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PRIVILEGES AND IMMUNITY OF FOREIGN MILITARY BASE AND PERSONNEL UNDER MODERN INTERNATIONAL LAW

Abstract:

In case of deployment of a foreign military base in the territory of any State, a number of problematic issues arise concerning the legal status of the military base and its personnel; in particular, what privileges and immunity they have with respect to the legal system of the host country. In this article, an attempt has been made to present the main approaches to the problem in international legal practice and determine the legal nature of the immunity granted to military bases and their personnel in the framework of modern international law. Given that the study of these matters first of all need to understand what the foreign military base represents, within the framework of the article also an attempt has been made to define the concept of foreign military base.

Keywords:

foreign military base, state immunity, functional immunity, jurisdiction, sending State, host State

JEL Classification: K33

Introduction

The use of overseas military bases and attempts to gain access to other strategic areas by states beyond the borders of their own territory are probably known to mankind from the earliest historical period. The long-term deployments of foreign military bases abroad in peacetime are also one of the main characteristics of contemporary geopolitics.

But no matter how much in practice of interstate cooperation the process of deployment of foreign military bases is becoming more and more common, in case of foreign military presence in any state, a number of problematic issues arise from the perspective of international law.

Such deployments abroad are often the cause of serious problems, especially because of dissatisfaction among civil society representatives of the host country. The arguments for dissatisfactions can be very different, for example, many cases are known in the history when some public circles of the receiving country have unequivocally accepted the fact, that a part of their state territory will be granted to a foreign state to deploy a military base there. As an argument, it is cited that the jurisdiction of the host state in its territory is strictly limited.

Perhaps, the basis for such a negative attitude toward the existence of foreign military bases comes from the historical period of colonialism, when powerful states created military bases and installations only with aggressive and imperialist ambitions.

Today, despite the radical transformation of the world order, despite the fact that international law acquired a more democratic description, nevertheless the problems of foreign military deployments have not been eliminated and they have both legal and political aspects.

The most important legal problems in case of stationing military bases abroad relate to the status of foreign military bases and their personnel, in particular, of what privileges and immunities they have over the legal system of the host country. In the context of international law, it is difficult to find a clear and comprehensive answer to the above-mentioned problems, since no general system of regulating the immunity of foreign military forces at international level has yet been formed. Legal sources in this area remain diverse, which sometimes leads to uncertainty.

So, the relevance of the topic is conditioned by the changes in the content of the international legal regime of foreign military bases in modern international law and by the legal problems, that arise in case of stationing of a foreign military base in any sovereign country.

In the context of this study our task is to define what represents foreign military base and to analyze the problems of immunities and privileges of foreign military bases and their personnel from the legal point of view.

Most important sources for studying the topic served the works of Dieter Fleck, Aurel Sari, Joop Voetelink, Robert E. Harkavy, John Woodliffe Rain Liivoja on relevant issue, as well as the reports of Special rapporteurs represented during the works of the International Law Commission; in particular the reports of Mr. Sompong Sucharitkul, Mr. Motoo Ogiso, Mr. Roman Anatolevich Kolodkin and Concepción Escobar Hernández. Important sources are also court cases on subject matter.

During the research were used general scientific (analysis, synthesis, comparison, specification, induction, deduction, idealization, analogy, modeling) and private-science (formal-legal, comparative-legal) research methods.

The object of the study is the legal relations that develop in the process of functioning of the immunities of military bases and their personnel abroad.

The subject of the study is a set of legal norms that determine the content of the immunities of military bases and their personnel abroad.

The main body of the article is composed of two parts. The first part presents approaches to the concept of „foreign military base“, which is poorly developed in the doctrine of international law. The second part considers the problems arising in international legal practice on the immunities and privileges of foreign military bases and their personnel, and determines the legal nature of the immunities, which can be granted to military bases and their personnel by host countries in the framework of modern international law.

The scientific novelty of the study consists 1) in defining the concept of "foreign military base", 2) in allocation of possible types and volumes of the immunities of foreign military bases and their personnel abroad.

