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Beyond Bilateral Agreements: Are Foreign Military Bases Adequately Regulated Under International Law?

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ABSTRACT

This paper interrogates the widely-held assumption that foreign military bases exist in a regulatory vacuum outside bilateral Status of Forces Agreements (SOFAs). Employing doctrinal legal analysis grounded in the customary law of state responsibility (ARSIWA), alongside a contemporary case study of the 2026 Diego Garcia/Iran episode, the paper argues that the accountability gap is not one of substantive law but of organisation. It demonstrates that pre-existing doctrines; attribution of armed forces' conduct, the conditional and bounded nature of host-state consent, and due diligence/complicity obligations under Article 16 ARSIWA; already regulate sending and host state conduct independently of any SOFA. The paper's central argument is that responsibility under international law tracks control rather than territory, and that this unifying principle, though never formally codified, already underlies existing jurisprudence. Drawing on the precedent of the Montreux Document for private military companies, the paper concludes by advocating for a consolidated framework that would not create new obligations but merely restate and organise binding rules that already exist, thereby reducing the asymmetries bilateral arrangements currently produce.

INTRODUCTION

With the significant increase in the number and intensity of inter-continental conflicts in recent times; foreign military bases are among the most consequential arrangements in international relations; yet their governance and regulation rests almost entirely on the fragile architecture of bilateral consent. In such cases, a Status of Forces Agreement (SOFA) may

determine the nature of such a consent; including the extent of access and duration; the details of who may prosecute the violators; among other considerations. Beyond these instruments, no unified legal status or framework, for foreign military bases, currently exists in international law.

While this absence is frequently read as a regulatory vacuum; as though the conduct of sending states, host states, and the forces they station abroad falls outside the reach of general international law until a bilateral text says otherwise; the paper shall argue that this understanding does not explore the substantial dimensions of international law. The obligations that actually regulate and actively shape the conduct of States' hosting or sending foreign forces, already exist independently of whatever a SOFA provides. The International obligations of States, deriving from general principles of international law, customary international law or the larger treaty obligations;¹ collectively result in clarifying the parameters for attribution in case of internationally wrongful acts, due diligence that binds a host State to what it knowingly permits on its territory, the law governing state responsibility with respect to consent between States. It is argued that the substance of such obligations already exist; what they lack is their general consolidation into a form which further gives a way to their unified regulation. The Montreux document of 2008² was an effort for States to consolidate the rules governing Private Military Security Companies; and this paper attempts to advance a similar effort.

THE CURRENT REGULATORY LANDSCAPE: THE ASYMMETRY IN PRACTICE

The conduct involving Foreign military bases is largely regulated by the SOFAs which are case-specific, usually bi-lateral agreements that are formulated keeping the involved parties' interests into consideration. We come across certain multilateral SOFAs such as those of the

¹ See Statute of the International Court of Justice art. 38(1)(a)–(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (identifying treaty, custom, and general principles of law as sources of international law)

² Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Sept. 17, 2008, 47 I.L.M. 482 (2008) [hereinafter Montreux Document].

NATO,³ the EU⁴ or the UN Model;⁵ but these are specific to State alliances and carefully constructed to mimic those realities; therefore are not generally applicable.

In theory, a SOFA can act as a treaty, a written international agreement, governed by international law; if it follows the guidelines as prescribed in the Vienna Convention of 1969.⁶ But many such SOFAs are constructed in the form of non-binding “soft” arrangements; such as joint communiqués, informal understandings; precisely because they fall outside this regulatory framework and the principle of *Pacta sunt servanda* which requires parties to follow the treaty in good faith.⁷ This very regulatory framework, the most prevalent in practice, is fragmented within the bi-lateral arrangement itself; wherein it largely is dictated by the asymmetry between the parties and thus can result in unfavourable arrangements; such as the understanding that the Guantanamo Bay prison, under the effective control of the United States, on the physical territory of Cuba, has been significantly opposed by Cuban leadership due to its construction and the legal grounds determining its formation were carried out in a politically varied environment.⁸

It must be noted that SOFAs primarily govern the conduct of the sending State’s forces within the host State and do not govern, determine or regulate the legality of its deployment and presence; which fundamentally involves various considerations of general international law; such as the prohibition on the use of force, the principle of non-intervention; and most critically; the host state consent, which in itself is a contested area of international law. A

³ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

⁴ Agreement Between the Member States of the European Union Concerning the Status of Military and Civilian Staff Seconded to the Institutions of the European Union, of the Headquarters and Forces Which May Be Made Available to the European Union in the Context of the Preparation and Execution of the Tasks Referred to in Article 17(2) of the Treaty on European Union, Including Exercises, and of the Military and Civilian Staff of the Member States Put at the Disposal of the European Union to Act in This Context, Nov. 17, 2003, 2003 O.J. (C 321)

⁵ Model Status-of-Forces Agreement for Peace-Keeping Operations, Rep. of the Secretary-General, U.N. Doc. A/45/594 (Oct. 9, 1990).

