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The Handbook of THE LAW OF VISITING FORCES

Second Edition

Edited by Dieter Fleck

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DIETER FLECK

In Collaboration with

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Preface

Military forces serving in the territories of other States have become a key characteristic of the post-World War II era. Tasked by their Sending States and often mandated by an international organization, they are conducting operations that need to be regulated to ensure compliance with international law, develop cooperation with the Receiving State, and achieve an effective mission performance.

Military Alliances, such as the North Atlantic Treaty Organization (NATO), have developed general principles and rules and, indeed, a body of status-of-forces agreements (SOFAs) that influenced the conduct of military operations also in other areas, thus addressing a subject matter of particular relevance to the current security environment. An expanding practice of peace operations conducted by the United Nations and regional organizations has brought a wealth of experience to Sending States and Host States alike.

The present *Handbook of the Law of Visiting Forces*, first published in 2001, was well received in a new wave of international cooperation in NATO's Euro-Atlantic Partnership for Peace Program. It has also served as a welcome tool for developing deeper understanding of the UN peacekeeping experience in times of expanding demands, involvement of regional organizations and increasing challenges. Together with my co-authors I welcome the opportunity in this revised edition to revisit established principles of military cooperation, address current developments, and thus contribute to further international cooperation and academic research. It is this coincidence of multiple goals and perspectives that has made this project both challenging and rewarding.

Even prior to its publication the development of this new edition has provided an excellent opportunity to facilitate and intensify international cooperation at various levels. Scholars and practitioners from different legal systems, different security environments, and different policy perspectives have participated in this rewarding exercise; some of them offering peer review comments to colleagues and all sharing the conviction that a frank exchange of views will enhance the efficiency of their professional work and support mutual understanding. I may express my particular gratitude for this very effective assistance on behalf of all co-authors.

We would like to thank those contributors to the first edition who could no longer participate in this project: Stuart Addy, William Anderson, Rodney Batstone, James A. Burger, Thomas Dörschel, Eckhard Heth, Max S. Johnson, Baldwin de Vidts, and Mark Welton. Our gratitude is also owed to Hiroshi Honma and A. P. V. Rogers who have passed away after the first publication.

As in the first edition of this Handbook, all co-authors again express their strictly personal opinions, which do not necessarily represent either the policy or the legal positions of their respective governments, international organizations, or institutions.

I am grateful to Oxford University Press, in particular to John Louth, Merel Alstein, Emma Endean-Mills, Natasha Flemming, and Kimberly Marsh for their professional support.

Cologne, December 2017
Dieter Fleck

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Abbreviations

ACO	Allied Command Operations (formerly SHAPE)
ACSA	Acquisition and Cross-Servicing Agreement
AJIL	*American Journal of International Law*
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
APSA	African Peace and Security Architecture
ARRC	Allied Command Europe (ACE) Rapid Reaction Corps
Art.	Article
ASF	African Standby Force
A&T Agreements	agreements conferring status similar to the status of administrative and technical staff of embassies
AU	African Union
AUMF	Authorization for the Use of Military Force
AWACS	Airborne Warning and Control System
BC	Before Christ
BGBl	*Bundesgesetzblatt* (Federal Gazette of Germany)
BSA	Bilateral Security Agreement
BT	Bundestag (Federal Diet of Germany)
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts* (Decisions of the Constitutional Court of Germany)
BYIL	*British Yearbook of International Law*
CFC	Combined Forces Command (Korea)
CFSP	Common Foreign Security Policy (European Union)
CIMIC	Civil-Military Cooperation
CIS	Commonwealth of Independent States
CMC	Crisis Management Concept (European Union)
Cmd.	Command Paper (UK Parliament)
CONOPS	Concept of Operations (Council of the European Union)
CPA	Coalition Provisional Authority (Iraq)
CPIUN	Convention on the Privileges and Immunities of the United Nations
Cr.	Cranch
CSDP	Common Security and Defence Policy (European Union)
CSTO	Collective Security Treaty Organization
DARIO	Draft Articles on Responsibility of International Organizations
DCA	Defense Cooperation Agreement
DMZ	Demilitarized Zone
Doc	document
DOD	Department of Defense (U.S.)
DPA	Department of Political Affairs
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
DVBI	*Deutsches Verwaltungsblatt*
ECOSOC	Economic and Social Council (UN)
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
ed.	editor
EEAS	European External Action Service

EHRR	European Human Rights Reports (UK)
EJIL	*European Journal of International Law*
ENJJTP	Euro-NATO Joint Jet Pilot Training Program
ENMOD	Convention on the Prohibition of any Military or Hostile Use of Environmental Techniques
ESDI	European Security and Defence Identity
EU	European Union
EUFOR	European Union Force
EUGS	EU Global Strategy and Security Policy
EUMC	Military Committee (Council of the European Union)
FMS	Foreign Military Sales
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia
GBlDDR	*Gesetzblatt der Deutschen Demokratischen Republik (Law Gazette, former GDR)*
GC	Geneva Convention
GDR	former German Democratic Republic
GFAP	General Framework Agreement for Peace
GOJ	Government of Japan
HC	House of Commons
HL	House of Lords
HMSO	Her Majesty's Stationery Office
HNS	Host Nation Support
HQ	Headquarters
HqCMC	Headquarters for the Coordination of Military Cooperation (CIS and CSTO)
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICoC	International Code of Conduct for Private Security Providers
ICRC	International Committee of the Red Cross
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the territory of the Former Republic of Yugoslavia
IDI	Institut de Droit International
IFOR	Implementation Force (Croatia and Bosnia-Herzegovina)
IFRC	International Federation of Red Cross and Red Crescent Societies
ILA	International Law Association
ILC	International Law Commission of the UN
ILDC	*Oxford Reports on International Law in Domestic Courts*
ILM	*International Legal Materials*
ILR	*International Legal Reports*
IMF	International Monetary Fund
IMHQ	International Military Headquarters
INTERFET	International Force in East Timor
IRRC	*International Review of the Red Cross*
ISAF	International Security Assistance Force (Afghanistan)
JCS	Joint Chiefs of Staff (U.S.)
JCSL	*Journal of Conflict and Security Law*
JSDF	Japan Self-Defence Forces

KATUSA	Korean Augmentation to the US Army
KFOR	International Security Force (Kosovo)
LCRB	Local Claims Review Board
LNTS	*League of Nations Treaty Series*
MAC	Military Armistice Commission
MDAA	Mutual Defense Assistance Agreement (U.S.—Japan)
MDL	Military Demarcation Line
MilLRev	*Military Law Review*
MINUGUA	United Nations Verification Mission in Guatemala
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MINUSTAH	United Nations Multidimensional Integrated Stabilization Mission in Haiti
MOD	Ministry of Defence
MOI	Ministry of the Interior
MONUSCO	Mission de l'Organisation des Nations Unies en République Démocratique du Congo
MOU	Memorandum of Understanding
MPCC	Military Planning and Conduct Capability (European Union)
MPEPIL	*Max Planck Encyclopedia of Public International Law*
MRAP	Mine Resistant Ambush Protected personnel carrier
MTA	Military Technical Agreement
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NATO SOFA	Agreement Between the Parties of the North Atlantic Treaty Regarding the Status of Their Forces
NGO	Non-Governmental Organization
NJW	*Neue Juristische Wochenschrift*
OEF	Operation Enduring Freedom (Afghanistan)
OHQ	Operational Headquarters
OJ	*Official Journal* (EU)
ONUC	Opérations des Nations Unies au Congo
ONUMOZ	Opérations des Nations Unies au Mozambique
OPCOM	Operational Command
OPCON	Operational Control
OPLAN	Operational Plan
OSCE	Organization for Security and Cooperation in Europe
para.	paragraph
PCIJ	Permanent Court of International Justice
PCRS	United Nations Peacekeeping Capability Readiness System
PfP	Partnership for Peace
POL	petroleum, oil and lubricants
PMSC	Private Military and Security Company
PSC	Peace and Security Council (African Union)
PSC	Political and Security Committee (Council of the European Union)
RAF	Royal Air Force
RDMilG	*Revue de Droit Militaire et de Droit de la Guerre*
RdC	*Recueils des Cours de l'Académie de droit international de la Haye*
Res.	Resolution
ROE	Rules of Engagement
ROK	Republic of Korea

RS	Resolute Support (Afghanistan)
RSM	Resolute Support Mission (Afghanistan)
s.	Section
SA	Supplementary Agreement
SC	United Nations Security Council
SFOR	Stabilization Force
SHAPE	Supreme Headquarters Allied Powers Europe (now ACO)
SIASJ	Situations in Areas Surrounding Japan
SOFA	Status-of-Forces Agreement
SOMA	Status-of-Mission Agreement
SPA	Strategic Partnership Agreement
SRSG	Special Representative of the Secretary-General (UN)
STANAG	Standardization Agreement (NATO)
Stat.	United States Statute
SZ RF	*Sobraniye Zakonodatelstva Rossiyskoy Federatzii [Collection of Laws of the Russian Federation]*
TACOM	Tactical Command
TACON	Tactical Control
TCN	Troop Contributing Nation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TIAS	Treaties and Other International Acts Series
TOA	Transfer of Authority
UK	United Kingdom of Great Britain and Northern Ireland
UKTS	*United Kingdom Treaty Series*
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMI	United Nations Mission in Iraq
UNAMID	United Nations Mission in Darfur
UNAMIR	United Nations Mission for Rwanda
UNAVEM	United Nations Angola Verification Mission
UNC	United Nations Command (Korea and Japan)
UNCLOS	United Nations Convention of the Law of the Sea
UNCRO-Croatia	United Nations Confidence Restoration Operation in Croatia
UNDOF	United Nations Disengagement Observer Force (Israel-Syria)
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force (Egypt)
UNFICYP	United Nations Peace-keeping Force in Cyprus
UNGA	United Nations General Assembly
UNIFIL	United Nations Interim Force in Lebanon
UNISFA	United Nations Interim Security Force for Abyei
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIS	United Nations Mission in Sudan
UNMISET	United Nations Mission of Support in East Timor
UNMISS	United Nations Mission in South Sudan
UNMOT	United Nations Mission of Observers in Tajikistan
UNOGIL	United Nations Observation Group in Lebanon
UNOMIG	United Nations Observer Mission in Georgia
UNOMUR	United Nations Observer Mission in Uganda-Rwanda
UNOSOM	United Nations Operation in Somalia
UNPREDEP	United Nations Preventive Deployment (FYROM)

UNPROFOR	United Nations Protection Force (former Yugoslavia)
UNRIAA	United Nations Reports of International Arbitral Awards
UNSMISS	United Nations Mission in Syria
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
UNTS	*United Nations Treaty Series*
UNWRA	United Nations Relief and Work Agency for Palestine Refugees in the Near East
US	United States of America
USC	United States Code
USFK	United States Forces Korea
USFOR-A	US Forces in Afghanistan
USPACOM	US Pacific Command
VAT	Value Added Tax
VCLT	Vienna Convention on the Las of Treaties
Vol.	Volume
WEU	Western European Union
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*

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PART I

GENERAL FRAMEWORK

1
Introduction

International efforts taken in many countries to implement and further develop military cooperation programmes, continuing day-to-day cooperation between Sending States and Receiving States, and the rapidly developing peacekeeping experience (an experience that includes multinational cooperation in actual armed conflict situations) have convinced participants of the necessity to elaborate clear status provisions for military and civilian personnel of foreign armed forces in a Receiving State. For exercises and even for transit operations in foreign countries, observance of international and national legal requirements is essential and must be ensured by all parties. A solid assessment of what is required and what is achievable in terms of agreement policy and legal framework for the implementation of current cooperation programmes is of both practical and theoretical significance.

The aim of the present Handbook is to compare and evaluate the role of Visiting Forces in legal doctrine and existing State practice with a view to describing options for further legal development. A special focus on status issues is necessary to achieve this goal. Consequently, this Handbook does not go into a detailed discussion of issues of international humanitarian law,[1] or the law of military operations in general,[2] branches of international law many readers will be more familiar with. It will address rights and obligations stemming from the presence of foreign forces in a Receiving State or Transit State. In this context international and national rules are of equal importance. States are not free to develop rules for Visiting Forces without regard of their international obligations. The relevant rules of international law need to be implemented at national level, a task that makes close cooperation and international exchange essential. This requires a good perception of the objectives of the law of Visiting Forces based on historic developments and current treaties (Section I). The relationship between international law and national law is of particular interest for any activity of foreign armed forces in a Host State (Section II). Out-of-area deployments, i.e. deployments in third countries not belonging to the same regional organization or military alliance, will require specific considerations insofar as specific Status-of-Forces Agreements (SOFAs) will be necessary (Section III). Existing international law and practice needs to be evaluated with a view to the question whether rules of customary law are evolving in this respect (Section IV). Based on these more general considerations the design of the present Handbook will be explained (Section V).

I. Objectives of the Law of Visiting Forces

The status of foreign forces in a Receiving State or a Transit State (*jus in praesentia*) is subject to international law. In the absence of a SOFA, it is informed by customary principles and rules regarding the immunity of foreign military forces as organs of their Sending States.

[1] See D. Fleck, *The Handbook of International Humanitarian Law* (3rd edn, OUP, 2013, paperback 2014).
[2] See T. D. Gill and D. Fleck, *The Handbook of the International Law of Military Operations* (2nd edn, OUP, 2015, paperback 2017).

For Member States of the North Atlantic Treaty Organization (NATO), the NATO SOFA[3] serves as a by now classic tool to solve status issues of allied forces stationed in the territory of another Member State. Representing a widely accepted framework for regulating the legal status of foreign forces, the NATO SOFA provides a good compromise between the primacy of the law of the flag and the principle of territorial sovereignty. Although its rules are sometimes used for solving status issues also outside NATO, their applicability as treaty law is limited to stays in the territory of its Parties. Other SOFAs were concluded by various States in the form of treaties or executive agreements (to become legally binding, the latter may or may not require ratification). There is a wide SOFA practice, e.g. between the United States and a large number of States;[4] between France and several African States; or between the United Kingdom and other States (e.g. Cyprus, 1960; Belize, 1981; Brunei, 1984; and Kenya, 1985).[5] It may be noted in this context that also within the European Union (EU) a special SOFA was concluded.[6] The EU SOFA, like NATO SOFA, is confined to regulating the relations between Member States. It does not apply to peace operations by Member States in third countries, for which purpose special SOFAs have been concluded by the EU. NATO, too, followed this practice in its relations with third States. The Alliance extended the rules of NATO SOFA to the Participants in the Partnership for Peace Program;[7] but it also negotiated different SOFAs for military operations in third States in which it was involved.[8] Furthermore, specific agreements were concluded for meeting special requirements of military headquarters in a Receiving State.[9]

[3] Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces—NATO SOFA—(19 June 1951), 199 *UNTS*, 67.

[4] Cf. *Operational Law Handbook* (U.S. Judge Advocate General's School, Charlottesville, 2015), Chapter 7.

[5] See Peter Rowe, *Defence: The Legal Implications* (London: Brassey's, 1987), 84–5.

[6] Agreement between EU Member States concerning the status of military and civilian staff seconded to the institutions of the EU, of the headquarters and forces which may be made available to the EU in the context of the preparation and execution of the tasks referred to in Art. 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the EU to act in this context (EU SOFA), 17 November 2003, <http://eur-lex.europa.eu/legal-content/en/ALL/?url=OJ%3AC%3A2003%3A321%3ATOC>.

[7] Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces (PfP SOFA) of 19 June 1995. The PfP SOFA provides that—except as otherwise agreed—all States Parties shall apply the provisions of the NATO SOFA as if they all were Parties to the latter. These Partner States are: Armenia, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Finland, Georgia, Ireland, Kazakhstan, Kyrgyz Republic, Malta, Moldova, Montenegro, Russia, Serbia, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine, and Uzbekistan. Twelve further States—Albania, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia—have joined NATO meanwhile and are now Parties to NATO SOFA. See <http://www.nato.int/cps/en/natolive/topics_82584.htm>.