The Definition Of “Foreign Military Base”

For studying the legal issues concerning to the immunities of foreign military bases and their personnel, it is important to understand what the concept "foreign military base" represents. The development of the term of “military base” is possible through the establishment of features inherent to military bases; by identifying the main elements that characterize the "military base" as such. Generally, military bases can be divided into two groups; bases on the territory of a national state and bases located in the territory of a

foreign state. The study of some important issues of international legal status of military bases of the last group is our task.

Under the concept of "foreign military base", we mainly understand the use of the territory of a particular state for military purposes on a contractual basis by foreign military forces.¹

However, when interpreting the concept of "foreign military base", it should be taken into account that legal relations on foreign military bases have had different characteristics in different historical periods, in particular, in the past; this type of relationship between the actors of international law was distinguished by principles of colonialism and attempts to dominate other nations. Hence, under the contemporary international law, respecting the principle of equality of states, when defining the concept of "foreign military base" it is necessary to underscore the fact of sovereign state.

On the other hand, it should be taken into account, that in order to identify the military bases in the territory of a foreign state, the fact of the deployment of such forces in the relevant territory within a certain period of time is required. This provision is important to distinguish the use of the territory of a state by military forces of the other state, which is conditioned by certain temporary circumstances, from the concept of "foreign military base". For example, a short-term military contingent entry into the territory of one state in order to move to another place could not be considered as a military base. We can say also, that an important provision of the concept of "foreign military base" is the transfer of rights to use a part of its territory by the host State to the sending State.²

There is a certain sense of confusion about the concepts currently used to describe the phenomenon mentioned for a long time by the term "military base". Perhaps, these concepts were used previously without any idea of the uncertainty of the definitions.

If we study the terminology used in treaties on military bases, it becomes apparent from the latter that a clear and definite use of the terms is absent.

In the narrowest sense, most often occur the terms "base", "object", "military access" and "deployment"³. Such a distinction depends on the types and degrees of foreign military presence, the political and economic conditions of such presence, and its temporary or permanent nature.

It should be noted that the choice of terminology can sometimes be conditioned by not so much legal as political considerations. So from the point of view of law it is difficult to find

¹ S. Bilotskyi- International Legal Problems of Foreign Military Presence/ Law of Ukraine, 2013, № 2.

² Sebastian Schmidt-Foreign Military Presence and the Changing Practice of Sovereignty: A Pragmatist Explanation of Norm Change/American Political Science Review, Vol. 108, No. 4 November 2014.

³ Robert E. Harkavy-Bases Abroad: The Global Foreign Military Presence; SIPRI 1989, p. 7.

a dividing line between these definitions, and it is not accidental that they are often used interchangeably. For example, in the opinion of some theoreticians, "deployment" usually is a strict technical definition, characterized by the lack of ideological content, primarily referring to a single-function limited operation.¹ Nevertheless, sometimes it is used as a general term in which the concepts of "base" and "object" are included.²

At present, the term "base" is most frequently used by law theorists, although in contractual provisions the term "object" is also very common. It is remarkable, that in the literature on strategic studies in recent years an attempt is made to distinguish between the two definitions mentioned above, which causes considerable emotional confusion. As noted by well-known field expert Robert Harkavy, it refers to "the process of describing the degree of autonomous control, exclusive use or access", as well as the tendency to use the term "base" for large installations, and the term "object" in case of smaller ones.³ But the latter is considered as an outdated version.

According to this approach, the term "base" defines the situation when a foreign state has the right to free access and freedom of actions. According to them, the "object" has become a more favorable term. It defines the situation when a host country has maximum sovereignty and where access to the host country is conditional, restricted, and subject to temporary decisions on use of territory in the given situation.⁴

If we follow this approach, for instance, European countries' deployments in the former colonial territories will be defined by the term "base". At the same time, taking into consideration that what was previously defined as a "base," now falls under the term "object", currently the view is put forward, that in the age of eliminated colonialism and global sovereignty, there are no "bases" anymore, but there are only "military objects".⁵

This point of view may well be nominally true, but most of theorists continue to use the former term, as such approaches or distinctions still remain on the political platform and from the perspective of law, any norm does not define a clear boundary between the terms used. Moreover, the term "military base" is used in many international treaties on foreign military presence, which are the most important sources of international law.

