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LEGAL SOURCES DETERMINING THE STATUS OF THE FOREIGN MILITARY BASE AND ITS PERSONNEL ABROAD

Abstract:

In the framework of modern international relations, it has become common for states to deploy military bases on the territory of another state for a variety of geopolitical purposes, which certainly raises a number of legal issues. Under the international law, a unified system defining the legal status of foreign military bases has not yet been established. The study of the legal relationship of military bases deployed in the territory of a foreign country shows that the international legal basis for their deployment is enshrined in various international treaties. Given that the legitimacy of the deployment of such military facilities is based on agreements between the contracting states, in this paper, an attempt is made to study the existing bilateral or multilateral agreements governing modern intergovernmental legal relations on military forces deployed by one state on the territory of another state, and to find the most preferable models through comparative analysis.

Keywords:

International law, Foreign military bases, Legal status, Status of forces agreement, Host state, Sending state

JEL Classification: K33

1.1 Introduction

The use of military bases and attempts to gain access to other strategic territories outside one's own state has been known to mankind since ancient times. It should be noted, that the deployment of foreign military bases also plays an important role in the modern world.

Accordingly, the study of practice shows that the deployment of military forces by one state in the territory of a foreign state often leads to legal disputes between states. One of the problems is that under international law, there is still no unified system that provides comprehensive regulations on the deployment of foreign military bases and their legal status.

The aim of this study is to identify sources that define the legal status of foreign military bases, to analyze them and to find the most preferred models.

The following **tasks** were set to achieve the goal of the research:

- to identify the legal documents regulating these legal relations in the framework of international law,
- to analyze the existing models of documents regulating the legal status of foreign military forces within the framework of various geopolitical units,
- to study the acting agreements between the states on foreign military forces, from the point of view of legal nature and as a result of comparative analysis to define the most preferable models.

The object of the research: legal relations on foreign military forces under international law.

The subject of the research: *Bilateral and multilateral agreements among states on foreign military forces deployed in the territory of foreign country.*

1.2 Material and methods

During the study, both general scientific and following private legal methods were used: *historical-legal, normative-logical, comparative-legal.*

The main material for the study in the framework of this work consists of international documents, multilateral agreements on status of military forces existing within the framework of the NATO member states, “the Partnership for Peace Program” countries, the United Nations, the European Union, and the separate bilateral agreements signed between the states in the CIS region on this issue.

1.3 Theory

The study of the legal relations related to military forces in the territory of a foreign country shows that international legal bases for their deployment and regulations on the legal status are enshrined in various international treaties.

It should be noted that in order to find the basis for the legitimacy of the deployment of foreign military bases (forces), it is necessary to first separate the issues related to the legal basis for their deployment in the territory of a foreign state from the issues related to the legal status of the military base and personnel during their stay in the territory of that state, which are regulated mainly by separate agreements between the contracting states.

Based on the above-mentioned distinction, the sources of law governing legal relations on foreign military bases can be conventionally divided into two groups. In our view, the first group will include international legal documents of universal and regional significance, which relate to the legitimacy of the establishment of a military base on the territory of another state, and the second group will include international agreements on the establishment of a foreign military base between the Contracting States, which will regulate mainly the issues related to the legal status of the military base and personnel during their stay in the territory of the foreign state.

Among the international universal documents relating on the international legal basis for the deployment of a military base by one state in the territory of a foreign state as the cornerstones can be considered the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations¹, the Declaration on Inadmissibility of Intervention and Interference in the Internal Affairs of States², as well as the UN General Assembly Resolution of 14 December 1974 on the Definition of Aggression³.

For example, the Article 3 (e) of the Annex to the UN General Assembly Resolution on the Definition of Aggression clearly addresses the principle of prohibition of interference in the internal affairs of foreign countries in the event of the deployment of foreign military forces and defines as aggression:

¹ Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations, New York, 24 October 1970 [https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2625\(XXV\)](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2625(XXV)) (Date of last visit: 05.05.2020).