[8] See e.g. Agreement Between the Republic of Croatia and the North Atlantic Treaty Organization (NATO) Concerning the Status of NATO and its Personnel, 21 November 1995; Agreement Between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organization (NATO) Concerning the Status of NATO and its Personnel, 21 November 1995, Appendix B to Annex 1-A (Agreement on the Military Aspects of the Peace Settlement) of the General Framework Agreement for Peace in Bosnia and Herzegovina. Both SOFAS were concluded at Wright-Patterson Air Force Base, Dayton, Ohio, 21 November 1995, and signed in Brussels 23 November 1995, UN Doc A 50/790 (30 November 1995), pp 27–30 and 35–8; Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan (4 January 2002), <http://www.nato.int/cps/en/natolive/topics_82584.htm http://www.operations.mod.uk/fingal/isafmta.pdf>, Annex A; Declaration by the North Atlantic Treaty Organisation (NATO) and the Government of the Islamic Republic of Afghanistan on an Enduring Partnership signed at the NATO Summit in Lisbon, Portugal (20 November 2010), <http://www.nato.int/cps/en/natohq/official_texts_68724.htm>.

[9] See for NATO the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (HQ Protocol or Paris Protocol) of 28 August 1952 (340 *UNTS* 200; *TIAS* 2978), which was adopted as a Protocol to NATO SOFA already at the beginning of NATO cooperation.

Different objectives of Visiting Forces may result in different SOFA provisions. This becomes most obvious if one compares deployments for training and exercises on the territory of an Ally with those for crisis management by peace operations. In the latter case reciprocal and long-term agreements are hardly available, but the Parties have to conclude an arrangement for a specific purpose. In such cases Sending States will not be ready to share jurisdiction on their contingents with the Receiving State. The UN Model SOFA[10] provides for privileges and immunities of members of military components including locally recruited personnel from jurisdiction of the Receiving State.[11] In no case has the practice of UN peace operations deviated from this principle (see Chapter 20).

In many situations, SOFAs could not be concluded in time or have not yet entered into force before deployment. Thus interim solutions had to be found to solve practical issues. For certain peace operations, binding solutions were found under the authority of the Security Council, in that the Security Council Resolution establishing the peace operation provided that the UN Model SOFA or an existing SOFA for another peace operation shall apply provisionally, pending the conclusion of a specific SOFA.[12] Such decision has to be accepted and carried out by participating States in accordance with Art. 25 of the UN Charter; but this cannot fully replace the conclusion of a SOFA, its ratification in the Receiving State, and active cooperation of the participating States in its implementation.

NATO's Partnership-for-Peace programme is another case in point. Defence Ministers hosting exercises have issued goodwill declarations to facilitate such solutions. The text of these declarations differed in various respects and some of the provisions stated, in particular as far as jurisdiction is concerned, went far beyond the competence of a defence minister. As far as damage claims were concerned, it was declared that these should be solved by mutual agreement of both sides, which means that a settlement of claims clause could not be agreed upon in advance.

The entry into force of the Partnership for Peace Status of Forces Agreement (PfP SOFA)[13] and its Additional Protocol of 19 June 1995 on the renunciation of the right to carry out death penalties[14] and its Further Additional Protocol of 19 December 1997,[15] which regulates the status of NATO military headquarters and headquarters personnel in the territory of States participating in the Partnership for Peace, has solved at least some of the questions raised. The PfP SOFA makes rules of the NATO SOFA of 1951 applicable to all Partners and thus extends the NATO SOFA regime to all PfP countries. Thus, indeed, the PfP SOFA may be seen as an offer to all new Partners of the Alliance to participate in this cooperation on an equal basis.

[10] Model Status-of-Forces Agreement for Peacekeeping Operations, UN Doc A/45/594 (9 October 1990), reprinted with a short commentary in Bruce Oswald, Helen Durham, and Adrian Bates (eds.), *Documents on the Law of UN Peace Operations* (OUP, 2010), 34–50.

[11] UN Model SOFA, paras. 27–8, 46–9.

[12] Examples include SC Res. 1320 (2000), para. 6, in respect of the UN mission in Ethiopia and Eritrea (UNMEE), and SC Res. 2043 (2012), para. 7, noting the agreement between the Syrian government and the UN in respect to the UN Supervision Mission in Syria (UNSMIS), to be established under the command of a Chief Military Observer. Some of such decisions were taken under Chapter VII of the UN Charter, see SC Res. 1990 (2011), para. 4, to apply the SOFA for the UN Mission in Sudan (UNMIS) *mutatis mutandis* to the UN Interim Security Force for Abyei (UNISFA); SC Res. 1996 (2011), para. 26, to apply the UN Model SOFA *mutatis mutandis* to the UN Mission in the Republic of South Sudan (UNMISS).

[13] See n. 7.

[14] Additional Protocol to the Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces (19 June 1995).

[15] Further Additional Protocol to the Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces (19 December 1997).

The PfP SOFA provides in Art. IV: 'The present Agreement may be supplemented or otherwise modified in accordance with international law.' For such modifications, the rules codified in Art. 41 of the Vienna Convention on the Law of Treaties[16] are relevant. By application of that Article, Parties to the PfP SOFA may modify it only as between themselves alone and subject to the following conditions: the modification in question must not be excluded by the PfP SOFA; it must not affect the enjoyment by the other Parties of their rights under the PfP SOFA or the performance of their obligations; it must not relate to a provision, derogation of which is incompatible with the effective execution of the object and purpose of the PfP SOFA as a whole; and the Parties in question shall notify the other Parties of their intention to conclude the agreement and of the modification to the PfP SOFA for which it provides. Thus, the scope of possible modifications is clearly limited. In practice, there will be hardly any requirement for modifications of SOFA rules in the implementation of the Partnership for Peace, but supplements may be useful and practical as between the Member States of the Alliance, e.g. for logistic support.

It is worth noting that not all instruments governing the law of Visiting Forces are of a nature that could guarantee their legal entry into force. Many SOFAs cannot be formally ratified by the appropriate organs of the participating States. This may influence, but often does not limit, their relevance for international cooperation. The legal status (and practical value) of less formal instruments, such as Memoranda of Understanding, Declarations of Intent and the like, will be discussed in the Commentary.

II. Relationship between International Law and National Law

The relationship between international law and the national law of the Receiving State, Transit States, and the Sending State is a matter of particular relevance for any Visiting Force. As certain SOFA provisions will affect the national legislation of the Receiving State and even Transit States, it would be difficult to see such rules being applied without regard to national law. Ratification and implementing legislation will be required in most States and existing national legislation may call for the conclusion of additional agreements to supplement general SOFA rules. In many States there is a trend in legislation for further specifying rules to conduct military operations. General principles are often not considered sufficient and governments and parliaments may wish to react in a very specific way to issues related to the exercise of military power.

Generally, diplomatic clearance is coordinated and approved between Sending and Receiving States as a prerequisite for a Visiting Force to enter the Receiving State's territory. In some States there exist special legislative requirements for the authorization of foreign military units to enter the State territory: provisions of the Receiving State may include general limitations as for purpose, size, and duration of the stay of foreign military forces; there may also be procedural regulations on coordination within the government of the Receiving State and the exercise of parliamentary control. Special procedures may also to be observed for the decision to send a State's own military forces abroad for participation in partnership activities or national training exercises for which appropriate facilities are not available in the own country. Legislative requirements, although they may be very different from country to country, do reflect an evolving trend to underline the legislative power of both the Sending and the Receiving State in decisions on temporary and permanent stays of national armed forces in another State. There is no doubt

[16] Vienna Convention on the Law of Treaties (23 May 1969), 1155 *UNTS*, 331.

that such requirements must be strictly observed, even if more liberal usages are practised in other States.

Many SOFA provisions are far from being self-sufficient. This of course is a strong argument in favour of cooperative approaches by Receiving and Sending States in the interpretation and implementation of the SOFA. Furthermore, requirements of contemporary State practice should be considered: neither the UN Model SOFA nor NATO SOFA include provisions on the right to stay on foreign territory (*jus ad praesentiam*), which may be regulated both at international and national level and generally remains subject to a special agreement.[17] As far as the rights and obligations during such stay (*jus in praesentia*) is concerned, there may be specific requirements for specific agreements in addition to a general SOFA (see Chapter 29). To offer only a few examples: issues of environmental protection were not dealt with in 1951 by NATO Member States, nor has the issue been addressed in the 1990 UN Model SOFA; support in terms of telecommunications or health services is not fully regulated in the NATO SOFA; transport regulations and other provisions on the conduct of exercises are missing altogether in this classic instrument. In many cases supplementing agreements are necessary to comply with host nation legislation or to meet special requirements of the Parties. Bilateral and multilateral discussions on such requirements might show certain congruence in the interests of participating States. Sending States and Receiving States should develop cooperative solutions for evolving issues, thus respecting the immunity of Visiting Forces and at the same time ensuring that national laws and regulations of the Receiving State will be complied with.

The NATO SOFA expressly restricts modifications by providing in the Preamble, paragraph 2: 'that … the conditions under which [the forces of one Party] will be sent, *in so far as such conditions are not laid down by the present Agreement*, will continue to be the subject of separate agreements between the Parties concerned'. According to Serge Lazareff,[18] this means that 'only the conditions not laid down in [the NATO] SOFA can be dealt with in separate arrangements … the Parties cannot deviate from SOFA but have the perfectly normal right to agree on complementing provisions… and the mere fact that SOFA is a compromise should not allow it to be modified'. Indeed, NATO SOFA is a fair compromise between the interests of more powerful States who would be in a better position to obtain concessions through bilateral negotiations, and less powerful States whose interests are best protected by strictly adhering to NATO SOFA.

The promulgation of distinct rules is necessary for the implementation of international legal obligations in this field. In controversial cases there may also be only limited confidence in the sound judgment of responsible authorities and individuals in the implementation of agreed general principles. For national parliaments and governments of both Sending and Receiving States it will make little difference whether military activities are those of the own national forces or of foreign or even multinational units. But in all circumstances, the overarching purpose of SOFAs, their implementing agreements, and their related domestic national legislation is to facilitate the orderly and efficient presence

[17] Peace operations are normally initiated by Security Council resolutions. They are based on three bedrock principles: consent of the Host State, impartiality, and non-use of force except in self-defence. For other military operations the consent of the Receiving State is to be established by special agreement. As stipulated in the preamble of the NATO SOFA: '… the decision to send them … continue to be the subject of separate arrangements between the Parties concerned'. National decisions preceding such arrangements will in most cases require parliamentary approval.

[18] S. Lazareff, *Status of Military Forces Under Current International Law* (Leyden, Sijthoff, 1971), 73–5 (emphasis added).

of Visiting Forces in Receiving States—by clearly defining the relevant and agreed legal framework and processes at all levels of government.

III. Out-of-Area Deployments

The concept of 'out-of-area deployments' is unique to regional organizations and military alliances; it does not apply to the UN. For NATO, operations outside the territories of its Member States raise political and legal concerns that need to be solved in accordance with the rules of international law.

In 1995, NATO troops were deployed to Croatia and Bosnia-Herzegovina under the authority of the Dayton Peace Agreement[19] in the first major out-of-area military action by NATO since its inception. Due to the fact that this deployment was to non-NATO countries, the NATO SOFA was not applicable. As a result, it was necessary to negotiate agreements on the status of the personnel of the Implementation Force (IFOR) while in the territory of Croatia and Bosnia-Herzegovina. The identical agreements entered into by NATO with these two Host States provide as follows: '"NATO personnel" means the civilian and military personnel of the North Atlantic Treaty Organization with the exception of personnel locally hired.'[20] The personnel present in Croatia or Bosnia-Herzegovina were personnel involved in the military operation itself, that is, either the implementation by NATO of the peace plan in Bosnia and Herzegovina or the possible withdrawal of UN forces from former Yugoslavia. As the presence of dependents was never a consideration, the definition in the two IFOR SOFAs was narrowly drafted to include only those personnel who were involved in the military operation. Due to the fact that the national military units participating in IFOR required substantial support from national support units not part of IFOR, Art. 19 of the agreements provided SOFA status to civilian and military personnel of the contributing NATO nations, acting in connection with the operation, even when not under NATO command and control. The NATO operation in Bosnia was also unique because IFOR included troop contributions from non-NATO nations. In order to provide equivalent status for the non-NATO personnel, it was necessary to insert a special provision in the SOFAs. Art. 21 of both the Bosnian and Croatian SOFA states that non-NATO personnel participating in the operation will be given the same privileges and immunities as those given to NATO personnel.

Subsequent NATO operations in the Balkans required the negotiation of additional agreements relating to the presence of NATO personnel. The experience in Bosnia with regard to the important activities of contractors and their non-military or NATO status caused NATO representatives to seek the inclusion of contractors within the definition of NATO personnel. Paragraph 1 of the Exchange of Letters between NATO and the Republic of Albania expanded the definition of NATO personnel found in the earlier agreements; now NATO personnel included 'military, civilian and contractor personnel assigned or attached to or employed by NATO, including military, civilian and contractor personnel from non-NATO States participating in Operation'.[21] When the International Security Assistance Force (ISAF) was tasked in December 2001 'to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a

[19] General Framework Agreement for Peace in Bosnia-Herzegovina, Dayton, 21 November 1995 (n. 8).
[20] See n. 8.
[21] Exchange of Letters between the North Atlantic Treaty Organization and the Republic of Albania (24 June 1999).

secure environment',[22] NATO could build on this experience. The status of ISAF personnel was specified in a Military Technical Agreement confirming full immunity of ISAF personnel in Afghanistan and regulating its rights and obligations.[23]

IV. Evolving Customary Law?

Already five decades ago when certain rules of the NATO SOFA including its principles regarding allocation of jurisdiction had also been taken up by the Warsaw Pact Powers, the argument was made that these rules, because of their fairness and plausibility, may pass into customary international law.[24] This process has now been underlined by subsequent developments. The invitation by NATO and its Member States to participate in a new Partnership for Peace (PfP)[25] and its acceptance and support by presently 22 States in Central and Eastern Europe[26] has brought a variety of new military contacts: there has been a considerable increase in joint military and social activities, in conferences, study periods, seminars, exchange programmes, and military exercises in recent decades. Another significant example is military cooperation between South and Central America, the Caribbean, and the United States which included the *Comité Juridico Militar de las Americas* (COJUMA) with its first comparative study of NATO SOFA and UN Model SOFA rules.[27]

Yet still today the question remains open, whether and to what extent SOFA rules may become applicable by custom. The very example of the allocation of jurisdiction under Art. VII of NATO SOFA is a good test for such critical consideration: There are often situations in which this balanced rule of NATO SOFA which provides for a right of the Sending State to exercise criminal jurisdiction through its own military authorities within the Receiving State, and includes regulation on concurrent jurisdiction by the Receiving State and the Sending State on specific groups of cases, would hardly be appropriate. A Sending State would have to bring judges and prosecutors to the Receiving State to execute this right, and it would have to accept the Receiving State's jurisdiction at least in certain cases, if Art. VII of NATO SOFA had to be applied. Where jurisdiction over military personnel is vested in civilian bodies, as is the case in Germany and other States, the Sending State's jurisdiction within a Receiving State would face additional problems. In the case of short visits for the purpose of PfP exercises and similar activities, the Sending State will hardly be prepared to exercise its jurisdiction within the host country. Considering the short period of such visits it is normally fully sufficient to adjudicate upon soldiers after their return to their Sending States. While waivers from jurisdiction accorded to the Receiving State may be difficult to achieve, the Sending State will remain interested in cases of crimes committed by any of its soldiers to have them returned as soon as possible from the Receiving State. Effective solutions have to be worked out by agreement.

An additional and more substantial objection against an unlimited application of Art. VII of NATO SOFA is its designed purpose to provide general rules for cooperation among Allies and its Partners: for military operations going beyond this framework, which in particular for peace operations in the territory of a third State, is in interests of the participants and the relevant legal requirements may be quite different. The Dayton

[22] SC Res. 1386 (2001), para. 1. [23] See n. 8.
[24] R. R. Baxter in his foreword to S. Lazareff, (n. 18) v–vi.
[25] Partnership for Peace: Invitation issued by the Heads of State and Government participating in the Meeting of the North Atlantic Council, (Brussels, 10–11 January 1994).
[26] See n. 7. [27] *Study of the Agreements of Visiting Armed Forces* (COJUMA, 2001).

