
Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice

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Abstract

The conduct of EU military and civilian crisis management operations in third states within the context of the European Security and Defence Policy has presented the EU with new administrative and operational challenges in recent years, including the need to define the international legal position of such operations and their personnel during their presence abroad. In some cases, the EU has entered into agreements with host states to determine the legal status of EU crisis management operations, while in other cases the application of already existing arrangements has been extended to them. The status agreements negotiated directly by the EU confer more extensive privileges and immunities on EU operations and their personnel than current international practice in this area would warrant. Despite opposition to this policy within the EU, it has remained in place under the two model status agreements adopted by the Council of the European Union in 2005 to serve as a basis for negotiations with prospective host states in all future EU operations. Even though no norm of international law compels the EU to request only such privileges and immunities as are absolutely necessary for the purposes of an operation, its practice of negotiating extensive privileges and immunities does not sit well with the growing emphasis on the accountability of peace support operations. This article offers an overview of the evolution of the EU's practice of concluding status agreements in the context of the European Security and Defence Policy and examines the key provisions of the two model status agreements.

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1 Introduction

Between 2003 and 2007, the EU launched 18 crisis management operations in 11 third countries within the context of the European Security and Defence Policy (ESDP).¹ In the majority of cases, the EU entered into so-called status of forces and status of mission agreements with the third states concerned to define the privileges and immunities of EU missions and their personnel, while in other cases already existing status arrangements were extended to cover EU operations. The need to determine the legal position of EU crisis management missions during their presence abroad has presented the EU with a significant opportunity ‘to assert its identity on the international scene’.² Not only has the Union entered into an ever growing number of international agreements in its own name, but it has also had to devise and implement a negotiating strategy for concluding status agreements with third states under the ESDP. The purpose of this article is to offer an overview of the EU’s practice in this area.³

Status of forces agreements (SOFAs) and status of mission agreements (SOMAs) are bilateral or multilateral treaties that define the legal position of military forces and civilian personnel deployed by one or more states or by an international organization in the territory of another state with the latter’s consent.⁴ They normally deal with

¹ The ESDP was launched by the European Council in June 1999 in order to provide the EU with the operational capabilities, made available to the EU by its Member States on a voluntary basis, and the institutional basis necessary for conducting autonomous crisis management operations in third countries. The ESDP’s underlying purpose is to enable the EU to respond more effectively to international crises. For an overview of the ESDP see Wessel, ‘The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice’, 8 *J Conflict & Security L* (2003) 265; T.C. Salmon and A.J.K. Shepherd, *Toward a European Army: A Military Power in the Making?* (2003); N. Gnesotto (ed.), *EU Security and Defence Policy: The first five years (1999–2004)* (2004); Keane, ‘European Security and Defence Policy: From Cologne to Sarajevo’, 19 *Global Society* (2005) 89; S. Graf von Kielmansegg, *Die Verteidigungspolitik der Europäischen Union: Eine Rechtliche Analyse* (2005); M. Trybus and N. White (eds), *European Security Law* (2007). Significant changes to the EU’s foreign and security policy system were envisaged by the Treaty Establishing a Constitution for Europe, 29 Oct. 2004 [2004] OJ C 310/1. See Naert, ‘European Security and Defence Policy in the EU Constitutional Treaty’, 10 *J Conflict & Security L* (2005) 187; M. Trybus, *European Union Law and Defence Integration* (2005), at 293–394. The Constitutional Treaty was officially abandoned by the European Council in June 2007 in favour of opening negotiations on a less ambitious Reform Treaty (see Council doc CIG 1/07, Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community, 23 July 2007). The draft Reform Treaty was signed by the Heads of State and Government of the Member States of the EU on 13 Dec. 2007 in Lisbon (see Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 Dec. 2007 [2007] OJ C306/1). The Treaty of Lisbon retains most of the innovations introduced by the failed Constitutional Treaty in the field of foreign and security policy. For an analysis of the relevant provisions by Steve Peers see www.statewatch.org/news/2007/aug/eu-reform-treaty-texts-analyses.htm.

² Art. 2 TEU.

³ See also Naert, ‘ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations’, in Trybus and White (eds), *supra* note 1, at 61; Tsagourias, ‘EU Peacekeeping Operations: Legal and Theoretical Issues’, in *ibid.*, at 102; Thym, ‘Die völkerrechtlichen Verträge der Europäischen Union’, 66 *ZaöRV* (2006) 863.

⁴ Bowett, ‘Military Forces Abroad’, 3 *Encyclopaedia of Public International Law* (1997) 388; Erickson, ‘Status of Forces Agreements: A Sharing of Sovereign Prerogative’, 37 *Air Force L Rev* (1994) 137. For a comprehensive treatment of the subject see D. Fleck (ed.), *The Handbook of the Law of Visiting Forces* (2001).

such issues as the entry and departure of foreign personnel, the carrying of arms, taxation, the settlement of claims, and the modalities for the exercise of civil and criminal jurisdiction over members of the visiting force or mission.

Despite the increasingly widespread use of SOFAs and SOMAs during the 20th century,⁵ a combination of three factors has prevented the emergence of a uniform legal regime in this field comparable, for example, to the law of diplomatic relations.⁶ First, states send their military and civilian personnel abroad for different non-hostile purposes, including exercises, technical and advisory missions, and large-scale peace-keeping operations. Secondly, the operational circumstances surrounding the deployment of foreign personnel differ drastically from one case to another. Legal arrangements devised for a stable and secure operational environment will almost certainly be unsuitable and inappropriate in post-conflict situations or cases where effective governmental authority is lacking in the host state.⁷ Thirdly, great powers tend to rely on their dominant position to secure more favourable conditions of stay for their forces abroad than they are prepared to grant to foreign forces present in their own territory.⁸ The combined effect of the diverse objectives pursued by foreign personnel, different considerations of military and operational necessity, and the political disparities between sending states and host states means that SOFAs and SOMAs differ widely in their terms.

Even though no *single* legal regime governing the status of visiting forces and missions has developed in international law, several distinct regimes can nevertheless be identified. For instance, SOFAs concluded in the context of structured military cooperation between politically equal partners are frequently based on the NATO SOFA of 1951.⁹ The Member States of the EU have thus modelled the EU SOFA of 2003,¹⁰ which governs the legal position of their military and civilian staff deployed *within* the territory of the EU for the purposes of the ESDP, on the relevant provisions of the NATO SOFA.¹¹ The UN and other international actors have also developed distinct arrangements regulating the immunities and privileges of peace support

⁵ R.J. Stanger, *Criminal Jurisdiction over Visiting Armed Forces* (1965), at 111–156.

⁶ See Young (now Denza), 'The Development of the Law of Diplomatic Relations', 40 *BYIL* (1964) 141.

⁷ Cf. M.J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999).

⁸ Prugh, 'The Soviet Status of Forces Agreement: Legal Limitations or Political Devices?' 20 *Military L Rev* (1963) 1; Hwang, 'Where Does Inequality Come From – An Analysis of the Korea–United States Status of Forces Agreement', 18 *Am U Int'l L Rev* (2002–2003) 1103.

⁹ Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951, 199 UNTS 67. See S. Lazareff, *Status of Military Forces Under Current International Law* (1971).

¹⁰ 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 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 European Union to act in this context (EU SOFA), 17 Nov. 2003 [2003] OJ C321/6.

¹¹ For a detailed commentary on the EU SOFA see Sari, 'The EU Status of Forces Agreement: Continuity and Change in the Law of Visiting Forces', forthcoming in *Revue de Droit militaire et de Droit de la Guerre* in 2008.

operations.¹² Generally speaking, these legal regimes offer different answers to the same basic question: how to reconcile the divergent interests of the sending state or organization on the one hand and those of the host state on the other hand, in particular as regards the exercise of jurisdiction in the territory of the host state over the visiting force or mission and its members?

This article examines what solution the EU has adopted to this problem. It begins with an outline of the various crisis management operations the EU has launched in the context of the ESDP between 2003 and the second half of 2007, and describes the evolution of its practice of concluding SOFAs and SOMAs with the third countries hosting these operations. The article will then examine in more detail the key provisions of two model status agreements adopted by the EU in 2005, and offer some concluding remarks.

2 ESDP Operations Between 2003 and 2007

Out of a total of 18 ESDP operations launched between 2003 and 2007, five were military in nature, 12 civilian, and one mixed military–civilian.¹³ Since the ESDP forms an integral part of the Common Foreign and Security Policy (CFSP), all ESDP missions pursue one or more of the foreign policy objectives of the EU set out in Article 11 of the Treaty on European Union (TEU).¹⁴ More specifically, military operations may be conducted to carry out the so-called Petersberg tasks listed in Article 17(2) TEU, that is ‘humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking’.¹⁵ All five military missions launched by the EU so far, that is operation *Concordia* in the Former Yugoslav Republic of Macedonia (FYROM), *Artemis* in the Democratic Republic of the Congo (DRC), *Althea* in Bosnia and Herzegovina (BiH), *EUFOR RD Congo* in the DRC, and *EURFOR Tchad/RCA* in the Republic of Chad and the Central African

¹² E.g. UN–Egypt (UNEF), 8 Feb. 1957, 260 UNTS 61; Israel–Egypt (MFO), 3 Aug. 1981, 1335 UNTS 327; Italy–Albania (Operation Alba), 21 Apr. 1997, *Gazzetta Ufficiale*, 9 Mar. 1999, at 4. See D.W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (1964); R.C.R. Siekmann, *National Contingents in United Nations Peace-Keeping Forces* (1991); H. McCoubrey and N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996); Bothe and Dörschel, ‘The UN Peacekeeping Experience’, in Fleck *supra* note 4, at 487.

¹³ On ESDP operations generally see Lindstrom, ‘On the ground: ESDP operations’, in Gnesotto, *supra* note 1, at 111; Merlingen and Ostrauskaitė, ‘ESDP Police Missions: Meaning, Context and Operational Challenges’, 10 *European Foreign Affairs Rev* (2005) 215; A. Nowak (ed.), *Civilian Crisis Management: The EU Way* (2006).

¹⁴ E. Denza, *The Intergovernmental Pillars of the European Union* (2002), at 129–133.

¹⁵ Pagani, ‘A New Gear in the CFSP Machinery: Integration of the Petersberg Tasks in the Treaty on European Union’, 9 *EJIL* (1998) 737; Grassi, ‘L’introduzione delle operazioni di peace-keeping nel Trattato di Amsterdam: profilo giuridici ed implicazioni politiche’, 53 *Comunità Internazionale* (1998) 295; von Kielmansegg, ‘The meaning of Petersberg: Some considerations on the legal scope of ESDP operations’, 44 *CMLRev* (2007) 629. Art. III-309(1) of the Constitutional Treaty, and most recently Art. 28 of the draft Reform Treaty, supplements the list of Petersberg tasks with new missions, including joint disarmament operations and military advice and assistance tasks. See Naert, *supra* note 1, at 196.

Republic¹⁶ carried out general peacekeeping and humanitarian tasks, though some were authorized to perform rescue operations and to take enforcement action as well.

On the civilian side, the Member States of the EU have identified four priority areas for developing the EU's civilian crisis management capabilities: police, the rule of law, civil administration, and civil protection.¹⁷ By the end of 2007, the EU had launched seven police missions: the *EU Police Mission (EUPM)* in BiH,¹⁸ *Proxima* in FYROM,¹⁹ *EUPOL Kinshasa* in the DRC,²⁰ *EU COPPS* in the Palestinian Territories,²¹ *EUPAT* in FYROM,²² *EUPOL AFGHANISTAN*,²³ and *EUPOL RD Congo* in the DRC;²⁴ two rule of law missions: *EUJUST Themis* in Georgia²⁵ and *EUJUST Lex* in Iraq;²⁶ one civilian monitoring mission: the *Aceh Monitoring Mission (AMM)* in Indonesia;²⁷ one security sector mission: *EUSEC RD Congo* in the DRC;²⁸ and one border assistance mission: *EU BAM Rafah* in the Palestinian Territories.²⁹ The only mixed civilian–military mission launched so far was the *EU Civilian–Military Supporting Action to AMIS II* in Sudan.³⁰ Three further missions should be mentioned in this context: the *EU Monitoring Mission (EUMM)*³¹ operating in the Western Balkans, the *EU Border Assistance Mission to Moldova and Ukraine*,³² and the EU Planning Team for Kosovo (*EUPT Kosovo*).³³ Although none of these three missions is formally considered to be an ESDP operation, all of them are crisis management missions conducted by the EU that in certain respects, given their tasks, duration, or legal basis, resemble ESDP operations.

The 18 ESDP missions launched to date share a number of common features, yet significant differences exist between them as well. On the one hand, all missions were established by the Council of the European Union in the form of a Joint Action based on Article 14 TEU. In all cases, the Council entrusted the Political and Security Committee with the political control and strategic direction of the operation in

¹⁶ Council Joint Actions 2003/92/CFSP of 27 Jan. 2003 [2003] OJ L34/26 (*Concordia*); 2003/423/CFSP of 5 June 2003 [2003] OJ L143/50 (*Artemis*); 2004/570/CFSP of 12 July 2004 [2004] OJ L252/10 (*Althea*); 2006/319/CFSP of 27 Apr. 2006 [2006] OJ L116/98 (*EUFOR RD Congo*); 2007/677/CFSP of 15 Oct. 2007 [2007] OJ L279/21 (*EUFOR Tchad/RCA*).

¹⁷ App. 3 to Presidency Report on the ESDP (Feira), 15 June 2000.

¹⁸ Council Joint Action 2002/210/CFSP of 11 Mar. 2002 [2002] OJ L70/1.

¹⁹ Council Joint Action 2003/681/CFSP of 29 Sept. 2003 [2003] OJ L249/66.

²⁰ Council Joint Action 2004/847/CFSP of 9 Dec. 2004 [2004] OJ L367/30.

²¹ Council Joint Action 2005/797/CFSP of 14 Nov. 2005 [2005] OJ L300/65.

²² Council Joint Action 2005/826/CFSP of 24 Nov. 2005 [2005] OJ L307/61.

²³ Council Joint Action 2007/369/CFSP of 30 May 2007 [2007] OJ L39/33.

