

# Report on Status of Forces Agreements



International Security Advisory Board

January 16, 2015

## **Disclaimer**

This is a report of the International Security Advisory Board (ISAB), a Federal Advisory Committee established to provide the Department of State with a continuing source of independent insight, advice and innovation on scientific, military, diplomatic, political, and public diplomacy aspects of arms control, disarmament, international security, and nonproliferation. The views expressed herein do not represent official positions or policies of the Department of State or any other entity of the United States Government.

While all ISAB members have approved this report and its recommendations, and agree they merit consideration by policy-makers; some members may not subscribe to the particular wording on every point.



**United States Department of State**

*Washington, D.C. 20520*

January 16, 2015

**MEMORANDUM FOR UNDER SECRETARY GOTTEMOELLER**

**SUBJECT: Final Report of the International Security Advisory Board (ISAB) on Status of Forces Agreements**

I am forwarding herewith the ISAB's report on Status of Forces Agreements (SOFAs). The report responds to your request of August 23, 2013, that the Board undertake a study of the strategies for and challenges to U.S. negotiation of SOFAs. The report was drafted by members of a Study Group chaired by the Honorable Walter Slocombe. It was reviewed by all ISAB members and unanimously approved by January 16, 2015.

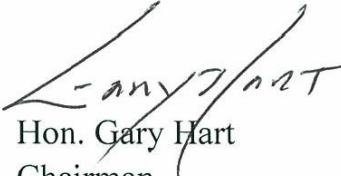
The report examines the reasons why status protections are needed, the forms SOFAs take, and the subjects and persons they may cover. The report also addresses the evolving context in which SOFAs have been reached – from the long term stationing of U.S. military personnel in Europe and Asia after WWII to U.S. operations in Iraq and Afghanistan after 9/11. There are still a significant number of nations where the United States has – or would seek to have – military forces in country for engagement, security cooperation, and other important missions, but with which we do not have a SOFA. The difficulties and delays experienced in recent SOFA negotiations indicates both that there is a significant gap between provisions desired by the United States and those to which prospective host countries are willing to agree and that there are aspects of internal U.S. government processes that add to the difficulties.

Adequate agreed status protections are important if the U.S. engagement is to occur under clear rules of jurisdiction and accountability that protect basic due process procedural rights for U.S. defense personnel, facilitate accomplishment of the missions for which U.S. military deployments are made, and reduce financial and administrative burdens. Moreover, SOFAs contribute to the resolution of disputes – without SOFA protections important strategic relationships can be undermined by disputes that could be avoided if agreed protections are in place.

The United States is a party to SOFAs – of varying terms and comprehensiveness – with many nations. However, there are still countries with which the U.S. military has significant interactions but with which no SOFAs exist—and in some cases, there are uncertainties about implementation of agreements on which the United States relies. The ISAB recommends filling those gaps in SOFA coverage, and enhancing implementation of existing agreements.

This report provides a number of recommendations aimed at facilitating negotiation of SOFAs, from strengthening State Department policy oversight and expertise, to more closely tailoring negotiations to U.S. interests and host country conditions, affording increased flexibility to our negotiators and more openness to reciprocity with host countries.

We encourage you to consider all of the report’s recommendations carefully. The Board stands ready to brief you and other members of the Administration on the report.



The image shows a handwritten signature in black ink that reads "Gary Hart". The signature is written in a cursive, slightly slanted style. Below the signature, the text "Hon. Gary Hart" and "Chairman" is printed in a standard serif font.

International Security Advisory Board

# INTERNATIONAL SECURITY ADVISORY BOARD

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# Report on Status of Forces Agreements

## Executive Summary

The ISAB was tasked with conducting a study of the strategies for and challenges to U.S. negotiation of SOFAs.

It is the policy of the United States that U.S. Defense personnel should not be sent to foreign countries unless sufficient status safeguards are assured. Status of Forces Agreements (SOFAs) are the means by which this policy is given effect. They define the legal status of U.S. Department of Defense (DoD) personnel<sup>1</sup>, activities, and property in the territory of another nation and set forth rights and responsibilities between the United States and the host government.

The Department of State has overall responsibility for leading the U.S. government's negotiation of SOFAs and shares responsibility for their implementation with DoD, which serves as executive agent for implementation and negotiation of supplemental agreements.

The United States has some form of SOFA agreement with more than 100 nations, about half under the NATO or the Partnership for Peace SOFAs, which apply, respectively, to all NATO allies and most Partnership for Peace partners. In addition, there are comprehensive agreements with long standing U.S. allies and partners like Australia, Israel, Japan, and Korea, and a variety of less comprehensive agreements with other nations. There are, however, still countries with which the United States has significant military relationships but no SOFA. It should be a U.S. government-wide priority to fill those gaps.

SOFAs serve a number of important U.S. interests, key among them being protection of U.S. military personnel from being subject to unfair criminal or civil justice systems. This is important not only to protect the rights of U.S. service members and to vindicate the United States' interest in exercising disciplinary

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<sup>1</sup> SOFA protections normally extend not only to uniformed service members in the host country, but also to civilian employees of Defense organizations in the country, and (with some limitations) to their dependents. Some degree of coverage of DOD contractors is sometimes provided for, but that is not the norm. Nationals of the host country are not covered. Unless otherwise stated, in this report, references to U.S. "forces" or "personnel" or the equivalent include those civilians and dependents covered by the agreement.

jurisdiction over U.S. uniformed personnel, but also because U.S. willingness to deploy forces overseas – and public support for such deployments – could suffer significant setbacks if U.S. personnel were at risk of being tried in an inherently unfair system, or at any rate, in one that departs fundamentally from U.S. concepts of basic procedural fairness. SOFAs also can reduce the financial and administrative burdens that arise if U.S. military operations are subject to host nation civil liability and to tax, customs, licensing, immigration, and other fiscal and regulatory requirements. They can also facilitate mission accomplishment by establishing clear rights with respect to such matters as wearing uniforms, carrying arms, providing installation security, operation of communications, damage claims procedures, and access to electromagnetic spectrum.

The contexts in which SOFA issues arise have evolved. The first context led to the NATO SOFA and similarly comprehensive agreements with other allies, developed after WWII as U.S. overseas military presence transitioned from wartime combat and occupation to long term peacetime stationing of U.S. forces in fully sovereign nations with which the United States had strong alliance or other security commitments. The second context emerged after the Cold War as the U.S. military undertook extensive programs of “engagement” with nations in the Third World or recently freed from Soviet domination – countries with which the United States did not have a security commitment or formal alliance. Military interactions with these countries usually involved exercises, training, and humanitarian assistance often of limited duration. The third also emerged in the early 1990s, during post-conflict transitions, peacekeeping, and humanitarian relief in difficult security situations, with widespread low-level conflict and some significant combat. After 9/11, the wars in Iraq and Afghanistan and extensive counter-terrorist operations produced a fourth context – continuing U.S. military presence that mixed intense combat with training local forces and broader “nation building” in circumstances of often uneasy cooperation with the local government.

Existing SOFAs vary enormously.

- Some, like the NATO SOFA, the terms of which apply to all NATO allies and most Partnership for Peace nations and like agreements with traditional allies such as Japan and the ROK, contain a broad and detailed array of coverages, embodying the principle of concurrent US and host nation jurisdiction over most criminal cases and detailing rules for use of facilities



and for financial and administrative matters. The basic NATO SOFA has been supplemented, often on a bilateral basis, over time with more detailed implementing agreements for specific projects as circumstances may require.

- Some, in the form of brief diplomatic notes, simply provide broadly stated “essential” – but basically exclusive – jurisdictional coverage under the rubric of status “equivalent” to that afforded administrative and technical staff of diplomatic missions. (These terms are often referred to as “A&T equivalent” protections).
- Others include reliance on the UN model and other special arrangements.
- Finally, the U.S. has in recent years developed a “Global SOFA Template” (“GST”) – an interagency approved standard form that provides for status protections desired by the United States – intended to be the standard for all future agreements and affording broad U.S. immunities.