Accord, for example, provided that NATO military personnel under all circumstances and at all times shall be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them in the area of operations.[28]

Hence NATO SOFA rules, while being balanced and fair and enjoying wide acceptance even beyond the North Atlantic Alliance, do not provide blueprints for every possible situation. Supplementing provisions may be required and sometimes other solutions have to be found and be put into force by new agreements. At the same time, there is a now greater awareness among the public at large in many countries with respect to military activities: environmental considerations and budget restrictions influence operational planning. There is also a changing attitude in parliaments where military matters are no longer considered to be the exclusive realm of the executive power. Rather, the legislative power is influencing foreign and security policy matters. This is not only true in the case of noise pollution, of environmental damage, or of damage to roads and bridges as a consequence of military exercises; it applies more or less to all military activities. Hence NATO SOFA rules, although they are widely acceptable as a model for a balanced and convincing solution even beyond the North Atlantic Alliance, cannot be seen as being customary law today *in toto*. In many events a new assessment of the given situation and the various interests involved remains necessary. In most cases, and this is true even for the cooperation between the members of the Alliance, NATO SOFA rules have to be supplemented by additional agreements.

A far more positive answer may be possible to the question whether rules of the UN Model SOFA[29] have entered into customary law for peace operations. Their well-established standards do reflect a widely shared *opinio juris* of Sending States and Receiving States alike. UN and State practice confirms that these standards are considered as mandatory for individual SOFAs to be concluded between the UN and Host States. Peace operations conducted by other organizations such as the African Union (AU), the Economic Community of West African States (ECOWAS), the European Union (EU),[30] or the North Atlantic Treaty Organisation (NATO), may also use the UN Model SOFA, *mutatis mutandis,* as a basis for agreements between the latter organizations and Receiving States in which military and civilian personnel are deployed. This appears to be practical, as similar issues are to be solved in peace operations conducted by these organizations. The UN experience may thus help to standardize similar activities. SOFAs for peace operations are serving a clearly delineated purpose, as distinct from other SOFAs regulating such different objectives as military cooperation, training or exercises, or unilateral presence for other purposes. It may thus be easier for peacekeepers than for other Visiting Forces to develop consistent practice and *opinio juris* in the absence of existing treaty provisions.

The fact that the United Nations adheres to the practice of concluding SOFAs on the basis of the UN Model SOFA for each peace operation, and Security Council resolutions establishing a peace operation often provide that the UN Model SOFA shall apply provisionally, pending the conclusion of a specific SOFA, would not speak against the customary validity of UN Model SOFA rules. It is a frequent phenomenon that treaty law

[28] See the Dayton SOFAs (n 8.), section 7. [29] See n. 10.

[30] The EU has adopted its own *Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State*, Council of the European Union, 2007, <http://register.consilium.europa.eu/pdf/en/07/st11/st11894.en07.pdf>; see also *Draft Model Agreement on the Status of the European Union Civilian Crisis Management Mission in a Host State (SOMA),* 17141/08, 15 December 2008, <http://register.consilium.europa.eu/pdf/en/08/st17/st17141.en08.pdf>.

confirms customary rules. This practice may be followed to provide more clarity, to add certain specifications, and to ensure cooperation on implementation and the settlement of disputes. Once enacted in the national law of the Host State, these provisions may effectively contribute to the success of the peace operation and likewise to an even more widely accepted customary status of the relevant rule. Acceptance by participating States will be necessary even in those cases in which SOFA rules apply by decision of the Security Council.

The question whether a SOFA rule has developed into customary law, requires an in-depth assessment rule by rule. This Handbook aims at contributing to such exercise.

V. The Design of this Handbook

The aim and purpose of this book required an approach that combines commentaries to rules widely used with case studies on situations of a more specific nature. Particular attention was given to broad participation in this project, to show that the global relevance of the subject is to be matched by cooperative efforts and 'ownership' by those affected. To provide the necessary background for the reader, some more general chapters precede the commentaries to specific rules and case studies. Chapter 2 describes the historical developments influencing the present law of Visiting Forces, not only focusing on North Atlantic cooperation and the work which led to the conclusion of NATO SOFA, but also discussing former Warsaw Pact arrangements and challenges by new types of military operations in the post-cold-war era. The chapter also evaluates the requirement for different rules in situations where military operations are being conducted for peacekeeping, peace enforcement and post-conflict peace-building. Specific requirements for and existing practice of multinational units are dealt with in Chapter 3, in which common trends of this new form of military cooperation are assessed, command and control issues are discussed, and the need for a continuous review is highlighted. Chapter 4 offers a legal evaluation of various forms of UN peace operations, showing their development over the last decades, commenting on accepted principles, and addressing current challenges. Chapter 5 explains the general legal status of Visiting Forces including their military and civilian members as a status of immunity *ratione materiae* under international law, a concept deriving from the sovereignty of States and the immunity of the international organization involved. As this status is neither fully confirmed, nor completely regulated in current treaty law, issues of customary law and general principles of law are in the focus of this chapter.

A commentary on applicable status law provisions is provided in Part II. It explains topical SOFA rules, commenting on the relevant sections of the UN Model SOFA and the corresponding Articles of NATO SOFA in context. This is to provide insight into similarities and important differences of the various provisions. Particular attention is taken to show that the conventional applicability of SOFA provisions is limited to stays in the territory of another Party and that deviations for other cases need to be contracted. This Part of the Handbook represents the most comprehensive and up-to-date commentary to the UN Model SOFA and NATO SOFA existing today, and it shows that these rules indeed provide a useful practical basis for solving similar cases in specific arrangements outside the field of application of the two SOFAs. At the same time, important differences are made apparent.

Legal issues of international military headquarters, both inside and outside UN or NATO command structures, are discussed in Part III. This Part again starts with the UN and NATO experience by offering comprehensive commentaries on the relevant

treaty law, including non-legally binding instruments as relevant for State practice and the practice of international organizations. It also examines the situation of other international military headquarters established by regional organizations, such as the African Union, the European Union, or the Collective Security Treaty Organization, formerly Commonwealth of Independent States.

Part IV describes the legal status and headquarters agreements of the International Committee of the Red Cross (ICRC) and national Red Cross and Red Crescent Societies providing humanitarian assistance in foreign countries.

The case studies offered in Part V evaluate State practice of Visiting Forces in Germany, Japan, Korea, Afghanistan, and of Russian forces in various Receiving States. A chapter on a specific legal approach taken in certain military operations, i.e. agreements conferring status similar to the status of administrative and technical staff of embassies (A&T Agreements), concludes this Part.

In Part VI conclusions are drawn on the role of Visiting Forces in respect of their legal background, lessons learned, and certain contentious issues. This Part includes practical guidelines for lawyers involved in pre-deployment negotiations and tasked to cooperate on SOFA negotiation and implementation.

2

Historical Developments Influencing the Present Law of Visiting Forces

Voltimand: Whereupon Old Norway, overcome with joy,
Gives him three thousand crowns in annual fee
And his commission to employ those soldiers,
So levied as before, against the Polack,
With an entreaty, herein further shown,
That it might please you to give quiet pass
Through your dominions for this enterprise,
On such regards of safety and allowance
As therein are set down.
King: It likes us well.
And at our more considered time we'll read,
Answer, and think upon this business.

Hamlet, Act II Scene I, 72–82.

I. Introduction

This chapter focuses on the historical and the legal development of the North Atlantic Treaty Organization (NATO) Status-of-Forces Agreement (SOFA) in 1951 and subsequent developments, in a range of other situations. It seeks to show how prior to 1951, bilateral agreements reflected, in reality, the relative bargaining positions of the Sending and Receiving States (and still do) and how the terms of the 1951 multilateral treaty were debated in the legislatures of the USA and the UK. This is no mere 'lawyers' law' concerned solely with resolving conflicts of jurisdiction between different States but the issues raised within it are frequently of constitutional significance, ranging from the protection of the citizen and of the serviceman to 'immunity' from the jurisdiction of the Receiving State (although not from jurisdiction of the Sending State). The issues discussed in relation to earlier SOFAs are likely to be recognizable to anyone proposing a new status-of-forces agreement. This chapter also sketches the background to challenges in the law relating to Visiting Forces posed by post-cold war types of military operations.

Shortly after the NATO SOFA was debated the Warsaw Pact countries entered into arrangements that were not dissimilar, in that they accepted the principle of concurrence, rather than exclusivity, of jurisdiction. The one major structural difference, it will be seen, was that the agreements were bilateral between the USSR and the individual countries of the Pact.

With the dissolution of the Soviet Union in the early 1990s new forms of military co-operation became possible, ultimately leading to some former Warsaw Pact countries joining NATO from 1999. But, this was not the only change. A number of States became parties to the Partnership for Peace arrangements and joint military training exercises then became possible. A new status-of-forces agreement was required, and subsequently agreed, to enable such exercises and other forms of military cooperation to take place on terms identical to the 1951 Agreement.

Finally, this chapter considers one of the essential issues of any status-of-forces agreement, namely, the protection of the human rights of the serviceman and of victims of a crime committed in the territory of the Receiving State. It is not uncommon, for instance, to provide in such an agreement the basic rights to a fair trial that may be found in human rights or humanitarian law treaties. The UN has had to take very positive steps also to protect potential victims from sexual exploitation by members of a Visiting Force taking part in UN peace operations.

II. The Law of Visiting Forces Prior to World War II

The seeds of the modern law relating to the status of armed forces in the territory of another State were sown prior to World War I. Where the armed forces of one State were present on the soil (or in the territorial waters) of another State[1] the consent of the Receiving State governed the relationship between the two entities. Although the law may have treated all States as equal their bargaining positions rarely were (or, indeed, are). Foreign naval vessels frequently called into the ports of friendly States to replenish supplies or for repairs and there was, in addition to any arrangement between friendly States, a commercial advantage to the Receiving State. Moreover, visits were likely to be short. It was not surprising, therefore, to see the consent of the Receiving State being freely given to enter its territorial waters. In *The Schooner Exchange* v. *McFaddon*,[2] the US Supreme Court even accepted that the 'jurisdiction of a nation within its own territory is necessarily exclusive and absolute [but] national ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction'.[3] There can be little doubt that this 'waiver of jurisdiction'[4] applied to enable the commander to deal with his subordinates for a naval or military offence but whether it went so far as to imply a waiver from the criminal law of the Receiving State for offences against its law on the territory of the Receiving State has been the subject of keen debate. Barton,[5] in an exhaustive study, thought not. He took the view that 'there exists a rule of international law according to which members of Visiting Forces are, in principle, subject to the exercise of criminal jurisdiction by the local courts and that any exceptions to this general and far-reaching principle must be traced to express privilege or concession'.[6] Wijewardane, on the other hand, concludes that 'there is

[1] As contrasted with a colony, which did not have independent statehood under international law.

[2] (1812) 7 Cr.116; 3 US Reports (LEd) 488, where subsequent decisions which relied upon this case are given. See also the complete reprint in Simmonds (ed), *Cases on the Law of the Sea,* Vol. I (1976), 136–47. For the limitations of this case see Barton, 'Foreign Armed Forces: Immunity from Supervisory Jurisdiction' (1949) 26 *BYIL* 380, 382–5; J. Voetelink, 'Status of Forces and Criminal Jurisdiction' (2013) *Netherlands International Law Review* 231, 234–5.

[3] Ibid. S. Lazareff, *Status of Military Forces under Current International Law* (Leyden: Sijthoff, 1971) 13–16. See also the discussion of this case by Lord Atkin in *Chung Chi Cheung* v. *The King* [1939] AC 160 (where the offence was committed on board the ship). Lord Atkin considered that it was not necessary to decide the issue of jurisdiction 'over members of a foreign crew who commit offences on land' (at 176).

[4] Strictly, this is a *waiver* of jurisdiction only where the sailors commit acts contrary to the law of the Receiving State. Thus, where their acts can be classified *only* as breaches of the naval (or military) disciplinary code, there is no jurisdiction on the part of the Receiving State to waive. There can only then be a *grant* of jurisdiction.

[5] See Barton, 'Foreign Armed Forces: Immunity from Criminal Jurisdiction' (1950) 27 *BYIL* 186, 234.

[6] He also draws attention to the wording of the Exchange of Notes, scheduled to the United States of America (Visiting Forces) Act 1942, in which the US ambassador in London writes, 'In order to avoid all doubt … the Military and Naval authorities will assume the responsibility to try and on conviction to punish all offences which members of the American Forces may be alleged … to have committed in the United Kingdom.' This, with respect, does not support the point made. The phrase 'In order to avoid all doubt' refers not to any pre-existing rule of customary international law as to the exclusive jurisdiction of the sending force but it is merely a summary of what was agreed by the Exchange of Notes.

a rule of international law that members of a Visiting Force are immune from the criminal jurisdiction of the Host State in respect of an offence connected with or arising out of an act or omission in the performance of official duty'.[7]

If the position under customary international law was unclear and susceptible to markedly different conclusions immediately after World War II it was even less clear during World War I. Then British and other allied forces were engaged in military action principally in France. It was common for agreements to exempt members of the visiting armed forces from the military courts of other allies for breaches of the local law in the combat areas (known as 'in the field').[8] All the agreements have 'in common the grant of "exclusive jurisdiction" to the authorities of the forces over their personnel … [but] they do not contain any express statement of the relationship of the service courts to the local courts of the host state'.[9] Outside the combat areas (for example, in the UK) more complex arrangements had to be made to enable an ally to hold its court-martial or other disciplinary procedures and possibly to deal with exclusive jurisdiction on the part of the Sending State. In the UK, an Order[10] was made under the Defence of the Realm Consolidation Act 1914, permitting an ally to operate its disciplinary procedures within the UK but it did not grant exclusive jurisdiction to the military authorities of an ally. When soldiers of the US Army were stationed in the UK in the latter part of World War I an agreement was proposed to give exclusive jurisdiction to US forces while in the UK but, due to the ending of the war, it was never concluded.[11]

France and Belgium were, of course, in a poor bargaining position when they sought the assistance of other military powers, such as the UK and the USA. The arrangements, previously referred to, resulted in the most practical solution to any conflicts of jurisdiction among the various military powers fighting an intense war within defined territories. The scope of the civilian courts to enforce the local criminal law would, in any event, have been very limited. It was not therefore surprising that the arrangements between the various States took the form they did. It is likely that the result would have been the same whether *The Schooner Exchange* v. *McFaddon* had been decided or not. It is, therefore, trite

[7] Wijewardane, 'Criminal Jurisdiction over Visiting Forces with Special Reference to International Forces' (1965–66) 41 *BYIL* 122, 143. Cf. King, 'Jurisdiction over Friendly Foreign Armed Forces' (1942) 36 *AJIL* 539, substantial extracts of which were printed in the Record of the US Senate, 7 May 1953, 4659, to support the argument of Senator Bricker that jurisdiction was exclusive to the Sending State (unless waived by the sending State). King, however, fails to recognize that in some common law countries (like the UK) national law must be applied in matters relating to trials, irrespective of the position under international law.

[8] See Barton (n. 5) 188. See also *R.* v. *Aughet* (1918) TLR 302, 303 for the Agreement between the UK and Belgium of April 1916 and for discussion of this case see Barton at 190–1. See also J. Voetelink, *supra*, p 235 on the various bilateral agreements during World War I.

[9] See Wijewardane (n. 7) 125, 126. In *R.* v. *Aughet* (see n. 8) the English Court of Criminal Appeal quashed a conviction by the Central Criminal Court in London of a Belgian officer who had injured a Belgian soldier in London after he had previously been tried by a Belgian court-martial in Calais. There would appear to have been no grounds for the transfer of Aughet to the Belgian authorities since his act of shooting a Belgian private soldier in London was not committed 'in the field' to justify the exclusive jurisdiction of the Belgian military authorities under the Agreement. Under English law the English courts clearly possessed jurisdiction to try him. The conviction by the Central Criminal Court in London was quashed because Aughet had been *acquitted* by a Belgian court-martial and it would be 'contrary to the true intent and meaning of the Convention to subject the man to punishment here for an offence for which he had been acquitted in accordance with Belgian law', Lawrence, (1918) *TLR* 302, 304.

[10] S.R. & O., 1918/367 (22 March 1918), reg. 6.

[11] See Barton (n. 5), 192, who opines that such an agreement would have been similar to that entered into between the US and France, where an exclusive jurisdiction to the authorities of the US over the members of its armed forces was granted. Wijewardine (n. 7), 125, agrees. See also Lazareff, (n. 3) 22. It is not clear, however, whether this jurisdiction would have been exclusive against the civil courts in the UK, see *R.* v. *Aughet* (n. 8). For the reasons argued in (n. 9), this would have been unlikely. There were no hostilities (by land) being carried out in the UK at the time, a situation quite different from France and Belgium.

to conclude, as does Lazareff,[12] that the issue was to be determined by *principle,* in other words the UK 'always insist[ing] on the principle of territorial sovereignty' and the US on the right of exclusive jurisdiction.

