

Note from the Field

The “Two-plus-Four” Treaty: Current Implications for U.S. Forces’ Activity and Freedom of Movement in Berlin and the New German States

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Introduction

The eighteenth anniversary of German re-unification was marked on 3 October 2008. The years following re-unification have witnessed the collapse of the Soviet Union, regional conflicts in the Balkans and Caucasus, the North Atlantic Treaty Organization’s (NATO) eastward expansion, and, most recently, the growing confidence and resurgence of the Russian Federation as a military power. In light of U.S. military basing initiatives in Poland and the Czech Republic as well as NATO “air policing” in the Baltic States, U.S. military planners must be cognizant of the international legal framework in which U.S. Forces operate in the united Germany. Especially important are the treaty-based constraints on stationing, deployment, temporary presence, and transit of military forces in and through Berlin and the new German States.

The Treaty

The Treaty on the Final Settlement with Respect to Germany (so-called “Two-plus-Four” Treaty), signed in Moscow on 12 September 1990 by the Federal Republic of Germany (FRG), the German Democratic Republic, the French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, represents one of the great successes of twentieth century diplomacy.¹ It ended the artificial division of Germany and Berlin, provided for a complete withdrawal of Soviet Forces from Germany, and terminated all remaining Four-Power (quadrupartite) rights and responsibilities for Berlin and Germany as a whole.² It created the basis for the emergence of a united, democratic, and sovereign FRG and permitted the united Germany to remain in NATO.³

Despite its overwhelmingly positive aspects, the Two-plus-Four Treaty contains several prohibitions that affect U.S. Forces’ operations and freedom of movement in Berlin and the new German States.⁴ These treaty prohibitions are found in the last sentence of paragraph 3 of Article 5, “Foreign armed forces and nuclear weapons or their carriers will not be stationed in that part of Germany [i.e., Berlin and the new German States] or deployed there.”⁵

These prohibitions on the stationing and deployment of non-German forces in eastern Germany proved quite controversial.⁶ On the eve of the treaty signing ceremony, the British Delegation insisted upon an explicit guarantee to be permitted to conduct military maneuvers in the new German States.⁷ This resulted in a crisis that threatened to delay the treaty’s signing, which was resolved only after frantic negotiations that included the famous “Pajama Conference” in Moscow.⁸ The resulting “agreed minute” was crafted to lend flexibility to the treaty’s application and protect the future interests of the contracting parties. It is the only addendum to the treaty.

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¹ Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, T.I.A.S. ____, 1696 U.N.T.S. 124, 29 I.L.M. 1186 (with agreed minute and related letters) (entered into force Mar. 15, 1991) [hereinafter Treaty on the Final Settlement with Respect to Germany].

² Letter of Transmittal, 25 Sept. 1990, 101st Cong., S. TREATY DOC. 101-20.

³ *Id.*

⁴ The new German States encompass the former territory of the German Democratic Republic, including Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt, and Thuringia.

⁵ Treaty on the Final Settlement with Respect to Germany, *supra* note 1.

⁶ Klaus-Rainer Jackisch, *An einem rundem Tisch mit scharfen Ecken*, DEUTSCHLANDFUNK, Oct. 3, 2005, <http://www.dradio.de/dlf/sendungen/hintergrundpolitik/425510/>.

⁷ *Id.*

⁸ On his own initiative, German Foreign Minister Hans-Dietrich Genscher went to the hotel where the American Delegation was staying to meet Secretary of State James Baker, who having retired for the evening under the combined effects of jet-lag, a sleeping tablet, and a small amount of whiskey, re-emerged from his hotel room clad in a bathrobe. Jackisch, *supra* note 6. Genscher convinced Baker to support a last minute change to the treaty in the form of an “agreed minute.” *Id.* German Foreign Office State Secretary Kastrup drafted it later that same night. *Id.*

The agreed minute provides that, “Any questions with respect to the application of the word ‘deployed’ as used in the last sentence of paragraph 3 of Article 5 will be decided by the Government of the united Germany in a reasonable and responsible way taking into account the security interests of each Contracting Party as set forth in the preamble.”⁹

In testimony before the Senate Armed Forces Committee, on 4 October 1990, a senior official in the U.S. Department of State revealed some of the thinking behind paragraph 3 of Article 5 and the agreed minute. He testified that,

Our interpretation of this provision [last sentence of paragraph 3 of Article 5] is that large-scale maneuvers, as these are defined in the Stockholm agreement, are not permitted, but that smaller-scale activities may take place at the discretion of the German Government. While the Germans may not wish certain types of smaller-scale activities to take place at certain times, our view is that freedom of decision is preserved in this regard.¹⁰

Thus, from a U.S. legal perspective, the force notification parameters agreed upon at Stockholm are the key to interpreting what constitutes a “deployment” for purposes of the treaty.¹¹

The Treaty in a Broader Context of International Law

Today, international law practitioners have an opportunity to consider numerous decisions taken by the Government of the united Germany in applying the last sentence of paragraph 3 of Article 5 of the treaty. Since the treaty’s entry into force, some official procedures have been established to regulate the military activities of the sending States (Belgium, Canada, France, the Netherlands, the United Kingdom, and the United States) in Berlin and the new German States. At this juncture, there is now substantial certainty about the types and levels of military activity the German Government will permit under the treaty.