²⁴ Council Joint Action 2007/405/CFSP of 12 June 2007 [2007] OJ L151/46.

²⁵ Council Joint Action 2004/523/CFSP of 28 June 2004 [2004] OJ L228/21.

²⁶ Council Joint Action 2005/190/CFSP of 7 Mar. 2005 [2005] OJ L62/37.

²⁷ Council Joint Action 2005/643/CFSP of 9 Sept. 2005 [2005] OJ L234/13.

²⁸ Council Joint Action 2005/355/CFSP of 2 May 2005 [2005] OJ L112/20.

²⁹ Council Joint Action 2005/889/CFSP of 12 Dec. 2005 [2005] OJ L327/28.

³⁰ Council Joint Action 2005/557/CFSP of 18 July 2005 [2005] OJ L188/46.

³¹ Council Joint Action 2000/811/CFSP of 22 Dec. 2000 [2000] OJ L328/53.

³² Commission doc C(2005)4231/1, European Community Border Assistance Mission, 25 Oct. 2005.

³³ Council Joint Action 2006/304/CFSP of 10 Apr. 2006 [2006] OJ L112/19.

accordance with Article 25 TEU. The personnel and assets employed were seconded or made available by the Member States and institutions of the EU as well as by third states and organizations, such as NATO.³⁴ In all 18 cases, the deployment of troops and civilian personnel was based on the express consent of the third state hosting the mission concerned. Civilian missions were financed from the budget of the European Communities, whereas the costs of military operations were borne by the EU Member States and any contributing third states pursuant to Article 28(3) TEU.³⁵ All operations were launched to complement or support already existing European and international donor programmes and activities on the ground.

On the other hand, ESDP missions differ significantly in their size. Whereas *EUJUST Themis* in Georgia consisted of fewer than a dozen civilian experts, the EU's largest crisis management operation so far, *Althea* in BiH, numbered close to 7,000 military personnel at its height. The costs involved in fielding an operation vary considerably too: while the financial reference amount for *EUPAT* was €1.5 million, the common costs of *EUFOR RD Congo* stood at close to €17 million. As regards their basic objectives, ESDP operations have ranged from supervisory (*EU BAM Rafah*), training (*EUJUST Lex*), advisory (*EUSEC RD Congo*), and monitoring (*AMM*) missions to military operations tasked to contribute to safety and security in their area of deployment (*Althea*). The members of these missions have carried out their tasks in radically different operational environments, from the corridors of the Georgian Ministry of Justice to the alleyways of Bunia in the DRC. Four operations, *Artemis*, *Althea*, *EUFOR RD Congo*, and *EURFOR Tchad/RCA* were authorized by the UN Security Council under Chapter VII of the UN Charter to use all necessary measures, including armed force, to accomplish their mandate.³⁶ Finally, the political and economic relations between the EU and the various host states also differ considerably. For example, as potential members of the bloc, BiH and FYROM enjoy closer and deeper ties with the EU as a whole than the DRC, a major beneficiary of European development assistance.

3 The Evolution of the Legal Status of ESDP Missions

A Status Arrangements under the ESDP

Subject to one exception, steps were taken in the course of all ESDP operations to define their legal status under international law during their presence in the territory of the host state. The resulting legal arrangements are far from uniform, however. In the majority of cases, the EU has entered into separate SOFAs or SOMAs with each host country concerned in accordance with the procedure laid down in Article 24

³⁴ Regarding cooperation between the EU and NATO in the field of the ESDP see App. to Annex VII to Presidency Report on the ESDP (Nice), 13 Dec. 2000, at 58; 'EU–NATO Declaration on ESDP', 42 ILM (2003) 242; Reichard, 'Some Legal Issues Concerning the EU–NATO Berlin Plus Agreement', 73 *Nordic J Int'l L* (2004) 37; M. Reichard, *The EU–NATO Relationship: A Legal and Political Perspective* (2006).

³⁵ Scannell, 'Financing ESDP Military Operations', 9 *European Foreign Affairs Rev* (2004) 529.

³⁶ SC Res. 1484 of 30 May 2003, 1575 of 22 Nov. 2004, 1671 of 25 Apr. 2006, and 1778 of 25 Sept. 2007, respectively.

TEU. This provision enables the Council to conclude international agreements with one or more states or international organizations in order to implement the CFSP, including the ESDP.³⁷ Such agreements are negotiated by the Presidency under the Council's authority. The EU has entered into separate status agreements with BiH for *EUPM*,³⁸ FYROM for *Concordia* and *Proxima*,³⁹ Georgia for *EUJUST Themis*,⁴⁰ the DRC for *EUPOL Kinshasa*,⁴¹ Indonesia for the *AMM*,⁴² and Gabon for *EUFOR RD Congo*.⁴³ Negotiations were underway in mid-2007 to finalize agreements concerning the legal position of *EUPOL AFGHANISTAN* and *EUPOL RD Congo*.⁴⁴ No new agreements were concluded in the case of *EUSEC RD Congo* and *EUPAT*, as the EU and the two host states concerned agreed to extend the application of earlier agreements, the *EUPOL Kinshasa* SOMA and the *Proxima* SOMA respectively, to these missions.⁴⁵ The international legal position of three missions, namely operation *EUJUST Lex*, *EU COPPS*, and *EU BAM Rafah*, was defined in informal arrangements taking the form of an exchange of letters between the High Representative for the CFSP and the competent authorities of the third parties concerned, rather than by way of international agreements based on Article 24 TEU.⁴⁶

In five cases, existing legal arrangements negotiated by a Member State or by third parties were extended to cover EU forces and civilian personnel. First, in the case of operation *Artemis*, the Government of Uganda unilaterally extended the application of a bilateral agreement concluded between France and Uganda on 18 June 2003 to other states contributing personnel and assets to *Artemis* during their presence in

³⁷ Generally see Denza, *supra* note 14, at 173–178; Marquardt, 'The Conclusion of International Agreements under Article 24 of the Treaty on European Union', in V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?* (2001), at 333; D.R. Verwey, *The European Community, the European Union and the International Law of Treaties* (2004), at 59–83; P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (2005), at 154–160.

³⁸ EU–BiH, 4 Oct. 2002 [2002] OJ L293/2.

³⁹ EU–FYROM, 21 Mar. 2003 [2003] OJ L82/46; EU–FYROM, 11 Dec. 2003 [2004] OJ L16/66.

⁴⁰ EU–Georgia, 3 Dec. 2004 [2004] OJ L389/42.

⁴¹ EU–DRC, 1 Sept. 2005 [2005] OJ L256/58.

⁴² EU–Indonesia, 9 Sept. 2005 [2005] OJ L288/60; extended by EU–Indonesia, 28 Feb. 2006 [2006] OJ L71/55 and EU–Indonesia, 15 Sept. 2006 [2006] OJ L273/9.

⁴³ EU–Gabon, 16 June 2006 [2006] OJ L187/43. The conclusion of a SOFA with Gabon was necessary because the 'over-the-horizon' back-up forces of *EUFOR RD Congo* were stationed in that country.

⁴⁴ Pending the conclusion of these agreements, *EUPOL RD Congo* is subject to the same arrangements as *EUFOR RD Congo* (see *infra* note 52 and the accompanying text), while the privileges and immunities of *EUPOL AFGHANISTAN* are addressed in general terms in the (unpublished) letter by the Afghan authorities inviting the mission into the country: information received from the General Secretariat of the Council.

⁴⁵ See rec (11) of Joint Action 2005/355/CFSP, *supra* note 28, and Art. 11(1) of Joint Action 2005/826/CFSP, *supra* note 22.

⁴⁶ While these arrangements appear to be non-binding instruments, the commitments undertaken by the third parties concerned in these instruments, whereby they agreed to grant certain privileges and immunities to the relevant EU missions and their personnel, were clearly intended to produce legal effects. Cf. Schachter, 'The Twilight Existence of Nonbinding International Agreements', 71 *AJIL* (1977) 296, at 301; Aust, 'The Theory and Practice of Informal International Instruments', 35 *ICLQ* (1986) 787. For a discussion of the EU's practice of concluding informal arrangements see Sari, 'The Conclusion of International Agreements in the Context of the ESDP', forthcoming in 57 *ICLQ* (2008).

Uganda,⁴⁷ where the forward base of the operation was located. Secondly, in Resolution 1551 of 9 July 2004, the Security Council decided that the status of forces agreements contained in Appendix B to Annex 1-A to the Dayton Peace Agreement should apply provisionally to operation *Althea*,⁴⁸ which is the legal successor of SFOR in BiH.⁴⁹ Thirdly, the personnel of the *EU Supporting Action to AMIS II* were covered by the SOMA concluded between the African Union and Sudan,⁵⁰ which in turn provided for the applicability of the relevant provisions of the General Convention on the Privileges and Immunities of the Organization of African Unity.⁵¹ Fourthly, in Resolution 1671 of 25 April 2006, the Security Council decided that the terms of the SOMA governing the legal position of the UN Mission to the Democratic Republic of the Congo (MONUC)⁵² should apply provisionally, *mutatis mutandis*, between the EU and the DRC in respect of *EUFOR RD Congo*. Finally, on 21 June 2006, the Head of the United Nations Interim Administration Mission in Kosovo (UNMIK) extended the application of UNMIK Regulation 2000/47,⁵³ which defines the status, privileges, and immunities of NATO's Kosovo Force (KFOR) and UNMIK in Kosovo, to *EUPT Kosovo* by way of an executive decision following a request from the High Representative for the CFSP.⁵⁴

No SOFA has been concluded between the EU and the DRC for the purposes of operation *Artemis*, despite the fact that the Council act establishing the operation expressly provided that such an agreement should be negotiated 'if required'.⁵⁵ The legal status of operation *Artemis* was therefore subject to the relevant rules of

⁴⁷ Annex I to Council doc. 10773/03, 26 June 2003; Council doc. 12225/03, Note Verbal from the Ministry of Foreign Affairs of the Republic of Uganda, 4 Sept. 2004.

⁴⁸ 35 ILM (1996) 75.

⁴⁹ This arrangement has been confirmed by SC Res. 1575 of 22 Nov. 2004, 1639 of 21 Nov. 2005 and 1722 of 21 Nov. 2006.

⁵⁰ Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC), 4 June 2004 (on file with the author). See recs (14) and (15) of Joint Action 2005/557/CFSP, *supra* note 30.

⁵¹ 25 Oct. 1965, 1000 UNTS 393.

⁵² UN–DRC, 4 May 2000 (on file with the author).

⁵³ UNMIK/REG/2000/47, 18 Aug. 2000, available at www.unmikonline.org/.

⁵⁴ Executive Decision 2006/18 on Privileges and Immunities of the European Union Planning Team for Kosovo and its Personnel, 21 June 2006 (on file with the author); exchange of letters between the High Representative and the Head of UNMIK (on file with the author).

⁵⁵ Art. 13 Council Joint Action 2003/423/CFSP, *supra* note 16. Military and civilian personnel made available by states for participating in international peace support operations are covered by the principle of state immunity under customary international law (see *infra* note 105), yet the exact scope of this immunity is uncertain. One would assume, therefore, that negotiating SOFAs or SOMAs, or at least informal arrangements, is always 'required', inasmuch as the timely conclusion of such agreements or arrangements is critical for clarifying the legal position of foreign personnel and protecting the legal interests of all parties involved, including private individuals who might suffer damage or injury as a result of the operation. The confusion surrounding the applicability of the UN Convention on the Jurisdictional Immunities of States and their Property (GA Res. A /RES/59/38) to military operations has arguably fuelled this uncertainty further: see Dickinson, 'Status of Forces Under the UN Convention on State Immunity', 55 *ICLQ* (2006) 427.

customary international law, a fact expressly recognized by the General Secretariat of the Council.⁵⁶

Considerable differences exist between the status agreements negotiated by the EU for the purposes of an ESDP operation and those pre-existing legal arrangements that have been extended to such operations on an *ad hoc* basis. By contrast, a comparison of the successive status agreements concluded directly by the EU reveals a relatively high degree of consistency between them as well as a clear pattern in their evolution. Since the common purpose of status agreements is to confer certain privileges and immunities on a body of foreign military or civilian personnel,⁵⁷ all SOFAs and SOMAs concluded by the EU address certain basic legal and practical questions. In particular, almost all of them include provisions regulating the exercise of civil and criminal jurisdiction by the local authorities over members of the mission, as well as provisions governing their entry and departure, freedom of movement, means of transport, and communications in the territory of the host state. In addition, the EU has followed its own earlier practice in negotiating new SOFAs and SOMAs. Although agreements concluded under Article 24 TEU are negotiated by the Presidency under the direction of the Council, members of the General Secretariat of the Council have played a key role in drafting ESDP status agreements.⁵⁸ This has enabled the General Secretariat to act as an institutional memory in relation to these agreements.

Two broad phases can be identified in the development of the EU's practice relating to SOMAs and SOFAs. The first phase begins with the conclusion of an agreement between the EU and BiH in late 2002 concerning the legal position of *EUPM*. This period is characterized by efforts to define the general principles to be followed by the EU in negotiating status agreements in the context of the ESDP. The second phase begins with the adoption of a generic EU Model SOFA and an EU Model SOMA in mid-2005. These two model agreements constitute the current framework for negotiating status agreements for future EU crisis management operations.

B The First Phase: Diplomatic Status and its Discontents

It appears that no advance planning was undertaken by the Council on the question of status agreements before the first ever ESDP mission, *EUPM* in BiH, was launched. Instead, the SOMA concluded between the EU and BiH in October 2002 for the purposes of *EUPM* simply followed the most relevant precedent of the time, that is the

⁵⁶ Council doc. 11621/05, 'Public access to documents – Confirmatory application N° 33/c/03/05' (submitted by the author), 5 Sept. 2005, at 4. In addition, it should be noted that the position of national contingents in the territory of the host state may also be subject to bilateral or multilateral agreements, including SOFAs, concluded between the host state and the states contributing personnel and assets to an ESDP operation.

⁵⁷ *Supra* note 4. The only exception in this regard is the *EUPM* SOMA, which closely follows the status agreements concluded for the ECMM/EUMM, and is less detailed than subsequent ESDP status agreements.