In many cases in recent years, although some new SOFAs have been negotiated, State negotiators believe a gap has emerged between the comprehensive provisions desired by the United States – and provided for in many of the earlier-era agreements and prescribed in the GST – and those to which host countries today are willing to agree. SOFAs – because they entail, by definition, some compromise of the sovereign rights that host nations would otherwise have under the basic international law rule that foreigners present in a nation are subject to the law of that nation – often raise issues of national pride, internal controversy over cooperation with the United States, unwillingness to defer to U.S. interests, reluctance to agree to U.S. demands because of a reduced sense of dependency on the United States for security, resistance to foregoing significant tax revenue and regulatory authority, and competition with neighbors who are seen as having “better” status agreements. Moreover, some other nations may be reluctant to agree to status provisions that protect only U.S. defense personnel and activities on their soil, while not giving reciprocal rights to their nation’s defense personnel and activities in the United States.

The effort over the last decade or so to impose the GST as a single standardized model has not been successful. To be sure, in some cases it has been possible to reach agreement on the GST text, and the United States has a legitimate interest in consistency among SOFAs, if only to be able to resist claims by individual host

nations for special treatment (or insist on treatment equivalent to that afforded some other country).

However, host countries have in many instances been unwilling to accept our standard terms. Internal U.S. procedures – such as a requirement that all significant variations from the GST form require interagency clearance – make it unnecessarily difficult for our negotiators to reach compromises that involve varying the standard terms. The result is no agreed protection, or, at best long delays in reaching agreements – and either foregoing useful military engagement and activities, or conducting them with no agreed status protections whatever.

A more effective approach would take better into account that a single “global” SOFA model will seldom be both necessary for U.S. purposes in every country and negotiable with the host nation. Enhancing the prospects for negotiation and implementation of a SOFA requires more consideration to issues of the context of a particular SOFA, reciprocity, the nature of likely U.S. military activities in the nation, and priorities among possible protective provisions.

Overall, the study recommends a greater degree of flexibility in framing and conducting negotiations, adaptation of internal USG procedures for negotiations, greater resources and training at State, and a greater willingness to provide some form of reciprocity to partners. We also recommend a separate study of the proper handling of the special cases of combat zones and post-conflict transitional status protections, and better archival procedures to provide ready access to SOFA agreements in force.

Our specific recommendations (elaborated on in Section IX below) are summarized here:

### **1. Give High Priority to SOFA Negotiations.**

Adequate agreed protections are important if U.S. engagement is to occur under clear rules of behavior and accountability. In addition to protecting US military personnel from unfair legal procedures and entanglement with local authorities, they contribute to amicable resolution of disputes, which, in the absence of an agreed framework can undermine important relationships, and they can provide

significant financial savings and reductions in administrative burdens. There are, however, still significant countries where the United States has an interest in military presence but with which no SOFAs exist. It should be a U.S. government-wide priority to fill those gaps.

## **2. Tailor Negotiations to Individual Country Conditions.**

Assessments of the risks of operating without protection and the type and scale of protections needed vary according to the circumstances in which a Combatant Command is operating, and the U.S. negotiating system should reflect that reality. The existing “Global SOFA Template” framework has not proved to be a means either for uniformity of agreements or ease of negotiation. U.S. interests would be better served by a more flexible system that authorized negotiation of more tailored agreements, geared to the nature of the host country’s relationship with the United States, the quality of its judicial and other legal systems, the scale of likely U.S. military involvement, and other relevant considerations.

## **3. Maintain Priority for Criminal Jurisdiction Provisions under Which Most Cases Will Be Resolved in U.S. Systems.**

U.S. policy seeks to maximize the exercise of jurisdiction over U.S. forces by U.S. authorities, whatever the form of the SOFA agreement – comprehensive, A&T equivalence, or other ad hoc protections. From this perspective, explicit agreement on exclusive U.S. jurisdiction is ideal. When SOFAs contain “concurrent jurisdiction” provisions, the United States rightly seeks to ensure that the host will in practice waive jurisdiction, so that effective exercise of jurisdiction over U.S. forces is maintained. The United States should continue, in most cases, to seek exclusive criminal jurisdiction, but where the local judicial system is a sound one, and there is reason to believe the host will normally waive jurisdiction, a concurrent jurisdiction regime should normally be acceptable.

## **4. Seek Protections for Contractors on a Case-by-Case Basis.**

Contractor status for criminal and civil jurisdiction purposes has recently become a more significant issue, as the U.S. military has come to rely heavily on contractors not only for logistical and other support functions, but for installation and

personnel security and even core mission accomplishment that in the past were carried out by uniformed personnel. Whether to insist on immunity – and how broadly and for what sort of contractor – would best be done on a case by case basis. Special considerations arise in the case of large scale deployments that entail a very substantial and continuing U.S. military presence. Where contractor support is deeply integrated into core military operations and their support, immunity is worth insisting on. As a negotiating matter, as well as on the merits, it may be useful to seek, not across the board protection for all DoD contractors, but only for a limited class, defined in the agreement to cover those non-profit, strongly government-linked entities that are most likely to be tasked with mission-critical tasks. In other situations that will not be appropriate, either because contractors are unlikely to be involved on a significant scale in the U.S. military’s activities, or because their involvement will not be closely linked to the military mission.

#### **5. Be Prepared to Offer Some Form of Reciprocity.**

U.S. negotiators ask for far-reaching immunities for U.S. military personnel and activities in the host country, while being effectively barred from offering the same immunity – or even a reduced version – to host country militaries’ activities in the United States. This is difficult for some countries to accept. A potentially useful approach to the reciprocity issue is the “counterpart” agreement approach – on the model of the Philippine and Israel arrangements. To the extent it could improve the negotiating climate, offer the host government with a politically acceptable route to agreement, and help secure protections for U.S. forces where there otherwise might be none, an offer of reciprocity of at least this type should normally be a tool available to U.S. negotiators.

#### **6. Study the Special Case of Jurisdiction and Status Generally in Mixed Combat/Presence Zones.**

A significant special case is the issue of status arrangements where purpose of the deployment is to partly to conduct combat operations, but also to assist the host government in post-conflict operations, counter terrorism efforts, and counter-insurgency situations, capacity-building and other missions that are not strictly combat – that is, cases in which U.S. forces are deployed into a potentially

dangerous environment where they may need to conduct combat operations that go well beyond mere force protection. The Iraq and Afghanistan experiences show that host countries will not readily accept that the United States will automatically have exclusive authority over what they see as potential misconduct by U.S. forces. But none of the SOFA models are particularly well suited to contexts of this kind. The ISAB did not analyze these “combat in less than all-out war” situations, but it is important that the U.S. government conduct this analysis and develop a set of principles for U.S. policy. Because the effectiveness of such missions often requires a “whole of government” approach (and may require extensive contractor support), the analysis should not be strictly limited to the status of U.S. military personnel.

## **7. Tailor Financial and Administrative Provisions.**

Although by far the most sensitive SOFA issues are those dealing with criminal and civil jurisdiction, as a practical matter the financial and administrative protections often have the greatest day-to-day significance. At a minimum, where financial issues are contentious, it is important to include non-military participants in U.S. SOFA delegations, so as to be able to work constructively to address their counterparts’ budget and other concerns. It also argues for flexibility on the U.S. side as to how these concerns should be met in the course of SOFA negotiations and whether a compromise might be in order.

## **8. Negotiations, Policy Oversight and Implementation.**

8.1. Strengthen Policy Oversight. Articulate a joint State-DoD policy that underscores the importance of securing agreement with host governments on SOFA protections and sets out principles as well as a process for greater policy cooperation between State and DoD to this end. Empower a relatively senior policy-focused official in both State and DoD to oversee the SOFA process from a policy, not simply a legal or administrative point of view.

8.2. Evaluate and Train Personnel with Status Responsibilities on SOFA Issues. Embed in State and DoD regional bureau and mission plans a requirement to assess performance on successful achievement and implementation of SOFA protections and provide training for relevant foreign service officers and civil servants.

8.3. Increase Embassy Role in Negotiations. The current process is highly centralized on an understaffed and over-burdened office in Washington. Embassy roles in SOFA negotiations vary from being central players, to leaving the job largely to the Washington office. It should be possible to allocate more of the responsibility to the individual posts, while preserving necessary central policy oversight. Although high level U.S. attention can be useful, it may also create the perception that the United States is willing to pay a higher price to reach agreement. It is more likely to be useful in cementing a deal at the final stage and building trust in the U.S. commitment to work cooperatively than to help in resolving routine negotiating problems.