In order to understand German Government decisions and practices within their proper context, one must understand the sophisticated legal approach taken by the German Government to the presence and status of foreign armed forces in the united Germany. German international law scholars, including those who shape official policy, make a distinction between the right of military forces to be present in a foreign country (*ius ad praesentiam*) and their legal status in the receiving State (*ius in praesentia*).¹² The German Foreign Office expresses this approach in the following formulation:

The presence of foreign forces on German territory requires a special legal basis. A distinction must be drawn between the right of presence and the law governing such presence. The right of presence derives from the required formal consent given by the Federal Republic of Germany to the presence of foreign armed forces within its territory. The law of residence governing their presence includes all legal provisions to which foreign forces are subject while present on German soil.¹³

Since 1954, U.S. Forces have been stationed in Germany on the basis of the so-called “Presence Convention.”¹⁴ Following re-unification in 1990, there was a review of various stationing agreements.¹⁵ On 25 September 1990, the German

⁹ Treaty on the Final Settlement with Respect to Germany, *supra* note 1, at agreed minute.

¹⁰ *Hearing on the Implications of Treaty on Final German Settlement for NATO Strategy and U.S. Military Presence in Europe Before the S. Armed Services Comm.*, 101st Cong. 7 (Oct. 4, 1990) (statement of James F. Dobbins, Jr., Principal Deputy Assistant Secretary of State for European and Canadian Affairs).

¹¹ At the Stockholm Conference, which met from January 1984 to September 1986, representatives of the participating States of the Conference on Security and Co-operation in Europe agreed to give notification in writing through diplomatic channels of a number of military activities. Document of the Stockholm Conference Confidence- and Security-Building Measures and Disarmament in Europe Convened in Accordance with the Relevant provision of the Concluding Document of the Madrid Meeting of the Conference on Security and Cooperation in Europe, Sept. 19, 1986, 26 I.L.M. 190. Specifically, they agreed to provide notice of the following military activities: those involving at least 13,000 troops, including support troops; those involving at least 300 battle tanks; those involving 200 or more sorties by non-rotary aircraft; parachute drops involving at least 3000 troops; and amphibious landings involving at least 3000 troops. *Id.*

¹² Dieter Fleck, *The Development of the Law of Stationing Forces in Germany: Five Decades of Multilateral Cooperation*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 349, 350 (Dieter Fleck ed., Oxford Univ. Press 2001).

¹³ German Foreign Office, *Legal Status of Forces in Germany and Abroad*, <http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/InternatRecht/Truppenstationierungsrecht.html> (last visited June 16, 2009).

¹⁴ Convention on the Presence of Foreign Forces in the Federal Republic of Germany of 23 October 1954, 6 U.S.T. 55,689, T.I.A.S. No. 3426, 3 U.N.T.S. 334.

¹⁵ Major Wes Erickson, *Highlights of the Amendments to the Supplementary Agreement*, ARMY LAW., Dec. 1993, at 14.

Government and the six sending States exchanged diplomatic notes extending the applicability of the Presence Convention; however, it was agreed that its “existing territorial application . . . [would] remain unaffected by the establishment of German unity.”¹⁶

In order to fill the legal void concerning Berlin and the territory of the former German Democratic Republic, diplomatic notes were exchanged on two occasions (1990 and 1994) to provide a basis for temporary military presence as well as regulate the status of the armed forces of the sending States. The 1994 exchange of diplomatic notes, which amended the 1990 exchange of diplomatic notes, provided that the NATO Status of Forces Agreement (SOFA), the NATO SOFA Supplementary Agreement (Supplementary Agreement), and the Agreements related thereto “remain in force as amended,” subject to the following:

Taking account of the fact that the existing territorial application of these Agreements remains unaffected by the establishment of German unity, the forces of the sending States, their civilian components, their members and dependents shall enjoy the same status in the Laender Berlin, Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia as they are granted in the Laender Baden-Wuerttemberg, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine/Westphalia, Rhineland-Palatinate, Saarland and Schleswig-Holstein. Their official activities in the first-named Laender are subject to approval by the Federal Government. The Federal Government shall decide taking into account the provisions of Article 5 (3) of the Treaty on the Final Settlement with respect to Germany of 12 September 1990, in accordance with the Agreed Minute of the same date to that Treaty.¹⁷

Thus, the sending States agreed, in express terms, that their “official activities” in Berlin and the new German States were subject to approval by the German Government. In a “Protocol Note” to the 1994 exchange of diplomatic notes, the following was noted by all parties:

In granting the approval necessary in accordance [with the 1994 exchange of diplomatic notes and other stationing agreements], German authorities will apply as generous criteria as possible.

In granting approval for official activities in the Laender Berlin, Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia, German authorities shall, as far as possible, apply *mutatis mutandis* the same technical procedures as those applicable in the Laender Baden-Wuerttemberg, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine/Westphalia, Rhineland-Palatinate, Saarland and Schleswig-Holstein. In cases in which no suitable procedures exist, German authorities shall apply simple technical procedures or, as far as possible, issue a general approval.

Official visits to the Embassies and consular missions of the sending States in the Laender Berlin, Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt, and Thuringia are on the basis of reciprocity not subject to approval. Approval for official visits to German authorities in Berlin shall be deemed to have been given when an appointment is agreed.¹⁸

From reading the Protocol Note, one can glean that certain types of military activity fall outside the scope of Article 5 of the Two-plus-Four Treaty and are not subject to German Government approval. For example, “members of the force” and “members of the civilian component” may conduct “official visits” to the American Embassy in Berlin as well as the American Consulate General in Leipzig without having to obtain any additional form of approval from the German Government.¹⁹

¹⁶ Exchange of Notes between the Governments of the Federal Republic of Germany, the Kingdom of Belgium, Canada, the French Republic, the Kingdom of the Netherlands, the United Kingdom, and the United States of America Concerning the Status of Their Forces during Temporary Stays in Berlin, Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia, of 25 September 1990, BGBl. 1994, Pt. II, at 3716 (as amended on 12 Sept. 1994) [hereinafter Exchange of Notes]; *id.* Pt. II, S. 29 (as amended by exchange of notes from 12 Sept. 1994); *id.* Pt. II, at 3716).