⁶ Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁷ VCLT, *supra* note 6, art. 26 (codifying the principle of *pacta sunt servanda*).

⁸ See generally Michael J. Strauss, *The Leasing of Guantanamo Bay* (2009) (discussing the contested legal basis of the 1903 and 1934 lease agreements between the United States and Cuba).

SOFA presupposes these considerations and primarily operates to administer the sending State's forces.

Furthermore we come across a core jurisdictional allocation problem. Basing upon the NATO SOFA model (Article VII);⁹ which the US–Japan, US–Korea, and most subsequent bilateral SOFAs substantially copy; it does not grant blanket immunity, but creates a concurrent jurisdiction regime with a "primary right" allocation formula; under which:

- The **sending State** has primary jurisdiction over offences arising solely from an act or omission "in the performance of official duty," and over offences against the sending state's own property or personnel.
- The **host State** has primary jurisdiction over everything else, including offences against host-state nationals or property.

The legally contestable term here; and the one that generates most real-world disputes; is "official duty." SOFAs typically leave a "duty certificate" issued by the sending State's commanding officer as effectively conclusive or near-conclusive evidence on this point, which is where the sovereignty asymmetry critique lands hardest; wherein the sending State is frequently the one that decides, as a practical matter, whether its own soldier gets tried by the host state at all.

Another consideration to note is that foreign forces personnel under a SOFA do not hold diplomatic immunity under the Vienna Convention on Diplomatic Relations.¹⁰ Their status is *sui generis* i.e. created entirely by the SOFA itself. This means the scope of their immunity is exactly as broad or narrow as the specific instrument says, with no background customary floor to fall back on the way there is for diplomats. Where a SOFA is silent, ordinary host State law applies by default; SOFAs are typically framed as exceptions carved out of the host State's general territorial jurisdiction, not as an alternative comprehensive code.

⁹ NATO SOFA, *supra* note 3, art. VII.

¹⁰ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

Before moving forward, it is necessary to be precise about the legal status of the framework this paper relies upon. The Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) were adopted by the International Law Commission in 2001¹¹ and merely taken note of by the UN General Assembly in Resolution 56/83;¹² they were never opened for signature or ratification, and no state is formally a party to them. Their authority for the purposes of this paper therefore does not rest on ARSIWA as an instrument, but on the customary international law it codifies; wherein the provisions relied upon here are not treated as binding because the ILC drafted them, but because they restate obligations that already existed, and continue to exist, independently of the Articles themselves. This is confirmed by the International Court of Justice's own practice as the Court applied the (then-draft) provisions of necessity and countermeasures in *Gabčíkovo-Nagymaros* as reflective of custom before the Articles were even finalised;¹³ it relied on the reasoning underlying Article 16 to assess state responsibility for complicity in the Bosnian Genocide case;¹⁴ and applied a due diligence standard consonant with the ARSIWA framework in *DRC v. Uganda*.¹⁵ Judicial decisions of this kind are themselves a recognised means of determining rules of law under Article 38(1)(d) of the ICJ Statute,¹⁶ and the Court's consistent willingness to apply these provisions in adjudicated inter-state disputes provides strong evidence that they reflect binding customary obligations rather than mere codificatory ambition. It is on this footing, rather than any claim that ARSIWA itself binds states as a matter of treaty law, that the doctrines discussed in this Part are treated as already-existing law capable of underpinning a consolidated framework for the governance of foreign military bases.

¹¹ Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n, pt. 2, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ARSIWA].

¹² G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) (adopted Dec. 12, 2001).

¹³ *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. 7, ¶¶ 50–58 (Sept. 25).

¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26).

¹⁵ *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 246–50 (Dec. 19).

¹⁶ Statute of the International Court of Justice art. 38(1)(d), *supra* note 1.

THE PRE-EXISTING DOCTRINAL BLOCKS

The claim advanced in this paper is not that international law is silent on the conduct of foreign military bases, but that the rules capable of governing that conduct already exist; scattered across the law of state responsibility, the law on the use of force, and the law of extraterritorial jurisdiction; and are simply never assembled into a single instrument that a state, a court, or an injured individual could consult. This section evaluates certain international principles which when taken together, demonstrate that the accountability gap identified in Part II is not a gap in substantive law but a gap in its organisation.

A. Attribution: The Sending State's Irreducible Responsibility

Under the customary rules codified in Articles 4 through 8 of ARSIWA,¹⁷ the conduct of a State's armed forces is attributable to that State as the conduct of its own organ, regardless of where those forces are physically located. Territorial presence on foreign soil does not sever this attribution, nor does the existence of a Status of Forces Agreement alter it.

