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FROM FOES TO FRIENDS: FOREIGN TROOPS IN POST-CONFLICT SITUATIONS

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No Self-contained Status Regime

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Status under *jus post bellum*

- is useful to start from the legal status under general international law
- problem: there is no self-contained 'law of visiting forces'

Three examples

- State immunity applies, but seems to defer to *lex specialis*
- the content of *lex specialis* is unclear
- the existence of armed conflict may modify the applicability of State immunity

General Principles

Consent to presence and status

- principle of territorial sovereignty requires prior consent to presence
  - consensual presence entails applicability of general rules of international law
  - non-consensual presence triggers applicability of the law of armed conflict

Respect for local law

- foreign armed forces are subject to territorial jurisdiction of the host State
  - respect for local law recognized in SOFAs
  - respect for local law also required by law of armed conflict

Exemptions from local jurisdiction

- foreign armed forces benefit from various exemptions from local jurisdiction
  - State immunity
  - functional immunity
  - privileges and immunities required by military exigencies

Operational necessity

- international practice suggests that status arrangements move on a sliding scale based on operational necessity
  - functional immunity as a minimum
  - additional immunities in deployed operations
  - law of armed conflict as a maximum

Jus dispositivum

- status of forces agreements reflect custom and may have contributed to it
- however, nothing prevents State to depart from custom
- status of forces agreements inject dynamism

Principles of *Jus Post Bellum*

The concept of *jus post bellum*

- three different paradigms of *jus post bellum* possible
  - self-contained regime
  - area of legal practice
  - normative framework

Distinct values and considerations

- *jus post bellum* emphasizes certain values:
  - general values: accountability, proportionality, criminal responsibility and good governance
  - distinct values: reconciliation, rebuilding, restitution and stewardship
- *jus post bellum* as a law of transition

Presence and Status under *Jus Post Bellum*

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Certain challenges

- typically no clean end to hostilities
- end of hostilities is not enough, consent is required
- consent can be problematic
- international mandates may complicate matters

Kosovo

- MTA (1999) calls for SOFA between KFOR and FRY
- KFOR status regulated unilaterally by UNMIK
- unclear whether Resolution 1244
  - authorizes UNMIK to do this
  - extinguishes KFOR's duty to negotiate SOFA

Iraq

- US seeks to conclude SOFA before handover
- revised CPA Order 17 regulates status unilaterally, but refers to Security Council Resolutions
- status effectively based on
  - Iraqi consent
  - Security Council authorization
  - law of belligerent occupation

Balancing Competing Interests under the *Jus Post Bellum*

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The Lozano case

- unusual set of circumstances: status to be resolved under customary international law
- US enjoys exclusive jurisdiction over Lozano:
  - legal context changed from armed conflict to 'warfare or quasi-warfare'
  - principle of the 'law of the flag' applies in all of these situations

Status under *jus post bellum*

- Lozano case supports the idea of a sliding scale, but draws distinction in the wrong place
- neither complete exemptions nor reciprocity are appropriate for post-conflict situations if applied at the wrong time
- UN Model SOFA draws appropriate overall balance

Conclusion

A law of transition

- two distinct considerations apply
  - changes in legal basis of presence affects status
  - jurisdictional balance must reflect distinct features of transition from conflict to peace
- requires a dynamic and contextual approach
  - status must reflect operational context
  - States must adjust their expectations and work towards transition