¹⁷ *Id.*

¹⁸ Protocol Note to Paragraph 3 of the Exchange of Notes, Exchange of Notes between the Governments of the Federal Republic of Germany, the Kingdom of Belgium, Canada, the French Republic, the Kingdom of the Netherlands, the United Kingdom, and the United States of America Concerning the Status of Their Forces during Temporary Stays in Berlin, Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia, of 25 September 1990 (as amended on 12 Sept. 1994) BGBl. 1994, Pt. II, at 3719 [hereinafter Protocol Note].

¹⁹ *Id.* This permits Germany to fulfill its obligations under Article 36 of the Vienna Convention on Consular Relations, which reads as follows in pertinent part:

The Protocol Note requires German authorities to apply “generous criteria” when considering requests for official activity and provides for the issuance of “general approval[s]” in some cases.²⁰ In this latter regard, the final sentence of the Protocol Note serves as a form of general approval for “official visits to German authorities in Berlin.” It provides expressly that German Government approval “shall be deemed to have been given when an appointment is agreed.”²¹

Finally, the Protocol Note provides that technical procedures for obtaining German Government approval shall, as far as possible, be applied uniformly throughout Germany.²² In cases, in which no existing procedures exist, German authorities are required to “apply simple technical procedures.”²³

When planning military activity in Berlin or the new German States, the most important reference for a Judge Advocate or Department of the Army attorney to consult is the German Federal Ministry of Defense’s “Information on the Cooperation between the Sending Nations and the Federal Ministry of Defense” (*Hinweise für die Zusammenarbeit der Entsendestaaten mit dem Bundesministerium der Verteidigung*).²⁴ Although a full explanation of the *Hinweise* and its ramifications for the sending States could fill several pages in an international law journal, for purposes of this practice note it is best to summarize the *Hinweise* by quoting from its Preliminary Remarks (*Vorbemerkung*). “This document is a summary and result of the implementation of the relevant agreements and treaties and the provisions derived from them between the sending nations and the Federal Republic of Germany” (*Dieses Dokument bildet eine Zusammenfassung und Umsetzung der einschlägigen Abkommen und Verträge der Entsendestaaten und die daraus abgeleiteten Bestimmungen in der Bundesrepublik Deutschland*).²⁵

In regard to Article 5 of the Two-plus-Four Treaty, its agreed minute, and the 1994 exchange of diplomatic notes, the *Hinweise* has become the primary technical procedure for obtaining German Government approval for official activity of the armed forces of the sending States in Berlin and the new German States.²⁶ The *Hinweise* performs a dual function. It provides a mechanism for the German Government to grant general approval for a number of peace-time military activities conducted by forces of the sending States stationed in Germany, while also processing individual requests for categories of official activity that are not subject to general approval.²⁷

Although not mentioned in the text of the *Hinweise*, the German Federal Ministry of Defense performs an inter-ministerial staffing function within the German Federal Government. Upon receipt of individual requests, the German Federal Ministry of Defense circulates these requests to other interested federal ministries as well as subordinate agencies. For example, international border crossing requests are circulated to the Federal Ministry of Interior (border police), Federal Ministry of Finance (customs), Federal Economics Ministry (arms import and export restrictions), and most importantly the Foreign Office. As a matter of legal competency within the German Federal Government, the Foreign Office makes the final determination whether to permit a requested military activity.

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State.

Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261, T.I.A.S. No. 6820 (entered into force Mar. 19, 1967).

²⁰ Protocol Note, *supra* note 18.

²¹ *Id.*

²² *Id.* As most Soldiers who have been stationed in Germany are aware, Germany is a highly regulated society. Along with the tremendous infrastructure and political support for training, moving, sustaining, and protecting the force comes an array of host nation legal requirements that must be satisfied. Fortunately, through many years of applied practice, the U.S. Forces satisfy these host nation requirements as matter of routine. Technical procedures for notifying German authorities and seeking their approval, in those cases where approval has not been granted on a general basis, vary depending on the type of military activity involved. For example, there are long-standing and separate technical procedures for notifying host nation authorities of maneuvers (i.e., off installation training) as well as scheduling training events at ranges and training areas operated by the German Armed Forces.

²³ *Id.*

²⁴ German Federal Ministry of Defense, Information on the Cooperation between the Sending Nations and the Federal Ministry of Defense (31 July 2008) [hereinafter *Hinweise*] (copy on file with USAREUR Office of the Judge Advocate (OJA) in both German as well as English).

²⁵ *Id.* at foreword.

²⁶ *Id.* para. 301.

²⁷ *Id.* app. 5/1.

Submission of individual official activity requests to the German Federal Ministry of Defense is accomplished through the U.S. Army Europe (USAREUR) Liaison Office, American Embassy Berlin, in accordance with guidance in the U.S. Department of Defense Foreign Clearance Guide.²⁸

One question, which is raised periodically at headquarters and in the field, is whether “official activity” by the U.S. Forces in West Berlin (i.e., former American, British and French Sectors) is covered under the treaty and subject to German Government approval. Over the years, USAREUR Liaison Office’s response has been a consistent, “Yes.”