The same may also be true when the inter-war agreements are considered. Agreements between the UK and Iraq in 1925[13] and Egypt in 1937[14] granted complete immunity from the local criminal jurisdiction to the visiting British forces.[15] In both instances the UK and the Receiving States must have considered these arrangements to have been in their respective interests, but the UK would, apart from its historical links, clearly have been in the stronger bargaining position. Added to which was the fact that the UK had never previously ceded to any other State *exclusive* jurisdiction over criminal offences committed by its armed forces abroad.[16] It had, however, permitted the trial of those subject to military law by the local courts in one of his Majesty's dominions[17] but it would appear also that the UK had accepted the principle of *concurrent* jurisdiction, even in colonies. Thus, the *Manual of Military Law* (1914) stated that 'in the United Kingdom, in most parts of India, and in most of the colonies, where there are regular civil courts close by, it is, as a general rule, inexpedient to try a civil offence by a military court, more especially if the offence is one which injured the property or person of a civilian, or if the civilian authorities intimate a desire to bring the case before a civil court'.[18] The decision as to whether a British soldier was to be tried was, however, exclusively within British military hands.[19] This acceptance of a concurrent jurisdiction was therefore non-statutory[20] and was likely to be invoked only in those parts of the world where the UK had some control over, or respect for, the fair administration of the local criminal law.

III. Visiting Forces During World War II

It is necessary to consider the pattern of some of the status-of-forces agreements prior to the NATO SOFA 1951 in order to reflect the background to the drafting of that Agreement and to get some feel for the serious constitutional implications of such agreements. It will be seen that much the same arguments were presented to the UK Parliament when it was considering the implementation of the 1951 Agreement by the Visiting Forces Bill 1952 and to the US Senate when it was debating ratification of the Agreement in 1953.

Once the US had declared war against Japan and its allies on 7 December 1941 the stage was set for a debate in the British Parliament over the status of the US forces based

[12] Lazareff, (n. 3) 21–2, 26. [13] (1925) 17 UKTS, Cmd. 2370, Art. 7.

[14] (1937) 6 UKTS, Cmd. 5360, Art. 4. By the Anglo-Egyptian Treaty of 1936 the British forces stationed in Egypt were transformed from being a military occupation to a Visiting Force, Barton (n. 5) 194.

[15] See Wijewardine (n. 9), 126–7; Barton (n. 5), 194–6.

[16] See s. 41 of the Army Act 1881 (repealed), making it a military offence to commit any offence against the criminal law of England, and proviso (b) confirming that a person subject to military law could be tried by a competent court in one of the dominions. Section 40 of the same Act (now s. 19, Armed Forces Act 2006) made it a disciplinary breach to commit an act to the prejudice of good order and military discipline. This would be sufficiently wide as to cover a criminal act according to the local law but not by English military law.

[17] See s. 41 (proviso (b)) and s. 44 of the 1881 Act. [18] HMSO (1914) 85.

[19] The deciding factor as to whether military or civil jurisdiction was to be selected appeared to be 'expediency', see ibid. 398 where the *Manual* advises that if a sexual offence is committed by a soldier against 'natives of India or any colony, the cases should usually be dealt with by a civil court, if this course can reasonably be followed'.

[20] There was no requirement for any international agreements since neither India nor any of the colonies, at the time, were independent States. See also s. 180 of the Army Act 1881, applying to India.

in the UK. In reality, the UK was in a weak bargaining position.[21] The US authorities had 'claimed'[22] *exclusive* jurisdiction over all criminal offences committed in the UK by members of its armed forces. The UK government accepted this (although it probably had little real choice in the circumstances) and recognized the 'very considerable departure which the … arrangements will involve from the traditional system and practice of the United Kingdom'.[23] By an Exchange of Notes, dated 27 July 1942, the UK government indicated that its acceptance was subject to 'the necessary Parliamentary authority' and hoped that the US government would ensure a reciprocal arrangement for any British forces in the USA. The Exchange of Notes represented, of course, an agreement as between two governments, in much the same way as any status-of-forces agreement. The requirement of parliamentary approval of international agreements is common in all democracies. In many common law countries, however, this parliamentary approval has to take the form of legislation whenever the rights and obligations of citizens are affected by an international agreement. The debates on proposed legislation show clearly the constitutional implications of status-of-forces agreements and the sometimes conflicting desires, on the one hand, of the executive to ensure effectiveness of the agreement entered into at the highest level of government and, on the other, of the legislative chambers in preserving their right to debate and to pass or to throw out proposed legislation. As a first step, therefore, the government will have to present its reasons for entering into a status-of-forces agreement.

In introducing the United States of America (Visiting Forces) Bill 1942 the Home Secretary gave as his reasons for the proposed legislation that the 'American Forces are, of course, accustomed to their own procedure and the principles of their own law … [they] would feel it necessary for them to provide defence for their men in our courts … constitutionally it is desirable, and indeed necessary, that where their troops go American legal authority should go with them'.[24] The US 'claim' did not refer to international law or the principles in *The Schooner Exchange*. In accepting the US position, the Home Secretary went on to state that if the government were to resist the US claim to exclusive jurisdiction 'we should be in a rather poor debating position because we ourselves made precisely the same claim in the case of the British forces in France in the last war when our military courts were given a jurisdiction somewhat similar to that now being claimed by the Government of the United States'.[25] It will be obvious from this discussion of the

[21] 'Britain, fighting for its life, wanted all the troops she could get there on the British Isles, and would make almost any sacrifice to get them there', Under Secretary of State, General Smith, statement to the US Foreign Relations Committee, 7 April 1953, 53.

[22] The Home Secretary, introducing the United States of America (Visiting Forces) Bill, *Hansard*, HC (series 5) Vol. 382, col. 877 (4 August 1942).

[23] Para. 3 of the Notes Exchanged Between His Majesty's Government in the United Kingdom and the Government of the United States, dated 27 July 1942, scheduled to the United States of America (Visiting Forces) Act 1942. They do not form part of the Act, see *Hansard*, HL (series 5) Vol. 124, col. 60 (29 July 1942). The Notes were described by the MP for Cambridge University as 'inelegant from a literary point of view', *Hansard*, HC (series 5) Vol. 382, col. 917. An alternative course would have been to extend the Allied Forces Act 1940 to US forces. This Act permitted a Visiting Force to apply its disciplinary provisions within the UK but it expressly provided that it should not affect the jurisdiction of any civil court in respect of any act against the law of the UK.

[24] *Hansard*, HC (series 5) Vol. 382, col. 877 (4 August 1942).

[25] Ibid. See also the argument of the Lord Chancellor in introducing the Bill in *Hansard*, HL (series 5) Vol. 124, col. 60, 29 July 1942.

agreements that existed during World War I that the agreement between the UK and France was quite different from that proposed in the 1942 Bill.[26]

Although a number of members of parliament criticized the Bill, it went through all its stages in the House of Commons on one day and received the royal assent two days later, having completed its parliamentary passage in record time.[27] It was so rushed that one member of the House of Lords was unable to attend the House on the day it was debated there and he was forced to express his very practical concerns about the working of the proposed legislation in a letter to *The Times*.[28] A member of the House of Commons saw the wider constitutional implications of the Bill when he commented that:

> Dealing as we are with a great constitutional change which is wholly without precedent, we are particularly in these times of emergency, the High Court of Parliament, and in particular in this House we are the protectors of the liberty of the subject. In these circumstances we should be failing in our duty, and indeed in our duty to our comrades in the American House of Representatives, if we did not devote some little care to the examination of a Bill which carries out an agreement by which we are absolutely and honourably bound.[29]

The 'great constitutional change' referred to was that the US had sought *exclusive* jurisdiction over its members while in the UK,[30] which, as explained, was without precedent since it would, if granted, oust the jurisdiction of the civil courts in respect of crimes committed within the UK. It would also have meant that offenders against the civil law of the UK would be tried by a military, as opposed to a civilian, court,[31] which in turn had implications for the supremacy of civilian law over military law. A great constitutional change could be more easily accepted if both States had accepted the same arrangement in their territories. The British government itself had, in the Exchange of Notes, invited the US government to accord reciprocal treatment to members of the UK armed forces in the US and this call was repeated by members of Parliament.[32] Given the speed with which the Bill was passed an answer was not available to members of Parliament before the Bill became law. In fact, ten years later, during the debate on the Visiting Forces Bill in 1952, the Attorney-General informed the House that reciprocity had been given by the

[26] *Hansard*, HC (series 5) Vol. 382, col. 883 (4 August 1942) Mr Jones MP pointed out that in France during World War I 'the British troops were engaged on active combatant service in zones which, with certain exceptions, were forbidden to civilian access' and at col. 895 Mr Silverman MP stated that the 'French courts of civil jurisdiction were unable to function, and there was only the French military jurisdiction operating'. The 1942 Act applied in a (largely) non-combat zone.

[27] The period of time from the Exchange of Notes to the Bill receiving the royal assent was therefore nine days.

[28] Lord Atkin, *The Times* of 3 August 1942. He stated 'My excuse for writing is that the Bill was brought on in the House on such short notice that I was unable to attend.'

[29] *Hansard*, HC (series 5) Vol. 382, col. 888 (4 August 1942), Mr Goldie, MP. Compare the debate in the House of Lords, which spans only fourteen columns: *Hansard,* HL (series 5) Vol. 124, cols. 60–74 (29 July 1942).

[30] Along with UK colonies, British protectorates or British mandate territory: s. 3.

[31] The effect of the Act was that all offences committed by US servicemen could be tried by US military courts. This gave considerably wider jurisdiction to US military courts than was possessed by their UK counterparts, since a British servicemen who was charged with treason, murder, manslaughter, or rape in the UK could be tried only by a civilian and not a military court: Army Act 1881, s. 41 (the Act in force at the time). This anomaly does not appear to have been drawn to the attention of Parliament in the parliamentary debates. It also permitted the US authorities to impose the death penalty for offences, such as rape, which did not attract that penalty in a civilian court in the UK. See generally, J. Lilly, J. Thompson, 'Executing US Soldiers in England, World War II' (1997) 37 *British Journal of Criminology* 262.

[32] The grant of exclusive jurisdiction to US military courts in the UK was not to be 'made dependent upon a formal grant of reciprocity [although] it would be very agreeable to His Majesty's Government … if the Government of the United States of America will be ready to take all steps in their power to ensure to the British forces concerned a position corresponding …' See also *Hansard*, HC (series 5) Vol. 382, col. 915 (4 August 1942), Sir Archibald Southby, MP.

US government to British forces in 1944.[33] Reciprocity was to be a major issue again when the 1952 Bill was debated.

There were no limitations to the scope of the 1942 Act. It therefore encompassed all offences against the law of any part of the UK committed by US servicemen irrespective of whether they were on duty or whether the offence was committed against a British national or another member of the US forces or against its property.[34] Although the Exchange of Notes stated that the agreement was to apply 'during the conduct of the conflict against our common enemies and until six months (or such period as may be mutually agreed upon) after the termination of such conflict and the restoration of a state of peace'[35] the Act remained in force until 1954, when the Visiting Forces Act 1952 came into force and repealed the 1942 Act.[36]

IV. Key Issues of the Negotiations, and of Parliamentary Debates, on NATO SOFA

When the last US Air Force aircraft left the UK in February 1946[37] a reasonable observer might have concluded that in Europe, at least, the law relating to Visiting Forces had served its purpose and would not be invoked again. The armed forces of the US, the UK, and France were in occupation of West Germany[38] while the USSR and the other three powers were in occupation of Berlin. This was, however, seen as a unique situation, being part of the price of an unconditional surrender on the part of Germany.

In 1946 the US began to realize that it needed air bases in Europe, as well as in the Pacific rim. Duke wrote that the 'state of air effectiveness in the immediate postwar period prompted particular fears about Europe'.[39] A Periphery Basing Plan had been drawn up seeking base rights in West Germany, Austria, Italy, Denmark, Norway, and France. This plan was not acceptable to some of the governments concerned and a different tactic was adopted. This was to agree basing facilities at the military level.[40] In a plan drawn up by General Spaatz of the US Air Force and Air Chief Marshall Tedder of the Royal Air Force

[33] *Hansard*, HC (series 5) Vol. 382, col. 915 (4 August 1942). These were stated to be Public Law No. 384 of the 78th Congress and contained in the Presidential Proclamation No. 2626 of 11 October 1944. This was said to show no such thing, but merely to give the US authorities the power to arrest a member of a Visiting Force and to hand him over for trial before a court-martial of the Visiting Force, *Hansard*, HC (series 5) Vol. 505, cols. 1609–10; 1613 (27 October 1952), Mr Bing, MP. The Home Secretary challenged this, Ibid. at col. 1621. Both were, in fact, correct. The view taken by the US was that customary international law permitted the exclusive jurisdiction over its own forces of a friendly visiting force in the US and that legislation to establish this jurisdiction was not, in accordance with US law, required, although procedural requirements (such as arrest, attendance of witnesses, imprisonment in the US) were; see Bathurst, 'Jurisdiction over Friendly Foreign Armed Forces: The American Law' (1946) 23 *BYIL* 338. That is why Public Law No. 384 was drawn in the way it was; s. 2 of which was very similar to the 1942 Act (in the UK) in requiring a trial in open court, to take place promptly and at a reasonable distance from the place where the offence was alleged to have been committed. See also S.R. & O., 1945/75, concerning the imprisonment or detention of members of the British armed forces following court-martial by their own Service to be served in US prisons.

[34] There were, no doubt, considerable practical problems, given that the trial by the US military authorities was to be held within a reasonable distance from the place where the offence was alleged to have been committed, especially if the offence was committed by servicemen on leave within the UK. Lord Atkin had pointed out some of these practical difficulties in his letter to *The Times,* see n. 28 above. See, however, the discussion on waiver of (US) jurisdiction, *Hansard*, HL (series 5) Vol. 124, col. 66 (29 July 1942), where the Lord Chancellor stated that this was 'a most unusual proposal: one which would never be justified or tolerated except under conditions of war.'

[35] See (n. 23), para. 10.

[36] Along with the Allied Forces Act 1940.

[37] *The Times* (1946) 23 February.

[38] See Chapter 41.

[39] S. Duke, *United States Military Forces and Installations in Europe* (OUP, 1989) 293.

[40] Ibid. 292.

(RAF) it was agreed that the 'RAF would prepare four or five … bases by mid-1947 for use by US bombers in time of emergency'.[41] By July 1947 rotational tours to these bases in England by heavy US bombers had begun.[42]

In early 1948 the Berlin crisis began, which resulted in a large airlift to that city in June. This event 'provided the pretext for the introduction of further US forces into Britain.[43] By July of that year questions were being asked in the House of Commons about the presence of the US bomber squadrons. The Secretary of State for Air replied that 'Units of the United States Air Force do not visit this country under a formal treaty but under informal and long-standing [sic] arrangements between the United States Air Force and the RAF for visits of goodwill and training purposes'.[44] The Secretary of State went on to say that 'the jurisdictional position of the United States forces in this country is still governed by the United States of America (Visiting Forces) Act 1942'.[45] Throughout 1948 the build up of US forces continued[46] so that by July 1950 the British House of Commons was told by the Prime Minister that 'the only foreign armed forces in this country are American. There are about 1,500 United States naval personnel in this country … and about 10,000 United States Air Force personnel'.[47] By January 1951 the number of US Air Force personnel had increased to 15,000.[48]

The unusual situation of large numbers of the members of a Visiting Force being present in the territory of another State during peacetime and with the consent of the Host State, had therefore come about. This had not arisen in consequence of a treaty between the two States (the UK and the USA) but by way of an informal arrangement at respective air force and naval level. The only status-of-forces agreement to govern jurisdictional matters between them was the United States of America (Visiting Forces) Act 1942, an Act which was to 'operate during the conduct of the conflict against our common enemies and until six months (or such other period as may be mutually agreed upon) after the final termination of such conflict and the restoration of a state of peace'.[49] It was clearly still in existence, largely because the arrangements between the US and the UK were informal and there was no need to seek any further legislative approval. Indeed, since the agreements were

[41] Ibid. 293. See also D. Campbell, *The Unsinkable Aircraft Carrier, American Military Power in Britain* (London, 1984) 28. This was known as the Spaatz-Tedder Agreement.

