (2010), *supra* n. 45, at paras. 56 et seq.

rights law or the international law of armed conflict'.[56] In reaching this conclusion the Court emphasized, however, that in the present case the immunity in criminal proceedings against a state official was not at issue. Because of the increasing interest of the international community in upholding fundamental human rights there is a trend towards prosecuting high-ranking officials accused of having committed international crimes.[57] However, public international law does not yet provide national courts with a firm legal basis for prosecuting these crimes, as was clear in the *Arrest Warrant* case.

To what extent are immunities applicable to military personnel suspected of having committed a criminal offence abroad? In the literature on public international law, immunities are mostly discussed in relation to the immunity of the state and of high-ranking state officials. The position of military personnel is sometimes ignored completely or is at best mentioned in passing.[58] Perhaps this apparent lack of interest is related to the fact that in most cases SOFAs express the status of forces in terms of jurisdiction over the visiting forces rather than in terms of immunities.[59]

Nevertheless, as 'the armed forces are one of the State's fundamental security institutions'[60] it is beyond doubt that these forces are state organs.[61] Obviously, this position does not change when these forces are deployed abroad for specific military duties with the consent of the host state. Consequently, the literature

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56. ICJ 3 February 2012, *Jurisdictional Immunities of the State* (*Germany* v. *Italy: Greece Intervening*), Judgment, para. 91.

57. Art. 27(2), Rome Statute of the International Criminal Court; Rome, 17 July 1998 declares that the Statute applies 'to all persons without any distinction based on official capacity' and that 'official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute'; cf. Art. 7 Charter of the International Military Tribunal; Art. 6 Charter of the International Military Tribunal for the Far East; Art. 7(2) Statute of the International Criminal Tribunal for the former Yugoslavia; and Art. 6(2) Statute of the International Criminal Tribunal for Rwanda.

58. E.g., Brownlie only dedicates a short paragraph to the status of forces; Brownlie, *supra* n. 32, at pp. 372-375. Fox touches upon the distinct position of visiting armed forces and stresses the uncertainty surrounding the law relating to the immunities of armed forces: Fox, *supra* n. 41, at pp. 717-724.

59. E.g., Art. 6(3) Model Agreement on the status of the EU-led forces, *supra* n. 24.

60. *Kamerstukken II* (Parliamentary papers) 2011/12, 33 279 no. 2 (Regeringsreactie op AIV advies 'Europese defensiesamenwerking', p. 2 (Government's response to the advisory report of the Advisory Council on International Affairs on 'European defence cooperation: sovereignty and the capacity to act'), <www.aiv-advies.nl/ContentSuite/template/aiv/adv/collection_single.asp?id=1942&adv_id=3028&page=regeringsreacties&language=UK>, visited June 2013.

61. E.g., *Report of the International Law Commission*, UN Doc. A/CN.4/415 (1991), reprinted in A. Dickinson, et al., *State Immunity: Selected Materials and Commentary* (Oxford, Oxford University Press 2004) p. 85; UN Doc. A/CN.4/596 + Corr.1 (2008), *supra* n. 47, at para. 16; ECtHR 21 November 2001, *McElhinney* v. *Ireland*, Application No. 31253/96, para. 38; Art. 4(1) Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83, 28 January 2002 and *ILC Report on the Work of Its Fifty-sixth Session*, UN Doc. A/59/10 (2004), ch. V, Responsibility of International Organizations, p. 110.

makes no exception for military personnel with respect to the rule that state officials enjoy immunity for acts performed in an official capacity. Therefore, under public international law military personnel, just like any other state official, enjoy functional immunity as a corollary of state immunity when acting in the performance of official duty, which is the military equivalent of 'in an official capacity'.[62] Indeed, SOFAs follow this position and respect the functional immunity of visiting armed forces with only very few exceptions.[63] Still, this position is not accepted under all circumstances, as is demonstrated by the ongoing criminal proceedings that India has initiated against two Italian marines who allegedly shot two fishermen off the coast of India in 2012.[64]