This position is based on the following analysis. The treaty’s operative sentence in paragraph 3 of Article 5, “Foreign armed forces and nuclear weapons or their carriers will not be stationed in that part of Germany or deployed there” must be read within the context of the paragraph in which it appears.²⁹ The first sentence of this paragraph reads as follows,

Following the completion of the withdrawal of the Soviet armed forces from the territory of the present German Democratic Republic and of Berlin, units of German armed forces assigned to military alliance structures in the same way as those in the rest of German territory may also be stationed in that part of Germany, but without nuclear weapon carriers.³⁰

When read in context, one can see that the last sentence in paragraph 3 refers back to the first sentence of the same paragraph, specifically, “the territory of the present German Democratic Republic and of Berlin.”³¹ Although the ordinary meaning of the term, “Berlin,” encompasses the entire city (which at the time of the treaty’s signing remained under quadripartite occupation, at least in the view of the western allies), an argument can be made that the Soviet armed forces did not physically “withdraw” from the western sectors of Berlin, hence the treaty does not restrict the present stationing or deployment of non-German forces in these former occupation sectors. Notwithstanding this argument, under the 1994 exchange of diplomatic notes, cited above, official activities in the present State of Berlin are subject to German Government approval.³²

The Treaty in Practice

When considering whether the U.S. Forces are obligated to seek approval for official activity in the new German States or Berlin, it is helpful to categorize the planned military activity in one of three categories: (1) Activities and Personnel not subject to German Government approval; (2) Activities subject to general approval; and (3) Activities subject to specific approval based upon individual request.

1. Activities and Personnel not subject to German Government Approval

a. Private Activities

No German Government approval is required for purely private activities of U.S. Department of Defense (DoD) personnel in Berlin and the new German States. Thus, personnel in a leave, pass, or other non-duty status may travel to Berlin and the new German States on an unrestricted basis. In doing so, they may avail themselves to the full privileges,

²⁸ U.S. DEP’T OF DEFENSE, 4500.54-G, FOREIGN CLEARANCE GUIDE (1 June 2009) [hereinafter DoD 4500-54-G], available at <https://www.fcg.pentagon.mil/fcg.cfm>. The German Federal Ministry of Defense maintains a database of approved official activity requests. Upon request, the German Foreign Office makes this information available to the treaty’s other Contracting Parties. Periodically, the Russian Embassy in Berlin requests this information. The German Federal Ministry of Defense’s database serves as a sort of informal “audit trail” to substantiate treaty compliance. Hence it is important for U.S. military units and personnel to submit official activity requests.

²⁹ Treaty on the Final Settlement with Respect to Germany, *supra* note 1.

³⁰ *Id.*

³¹ *Id.*

³² Another legal consideration is the “Presence Convention.” Convention on the Presence of Foreign Forces in the Federal Republic of Germany, 23 Oct. 1954, 6 U.N.T.S. 5689. As discussed above, the Presence Convention does not extend to Berlin or the new German States. In the absence of German Government approval granted within the context of the exchange of diplomatic notes, the legal status of U.S. Forces’ personnel in West Berlin would be questionable. It is foreseeable that the German Government would consider any “unapproved” activity in West Berlin to constitute a violation of its national sovereignty. This could result in non-recognition of NATO SOFA status for U.S. Forces’ personnel that could pose serious problems for individuals with regard to foreign criminal jurisdiction and claims. Finally, the Russian Government could be expected to lodge diplomatic objections to any “unapproved” activity on the basis of the treaty itself.

immunities, and benefits afforded them under NATO SOFA and the Supplementary Agreement.³³ Under the 1994 exchange of diplomatic notes, NATO SOFA status for individual DoD personnel in Berlin and the new German States is not contingent upon the performance of official duties there.

b. Defense Attachés and Military Personnel with “A&T” status

Based on the presence of a robust Defense Attaché Corps in Berlin, it is safe to assume that Defense Attachés, possessing full diplomatic status, as well as military personnel, possessing “administrative and technical” (A&T) status, under the Vienna Convention on Diplomatic Relations, are not considered “foreign armed forces” or “stationed” in Berlin for purposes of Article 5 of the treaty.³⁴ They are not prohibited from performing their military-diplomatic duties in Berlin, which is once again the seat of Germany’s Federal Government. Furthermore, DoD personnel assigned duty in Berlin (e.g., U.S. Defense Attaché Office and Office of Defense Cooperation), who possess full diplomatic or A&T status³⁵ are not covered by the 1994 exchange of diplomatic notes.³⁶ Although they must undergo diplomatic accreditation, their official activities in Berlin and the new German States are not subject to approval by the German Federal Government to comply with the Two-plus-Four Treaty.

c. Visits to American Embassy Berlin and American Consulate General Leipzig

The Protocol Note to the 1994 exchange of diplomatic notes provides that, “[o]fficial visits to the Embassies and consular missions of the sending States in the Laender Berlin, Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia are on the basis of reciprocity not subject to approval.”³⁷ Thus, “members of the force,” “members of the civilian component” and their “dependents” may visit these diplomatic facilities without any form of notification to host nation authorities, even when visiting in an official capacity.

d. Civilian Labor

The prohibitions in Article 5 of the treaty do not apply to local civilian labor employed by a sending State under Article 56 of the Supplementary Agreement. These employees, who tend to be German Citizens, and are not considered members of the civilian component, do not constitute “foreign armed forces” within the meaning of the treaty. Over the years, these employees (sometimes referred to as LN Employees) have visited numerous German civil and military authorities without objection.

e. DoD Contractors and DoD Contractor Employees

Arguably, DoD contractors and their employees do not constitute “foreign armed forces” for purposes of Article 5 of the treaty. This legal position is supported by NATO SOFA and the Supplementary Agreement.³⁸ In Germany, the majority of DoD contractor employees do not qualify for SOFA status as a member of the civilian component. Following this logic, the

³³ Exchange of Notes, *supra* note 16.