⁵⁸ Council doc. 12132/02, Framework for drafting a document on the Status of Forces Agreement (SOFA) to be used in the event of EU led Police operation, 3 Oct. 2002, at 3–4.

arrangements adopted to regulate the legal position of the *EUMM*. The Memorandum of Understanding defining the mandate and status of the *EUMM*'s predecessor, the *European Community Monitoring Mission (ECMM)*, provided that its personnel should during their mission be granted the privileges and immunities of diplomatic agents,⁵⁹ as defined in the Vienna Convention on Diplomatic Relations of 1961 (VCDR).⁶⁰ When the *ECMM* was restructured and transformed into the *EUMM* in 2000, the EU entered into new SOMAs with the Federal Republic of Yugoslavia, FYROM, and Albania.⁶¹ These agreements continued the earlier arrangements and granted the *EUMM* the status of a diplomatic mission and its personnel the privileges and immunities of diplomatic agents. This precedent was followed in the case of *EUPM* and subsequently in operations *Concordia*, *Proxima*, *EUPAT*, *EUJUST Themis*, *EUPOL Kinshasa*, and *EUSEC RD Congo*.

The conferment of diplomatic privileges and immunities on foreign military and civilian personnel is not unusual in international law. Military, naval, and air attachés and other military staff attached to a foreign embassy normally benefit from the privileges and immunities enjoyed by diplomatic agents.⁶² Full diplomatic privileges and immunities are sometimes conferred on the heads of foreign military missions,⁶³ and occasionally on their members as well.⁶⁴ Personnel deployed abroad for various short-term activities, such as exercises, training activities, or disaster relief, are frequently granted a status equivalent to that accorded to administrative and technical staff under the VCDR,⁶⁵ in particular in the treaty practice of the United States.⁶⁶ In the

⁵⁹ Memorandum of Understanding on the Monitor Mission to Yugoslavia, 13 July 1991 (on file with the author). Identical arrangements were made in subsequent instruments relating to the *ECMM* as well, e.g. Memorandum of Understanding between the EU Member States and Croatia of 21 Dec. 1998 (on file with the author). Diplomatic status was also conferred on the EU Administration of the town of Mostar in BiH: Art. 19 Memorandum of Understanding on the European Union Administration of Mostar, 5 July 1994 (on file with the author). See Lopandic, 'Les Mémoires d'Entente: Des Instruments Juridique Spécifiques de la Politique Etrangère et de Sécurité de l'Union Européenne – Le Cas de l'ex-Yugoslavie', 392 *Revue du Marché Commun et de l'Union européenne* (1995) 557; Pagani, 'L'Administration de Mostar par L'Union Européenne', 42 *AFDI* (1996) 234.

⁶⁰ 18 Apr. 1961, 500 UNTS 95. See E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (2nd edn, 1998).

⁶¹ EU–FRY, 25 Apr. 2001 [2001] OJ L125/2; EU–FYROM, 31 Aug. 2001 [2001] OJ L241/2; EU–Albania, 28 Mar. 2003 [2003] OJ L93/50.

⁶² On attachés see *The Amazon* [1940] P 40 (CA); *Caravel Office Building Co v. Peruvian Air Attaché* (1975) 347 A 2d 280 (DC); *Duff v. The Queen* (1979) 39 FLR 315 (Fed Ct Aust), at 352–356. For other attached personnel see US–Indonesia, 15 Aug. 1950, UST 1619; Art. V of US–Honduras, 20 May 1954, 222 UNTS 87; US–Jamaica, 6 June 1963, UST 821; US–Kuwait, 15 Apr. 1975, TIAS 8066.

⁶³ Art. 5 of France–Cameroon, 13 Nov. 1960, 741 UNTS 206; US–Congo, 19 July 1964, TIAS 5530.

⁶⁴ Art. 13 of US–Liberia, 11 Jan. 1951, 122 UNTS 125. For an early example see UK–Egypt, 21 Oct. 1937, 184 LNTS 285.

⁶⁵ Brazil–Paraguay, 24 July 1995, 1953 UNTS 124; France–Tajikistan, 7 Dec. 2001 [2003] Journal Officiel de la République Française (JORF) 12474; Australia–Kyrgyz Republic, 14 Feb. 2002 [2002] ATS 14; France–Guyana, 1 July 2004 [2004] JORF 16337. Some agreements expressly prohibit the conferment of diplomatic status on foreign military personnel: Art. 9(6) of Germany–Tanzania, 22 Jan. 2002, [2002] II BGBI 622; s. VI(6.1) of US–UK, 13 Feb. 2006, KAV 7537.

⁶⁶ US–Grenada, 11 Oct. 1993, KAV 3693; US–Suriname, 17 Jan. 1996, KAV 4513; US–Nicaragua, 25 Nov. 1998, KAV 5581; US–Paraguay, 30 Mar. 2001, KAV 6971; US–Afghanistan, 28 May 2003, KAV 6192; US–Rwanda, 11 July 2005, KAV 7344; Art. IX of US–BiH, 22 Nov. 2005, KAV 7496.

field of peacekeeping, the head of mission or force commander and other high-ranking members of peace support operations are routinely granted the privileges and immunities enjoyed by diplomatic agents.⁶⁷ However, it is far less common to confer diplomatic status on all members of a peace support operation. Small detachments of an operation and individual national contingents have occasionally been accorded the privileges and immunities of diplomatic agents or those of technical and administrative staff under the VCDR.⁶⁸ In addition, members of UN military observer missions have in the past been granted full diplomatic status,⁶⁹ but in more recent decades only senior members of observer missions have benefited from such treatment.⁷⁰ The EU's early practice of entering into agreements stipulating that all members of an ESDP operation shall be granted privileges and immunities equivalent to those enjoyed by diplomatic agents is therefore somewhat exceptional, as this goes beyond the privileges and immunities normally conferred on members of peace support operations under similar circumstances.

It is not entirely clear why the EU has adopted this approach. Relying on the relevant provisions of the VCDR absolves the EU and host states from having to draft detailed definitions themselves, yet it is unlikely that this fairly widespread drafting technique was chosen simply for reasons of convenience.⁷¹ While the precedent of the *ECMM* and *EUMM* SOMAs may account for the conclusion of similar agreements with FYROM and BiH, it does not explain why the EU has negotiated such arrangements with Georgia and the DRC. Since the privileges and immunities of diplomatic agents are broader than those normally granted to foreign troops,⁷² the most likely explanation is that the EU has demanded full diplomatic status for members of ESDP operations as a means to maximize their privileges and immunities in the territory of the host state. However, third states and local communities may consider this strategy heavy-handed.⁷³ While the conferment of full diplomatic status may be appropriate on an exceptional basis and in the case of smaller missions, such as *EUJUST Themis*, *EUPOL Kinshasa*, or *EUSEC RD Congo*, it is more difficult to justify why members

⁶⁷ Para. 25 of Israel–Egypt (MFO), 3 Aug. 1981, 1335 UNTS 327; Art. VI(23) of UN–Mozambique (UNOMOZ), 14 May 1993, 1722 UNTS 39; Art. VI(24) of UN–FYROM (UNPROFOR), 14 June 1994, 1788 UNTS 257; Art. VI(26) of UN–Ethiopia (UNMEE), 23 Mar. 2001, 2141 UNTS 24.

⁶⁸ Art. 1, Additional Protocol UN–Angola (UNTAG), 9 June 1989, 1537 UNTS 13; UK–Lebanon (MFO), 31 Jan. 1983, 1316 UNTS 197.

⁶⁹ UN–Lebanon (UNOGIL), 13 June 1958, 303 UNTS 271.

⁷⁰ UN–Iran (UNIIMOG), 28 Mar. 1989, 1512 UNTS 47; UN–Kuwait (UNIKOM), 20 May 1992, 1675 UNTS 163; UN–Uganda (UNOMUR), 16 Aug. 1993, 1730 UNTS 103. On UN military observer missions see J. Hillen, *Blue Helmets: The Strategy of UN Military Operations* (2nd edn, 2000), at 33–57.

⁷¹ Numerous multilateral and bilateral status agreements simply refer to the relevant provisions of the NATO SOFA instead of reproducing them, e.g. Partnership for Peace SOFA, 19 June 1995, TIAS 12666; Memorandum of Understanding between Estonia, Finland, Norway, and Sweden concerning a Multinational Battle Group to be made available to the EU, 17 May 2005 (on file with the author); US–France, 22 July 2004, KAV 6591. This technique is also frequently used in technical agreements.

⁷² Unlike diplomatic agents, foreign military personnel are usually liable to arrest and brief periods of detention by the local authorities, their private residence is not inviolable, nor do members of their household benefit from most of the privileges and immunities they themselves enjoy.

⁷³ Cf. L.S. Frey and M.L. Frey, *The History of Diplomatic Immunity* (1998), at 575–576.

of ESDP operations should benefit from the privileges and immunities enjoyed by diplomatic agents as a general rule, especially in the case of operations involving large, self-sufficient bodies of military and civilian personnel.⁷⁴

Doubts were raised about this strategy within the EU from the outset. In a study dealing with the drafting of status agreements for EU police missions published in October 2002, the Council General Secretariat noted that the purpose of SOFAs and SOMAs is to confer 'protective legal status' on members of a crisis management operation.⁷⁵ However, according to the General Secretariat, a balance must be struck between this objective and the need to respect the territorial sovereignty of the host state, so that only such privileges and immunities should be sought as are necessary to ensure the legal security of ESDP personnel.⁷⁶ This emphasis on the strict functionality of the privileges and immunities to be negotiated with host states is clearly at odds with the EU's repeated requests for treatment equivalent to full diplomatic status.

Similar points were made in a paper submitted by the Danish Presidency in December 2002.⁷⁷ Not only did the paper suggest that privileges were less important than immunities in order to ensure the independence and legal protection of an EU crisis management mission,⁷⁸ but it also advised against the wholesale adoption of the status regimes contained in the VCDR or the Convention on the Privileges and Immunities of the UN of 1946.⁷⁹ Instead, it favoured a more flexible 'building-block' approach whereby the privileges and immunities of an EU mission would be defined on a case-by-case basis so as to reflect its specific functions and operational circumstances. The Presidency paper also recalled the need to strike a balance between the privileges and immunities of ESDP personnel, the sovereignty of the host state, and the rule of law, and in this respect underlined that consideration would have to be given to the public perception of the mission.⁸⁰ Apparently, Denmark was not the only Member State to have expressed reservations about the conferment of diplomatic status on ESDP personnel. A document identifying the lessons to be learned from the planning of *EUPM* noted that the elaboration of the draft *EUPM* SOFA 'illustrated the sensitivity of the

⁷⁴ It is noteworthy in this context that Israel has granted full diplomatic status only to the Head of Mission of *EU BAM Rafah*, while other personnel of the mission benefit from the privileges and immunities afforded to administrative and technical staff under the VCDR. See Letter from the Vice Prime Minister of Israel addressed to the High Representative for the CFSP, 23 Nov. 2005 (on file with the author).

⁷⁵ Council doc 12132/02, *supra* note 58, at 2. See also Council doc. 9490/06, Policy of the EU on the security of personnel deployed outside the EU in an operational capacity under Title V of the TEU, 29 May 2006, at 9.

⁷⁶ Council doc 12132/02, *supra* note 58, at 2. For the classic statement of the functional nature of the immunities of visiting forces see *The Schooner Exchange v. McFaddon* (1812) 11 US 116.

⁷⁷ Council doc 15711/02, Generic Status of Force Agreement for Police Missions, 17 Dec. 2002.

⁷⁸ For a status agreement granting certain categories of military personnel the immunities attaching to technical and administrative staff under the VCDR without the corresponding privileges see Art. IV of Brazil–Paraguay, 24 July 1995, 1953 UNTS 124.

⁷⁹ 13 Feb. 1946, 1 UNTS 15.

⁸⁰ Council doc 15711/02, *supra* note 77, at 2–3.

question of immunities for Member States'.⁸¹ Regrettably, the document offered no further details.

C *The Model Agreement for EU Police Missions: a Duty of Self-restraint?*

The concerns raised in the Danish Presidency paper were addressed for the first time in a model status agreement for EU police missions drafted by the General Secretariat of the Council.⁸² Whereas early versions of the model agreement did not contain any provisions dealing with privileges and immunities, the third revised version drafted in April 2003 offered EU decision-makers a choice between three different legal solutions, depending on the overall legal, political, and security situation in the host state, including the human rights situation and the state of the local judicial system.⁸³ Under the first scenario, members of an EU police mission were to be granted privileges and immunities equivalent to those set out in section 22 of the UN Privileges and Immunities Convention, which defines the legal position of experts on mission for the UN.⁸⁴ In effect, the General Secretariat thereby proposed that the EU should follow the practice that has evolved in the context of UN peacekeeping.⁸⁵ Since peace support operations established by and operating under the command and control of the UN are subsidiary organs of the Organization, in principle, they and their personnel fall within the scope of application of the UN Privileges and Immunities Convention. Accordingly, civilian police and other civilian personnel taking part in UN peace support operations are considered as experts on mission for the UN, and therefore benefit from the privileges and immunities listed in section 22 of the Convention.⁸⁶ The same provision was to be applied to the personnel of EU police missions by analogy.⁸⁷ The second scenario was identical with the first, except that it also conferred on members of EU police missions 'absolute immunity' from the criminal jurisdiction of the host state. Apart from high-ranking officials, usually only military members of a military component enjoy complete immunity from local criminal jurisdiction in UN peacekeeping practice.⁸⁸ Finally,

⁸¹ Council doc 11206/03, Lessons from the planning of the EU Police Mission in Bosnia and Herzegovina (EUPM), 14 July 2003, at 8.

⁸² Council doc 9313/03, Model agreement on the status of an EU-led Police mission, 14 May 2003. For the first version of this text see Council doc 14612/02, 27 Nov. 2002.

⁸³ Art. IV, Council doc 14612/3/02 REV3, 24 Apr. 2003. Cf. Perritt, 'Policing International Peace and Security: International Police Forces', 17 *Wisconsin Int'l LJ* (1999) 281, at 310–323.

⁸⁴ These privileges and immunities include immunity from personal arrest or detention, immunity from legal process of every kind in respect of words spoken or written and acts done by experts in the course of the performance of their mission, and inviolability for all papers and documents.