5. MILITARY OPERATIONAL LAW

In section 2 above, the basic rule was identified indicating that the consent of the host state to the presence of visiting armed forces implied a waiver of the exercise of criminal jurisdiction by the host state over these forces with the understanding that the foreign state could exercise that jurisdiction over its forces. Under public international law the scope of this basic rule seems limited to the immunity of visiting armed forces acting in the performance of official duty. From this perspective the numerous SOFA provisions emphasizing the exclusive jurisdiction of the host states over their forces serving abroad that were referred to in section 2 are difficult to explain as they implicate a much wider application of the basic rule. The international law of military operations can offer another perspective on this issue. This section will first introduce this relatively new sub-discipline within military law before exploring criminal jurisdiction over visiting forces from an operational law perspective.

The rule of law requires that military operations take place on the basis of and in accordance with the law. With regard to international operations the applicable law will be, on the one hand, public international law and, on the other, the different branches of both sending state law and host state law. These rules, which concern the actual deployment of military forces, together constitute military operational law: 'the domestic, foreign, and international law associated with the planning and execution of military operations in peacetime or hostilities'.[65] Even

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62. E.g., V. Eboli and J.P. Pierini, 'The "Enrica Lexie Case" and the Limits of the Extraterritorial Jurisdiction of India', Centro di documentazione europea – Università di Catania, Online Working Paper 2012, <www.cde.unict.it/sites/default/files/39_2012.pdf>, visited June 2013, p. 11.

63. E.g., Agreement for the Training in Canada of Personnel of the Armed Forces of Nigeria; Lagos, 3 July 1963, Vol. 529 *UNTS* 1965, No. 7656, and Agreement for the Training in Canada of Personnel of the Armed Forces of Barbados; Bridgetown, 12 November 1985, Vol. 1469I *UNTS* 1987, No. 24897.

64. J.W. Davids, 'India v. Italy: The Indian Supreme Court Decides', *The {New} International Law*, 30 January 2013, <thenewinternationallaw.wordpress.com/>, visited June 2013.

65. R.L. Bridge, 'Operations Law: An Overview', *Air Force L Rev.* (1994) p. 1 at p. 3. See also T.D. Gill and D. Fleck, *The Handbook of International Law of Military Operations* (New York,

though military operational law has long played an important role in relation to the conduct of military operations, it is a relatively new branch of law in 'the way and extent to which these various areas of law interact with each other and influence and regulate and shape the way in which contemporary operations are planned and conducted'.[66]

The origin of this field of law can be traced back to the Vietnam War. Crimes committed by US soldiers during that war were widely covered by international news agencies. Especially the My Lai massacre in March 1968, that cost hundreds of Vietnamese civilians their lives, attracted worldwide attention and shocked public opinion.[67] In response, the Department of Defense introduced the Law of War Program for the armed forces. First and foremost, the programme provided for mandatory training for all military personal in the law of armed conflict.[68] With respect to the development of military operational law, the decision to have legal advisors (legads) review operation plans to insure they comply with the law of armed conflict was equally important.[69] It implied that the legads were involved as early as the planning of military operations in the operations themselves and could advise the commander and his staff on the interpretation and application of the law of armed conflict. Over time, the legads became actively engaged in other aspects of the legal framework of military operations, like Rules of Engagement and the status of forces.

Military operational law is still developing because of continuing changes in the operational environment. Contemporary crisis management operations increasingly focus on the reconstruction of states after violent conflicts. Under these circumstances the armed forces are no longer primarily conducting major combat operations on a traditional battlefield, but are working side by side with a growing number of civilian partners with a diverse background[70] with whom they share the contemporary area of operation. Simultaneously, our society has become increasingly regulated. A trend that is not lost on military operations as legal considerations have an increasing impact on how military operations are conducted. In addition, public interest in military action is stronger than before. With this interest comes a demand for higher degrees of legal accountability and political control. Thus, military operational law has become vital for the planning and conduct of all types of military operations.

Oxford University Press 2010) p. 3: 'the various bodies of national and international law which are applicable to and regulate the planning and conduct of military operations'.

66. *Idem*, at p. 5.