[42] Ibid. 294. Note the statement by the Prime Minister in answer to a question in the House of Commons that 'By arrangement between the two governments units of the United States Air Force have been stationed in the United Kingdom since the time of the Berlin airlift': *Hansard*, HC (series 5) Vol. 484, col. 208 (21 February 1951).

[43] Ibid. However, in April the Minister of Defence replied to a question in the House of Commons by saying that 'there are no agreements for joint use of bases by British and US Forces but the United States Navy has, in accordance with normal procedure, paid visits to a number of British ports during the past six months': *Hansard*, HC (series 5) Vol. 450, cols. 43–4 (28 April 1948).

[44] *Hansard*, HC (series 5) Vol. 454, col. 123 (written answers) (28 July 1948). The agreement referred to was (presumably) the Spaatz-Tedder Agreement of 1946, the intention of which was to go beyond merely goodwill and training visits. For an account of the discussion in the Cabinet on 28 June 1948, see A. Shlaim, 'Britain, the Berlin Blockade and the Cold War' (1983–4) 60 *International Affairs,* 1, 7. Shlaim comments that the Berlin airlift 'actively solicited a permanent American military presence in the UK as a concrete token of American commitment to the defence of Western Europe' (p. 12).

[45] *Hansard*, HC (series 5) Vol. 454, col. 123 (28 July 1948).

[46] In response to a question from an MP on 1 December 1948 the Secretary of State for Air referred to the answer he gave on 28 July and added, 'Additional facilities have been placed at the disposal of the USAF since that date because of the requirements of the Berlin air lift', *Hansard*, HC (series 5) Vol. 470, col. 186 (written answers) (1 December 1948).

[47] *Hansard*, HC (series 5) Vol. 478, col. 26 (24 July 1950).

[48] Along with 25 Army personnel, *Hansard*, HC (series 5) Vol. 483, col. 897 (31 January 1951).

[49] Exchange of Notes, 27 July 1942, para. 10, scheduled to the United States of America (Visiting Forces) Act 1942, although the Act itself did not contain any provision for its expiry.

informal and did not possess the status of a treaty there was no requirement to disclose them to Parliament[50] unless members of Parliament sought answers to specific questions.

The situation was highly unsatisfactory. As it has been shown, the jurisdiction of the civil courts of the UK had been ousted in respect of all crimes committed by US service personnel, whatever the circumstance of the commission of the crime. This arrangement had been negotiated during the course of World War II at a time when the UK was hardly in a strong bargaining position. It could not be said to represent the status of Visiting Forces under customary international law in peacetime. Indeed, the other major peacetime treaty then is existence was the 1947 US–Philippines Agreement on Military Bases[51] granting exclusive jurisdiction to the US military authorities for offences committed on the bases, but not otherwise.

By 1951 public attitudes, both in Europe and elsewhere, to the stationing of the armed forces of one state in the territory of another had changed. What might have been accepted in wartime would not be accepted in peacetime. A member of Parliament might well be reflecting the views of a number of his constituents when he described the US armed forces' presence in the UK as a 'humiliating occupation'[52] but since collective self-defence was the lynchpin of the NATO Treaty of 1949, public attitudes would just have to change. The nature of the defence task had changed from the defence of the UK or of the US to the defence of Western Europe.[53] What was likely to be of much greater concern in this changed world was the possibility of public resentment towards the members of a Visiting Force who (as in the United States of America (Visiting Forces) Act 1942) had immunity from the local criminal law, or where there were not reciprocal arrangements between the armed forces of the Sending and Receiving States.[54]

Status-of-forces agreements prior to 1951 had dealt almost entirely with the rights of a Visiting Force to administer its disciplinary proceedings in the Receiving State[55] and as to jurisdiction over criminal offences. All other matters, such as claims for compensation in respect of torts, had been left to be resolved by administrative action.[56] In the UK, a US

[50] The Ponsonby rule (see *Hansard*, HC (series 5) Vol. 171, col. 2007 (1 April 1924)) requires treaties to be laid before Parliament for 21 days prior to ratification by the Crown. This arrangement was considered to be unsatisfactory, see *Third Report from the Defence Select Committee,* 1997/98, *NATO Enlargement,* HC Paper 469, para. 106. The courts of law saw the decision to invite US forces into the UK as a non-justiciable matter and one within the prerogative of the Crown, *Chandler* v. *Director of Public Prosecutions* [1964] AC 763.

[51] (1949) 43 *UNTS* 272 (Art. XIII); See also G. Tanham and A. Bernstein (eds.), *Military Basing and the US/Soviet Military Balance in Southeast Asia* (New York, 1989) 120.

[52] *Hansard*, HC (series 5) Vol. 483, col. 897 (31 January 1951). This view was not universal. Another MP stated 'Is it not better to have Allied Forces in this country than enemy armed forces?' *Hansard*, HC (series 5) Vol. 478, col. 27 (24 July 1950). For the importance of maintaining good relationships between the US forces and the UK population see *Hansard*, HL (series 5) Vol. 183, cols. 356–78 (8 July 1953).

[53] See the debate on the air estimates, *Hansard*, HC (series 5) Vol. 513, col. 132 (24 March 1952), where Mr Henderson MP stated: 'Surely we must look at the combined air defence system, including as it does both the Royal Air Force and the American Air Forces in this country and in Europe, and not argue that if we took them separately they are woefully inadequate.'

[54] Hanks in Tanham and Bernstein (eds.) (n. 51 above) 120 commented that 'in the Philippines, it [exclusive jurisdiction on the part of the US forces] became a lightning rod attracting escalating political confrontation, particularly after the United States joined the North Atlantic Treaty Organization and subscribed to "status of forces" agreements, which eliminated such restrictions on national sovereignty'. The grant of exclusive jurisdiction to a visiting force was described in the UK Parliament as 'a very humiliating experience for this country to concede', *Hansard*, HC (series 5) Vol. 505, col. 1084 (23 October 1952).

[55] The Visiting Forces (British Commonwealth) Act 1933 was a good example of this and was intended for peacetime (as well as wartime) application.

[56] For an excellent discussion of the principles of immunity for civil claims, see J. Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law* (Dordrecht, 1992) 207–9; T. Meron, 'Some Reflections on the Status of Forces Agreements in the Light of Customary International Law' 6 *ICLQ* (1957), 689, 694.

Claims Commission existed to which those British citizens, for example, who were injured in a road accident at the hands of a member of the US armed forces might apply.[57] It was to be expected that such accidents would cause public sympathy for the victims where it might not be obvious that compensation would be payable, unlike the situation where the defendant was not a member of a Visiting Force. So, in December 1952 a member of Parliament asked the Minister of Transport 'if he was aware that three persons were killed and others injured in a recent road accident in which a United States airman was one of the drivers involved, and that at the recent court-martial … this airman stated that he had not been given a copy of the Highway Code, nor told of the British speed limit on heavy lorries'.[58] Since the US Claims Commission was required to deal with cases whether the serviceman was on duty or not, many more British citizens would be likely to find themselves unable to invoke the jurisdiction of the civilian courts in claims for damages than would be likely to be the victims of crime committed by members of the Visiting Force. The desirability for this issue to be determined by treaty was therefore obvious even though it did not possess the same political significance as the jurisdiction of a Receiving State over criminal offences.

Since the NATO Treaty envisaged a long-term arrangement of collective self-defence of a defined area, any status-of-forces agreement would need to reflect the fact that the armed forces of any NATO State may be stationed in any other State during peacetime for, possibly, considerable periods of time. A multilateral treaty, rather than a series of bilateral agreements would for 'psychological' reasons be the only answer and would ensure 'equalization' as between all Sending and all Receiving States.[59] A status-of-forces agreement would therefore have to be as comprehensive as possible. None of the previous agreements offered a precedent and therefore the terms of it would have to be negotiated from the beginning. In some countries, in addition, legislation would be required to give effect to those parts of an international agreement which related to the jurisdiction of the criminal and civil courts.[60] Thus, negotiators would have to bear in mind what their individual parliaments might or might not consider to be acceptable in a peacetime arrangement among friendly States. It might be thought that a long-term agreement which gave one state greater rights than others, or one which extended the categories of individual entitled to the special arrangements of a Visiting Force, or one which had the effect that persons of a Visiting Force were to be tried before a military court (of their own State) whereas members of the armed forces of the Receiving State would, for similar acts, be tried in the civilian courts, would require considerable discussion in individual legislatures if the 'constitutional position of our courts of justice and the rights and liberties of the public'[61] were to be safeguarded.

[57] *Hansard*, HC (series 5) Vol. 483, col. 1342 (5 February 1951).

[58] *Hansard*, HC (series 5) Vol. 509, col. 117 (written answers) (15 December 1952). The Minister of Transport had, some eight months previously, stated that the US authorities had arranged for such instruction and that the policy was now to employ British civilian drivers so far as is practicable', *Hansard*, HC (series 5) Vol. 500, col. 21 (written answers) (5 May 1952). The driver of the lorry was acquitted before a US court martial of manslaughter, *Hansard*, HC (series 5) Vol. 505, col. 1595 (27 October 1952).

[59] Lazareff, (n. 3) 163.

[60] Including rights of arrest and detention for limited periods. The US Foreign Relations Committee was told by the then Under Secretary of State Walter B. Smith that implementing legislation was not required, *Record*, 7 April 1953, p. 8.

[61] *Hansard*, HC (series 5) Vol. 505, col. 1643 (27 October 1952), speech of the Home Secretary during the passage of the Visiting Forces Bill. See also the case of Mr William Cobb, who was arrested at his place of work by US servicemen on a 'spy-hunt exercise'. Mr Cobb, 'an honest, ordinary, law-abiding British citizen was marched with his hands above his head to another building. He was then searched and told that if they found

Given the multilateral nature of the negotiations[62] which led to the 1951 Status-of-Forces Agreement it was virtually inevitable that legislatures in the individual countries would be faced with a *fait accompli.* They could not, in reality, renegotiate what was, in fact, a compromise[63] solution to the issue of jurisdiction. Neither could they hold up the passing of legislation since in those countries where legislation was required it had to be in place before the executive arm of government could ratify the 1951 Agreement. Since the members of most parliaments would have been in favour of a common defence policy, as set out in the NATO Treaty, ratification of the Agreement was seen as an imperative. In reality, therefore, individual legislatures could tinker at the edges[64] of the Agreement but could do little else, despite the high-sounding ideals of protecting the rights and liberties of the subject or safeguarding constitutional rights.

In the US Senate, Senator Bricker argued for exclusive jurisdiction on the part of the Sending State, relying upon the judgment of Marshall CJ in *The Schooner Exchange* v. *McFadden* case as support for this proposition. Using an example of a French soldier in Richmond who kills a citizen of Virginia, his argument can be summed up in the following passage: 'Americans in Richmond will gladly turn over the French soldier to his commanding officer when they realize that Americans in Marseilles will thereby be kept out of the hands of a Communist judge.'[65] He saw his role as to 'protect … American boy[s][66] … who have[s] been drafted, called from their homes and sent abroad[67] … who today are being tried for crimes in foreign courts where cruel and unusual punishments may be inflicted upon them'[68] and who 'may be incarcerated away from [their] homes … family and … friends'[69] under trial procedures that do not

anything he would be shot. Rifles were pointed at his back all the time. He was then ordered to sit on the grass, and one man guarding him was told to shoot him if he moved. That is what can happen when we have American troops performing manouvres in this country' (Mr Fletcher, MP, *Hansard*, HC (series 5) Vol. 505, col. 1056 (22 October 1952)).

62 The first draft of the Agreement was prepared by the US Department of Defense in 1950, *Record of the Foreign Relations Committee*, 7 April 1953 at 13. Mr Phleger (Legal Advisor, Department of State) told the Foreign Relations Committee, 'I have no doubt that when the negotiators sat down, the objective which the US negotiators had was to get the maximum of jurisdiction over its own forces while abroad, tempered, however, by the realization that if they acquired that abroad they would have to grant it in the United States.' General Bradley, Chairman of the Joint Chiefs of Staff, in his statement to the Committee recognized that the Agreement did not 'contain every single right and exemption desired by the armed services from the point of view of a sending state. This is, of course, because it is a multi-lateral treaty, and also because it is designed to balance the rights of each state, both as a sending state and a receiving state,' ibid. 34. For a detailed account of the negotiations of the Agreement, including summary records of meetings, see Joseph M. Snee, NATO *Agreements on Status: Travaux Preparatoires.* International Law Studies, Vol. LIV, (1961, Naval War College). See also Lazareff, (n. 3) Ch. 1; G. Draper, *Civilians and the NATO Status of Forces Agreement* (Leyden, 1966) 18–21, 44–6 (who discusses the different views of the UK and the US over whether civilians should be included in the Agreement). For a precedent agreement, see the Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence (signed in Brussels) 1949, UKTS No. 1 (1949), Cmnd. 7599. For its significance see Snee (above) and Lazareff, (n. 3) at 64.

63 *Hansard*, HC (series 5) Vol. 505, col. 564 (17 October 1952), speech of the Home Secretary. Sir Vincent Evans, legal adviser to the UK Delegation to the UN, commented that the NATO SOFA 'like all international agreements it represents a compromise between conflicting interests, and is never completely satisfying to anyone,' cf. 'Jurisdiction Over Visiting Forces and the Development of International Law', *Proceedings of the American Society of International Law*, Vol. 52 (April 1958), 174, 181.

64 Cf., e.g. the use of the term 'arising out of and in the course of his duty' in s. 3 (1) (a) of the Visiting Forces Act 1952 and the expression actually used in Art. VII (3) (a) (ii) of the 1951 Agreement. For the debate on this phrase see *Hansard*, HC (series 5) Vol. 505, cols. 1159 *et seq.* (22 October 1952).

65 *Record*, 7 May 1953, 4668.

66 Senator Bricker might also have referred to the civilian component and dependents.

67 *Record*, 7 May 1953, 4671. 68 Ibid. 4672. 69 Ibid. 4673.

comply with US standards'.[70] The Agreement was, however, ratified with reservations[71] on 15 July 1953.

In the UK, the Visiting Forces Bill 1952, like the United States of America (Visiting Forces) Act 1942, was rushed through Parliament. It was given its second reading[72] on 17 October and concluded all its stages in both Houses of Parliament on 27 October. It received the royal assent three days later. For a Bill that was described in Parliament as 'most revolutionary',[73] 'difficult',[74] and 'with far-reaching consequences'[75] this speed of passage, during peacetime, may be considered to be unusual, especially when it is noted that it did not come into force until 12 June 1954.

The main issue that worried members of Parliament was reciprocity with the USA. An amendment was tabled, the effect of which, if passed, would have been to ensure that the Act would not apply to any state until reciprocal arrangements had been made by the government of that country.[76] This was, in reality, designed to ensure that the USA did not receive the benefits of the Act in the UK without giving reciprocal benefits to UK forces in the USA. The fact that there would never be anywhere near the same number of UK forces in the USA compared with US forces in the UK showed that the issue was one of principle. One member urged the Home Secretary to 'stand up to the United States of America in this matter',[77] another commented 'Let us have reciprocity, and not go on with legislation until we do.'[78] Although there was considerable doubt expressed by some members as to whether it would be constitutionally proper for the USA to grant a reciprocal arrangement[79] the Home Secretary was prepared to go so far as to say that he 'hoped to get reciprocity'[80] and that he would give an undertaking to await reciprocal arrangements with other countries except the USA'.[81]

Other main challenges to the Bill included proposals to exclude the civilian component from the privileges of a member of a Visiting Force[82] and to deny the primary right to the Visiting Force if a crime was committed against a British subject, even if it was committed on duty.[83] The argument in favour of the former proposal was couched in terms of 'why in the world should we have to [cede jurisdiction] in the case of a civilian employed by the force?'[84] and 'why on earth should such jurisdiction be extended to a vague indeterminate, indefinite body of civilian aliens who accompany such forces?'[85] As for the second

[70] Ibid. 4674. Senator Bricker's (and other) comments on the floor of the Senate led to the matter being referred back to the Foreign Relations Committee on 12 June 1953 for a supplementary hearing since it was feared that the two-thirds majority required for ratification might not be attained. Senator Bricker had argued that the decision of the US Supreme Court in *The Schooner Exchange* case, supported his case concerning exclusive jurisdiction on the part of the Sending State but this case had not been discussed by the Foreign Relations Committee.