8.4. Adjust Negotiating Tactics. The United States has leverage in SOFA negotiations, and should be prepared to use it. The leverage derives in part from the value the host government attaches to a U.S. military presence. It is highest when the host sees a serious security threat and recognizes a strong need for U.S. presence and security support. Problems emerge when public attitudes toward a security relationship with the United States and/or concerns regarding incursions on sovereignty outweigh the perceived need for a U.S. presence. In other cases, the United States has little leverage. This is likely if there has been a pattern of engagement without status protections in the past, which provides little or no leverage – unless the U.S. side is prepared credibly to assert that without an agreement engagement will be cut back or eliminated. Whatever the context, the U.S. negotiators should be authorized to use whatever leverage the United States has in the negotiations arising from broader issues, not simply treat the problem as a technical one of legal status.

8.5. Strengthen Continuity of Operations at State and DoD. The problems of policy and expertise continuity at State should be addressed. One way to do this might be to establish a permanent civil service position in the office of the SOFA Negotiator, whose responsibility would include maintaining knowledge of SOFA negotiating experience and providing advice to the SOFA Negotiator and the Department by drawing on that base of knowledge. It may also be useful to establish a “surge” capability at State that would enable two Negotiators to lead teams simultaneously. To this same end, there should be designated in both State

and OSD a single, policy-focused official to oversee the SOFA process from a policy, not simply a legal or administrative point of view.

8.6. Strengthen Local Implementation Efforts. Effective enforcement and implementation of SOFAs depends on a good day-to-day relationship between U.S. forces and local authorities, between the embassy and the host government, and between the embassy and U.S. military in country and in the relevant command. Personal relationships play a large role. Sustained embassy commitment can help iron out implementation problems, especially where individual cases present novel issues or have become matters of public controversy. Unclear coverage or applicability of the terms of a SOFA make enforcement more difficult. This argues for an effort to ensure that SOFA terms are clear and well understood by all of the relevant host government authorities.

## **9. Public Access.**

9.1. Create a SOFA Database. A comprehensive, electronically searchable database of all agreements on which elements of the U.S. government rely as establishing status rules for U.S. forces – which does not exist today – should be created, both to facilitate U.S. government activity in the field and to enhance public accountability.

9.2. Make SOFAs Public and Easy to Access in a Central Location. Most SOFA agreements are unclassified and available to the public, yet sometimes hard to locate. There are circumstances in which it is necessary to classify SOFA agreements, but in most cases it is desirable that SOFAs be public, so as to have a clear basis for confidence that U.S. jurisdictional and financial interests are protected – and in particular that U.S. jurisdictional rights are established and known so that they can be credibly invoked when U.S. service members might otherwise be subject to unfair judicial and legal systems.

## **10. Use Public Diplomacy Sparingly.**

While U.S. public diplomacy promoting a SOFA agreement could be useful in specific cases, these are likely confined to a narrow set of circumstances in which the host government sees utility in U.S. public statements and U.S. messaging

responds flexibly, sensitively, and constructively to concrete public concerns. The main area where public diplomacy will be important in the SOFA context is where incidents arise. The State Department should take the lead for the U.S. in public information efforts on SOFA issues because of the compelling need to coordinate closely with host governments and the U.S. military and draw on Embassy expertise in assessing and addressing local concerns. A campaign based on boilerplate talking points drafted in Washington risks doing more harm than good.

## **I. Our Task**

The Terms of Reference for this study were issued by the Under Secretary for Arms Control and International Security. She requested that the ISAB undertake a study of the strategies for and challenges to U.S. negotiation of Status of Forces Agreements (SOFAs).

The ISAB was asked to examine and assess:

- The results and status of recent efforts to negotiate SOFAs, including - reactions and responses from host nations to sought-for U.S. rights, privileges, and immunities, including criminal and civil jurisdiction, the wearing of uniforms, the carrying of arms, tax and customs relief, entry and exit of personnel and property with military identification and travel orders, and resolving damage claims;
- The widening gap between provisions desired by the U.S. Department of Defense and those for which host nations are willing to provide consent;
- Host nation perspectives on U.S. SOFAs and the basis of host nation objections to U.S. SOFA provisions; and
- Improved strategies for U.S. negotiations of future SOFAs, including a view on whether the increased use of public diplomacy would be useful.

The Terms of Reference further state that during its conduct of the study, the ISAB may expand these tasks, as it deems necessary. The ISAB formed a Working Group to conduct this study. (See list of Members at Appendix C.)



## **II. What We've Done**

The Working Group has convened fourteen meetings and interviewed eighteen current and former State Department and Defense officials. The Group met with senior State Department negotiators (Ambassador Eric John and Ambassador-Thomas Daughton), a former Under Secretary of Defense for Policy (James Miller), and legal advisors from the Defense Department's Office of the General Counsel, Office of the Chairman of the Joint Chiefs of Staff, and the State Department Office of the Legal Advisor. Among the U.S. government legal experts interviewed were Charles Allen, Deputy General Counsel for the Department of Defense and Joshua Dorosin of the Legal Adviser's Office at the State Department. The Group also met with Staff Judge Advocates and the International Affairs staff from each of the six regional commands and with Wallace "Chip" Gregson (Lt. Gen., USMC (Ret.)) to discuss SOFA-related challenges based on his experience in the Asia Pacific. The candor and expertise of the people we met with have been of immense assistance. However, none of them have any responsibility for this report or its conclusions. Finally, sincere thanks go to Amy Gordon, Executive Secretary of the ISAB SOFA study group, for her superb assistance.

## **III. Why We Need SOFA Protections**

SOFAs<sup>2</sup> define the legal status of U.S. Defense Department personnel<sup>3</sup>, activities, and property in the territory of another nation and set forth rights and responsibilities between the United States and the host government. The United

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<sup>2</sup> As explained at p. 26 below, there is no single "Status of Forces Agreement" form or format. In our report, we have used the acronym "SOFA" to refer generically to any agreement between the United States and a foreign nation that addresses status issues.

<sup>3</sup> SOFA protections normally extend not only to uniformed service members on duty in the country, but to their dependents, and to civilian employees of Defense organizations in the country. Coverage of DoD contractors is sometimes provided for, but that is not the norm.

States is party to more than 100<sup>4</sup> agreements addressing the status of U.S. forces in foreign countries.<sup>5</sup>

It is a generally accepted rule of international law that any person present in a country is subject to that country's laws unless that country has consented to some limitation of its jurisdiction.<sup>6</sup> SOFAs establish agreed exceptions to this rule because, by them, the host government agrees to waive in favor of the sending state certain jurisdictional and other rights it would otherwise have.

Status of Forces Agreements provide protections that serve a number of important U.S. interests. Depending on their particular terms, they may, among other things:

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<sup>4</sup> There is, as noted below, no compendium of agreements that the US military and diplomatic authorities regard as embodying status of forces rules for U.S. military personnel, and therefore no way of determining exactly how many such agreements are in effect. Secretaries Rice and Gates estimated in testimony to Congress in 2008 that the U.S. is party to more than 115 SOFAs.

<sup>5</sup> The United States has undoubtedly the most extensive network of bilateral SOFA agreements, but it is by no means the only nation that has entered into similar arrangements. Many other countries have concluded bilateral SOFAs including the UK, France, Australia, Germany, Italy, Russia, and the Republic of Korea.

<sup>6</sup> *Wilson v. Girard*, 354 U.S. 524, 529 (1957). Protected status or immunity from local jurisdiction can derive from legal doctrines independent of any SOFA. For example, under international law, the sending country has exclusive jurisdiction over forces in another country for the active conduct of combat operations, or by reason of occupation. Sovereign immunity and related principles may protect government property and actions from local jurisdiction. Broad immunities are also available to military personnel who are part of a UNSC-authorized operation. See p. 31 below.