⁸⁵ See Siekmann, *supra* note 12, at 120–152; Bothe and Dörschel, *supra* note 12, at 496–497; Annex to UN doc A/59/710, A comprehensive strategy to eliminate future sexual exploitation and abuse in UN peacekeeping operations, 24 Mar. 2005, at 32.

⁸⁶ Art. VI(26), UN doc A/45/594, Model status-of-forces agreement for peacekeeping operations: Report of the Secretary-General, 9 Oct. 1990 (hereinafter 'UN Model SOFA').

⁸⁷ These provisions have occasionally been applied on a bilateral basis as well: Art. 1(f) of France–Burundi, 7 Oct. 1969 [1970] JORF 3784.

⁸⁸ Art. VI(46)(b), UN Model SOFA.

under the third scenario, personnel performing ‘essential functions’ in the framework of an EU police mission were to be granted all privileges and immunities equivalent to those of diplomatic agents, while locally hired personnel performing auxiliary functions were to benefit from privileges and immunities equivalent to those granted to ‘similar staff’ under the VCDR, which presumably meant administrative and technical personnel.⁸⁹

As the General Secretariat explained in a footnote, the purpose of offering decision-makers a choice between these three scenarios was to enable them to strike ‘an appropriate balance between the requirement to allow EU mission personnel to fulfil their mandate safely and independently, and the necessity to respect the Rule of Law in the territory of the Host Party’.⁹⁰ The footnote went on to proclaim that the ‘EU will act responsibly when deciding the appropriate degree of privileges and immunities for each mission’.⁹¹ This statement seems to imply that the EU is under some kind of an obligation to choose the least intrusive of the three scenarios under the prevailing circumstances. In fact, whatever the relevant ethical considerations may be,⁹² no legal obligation to this effect exists.

There is no principle of international law which compels the EU to request only such privileges and immunities as are strictly necessary to enable ESDP missions to carry out their mandate. Even the conferment of very extensive privileges and immunities does not infringe the sovereignty of the host state, given that every state is free, in principle,⁹³ to waive its right to exercise its jurisdictional competences within its territory.⁹⁴ No rule or principle of international law requires that the resulting status agreements must be based on reciprocity.⁹⁵ Nor do the objectives of the CFSP as

⁸⁹ See Art. 37 VCDR.

⁹⁰ Council doc 14612/3/02 REV3, 24 Apr. 2003, at 7.

⁹¹ *Ibid.*

⁹² Cf. Manners, ‘Normative Power Europe: A Contradiction in Terms?’, 40 *J Common Market Studies* (2002) 235.

⁹³ Certain international agreements to which a host state is a party, such as the Geneva Conventions of 1949, may impose on it an obligation to exercise its jurisdiction under certain circumstances. See van Elst, ‘Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions’, 13 *Leiden J Int’l L* (2000) 815.

⁹⁴ To paraphrase the Permanent Court of International Justice (PCIJ), the host state’s undertaking in a status agreement to refrain from exercising its jurisdictional competences constitutes an exercise, not an abandonment, of its sovereignty: *The SS Wimbledon* (1923), PCIJ Series A, No 1, at 25. Cf. Klabbbers, ‘Clinching the Concept of Sovereignty: Wimbledon Redux’, 3 *Austrian Rev Int’l & European L* (1998) 345. In fact, both the PCIJ and the International Court of Justice (ICJ) have found the delegation of broad jurisdictional powers by one state to another compatible with the continued existence of sovereignty: see *Lighthouses in Crete and Samos (France v. Greece)* (1937), PCIJ Series A/B, No 71, at 103; *Rights of Nationals of the United States of America in Morocco (France v. USA)* [1952] ICJ Rep 176, at 188.

⁹⁵ The notion that ‘unequal treaties’ are void has never become accepted in international law: I. Brownlie, *Principles of Public International Law* (2nd edn, 2006), at 591; A. Aust, *Modern Treaty Law and Practice* (2000), at 257. See also Lester, ‘Bizerta and the Unequal Treaty Theory’, 11 *ICLQ* (1962) 847; Caffisch, ‘Unequal Treaties’, 35 *German Ybk Int’l L* (1993) 52; Craven, ‘What Happened to Unequal Treaties? The Continuities of Informal Empire’, 74 *Nordic J Int’l L* (2005) 335. At any rate, it cannot be convincingly argued that an international agreement defining the legal position of military and civilian personnel present in the territory of the host state as a result of an invitation to aid and assist the local authorities lacks an element of *quid pro quo*, as required by some authors, such as Detter, ‘The Problem of Unequal Treaties’, 15 *ICLQ* (1966) 1069, at 1088.

defined in Article 11 TEU, in particular the principle of the rule of law, impose such restrictions. Extensive privileges and immunities are not automatically incompatible with the 'necessity to respect the Rule of Law in the territory of the Host Party', given that jurisdictional immunities merely constitute a procedural bar to the exercise of jurisdiction by the local authorities, but do not affect the underlying applicability of local laws and regulations.⁹⁶ Many status agreements, including those concluded by the EU, thus impose an express duty on foreign personnel to respect local law.⁹⁷ Moreover, not only can jurisdictional immunities be waived, but the EU and host states may agree to establish alternative procedures and mechanisms for resolving disputes involving private claimants.⁹⁸ It should be remembered in this respect that, as a matter of international law, the jurisdictional competences of sending states extend to acts committed by their nationals and officials abroad,⁹⁹ and that in many cases status agreements permit the authorities of the sending state to exercise some of these competences in the territory of the host state in accordance with their own laws and regulations.¹⁰⁰ In any event, the domestic authorities of sending states will almost certainly be able to institute proceedings against such nationals and officials once they have returned to the territory of the sending state.¹⁰¹ The exemption of ESDP personnel from local jurisdiction therefore does not inevitably lead to unaccountability and impunity.

Nevertheless, the jurisdictional immunities granted to ESDP missions and their personnel may have implications for the protection of fundamental human rights, above all the right of private individuals in the host state to have their civil rights and obligations determined before a court or tribunal in accordance with Article 6(1) of the European Convention on Human Rights (ECHR),¹⁰² assuming that the Convention applies to them.¹⁰³ The right to access courts or tribunals enshrined in Article 6(1) of

⁹⁶ H. Fox, *The Law of State Immunity* (2002), at 19–20.

⁹⁷ E.g. Art. II, NATO SOFA; Art. IV(6), UN Model SOFA. It has been suggested that provisions to this effect reflect customary international law: van Panhuys, 'Some Recent Developments of International Law in Respect of the Conflicts of Jurisdiction Resulting from the Presence of Foreign Armed Forces in the Territory of a State', 2 *Netherlands Int'l L Rev* (1955) 253, at 256.

⁹⁸ See *infra* sect. 4. D on claims.

⁹⁹ Seyersted, 'Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organisations', 14 *ICLQ* (1965) 31 and 493, at 33–43.

¹⁰⁰ E.g. Art. 11 of Israel–Egypt (MFO), *supra* note 12; Art. VII(1)(a), NATO SOFA. See *infra* note 171, and the accompanying text.

¹⁰¹ Cf. Human Rights Committee Communication 1374/2005 (Spain), 11 Aug. 2006 (dismissing as inadmissible a complaint against the Spanish Police Unit in Kosovo on the basis that its authors failed to seek redress from the Spanish authorities).

¹⁰² Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 Nov. 1950, 213 UNTS 222. Cf. *Waite and Kennedy v. Germany*, 30 EHRR (2000) 261, at para. 67.

¹⁰³ All EU Member States are parties to the ECHR, and as such are obliged under Art. 1 to 'secure to everyone within their jurisdiction the rights and freedoms' set out in the ECHR. In principle, this obligation may arise in the context of a crisis management operation in the following circumstances: where the Member States exercise effective control over an area outside their national territory (*Loizidou v. Turkey*, 20 EHRR (1995) 99, at para. 62; *Cyprus v. Turkey*, 35 EHRR (2002) 30, at paras 75–80; *Issa v. Turkey*, 41 EHRR (2005) 27, at paras 68–71), to the extent that their personnel or other officials exercise authority

the ECHR is not absolute, but may be restricted subject to certain conditions. First, it may not be limited in such a way or to such an extent that its very essence is impaired; secondly, the restrictions in question must pursue a legitimate aim and a reasonable relationship of proportionality must exist between the means employed and the aim sought to be achieved.¹⁰⁴

The attribution of privileges and immunities to ESDP personnel in order to enable them to carry out their mandate, as agreed between the EU and the host state, clearly constitutes a legitimate aim, especially where the terms of a status agreement simply give effect to the host state's obligations under customary international law to exempt foreign personnel from its jurisdiction on the basis of the principle of state immunity.¹⁰⁵ By contrast, it is difficult, if not impossible, to decide on the basis of normative considerations whether the restrictions imposed by ESDP status agreements on the right to access courts is proportionate to the aim they pursue, that is whether the extent of the legal exemptions conferred on ESDP missions is proportionate to the objective of enabling them to carry out their mandate. What constitutes an 'appropriate balance' between the need for legal security of an ESDP operation and respect for the territorial sovereignty of the host state depends entirely on the political judgement of the EU and the host state concerned: nothing prevents the two parties from entering into legal relations biased in favour of the EU if this is what both of them consider expedient under the circumstances. In effect, the test of proportionality would involve a judicial assessment of whether or not the deployment of an ESDP operation under the conditions agreed can reasonably be said to benefit both parties in equal measure. While it may be argued that this matter is not justiciable, in the final analysis the extension of diplomatic status to foreign military and civilian personnel cannot be said to be altogether disproportionate, since diplomatic privileges and immunities form a well-established legal regime in international law that the European Court of Human Rights has found to be compatible with the ECHR.¹⁰⁶

over individuals in the host state (*Cyprus v. Turkey* [1975] 2 DR 125, at 136; *Öcalan v. Turkey*, 37 EHRR (2003) 10, at para. 93), or in cases where the acts of their national authorities produce effects outside their national territory (*Droz and Janousek v. France and Spain*, 14 EHRR (1992) 745, at para. 91). There is some uncertainty in the English courts whether or not the first scenario arises only where the host state is itself a party to the ECHR: *Al Skeini* [2004] EWHC 2911 (Admin), [2005] 2 WLR 1401, at paras 249, 274–278; *Al Skeini* [2005] EWCA Civ 1609, [2007] QB 140, at paras 79–80 and 96; and *Al-Skeini* [2007] UKHL 26, [2007] 3 WLR 33; but see Wilde, "The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?" [2005] *European Human Rights L Rev* 115. Whatever the correct position is, for the foreseeable future few, if any, ESDP operations will find themselves in effective control of foreign territory. On the applicability of the ECHR in the context of peace support operations see also Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases', forthcoming in 8 *Human Rights L Rev* (2008).

¹⁰⁴ *Waite and Kennedy*, *supra* note 102, at para. 59.

¹⁰⁵ *Ibid.*, at para. 63; *McElhinney v. Ireland*, 34 EHRR (2002) 13, at para. 35. On the applicability of the principle of state immunity to foreign personnel see *Shooting Range Extension Case*, 86 ILR (1984) 533 (Verwaltungsgerichtshof Kassel), at 534; *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F 3d 148 (DC Cir. 1994), at 153.

¹⁰⁶ *Fogarty v. United Kingdom*, 34 EHRR (2002) 12, at para. 36.

Accordingly, neither general international law nor the norms of international human rights law impose a duty of self-restraint on the EU in the negotiation of privileges and immunities, provided that private individuals present in the host state are able effectively to assert their rights in relation to an ESDP mission and its personnel in one form or another.¹⁰⁷ The fact that since April 2003 the EU has requested and obtained full diplomatic privileges and immunities for five ESDP operations (*Proxima*, *EUPAT*, *EUJUST Themis*, *EUPOL Kinshasa*, and *EUSEC RD Congo*), including two police missions, suggests that the Council's General Secretariat's calls for moderation were not heeded. However, there are indications that the practice of requesting treatment equivalent to full diplomatic status for ESDP missions and their members continued to be a matter of debate among the Member States.¹⁰⁸ In the case of *EUJUST Themis*, the Political and Security Committee felt compelled to declare that 'the extent of the privileges and immunities foreseen [in the SOMA concluded between the EU and Georgia] for staff of the Mission do not constitute a precedent' for future missions.¹⁰⁹

D The Second Phase: the EU Model SOFA and SOMA

The second phase in the development of the EU's practice relating to status agreements began with the adoption of an EU Model SOFA and an EU Model SOMA.¹¹⁰ The experiences gained in the course of the first few ESDP missions highlighted the need to streamline the procedures governing the conclusion of international agreements with third countries under Article 24 TEU. The fact that Article 24 TEU requires two successive decisions by the Council – one to authorize the Presidency to open negotiations and one to approve the resulting text – meant that in practice this provision turned out to be 'a cumbersome tool for negotiating agreements with third parties'.¹¹¹ Thus, in the case of *EUPM*, the EU had to open negotiations with third states contributing personnel

¹⁰⁷ More stringent conditions might apply if the EU were to administer territory in the absence of effective local government: see Ombudsperson Institution in Kosovo, Special Report No 1 on the Compatibility with Recognized International Standards of UNMIK Reg 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 Aug. 2000), 26 Apr. 2001, esp. at paras 21–28. See Brand, 'Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation', 70 *Nordic J Int'l L* (2001) 461; Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', 12 *EJIL* (2001) 469; Verdirame, 'UN Accountability for Human Rights Violations in Post-Conflict Situations', in N.D. White and D. Klaasen (eds), *The UN, Human Rights and Post-conflict Situations* (2005), at 81, 92–95.

¹⁰⁸ It is not clear why some of the Member States have opposed this practice. They may have called for more limited privileges and immunities in order to prevent a possible deterioration in relations between the EU and the host country's population. For an account of such a situation see Norman, 'The Rape Controversy: Is a Revision of the Status of Forces Agreement with Japan Necessary', 6 *Indiana Int'l & Comp L Rev* (1995–1996) 717.

¹⁰⁹ Council doc 10651/04, Draft Council Status of Mission Agreement on *EUJUST Themis*, 18 June 2004, at 1. I owe this point to Naert, *supra* note 3, at 82.