[71] These were that the Agreement did not constitute a precedent and that a commanding officer may ask for a waiver of jurisdiction if he was satisfied that an accused would be in danger of a denial of the constitutional rights he would enjoy in the USA.

[72] This is the occasion of the first opportunity to debate a Bill. For the committee stage in the House of Lords, see *Hansard*, HL (series 5) Vol. 177, col. 1244 (17 July 1952).

[73] *Hansard*, HC (series 5) Vol. 505, col. 606 (17 October 1952). [74] Ibid. col. 577.

[75] Ibid. col. 585.

[76] Ibid. col. 1054 (22 October 1952). The amendment was put to a vote and was defeated by 154 to 164 votes.

[77] Ibid. col. 1070, Mr Bing, MP. [78] Ibid. Mr Silverman MP.

[79] The Home Secretary responded, 'I cannot believe that [the previous government] signed an agreement which they knew, or even suspected, could not be given effect to by the other signatories' (ibid. col. 1110).

[80] *Hansard*, HC (series 5) Vol. 505, cols. 1081 and 1087. [81] Ibid. col. 1586.

[82] Ibid. col. 1149. The 'United Kingdom delegate [to the working group preparing what became the 1951 Agreement] presented a strong argument against including civilians within the scope of the jurisdictional provisions in the Agreement' (Draper, n. 62) 45–6.

[83] Ibid. col. 1158. [84] Ibid. col. 1150. [85] Ibid. col. 1152.

proposal, it was suggested that the Bill went further than the 1951 Agreement itself and that there was a significant difference between 'in performance of official duty' (the 1951 Agreement) and in the course of duty (the Bill).[86] Both proposals were defeated.

The Visiting Forces Act 1952 applies those parts of the 1951 Agreement which affected the UK legal system, in a similar (although by no means identical) way to that adopted by other states. Thus, it defines the procedure by which a state can be classified as a Visiting Force,[87] permits the exercise of disciplinary powers by a Visiting Force,[88] prohibits double-jeopardy,[89] deals with arrest under UK law,[90] prohibits any claim in the British courts relating to the terms of service of a member of a Visiting Force or of the civilian component,[91] provides restrictions on the powers of a coroner to hold inquests where the deceased person had a relevant association with the Visiting Force or a member of such force is detained in respect of a charge of homicide,[92] and the procedure for making civil claims.[93] All other obligations under the 1951 agreement can be implemented by administrative action.[94] The 1952 Act has been amended subsequently, on several occasions.

The Act *appears* to give *exclusive* jurisdiction to the Visiting Force in respect of offences against UK law[95] where the primary right under Art. VII (3) of the 1951 Agreement rests with that force. The reason given in Parliament for the absence of any reference to a primary right was that 'our courts have an inherent right to deal with offences in the United Kingdom by whomsoever committed'.[96] The British courts would, however, have the right to try a member of a Visiting Force, or of the civilian component, if the competent authorities of the Visiting Force do not propose to deal with a particular alleged offender.[97] It is very unlikely that a breach of UK law will not also be a breach of the military law of a Visiting Force[98] and it may be that, in practice, jurisdiction is *de facto,* but not *de jure*, exclusive.

[86] Ibid. cols. 1158 *et seq*. The point was made graphically in the following passage, 'one of the consequences likely to flow was that under this Bill an English girl ravaged by an American or other foreign serviceman in this country might find that she had no chance of bringing the man to justice in a British court, but would have to have that case tried before an American or other court-martial' (col. 1160). The strength of feeling is, perhaps, to be judged not only by the use of this particular example but the choice of the word 'ravaged'.

[87] Section 1. An amendment was introduced in the House of Lords to ensure that the government, without any further approval from Parliament, did not 'introduce into this country the forces of some other State not a party to the North Atlantic Treaty at all': *Hansard*, HL (series 5) Vol. 177, col. 1247 (17 July 1952). See now section l (2) and statutory instruments expanding the number of countries who may send a Visiting Force; the Visiting Forces and International Headquarters (Application of Law) Order 1995, S.I. 1965/1536, as amended by the 1998 Order, S.I. 1998/253. It has been altered from time to time.

[88] Section 2. [89] Section 4.

[90] Section 5. See also s. 13 dealing with the arrest of deserters or those absent without leave.

[91] Section 6. [92] Section 7.

[93] Section 9. See also the statement of the Lord Chancellor, *Hansard*, HL (series 5) Vol. 177, cols. 1248–52 (17 July 1952).

[94] See, for example, the obligation to consider a waiver of jurisdiction, Art. VII (3) (c) of the 1951 Agreement. Many of the other provisions of the Agreement may be implemented by this process.

[95] Section 3.

[96] *Hansard*, HC (series 5) Vol. 505, col. 566 (17 October 1952), the Home Secretary in introducing the Bill. He went on to say, however, that it was the government's intention 'that the British courts should exercise their jurisdiction in the normal way in the cases in which they have the primary right'.

[97] Section 3 (3) (a). See also Art. VII (3) (c) of the 1951 Agreement.

[98] It is, for instance, common for the military law of States to contain a 'general sweeping up' section to cover acts or omissions that are prejudicial to good order and military discipline. See, for example, Art. 134 of the Uniform Code of Military Justice 1950 (US) and s. 19 of the Armed Forces Act 2006 (UK); s. 69 of the Armed Forces Act 1968 (Kenya); s. 77 of the Armed Forces Act 1962 (Ghana); ss. 69 and 70 of the Army Act 1950 (India). Dependents and members of the civilian component are unlikely, however, to be subject to this type of provision. Compare the position of US civilians, who by the law of the US may not be tried for any offence by military courts or procedures, *McElroy* v. *US ex rel Guagliardo* 361 US 281 (1960); *Grisham* v. *Hagan* 361 US 278 (1960); *Kinsella* v. *US, Ex Rel Singleton* 361 US 234 (1960).

This may then lead some to think that members of a Visiting Force have immunity from the law of the Receiving State, which in turn may fuel resentment, even if the position is reciprocal in the law of the Sending State. Occasionally such views are aired in Parliament. Thus, in 1984 a member[99] of the UK Parliament stated that 'this is not the same form of total immunity as that enjoyed by diplomats, but it is a kind of immunity nevertheless'.[100] He drew attention to the fact that '1,123 offences committed by foreign servicemen in Britain could have been subject under the Act primarily or exclusively [sic] to foreign jurisdiction'[101] and that 'visiting forces in Britain enjoy a greater degree of immunity than in other NATO states'.[102]

It would be strange indeed if a number of States had become party to the 1951 Agreement, with its clearly worked-out rules as to criminal jurisdiction, and then had implemented these rules in such a way as to confuse concurrent with exclusive jurisdiction. It is suggested that the UK Visiting Forces Act 1952 does no such thing. Jurisdiction is concurrent in respect of those offences set out in Art. VII (3) (i) and (ii).[103] Should the UK prosecuting authorities certify that a person covered by the Act is not to be dealt with by the law of the sending state then that person may be tried in the UK courts. This is but one way to achieve the principle outlined in Art. VII (3) (c), which is wide enough to cover cases both where the sending state decides not to deal with the case and also where the receiving state requests a waiver of jurisdiction. It is to be contrasted with the United States of America (Visiting Forces) Act 1942, which did confer exclusive jurisdiction on the US military authorities. In that Act the exclusivity of the jurisdiction could only be waived if the government of the US made representations to a British secretary of state who was then given power to direct that the exclusive jurisdiction on the part of the US should not apply.[104]

V. The Warsaw Pact Arrangements

A superficial examination of the status-of-forces arrangements made under the Warsaw Pact of 1955[105] would suggest that they were similar to those established under the NATO Treaty. There were, in fact, two main differences of principle. The first was that it was never intended that non-USSR forces would be stationed in the USSR,[106] and the second that the agreements were bilateral and not multilateral. There could, therefore, be significant

[99] Mr Ashdown, later to become leader of the Liberal Democrat Party.

[100] *Hansard*, HC (series 6) Vol. 109, col. 197 (17 July 1984).

[101] Ibid. col. 198. This was the latest figure available from the year 1980–81. No figures are kept as to how many of these offences were tried by the Visiting Force, ibid. The Ministry of Defence, in a Memorandum of 1 April 1996, stated that 'cases involving members of visiting forces are not identified separately and … no details of such cases are collected centrally', *Special Report from the Select Committee on the Armed Forces Bill 1995–96,* HC Paper (1996) 143, 236.

[102] See (n. 100) at col. 199. Mr Ashdown also went on to say 'In 1980, a secret document leaked to the press revealed that certain NATO countries would have to sign an emergency agreement to give local United States commanders certain immunities from their law before United States reinforcements could be deployed in Europe. Britain was the only major NATO power not required to give such an undertaking, presumably because it was considered that the Visiting Forces Act 1952 and the International Headquarters and Defence Organisations Act 1964 already gave such immunities.'

[103] Cf. J. Woodliffe (n. 56) 180, who writes, 'The Act does, nevertheless, create an immunity from jurisdiction in respect of alleged offences of the type listed in Art. VII 3 (a) (i) [sic] of the NATO SOFA.' He then goes on to refer to s. 3 (3) (a) of the 1952 Act.

[104] Section 1 (1) and proviso. The 'waiver' could only be made at governmental, as contrasted with prosecutorial, level.

[105] Treaty of Friendship, Co-operation and Mutual Assistance (Albania, Bulgaria, Hungary, German Democratic Republic, Poland, Romania, USSR, Czechoslovakia) 219 *UNTS* 3 (English translation at pp. 26 *et seq.*); 49 *AJIL* Suppl. 194 (14 May 1955).

[106] See Chapter 45.

differences in each agreement, which might reflect 'political realities, historical factors, and the military needs of the service chiefs in Moscow in planning military operations in Europe'.[107] In respect of criminal jurisdiction, the agreements were not dissimilar to their NATO equivalent. They generally provided that the authorities of the Receiving State were to apply the criminal law of that State to criminal acts committed by members of the Soviet forces or members of their families. This would not apply where the offence was committed against the USSR, Soviet forces, or against their family members or the criminal acts were committed during the discharge of official duties. In these cases Soviet law would apply.[108] This may be contrasted with the system of primary rights under the NATO SOFA, where jurisdiction is concurrent. A member of the Soviet armed forces, who committed an off-duty offence against the criminal law of one of the states with which the USSR had an agreement could, in consequence, be tried by the civilian courts of that State, in much the same way as his NATO counterpart.[109]

VI. Challenges Posed by Post-Cold War Types of Military Operations

The 1951 Agreement envisioned the armed forces of NATO parties being based in each other's territory within the NATO area. It has now become more common for these forces to operate outside the original NATO area, for training, humanitarian missions, as part of a UN (or EU) mandated force or, indeed, for specific operations, as in Afghanistan from 2001 as part of ISAF. In addition, the Partnership for Peace (PfP) initiative led, ultimately, to an expansion of NATO itself, but it remains as the governing instrument for those states party it but which remain outside the NATO infrastructure.[110]

Where the armed forces of one country are present with consent in the territory of another some form of status-of-forces agreement will need to be concluded.[111] A suitable precedent may be found in any of the aforementioned instruments,[112] a UN status-of-forces agreement[113] or elsewhere. The NATO Status of Forces Agreement itself often provides a

[107] D. Holloway and J. Sharp (eds.), *The Warsaw Pact: Alliance in Transition?* (London, Macmillan, 1984) 45. A brief account of these status of forces treaties and some of the differences among them can be found in F. Beer, *Alliances: Latent War Communities in the Contemporary World* (Texas, 1970) 160–2. For the numbers and composition of Soviet forces in Eastern Europe see, G. Holden, *The Warsaw Pact* (Oxford, Blackwell, 1989), 165.

[108] Agreement on the Legal Status of Soviet Troops Stationed in Poland (17 December 1956); Agreement Concerning Questions Connected with the Presence of Soviet Forces on East German Territory (12 March 1957); Agreement on the Legal Status of the Soviet Forces Present on the Territory of the Hungarian People's Republic (27 May 1957). English translations may be seen in (1958) 52 *AJIL* 221, 210, 215, respectively.

[109] For a discussion of the 'comparative simplicity of the jurisdictional formulae employed in [these Agreements]' see Draper (n. 62) 164.

[110] Agreement among the States Parties to the North Atlantic Treaty and the other States Participating in the Partnership for Peace regarding the Status of their Forces, 19 June 1995, and the Additional Protocol of the same date, UKTS (1996), Misc. No. 12, Cm. 3237; Agreement on the Status of Missions and Representatives of Third States to the North Atlantic Treaty Organisation, *UKTS* (1996) Misc. No. 2, Cm. 3137.

[111] For an excellent discussion of the break-up of the USSR and the continued presence of troops in Eastern European States, see Woodliffe, 'The Stationing of Foreign Armed Forces Abroad in Peacetime' 43 *ICLQ* (1994) 443–8.

[112] Despite the reservation made upon ratification by the US Senate of the 1951 Agreement. See, for example, the Exchange of Notes between the Government of the UK and the Government of Belize concerning the presence in Belize after Independence of UK armed forces, (1982) UKTS 17, Cmnd. 8520; Exchange of Notes between the government of the UK and the Sultan of Brunei (1984) UKTS 31, Cmnd. 9207.

[113] See, for example, the Agreement between the UN and the Government of Cyprus Concerning the Status of the UN Peacekeeping Force in Cyprus (31 March 1964), in R. Higgins, *United Nations Peacekeeping, Documents and Commentary,* Vol. 4, *Europe 1946–79* (OUP, 1981) 212, which grants exclusive jurisdiction to the national contingents over criminal offences committed by their members in Cyprus. For status of forces agreements

precedent,[114] but this will depend largely upon the nature of the negotiations between the states concerned, the length of time the sending state's forces will be in the receiving state, and the nature of the operation. The practical position of many States deploying their armed forces personnel abroad may be similar to that expressed by a UK government minister that the aim in negotiating a status-of-forces agreement was:

> normally to secure arrangements which allow the UK service authorities to exercise exclusive jurisdiction over UK personnel but this cannot always be achieved, either because the receiving state cannot make such concessions for legal reasons or because the authorities are not prepared to do so. As a minimum we would aim to secure concurrent jurisdiction, as in the NATO SOFA, but there have been variations which allowed exclusive UK jurisdiction in military exercise areas or over offences committed in the course of duty.[115]

The main difference between these arrangements and the NATO, or other treaty-based status-of-forces agreements is that these new arrangements may be in the form of a memorandum of understanding and are kept within the absolute control of the executive arm of government and may not, as result, be subject to debate in a legislature.[116]

The importance to a national contingent of securing a status-of-forces agreement, in some form, prior to deployment cannot be overstated. A wide variety of issues will need to be agreed, ranging from the procedures for civil claims, the importation and use of military equipment and so on. Should such an agreement grant exclusive jurisdiction to the sending state, that state can be confident that its rules of engagement will reflect its national law; a greater degree of certainty for its soldiers can then be possible. The alternative is to conclude that soldiers of the sending state who use excessive force in carrying out their mission could be liable to the law of the sending state but also to the criminal law of the receiving state.[117]

The end of the cold war period provided great opportunities, but also great challenges, for the UN in mandating peace operations of various forms. Rather than having to deal solely with states, it found itself having to grapple with the significant activities of 'warlords, thugs … and all sorts of people who … couldn't have cared less about the Charter or the Security Council'.[118] In an attempt to make the UN better able to meet some of these

in respect of UNEF and ONUC see Siekmann, *Basic Documents on United Nations and Related Peacekeeping Forces* (Leyden: Nijhoff, 1985). See also the Agreement Between the Federal Republic of Yugoslavia and the North Atlantic Treaty Organization (NATO) Concerning Treaty Arrangements for Peace Plan Operations; Agreement Between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organization (NATO) Concerning the Status of NATO and its Personnel; Agreement Between the Republic of Croatia and the North Atlantic Treaty Organization (NATO) Concerning the Status of NATO and its Personnel, (1995) *ILM* 106, 104, and 102 respectively. In each, exclusive criminal jurisdiction is given to the respective national elements in respect of military personnel. Civilian personnel (including those locally hired) are not subject to this arrangement and practical problems may well arise in consequence.