² Declaration on Inadmissibility of Intervention and Interference in the Internal Affairs of States <https://undocs.org/en/A/RES/36/103> (Date of last visit: 05.05.2020).

³ Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, [https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314\(XXIX\)](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314(XXIX)) (Date of last visit: 05.05.2020).

"the use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement"⁴.

As for the documents of regional significance, it must be stated that in this group a very important place occupies The Helsinki Final Act of 1975⁵, which strengthened the principles of sovereign equality of states, respect of the rights arising from sovereignty (including the right to conclude bilateral or multilateral agreements), prohibition of the use of force or the threat of force, inviolability of borders, territorial integrity of states, peaceful settlement of disputes, non-interference in internal affairs, fundamental freedoms and human rights, including respect for freedom of thought, conscience, religion or belief, equal rights of peoples and self-determination, cooperation between states, and conscientious fulfillment of obligations under international law.

Analyzing the provisions of the above-mentioned documents, it should be emphasized that in peacetime, the evidence of the legality of the deployment of a military base by one state in the territory of another state is the consent of the host state. Otherwise, when there is no consent of the host state, the presence of such military forces *prima facie* lacks legal grounds and violates the principle of inadmissibility of interference in the internal affairs of the state.

Accordingly, the main legal source regulating the issue of deployment of foreign military base, defining the legal status of military base and the personnel of the latter in the territory of a foreign state is the appropriate agreement between the Contracting States. The above-mentioned agreements between the states in most cases correspond to the definition of the term "treaty" given in Article 2 of the Vienna Convention on the Law of Treaties, particularly: "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation⁶.

However, this does not preclude the right of states to conclude agreements that are not legally binding, which are widely used within the concept of "soft power", So, it is

⁴ Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, Article 3 (e) of the Annex , [https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314\(XXIX\)](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314(XXIX)) (Date of last visit: 05.05.2020).

⁵ Helsinki Final Act/ Final act of the 1st CSCE Summit of Heads of State or Government, 1 August 1975 Helsinki <https://www.osce.org/helsinki-final-act?download=true> (Date of last visit: 05.05.2020).

⁶ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Article 2 https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (Date of last visit: 05.05.2020).

clear that the primary distinguishing feature of this type of agreement is that it is outside the scope of the *pacta sunt servanda* principle. Consequently, this kind of agreements are mostly political in nature and do not provide for legal responsibility⁷. The above-mentioned agreements are often defined by the following terms: initiative, joint communiqué or informal agreement⁸.

As for the treaties regulating the legal status of foreign military bases and their personnel, it should be noted that the latter do not generally coincide with agreements reached between states on the establishment of a military base or the acquisition of military access. From the study of international experience, it can be concluded that the agreements on the status of foreign military bases in the majority of cases follow the conclusion of general agreements on military-political cooperation and the establishment of military bases, are an integral part of the latter agreements, and very often the agreements on military-political cooperation between the states serve as the basis for concluding agreements on the legal status of the overseas military forces. For example, in 1960 the United States and Japan have signed an agreement on the status of the military forces, based on the provision of Article 6 of the "Agreement on Mutual Cooperation and Security" already signed between the two countries⁹. On the basis of such a contractual provision, was also signed the Agreement on the Status of Forces between the United States and Korea in 1966¹⁰.

These types of agreements mainly regulate the legal status of military base personnel and property in the host country, in particular, criminal and civil jurisdiction, uniforms and weapons, tax and customs legal relations, military base personnel and property entry and exit, and other similar issues. In other words, the agreements on the status of military forces define the scope of activities of the military base personnel in the territory of a foreign country; regulate the issues related to the application of the domestic legislation of the host country to the personnel and property.

⁷ Oscar Schachter - The Twilight Existence of Nonbinding International Agreements, the American Journal of International Law, Vol. 71, No. 2 (Apr., 1977), p 301.

⁸ John Woodliffe - The Peacetime Use of Foreign Military Installations under Modern International Law, Martinus Nijhoff Publishers, 1992, Dordrecht, p. 21.