As a broader concept it can be mentioned also the term "military access". It includes not only permanent or long-term base deployments, but also such activities as arrival of navy at the port, regular or periodic entry permit for fishing or ocean ships, use of air space,

¹ Robert E. Harkavy-Bases Abroad: The Global Foreign Military Presence; SIPRI 1989, p. 7.

² John Woodliffe - The Peacetime Use of Foreign Military Installations under Modern International Law; p. 31.

³ Robert E. Harkavy-Bases Abroad: The Global Foreign Military Presence; SIPRI 1989, p. 7.

⁴ Robert E. Harkavy- Great Power Competition for Overseas Bases: The Geopolitics of Access Diplomacy, 1982. Pergamon Press Inc., p.15.

⁵ Robert E. Harkavy-Bases Abroad: The Global Foreign Military Presence, SIPRI 1989, p. 8.

special military aircraft traffic (sometimes also use of commercial airports), intelligence activities-totally confidential or not, and so on.¹

One can also use the term of "foreign military presence" with a broader meaning. It includes both the "base" and "object" concepts.

As for the classification of military bases, there are many versions. However, the most appropriate classification from the perspective of legal regulation may have the following appearance:

1. According to the place of deployment military bases shall be divided into three groups: naval, air and land.
2. According to the legal basis of deployment, foreign military bases can be divided as follows: the bases established on the basis of a bilateral agreement between the States on a given territory and bases established within the framework of any international organization or multilateral agreement in the territory of the allied state (for example, Russia's military bases in CSTO member states or US military bases in NATO member states).
3. According to the purpose of deployment, foreign military bases can be divided into two types: ensuring the protection of the allied state within the framework of any alliance and serving the interests of their own state.

It should be noted that this method of classification proposed by us is not final and unequivocal, and with regard to various aspects of the issue new ways of classification can be distinguished. Sometimes these separated types can be combined in case of the same military base. For example, the third article of the Treaty of 1995 between the Republic of Armenia and the Russian Federation on the Russian military base in the territory of the Republic of Armenia² and the Protocol 5 on Making Amendments to the Treaty³ above state, that the Russian military base during the stay in the territory of the Republic of Armenia, besides the protection of the interests of the Russian Federation, together with the RA Armed Forces provides the security of the Republic of Armenia.

¹ Robert E. Harkavy -Great Power Competition for Overseas Bases: The Geopolitics of Access Diplomacy, 1982 Pergamon Press Inc., p. 14

²The Treaty between the Russian Federation and the Republic of Armenia on the Russian military base on the territory of the Republic of Armenia of 1995 <http://docs.cntd.ru/document/901933348>

³ The Protocol N 5 on Making Amendments to the Treaty between the Russian Federation and the Republic of Armenia on the Russian military base on the territory of the Republic of Armenia of 1995 <http://docs.cntd.ru/document/902237605>

Summarizing the facts, it should be noted, that the study of treaty provisions and of writings of international lawyers and specialists in this sphere shows, that "military base" is not a legal term of art, but we suggest to define the term "foreign military base" in the context of modern international law and for the purposes of this article as follows: "Foreign military bases are long-term deployments of foreign military forces on a contractual basis within the territory of other sovereign state, using the territory for military purposes within the limits of their rights, transferred by the latter state". Of course, the definition of a specific military base may be formulated differently in the contract on creation of the base, but there are general international law principles that must be reflected in such contracts.

Regardless of what a term in a concrete agreement will be used in terms of characterization of a foreign military presence, "military base", "object" or "deployment", the legal nature, the status and the scope of the given military presence will be defined by specific provisions of that treaty.

Privileges And Immunity Of Foreign Military Base And Its Personnel

The main source of the problems of deploying foreign military bases abroad is the legal status of the latter in the territory of a sovereign state. The problem is that the factual deployment of a military base of one state in some part of another state significantly limits the jurisdiction of the host country towards that territory, which in its turn leads to the problem of legitimacy of that military presence.

Of course, foreign military presence is largely legitimized through the legal arrangements between the host and the sending countries. In this respect, the concept of host state's consent is very essential. In fact, the consent given by the host country for the deployment of a foreign military base should be viewed as a legitimate guarantee of a foreign military base.