In very limited cases, military personnel may have diplomatic immunity. Diplomatic immunity – now largely defined by the 1961 Vienna Convention on Diplomatic Relations – already existed as an element of customary international law before the Conventions. The Convention establishes several tiers of diplomatic privileges and immunities. Diplomatic agents (and eligible members of their households) enjoy complete immunity from the criminal jurisdiction of the host State and they enjoy comprehensive, but not complete, immunity from the civil and administrative jurisdiction of the host State. The administrative and technical (A&T) staff of the Embassy (and eligible members of their households) enjoy immunity from criminal jurisdiction of the host State, but enjoy immunity from the civil jurisdiction of the host State only for acts arising in the conduct of their official duties. Members of the service staff of the Embassy (other than nationals of, or permanent residents in, the host country) enjoy immunity solely for acts undertaken in the performance of their official duties. Those covered by the Convention also receive varying degrees of exemptions from dues, taxes and custom duties, and military and public service obligations. These vary according to the particular circumstances and preferences of the host government. (Consular immunities, defined by the separate Convention on Consular Relations, are somewhat similar, though, in general less extensive.)

In practice, diplomatic (or consular) immunity covers very few U.S. military personnel, because only those personnel who have been accredited to the Embassy (or consulate) have these Convention-based immunities. Full diplomatic immunity generally extends only to Defense Attachés and the chief of the security cooperation organization (if an SCO is present). Other military personnel under Chief of Mission authority, including Defense Representatives, Marine Guards, and Defense officials working on security assistance, normally have A&T status. DoD personnel in the country under the authority of a U.S. geographic combatant commander (i.e., not accredited to the Embassy or consulate, such as those on temporary assignment) do not have diplomatic status; the only immunities they are afforded are those provided by a SOFA.

- Protect against U.S. personnel being subject to host country criminal or civil justice systems. This is important not only to protect U.S. personnel's rights and to vindicate the U.S. interest in exercising disciplinary authority over its personnel, but also because U.S. willingness to deploy forces overseas – and public support for such deployments – could suffer significant setbacks if U.S. personnel were at risk of being tried in a potentially unfair system. The United States also has an interest in preserving the principle that U.S. military discipline is enforced by the U.S. military justice system.
- Establish authorities for U.S. military presence in foreign countries and help provide predictability in the conduct of relations with the host nation government;
- Save money by avoiding liability for taxes and other charges and simplify administrative procedures including with respect to such matters as damage claims against the U.S. government or personnel, taxes, duties, licensing, entry and exist formalities, and access to spectrum;
- Reflect U.S. positions on governmental immunities, and by reducing jurisdictional, financial, and administrative risks, encourage greater engagement and cooperation on security issues.
- Adequate agreed protections are also important if U.S. engagement is to occur under clear and mutually accepted rules of jurisdiction, accountability, and application of local regulatory and fiscal regimes. They also contribute to the resolution of disputes, which, in the absence of an agreed framework can undermine important strategic relationships.

In principle, it is U.S. policy, reflected in DoD orders, not to send military personnel to a foreign country without satisfactory status protections. However, sometimes there are supervening interests that counsel doing so. Lack of a SOFA in such a situation can require difficult decisions, balancing the utility of activities that would require U.S. military presence in a foreign country against the principle that the U.S. military will not conduct activities in foreign countries unless there is (at a minimum) assurance that U.S. service members will not be subject to an unfair criminal jurisdiction system and the risks that arise when incidents occur

and there is no SOFA to define US jurisdictional rights. Where no SOFA exists, an activity may sometimes be deemed so important and/or the risks so limited that the relevant commander may approve deployment in the absence of status protections, but that entails risks. The alternative is that useful activities are foregone rather than run the risks. It is to avoid these choices that SOFAs are so desirable.

#### **IV. The Context for SOFAs**

Over time, the U.S. approach to SOFAs has evolved in response to changes in host country conditions and U.S. operational requirements and in the purposes for which U.S. military personnel are in foreign countries.

The first stage of SOFA development emerged soon after World War II as U.S. overseas military presence evolved from wartime combat and occupation – for which international law, in general, provided for exclusive U.S. jurisdiction – to a historically unprecedented long term peacetime stationing of U.S. forces in fully sovereign nations that welcomed them as part of a bilateral or multilateral alliance or mutual security relationship. In this period, the United States – for the first time – began to establish significant long-term military presence on foreign territory that could not plausibly be regarded as either for on-going combat operations or as an exercise of occupation powers. Instead, U.S. forces were to be deployed on a more or less long term basis as part of alliances, both bilateral and multilateral, and with the consent and invitation of the host nations. Moreover, while the forces were, in general, ready for combat if necessary, the assumption was that these would be long term, peacetime deployments, not ongoing military operations. Typically, these deployments involved large permanent installations, and extensive routine interaction with the local communities and host country authorities.

The NATO SOFA – and the more or less contemporaneous bilateral agreements with major allied countries like Japan, the Republic of Korea, and Australia – are derived from this post-WWII transition in the nature of U.S. overseas deployment.

A second sort of U.S. military presence in connection with which status issues arise developed over time, but became increasingly important after the end of the Cold War, as the U.S. military undertook extensive programs of “engagement”

with foreign nations – usually either in the Third World or recently freed from Soviet domination – with which the United States did not have a security commitment, much less a formal alliance. As part of these programs, the U.S. military sends personnel to foreign countries to conduct exercises, training, equipment familiarization, humanitarian assistance, and in general build goodwill and contacts with foreign military establishments. Typically, the number of U.S. military present in a country, and the duration of their stay are limited, though often the overall engagement relationship is a continuing one.

A third sort of U.S. military presence relevant to SOFA issues also emerged in the early 1990s, as the United States began to grapple with the problems of post-conflict transitions, peacekeeping, and humanitarian relief in difficult security situations, sometimes with explicit UN Security Council (UNSC) authority, sometimes without. These situations were envisioned as something more than “engagement,” but less than all-out combat operations. However, some involved very significant combat, and virtually all involved a potentially non-benign environment, with at least endemic low-level conflict, a non-Western cultural context, and complex relationships with the host government.

After 9/11, the wars in Iraq and Afghanistan, and extensive counter-terrorist operations in a number of countries produced yet a fourth context– continuing U.S. military presence that mixed intense combat with training local forces and broader “nation building”– all in states with at least nominally fully sovereign governments.

The emergence of these new sorts of U.S. military presence has brought with it a need for status protection, but the issues most relevant and the kinds of status problems likely to emerge are different.<sup>7</sup>

At the same time as U.S. purposes for deployments and the nature of those deployments have changed, foreign perspectives on status agreements and issues have as well. Foreign countries, including both traditional U.S. allies and other hosts for other types of military presence, have become increasingly sensitive to

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<sup>7</sup> This list of differing contexts where SOFAs are needed is not exhaustive. For example, jurisdiction issues also arise in the case of countries where a major interaction with the U.S. military will be that the U.S. Navy will want to make port visits to provide liberty for the crews and resupply and upkeep for the ships.

sovereignty concerns.<sup>8</sup> Acknowledging dependence on and deference to the United States has become more difficult for many host governments, even those that genuinely value and need U.S. security support and cooperation. And there are now more instances than in the past in which the United States is at least as eager as the host nation to proceed with engagement activities. Official and popular attitudes often make it politically unpalatable for host governments to concede sovereignty (for example, by providing immunity to criminal jurisdiction or exemptions to taxes or tariffs or licensing requirements), especially in the context of agreements that are very broad in scope, extremely complex, and not reciprocal. Moreover, the nations where U.S. forces are present for these new purposes are, in an increasing number of cases, politically, economically and culturally, more different from the United States than the nations where earlier ‘peacetime’ deployments had been undertaken.

All these factors complicate negotiation of SOFAs with those countries where there are no agreements in place. While there have been some successful negotiations of SOFAs in recent years, in other cases, negotiations have either stalemated, or taken so long that useful engagement and other activities have been cancelled or deferred – or undertaken without status protections.

## **V. Fields of Coverage**

The fields of SOFA coverage – the subjects addressed in an agreement and the terms in which they are addressed – are potentially quite broad, ranging from immunities from criminal and civil jurisdiction to exemptions from taxes and fees and a wide array of administrative and regulatory provisions, and access arrangements affecting services or facilities that support operations of U.S. forces.