This principle is uncontroversial precisely because it requires no innovation to the State's already established obligations; it is a direct application of ordinary attribution doctrine to a basing context. In the same regard a consolidated instrument would therefore not be creating this obligation; it would simply be stating clearly, in one place, what already binds every sending state regardless of whether its particular SOFA happens to mention it.

A more demanding question; where friction between personnel and host communities is a recurring source of dispute, is whether attribution holds when a soldier acts beyond the scope of authority, in violation of orders, or in clear breach of domestic or international law. Article 7 of ARSIWA answers this in the affirmative that the conduct of a State organ is attributable to the State even where the organ exceeds its authority or contravenes instructions, provided it acts in that capacity.¹⁸

In the *Caire* case (France v. Mexico, 1929),¹⁹ the French-Mexican Claims Commission held Mexico responsible for the murder of a French national by Mexican military officers acting outside their orders and for personal motives, reasoning that the officers had used the powers and position their official status gave them, and that a State bears responsibility for the acts of its officials even where those acts are unauthorised or exceed competence, so long as the officials acted under cover of their official character. The *Youmans* case (1926),²⁰ decided by

¹⁷ ARSIWA, *supra* note 11, arts. 4–8.

¹⁸ ARSIWA, *supra* note 11, art. 7.

¹⁹ *Caire Claim* (Fr. v. Mex.), 5 R.I.A.A. 516 (Fr.-Mex. Claims Comm'n 1929).

²⁰ *Youmans Claim* (U.S. v. Mex.), 4 R.I.A.A. 110 (Gen. Claims Comm'n 1926).

the same commission, reached a similar conclusion where Mexican troops sent to protect American nationals during a riot instead joined in attacking them.

Similarly Article 5 of ARSIWA holds relevance when the conduct of an organ of a State, which is not uniformed personnel, is in question; can be attributable to the State.²¹

B. Consent and Its Limits

The second building block is more doctrinally demanding, because it does two things at once; it explains why a foreign military presence is lawful in the first place, and it marks the boundary beyond which that lawfulness ceases.

A host State's consent operates as the threshold condition for the lawful presence of foreign forces on its territory; where consent is validly given, the deployment does not violate the prohibition on the use of force, nor does it constitute an unlawful intervention in the host state's internal affairs. It must be noted that validity is not presumed; it is conditioned; where consent must be given by the highest available governmental authority capable of representing the state, must be freely given rather than procured through coercion or fraud, must be issued prior to the conduct it authorises (or, if issued after the fact, operates only as a waiver of a completed wrong rather than a retroactive cure), and, critically, the resulting conduct must remain within the limits of what was actually consented to.²² A state that permits a base for one purpose does not thereby permit its use for every purpose a Sending state might later find convenient.

Consent is not a single, undifferentiated grant that, once given, immunises everything that follows, it is scoped; and operates in a specific contextual sphere; wherein a host State may validly consent to the presence of a base for its own defence, for regional security cooperation, or for a defined set of operational purposes, without thereby consenting to the base being used as a platform for operations against a third state unconnected to the terms of the original arrangement. The events surrounding Diego Garcia in early 2026 illustrate this distinction with unusual clarity;²³ when the United Kingdom authorised American use of the base and of RAF Fairford for operations against Iran, it attempted to confine that authorisation to defensive action against incoming missiles and drones,²⁴ precisely because it understood, correctly, as a matter of law; that the scope of its consent was not unlimited

²¹ ARSIWA, *supra* note 11, art. 5.

²² ARSIWA, *supra* note 11, art. 20.

²³ *UK Arguments for US Operations from Its Bases Blur the Line Between Lawful Self-Defence and Unlawful War on Iran*, Chatham House (Mar. 6, 2026), <https://www.chathamhouse.org/2026/03/uk-arguments-us-operations-its-bases-blur-line-between-lawful-self-defence-and-unlawful-war>.

²⁴ *Israel/US-Iran Conflict 2026: Background and UK Response*, House of Commons Library (2026), <https://commonslibrary.parliament.uk/research-briefings/cbp-10521/>.

simply because a base existed and a request had been made. Whether that self-imposed limitation could be maintained in practice, once the base was being used within a live and expanding theatre of war, is a separate question, but the attempt itself confirms that consent; in practice; is treated, even by the states relying on it, as a bounded rather than an open-ended authorisation.

There exists a further limit that operates regardless of the scope i.e. consent cannot cure a breach of a peremptory norm of international law;²⁵ where the prohibition on the use of force is engaged as a matter of jus cogens, no host-state authorisation can retroactively legalise conduct that violates it. This means that a host State's consent to a base's presence is analytically distinct from; and does not extend to; whatever unlawful use a Sending State might make of that base once established. The distinction matters because it is precisely the point at which host-state responsibility; rather than sending-state responsibility; re-enters the analysis.