³⁴ Those members of the Defense Attaché Corps from NATO Member States also lack status under the NATO Status of Forces Agreement in Germany, by operation of the Protocol of Signature to the Supplementary Agreement.

Service attachés of a sending State in the Federal Republic, the members of their staffs and any other service personnel enjoying diplomatic or other special status in the Federal Republic shall not be regarded as constituting or included in a ‘force’ for the purpose of the NATO Status of Forces Agreement and the Supplementary Agreement.

Protocol of Signature to the Supplementary Agreement Pt. I, Re art. I, para. 1(a)2, 3 Aug. 1959, 102 T.I.A.S. 5351 (Agreed Minutes and Declarations concerning the Status of Forces Agreement) [hereinafter Protocol of Signature].

³⁵ A&T status is described in Article 37 of the Vienna Convention on Diplomatic Relations. Vienna Convention on Diplomatic Relations art. 37, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

³⁶ The exchange of diplomatic notes restricts the official activities of “members of the force,” “members of the civilian component,” and “dependents” only. Diplomatic personnel do not fit within any of these categories of persons possessing status under the NATO SOFA. Protocol of Signature, *supra* note 34.

³⁷ Protocol Note, *supra* note 18.

³⁸ *Id.*

United States has no legal duty to notify the German Government under the 1994 exchange of diplomatic notes, which covers only those personnel possessing NATO SOFA status. However, for political and diplomatic reasons, the American Embassy in Berlin notifies the German Government of most DoD contractor activity in the new German States and Berlin. This type of notification stems from the acute political sensitivities that prevail in re-unified Germany, not out of a strict legal obligation.³⁹

2. Activities Subject to General Approval

a. U.S. Military Aircraft Landing in Support of Visits to American Embassy Berlin and American Consulate General Leipzig

As a matter of longstanding practice, the German Federal Ministry of Defense has permitted U.S. military aircraft to fly and land in direct support of visits to U.S. diplomatic facilities using blanket diplomatic clearance numbers issued annually to the U.S. Forces. Since republication of the *Hinweise* in 2005, there has been explicit approval for aircraft from any of the six sending States to land in support of visits to diplomatic facilities in Berlin.⁴⁰ Recently, this privilege has been extended to other nations.⁴¹ All other U.S. military aircraft landing in Berlin or the new German States must request and obtain an individual diplomatic clearance number from the German Federal Ministry of Defense through U.S. Defense Attaché Office Berlin by following the procedures listed in the DoD Foreign Clearance Guide.⁴²

b. U.S. Military Flights over the new German States and Berlin

Initially, the German Federal Ministry of Defense insisted upon an individual diplomatic clearance number for each U.S. military aircraft flying in the airspace over the new German States.⁴³ This gave rise to hundreds of reported violations of German airspace and created a bureaucratic conundrum. To resolve this situation, on 23 April 2001, the German Federal Ministry of Defense decided to extend blanket diplomatic clearance, which had previously applied only to U.S. military flights over western Germany, to most U.S. military flights over the new German States.⁴⁴ This extended blanket diplomatic clearance has been granted on an annual basis since 2001.⁴⁵ In support of Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), numerous U.S. military flights have used these blanket diplomatic clearance numbers. Aircraft that require individual diplomatic clearance (e.g., those participating in air exercises) are described in the DoD Foreign Clearance Guide, which provides detailed guidance on how to request flight clearance numbers through U.S. Defense Attaché Office Berlin.⁴⁶

³⁹ Since the treaty entered force, there has been significant DoD contract activity in the new German States and Berlin. For example, DoD has ongoing contracts with German commercial firms to demilitarize U.S. Army ordnance and U.S. Air Force bombs at former ammunition plants in the State of Brandenburg. Also, in May 2006, DoD contractors began to use Leipzig-Halle International Airport to refuel and repair DoD contract aircraft transporting DoD personnel on rest and recuperation (R&R) to and from the United States. To date, approximately 1 million R&R passengers have landed at Leipzig-Halle. More recently, DoD contract aircraft have transported newly procured military vehicles from the United States, using Leipzig-Halle for technical stops enroute to their theaters of operation. In supporting these movements, the German Government has used military-diplomatic clearance procedures applicable to military flights. Each DoD contract flight is assigned an individual flight clearance number granted by the German Federal Ministry of Defense in response to an individual military-diplomatic request submitted by U.S. Defense Attaché Office Berlin. For more information and analysis of contractor use of Leipzig-Halle, see the German Federal Government's answer to a parliamentary interpellation from the Die Linke, a left-wing party in the political opposition. *Nutzung des Mitteldeutschen Flughafens Leipzig/Halle für militärische Zwecke* [Use of Central German Airport Leipzig/Halle for Military Purposes], *DEUTSCHER BUNDESTAG, 16. Wahlperiode, Drucksache 4343*.

⁴⁰ *Hinweise*, *supra* note 24, app. 5/2.

⁴¹ The Military Aeronautical Information Publication Germany (MIL AIP) provides that “[n]ations holding valid permanent flight permits do not need individual permits to enter Berlin in order to visit diplomatic representations.” GERMAN ARMED FORCES AIR TRAFFIC SERVICES OFFICE, MILITARY AERONAUTICAL INFORMATION PUBLICATION GERMANY, GEN 1.2 to 2.2, 5 (19 May 2009) [hereinafter MIL AIP], available at <http://www.mil-aip.de/>.

⁴² DOD 4500-54-G, *supra* note 28.