SOFA *criminal jurisdiction* provisions are the highest priority for DOD and, historically, for Congress. These are meant to ensure that U.S. service members accused of crimes are treated fairly and in a manner consistent with U.S. constitutional protections, and to affirm the primacy of U.S. military law for

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<sup>8</sup> Sovereignty concerns are not exclusively those of the potential host. The United States as a sovereign has the right to decide itself on the conditions under which it will send military personnel to foreign countries. The task of SOFA negotiators is to find an appropriate balancing of these conflicting sovereignty interests.

disciplinary purposes.<sup>9</sup> Accordingly, the United States seeks exclusive criminal jurisdiction, or at least concurrent jurisdiction arrangements that will, in practice, secure U.S. jurisdiction where doing so is important to U.S. interests. The 1953 U.S. Senate Resolution of Ratification for the NATO SOFA included “sense of the Senate” language that underscored the importance of maintaining U.S. criminal jurisdiction over U.S. military personnel and protecting the constitutional rights of U.S. service members.<sup>10</sup> Although the Resolution declared that the concurrent jurisdiction provisions of the NATO SOFA were not to be regarded as a precedent, the United States has agreed to concurrent jurisdiction in a significant number of later agreements. In other cases, notably those providing for “A&T equivalence”, SOFAs negotiated after the NATO SOFA do give exclusive criminal jurisdiction to the United States.

Conversely, U.S. requirements for criminal jurisdiction raise serious sovereignty concerns for host governments, especially with regard to the implication that their judicial systems are not fair, and the possibility that serious offenses against host country nationals will be adjudicated by a foreign legal system. These concerns are all the greater where there is an issue, not just of what nation will manage the prosecution and have custody of the accused between arrest and conviction (or during imprisonment if convicted)<sup>11</sup>, but whether there will be prosecution at all.<sup>12</sup>

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<sup>9</sup> However important protecting defendants’ due process rights may be, it is not the only U.S. interest in securing criminal jurisdiction. The United States has an interest in enforcing its own disciplinary standards and system for personnel under military authority, as a critical part of the chain of command.

<sup>10</sup> More specifically, the Resolution declared that the concurrent jurisdiction provisions of the NATO SOFA are not a precedent for other agreements, that whenever a U.S. military person is to be tried by a host nation the accused’s commanding officer must consider whether “there is a danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the U.S.,” and, if that is the case, the accused’s commander must request the host nation to waive jurisdiction; and if waiver is refused, seek diplomatic support for his request and notify the congressional armed services committees. Further, a U.S. representative must attend and monitor a host nation trial and report failures to comply with the SOFA’s provisions regarding procedural rights of an accused.

<sup>11</sup> The more detailed SOFAs often include, in addition to the provisions on allocation of jurisdiction, elaborate rules regarding arrest, investigation, pre-trial custody, and incarceration. For example, in some cases, the U.S. seeks foreign agreement that sentences by host nation courts can be served in U.S. military prisons. In at least one case – that of Japan – the host has established a special prison for U.S. military personnel convicted in Japanese courts.

<sup>12</sup> Often, the U.S. military can attempt to assuage host country concerns about waiving jurisdiction by assuring the host nation that waiver of jurisdiction will produce a vigorous prosecution by U.S. court martial. Highly controversial cases have arisen, however, where no such assurance is possible, for example, where a host country national has been killed in an incident that the host nation or at least its media or public opinion regard as an act of gross negligence if not deliberate indifference to the lives of locals, but that U.S. military authorities regard as a genuine accident or otherwise not justifying any disciplinary action. Such high profile cases are particularly difficult because they combine strong host country sensitivities with the danger of “railroading” of U.S. personnel that is a core concern for U.S. SOFA interests.

In general, the United States seeks, as an aspect of its effort to secure maximum criminal jurisdiction, not only the right to try criminal cases in under U.S. military law, but also pre-trial custody of defendants, even where the host retains jurisdiction or the ultimate jurisdictional question is still unresolved. Pre-trial custody is significant not only because of concerns about conditions of confinement, but to ensure procedural protections during pre-trial and pre-indictment investigation. A number of cases have arisen over the years involving the efforts of a host nation to insist on jurisdiction and/or pre-trial custody, notably in cases it regards as particularly egregious. In some cases, the United States can accept that the nature of the case is such that host country jurisdiction and even pre-trial custody is acceptable. However, these cases also have the potential to raise the greatest risks of actual or perceived unfair treatment, precisely because they are publicly controversial.

Ideally, the United States would secure exclusive criminal jurisdiction, and some SOFAs – notably those that give “A&T equivalence” so provide.<sup>13</sup> However, over half of U.S. SOFA agreements use the NATO model and provide for concurrent/shared criminal jurisdiction.<sup>14</sup> Despite the 1953 Senate assertion that the NATO concurrent jurisdiction rule was not to be a precedent, many later SOFA agreements that have not been submitted for Senate approval, including those with Australia, Israel, Japan, Korea, and the Philippines follow its pattern. That fact makes it hard to negotiate new agreements with tougher terms, especially exclusive U.S. jurisdiction. However, in practice, under concurrent jurisdiction regimes, the United States has usually been able to secure jurisdiction, even where the host

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<sup>13</sup> Under Art. 37(2) of the 1961 Vienna Convention on Diplomatic Relations, “administrative and technical staff” are entitled to full criminal immunity and are subject to civil jurisdiction of the host state only for actions outside official duties.

<sup>14</sup> Under Article VII of the NATO SOFA, a jurisdictional framework is established which assigns exclusive jurisdiction only in certain cases; notably when an offense is punishable by only one of the countries’ laws. When the substantive law of both countries are implicated, primary jurisdiction is assigned to the sending state only if the offense is against the sending state’s property or forces, or, in cases where the offense has been carried out in the course of official duties. In the case of any other offense, the host state is assigned primary jurisdiction. As a practical matter, these are usually off-post incidents, ranging from traffic accidents to bar fights to the grimmest rapes and murders. This “concurrent” jurisdiction arrangement applies to both criminal and civil cases. However, Article VII also stipulates that “the authorities of the state having the primary right shall give sympathetic consideration to a request from the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.” In practice, this means that in routine cases host country jurisdiction is waived, while the disposition of particularly sensitive or egregious cases is negotiated between the two States, but from the point of view of the United States, there is an expectation that the host will normally waive if the United States asks it to.



nominally has the “primary” claim, by invoking the provision requiring the host to give ‘sympathetic consideration’ to U.S. requests that the host waive jurisdiction to the United States. Indeed in some cases, the United States has been able to negotiate a supplemental bilateral agreement with host nations whereby – under what is sometimes referred to as the “Netherlands Formula” – the host agrees that in all cases, except those of “particular importance” to it, it will automatically “waive back” to the United States the primary jurisdiction that it could exercise over U.S. personnel.

*Civil jurisdiction and damage claims procedures* are also important and involve two U.S. priorities: preserving fair treatment for U.S. personnel and containing costs. Typically, detailed SOFAs include procedures for handling claims against the United States for damages alleged to result from U.S. military activities. But the United States also seeks to limit host country jurisdiction over civil claims against individuals as well. In many cases, the United States has agreed to a limited provision for civil jurisdiction which provides immunity for acts carried out by U.S. personnel during the course of official duties. For civil claims arising out of acts outside the course of official duties, the host nation’s courts generally have jurisdiction. This level of immunity is normally described as “equivalent to Administrative and Technical immunities” contained in the Vienna Convention on Diplomatic Relations of 1961.<sup>15</sup>

An important component of U.S. SOFAs is the provisions that cover *fees and taxes*. In general, the United States seeks broad, unambiguous exemptions both for itself and for U.S. personnel from all host country taxes, fees, duties, tariffs, and other financial obligations to local governments, other than charges for goods or services provided. Such exemption has not only direct financial advantages; it usually significantly reduces administrative and bureaucratic burdens. For U.S. government operations, the principal issue is usually distinguishing “taxes”

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<sup>15</sup> Under the Vienna Convention, the administrative, technical and service staff of an embassy (and members of their households) have immunity from host government jurisdiction for all criminal offenses but only from civil liability for acts arising in the course of official duties. (These are generally referred to as “A&T” – administrative and technical – protections.) Those with A&T status also receive varying degrees of immunity from taxes and custom duties, military and public service obligations, and visa and alien registration requirements. These vary according to the particular circumstances and preferences of the host government. All diplomatic immunities, including A&T status are normally granted on a reciprocal basis, but SOFAs on this model are not reciprocal. It is in part for that reason that they are described as providing only the “equivalent” of A&T status.