C. Due Diligence and Complicity

We begin by reiterating a principle; long recognised in the jurisprudence of the ICJ stemming from the Corfu Channel case;²⁶ that a State may not knowingly allow its territory to be used for acts contrary to the rights of other states. It is a free-standing obligation of general international law, owed by every State in respect of its own territory and its application to foreign military bases is a natural, rather than a novel, extension wherein; a host State that becomes aware that a base on its soil is being used to facilitate internationally wrongful conduct; and fails to act on that knowledge; does not automatically escape responsibility simply because the conduct in question was carried out by the sending State's forces rather than its own.

Article 16 of ARSIWA sharpens this further wherein it asserts that a State that aids or assists another state in the commission of an internationally wrongful act incurs responsibility for that assistance where it is aware of the circumstances making the assisted State's conduct wrongful, and where the assistance is given with a view to facilitating that conduct and does in fact facilitate it and herein, the assistance need not be indispensable to the wrongful act; a substantial contribution shall suffice.²⁷ Granting or maintaining access to a military base including permitting refueling, logistical support, or launch access; is squarely the kind of contribution capable of meeting this threshold.

This is precisely the accountability question the Diego Garcia episode throws into relief, independent of how the underlying conflict is ultimately characterised, under which; once the

²⁵ ARSIWA, *supra* note 11, art. 26.

²⁶ Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 22 (Apr. 9).

²⁷ ARSIWA, *supra* note 11, art. 16.

United Kingdom authorised the use of the base for operations against Iran, it placed itself within the analytical frame of Article 16 where the legal question was no longer only whether the American operations complied with the *jus ad bellum*, but whether the UK's own act of authorisation i.e.; knowing, contemporaneous, and consequential; carried independent legal exposure as a form of assistance to those operations.²⁸ In this case a SOFA, or any comparable basing agreement, has nothing to say about this question since it regulates jurisdiction over personnel and property; it does not, and was never designed to, regulate the host state's own responsibility for the uses to which it permits its territory to be put.

D. The Unifying Principle: Control, Not Territory

We now converge on a single organising idea that a consolidated framework could make explicit that responsibility under international law tracks control, and not mere territorial location. It is observed that attribution follows the sending State's forces wherever they operate because the state, not the territory, is the relevant unit of responsibility and consent is bounded because a host State's authority over its own territory is not extinguished by the mere presence of a foreign base; its control, and therefore its responsibility, persists in modified form. Due diligence and complicity bind the host state precisely because knowledge and the capacity to prevent; not territorial sovereignty as a formality; are what the law treats as generating an obligation to act.

This is the thread the remainder of this paper draws on: if control, in its various forms, is already the organising principle beneath the law of attribution, consent, and complicity, then a common set of guidelines for foreign military bases would not be inventing a new standard. It would be making explicit a standard the law already applies, case by case and dispute by dispute, without ever writing it down as such.

THE CONSOLIDATION: IN THEORY AND PRACTICE

Our Analysis reveals how the doctrines highlighted require no new dedicated instruments for them to be legitimately recognised as part of international law. Building upon the precedents of the Montreux document²⁹ or the UN Guiding Principles on Business and Human Rights (2011);³⁰ we can conclude that States' efforts in consolidation and clarification of the existing principles can result in setting up of new normative understandings as reinforced by the ICJ's

²⁸ *The United Kingdom's Use of Force Against Iran: Walking a Legal Tightrope?*, Just Security (Mar. 5, 2026), <https://www.justsecurity.org/133231/united-kingdom-iran-war-international-law/>.

²⁹ Montreux Document, *supra* note 2.

³⁰ Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. HR/PUB/11/04 (2011).

own treatment of general principles under Article 38(1)(c)³¹ of its Statute in *Barcelona Traction* (1970)³² and *North Sea Continental Shelf* (1969);³³ a rule may bind states through pathways independent of treaty codification, provided it is sufficiently fundamental across legal systems; as due diligence, rooted in analogues to nuisance and negligence in domestic law, plausibly is.

A framework for foreign military bases could adopt a similar structure wherein it works to build on the highlighted principles and comprehensively clarifies, among others, the Sending State obligations, the Host State obligations and the explicit parameters to consent thereby codifying the validity requirements already settled in customary practice. A practice of this kind shall set precedents for State practice in their conduct when dealing with foreign military bases; it shall work to ensure that the adverse effects of the asymmetrical nature of bi-lateral relations are reduced to a minimum and a uniform understanding of this practice shall be prevalent which shall provide certain common grounds; so as to ensure that the principles and purposes of international law are fulfilled not just in theory, but in practice.

³¹ Statute of the International Court of Justice art. 38(1)(c), *supra* note 1.

³² *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Second Phase, Judgment, 1970 I.C.J. 3 (Feb. 5).

³³ *North Sea Continental Shelf* (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).