⁴³ Letter from German Federal Ministry of Defense—Fü S II 5—*Militärattachéreferat* to the American Embassy Berlin (copy on file with the USAREUR OJA).

⁴⁴ *Id.*

⁴⁵ This annual letter is underscored by Appendix 5/2 of the *Hinweise* which indicates no specific request is required for countries whose aircraft have been granted blanket clearance. *Hinweise*, *supra* note 24, app. 5/2.

⁴⁶ DOD 4500-54-G, *supra* note 28.

c. *Visits to German Civil Authorities in Berlin*

The Protocol Note to the 1994 exchange of diplomatic notes states that, “[a]pproval for official visits to German authorities in Berlin shall be deemed to have been given when an appointment is agreed.”⁴⁷ This language is buttressed by Appendix 5/1 of the *Hinweise* which extends general approval to visits of up to 100 persons to German civil authorities as long as the visitors are unarmed and not taking part in a military exercise and do not stay in a German military installation.⁴⁸ This general approval covers virtually all visits to German authorities in Berlin. Here it is important to note that the general approval in the *Hinweise* does not extend to visits to German military authorities and installations. Instead, the *Hinweise* requires individual requests for visits to German military authorities and installations in Berlin to follow the Request for Visit Process (*Besuchskontrollverfahren*).⁴⁹ In this regard, there is a certain tension between the Protocol Note to the 1994 exchange of diplomatic notes and the *Hinweise*.

d. *Trips by Unarmed Personnel to Berlin and the New German States*

Many types of routine military activity fall under a broad general approval published in the *Hinweise*. For example, band performances, battle staff rides (some favorite battle sites include Berlin, Leipzig, and Jena) and visits by military liaison personnel are covered under a general approval for visits of up to 100 unarmed persons provided they do not stay in any German military facility. Unfortunately, the *Hinweise* does not apply the same standard applied in the 1996 *Wichert Decree*.⁵⁰ Prior to the initial publication of the *Hinweise* in 2002, the sending States could cite the *Wichert Decree* for general approval for all visits by units less than “company strength,” even those with Soldiers under arms.

e. *Interstate German Travel without International Border-Crossing*

Appendix 5/1 of the *Hinweise* provides general approval for all military movements within the FRG that do not involve the crossing of an international border.⁵¹ Thus, military personnel stationed at bases in western Germany may travel through the new German States without having to file a separate transit request, so long as they do not cross into Poland or the Czech Republic or depart Germany from a port on the Baltic Sea.⁵² Such interstate travel is rare because most travel through the new German States involves movements to and from Poland. However, there have been instances in which troops headed to a North Sea port or training area in Schleswig-Holstein have been routed through the new German States.

3. *Activities Subject to Specific Approval Based upon Individual Request*

a. *Liaison Officers, Exchange Officers, and Military Students*

The German Government has permitted liaison officers from two sending States to perform duties in Berlin since the German Government moved from Bonn to Berlin in 1999. This practical step has permitted Germany and the sending States to fulfill their mutual obligations under NATO SOFA and the Supplementary Agreement.⁵³ In a recent diplomatic note, the German Foreign Office confirmed that the service in Berlin of a U.S. military officer performing liaison duties between the

⁴⁷ Protocol Note, *supra* note 18.

⁴⁸ *Hinweise*, *supra* note 24, app. 5/1.

⁴⁹ *Id.*

⁵⁰ The so-called *Wichert Decree* (*Wichert Erlass*) was issued by State Secretary Wichert. German Federal Ministry of Defense, Application Rules for Visits, Exercises, Transit Stays and Other Temporary Stays by Members of Foreign Armed Forces in the Federal Republic of Germany (14 Mar. 1996) (copy on file with the USAREUR OJA) (in German and in unofficial English translation).

⁵¹ *Hinweise*, *supra* note 24, app. 5/1.

⁵² Although the filing of a transit request (with the German Federal Ministry of Defense in Berlin) is not required for military movements taking place exclusively within Germany, military convoys may require “march credits” as well as other forms of host nation permission based on other existing agreements.

⁵³ Under Article 3 of the revised Supplementary Agreement to the NATO SOFA, “German authorities and the authorities of a Force” have an affirmation obligation to “ensure close and reciprocal liaison” in order to fulfill obligations imposed by the North Atlantic Treaty and implement NATO SOFA and the Supplementary Agreement. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany art. 3 (n.d.), 6 T.I.A.S. No. 5351.

stationed forces and German federal ministries does not violate Article 5, paragraph 3 of the Two-plus-Four Treaty.⁵⁴ The German Government has also permitted liaison officers to be assigned to units and activities outside the U.S. Embassy in Berlin. On 23 July 2002, the Chief of Staff of the German Armed Forces wrote the Chairman of the U.S. Joint Chiefs of Staff to cordially invite him to send a liaison officer on a permanent basis to the German Joint Operations Command in Potsdam, Brandenburg.⁵⁵ Although relatively small in number, the DoD has sent a steady stream of military personnel to Berlin and the new German States for career development purposes.⁵⁶ For example, U.S. Navy exchange personnel have served in German Naval units on the Baltic Coast.⁵⁷ United States Foreign Area Officers (FAOs) and other military students have attended the German Army Staff School at Dresden as well as studied at civilian universities in Berlin and the new German States.⁵⁸