¹¹⁰ Council doc 8720/05, Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State, 18 May 2005; Council doc 10564/05, Draft Model Agreement on the status of the European Union Civilian Crisis Management Mission in a Host State (SOMA), 27 June 2005.

¹¹¹ Council doc 11206/03, *supra* note 81, at 8–9.

and assets to the mission already in the early stages of the planning process to be able to define the modalities of their participation in the mission in time. The fact that parallel negotiations had to be conducted with a large number of third states appears to have significantly increased the administrative burden this entailed.¹¹² The difficulties encountered in financing operation *Concordia* further underlined the importance of having efficient procedures in place to enable the EU to enter into the necessary agreements with host states and contributing third states as soon as possible.¹¹³

The Council responded to these experiences by concluding several framework participation agreements with third states and by adopting model texts to accelerate the conclusion of international agreements under Article 24 TEU. On 23 February 2004, the Council approved a generic ‘framework participation agreement’ to serve as a basis for establishing a permanent legal framework for the participation of third states in future EU crisis management operations,¹¹⁴ and authorized the Presidency to open negotiations with certain third countries to this end.¹¹⁵ So far, the EU has entered into such agreements with seven third countries,¹¹⁶ two of which have since become Member States of the EU. This was followed by the adoption, on 13 September 2004, of two model agreements on the participation of third states in military and civilian crisis management operations led by the EU.¹¹⁷ As before, the Council authorized the Presidency to open negotiations on the basis of these model agreements with third countries which have not entered into framework participation agreements with the EU in order to define the conditions governing their participation in future ESDP missions.¹¹⁸

Finally, on 23 May 2005, the Council approved an EU Model SOFA concerning the legal status of EU military operations,¹¹⁹ followed by the adoption on 18 July 2005 of an EU Model SOMA concerning the legal position of EU civilian missions.¹²⁰ The EU Model SOMA supersedes the earlier model agreement for EU police missions.¹²¹ In

¹¹² *Ibid.*

¹¹³ Council doc 11154/1/03 REV1, Lessons learned from the first EU military operation (*Concordia*), 15 Sept. 2003, at 7.

¹¹⁴ Council doc 6040/04, Draft Agreement between the EU and some third states establishing a framework for the participation of some third states in the EU crisis management operations (framework participation agreement) – Report, 6 Feb. 2004.

¹¹⁵ 2562nd Council meeting (General Affairs), 23 Feb. 2004, at p. v. The third countries concerned were Canada, Iceland, Norway, Turkey, Bulgaria, Romania, Russia, and Ukraine.

¹¹⁶ EU–Romania, 22 Nov. 2004 [2005] OJ L67/14; EU–Norway, 3 Dec. 2004 [2005] OJ L67/8; EU–Iceland, 21 Feb. 2005 [2005] OJ L67/2; EU–Bulgaria, 24 Jan. 2005 [2005] OJ L46/50; EU–Ukraine, 13 June 2005 [2005] OJ L182/29; EU–Canada, 24 Nov. 2005 [2005] OJ L315/21; EU–Turkey, 29 June 2006 [2006] OJ L189/17.

¹¹⁷ Council doc 12047/04, Draft model agreement between the EU and a third state on the participation of a third state in an EU military crisis management operation, 3 Sept. 2004; Council doc 12050/04, Draft model agreement between the EU and a third state on the participation of a third state in an EU civilian crisis management operation, Sept. 2004. Both documents are classified.

¹¹⁸ See Letter from Rt Hon Denis MacShane MP, in House of Lords European Union Select Committee, Correspondence with Ministers (Forty-fifth Report), HL 243 (Session 2005–2006), at 240.

¹¹⁹ 2659th Council Meeting (General Affairs and External Relations), 23 May 2005, at 10.

¹²⁰ 2674th Council Meeting (General Affairs and External Relations), 18 July 2005, at 21.

¹²¹ In fact, the Council never formally approved the latter document.

both cases, the Council authorized the Presidency, assisted where necessary by the Secretary-General/High Representative for the CFSP,¹²² to open negotiations with prospective host states based on the model agreements in order to define the legal status of future ESDP missions. The EU Model SOFA and SOMA are thus conceived as permanent negotiating mandates for the purposes of Article 24 TEU, enabling the Presidency to rely on them as a basis for negotiations with third states without the need to seek a fresh mandate from the Council in specific cases.¹²³ As a result, only one Council decision approving the resulting text is necessary, which should considerably reduce the time required to conclude status arrangements under the ESDP. In this respect, the EU Model SOFA and SOMA build on the precedent set by the UN Model SOFA of 9 October 1990, which was prepared by the Secretariat of the UN as a means to expedite the conclusion of status arrangements for UN peace support operations.¹²⁴ The adoption of the two model agreements by the Council should also put an end, at least for the time being, to the controversy among the Member States concerning the extent of the privileges and immunities to be requested for ESDP operations and their personnel.

Since the EU Model SOFA and SOMA constitute permanent negotiating mandates to the Presidency, the Council considers that their disclosure would undermine the EU's position in future negotiations with third states. The Council has accordingly denied public access to the model agreements and related documents.¹²⁵ Nevertheless, the text of the agreements can be obtained from the Member States, which permits a detailed analysis of their provisions in the following section of this article. By the end of 2007, the EU has entered into two agreements based on the model agreements, the *AMM SOMA* and the *SOFA* concluded with Gabon in connection with *EUFOR RD Congo*.¹²⁶ These texts are for the most part identical with the EU Model SOFA and SOMA.

4 The Terms of the EU Model SOFA and SOMA

The decision to adopt separate model agreements for military operations and for civilian missions in the form of the EU Model SOFA and SOMA was most likely taken in recognition of the fact that distinct considerations apply to military and civilian crisis management missions. That military and civilian missions differ in a number of respects cannot be denied.¹²⁷ Nevertheless, the utility of having two separate model agreements may be questioned. The circumstances of military and civilian

¹²² This is a notable development, given that Art. 24(1) TEU directs the Commission, rather than the Secretary-General/High Representative for the CFSP, to assist the Presidency as appropriate.

¹²³ Council doc 11697/05, Confirmatory application made by Mr Aurel Sari (35/c/04/05), 16 Sept. 2005, at 4–5.

¹²⁴ *Supra* note 86. Cf. UN doc. A/44/301, Report of the Special Committee on Peacekeeping Operations, 9 June 1989, at para. 25.

¹²⁵ Council doc 11697/05, *supra* note 123. See EC Reg 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

¹²⁶ *Supra* notes 42 and 43.

¹²⁷ For instance, there is no need to make arrangements for military policing in the course of civilian missions.

missions do not differ to such an extent that two separate texts are absolutely necessary. The UN Model SOFA, for example, lays down rules for both military and civilian personnel in a single framework. In fact, the majority of the provisions of the EU Model SOFA and SOMA are identical. The adoption of a single model agreement for all types of EU crisis management operations would have contributed to greater consistency. In several places, otherwise identical provisions of the EU Model SOFA and SOMA differ slightly in their choice of words and other details, which could cause complications in their interpretation and give rise to differences in their implementation.¹²⁸ Moreover, it is not clear which of the two model agreements should be used in the case of mixed civilian–military missions, such as the *EU Supporting Action to AMIS II*.

The EU Model SOFA and SOMA are based on a broader range of sources than earlier status agreements concluded under the ESDP. In fact, it appears that those responsible for drawing up the two texts adopted a cut-and-paste approach to treaty drafting. The two model agreements rely heavily on the provisions of the VCDR and the UN Model SOFA, and include elements taken from the UN Privileges and Immunities Convention, the EU SOFA, the NATO SOFA, the *ECMM/EUMM* arrangements, the *Concordia* SOFA, and the *Proxima* SOMA. This approach has clearly affected their overall structure. Both model agreements open with a preamble, define certain key terms, and specify the privileges, immunities, and facilities to be granted to EU crisis management missions and their members, and close by addressing certain technical matters. However, whereas related provisions of the UN Model SOFA are arranged into articles to make the document easier to navigate, the terms of the EU Model SOFA and SOMA do not appear to follow any logical order. It is therefore more convenient, for the purposes of the present analysis, to discuss their key provisions under substantive headings rather than in their numerical order.

A Preamble, Scope, and Definitions

The preambular paragraphs of the EU Model SOFA and SOMA begin by identifying the parties to the two agreements. Whereas Article 24 TEU does not clarify whether or not international agreements concluded by the Council under this provision are concluded on behalf of the EU, so far all status agreements concluded for the purposes of the ESDP name the ‘European Union’, rather than its Member States, as one of their contracting parties. The Council decisions authorizing the Presidency to sign these agreements have accordingly directed the Presidency to do so ‘in order to bind the European Union’.¹²⁹ The respective preambles to the EU Model SOFA and

¹²⁸ E.g. the definition of ‘facilities’ under Art. 1(3)(f) of the EU Model SOMA expressly includes buildings, whereas the corresponding definition under Art. 1(3)(h) of the EU Model SOFA does not. Similarly, Art. 4(7) of the EU Model SOMA grants ‘EU Mission’ personnel ‘free and unrestricted movement’ in the territory of the host state, whereas the corresponding provision, Art. 4(5) of the EU Model SOFA, grants ‘EUFOR’ personnel ‘freedom of movement and freedom to travel’ within the territory of the host state.

¹²⁹ E.g. Council Dec 2002/845/CFSP of 30 Sept. 2002 (*EUPM*) [2002] OJ L293/1.

SOMA continue this practice and identify the EU and the host state as the 'Parties' to the agreements. The rest of the two preambles consist of two placeholders reserved for references to various instruments relevant to the operation or mission, such as UN Security Council resolutions, and one substantive paragraph.¹³⁰

The substantive preambular paragraph of the EU Model SOFA and SOMA declares that 'this Agreement will not affect the Parties' rights and obligations under international agreements and other instruments establishing international courts and tribunals, including the Statute of the International Criminal Court'. The legal significance of this clause, which is derived from the preamble to the EU SOFA,¹³¹ is marginal. First, the chances that the EU Model SOFA and SOMA could affect the rights and obligations arising under the relevant international agreements and instruments are in most cases remote¹³² or, as regards Security Council Resolutions, non-existent.¹³³ Secondly, the paragraph specifically refers to the rights and obligations of the 'Parties' to the EU Model SOFA and SOMA, that is the EU and the relevant host state. However, the EU – conceived as an international organization that is legally distinct from its Member States – is not a party to any international agreements or other instruments establishing international courts and tribunals, including the Rome Statute of the International Criminal Court, and as such is not subject to any obligations arising under these agreements and instruments.¹³⁴ Nor is the EU bound by the relevant Security Council Resolutions.¹³⁵ Thirdly, as regards the Member States' obligations under the Rome Statute, no conflicts should arise between the EU Model SOFA and SOMA and the Rome Statute that cannot be addressed in accordance with the relevant provisions of the Statute, in

¹³⁰ Other preambular paras concerning the mission's duration and mandate, the EU's broader policy goals, or the objectives of the status agreement may be added, where appropriate.

¹³¹ The para. concerned first appeared in the sixth revised version of the draft EU SOFA in Dec. 2002: see Council doc SN 4438/6/01 REV6, 20 Dec. 2002.

¹³² The clause is extremely broad, given that it covers *any* international agreement or instrument establishing an international court or tribunal, such as the UN Convention on the Law of the Sea establishing the International Tribunal for the Law of the Sea, or GA Res 351 A (IV) creating the UN Administrative Tribunal. It is unlikely that a conflict will ever arise in practice between the majority of these instruments and the EU Model SOFA and SOMA.

¹³³ The model agreements cannot affect the obligations arising under SC Res 827 and 955 creating the international criminal tribunals for the former Yugoslavia and Rwanda; see *Lockerbie Case (Libya v. UK), Request for the Indication of Provisional Measures* [1992] ICJ Rep 3, at para. 39.

¹³⁴ It would be arbitrary to dismiss this as a drafting error and instead interpret 'Parties' to refer to any EU Member States and third states contributing personnel to an operation, rather than the 'European Union'. Incidentally, the EU has assumed certain obligations in relation to the ICC under the Agreement between the ICC and the EU on cooperation and assistance, 10 Apr. 2006 [2006] OJ L115/50, though it has not thereby become bound by the Rome Statute.

¹³⁵ The EU is not a party to the UN Charter and, unlike the European Community, has not assumed powers previously exercised by its Member States. Consequently, only the Member States of the EU and the European Community are bound by obligations flowing from Security Council resolutions, not the EU. See Case T-306/01, *Yusuf v. Council and Commission* [2005] ECR II-3533, at paras 226-259; Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649, at paras 181-208; Case T-253/02, *Ayadi v. Council* [2006] ECR II-2139, at para. 116. See also Declaration on Arts J14 and K10 of the TEU, Final Act, ToA [1997] OJ C340/1, at 131.

particular Article 98.¹³⁶ Given its limited practical significance,¹³⁷ it is safe to assume that this paragraph was inserted into the EU Model SOFA and SOMA *ex abundanti cautela* and in order to reaffirm the EU's commitment to the Rome Statute.¹³⁸

The EU Model SOFA and SOMA define their scope of application by declaring that they shall apply to EU crisis management missions and their personnel, and shall do so only within the territory of the host state.¹³⁹ This underlines that the model agreements do not cover foreign personnel who are present in the territory of the host state for other purposes than participating in an EU crisis management operation, nor do they govern the legal status of members of EU operations outside the territory of the host state. The EU Model SOFA and SOMA also define certain key terms used throughout the two agreements.¹⁴⁰ The central concept of the EU Model SOFA is the notion of 'European Union-led Forces (EUFOR)', which it defines as 'EU military headquarters and national contingents contributing to the operation, their equipment and their means of transport'.¹⁴¹ By contrast, the EU Model SOMA employs the concept of an 'EU Mission', which includes 'the components, forces, units, headquarters and personnel deployed in the territory of the Host State and assigned to' a given EU crisis management mission.¹⁴² Members of 'EUFOR' and the 'EU Mission' are known as 'EUFOR' personnel and 'EU Mission' personnel.¹⁴³ Both classes of personnel are defined in broad terms. In particular, they include 'personnel on mission' for a sending state or an EU institution in the framework of the operation or mission, which constitutes an innovation compared to earlier ESDP status agreements.