⁹ Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, signed on 19 January 1960 in Washington
<https://www.mofa.go.jp/mofaj/area/usa/sfa/pdfs/fulltext.pdf> (Date of last visit: 05.05.2020).

¹⁰ Agreement under Article IV of the Mutual Defense 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 the Republic of Korea, signed at Seoul July 9, 1966
https://www.usfk.mil/Portals/105/Documents/SOFA/A01_SOFA.Art.I-XXXI.pdf (Date of last visit: 05.05.2020).

Referring to the agreements between the states on the issues in question, we consider it necessary to emphasize that in this regard what matters is the will of the states to establish mutual rights and responsibilities under international law, and it does not matter at all what technical structure or what name the agreement will have. Accordingly, under international law, there are no imperative requirements for the sample document or content of these documents.

However, it should be noted that in addition to the various bilateral agreements, separate multilateral agreements on the status of foreign military forces have been formed within the framework of different international cooperation, which reflect the more general approaches and seem to establish common regulations between various groups of state under modern international law.

Among the multilateral treaties on the status of foreign military forces the NATO Agreement signed among NATO member states on 19 June, 1951 (NATO SOFA, Status of Forces Agreement) has become more widely used¹¹.

This document is a multilateral agreement between NATO member states that regulates the status of military forces belonging to one member state of the North Atlantic Treaty Organization in the territory of another member state¹².

In order to get a more comprehensive picture of the situation in which the agreement is applicable, it is necessary to refer to the definition given in part 1 (a) of Article 1 of the Agreement, according to which military **force** is interpreted as:

“the personnel belonging to the land, sea or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connection with their official duties, provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a 'force' for the purpose of the present Agreement”¹³.

The analysis of the quoted definition makes it clear that there are certain mandatory conditions for the applicability of the agreement, in particular:

- the agreement is applicable to the personnel of *the military force*,

¹¹ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, signed in London on 19 June 1951 https://www.nato.int/cps/en/natohq/official_texts_17265.htm (Date of last visit: 10.05.2020).

¹² R. Chuck Mason-Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?, Congressional Research Service, March 15, 2012, <https://fas.org/sgp/crs/natsec/RL34531.pdf> (Date of last visit: 10.05.2020).

¹³ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, signed in London on 19 June 1951, Article 1, part 1 (a), https://www.nato.int/cps/en/natohq/official_texts_17265.htm (Date of last visit: 11.05.2020).

- military personnel belonging to a NATO member state must be located in the territory of another NATO member state,
- the mentioned military personnel must be in the territory of the given state in order to perform their official duties.

In addition, from the analysis of the above-mentioned facts it becomes clear to us that the agreement on the status of NATO military forces is not limited only to foreign military bases studied by us and has a much wider scope for settlement. In particular, it refers to the military in general, which meets the conditions set forth above.

As for the applicability of the agreement in functional viewpoints, in this context we consider it important to note that according to a number of assessments, the agreement is far from being self-sufficient¹⁴. The reason for this kind of qualification probably lies in the fact that many issues to be settled are not addressed in the Agreement. As an example, we can mention that in the agreement there are no regulations on environmental protection issues.

As a result, there are many cases when, in addition to this agreement, additional amending agreements regulating related issues are concluded between parties. For example, in connection with the foreign military forces stationed in the territory of the Federal Republic of Germany between several NATO member states an agreement supplementing the NATO status of forces agreement in 1959 has been signed¹⁵.

So, the signing of additional agreements is not only not excluded, but also clearly stipulated by the NATO status of forces agreement of 1951. In particular, in the agreement it is stated that the conditions under which forces will be sent, in so far as such conditions are not laid down by the Agreement, will continue to be the subject of separate arrangements between the Parties concerned¹⁶.

A multilateral agreement on the status of foreign military forces is also in force between the NATO member states and the countries participating in the Partnership for Peace Program (PfP). The program is a bilateral cooperation between the separate member states of the Euro-Atlantic Partnership and the NATO member states¹⁷.

¹⁴ Stuart Addy-The Handbook of the Law of Visiting Forces, Oxford University Press, 2018, p. 49.