In this regard some specialists of this field consider, that the fact that the legitimacy of deployment of foreign military bases is justified by the agreement given by the hosting sovereign state, shows that the problem lies in the relations between the contracting parties.¹ But we believe, that in all cases states are accountable to the international community. And the Vienna Convention on Law of Treaties itself by defining the concept of treaty states; „treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument

¹ Osmo Apunen- Legitimation Patterns of Foreign Military Presence/ Current Research on Peace and Violence, Vol. 4, No. 2 (1981), pp. 101-113

or in two or more related instruments and whatever its particular designation"¹. This definition clearly states, that every international treaty must be governed by international law, consequently status of forces agreements also must comply with the general principles of international law.

So, the theoretical justification for granting privileges and immunities to military bases and their personnel abroad, of course, depends on their legal status, which can be defined differently in different status of forces agreements, but there are some general principles of international law, by which states are guided in this field of international relations.

Foreign military bases abroad are undoubtedly bodies using state immunity institute,² which is also evidenced by the provision contained in the comments of the International Law Commission on "Draft Articles on Jurisdictional Immunities of States and Their Property"³. The comments of the second draft article indicate the bodies that are considered to be state bodies. It is noted that state is represented by its government, and the government is often composed of state bodies, agencies and ministries, acting in his behalf. Excluding the latter's being an international legal entity as sovereign structures; it is emphasized that they may, nevertheless, represent the state or act on behalf of the central government of the state. The commentary of the article clearly includes the military forces of the state among the mentioned bodies.

There are also a number of precedents on state immunity of foreign military forces.⁴ It should be noted that The Schooner Exchange case, which was examined by the US Supreme Court in 1812⁵, has played a crucial role in shaping a modern approach to the legal status of military forces abroad. This precedent is viewed not only locus classicus for the principle of state immunity, but is generally regarded as the first case in relation to the rights of foreign military forces.⁶

The schooner Exchange was an American ship belonging to John McFaddon and William Greetham (plaintiffs), which sailed from Baltimore, Maryland, on October 27, 1809, for San Sebastián, Spain. On December 30, 1810 the Exchange was seized by order of

¹ Vienna Convention on the Law of Treaties 1969

http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

² Aurel Sari-The Status of Armed Forces in Public International Law: Jurisdiction and Immunity, 2015

<https://ssrn.com/abstract=2555278>

³ Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries/ Yearbook of the International Law Commission, 1991, vol. II, Part Two.

⁴ The Exchange v. McFaddon, 11 U.S. 116 (1812); *Littrell v. US* (No. 2) [1995] 1 WLR 82; *Re Canada Labour Code*, [1992] 2 S.C.R. 50.

⁵ The Exchange v. McFaddon, 11 U.S. 116 (1812).

⁶ Aurel Sari-The Status of Armed Forces in Public International Law: Jurisdiction and Immunity, 2015

<https://ssrn.com/abstract=2555278>

Napoleon Bonaparte, after which it was militarized and added to the French navy under the name *Balau*. Later, when the warship stopped due to bad weather in the port of Philadelphia, John McFaddon and William Greetham filed an action in the district court, claiming that the ship was confiscated illegally.

It should be noted that, as a result of the case investigation, the court should determine whether *Balau* was defended by legal regulation of foreign sovereign immunity or not, and whether the claimants had a right of ownership over the ship.

The court rejected the claim on the grounds of lack of jurisdiction. Then the appellate court reversed the decision of the first instance court, and finally the case appeared in the Supreme Court. The Supreme Court reaffirmed the district court's decision. As regards property rights of the plaintiffs, the Court finds that it can not in any way help, since the ship was legally confiscated by another autonomous entity.¹

It should be noted that the Chief Judge of the Supreme Court, Mr. Marshall, expressing the opinion of the court, as a result of the case investigation, set out some precedential provisions, which subsequently became a valuable basis for legal regulations applicable to foreign military forces.