B Status and Facilities of EU Crisis Management Missions

The most important legal principle governing the position of EU crisis management missions and their personnel in the territory of the host state is spelled out in the first

¹³⁶ See Fleck, 'Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?', 1 *J Int'l Criminal Justice* (2003) 651.

¹³⁷ A fine example of this is the inclusion of the clause in the *Proxima* SOMA despite the fact that neither of the two 'Parties' to the agreement, that is the EU and FYROM, was a signatory to the Rome Statute.

¹³⁸ Council Conclusions on the ICC, 2450th Council meeting (External Relations), 30 Sept. 2002, at 10; Council Common Position 2003/444/CFSP of 16 June 2003 on the ICC [2003] OJ L150/67. The EU thereby seems to have closed the door on possible US contributions to ESDP operations that are subject to status agreements based on the EU Model SOFA and SOMA, given the US Government's opposition to the ICC. See Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council', 15 *EJIL* (2004) 701; Eubany, 'Justice for Some? US Efforts under Article 98 to Escape the Jurisdiction of the International Criminal Court', 27 *Hastings Int'l & Comp L Rev* (2003) 103.

¹³⁹ Art. 1(1) and (2), EU Model SOFA; Art. 1(1) and (2), EU Model SOMA. Cf. Art. 1(1) and (2), *Concordia* SOFA.

¹⁴⁰ Art. 1(3), EU Model SOFA; Art. 1(3), EU Model SOMA. Provisions of this nature are found in many status agreements, e.g. Art. I, NATO SOFA; paras 1–5 of UN–Egypt (UNEF), 8 Feb. 1957, 260 UNTS 61; Art. I, UN–Haiti (UNMIH), 15 Mar. 1995, 1861 UNTS 268.

¹⁴¹ Art. 1(3)(a), EU Model SOFA.

¹⁴² Art. 1(3)(a), EU Model SOMA. The term 'EU Mission' is used in the EU Model SOMA merely as a placeholder, and will be replaced by the official code name of the mission in question.

¹⁴³ Art. 1(3)(f), EU Model SOFA; Art. 1(3)(c), EU Model SOMA.

substantive provisions of the EU Model SOFA and SOMA, which declare in identical terms that 'EUFOR' and the 'EU Mission' and their respective personnel 'shall respect the laws and regulations of the Host State and shall refrain from any action or activity incompatible with the objectives' of the operation or mission.¹⁴⁴ The duty to respect local law is a standard feature of modern SOFAs and SOMAs.¹⁴⁵ It gives effect to the territorial sovereignty of the host state by confirming that, as a matter of general principle, foreign troops and personnel are subject to local laws and regulations.¹⁴⁶ With one exception, all status agreements concluded by the EU in the context of the ESDP have contained a provision to this effect.¹⁴⁷ The *Concordia* and *Proxima* status agreements even went one step further and imposed an obligation on the two missions concerned to respect local laws concerning the protection of the environment and cultural heritage.¹⁴⁸

In practice, the implementation of the duty to respect local law has given rise to a number of difficult questions concerning its scope and nature.¹⁴⁹ The text of the NATO SOFA, for example, fails to make it sufficiently clear whether the duty applies only to forces, their individual members, or both.¹⁵⁰ In the past, this ambiguity has led some NATO states to deny that their forces were bound by a general duty to respect local laws and regulations.¹⁵¹ No difficulties of this kind should arise under the EU Model SOFA and SOMA, given that these agreements clearly extend the duty to respect local law to both the EU crisis management mission and its individual members. However, unlike the UN Model SOFA,¹⁵² the EU Model SOFA and SOMA do not direct the operation

¹⁴⁴ Art. 2, EU Model SOFA; Art. 2, EU Model SOMA.

¹⁴⁵ See *supra* note 97. Some agreements also impose a duty to respect local customs and traditions: e.g. Art. 4 of Canada–Bahrain, 16 Jan. 1991, 1852 UNTS 389.

¹⁴⁶ Lazareff, *supra* note 9, at 100–101; J. Woodliffe, *The Peacetime Use of Foreign Military Installations under International Law* (1992), at 172; Batstone, 'Respect for the Law of the Receiving State', in Fleck, *supra* note 4, 61.

¹⁴⁷ No corresponding provision was included in the *EUPM* SOFA. It is unlikely that this omission was intentional.

¹⁴⁸ Art. 9, *Concordia* SOFA; Art. 2(1), *Proxima* SOFA. The duty laid down in Art. 9 of the *Concordia* SOFA to respect local and international norms regarding, amongst other things, the sustainable use of natural resources and the protection of 'cultural heritages and values' seems to be without precedent in international practice in this area.

¹⁴⁹ One difficulty concerns the question whether the duty to 'respect' local law involves a duty to obey local laws and regulations or merely a duty to take these into consideration. For the former view see Heitmann, 'Die Benutzung von Liegenschaften durch ausländische Streitkräfte in der Bundesrepublik Deutschland' [1989] *Neue Juristische Wochenschrift* 432, at 434–435; for the latter view see Welton, 'The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics', 122 *Military L Rev* (1988) 77, at 95–96; Phelps, 'Environmental Law for Overseas Installations', 40 *Air Force L Rev* (1996) 49, at 58.

¹⁵⁰ This lack of precision is partly the product of discrepancies between the English and French language versions of the text, both of which are equally authentic. See Schwenk, 'Jurisdiction of the Receiving State over Forces of the Sending State under the NATO Status of Forces Agreement', 6 *Int'l Lawyer* (1972) 525, at 529–530.

¹⁵¹ Schubert, 'Legal Aspects of Environmental Protection (EP) Overseas as Exemplified by German EP Legislation', 16 *Air Force L Rev* (1974) 1, at 8.

¹⁵² Art. IV(6), UN Model SOFA.

commander or the head of mission to take all appropriate measures to ensure that the duty to respect local law and to refrain from any action or activity incompatible with the objectives of the operation or mission is complied with.

The EU Model SOFA and SOMA grant EU crisis management missions a series of privileges in the host state. None of these are particularly controversial, though some of them are unusual. The model agreements authorize 'EUFOR' and the 'EU Mission' to display the flag of the EU on their facilities and elsewhere.¹⁵³ Unlike the UN Model SOFA, they also grant EU missions the right to display the national flags and insignia of their constituent national elements. EU crisis management missions benefit from various privileges as regards the crossing of borders and movement within the territory of the host state.¹⁵⁴ For instance, the host state is bound to facilitate the entry and departure of EU missions and exempt their personnel from visa and immigration regulations.¹⁵⁵ The privileges conferred on 'EUFOR' and the 'EU Mission' in this area are not identical, however. Whereas the EU Model SOMA provides that the vehicles and aircraft used by the 'EU Mission' shall not be subject to local licensing or registration requirements,¹⁵⁶ the EU Model SOFA grants no comparable exemptions to 'EUFOR'. EU crisis management missions may install and operate various communication devices and equipment in the territory of the host state without restrictions.¹⁵⁷ They also enjoy the right to take charge of and make suitable arrangements for the repatriation of any deceased personnel and their personal property.¹⁵⁸ The host state undertakes to assist 'EUFOR' and the 'EU Mission' in finding suitable facilities for the purposes of the operation or mission, and agrees to make facilities owned by it available free of charge.¹⁵⁹ Remarkably, the EU Model SOFA also requires host states to provide, free of charge, 'facilities owned by private legal entities' if requested to do so by 'EUFOR'.¹⁶⁰ In an equally remarkable move, the EU Model SOMA directs host states to provide the 'EU Mission' with 'effective access' to buildings, facilities, locations, and official vehicles within their control as well as to documents, materials, and information within their control that are relevant to the mandate of the 'EU Mission'.¹⁶¹ The scope of this obligation is surprisingly broad.

The EU Model SOFA and SOMA grant EU crisis management missions similar immunities to those enjoyed by diplomatic missions under the VCDR. The facilities, archives, and documents and official correspondence of 'EUFOR' and the 'EU Mission'

¹⁵³ Art. 3(3), EU Model SOFA; Art. 3(3), EU Model SOMA.

¹⁵⁴ Art. 4, EU Model SOFA; Art. 4, EU Model SOMA.

¹⁵⁵ The need to exempt EU personnel from visa regulations in express terms was one of the lessons identified from the conduct of EUPM. See Council doc 11206/03, *supra* note 81, at 8. Such exemptions may be found in most status agreements: see Art. III, NATO SOFA; Art. VI(33), UN Model SOFA. See also *Wright v. Cantrell* (1943) 12 Annual Digest 133 (Sup Ct NSW), at 140.

¹⁵⁶ Cf. Art. IV(13), UN Model SOFA.

¹⁵⁷ Art. 14, EU Model SOFA; Art. 15, EU Model SOMA. Cf. Art. IV(13), UN Model SOFA.

¹⁵⁸ Art. 12, EU Model SOFA; Art. 14, EU Model SOMA. Cf. Art. VI(50), UN Model SOFA.

¹⁵⁹ Art. 10, EU Model SOFA; Art. 12, EU Model SOMA. Cf. Art. V(16), UN Model SOFA.

¹⁶⁰ This particular provision has been omitted from the EU–Gabon SOFA.

¹⁶¹ Art. 11, EU Model SOMA.

are inviolable.¹⁶² The mission's 'facilities, their furnishings and other assets therein as well as its means of transport' are immune from search, requisition, attachment, or execution.¹⁶³ Moreover, the mission itself, as well as its property and assets, enjoys immunity from every form of legal process.¹⁶⁴ 'EUFOR' and the 'EU Mission' are exempt from all national, regional, and communal taxes and charges of a similar nature in respect of 'purchased and imported goods, services provided and facilities' used by them for the purposes of the operation or mission.¹⁶⁵ Somewhat inconsistently, the model agreements add that 'EUFOR' and the 'EU Mission' 'shall not be exempt from dues, taxes or charges that represent payment for *services rendered*'.¹⁶⁶ It is notable that neither the EU Model SOFA nor the EU Model SOMA makes any provisions for the mandatory or discretionary waiver of the immunities enjoyed by 'EUFOR' or the 'EU Mission'. However, this should not prevent the competent authorities from waiving the immunities of an EU crisis management operation, though it is not clear who or what that competent authority may be.¹⁶⁷

The EU Model SOMA directs the host state to assume full responsibility for the security of 'EU Mission' personnel and to take any necessary measures for the protection, safety, and security of the 'EU Mission' and its personnel.¹⁶⁸ No provision to this effect was included in the EU Model SOFA, though the agreement entitles the force commander to establish a military police unit in order to maintain order in the facilities of 'EUFOR'.¹⁶⁹

C Privileges and Immunities of 'EUFOR' and 'EU Mission' Personnel

Members of EU crisis management operations benefit from extensive privileges and immunities based on a combination of the privileges and immunities conferred on diplomatic agents under the VCDR and the relevant provisions of the UN Model SOFA. On the one hand, the EU Model SOFA and SOMA grant 'EUFOR' and 'EU Mission' personnel immunity from the criminal jurisdiction of the host state 'under all circumstances'.¹⁷⁰ At the same time, they also entitle the competent authorities of the sending state to exercise in the territory of the host state 'all the criminal jurisdiction and disciplinary powers conferred on them by the law of the Sending State with regard to all ["EUFOR"/"EU Mission"] personnel subject to the relevant law of

¹⁶² Art. 5(1), (4), and (5), EU Model SOFA; Art. 5(1), (4), and (5), EU Model SOMA. Cf. Arts. 22(1), 24, and 27(2) VCDR.

¹⁶³ Art. 5(2), EU Model SOFA; Art. 5(2), EU Model SOMA. Cf. Art. 22(3) VCDR.

¹⁶⁴ Art. 5(3), EU Model SOFA; Art. 5(3), EU Model SOMA. Cf. Art. II(2) UN Privileges and Immunities Convention.

¹⁶⁵ Art. 5(6), EU Model SOFA; Art. 5(6), EU Model SOMA. This provision joins together paras (5) and (6) of Art. 4 of the *Concordia* SOFA. Cf. Art. 23(1) VCDR.

¹⁶⁶ Art. 5(6), EU Model SOFA; Art. 5(6), EU Model SOMA. Emphasis added.

¹⁶⁷ Possible candidates include the force commander or head of mission, the Council, the Secretary-General of the Council, the Political and Security Committee, or the representatives of the contributing states acting jointly.

¹⁶⁸ Art. 9, EU Model SOMA. Cf. Art. IV(1), Memorandum of Understanding on Monitoring Activities in Bosnia-Herzegovina, 1 Oct. 1991 (on file with the author).

¹⁶⁹ Art. 13, EU Model SOFA.

¹⁷⁰ Art. 6(3), EU Model SOFA; Art. 6(3), EU Model SOMA. Cf. Art. 31(3) VCDR.

the Sending State'.¹⁷¹ As a result of these two provisions, the competent military and civilian authorities of a sending state may exercise their jurisdiction in the territory of the host state in accordance with their own laws and regulations in all criminal and disciplinary matters over any 'EUFOR' and 'EU Mission' personnel who are subject to the law of that sending state, to the complete exclusion of the jurisdiction of the host state in these matters. On the other hand, the EU Model SOFA and SOMA exempt 'EUFOR' and 'EU Mission' personnel from the civil and administrative jurisdiction of the host state 'in respect of words spoken or written and all acts performed by them in the exercise of their official functions'.¹⁷² The model agreements also reproduce the procedure set out in the UN Model SOFA for determining whether or not the act in question was committed by 'EUFOR' and 'EU Mission' personnel in the performance of their official functions, and add a useful clarification whereby a certification issued by the competent EU authorities to this effect shall be binding on the host state.¹⁷³

Members of EU crisis management operations enjoy a range of additional privileges and immunities as well. They are not liable to any form of arrest or detention, nor are they obliged to give evidence as witnesses.¹⁷⁴ No measures of execution can be taken against them, except in civil proceedings not related to their official functions.¹⁷⁵ They are exempt from local social security provisions in respect of services rendered for the operation or mission.¹⁷⁶ They are also exempt from any form of taxation in the host state on the salary and emoluments they receive from 'EUFOR' or the 'EU Mission' and their sending state as well as on any income they receive from outside the host state.¹⁷⁷ Their papers, correspondence, and property enjoy inviolability, and their personal baggage is exempt from inspection.¹⁷⁸ Articles for their personal use are exempt from all customs duties, taxes, and related charges.¹⁷⁹ In addition, the EU Model SOMA grants 'EU Mission' personnel the right to 'purchase free of duty or quantitative restrictions items required for their personal use' and exempts such personnel from VAT and taxes for goods and services purchased on the domestic market.¹⁸⁰ The EU Model SOFA contains no comparable provision.