[114] See, for example, the EU SOFA, 2003/C 321/02, *Official Journal of the European Union*, C321/6, (21 December 2003); A. Sari, 'The European Union Status of Forces Agreement (EUSOFA)' 13 *JCSL* (2006), 353.

[115] Special Report from the Select Committee on the Armed Forces Bill 1995/96, HC Paper 143, p. 236, a view which appears still to be the case, see *Hansard*, HL, Vol. 768, col. 2418 (11 February 2016).

[116] See the *Second Report of the Defence Committee* (1997–98) HC Paper 521, para. 44, which comments: 'when British paratroops exercised last autumn [1997] in the Ukraine, that was the subject of a bilateral memorandum of understanding designed specifically to deal with the circumstances of that exercise'. An alternative to a treaty arrangement is to make an agreement under a Treaty power, see the Agreement under Art. IV of the Mutual Defence Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Areas and the Status of United States Armed Forces in Korea, 9 July 1966, 674 *UNTS* 163.

[117] See Simpson, *Law Applicable to Canadian Forces in Somalia 1992/93,* a Study prepared for the Commission of Inquiry into the Deployment of Canadian Forces in Somalia (1997, Canadian Government), Ch. 4.

[118] B. Urquart and M. Glennon, 'The Role of the United Nations in a Unipolar World' 19 *New England Journal of Public Policy* (2005), 177, 180.

challenges, the Brahimi Report in 2000 had recommended a number of practical solutions to try and ensure the effectiveness of UN Peace operations,[119] including a presumed authorization on the part of UN peacekeepers to prevent a breach of human rights affecting the civilian population.[120] This theme, of protecting the civilian population during a UN peace operation, has been constant since then, but to it has been added an additional concern, that of protecting individuals from the possibility of harm caused by some individual UN peacekeepers. This has usually taken the form of sexual exploitation, largely due to the 'inherently unequal power dynamics' between civilian and peacekeeper.[121] In respect of a troop-contributing state, the power of the UN to enforce a 'zero-tolerance policy' of any form of sexual exploitation (along with any other criminal act committed) is hampered by the political reality of having to accept that criminal and disciplinary jurisdiction over its members will usually remain with that state.[122] Anticipating the possibility that sexual exploitation may occur it seems sensible to include procedures to be followed as between the troop-contributing state and the UN, from the moment an allegation is made until a final report on individual cases is transmitted to the UN.[123]

The events of 11 September 2001 ('9/11') led, ultimately, to separate coalitions of States conducting military operations in Afghanistan, from 2001, and in Iraq from 2003. In both instances there was initially no government in being to agree a status-of-forces agreement, but on the formation of governments in the respective states, agreement was reached. At all times it was clear that exclusive criminal jurisdiction over its own armed forces was held by the Sending State.[124] That no status-of-forces agreement between the US and Iraq could be reached in 2011 led to the termination of the deployment of US and NATO states in Iraq.[125]

The protection of human rights of members of the armed forces of a sending state was a key issue in the debates in the respective legislatures of the UK[126] and the USA in 1952 to 1953, although the term 'human rights' was rarely, if ever, used. Instead, the emphasis (in

[119] Report of the Panel on United Nations Peace Operations, A/55/305/S/2000/809, 21 August 2000.

[120] Ibid. para. 62.

[121] See Secretary General's Bulletin, UN Doc ST/SGB/2003/13 (9 October 2003), section 3.2(d). 'Sexual exploitation' is defined in section 1; 'A Comprehensive Strategy to Eliminate Sexual Exploitation and Abuse in United Nations Peacekeeping Operations,' A/59/710, (24 March 2005). Issues of jurisdiction were discussed in the 'Report of the Group of Legal Experts on Ensuring Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peace Operations,' A/60/980, (16 August 2006); 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the Secretary-General', A/69/779, (13 February 2015); 'Report of the High-Level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and People,' A/70/95-S/2015/446, (17 June 2015), paras. 282–8.

[122] See also the UN Model Status-of-Forces Agreement for Peace-keeping Operations, (9 October 1990), A/45/594, para. 47(b). For a wide-ranging account see R. Burke, 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity' 16 *JCSL* (2011) 63, who draws attention to the fact that 'the UN does not invariably succeed in negotiating a SOFA prior to the deployment of peacekeepers', 67. The UN may also have to accept that a State will refuse to contribute troops if it cannot obtain a guarantee that individual members of its forces participating in a peace operation will not be handed over to the International Criminal Court. See the position of the US on this issue, D. Fleck, 'Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?', *Journal of International Criminal Justice* (2003), 651, 652.

[123] As well as providing compensation to victims. See the Report of the High-Level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and People,' A/70/95-S/2015/446, (17 June 2015), paras. 282–8. This report also provides its own sanctions against an individual (in the form of loss of allowances and denial of any future participation in such operations) and against the troop-Contributing State.

[124] See generally, P. Rowe, *Legal Accountability and Britain's Wars 2000–2015* (Routledge, 2016), which deals with the exercise of UK criminal jurisdiction over its own military personnel for acts committed in Iraq and Afghanistan, and with claims brought before the UK courts by Iraqi and Afghan civilians.

[125] J. Voetelink, 'Status of Forces and Criminal Jurisdiction' *Netherlands International Law Review* (2013) 231, 233.

[126] In the UK Parliament the issue mainly revolved around the protection of UK citizens from the criminal acts of servicemen of a Sending State. See, however, G. Borrie, 'Courts-Martial, Civilians and Civil Liberties' 32 *Military Law Review* (1969). 35.

the US) was placed on the protection of the 'constitutional rights' of a serviceman abroad and in the UK on his 'civil liberties.' The NATO SOFA itself provides a very basic 'human rights charter' in Art. VII (9) to apply when a member of a Visiting Force is tried by the courts of a receiving state. This is, however, concerned more with the processes of the trial than with fundamental guarantees of a fair trial.[127] A bilateral SOFA may provide an opportunity for a Sending State to agree more specific rights to its servicemen who find themselves under the jurisdiction of the Receiving State. Such a procedure is to be seen in the Agreement made between the USA and the Republic of Korea in 1966.[128] This provides, inter alia, for trial by an 'impartial tribunal composed exclusively of judges who have completed their probationary period' for a 'right of appeal' and for a right not to be subject to trial except under conditions consonant with the dignity of the US armed forces, including appearing in appropriate military or civilian attire.[129] Such a wide-ranging 'human rights charter' could not, in practical terms, be negotiated on a multilateral basis in a SOFA.

It may seem ironic that some Sending States, in particular the UK and the USA, were concerned in 1952 about subjecting their service personnel to the jurisdiction of a Receiving State, in that they might suffer a denial of their basic human rights, only to find that when they exercise their own jurisdiction as a Sending State it was argued that they may be in breach of the human rights obligations of the Receiving State.[130] Art. 1 of the European Convention on Human Rights 1950, for instance, requires High Contracting Parties to 'secure to *everyone* within their *jurisdiction* the rights and freedoms defined in Section 1 of this Convention'.

There is potential for a conflict between the NATO SOFA (or similar agreements) and the 1950 Convention where the Sending State has the primary right of jurisdiction, within the meaning of the former treaty. It is possible to argue that a Sending State, which exercises its primary, or exclusive, right of criminal or disciplinary jurisdiction on the territory of the receiving state, could cause that state to be in breach of its human rights obligations owed to all those (including members of the Sending State) on its territory.[131] Were this to be the case it might prove difficult for a Receiving State to accommodate a status-of-forces agreement, which permits such jurisdiction on its territory by the Sending State. The European Court of Human Rights has, however, established that the exercise by a Sending State of its criminal or disciplinary jurisdiction in these circumstances would not necessarily cause any breach of a human rights obligation to be attributed to the Receiving State.[132] The responsibility would lie fully upon the Sending State.

[127] Contrast may be made with Art. 74 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 12 December 1977, 16 *ILM* (1977), 1391. See also the US Reservation to the NATO SOFA to the effect that a US commanding officer, who considers that a member under his command may be denied his 'constitutional rights' in the courts of a Receiving State should seek a waiver of jurisdiction.

[128] See n. 118, Art. XXII and Agreed Minutes.

[129] There are also terms in the Agreement prohibiting retrospective criminal liability, self-incrimination, cruel and unusual punishments, standing trial whilst unfit, and involuntary confessions.

[130] See generally, G. Draper (n. 62) Ch. 8. This chapter was written prior to the UK's acceptance of the right of individual petition under Art. 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. See also Draper's discussion (at 156) of the problems caused when considering an act that is an offence only against the law of the law of the Sending State, with Art. 5 (1) (c) of the Convention.

[131] The International Covenant on Civil and Political Rights, 1966, Art. 2; the European Convention on Human Rights, 1950, Art. 1.

[132] See, for example, *Martin* v. *United Kingdom* (2007) 44 EHRR 31; *Blagojevic* v. *Netherlands*, Application No 49032/07, (8 November 2007), para. 44; *Djokaba Lambi Longa* v. *Netherlands*, (2013) 56 EHRR SE1, paras. 70–3.

Problems may be caused, however, for a State Party to the 1950 Convention which is requested to hand over a member of its Visiting Force for trial by the Receiving State in the exercise of its primary right to criminal jurisdiction, where the trial processes are incompatible with those set out in the 1950 Convention. The Sending State may be unable to do so, since it will owe Convention rights to its own armed forces members wherever they are serving.[133] To be able to do so the Sending State can only call upon the Receiving State to comply with the Convention, although it is not a party to it. This would suggest that, where there is any doubt about the ability of a potential receiving state to comply with the Convention, the Sending State should try and negotiate exclusive jurisdiction in a status-of-forces agreement. This is, essentially, the reason why Senator Bricker, during the debate in the US Senate on the ratification of the 1951 Agreement, argued for exclusive jurisdiction on the part of the Sending State.

Experience from the participation of States in Iraq and Afghanistan shows that the European Convention on Human Rights 1950 has had the possible effect of making members of the armed forces of a sending state, which, in turn, is a party to the 1950 Convention, more likely to be held accountable for their actions. This is largely due to the obligations under that Convention to investigate possible breaches of Arts. 2 (the right to life) and 3 (the prohibition of torture, inhuman or degrading treatment), which in turn could lead to criminal or disciplinary proceedings against individual members of the force by the Sending State.[134]

VII. Conclusion

The history of the law relating to Visiting Forces reflects a change in the nature of the deployment of military forces outside a State's own territory. Discussion of immunity of members of Visiting Forces tends to concentrate on their immunity from the law of the Receiving State, whereas the member is not immune for criminal conduct, in that he or she remains subject to the law of Sending State.[135] It is in the interests of any Sending State to be able to discipline its own armed forces member, unless it has agreed (as in, for example, the NATO SOFA) to the Receiving State exercising its criminal law over the member.

There are a number of possibilities for dealing with criminal jurisdiction, which States may agree upon, subject to all the circumstances. First, the Sending State may possess exclusive jurisdiction. It has been argued that this has been the more likely case where the Sending State is in a stronger bargaining position than the Receiving State, or than the UN, which wishes to establish a peace operation of one type or another. In discussing this option, Sending and Receiving States are likely to have to consider the following matters of detail. Does the Sending State's law permit it to try members of its own armed forces abroad by its military court for criminal offences, as distinct from purely military breaches? If not, that member will have to be returned to the Sending State for trial. The effect may be that no actual trial takes place, either through a lack of will to do so, or through the difficulty of securing the attendance of victims or witnesses at a trial in the Sending State. Even if a trial does take place, the victim, who may have given a statement to the Visiting Force, but who does not attend the trial, may be totally unaware of any

[133] *Smith* v. *Ministry of Defence* [2013] UKSC 41.

[134] See P. Rowe, (n. 130), at 165–8.

[135] A. L. Goodhart, quoted in N. Bentinck, 'The USA Visiting Forces Act, 1942' 6 *Modern Law Review* (1942), 68, 72, described this as a 'matter of responsibility [of the Sending State] and not of privilege [of the Visiting Force member].'

outcome of the proceedings.[136] Where a statement is given to a third body, such as the UN or a human rights organization, the format of the statement itself may not be admissible in the courts of the Sending State. Again, does the law of the Sending State reach so far as to permit civilians accompanying its Visiting Force (such as specialist engineers or security guards), to be tried by the Sending State's military court sitting abroad, or even by its own courts? A Receiving State would also have to consider whether a Sending State's military court could, under its law, use torture in the investigative process, or sentence a member of its Visiting Force to death, both of which might be quite unacceptable to the Receiving State.

Secondly, the Sending State could, in theory, agree that the criminal process operating in the territory of the Receiving State should apply also to members of the Visiting Force at all times and not merely when acts are committed off-duty. As discussed, this is an unlikely outcome, unless the crime concerned is one recognized by the Receiving State but not by the Sending State. Should the Receiving State request the handing over of a member of the Visiting Force, some form of extradition, or other process, would be needed to be in place on the part of the Sending State to enable it to do so. Whether a Sending State could, for political or other reasons, agree to this is likely to prove problematic.

Finally, States could agree to apportion jurisdiction, whether in the format of the NATO SOFA, a variety of it, or in some other way. Where this occurs, some of the features of the other options discussed will apply, for example, where the Sending State possesses primary jurisdiction or the Receiving State waives its primary right.

The perceived need to protect the rights of the Visiting Force member, on the part of the Sending State, and of the potential victim, by the Receiving State, should any criminal offence be committed by the former, has loomed large in all parliamentary debates, in addition to those taking place in the UN when it is attempting to establish the legal regime to apply during a peace operation. In that case the UN has to be concerned about the nationals of any state in which it is conducting operations.

The ability of states to negotiate, or to agree, over potential conflicts of jurisdiction when Visiting Forces are deployed is the main reason why potential clashes of sovereignty are able to be resolved, generally, in a way acceptable to all parties. It is not therefore hard to explain why the deployment of Visiting Forces remains a fairly common practice, despite a constantly changing political climate.[137]

[136] Even if the UN is informed of the outcome, it is not clear that this information is passed on to the victim. See generally, Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the Secretary-General, A/69/779 (13 February 2015).

[137] The deployment of UK armed forces may be similar to a number of other States in the range of their participation as a Visiting Force. A minister informed Parliament that 'this very day, the UK has more than 4000 military personnel deployed overseas on 20 key operations, in 24 countries worldwide,' *Hansard*, H.C. Vol. 594, col. 485 (12 March 2015).

3

Multinational Military Operations

I. General

Military operations are widely characterized today by their multinational character. This applies as much to activities in the own country as to Visiting Forces abroad, as States are interested in profiting from foreign experience in military training and exercises and using support by Allies and other States when conducting military operations in a foreign country. Multinationality is not only significant in peace operations; it is also essential for day-to-day cooperation within alliances.[1]

Some European States, such as Germany, have incorporated large if not most parts of their national military forces in permanent multinational units (see Section II). Many other States including the US are forming ad hoc military units for specific operations (Section III). The United Nations (UN), North Atlantic Treaty Organization (NATO), and other international organizations are pursuing standby arrangements and high readiness commitments to allow for rapid response (Section IV). In all these situations command and control issues are to be considered (Section V). While there are many different forms of multinational military cooperation, and Sending States will avoid regulating these matters in Status-of-Forces Agreements (SOFAs) with the Receiving State, they are nevertheless relevant for the law and practice of Visiting Forces. Some conclusions will be drawn on the concept of multinational military operations for the North Atlantic Alliance, the European Union and beyond (Section VI).

II. Permanent Multinational Units

Multinational military units are characterized by military-to-military coordination between States. They are not entities with a corporate, political element of their own, nor do they enjoy an independent status distinct from the contributing States. Nevertheless they tend to mark a trend in the larger context of regional security. For this trend also financial considerations may be important. Modernization despite dwindling resources can be facilitated in a multinational context. Multinationality may provide a key for continued participation in military operations at corps level which otherwise would not be possible for various nations. What matters more, however, is a new chance to deepen cooperation and further develop mutual understanding of the daily interests and requirements of the participating States.