67. J.F. Addicott and W.A. Hudson, 'The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons', 139 *Military L Rev.* (1993) p. 153 at pp. 153 et seq.

68. M.F. Lohr and S. Gallotta, 'Legal Support in War: The Role of Military Lawyers', 4 *Chicago JIL* (2003) p. 465 at p. 470.

69. F.L. Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (Washington, Office of the Judge Advocate General and Center of Military History United States Army 2001) p. 31.

70. Such as: the governmental agencies of both the sending state and the host state, civilian contractors, governmental and non-governmental organizations, and police units.

As military operational law focuses on the legal aspects of the planning and execution of military operations, the status of troops stationed abroad is an integral part of the legal framework of an international operation.[71] Legal theory on this particular field of military operational law is still somewhat immature. However, from the experiences of the past few decades and the findings of public international law scholars the following perspective on criminal jurisdiction over visiting forces can be derived.

From the military operational law perspective SOFAs must be viewed from the broader context of the foreign military presence. SOFAs represent what is sometimes referred to as the *jus in praesentia*: the law that applies while forces are abroad.[72] Principally, SOFAs deal with the rights and obligation of the forces and do not take into account the legal basis for the foreign stay, which is part of the *jus ad praesentiam* and also covers the consent of the host state.[73] The *jus in praesentia* cannot be divorced from the *jus ad praesentiam* as they together form the law of visiting forces. The legal basis not only justifies the military presence in a foreign state, but also clarifies and justifies the task that the forces are allowed to carry out by the host state. As SOFAs draw on that legal basis, any review of SOFA provisions, including the arrangements on criminal jurisdiction, must take that legal basis into account. Therefore, it may make a difference if a military unit is, for example, deployed for training activities or is participating in a crisis management operation under an international mandate.

In a purely legal sense, SOFAs define the legal position of foreign forces in a host state. Viewed from the military operational law perspective, SOFAs should also create a feasible framework for mission accomplishment.[74] In this respect, the agreements must facilitate the entry into and the presence of the foreign forces in the host state. Therefore, SOFAs should take into account all aspects of the foreign presence and deployment of the forces and anticipate the operational conditions and practice. This implies that the nature of the mission and the tasks assigned come into play as well.

In general, sending states will strive for the best possible protection of their forces, not only in a physical sense, but in a legal sense as well.[75] In that respect, sending states will prefer the familiar national criminal proceedings over foreign procedures that may offer a different level of legal protection. Especially when forces are stationed in states with other legal traditions, or in states where legal

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71. Voetelink, *supra* n. 4, at p. 211.

72. D. Fleck, 'Present and Future Challenges for the Status of Forces (*ius in praesentia*): A Commentary to Applicable Status Law Provisions', in D. Fleck, ed., *The Handbook of the Law of Visiting Forces* (Oxford, Oxford University Press 2003) pp. 47 and 353.

73. *Idem*, at pp. 49 and 353. Obviously, *jus in praesentia* and *jus ad praesentiam* cannot be separated and sometimes agreements even seem the merge elements of both, e.g., the Agreement between the United States of America and the Republic of Iraq on the Withdrawal of US Forces from Iraq and the Organisation of their Activities during their Temporary Presence in Iraq; 17 November 2008, *supra* n. 7.

74. Voetelink, *supra* n. 4, at p. 217.

75. *Idem*, at pp. 234-238.

institutions are not fully developed or have been weakened by armed conflicts, the sending states may want to limit the role of the host state's authorities in criminal proceedings involving their military personnel. To what extent the host state will accommodate these wishes depends, *inter alia*, on the legal basis of the deployment, the specific circumstances of that deployment, the relative power of the states concerned, and the interest of these states.

Further, operational conditions must be accounted for as well.[76] One of the basic principles of military action is unity of command which dictates that commanding officers must lead their units without interference from outside the military chain of command and control and independent from the host state authorities. Especially during actual combat missions and combat support the principle is pivotal to mission accomplishment. Under these conditions the operational deployment of troops in befriended states entails the functional necessity for full criminal immunity for the troops.