D Claims

The conduct of peace support operations often causes injury and damage to private parties in the host state, such as injury and damage resulting from the use of

¹⁷¹ Art. 8, EU Model SOFA; Art. 8, EU Model SOMA. Cf. Art. VII(1)(a), NATO SOFA.

¹⁷² Art. 6(4), EU Model SOFA; Art. 6(4), EU Model SOMA. Cf. Art. VI(46), UN Model SOFA and Art. 37(2) VCDR.

¹⁷³ *Ibid.*

¹⁷⁴ Art. 6(1) and (5), EU Model SOFA; Art. 6(1) and (5), EU Model SOMA. Cf. Arts. 29 and 31(2) VCDR.

¹⁷⁵ Art. 6(6), EU Model SOFA; Art. 6(6), EU Model SOMA. Cf. Art. 31(2) VCDR and Art. VI(49)(b), UN Model SOFA.

¹⁷⁶ Art. 6(8), EU Model SOFA; Art. 6(8), EU Model SOMA. Cf. Art. 33(1) VCDR.

¹⁷⁷ Art. 6(9), EU Model SOFA; Art. 6(9), EU Model SOMA. Cf. Art. VI(29)(b), UN Model SOFA.

¹⁷⁸ Art. 6(2) and (10), EU Model SOFA; Art. 6(2) and (11), EU Model SOMA. Cf. Arts. 30(2) and 36(2) VCDR.

¹⁷⁹ Art. 6(10), EU Model SOFA; Art. 6(11), EU Model SOMA. Cf. Art. 36(1) VCDR.

¹⁸⁰ Art. 6(10), EU Model SOMA. Cf. Art. VII(6) of EU-FRY (*EUMM*), *supra* note 61; Art. 5(5) and (6), *Proxima* SOFA.

armed force against individuals¹⁸¹ or from the occupation and destruction of private property.¹⁸² The prompt and fair settlement of claims relating to the acts or omissions of peace support operations can play a significant role in maintaining amicable relations between them and the local population. However, the fact that status agreements normally exempt peace support operations and their members from local civil jurisdiction in matters arising out of the performance of their official duties means that private parties are unable to bring claims relating to such cases directly before the judicial authorities of the host state. The entity or entities that are responsible under international law for the activities of an operation – which, depending on the act or omission in question, include the international organization controlling the operation, the sending states, or both – therefore may decide to discharge their international obligation to make full reparation for such injury and damage by creating alternative procedures to compensate private claimants.¹⁸³

Status agreements concluded by the UN both before and after the adoption of the UN Model SOFA provide for the establishment of a standing claims commission in order to settle disputes of a private law character over which the local courts have no jurisdiction because of the immunity attaching to a UN peace support operation and its members.¹⁸⁴ However, no UN standing claims commission has ever been established in practice. Instead, third-party claims not resulting from operational necessity are settled by the operation internally through a local claims review board composed of UN officials.¹⁸⁵ More recent status agreements concluded by the UN now acknowledge this practice, and provide that standing claims commissions shall settle only those claims which cannot be settled in accordance with the internal procedures of the UN.¹⁸⁶ Multinational peace support operations not falling under UN command and control, such as the Stabilization Force (SFOR), Operation Alba, and KFOR, employ somewhat different procedures. Claims brought by private parties relating to acts or omissions attributable to members of a national contingent are usually settled by the contingent itself. Only claims that cannot be settled in this way because

¹⁸¹ *Emmanuel v. US*, 253 F 3d 755 (1st Cir. 2001); *Bici v. Ministry of Defence* [2004] EWHC 786 (QB), *The Times*, 11 June 2004.

¹⁸² *Nissan v. Attorney-General* [1968] 1 QB 28; *M v. United Nations and Belgium*, 45 ILR (1966) 446 (Trib Civ Brussels) and 69 ILR (1969) 139 (CA Brussels); *Askir v Boutros-Ghali*, 933 F Supp 368 (SDNY 1996).

¹⁸³ Generally see S.R. Lüder, *Völkerrechtliche Verantwortlichkeit bei Teilnahme an 'Peace-keeping'-Missionen der Vereinten Nationen* (2004); M. Zwanenburg, *Accountability of Peace Support Operations* (2005). Cf. Art. VI of UN–Italy, 23 Nov. 1994, 1979 UNTS 351.

¹⁸⁴ E.g. para. 38 of UN–Cyprus (UNFICYP), 31 Mar. 1964, 492 UNTS 57; Art. VII(57) of UN–South Africa (UNTAG), 10 Mar. 1989, 1526 UNTS 3; Art. VII(51), UN Model SOFA; Art. VII(50) of UN–Rwanda (UNAMIR), 5 Nov. 1993, 1748 UNTS 16.

¹⁸⁵ UN doc A/51/389, Report of the Secretary-General, 20 Sept. 1996, at paras 20–33; UN doc A/51/903, Report of the Secretary-General, 21 May 1997, at paras 7–11; K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von friedenssichernden Maßnahmen und Territorialverwaltungen* (2004), at 166–512.

¹⁸⁶ Arts. VII(53) and VIII(54), UN–CAR (MINURCA), 8 May 1998, 2015 UNTS 734; Arts. VII(54) and VIII(55), UN–Sierra Leone (UNAMSIL), 4 Aug. 2000, 2118 UNTS 190; Arts. VII(54) and VIII(55), UN–Ethiopia (UNMEE), 23 Mar. 2001, 2141 UNTS 24.

of a dispute between the claimant and the national contingent concerned as well as claims relating to the activities of the operation's international elements are settled by a standing claims commission and, in the final instance, by an arbitration tribunal or commission.¹⁸⁷

In sharp contrast to international practice at the time, the status arrangements adopted for the *ECMM* and the EU Administration of Mostar compelled the host states concerned to indemnify the sending parties in respect of any claims connected with the activities of these missions and their personnel, and did not establish alternative mechanisms to compensate private individuals who suffered injury or damage as a result of their activities.¹⁸⁸ Surprisingly, the *EUMM* status agreements and the *EUPM* SOMA did not deal with the settlement of claims at all. This omission was remedied in subsequent *ESDP* status agreements. The *Concordia* SOFA called for the establishment of a Joint Claims Commission composed of representatives of the EU force and the competent authorities of the host state to deal with claims for death, injury, damage, or loss.¹⁸⁹ The detailed procedures for addressing and settling claims were to be specified in separate arrangements concluded between the force commander and the competent local authorities.¹⁹⁰ By contrast, the *Proxima* SOMA and subsequent agreements based on it simply provided that claims shall be submitted to the head of mission to be settled in accordance with the procedures defined in separate arrangements to be concluded between the head of mission and the authorities of the host state.¹⁹¹ The lack of reference to a joint claims commission in these agreements suggests that claims were to be settled internally by the EU mission without the involvement of the representatives of the host state, as in the case of UN local claims review boards.

The EU Model SOFA and SOMA put into place more elaborate claims settlement procedures, consisting of three main stages, than the earlier *ESDP* status agreements did. The model agreements begin by declaring that 'EUFOR' and the 'EU Mission' and their personnel shall not be liable for any damage to or loss of civilian or government property related to operational necessities or caused in connection with civil disturbances or the protection of 'EUFOR' or the 'EU Mission'.¹⁹² Significantly, this disclaimer is expressly limited to claims involving damage to or loss of property, and is therefore narrower in scope than the disclaimer clauses found in earlier *ESDP*

¹⁸⁷ Schmalenbach, *supra* note 185, at 535–564; Guillaume, 'La Réparation des Dommages Causés par les Contingents Français en ex-Yougoslavie et en Albanie', 43 *AFDI* (1997) 151; Prescott, 'Operational Claims in Bosnia-Herzegovina and Croatia', *Army Lawyer* (1998: June) 1; Guillaume, 'Le cadre juridique de l'action de la KFOR au Kosovo', in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (2002), at 243, 256–258.

¹⁸⁸ Art. XI(2), *ECMM* MoU, *supra* note 59; Art. 20, *Mostar* MoU, *supra* note 59. For a bilateral example of this nature see Art. VII, US–BiH, *supra* note 66.

¹⁸⁹ Art. 13, *Concordia* SOFA.

¹⁹⁰ Art. 16, *Concordia* SOFA. See Council doc 7307/03, Processing dossiers of the Joint Claims Commission, 7 Apr. 2003.

¹⁹¹ Art. 14, *Proxima* SOMA; Art. 13, *EUJUST Themis* SOMA; Art. 14, *EUPOL Kinshasa* SOMA.

¹⁹² Art. 15(1), EU Model SOFA; Art. 16(1), EU Model SOMA.

status agreements and some recent UN instruments.¹⁹³ In the first instance, claims for damage to or loss of civilian or government property that are not covered by the disclaimer clause as well as claims for death of or injury to persons shall be forwarded to 'EUFOR' or the 'EU Mission' by the competent authorities of the host state with a view to reaching an amicable settlement.¹⁹⁴ Where no amicable settlement can be reached using the internal settlement procedures of the mission or operation, the claim shall be submitted to a claims commission composed on an equal basis of representatives of 'EUFOR' or the 'EU Mission' and representatives of the host state. The claims commission operates by consensus.¹⁹⁵ Finally, where no settlement can be reached within the claims commission, disputes involving claims of up to and including €40,000 are to be settled by diplomatic means between the host state and EU representatives, while disputes concerning claims above €40,000 are to be submitted for a binding decision to an arbitration tribunal composed of three arbitrators appointed by the host state and 'EUFOR' or the 'EU Mission'.¹⁹⁶ The terms of reference of the claims commission and the arbitration tribunal, as well as the conditions under which claims may be lodged, are to be determined in administrative arrangements concluded between the host state and 'EUFOR' or the 'EU Mission'.¹⁹⁷

The primary objective of the EU Model SOFA and SOMA is to bring about the amicable settlement of claims through the internal mechanisms of the ESDP operation. Should this fail, the model agreements provide for the involvement of the representatives of the host state in the form of a mixed claims commission and, in the final instance, an arbitration tribunal. Two difficulties arise with this procedure. First, some claims may arise only after the termination of the EU crisis management mission,¹⁹⁸ at which time the mission can no longer appoint representatives to the claims commission and the arbitration tribunal. One solution to this problem is to establish these two bodies at the beginning of each mission in anticipation of potential claims, yet this may be impractical for administrative reasons in the case of smaller missions, such as *EUJUST Themis*. A better solution therefore would be to delegate the task of appointing

¹⁹³ *Supra* note 191. Incidentally, this highlights a certain ambiguity in the UN's practice relating to operational necessity. Local claims review boards established by UN peace support operations have for decades consistently excluded the UN's liability for damage to or loss of private property caused by UN peace support operations in the course of operational necessities. See Schmalenbach, *supra* note 185, at 487–496. Since Art. VII(51) of the UN Model SOFA does not mention this exception to the Organization's liability, the UN Secretary-General has recommended that the principle should be formally incorporated into that provision. See UN doc A/51/389, *supra* note 185, at paras 13–15. This view has been endorsed by the General Assembly in GA Res 52/247 of 17 July 1998. However, despite the limited scope of the Secretary-General's recommendation, recent instruments concluded or adopted by the UN have extended the principle of operational necessity to cover not only damage to property, but also personal injury, illness, or death arising from or directly attributed to the UN. See Art. VII(54), UN–Ethiopia (UNMEE), 23 Mar. 2001, 2141 UNTS 24; s. 7, UNMIK Reg 2000/47, *supra* note 53.

¹⁹⁴ Art. 15(2), EU Model SOFA; Art. 16(2), EU Model SOMA.

¹⁹⁵ Art. 15(3), EU Model SOFA; Art. 16(3), EU Model SOMA.

¹⁹⁶ Art. 15(4) and (5), EU Model SOFA; Art. 16(4) and (5), EU Model SOMA.

¹⁹⁷ Art. 15(6), EU Model SOFA; Art. 16(6), EU Model SOMA.

¹⁹⁸ Cf. Council doc 11154/1/03 REV1, *supra* note 113, at 4.

EU representatives to the claims commission and the arbitration tribunal to a permanent organ based in Brussels, such as the Political and Security Committee. Secondly, the fact that it is up to the force commander or head of mission of each EU crisis management operation to define, through negotiations with the host states concerned, the terms of reference and detailed operating procedures of the claims commission and the arbitration tribunal leads to a duplication of efforts and hampers the emergence of common standards and a consistent claims settlement practice under the ESDP.¹⁹⁹ The use of generic terms of reference and procedures, the creation of a central database held by the General Secretariat of the Council containing copies of the relevant administrative arrangements as well as the individual claims dossiers, and the identification of ‘lessons learned’ in settling third party claims during successive EU crisis management operations could go a long way in remedying this defect.²⁰⁰

E Final provisions

The final provisions of the EU Model SOFA and SOMA address certain technical matters. For instance, they emphasize that the government of the host state bears responsibility for implementing and ensuring compliance with the privileges, immunities, and rights granted to ‘EUFOR’ and the ‘EU Mission’ and their respective personnel.²⁰¹ They also expressly recognize that separate arrangements may be concluded between the force commander or the head of mission and the authorities of the host state to deal with operational, administrative, and technical matters.²⁰² In contrast to the UN Model SOFA and earlier ESDP status agreements, the EU Model SOFA and SOMA provide that they shall enter into force upon signature, rather than following their ratification.²⁰³ They also provide that some of their provisions shall be deemed to have applied from the date of the operation’s deployment if that date precedes their entry into force.²⁰⁴ This retrospective application of the model agreements is not workable in all cases, however. Whereas the right of ‘EUFOR’ and the ‘EU Mission’ to use any public roads without the payment of fees or charges can be given retrospective effect by reimbursing any fees already paid, it is difficult to see, for example, how the inviolability of their official correspondence can be fully guaranteed in this way.