b. U.S. Military Aircraft Landings

Other than missions in direct support of a diplomatic visit, as discussed above, U.S. military aircraft require individual diplomatic clearance to land in Berlin and the new German States.⁵⁹ On two occasions prior to OEF and OIF, the German Federal Ministry of Defense permitted a brigade of USAREUR rotary-wing aircraft to land and refuel at several airfields in eastern Germany on their way to and from Poland. These aviation assets (both attack and support helicopters) transited in support of a series of annual exercises known as VICTORY STRIKE that took place in western Poland.⁶⁰ Since the cancellation of VICTORY STRIKE IV, USAREUR aviation assets have transited to Poland infrequently and in much smaller numbers. United States Air Force aircraft have also been permitted to land in the new German States. For example, U.S. Air Force jet fighters have landed at the German Air Force Base in Laage, Mecklenburg-Western Pomerania, and remained there a few days.⁶¹ The German Federal Ministry of Defense permitted this temporary presence to facilitate close-air combat training with MIG-29 aircraft flown by the German Air Force. Finally, the German Federal Ministry of Defense has permitted foreign military (including U.S. Air Force and U.S. Army) aircraft to land at Schönefeld Airport, in Brandenburg, to participate in the internationally renowned Berlin Air Show.⁶²

c. Air Exercises

Military aircraft training in the airspace over the new German States require individual diplomatic clearance.⁶³ Since the treaty took effect, there has been minimal training by USAREUR aircraft in the airspace over the new German States. This fact results from the limited operating range of rotary-wing aircraft as opposed to any legal constraints. Geographic distance is also a factor that has limited the number and duration of training missions by U.S. Air Force aircraft over the new German States. However, the new Eurofighters stationed at the German Air Force Base at Laage are attractive training partners.

⁵⁴ German Foreign Office, Note Verbale, Berlin, (Mar. 24, 2005) (copy on file with the USAREUR OJA).

⁵⁵ Letter from General Wolfgang Schneiderhan, Chief of Staff, German Armed Forces, to General Richard B. Myers, Chairman of the U.S. Joint Chiefs of Staff (July 23, 2002) (copy on file with the USAREUR OJA). At present, military officers from eleven nations perform liaison duties at the German Joint Operations Command in Potsdam. These military liaison officers are from Austria, Belgium, Denmark, France, the Netherlands, Norway, Poland, Spain, Sweden, the United Kingdom, and the United States.

⁵⁶ This assertion is based on the author's professional experience of ten years at the U.S. Embassy, Berlin [hereinafter Professional Experience]. During the course of these duties, the author has personally met and spoken to some of the officers referred to above.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ This requirement may be found in *Hinweise*, as well as MIL AIP. *Hinweise*, *supra* note 24, app. 5/2; MIL AIP, *supra* note 41, GEN 1.2- 2.1. Specific guidance for DoD and DoD-contract flights are found in the DoD 4500.54-G. DoD 4500-54-G, *supra* note 28.

⁶⁰ The German Federal Ministry of Defense issued one diplomatic clearance number for all aircraft notified as taking part in the exercise. USAREUR LNO provided multiple data points to obtain diplomatic clearance for these aircraft, to include aircraft call-signs, airfield of origin, airfield of transit, final destination, arrival and departure times and dates.

⁶¹ This assertion is based on conversations that the author had with the USAFE Liaison Officer and e-mail traffic.

⁶² The author has visited the air show on at least two occasions and has seen the air aircraft on display there.

⁶³ Blanket diplomatic clearance granted in the annual letter from the German Federal Ministry of Defense does not cover military training flights over the new German States. Specific clearance requirements may be found in Appendix 5/2 of the *Hinweise*, *supra* note 24. Guidance for DoD and DoD-contract flights is contained in the DoD Foreign Clearance Guide. DoD 4500.54-G, *supra* note 28.

d. Ground Transits involving International Border-Crossing

Department of Defense personnel crossing the German-Polish Border or German-Czech Border via the new German States require individual diplomatic clearance.⁶⁴ Requests for transit are processed through the USAREUR Liaison Office to the German Federal Ministry of Defense. In the absence of a properly approved transit request, DoD personnel may experience border delays and other problems. Since the Two-plus-Four Treaty entered into force, significant numbers of foreign military personnel (principally British, Dutch, and U.S. Forces) have transited the new German States on their way to and from training exercises in Poland. During VICTORY STRIKE I, which took place in the fall of 2000, approximately 3000 U.S. Soldiers transited the new German States on their way to Poland.⁶⁵ To move this heavy brigade, USAREUR contracted for thirty commercial rail shipments, consisting of approximately 1000 flat-cars.⁶⁶ VICTORY STRIKE II, which took place in the fall of 2001, involved troop and equipment transits on a similar order of magnitude.⁶⁷ Since OEF and OIF, many USAREUR units have been deployed outside Germany, so that the frequency of transits to Poland has diminished. Transits in recent years have involved platoon and company-size troop movements.⁶⁸ For some recurring supply missions to Poland, the German Federal Ministry of Defense has issued blanket border-crossing approval to 21st Theater Sustainment Command activities for a period of up to one year.⁶⁹

e. Training at German Armed Forces' Facilities

There are a number of modern training areas operated by the German Armed Forces in the new German States. These include the German equivalent of the U.S. Army's National Training Center (*Gefechtsübungszentrum Heer* located in Altmark, Saxony-Anhalt), as well as a large military operations in urban terrain (MOUT) training site in Lehnin, Brandenburg.⁷⁰ In recent years, Dutch mechanized battalions have trained at *Gefechtsübungszentrum Heer*, while U.S. Special Forces and other light forces have trained periodically at the Lehnin MOUT site.⁷¹ Overall, U.S. Forces have trained very little on military bases in the new German States. To date, the largest U.S. training event comprised one armor battalion that spent a few weeks on a tank and maneuver range in the Oberlausitz, Saxony.⁷² The scheduling of unit training at German Armed Forces' facilities is accomplished by the U.S. Allied Training Scheduler, Joint Multinational Training Command (JMTC), in accordance with Army Europe (AE) Regulation 350-10 that implements a bilateral U.S.-German agreement providing for the co-use of training facilities.⁷³ The JMTC serves as European Command's lead service for training in Germany and schedules training events for all U.S. service components. In addition to the application of these technical procedures, USAREUR Liaison Office provides notice of all such training events to the German Federal Ministry of Defense in Berlin.