More important, operational circumstances demand that the sending states continue to exercise full control over their forces, including the exercise of criminal jurisdiction over the troops. Therefore, SOFAs in general do not stress the immunity of the forces, as mentioned previously, but reinforce the fact that the troops are subject to the exclusive jurisdiction of the sending states. As such arrangements preclude the host state's exercise of enforcement and adjudicative jurisdiction, the exclusive jurisdiction provisions in the SOFAs include the immunity of the visiting forces.[77] In other words, out of operational necessity, troops are subjected to the exclusive criminal jurisdiction of the sending states' authorities and as a collateral enjoy full criminal immunity from the host state's courts.

Crisis management operations do not necessarily have a combat character. Nevertheless, the operations take place in an unstable and possibly even hostile environment. The troops are generally armed[78] and are authorized under the mission-specific Rules of Engagement to use armed force in order to fulfil their mandate. Under these circumstances the same rule applies as in actual combat situations and are troops subjected to the exclusive criminal jurisdiction of the sending states' authorities out of operational necessity. Furthermore, crisis management operations have an international character that require the independent exercise of the functions of the visiting forces from the host state for which immunity for the forces is essential.[79] With very few exceptions, mission-specific SOFAs for

76. *Idem*, at pp. 240 et seq.

77. This particular link between exclusive jurisdiction and immunity was, *inter alia*, assumed in a study on the UNEF, where it was stated that members of UN forces should be immune from the criminal jurisdiction of the host state and, therefore, should be under the exclusive jurisdiction of their respective national states; *Summary Study of the Experiences Derived from the Establishment and Operation of the Force, Report of the Secretary-General*, UN Doc. A/3943 (1958), 9 October 1958, para. 136.

78. An exception can be observer missions in which military observers operate unarmed.

79. UN Doc. A/3943 (1958), *supra* n. 77, para. 136.

such operations provide for the exclusive jurisdiction of the sending states.[80] Indeed, the sending states' exclusive jurisdiction over their forces participating in a crisis management operation can in the author's opinion be regarded as a customary international norm. Neither states nor other international organizations have contested the arguments which the UN has repeatedly raised.[81] On several occasions, states and organizations have argued in the same vein.[82]

In contrast, international military co-operation in general lacks the necessity to grant visiting forces exclusive jurisdiction and criminal immunity. Although peacetime military co-operation is currently essential for the proficiency and readiness of the armed forces, the need for a commander to exercise full control over his troops is not under all circumstances as absolute as under operational conditions.[83] Therefore, many SOFAs, including the NATO SOFA, adopted with a view to facilitating peacetime co-operation, reflect a more balanced relationship between the sending states' and host states' interests.

Even though the NATO SOFA methodology is widely followed in other SOFAs, no real uniform criminal jurisdiction provision is being used for international military co-operation. Visiting forces may be subjected to the exclusive jurisdiction of the sending state's jurisdiction or may barely enjoy functional immunity and anything in between. Much will depend on the balance of power between the

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80. E.g., para. 2, Annex A, Arrangement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste Concerning the Restoration and Maintenance of Security in Timor-Leste; Dili, 25 May 2006, <www.laohamutuk.org/reports/UN/06SOFAs.html#Australia>, visited June 2013, provides for 'the status equivalent to that accorded administrative and technical staff of the Contributing Governments under the Vienna Convention on Diplomatic Relations of April 18, 1961', which implies criminal immunity for the visiting forces.

81. The Model UN SOFA, para. IV(6) mentions the 'customary principles and practices which are embodied in the model status-of-forces agreement', *supra* n. 22. The UN Office of Legal Affairs also refers to the customary principles and practices specifically with regard to exclusive criminal jurisdiction; 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) pp. 323-325.