(generally exempt) from “charges for services” (generally payable). However, as the United States has expanded its military engagement overseas, and, in particular, its reliance on contractors for a wide variety of services, the significance of financial terms has increased, as the U.S. military and its contractors have had to contend with a very complex and costly array of disputes over asserted charges, some as a result of corruption and some perfectly legal under host government law but in conflict with the provisions of the SOFA, or at least, U.S. understandings of those provisions.

In addition, the United States seeks a wide array of *administrative arrangements and legal and regulatory exemptions* meant to facilitate smooth operations. These include special entry and exit arrangements, e.g., waiver of visa and residence requirements, licensing and documentation for imports and exports, requirements for local professional, driving and other licenses, provisions for the employment of American citizens, host country citizens, and/or third country nationals, applicability of local labor and environmental laws, access to communications bandwidth, permission to carry weapons and wear uniforms, control over access to U.S. facilities and equipment, as well as applications of the agreed protections to dependents, civilian DoD employees, and contractors. Negotiation of these provisions – and those related to fees and taxes – can be difficult, not only because of the abstract sovereignty/pride and the practical legal, fiscal, and regulatory issues raised, but because the foreign government agencies involved, who may not be keen on surrendering authority and revenue and whose views are likely to be taken into account in establishing the host country’s position, are not (usually) under the control of the foreign and defense ministries that are directly involved in the negotiations and are likely to be most interested in constructive association with the United States on security-related matters.

### ***Persons Covered: The Contractor Question***

A continuing issue is the extent to which a SOFA, whatever its form, should cover personnel other than uniformed military, and in particular, whether contractors and their personnel should be covered, and in what ways. Normally, civilians attached to military units as U.S. employees, certain dependents of military personnel, and

civilian DoD employees<sup>16</sup> are covered by the terms of the agreement.<sup>17</sup> It is very much the exception, however, that contractors, i.e., individuals or entities performing services for DoD but not as direct employees, are covered.

Historically, the United States has not sought jurisdictional protections for contractors. Contractors are not covered in the NATO or PfP SOFAs or in the other earlier SOFAs with major allies, nor in “A&T equivalent” agreements. The GST exempts contractors from taxes and similar charges, but not from jurisdiction. The recent agreement with Afghanistan grants U.S. contractors broad exemptions from tax and regulatory laws, but Afghanistan retains exclusive criminal and civil jurisdiction. One of the few – perhaps a unique – example of a SOFA arrangement that barred local criminal jurisdiction over contractors was the original CPA order for Iraq.

The issue of contractor status for criminal and civil jurisdiction purposes and for exposure to local taxes and regulation has recently become more significant, as the U.S. military has come to rely heavily on contractors for logistical and other support functions and even for installation and personnel security functions that in the past were carried out by uniformed personnel. Moreover, entities that are formally DoD contractors – often with strong governmental links and a non-profit structure, like the National Labs or FFRDCs – sometimes perform tasks with forward deployed U.S. forces that cannot properly be considered “support” or “commercial” in character, but rather are central parts of the military mission. Particularly in the case of large scale deployments, whether for presence or operations, the U.S. military has a high degree of dependence on, and integration with, contractor activities.

On the other hand, some functions provided by contractors, while important, are not particularly integrated with accomplishing the mission, but are more in the nature of routine support that might be provided by local contractors. Moreover, contractor behavior is often not subject to direct governmental control and

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<sup>16</sup> In general, SOFA protections do not apply to civilians who are normally residents of the host country, regardless of nationality.

<sup>17</sup> There are sometimes issues of what constitutes “employment” by DoD. Some civilian entities that are not formally part of the military may be so closely linked to DoD and so integrated with military units and operations as to be effectively part of the military enterprise, and not simply contractors. FFRDCs and their personnel might be an example.

contractor action – particularly in the case of private security services – has come under intense scrutiny due to a series of incidents in Iraq and Afghanistan. Host countries that are prepared to accept a special status for personnel with a direct connection to the U.S. government and subject to military discipline are likely to be more reluctant to extend such concessions of sovereignty to people and entities whose link to the U.S. military is – at least in the view of the host nation – essentially commercial.

The issue of criminal jurisdiction over contractors is sometimes said to be complicated by the question of what judicial system has jurisdiction if the host does not. This issue, which may be significant in the case of contractors of other U.S. government agencies, does not, however, arise for DoD contractors. By virtue of the Military Extended Jurisdiction Act, contractors for DoD – but not those working for other U.S. government entities – when working overseas are subject to U.S. federal criminal law under the Special Maritime Jurisdiction of the United States, and therefore may be tried in U.S. District Courts for serious offenses (those punishable by a year or more imprisonment). So, for DoD contractors, at least, there is no serious potential “jurisdictional gap” – the United States has authority to prosecute.<sup>18</sup>

Contractor coverage is not only a question of jurisdiction but of financial and administrative arrangements. The United States has a legitimate financial and administrative interest in securing agreement that contractors performing functions that support U.S. operations in foreign countries should not be subject to licensing, taxes, and customs duties in the countries where they are providing the services to U.S. personnel. There are, moreover, legitimate arguments that a U.S. government activity that will normally be conducted only because the foreign government believes it serves its security interests should not be a source of revenue to the host country.<sup>19</sup> Those costs, if imposed, simply add to the cost to the U.S. taxpayer of

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<sup>18</sup> In 2006, legislation made “persons serving with or accompanying an armed force in the field” during “a contingency operation” subject to the UCMJ. There is some question as to the conditions under which civilians can be made subject to military law and procedure. *Reid v. Covert*, 357 US 1, 23 (1957) held that in general, civilians cannot constitutionally be tried by court-martial, but “there might be circumstances where a person could be “in” the armed services for purposes of [the constitution] even though he had not formally been inducted into the military or did not wear a uniform.” It appears that, in practice, even after the new legislation, DoD normally refers contractor (or other civilian) charges to DOJ for prosecution in the regular courts.

<sup>19</sup> Reflecting this concern, Congress has prohibited any Nunn-Lugar program from paying Russian (or other states of the former Soviet Union) taxes, duties, license fees and the like.

providing the benefit to the host. Moreover, exemption for compliance with local rules for determining and collecting such charges is likely to facilitate efficient and timely contractor performance by avoiding local bureaucracies.

Contractor exemption from fees and duties – even if agreed in form – often present some of the most complicated and contentious implementation issues. Even if a host government has agreed to exempt contractors from fees and duties, this may come as a surprise to government agencies and private companies that have not been told and were not involved in the SOFA negotiations. Costly delays may be the result. An example of this problem is the issue faced by U.S. forces in Australia when its contractor for express package delivery was unexpectedly charged customs duties. Although the SOFA agreement specified an exemption from such duties for U.S. contractors, the Australian authorities had not anticipated that this type of express delivery service would fulfill a contractor role for U.S. forces and the Australian customs authorities claimed they were legally required to impose the duties. It took quite some time to sort out the problem and caused significant costs and delays for both the contractors and U.S. forces in Australia.

### ***Reciprocity***

With a very important exception – the NATO SOFA (the terms of which also apply in this respect under Partnership for Peace SOFA)<sup>20</sup> – U.S. SOFA agreements are not reciprocal in character.<sup>21</sup> That is, U.S. military personnel in the host country are entitled to the immunities agreed, but host forces in the United States are completely subject to U.S. law.

The absence of reciprocity has become a sensitive issue, likely to become more so as the United States engages new partners. Even where (as was usually the case historically) only the United States would be likely to send military personnel to other nations, the absence of reciprocity raises issues of pride and sovereignty. Moreover, in some cases, notably for countries whose forces use training facilities

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<sup>20</sup> The NATO SOFA of 1951 established the principle of reciprocity among NATO Members, a principle subsequently applied among Partnership for Peace partners, who, with a few exceptions, have adopted the PfP SOFA which follows the NATO SOFA in this respect. The principle of reciprocity in the multilateral NATO SOFA was agreed by the NATO Military Committee at the beginning of the SOFA drafting process in 1949. This is generally understood to be the result of a common perception of political equality and compatibility among prospective signatories at that time. It is less clear that perception applies to all the PfP countries.

<sup>21</sup> As noted below, the agreements with the Philippines and with Israel include a limited reciprocity provision.

in the United States or have extensive military procurement or exchange programs that bring their personnel to the United States, reciprocity is more than a sovereignty principle; it is also a practical issue.