Since 1998, the Security Council has on several occasions decided that the UN Model SOFA shall apply provisionally to UN operations pending the conclusion of a

¹⁹⁹ In fact, the Council does not hold copies of the various technical arrangements concluded by EU crisis management operations in this area: see Council doc 5030/07, Confirmatory application made by Mr Aurel Sari (01/c/01/07), 27 Feb. 2007, at 10.

²⁰⁰ See also Zwanenburg, *supra* note 183, at 287–314.

²⁰¹ Art. 17(1), EU Model SOFA; Art. 18(2), EU Model SOMA.

²⁰² Art. 18, EU Model SOFA; Art. 19, EU Model SOMA. For instance, such a technical arrangement has been concluded between the EU and FYROM defining the practical modalities of the *Proxima* protection element (on file with the author).

²⁰³ Art. 19(1), EU Model SOFA; Art. 20(1), EU Model SOMA. Cf. Art. X(59), UN Model SOFA; Art. 18(1), *Proxima* SOFA.

²⁰⁴ Art. 19(2), EU Model SOFA; Art. 20(2), EU Model SOMA.

permanent status agreement between the Organization and host states.²⁰⁵ There is no reason why the EU should not use the EU Model SOFA and SOMA in the same way. The provisional application of the two model agreements would prove particularly useful in cases where an operation is launched at short notice or where the signature of final status arrangements has been delayed.²⁰⁶ Giving effect to the terms of the model agreements in such cases on a provisional basis would certainly lead to greater legal clarity than their retrospective application or falling back on the relevant principles of customary international law. However, whereas the Security Council may use its powers under Chapter VII of the UN Charter to compel a host state to apply the UN Model SOFA, or indeed any other status agreement, in the context of a peace support operation, the provisional application of the EU Model SOFA and SOMA would depend on the consent of the host state.

5 Conclusions

The EU's practice in negotiating status agreements with third parties has evolved along two main lines over the past 15 years. First, the status agreements concluded by the EU have become increasingly more sophisticated. The most recent agreements regulate a broader range of matters and do so in greater detail than most of their predecessors, including the first ESDP status agreement, the *EUPM SOMA*. Secondly, the process of concluding status agreements under the ESDP has been simplified. The experiences gained during the first few ESDP missions have clearly demonstrated that the procedures governing the conclusion of international agreements under Article 24 TEU were unwieldy and therefore unsuited to keeping up with the fast pace of international crisis management operations.²⁰⁷ In response, the Council adopted the EU Model SOFA and SOMA to eliminate the need to issue a fresh negotiating mandate to the Presidency in the course of future EU crisis management operations.

The adoption of the two model agreements should be welcomed as a sign of the ESDP's maturity.²⁰⁸ In addition to streamlining the decision-making process under Article 24 TEU, the model agreements should help to increase the consistency of the EU's dealings with host states and local populations, in particular as regards the

²⁰⁵ E.g. SC Res 1590, 24 Mar. 2005. This practice followed a recommendation to this effect by GA Res A/RES/52/12B, 19 Dec. 1997, at para. 7.

²⁰⁶ Of course, where final status agreements have been negotiated and concluded on the basis of the EU Model SOFA or SOMA, but have not yet entered into force, these final agreements, rather than the EU Model SOFA or SOMA, should be applied provisionally. E.g. the *AMM SOMA* has been applied provisionally pending its entry into force. Similarly, the Ugandan authorities have applied the terms of the agreement between Uganda and France to other contributing states on a provisional basis before its application was formally extended to these states: see Council doc 12225/03, *supra* note 47, at 5. See also *supra* note 44.

²⁰⁷ The fact that speed is of the essence is highlighted by the Council's decision to adopt the text of the EU–Gabon SOFA first in one language only. See Council doc 10307/06, Operation EUFOR RD Congo, 8 June 2006.

²⁰⁸ By comparison, it should be remembered that it took the UN over three decades following the launch of its first large-scale peace support operations to draw up the UN Model SOFA.

settlement of claims brought by private parties against ESDP missions. The drafters of the EU Model SOFA and SOMA have clearly attempted to build upon the experiences of the EU and other international actors by introducing several important clarifications and innovations to the model agreements. For example, the EU Model SOFA expressly declares that the right granted to 'EUFOR' and its personnel to move and travel freely within the territory of the host state includes its territorial sea and air space.²⁰⁹ Similarly, unlike the UN Model SOFA, the EU model agreements entitle EU crisis management missions to construct, alter, or otherwise modify facilities in the host state.²¹⁰

At the same time, the EU Model SOFA and SOMA suffer from certain shortcomings. The fact that the two model agreements differ in places where they should not somewhat undermines their contribution to consistency in the ESDP. For example, 'EUFOR' personnel are exempt from customs control when entering, leaving, or staying within the territory of the host state, but 'EU Mission' personnel are not.²¹¹ Similarly, whereas the EU Model SOMA recognizes the autonomy of the 'EU Mission' and calls on the host state to respect its international character,²¹² the EU Model SOFA is silent on this matter. Surely, 'EU Mission' personnel should be exempt from local customs control under the same conditions as 'EUFOR' personnel, while the international nature of military operations merits equal recognition to the international nature of civilian missions. Both model agreements fail to address certain questions, such as the right to recruit local personnel.²¹³ Moreover, even though their respective preambles clarify that the model agreements apply solely to personnel taking part in EU crisis management missions, this does not exclude the possibility that other bilateral or multilateral status agreements in force between one or more sending states and the host state may also apply to such personnel. A provision determining which of the applicable status agreements should take precedence would have been helpful.²¹⁴

The extent of the privileges and immunities conferred on EU crisis management missions and their personnel presents more serious difficulties. The EU Model SOFA and SOMA do not represent a clear break with the EU's past practice of requesting privileges and immunities equivalent to those enjoyed by diplomatic missions and agents under the VCDR. Although the model agreements no longer grant full diplomatic status to EU missions and their members in formal terms, they now simply reproduce, subject to significant modifications and additions, the relevant privileges and

²⁰⁹ Art. 4(5), EU Model SOFA. See also Art. 4(7), EU Model SOFA.

²¹⁰ Art. 11, EU Model SOFA; Art. 13, EU Model SOMA.

²¹¹ Cf. Art. 4(1), EU Model SOFA and Art. 4(1), EU Model SOMA.

²¹² Art. 2(2), EU Model SOMA.

²¹³ Cf. Art. V(22), UN Model SOFA.

²¹⁴ Both model agreements state that nothing in their provisions 'is intended or may be construed to derogate from any rights that may attach to an EU Member State or to any other State contributing' to 'EUFOR' or the 'EU Mission' under other agreements: see Art. 17(2), EU Model SOFA and Art. 18(2), EU Model SOMA. This clause merely safeguards the rights of contributing states without deciding which of the applicable agreements shall take precedence *in toto* over the other, as does Art. 19(6) of the EU SOFA. Cf. Rapport Fait au Nom de la Commission des Affaires Etrangères sur le Projet de Loi n° 1781 autorisant l'approbation de le SOFA UE (par M.B. Schreiner), 26 Nov. 2004, at 18–19.

immunities found in the VCDR. Combined with the conferment of a range of additional privileges and immunities, this means that the legal status granted to EU missions and their members in the territory of the host state does not correspond to current international practice in several respects.²¹⁵ Perhaps the most glaring difference between the model agreements and recent international practice in this area results from the complete exemption of civilian personnel from local jurisdiction in criminal matters and the corresponding entitlement of the sending state to exercise all criminal jurisdiction over such personnel in accordance with its own laws.²¹⁶ Normally, only military personnel are subject to the exclusive jurisdiction of their sending state in criminal matters under all circumstances.²¹⁷

The fact that the EU Model SOFA and SOMA confer more extensive privileges and immunities on EU crisis management missions and their members than those granted to international and multinational peace support operations working under similar conditions is bound to be controversial, in particular now that the accountability of peacekeeping operations is receiving ever more attention in academic circles as well as in international fora.²¹⁸ It is unlikely that those EU Member States which have opposed the conferment of full diplomatic status on ESDP missions, and their personnel will be completely satisfied with the EU Model SOFA and SOMA. Similarly, certain third states hosting EU missions may well consider that the model agreements are biased too much in favour of the EU.²¹⁹ In this respect, it is regrettable that the EU Model SOFA and SOMA do not offer the Presidency alternative negotiating strategies depending on the legal, political, and security situation in the host state, as did the model agreement for EU police missions prepared by the Council General Secretariat. Indeed, the problem with the EU's approach lies in the fact that it seeks to confer extensive privileges and immunities on ESDP operations as a general rule, rather than reserve this option for those more volatile operational circumstances where a high level of legal protection is perfectly justified.²²⁰

²¹⁵ With the notable exception of UNMIK Reg. 2000/47, *supra* note 53, that is. S. 2.4 of the Reg. confers immunity on KFOR personnel, other than locally recruited staff, 'from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo'. This has not gone without criticism: see *supra* note 107. It is worth noting that s. 2.4 does not confer immunity on KFOR personnel before the courts of the Republic of Serbia outside the territory of Kosovo.

²¹⁶ Arts. 6(3) and 8, EU Model SOMA.

²¹⁷ Cf. Art. VI(47), UN Model SOFA.

²¹⁸ In addition to the literature cited *supra* note 107, see Rawski, 'To Waive or not to Waive: Immunity and Accountability in UN Peacekeeping Operations', 18 *Connecticut J Int'l L* (2002–2003) 103; UN doc E/CN.4/Sub.2/2005/42, Working paper on the accountability of international personnel taking part in peace support operations submitted by Françoise Hampson, 7 July 2005.

²¹⁹ Nevertheless, it would be wrong to conclude that the EU Model SOFA and SOMA are completely one-sided. They do impose various obligations on 'EUFOR' and the 'EU Mission', such as the duty to respect local law or the duty regularly to inform the host state of the number of 'EUFOR' or 'EU Mission' personnel stationed within its territory: see Art. 2(2), EU Model SOFA; Art. 2(3), EU Model SOMA. For an international relations perspective on this issue see Hettne and Söderbaum, 'Civilian Power or Soft Imperialism? The EU as a Global Actor and the Role of Interregionalism', 10 *European Foreign Affairs Rev* (2005) 535.

²²⁰ As in the case of ISAF, see Annex A to the Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, 4 Jan. 2002, 41 *ILM* (2002) 1032.

Whatever their strengths and weaknesses, the conclusion of status agreements in the context of the ESDP has already had a profound impact on the visibility of the EU on the international legal scene. Several commentators have relied on these and related agreements to suggest that they confirm beyond doubt that the EU is capable of operating as an independent subject of international law.²²¹ The interpretation of Article 24 TEU and the question whether or not the EU possesses international legal personality have long been the subject of debate.²²² Given the somewhat abstract nature of the arguments involved, it is certainly tempting to point to the Council's practice of concluding international agreements in the name of the 'European Union' as conclusive proof that the EU enjoys implied or *de facto* legal personality under international law. However, a careful analysis of the provisions of the relevant status agreements should temper some of this enthusiasm. It may well be that 'fairly strange intellectual operations' are now required to demonstrate that international agreements concluded pursuant to Article 24 TEU create legal relations between the third parties concerned and each of the Member States of the EU, rather than between those third parties and the EU as such.²²³ However, the fact remains that the international obligation to make reparation for any injury and damage caused by EU crisis management missions is discharged, in accordance with the procedures laid down in the relevant status agreements, by the institutions of the EU and the sending states acting individually or jointly: the EU as such plays no role whatsoever in this respect.²²⁴ Even though this excludes neither the possibility that the EU enjoys international legal personality nor the possibility that it bears (concurrent) responsibility for the acts or omissions of EU crisis management operations under international law, it nevertheless underlines that in practice the Union is, for the time being, an international actor more in name than in substance.

²²¹ Editorial Comment, 'The European Union – A New International Actor', 38 *CMLRev* (2001) 825; Reichard (2004), *supra* note 34, at 52; Tsagourias, *supra* note 3; Naert, *supra* note 3; Eeckhout, *supra* note 37, at 159–160; Verwey, *supra* note 37, at 60–61; Thym, *supra* note 3. Cf. P. Koutrakos, *EU International Relations Law* (2006), at 409.

²²² The literature on the subject is vast. For a selection of views in addition to those already cited *supra* notes 37 and 221 see Pechstein, 'Rechtssubjektivität für die Europäische Union?', 31 *Europarecht* (1996) 137; Wessel, 'The International Legal Status of the European Union', 2 *European Foreign Affairs Rev* (1997) 109; Tizzano, 'La personnalité internationale de l'Union européenne' [1998] 4 *Revue du Marché Unique Européen* 11; Hafner, 'The Amsterdam Treaty and the Treaty-Making Power of the European Union: Some Critical Comments', in G. Hafner *et al.* (eds), *Liber Amicorum Professor Seidl-Hohenveldern* (1998); Dashwood, 'External Relations Provisions of the Amsterdam Treaty', 35 *CMLRev* (1998) 1019; Neuwahl, 'A Partner With a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam', 3 *European Foreign Affairs Rev* (1998) 177; de Zwaan, 'The Legal Personality of the European Communities and the European Union', 30 *Netherlands Ybk Int'l L* (1999) 75; Gautier, 'The Reparation for Injuries Case Revisited: The Personality of the European Union', 4 *Max Planck UNYB* (2000) 331; Leal-Arcas, 'EU Legal Personality in Foreign Policy?', 24 *Boston U Int'l LJ* (2007) 165.

²²³ Tomuschat, 'The International Responsibility of the European Union', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002), at 181.

²²⁴ See the arrangements for the settlement of claims made in various Council Joint Actions establishing EU crisis management missions, as well as Council Dec. 2004/197/CFSP of 23 Feb. 2004 establishing a mechanism to administer the financing of the common costs of EU operations having military or defence implications [2004] OJ L63/68 (as amended by Council Decs 2004/925/EC of 22 Dec. 2004 [2004] OJ L395/68, and 2005/68/CFSP of 24 Jan. 2005 [2005] OJ L27/59).