¹⁵ Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany and Protocol of Signature, signed at Bonn, on 3 August 1959, <https://treaties.un.org/doc/Publication/UNTS/Volume%20481/volume-481-I-6986-English.pdf> (Date of last visit: 11.05.2020).

¹⁶ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, signed in London on 19 June 1951, Preamble, paragraph 2, https://www.nato.int/cps/en/natohq/official_texts_17265.htm (Date of last visit: 11.05.2020).

¹⁷ Official webpage of NATO, https://www.nato.int/cps/en/natohq/topics_50349.htm

The agreement on the status of military forces with the countries participating in the Program was signed in Brussels on June 19, 1995¹⁸. The functional essence of this agreement is that it makes the provisions of the NATO Agreement on Status of Forces (NATO SOFA) applicable to the countries participating in the Program. This assertion is based on the provision of Article 1 of the Agreement, which provides that all States Parties to this Agreement shall apply the provisions of the Agreement between Parties to the North Atlantic Treaty regarding the status of their forces (NATO SOFA), done at London on 19 June 1951, as if all State Parties to the Agreement were Parties to the NATO SOFA.

The next multilateral agreement on the status of foreign military forces was formed within the framework of the European Union. The EU Agreement on the Status of Armed Forces (EU SOFA) provides regulations for the legal status of military and civilian personnel, military forces and units deployed by one EU member state in the territory of another member state in the context of the European Security and Defense Policy. The agreement was signed by the member states on November 17 in 2003, but has not yet entered into force¹⁹.

However, the Agreement is aimed at resolving issues related to the legal status of the military forces of the EU member states participating in the crisis management and related missions in the framework of the European Security and Defense Policy, and plays a significant role in developing the EU's crisis management capabilities. It should be noted that the regulations of this Agreement are also based on the provisions of the Agreement on the Status of Forces (NATO SOFA) concluded between NATO member states in 1951²⁰.

There also exists a so-called model agreement on the legal status of military forces within the framework of UN peacekeeping activities (UN MODEL SOFA). It was

(Date of last visit: 11.05.2020).

¹⁸ 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, Brussels, 19 June 1995

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¹⁹ Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 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 European Union to act in this context (EU SOFA), [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:42003A1231\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:42003A1231(01)) (Date of last visit: 19.05.2020).

²⁰ Aurel Sari- The European Union Status of Forces Agreement (EU SOFA),

<https://ssrn.com/abstract=1383065>

(Date of last visit: 19.05.2020).

published by the UN Secretary General in 1990²¹. The Agreement aims to serve as a basis for the drafting of separate treaties between the host states and peacekeeping forces of the United Nations, providing provisions for regulating legal relations between the parties, as well as defining rights and responsibilities.

As for the legal framework in the post-Soviet region, where almost in every state is located a foreign military base, at least in the past, it should be noted that the legal relationship on the deployment of foreign military forces is based solely on bilateral agreements. Neither in the framework of the Commonwealth of Independent States (CIS) formed in 1991²², nor in the framework of the Collective Security Treaty Organization (CSTO)²³ established in 2002 on the basis of the Collective Security Treaty²⁴, any form of joint settlement has yet been reached on the deployment of foreign military forces, despite the fact that the CSTO as an organization is a multilateral military-political cooperation of post-Soviet states, as well as numerous decisions and documents regulating various aspects of military-political relations between the CIS and CSTO member states have been established²⁵.

²¹ Model of Status of Forces Agreement for Peace-keeping Operations, Report of the Secretary-general, A/45/594, 9 October 1990, <https://undocs.org/a/45/594> (Date of last visit: 19.05.2020).

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²⁴ Collective Security Treaty, dated May 15, 1992 https://en.odkb-csto.org/documents/documents/dogovor_o_kollektivnoy_bezopasnosti/ (Date of last visit: 25.05.2020).

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1.4 Conclusion

Summing up the above discussed facts, it can be said that the legal system on foreign military bases within the framework of modern international law is mostly contractual.

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