f. Maneuvers

Training outside military facilities is subject to approval of the German Federal Ministry of Defense. This rule applies in the old as well as new German States. Notice of maneuvers by units from all U.S. service components is provided to German authorities by the U.S. Forces Executive Agency for Maneuver (USFEAM), a function performed in the past by V Corps,

⁶⁴ *Hinweise*, *supra* note 24, app. 5/1. Specific guidance for DoD Personnel is contained in the DoD Foreign Clearance Guide. DoD 4500.54-G, *supra* note 28.

⁶⁵ Victory Strike, GlobalSecurity.org, <http://www.globalsecurity.org/military/ops/victory-strike.htm> (last visited June 16, 2009) [hereinafter Victory Strike].

⁶⁶ Professional Experience, *supra* note 56.

⁶⁷ Victory Strike, *supra* note 65.

⁶⁸ Professional Experience, *supra* note 56. The author has personally participated in processing transit requests for the above-referenced movements.

⁶⁹ Approval on file in USAREUR Liaison Office, American Embassy Berlin (copy on file with the USAREUR OJA).

⁷⁰ The Lehnin MOUT Site is located thirty kilometers southwest of Berlin and was constructed originally on a military base of the National People's Army (*Nationale Volksarmee*). It was completed in 1988, shortly before fall of the Berlin Wall. Tactical battle plans discovered after the fall of the Berlin Wall indicate that it was designed specifically to train National People's Army assault troops for an invasion of West Berlin.

⁷¹ Professional Experience, *supra* note 56. The author provided notice of this training to the German Ministry of Defense and personally spoke to the German Commander of the Training Area about this type training.

⁷² *Id.* The author provided notice to the German Ministry of Defense and personally spoke to the U.S. Army battalion commander.

⁷³ Arrangement between the Federal Minister of Defense of the Federal Republic of Germany and the Commander in Chief, United States Army, Europe and Seventh Army on the joint use of military training areas in the Federal Republic of Germany, which are under Bundeswehr or U.S. Army administration (Aug. 2, 1991) (as supplemented) (copy on file with the USAREUR OJA).

G5.⁷⁴ Notice is provided to local German authorities by applying procedures set forth in a 1993 agreement.⁷⁵ Additional notice is provided to the German Federal Ministry of Defense in Berlin. Since the final departure of the Russian Armed Forces from Germany in 1994, the U.S. Forces have conducted very few maneuvers in the new German States. The largest such maneuver, a signal brigade exercise, took place in 2000 in mountainous terrain in Thuringia.⁷⁶ Some other sending States have also maneuvered in the new German States. For example, British Forces' engineers periodically erect a pontoon bridge across the Elbe River in Saxony-Anhalt.⁷⁷

g. Visits to German Military Authorities

The German Federal Ministry of Defense requires most foreign military visitors to follow the Request for Visit Process (*Besuchskontrollverfahren*) as a precondition to any visit to a German military facility in the new German States or Berlin. Requests for DoD personnel are submitted to the German Federal Ministry of Defense by USAREUR Liaison Office or U.S. Defense Attaché Office, U.S. Embassy Berlin.

h. Personnel under Arms

On a few occasions, armed U.S. Forces' personnel have conducted security missions in the new German States, to include guarding shipments of ammunition and equipment. Also, U.S. Forces' security and logistic personnel have provided support for presidential and other state visits. This type activity is subject to German approval and is coordinated closely with German authorities.

Practice Tips

Before undertaking any activity in the new German States or Berlin, DoD personnel and DoD-sponsored civilians are well advised to consult and follow clearance procedures established in the U.S. DoD Foreign Clearance Guide. This is important for several reasons. First, non-compliance may result in an accusation that the U.S. Government has breached its obligations under Article 5 of the Two-plus-Four Treaty. Furthermore, non-compliance may cause interested parties to perceive a violation of German sovereignty—is no secret that U.S. Forces' activity in the new German States and Berlin is monitored. Finally, DoD Personnel who neglect to follow established clearance procedures place themselves in an untenable position whereby German authorities lack a legal basis upon which to recognize their status under the NATO SOFA and Supplementary Agreement. When one considers all the privileges, immunities, and benefits afforded by these cornerstone documents, one can readily envision the potentially serious legal implications, particularly concerning the areas of foreign criminal jurisdiction, claims, customs, and taxation, that a lack of recognized SOFA status could raise.

⁷⁴ Due to USAREUR's ongoing transformation, V Corps, G5 is no longer the USFEAM. As of this writing, the new USFEAM has not been designated.

⁷⁵ Agreement to Implement Paragraph 1 of Article 45 of the Agreement of 3 August 1959, as Amended by the Agreements of 21 October 1971, 18 May 1981 and 18 March 1993, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany (Mar. 18, 1993) (copy on file with the USAREUR OJA).

⁷⁶ E-mail from USAREUR LNO, American Embassy Berlin, to Political Section, American Embassy Berlin (Mar. 16, 2000) (copy on file with the USAREUR OJA).

⁷⁷ Document from British Forces Liaison Office Germany (copy on file with the USAREUR OJA).