By the opinion of Judge Marshall, as a result of development of inter-state relations, an international customary norm has been formed, according to which states in some cases refuse their exclusive territorial jurisdiction. Such waiver of jurisdiction occurs, for example, with regard to ambassadors of foreign countries. The judge clearly states that the above provision applies to foreign military forces when crossing the territory of another state with the consent of the latter. He notes that immunity of foreign military forces is based on the agreement between the sending State and the host country by which the host country waives its jurisdiction. As long as the alleged waiver remains in force, without the prior notification by the host State, the propagation of its jurisdiction over the foreign military forces by the host state in interstate relations will be considered a violation of the rule of goodwill adopted by States. Judge Marshall justified the applicability of the institute of immunity for foreign military forces by the fact that subjecting foreign military forces to the jurisdiction of the receiving State, will be hampered their effectiveness as a military unit.²

In fact, the *Schooner Exchange* case was based on the absolute state immunity doctrine. It should be noted that, at least until the beginning of the 20th century, when the first developments regarding the limited state immunity doctrine began, foreign military forces

¹ *The Exchange v. McFaddon*, 11 U.S. 116 (1812).

² *The Exchange v. McFaddon*, 11 U.S. 116 (1812)

had full immunity from jurisdiction of local courts.¹ Perhaps this may explain the fact that in that period the states did not seek to conclude special agreements on the legal status of their military forces abroad, which, by virtue of international customary law, had absolute immunity.

And in the early 20th century the theory of absolute state immunity was subjected to pressure.² Gradually, the courts began to be guided by the concept of limited immunity. The limited state immunity doctrine was strengthened through numerous court cases. For example, in *Wright v. Cantrell* case, the Supreme Court of New South Wales, on the basis of a detailed study of state practice concluded, that absolute immunity is "completely absent" by common agreement among States. A good example of the application of the doctrine of limited immunity is *Wilson v. Girard* judicial precedent, in which the United States refuses from its jurisdiction over the crime committed by its military forces in Japan.

It should be emphasized that the concept of limited immunity of foreign military forces as a result of the balance between the laws of the host state and the flag state is based on two so-called restrictions: the first is, that there is a need for foreign military forces to have a functional immunity for *iure imperii* operations and not for the private law sector of *iure gestionis* (commercial transactions, employment contracts, personal and property damages), the second is the limitations on procedural matters: foreign military forces are not reserved to ignore the constitutional, criminal or other laws of the receiving State, however, the receiving State undertakes to waive its jurisdiction if it may have an impact on the performance of official duties of foreign military forces.³

Nevertheless, no matter how widely accepted the fact that the Institute of state immunity also extends to foreign military forces, it is still unclear to what extent foreign military forces use this immunity, or by what legal norms are regulated their immunities, whether the main international legal sources governing the institution of state immunities are applicable to them or the immunities of foreign military bases and military personnel are defined by separate legal norms?

Examination of legal sources shows, that the privileges and immunities enjoyed by foreign military bases and their personnel have been generally recognized as a separate international legal category. Particularly, Article 31 of the European Convention on State Immunities of 1972⁴ states: 'Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be

¹ Joop Voetelink- *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad*, Springer 2015, p. 156.

² Joop Voetelink- *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad*, Springer 2015, p. 156.

³ *The Handbook of the Law of Visiting Forces*/edited by Dieter Fleck, Oxford University Press, 2001, p. 5.

⁴ *European Convention on State Immunity*; Basel, 16.V.1972/ *European Treaty Series* - No. 74.

done by, or in relation to, its armed forces when on the territory of another Contracting State'. The explanatory report of the Convention states that the aforementioned article aims to establish, that the Convention is not designed for the settlement of situations, which may appear in the event of armed conflict, as well as cannot be invoked for the settlement of disputes arising out as a result of deployment of military forces between the allied states.¹

As regards the applicability of the United Nations Convention on Jurisdictional Immunities of States and Their Property² to military bases, then the answer to this question is not clear yet. Unlike Article 31 of the "European Convention on the State Immunity", any article of the Convention does not directly refer to foreign military presence, which separates the two views on the applicability of the Convention in respect of this issue.