Since 2003, the North Atlantic Alliance is equipped with the NATO Response Force as an instrument for rapid reaction in crises. National contributions are made available on the basis of long-term rotation plans. At the NATO Summit in Wales (2014) a Very High Readiness Task Force was agreed which can be deployed within hours. Since 2004 the European Union, too, has formed multinational Battlegroups at battalion level. Beyond

[1] A recent example for NATO is the decision to establish, beginning in 2017 and underpinned by a viable reinforcement strategy, four battalion-sized multinational battlegroups on a rotational basis to secure an enhanced forward presence in Estonia, Latvia, Lithuania, and Poland (see para. 40 of the Warsaw Summit Communiqué (July 2015)).

such short-term cooperation, multinational military units may lend a new quality to the European unification process by helping make it irreversible in the fields of security and defence. Arts. 42–46 of the Treaty on European Union (TEU)[2] provide for a common security and defence policy which shall include the progressive framing of a common Union defence policy. Protocol No. 10 to the Treaty on the Functioning of the European Union (TFEU)[3] envisages in Art. 1 (a) the development of defence capacities through 'national contributions and participation, where appropriate, in multinational forces'. While pooling of military capabilities is cost-effective and allows for joint military training, this process may also contribute to the continuity and predictability of international relations. It will promote a common security and defence identity which in a very distinct way may increase the security of the nations involved. Although such trends are still unique in Europe today, they might well prove significant for other regions of the world. This section informs on present agreements concerning permanent multinational units (1) and describes the status of the military and civilian personnel involved (2).

1. Present agreements on multinational units

The concept of permanent multinational units manifests itself especially clearly in the Bundeswehr. For several decades, the German Air Force has increasingly developed multinational cooperation, a fact reflected in its daily training programmes, doctrine, and Alliance integration. Much of the Air Force (fighter wings, surface-to-air missile units, and air combat operations centres) is already subordinate to NATO commanders in peacetime, receiving operation orders from the integrated NATO structure on the basis of NATO operation plans. Close international cooperation is manifested today in the European Air Transport Command in Eindhoven, the Netherlands, where military air transport capabilities of France, Germany, Italy, Spain, Netherlands, Belgium, and Luxembourg are effectively pooled.[4] The German Navy permanently contributes two destroyers or frigates as well as a mine countermeasures unit to NATO's Standing Naval Forces. Since 1996 a German-French Naval Force is also operating on a temporary basis. The highest amount of multinationalization has been reached in the German Army: with only minor exceptions all major formations of the German Army are multinational today.

In the German case, three different models of multinational units have been developed simultaneously. First, two German/US corps follow the so-called *lead nation model*, with the US and Germany taking turns to perform command functions and occupy key positions. The second, or *framework,* model is illustrated by the Allied Command Europe (ACE) Rapid Reaction Corps, in which the British Forces provide the framework, that is, command, control, administration, and logistic support of the headquarters and define procedures. By contrast, the framework is provided by the Bundeswehr for the Joint Air Power Competence Centre (JAPCC) based in Kalkar. The Danish-German Corps LANDJUT, established in 1962, was the first formation organized according to the third model, *deepening integration*. The German-Netherlands Corps, the European Corps, and the Multinational Division (Central) have provided an opportunity to further develop and deepen the integration model.

[2] Treaty on European Union (TEU), *Official Journal of the European Union* (26 October 2012), C 326/13-45 (consolidated version).

[3] Treaty on the Functioning of the European Union (TFEU), *Official Journal of the European Union* (26 October 2012), C 326/47-390 (consolidated version).

[4] See <http://eatc-mil.com>.

The European Corps (Eurocorps), headquartered in Strasbourg, France, consists of personnel from five nations (Belgium, France, Germany, Luxembourg, and Spain). It attained operational readiness in October 1996. One of its core elements is the Franco-German Brigade, which has existed since 1988 and which, in part, is integrated down to company level. The status of the Eurocorps headquarters in Strasbourg and of the formations operating jointly on the territories of each participating State are defined in the 'Strasbourg Convention' of 2004.[5]

The German-Netherlands Corps, with its headquarters in Münster, Westphalia, is a first example of a multinational unit with forces of each participating State stationed on the territory of the partner State. This Corps comprises a German Army division and the major part of the Netherlands Army. In a joint declaration dated 6 October 1997, the respective Ministers of Defence designated the Corps Headquarters in Münster as a Force Answerable to Western European Union (FAWEU), designed to operate in missions laid down in the Petersberg Declaration of the Ministerial Meeting of the Western European Union of 19 June 1992,[6] namely humanitarian missions or evacuation of nationals, peacekeeping missions, and combat force missions for crisis management, including peace-enforcement missions. Principles of cooperation are laid down in the Convention on the German-Netherlands Corps.[7] While command and control remain national responsibilities, the Corps Commander is vested with an 'Integrated Directing and Control Authority'.[8] The HQ has legal authority to contract, hire civilian personnel and pay claims, all from a multinational corps budget and on behalf of the two participating States. Property acquired with common funds is to be considered as owned in common by the Federal Republic of Germany and the Kingdom of the Netherlands. Employment contracts of civilians hired to work at the Headquarters in Münster are governed by German labour and social law.

The LANDJUT Corps had been based in the area of Jutland/Schleswig-Holstein since 1962, with the existing NATO headquarters of the Allied Land Forces Schleswig-Holstein and Jutland (HQ LANDJUT) in Rendsburg being used for command and control. When HQ LANDJUT was disbanded in spring 1999 following the introduction of the new NATO command structure, close Danish-German army cooperation was continued on a trilateral basis, together with Poland, in the Multinational Corps Northeast. This formation was activated in 1999, after Poland's accession to the North Atlantic Treaty. To this end, the governments of Denmark, Germany, and Poland had signed a Convention[9] to define their responsibilities, principles of organization and co-operation in the Corps, and the status of its headquarters in Szczecin. The Danish Division and the 14th (GE) Mechanized Infantry Division (Neubrandenburg) continued to cooperate as they did in the LANDJUT Corps, reinforced by the 12th (PL) Division as a new and equal partner. Permanent deployment in partner countries is restricted to the Danish and German elements of the

[5] Traité relatif au Corps européen et au statut de son Quartier général entre la République française, la République fédérale d'Allemagne. Le Royaume de Belgique, le Royaume d'Espagne et le Grand-Duché de Luxembourg (22 November 2004), *BGBl* 2008 II 694.

[6] Bulletin No. 68 (23 June 1992), 649 *et seq*.

[7] Convention of 6 October 1997 between the Government of the Federal Republic of Germany and the Government of the Kingdom of the Netherlands on the General Conditions for the 1 (German-Netherlands) Corps and Corps-related units and establishments (*BGBl* 1998 II 2438).

[8] See n. 54 and accompanying text.

[9] Convention of 5 September 1998 between the Government of the Kingdom of Denmark, the Government of the Federal Republic of Germany, and the Government of the Republic of Poland on the Multinational Corps Northeast (*BGBl* 1999 II 676) amended on 16 April 2009 (*BGBl* 2011 II 586).

Corps headquarters based in Szczecin. The experience gained in Münster and Strasbourg could thus be utilized for the new trilateral corps.

When the German-Netherlands Corps was formed, a classification between crisis reaction forces and main defence forces was still valid in the Bundeswehr, a classification later to be abolished. On the German side only main defence forces were assigned to the Corps on a permanent basis, but this did not preclude crisis reaction forces of the Bundeswehr from being also assigned to the Corps for specific missions. The fact that the Corps headquarters had been designated FAWEU underlined the interest that both sides had in jointly to accomplishing this part of the spectrum of tasks as well. Similar arrangements were made for the Multinational Corps Northeast.

Other multinational units in Europe also demonstrate the attractiveness of the integration model far beyond the German borders. For many years the United Kingdom/Netherlands Amphibious Force has developed close and effective cooperation in accordance with NATO plans and national commitments. NATO plans on a European Multinational Maritime Force supported the concept of European Security and Defence Identity (ESDI) and led to the creation of a non-standing naval force, EUROMARFOR which was repeatedly activated in military operations.[10] The European Rapid Operational Force (EUROFOR), with its headquarters in Verona, Italy, comprised personnel from France, Italy, Portugal, and Spain and was involved in three deployments,[11] before it was transformed into an EU Battlegroup and eventually dissolved in 2012. Finally, the Baltic Battalion (BALTBATT) and the Baltic Naval Squadron (BALTRON) have proven their usefulness for many different operations, while other multinational military units are planned to assume specific tasks in the near future.

In all founding documents of multinational units the international framework for their operations is clearly addressed. As provided in Art. 3 of the Strasbourg Convention for the Eurocorps[12] they may be mandated for operations of the UN, the EU, NATO, or a joint decision of the Parties.

2. The status of personnel

The status of military and civilian personnel of multinational units is complex because the provisions of international law apply to the status of foreign members but not to nationals of the Receiving State. Whereas the NATO SOFA of 1951 extends to all NATO Members, and to the new Partners of the Alliance through the PfP SOFA of 1995, it mainly contains rather general regulations. Indeed, the preamble of NATO SOFA contemplates the possibility of separate arrangements between the parties concerned 'in so far as such conditions are not laid down by the present Agreement'. In many cases there is a need to supplement the NATO SOFA provisions; varying interests have led to quite different supplementing

[10] Operation *Enduring Freedom* in the Indian Ocean (January 2003–December 2005); EU Operation *Atalanta* (December 2011–August 2013 and again since December 2013).

[11] Albania (2000–2001); Macedonia (2003); Bosnia and Herzegovina (2007).

[12] See n. 5. Art. 3 reads: '(1) Les missions du Corps européen peuvent lui être confiées dans le cadre soit des Nations unies, soit de l'Union de l'Europe Occidentale (UEO). Soit de l'Organisation du Traité de l'Atlantique Nord (OTAN), soit de la politique étrangère te de sécurité commune de l'Union européenne, soit d'une décision commune prise par les Parties contractantes. (2) Dans ces conditions, les missions du Corps européen, outre ses mission de participation à la défense commune, incluent les mission humanitaires et d'évacuation, des missions de maintien de la paix et les missions de forces de combat pour la gestion des crises, y compris les missions de rétablissement de la paix.'

arrangements during the now more than six decades of cooperation within the Alliance (see Chapter 29).

Art. IV of the PfP SOFA provides for the possibility of supplementing *or otherwise modifying* it in accordance with international law. For such modification, the rules codified in Art. 41 of the Vienna Convention on the Law of Treaties[13] are relevant. By application of that Article, Parties of the PfP SOFA may modify it only as between themselves alone and subject to the following conditions: the modification in question must not be prohibited by the PfP SOFA; it must not affect the enjoyment by the other Parties of their rights under the PfP SOFA or the performance of their obligations; it must not relate to a provision, derogation of which is incompatible with the effective execution of the object and purpose of the PfP SOFA as a whole; and the Parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the PfP SOFA for which it provides. Thus, the scope of possible modifications is clearly limited. Experience gathered so far in the implementation of the PfP programme determines that modifications of PfP SOFA rules are neither intended nor required under existing supplementing agreements. There is, indeed, a widely shared interest in avoiding modifications altogether.

Cooperation within multinational units may contribute to increased interest in the reciprocity of such separate arrangements. In this context, the Netherlands deserve special credit because it was the first Ally to conclude a Supplementary Agreement with the Federal Republic of Germany in 1997[14] which defines the rights and duties of Bundeswehr personnel stationed in the Netherlands in provisions which are fully congruent with the Supplementary Agreement regarding the status of forces permanently stationed in Germany.[15] Special tribute is also to be paid to the Czech and Polish negotiators who demanded full reciprocity from the beginning of the negotiations on agreements in accordance with the German Visiting Forces Act. In doing so, they effectively contributed to uniform standards, for as a national law the German Visiting Forces Act is limited to the status of foreign forces in Germany.

In addition to the provisions relating to the status of formations of a Sending State, special rules have to be established on the status of multinational headquarters. An exception was the LANDJUT Corps because it was commanded by an existing NATO headquarters, the status of which ensues from the Paris Protocol of 1952[16] and the 1967 Agreement regarding NATO headquarters in Germany.[17] By contrast, the Szczecin Convention of 5 September 1998 on the Multinational Corps Northeast[18] provided for specific rules due to the fact that an application of the Paris Protocol, either *mutatis mutandis* or under its Art. 14, was excluded for political and legal reasons: By Art. 14 the whole or any part of the Paris Protocol may be applied, by decision of the North Atlantic Council, to any

[13] Vienna Convention on the Law of Treaties of 23 May 1969 (1155 *UNTS* 331).

[14] Zusatzabkommen zu dem Abkommen vom 19. Juni 1951 zwischen den Parteien des Nordatlantikvertrags über die Rechtsstellung ihrer Truppen hinsichtlich der im Königreich der Niederlande stationierten deutschen Truppen [Agreement to Supplement the 1951 NATO Status of Forces Agreement Regarding the Status of German Forces Stationed in the Kingdom of the Netherlands] vom 6. Oktober 1997 (*BGBl* 1998 II 2407).

[15] See (n. 3).

[16] Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris Protocol) of 28 August 1952 (340 *UNTS* 200).

[17] Agreement between the Federal Republic of Germany and the Supreme Headquarters Allied Powers Europe on the special conditions applicable to the establishment and operation of International Military Headquarters in the Federal Republic of Germany (Supplementing Agreement to the Paris Protocol) of 13 March 1967 (*BGBl* 1969 II 2009).

[18] See (n. 9).

international military headquarters or organization established pursuant to the North Atlantic Treaty. The headquarters of the Multinational Corps Northeast in Szczecin, however, is not part of the NATO command structure. Reference to the Paris Protocol on NATO headquarters could have resulted in a misunderstanding in this respect which would not have been without political implications: As confirmed in Part IV of the NATO-Russia Founding Act,[19] in the current and foreseeable security environment the Alliance will carry out its collective defence and other missions 'by ensuring the necessary interoperability, integration, and capability for reinforcement' rather than 'by additional permanent stationing of substantial combat forces'. Even if provisions of the Paris Protocol had been used, major adaptations would have been necessary considering the fact that the Multinational Corps Northeast is subordinated to only the three Ministers of Defence; therefore, the rights and responsibilities of NATO as defined in the Paris Protocol are inapplicable. The Multinational Corps Northeast derives no juridical personality from the North Atlantic Treaty Organization as provided in Art. 10 of the Paris Protocol. Its authority is exclusively derived from the three participating States. Property of the headquarters of the Multinational Corps Northeast is that of the States and only participating States may be committed in legal proceedings. Finally, the North Atlantic Council will not be involved in the settlement of possible disputes, which will remain the exclusive responsibility of the Parties under the Convention. These adaptations go far beyond what is normally considered as an application *mutatis mutandis*.[20] Hence, no precedence was established here. As far as relevant, however, experience and common practice deriving from the application of certain Paris Protocol provisions may be useful for interpretation purposes.

Unlike NATO headquarters that act on behalf of the North Atlantic Treaty Organization, the headquarters of multinational units generally do not require a legal personality of their own, for participating States remain the subjects of all rights and duties. The States own all real property and equipment, either individually, or jointly. The fact that military and civilian personnel remain under national command does not, however, preclude combined headquarters from concluding contracts on support services payable from the joint budget. Doing so requires an agreement on contractual competence because the contracts are concluded on behalf of the participating States. Art. 8 of the Convention on the German-Netherlands Corps and Art. 11 of the Szczecin Convention on the Multinational Corps Northeast provide for this solution.

According to the German constitution, the authority to conclude contracts and perform other administrative functions is exercised by agencies of the defence administration, not

[19] Founding Act on Mutual Relations, Cooperation and Security Between the North Atlantic Treaty Organization and the Russian Federation, signed in Paris on 27 May 1997, <http://www.nato.int/cps/en/natohq/official_texts_25468.htm>: '… NATO reiterates that in the current and foreseeable security environment, the Alliance will carry out its collective defence and other missions by ensuring the necessary interoperability, integration, and capability for reinforcement rather than by additional permanent stationing of substantial combat forces. Accordingly, it will have to rely on adequate infrastructure commensurate with the above tasks. In this context, reinforcement may take place, when necessary, in the event of defence against a threat of aggression and missions in support of peace consistent with the United Nations Charter and the OSCE governing principles, as well as for exercises consistent with the adapted CFE Treaty, the provisions of the Vienna Document 1994 and mutually agreed transparency measures. Russia will exercise similar restraint in its conventional force deployments in Europe. …'

[20] Cf. the definition of *mutatis mutandis* taken from Black's Law Dictionary: 'With the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices and the like.'