82. The International Law Commission mentions in its commentary on draft Art. 4 on the responsibility of international organizations that 'the State retains disciplinary powers and criminal jurisdiction over the members of the national contingents', UN Doc. A/59/10 (2004), *supra* n. 61. Recently, Italy claimed jurisdiction over two marines who were detained by India based, *inter alia*, on the argument that 'the immunity of peacekeepers working within the framework of UN resolutions must be reasserted, along with "assertion of immunity and national jurisdiction as general and broadly recognized principles"', Press release by the Italian Ministry of Foreign Affairs, <www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Approfondimenti/2012/03/20120330_prosue.htm?LANG=EN>, visited June 2013. With respect to its forces participating in the International Force in East Timor (INTERFET) New Zealand claimed that international customary law relative to crisis management operations had developed to the point that absent a SOFA the New Zealand forces were subject to its exclusive jurisdiction in respect of criminal offences, K. Riordan, 'Operations Law – Peacekeeping Operations in East Timor: A New Zealand Military Perspective', *New Zealand Armed Forces L Rev.* (2001) p. 19 at p. 23.

83. Voetelink, *supra* n. 4, at p. 247.

states involved.[84] Host states that are economically or militarily dependent on the support of the sending states will be more inclined to meet the demands of these states and to partly surrender sovereign rights in favour of the visiting forces. The same applies when the foreign military presence only has a limited impact on the host state. On the other hand, when the foreign military presence is mutually beneficial to the sending state and the host state, it may result in a more balanced provision on jurisdiction.

In sum, military operational law is concerned with the legal aspects of the planning and execution of military operations. Viewed from this perspective, the legal basis and the tasks assigned to the visiting forces are also relevant for the criminal jurisdiction over these forces. Troops taking part in combat operations in befriended states or in crisis management operations are subjected to the exclusive criminal jurisdiction of the sending states' authorities and, as a collateral, enjoy full criminal immunity from the host state's courts. No such rule applies during international military co-operation. In that situation, jurisdiction over the visiting forces is strongly influenced by the specific circumstances of the foreign presence, the balance of power between the states concerned, and the interests of these states.

6. CONCLUSION

Over time, it has become common practice for states to lay down in detail the rights and obligations of armed forces present on friendly foreign territory with the consent of the host state in specific international agreements, often referred to as SOFAs. The issue of criminal jurisdiction over visiting forces is one of the core provisions of these agreements. As many SOFAs stress the role of sending states in exercising criminal jurisdiction over their forces abroad, it is clear that many states have extended their prescriptive jurisdiction with respect to their forces extraterritorially. As the prescriptive jurisdiction of the host state continues to apply as well, a soldier stationed abroad can thus be subject to both the sending state's law and the host state's law. Moreover, he will also be subjected to the host state's enforcement and adjudicative jurisdiction.

A host state can refrain from exercising its enforcement and adjudicative powers with respect to foreign officials, thus granting them immunity. In general, high-ranking state officials enjoy immunity for both the acts carried out in their official capacity and private acts, while other state officials only enjoy functional immunity. As the armed forces of a state are beyond doubt a state organ, military personnel deployed abroad for specific military duties with the consent of the host state enjoy functional immunity when acting in the performance of an official duty.

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84. As has been stated by the ICJ: 'Law cannot be divorced from politics or power'; ICJ 20 February 1969, *North Sea Continental Shelf*, Judgment, *ICJ Reports* (1969) p. 3 at pp. 42-43.

Most SOFAs address the exercise of criminal jurisdiction over visiting armed forces rather than focusing on the immunity of these forces. This practice can be explained from the military operational law perspective. This discipline focuses on the law related to the planning and execution of military operations. From that perspective, the immunity of the visiting forces is not without importance. Immunity shields the forces from foreign legal procedures and thus offers them protection when operating abroad.

More importantly, operational necessity may demand that a commander under all circumstances exercises full control over his forces, including the exercise of criminal jurisdiction. Under these conditions, immunity is not sufficient, as it does not authorize the sending state to effectively exercise jurisdiction over its forces abroad. Therefore, SOFAs often state that the visiting forces will be subjected to the exclusive jurisdiction of the visiting state. During peacetime, within the context of international military co-operation, the need for a commander to be able to exercise full control over his forces may be less urgent than in armed conflict situations or crisis management operations. Therefore, many SOFAs that address military co-operation take a more balanced approach depending on the specific circumstances of the foreign presence, the balance of power between the states concerned, and the interests of these states.