Supporters of the first view consider that this Convention does not regulate the issue of immunity to foreign military forces based on some interpretations. Particularly, Gerhard Heffner, the Chairman of the ad-hoc Committee on Jurisdictional Immunities of States and Their Property, in his statement made during the thirteenth meeting of the Sixth Committee on 25 October, 2004 states, that it has always dominated the general approach that military activities are not regulated by this Convention.³ The same thesis is also raised by Special Rapporteur Sompong Sucharitkul in 1981 in its second report on jurisdictional immunities of States and their property, in which he states that these articles are not intended to regulate certain areas or to influence the legal status or the degree of immunity of such subjects, governed by bilateral agreements or international conventions or norms of international customary law, such as embassies, consulates, delegations, foreign military forces.⁴

In contrast to these interpretations, there is also an approach that neither the text of the Convention nor the preparations for it fully exclude the applicability of the Convention to foreign military bases.⁵ One of the arguments introduced to justify approach is that the Article 3 of the Convention⁶, in which those entities that are not covered by the Convention are clearly mentioned, does not refer to foreign military forces.

¹ Explanatory Report to the European Convention on State Immunity; Basel, 16.V.1972 <https://rm.coe.int/16800c96c3>

² United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

³ Summary record of the 13th meeting of the Sixth Committee, 22 March 2005, New York; UN Doc. A/C.6/59/SR.13, p.6.

⁴ Second report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur, 11 April and 30 June 1981; UN Doc. A/CN.4/331 and ADD.I
http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_331.pdf&lang=EFS

⁵ Andrew Dickinson- Status of Forces under the UN Convention on State Immunity; The International and Comparative Law Quarterly Vol. 55, No. 2 (Apr., 2006), pp. 427-435.

⁶ United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

It should be noted that in this respect, discussions were also held at the preparatory stage of the Convention. Attempts were made to restore the gap and to add a separate paragraph in the text of the article, which would clearly indicate that the Convention does not apply to military bases.¹ However, the Special Rapporteur Motoo Ogiso, in his report of 1988 on Jurisdictional Immunities of States and Their Property, referring to the above mentioned recommendation states that the privileges and immunities of military forces of a State in the territory of another State shall be governed by the agreement between the two contracting States and not by customary international law, so the inclusion of such paragraph is groundless.²

This argument is based on Article 26 of the Convention, which establishes that any provision of the Convention does not affect the rights and obligations assumed by participating States under the other existing international treaties on the matters covered by the Convention.³

Nevertheless, it should be noted that the United Nations Convention on “Jurisdictional Immunities of States and Their Property” does not apply to criminal proceedings⁴ and has not yet entered into force. And the foreign military bases as public bodies are entitled to certain immunities and privileges-be defined by bilateral treaties or by international customary norms.

It is important to differentiate between the immunities of foreign military bases as one unit and the immunities of military personnel of these bases, which is a direct consequence of the fact that these two entities have different legal statuses.

In general, there is a view that members of military personnel of foreign military bases enjoy immunity when they are in service and in the military base area.⁵

Here the question may arise; whether the institute of immunity is acting for any act committed by a member of military base personnel during his service and within the military base? Of course, it is accepted that in each case the basis for legal settlement is

¹ (A proposal was made by the United Kingdom)/Preliminary report on jurisdictional immunities of States and their property by Mr. Motoo Ogiso, Special Rapporteur, 20 May 1988; UN Doc. A/CN.4/415/ Yearbook of the International Law Commission 1988 Volume II Part One; A/CN.4/SER.A/1988/Add.I (Part 1), p.103.

² Preliminary report on jurisdictional immunities of States and their property by Mr. Motoo Ogiso, Special Rapporteur, 20 May 1988; UN Doc. A/CN.4/415/ Yearbook of the International Law Commission 1988 Volume II Part One; A/CN.4/SER.A/1988/Add.I (Part 1), p. 103.

³ United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

⁴ Resolution adopted by the General Assembly [on the report of the Sixth Committee (A/59/508)]: 59/38 United Nations Convention on Jurisdictional Immunities of States and Their Property, United Nations General Assembly Fifty-Ninth Session Agenda Item 142, Resolution No. A/RES/59/38, 16 December 2004
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/38

⁵ Joop Voetelink-Status of Forces: Criminal Jurisdiction over Military Personnel Abroad; Springer 2015, p. 32.

the interstate agreement on deployment of the military base, but in our opinion, within the framework of contemporary international law, states should act in conformity with accepted standards of goodwill, and the treaties must reflect the customary norms of international law and international legal practice.