Although some U.S. experts believe that the Senate's 1953 Resolution of Ratification of the NATO SOFA contains a mandate against reciprocity, this does not appear to be the case, at least judged by the actual words of the Resolution. The Resolution focuses, not on reciprocity, which is not mentioned, but on concurrency of jurisdiction and on ensuring procedural protections for U.S. personnel. It states that the "criminal jurisdiction provisions of Article VII do not constitute a precedent for future agreements." This refers to the "shared/concurrent jurisdiction" provisions that are contained in Article VII of the NATO SOFA, not to the reciprocal nature of the overall SOFA. The Resolution requires that U.S. personnel subject to foreign jurisdiction get a fair trial, not that U.S. courts always be able to try foreign personnel in the United States.

It must be recognized that for the United States, under our federal system, absolute reciprocity may be difficult to implement, even if the Resolution is not regarded as a legal or congressional bar. Assurance that a promise of reciprocity would be effective might require passage of a federal statute – or rely on the Supremacy Clause – to ensure uniform enforcement in each of the states.<sup>22</sup> Arguments against the pursuit of such a federal statute appear to derive from concerns about antipathy in Congress to federal overrides of state jurisdiction and to the widely-held view that the United States is providing assistance to other countries and therefore we are entitled to insist on unilateral concessions on jurisdiction. In situations where host countries place a high value on U.S. assistance, support, and engagement, that argument, while awkward, may be effective. In other cases, reciprocity provisions could help assuage host government concerns about incursions on sovereignty and provide a defense against domestic criticism of an 'unbalanced' agreement.

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<sup>22</sup> The executive branch seems to have taken the position that the fact that the NATO SOFA was ratified as a treaty is sufficient to make its reciprocity/immunity provisions effective as a matter of domestic law, including with respect to newly acceding allies and Partnership for Peace members. We have not attempted to research what U.S. domestic law action, if any, would be required for a reciprocity provision to bind the states to reciprocity provisions in other agreements. It is not clear that a treaty is legally necessary – or sufficient. On the one hand, in general, the President has broad authority to grant diplomatic immunity, without specific congressional action. On the other, treaties are not necessarily self-executing so as to operate automatically as domestic law; frequently affirmative implementing legislation is necessary.

Traditionally, the argument against reciprocity has been not only the federalism problems it may present, but the idea that the United States does not have an overriding need for foreign forces on its soil. This is too narrow a view. Often the United States does have an indirect interest in being able to agree to some reciprocity, whether or not the United States sees a value to foreign military activities on American soil, because the United States is often highly interested in the engagement with the host military. For those activities to have appropriate status protection, host nation agreement on a SOFA is important to the United States. And reciprocity in some form may be helpful in securing that agreement.

In almost all cases, lack of reciprocity is a potentially sensitive issue and an obstacle to agreement on a SOFA, even if there would in practice be few situations in which host country militaries would be present in the United States and able to take advantage of status protections if they existed. Nor is the issue quite so one-sided as sometimes asserted. Important forms of military engagement involve the presence of foreign military personnel in the United States – on exchange programs and for training, including on major FMS cases.

A potentially useful approach to the reciprocity issue is the approach used in the 1998 Visiting Forces Agreements with the Philippines and the 1991 Agreement Between Israel and the United States of America on the Status of Israel Personnel.<sup>23</sup> This provides different jurisdictional terms in the two cases (U.S. forces in the Philippines or Israel, and Philippine or Israeli forces in the United States). For U.S. forces in the respective foreign countries, standard concurrent jurisdiction is the rule. Under the separate agreement that covers the presence of those two countries military personnel in the United States, the United States agreed that “When so requested in a particular case by the Government of the Republic of the Philippines[Israel], the United States Department of State or Department of Defense will ask the appropriate authorities in the United States having jurisdiction over an offense committed by Republic of Philippines [Israel] personnel to waive in favor of the Republic of the Philippines [Israel] their right to exercise jurisdiction, except in cases where the Department of State and the Department of

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<sup>23</sup> A somewhat similar arrangement exists with Singapore, under which, in addition to other non-jurisdictional exemptions from U.S. laws and requirements, DoD undertakes to “do its utmost” to secure agreement by U.S. authorities to waive criminal jurisdiction when Singapore so requests.

Defense, after special consideration, determine that United States interests require the exercise of federal or state jurisdiction.”

The Philippine and Israel agreements are not strictly speaking totally reciprocal. Not only are the respective jurisdictional provisions embodied in separate agreements, they are not identical in their terms. Because the United States undertakes only to “ask” U.S. authorities to waive jurisdiction, with no formal legal obligation to secure such a waiver, no special U.S. legislation or other legal action has been deemed required. While the two partner countries’ basis for seeking waiver of U.S. jurisdiction is differently described and may be arguably weaker than the U.S. basis for seeking waiver of their jurisdiction (and the difference may provoke resentment) neither the United States nor the foreign nation has an absolute right to a waiver, only a right to seek it and hope for cooperation from the other party.

In any event, it appears that the reciprocity concession was sufficient to help achieve the significant effect of agreement by the Philippines to renewed arrangements for the presence of US military, despite the lingering legacy of prior problems.

## **VI. Types of Agreements**

There is no single “Status of Forces Agreement.” On the contrary, many different types of SOFAs exist, with widely varying scope, range of persons protected, duration, level of detail, and specific provisions on particular topics. They range from complex documents embodying scores of pages of detailed rules to single sentences in diplomatic notes. This diversity poses significant challenges for negotiators and implementers, who are operating in a complex set of conditions and need the kind of policy guidance and support that helps determine when a SOFA is really needed, what are U.S. priorities for its contents, and how best to frame the goals and tactics for a negotiation (including which fields of coverage are essential).

SOFAs vary enormously in scope and duration. Some, like the NATO SOFA, contain a comprehensive array of coverages, which have been supplemented over time with still more detailed implementing agreements for specific projects as



circumstances and specific issues or activities may require. Some simply provide broadly stated “essential” coverage such as A&T equivalent protections.<sup>24</sup> Some, notably the NATO SOFA, have long, even indefinite, duration while others may be fixed for a short or long period of time, ranging from a few weeks to several years.<sup>25</sup> Some agreements cover the entire spectrum of military presence (for example under a Defense Cooperation Agreement or basing agreement), some are open-ended, some cover all “agreed activities,” and others pertain only to specific events such as a particular training exercise.<sup>26</sup>

The following outlines the main types of SOFA agreements now in force.

NATO SOFA. The NATO SOFA and the PfP SOFA (whose terms are essentially those of the NATO SOFA) account for almost half of all SOFAs in force for the United States today. A formal multilateral treaty, to which the United States and all NATO allies are parties, the NATO SOFA was ratified by the Senate in 1953. The reciprocity provisions of PfP SOFA had congressional authorization,<sup>27</sup> but the PfP SOFA was not ratified by the Senate.

The NATO SOFA’s fundamental criminal jurisdiction concept is “concurrent/shared jurisdiction.” Under this system, the ‘sending state’ has ‘the primary right’ to exercise jurisdiction over “offenses arising out of ... performance of official duty,” subject to an obligation to give “sympathetic consideration” to waiving jurisdiction where the host nation asserts that a waiver is “of particular importance.” Conversely, the host state has the primary right to exercise jurisdiction over offenses not within official duty, but the host state undertakes to give ‘sympathetic consideration’ to requests of the sending state for a waiver of

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<sup>24</sup> This pattern has been applied particularly often for emerging nations with which the U.S. military seeks to conduct engagement activities relatively limited in scale, frequency, and (hopefully) risk.

<sup>25</sup> For example, with Guatemala the U.S. has negotiated and concluded several SOFA agreements which cover a specific period of time – usually three or four years – and a particular set of activities.

<sup>26</sup> An example of an explicitly long term agreement is the recently-concluded Security and Defense Cooperation Agreement with Afghanistan, which is to remain in force until 2024 and automatically thereafter, unless either party gives two years notice of termination.

<sup>27</sup> Section 514(b) of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (P.L. 103-236) (President authorized to confer rights on partner personnel in the United States “comparable” to those the partner affords U.S. personnel in the partner nation.)

jurisdiction in cases it considers of particular importance.<sup>28</sup> Reflecting U.S. concern about procedural protections, the NATO SOFA binds parties to afford a list of procedural protections in criminal proceeding they may conduct against U.S. military personnel.