In international law, it has been formed the institute of so-called foreign jurisdictional and enforcement immunity of state officials, according to which state officials have immunity in the territory of another State for acts committed within the scope of their official duties.¹ The said immunity is known in international law as a functional immunity or *ratione materiae* immunity.²

It should be noted that since 2007 the International Law Commission has started work on studying the theme "Immunity of state officials from foreign criminal jurisdiction" and codification of norms of the relevant international legal institute.³

The fact that members of military personnel of foreign military bases enjoy functional immunity while performing their official duties is proved by both the well-known theorists of the field and numerous court cases.⁴ The problem lies in determining the legal content of functional immunity (*ratione materiae*). As it is mentioned in the special reports submitted by the International Law Commission on the immunity of public officials from foreign criminal jurisdiction, the main characteristic features of functional immunity can be grouped as follows:⁵

- is given to all state officials
- is given only for those actions that can be qualified as "acts performed within the scope of official duties"
- has no time limits, as the *ratione materiae* immunity continues to operate even if the person, to whom the immunity is granted, no longer occupies the position.

¹Aurel Sari-The Status of Armed Forces in Public International Law: Jurisdiction and Immunity, 2015 <https://ssrn.com/abstract=2555278>, Prosecutor v. Tihomir Blaskić (Judgement on the Request of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997), (1997) 110 ILR 607 (ICTY Appeals Chamber).

² Second report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur, 10 June 2010, UN Doc. A/CN.4/631

³ The official website of the International Law Commission-http://legal.un.org/ilc/summaries/4_2.shtml

⁴ Voetelink, J. -Status of Forces and Criminal Jurisdiction. (2013). Netherlands International Law Review, 60(2), 231-250. https://pure.uva.nl/ws/files/1737876/134809_NILR_2013_2_Voetelink_Status_of_Forces.pdf

Rain Liivoja-Criminal Jurisdiction over Armed Forces Abroad, Cambridge University Press, 2017, Underhill v. Hernandez, 65 F. 577 (Circuit Court of Appeals 2nd Cir. 1895), Amrane v. John (1932) (Egypt, Civil Tribunal of Alexandria), Lozano (Mario Luiz) v Italy, Case No 31171/2008, 24th July 2008, Italy; Supreme Court of Cassation.

⁵ Third report on the immunity of State officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur, 2 June 2014, Doc. A/CN.4/673

In fact, we can distinguish two key conditions that are necessary for a member of a foreign military base to benefit from the functional immunity: the connection with its own state and the committed act must be within the scope of official duties. As regards the first condition, it has already been mentioned above, that based on international judicial practice it can be argued that members of foreign military base enjoy functional immunity. But it is important to find out in each case whether the performed action proceeds from the official duties or not. And what is considered to be done within the scope of official duties is the act of a state official selling the elements of state authority.¹

Summing up, it should be underlined that, despite the fact that the applicability of the conventions mentioned by us to foreign military bases this or that size is excluded, however, foreign military bases are considered to be state bodies and consequently enjoy state immunity. Immunity and privileges granted to foreign military bases by the host country are important in terms of securing uninterrupted work of the latter. It is also possible to consider the immunities of foreign military bases as a separate international legal category.

In contemporary international law, the theory of limited state immunity is also widely disseminated but it has more inclusiveness in non-criminal cases and in cases of criminal cases, States continue to have full immunity from foreign judicial and enforcement jurisdiction.

As for the immunity of members of military bases, they have at least functional immunity for actions within the scope of their official duties. In this regard, we attach importance to the codification efforts initiated by the International Law Commission on the theme "Immunity of public officials from foreign criminal jurisdiction" and to ensure certain uniformity of the legal framework applicable to foreign military bases we consider it appropriate that the proposed articles also made reference to the immunities of members of foreign military forces.

We believe that, when deploying military bases abroad, States should be guided by these rules when concluding treaties on deployment of military bases, in particular, the theory of limited immunity of States should be taken as a basis, and in criminal cases in treaties for military personnel it should be provided exceptions to the host country's jurisdiction only for the actions carried out within the scope of their official duties.

¹ Fourth report on the immunity of State officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur, 29 May 2015, Doc. A/CN.4/686

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