The NATO SOFA provides for host and sending nation sharing of liability for damage claims against either government and an administrative system for adjudicating them. Individuals are immune from local civil jurisdiction of “line of duty” acts, but not others.

The NATO SOFA also covers a broad range of issues other than criminal and civil jurisdiction, including entry formalities, registration of aliens, driving permits, wearing of uniforms, carrying arms, property damage claims, taxation, local purchases for personal or official use, access to needed facilities, compliance with local labor laws, and applicability of host nation taxation and import duties.

The NATO SOFA applies to sending state military personnel and those civilians<sup>29</sup> who are directly employed by the military, and their eligible dependents. Its terms do not extend to contractors.

The NATO SOFA itself is a 10 page document, supplemented over decades by a multitude of specific implementing agreements, often on a bilateral basis, on specific matters, and an accumulated pattern of practices and understandings. It has been supplemented over the years by other agreements, both multilateral and bilateral, some of them of intricate detail and specificity.<sup>30</sup>

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<sup>28</sup> As noted above, p. 18-19, in some cases, the United States has entered into supplemental agreements under the NATO SOFA that are designed to create what is in effect a presumption the United States will be able to obtain jurisdiction in “concurrent jurisdiction” situations.

<sup>29</sup> SOFAs do not, in general, protect DoD personnel who are nationals or permanent residents of the host nation.

<sup>30</sup> For example, four years after Germany joined NATO in 1955, it concluded an agreement adhering to and implementing the NATO SOFA of 1953. Since then Germany has concluded a series of complex and detailed – and sometimes controversial – implementing agreements with the U.S., often relating to specific projects or activities. These agreements now cover a wide array of provisions, including measures covering DoD contractors in Germany.

The NATO SOFA is a multilateral treaty among the United States and its NATO partners,<sup>31</sup> creating in effect a wide-ranging system of interlocking bilateral agreements among the parties.<sup>32</sup> And, unlike virtually all other SOFAs, it is fully reciprocal. Thus, military personnel from NATO countries present in the United States on duty are subject to, and entitled to, the same privileges and immunities as U.S. troops in NATO countries.

The NATO agreement, at least when initially entered into, presumes a well-functioning host government, reasonably good quality local justice system, good bilateral relations, more or less shared culture, and a peacetime environment.<sup>33</sup>

Bilateral Agreements. There are a number of other comprehensive *bilateral SOFA agreements*, notably with well-established U.S. allies and partners like Australia, Israel, Japan, the Republic of Korea, and the Philippines. These are bilateral executive agreements, not treaties (although in some cases they are linked to formal mutual security treaties). In general, their terms echo the NATO agreements, including concurrent criminal jurisdiction, but unlike the NATO SOFA, they are not reciprocal.

Exchange of Diplomatic Notes (A&T equivalent coverage). Since at least the 1970s, having found negotiating comprehensive SOFA agreements too cumbersome, particularly for relatively low profile, short term “engagement” activities, the United States has often turned to exchanges of diplomatic notes to establish the “equivalent of” *administrative and technical protections (A&Ts)*. These “A&T equivalent” arrangements, reflected in a U.S. diplomatic note to which the host nation agrees, have, in many cases, become the standard sought by the United States for both long and short-term activities in many new agreements.

As explained above, these arrangements typically provide for status equivalent to A&T status, as defined in the Vienna Convention for certain diplomatic personnel. They thereby give U.S. military personnel full immunity from criminal jurisdiction

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<sup>31</sup> As additional nations have joined the Alliance they have adhered to the NATO SOFA, so there are now 28 parties to it. In addition, most of the 24 Partnership for Peace countries have accepted its terms, though in some cases, notably Russia, with significant reservations.

<sup>32</sup> All parties to the NATO SOFA thus have the rights and obligations provided as between them and all other parties.

<sup>33</sup> Whether this premise is true for all the Pfp parties to the Pfp SOFA is of course subject to debate.

of the host government and civil immunity for acts in the course of official duties, as well as exemption from taxes and duties.<sup>34</sup> The exchange of diplomatic notes creates an international agreement between the parties. An advantage of the “A&T” approach is that it avoids the need to agree on specific provisions and incorporates immunities familiar in diplomatic circles. Conversely, it has the drawback of not providing detailed, nation-specific guidance.<sup>35</sup>

Sometimes, the Note providing A&T equivalent status is explicitly limited to a particular activity and its effectiveness is limited in duration, but in other cases, it applies to all other “agreed activities” or all U.S. military activities in the country and has no explicit termination date. The United States normally seeks that language and interprets it as establishing A&T equivalent status for personnel present for later activities to which the original diplomatic note did not explicitly refer (at least until the note agreement expires by original terms) without a need to secure the express consent of the host nation to the extension of the note’s status terms to the new activities.

Defense Cooperation Agreements. In the early 1990s, as the United States deployed large numbers of troops and contractors to Persian Gulf countries, it would sometimes rely for status protections on terms inserted into broader Defense Cooperation Agreements that, in addition to their main purpose of setting forth a framework for security cooperation between the United States and the host nation, contained status provisions that would otherwise have been included in separate SOFAs, covering jurisdiction (often A&T equivalence) and exemptions from taxes, duties, and licensing requirements, along with other administrative provisions meant to facilitate operations.

Another approach uses Visiting Forces Agreements, which are meant to apply to troops stationed temporarily in the host country. An example is the Visiting Forces Agreement between the Philippines and the United States, concluded in 1998, and recently applied to U.S. military personnel present in the Philippines pursuant to the new Enhanced Defense Cooperation Agreement. This consists of two

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<sup>34</sup> Vienna Convention, Art 37(2). Note that under “A&T equivalence” there is no concurrent jurisdiction; the criminal immunity is complete.

<sup>35</sup> The “administrative and technical” provisions do not explicitly address other subjects often covered in SOFAs, such as licenses, uniform, and carrying weapons, though these subjects are sometimes addressed in other parts of the diplomatic note.

“counterpart” documents, the first of which provides status protections for U.S. forces present in the Philippines and the second of which provides status protections for Philippine forces present in the United States.

Visiting Forces Acts and other Host Country Domestic Legislation. In a few cases, host countries have – often in consultation with the United States – enacted domestic legislation that confers certain immunities in connection with the presence of U.S. (or, other foreign) military personnel.<sup>36</sup> Examples of countries which have done this are the United Kingdom, Jamaica, and Belize. In general these Acts require that the sending state provide a list of all personnel and that one of two types of jurisdiction be applied; either concurrent jurisdiction (the NATO model) or protections equivalent to A&T status.<sup>37</sup>

The UN Model. The UN Security Council has authorized a number of peace-keeping and other missions that entail the presence of both UN personnel and national military forces, including those of the United States, in foreign countries. This necessarily has raised status issues, which the UN system has pursued with vigor. Ultimately, UN claims to immunity rest on the 1946 Convention on the Privileges and Immunities of the United Nations, Article VI of which grants “experts on mission” for the UN immunity from, inter alia, arrest and legal process during performance of their mission. The UN Secretary General promulgated a “UN model SOFA” to be used for peace-keeping operations.<sup>38</sup> The model is very broad in scope. For example, it bars host country arrest or detention of UN peace-keepers, grants exclusive jurisdiction to the sending state for all criminal cases, blocks host country civil jurisdiction over acts done in the line of official duty (as conclusively determined by a UN official), and extends broad exemption from taxes, duties, documentation, etc.<sup>39</sup>

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<sup>36</sup> Normally, the United States is unwilling to rely on Visiting Forces Acts, seeking a bilateral agreement, because such Acts are fundamentally different from SOFAs in that they are *domestic* host country legislation waiving sovereign rights – not international agreements, and therefore presumptively subject to host country amendment and interpretation. (It is also not uncommon for host governments to insist on legislative approval of SOFA agreements and/or passage of domestic legislation permitting their implementation.)

<sup>37</sup> See page 41 below for description of the special case of Iraq.

<sup>38</sup> The UN model SOFA is set forth in “Model Status-of-Forces Agreement for Peace-Keeping Operations, Gen. Assembly Doc. A/45/594 (1990).

<sup>39</sup> Reflecting the U.S. position vis-à-vis the International Criminal Court, recent UNSC authorizations in cases where U.S. participation is a possibility typically ensure against transfer to U.S. personnel for ICC proceedings.

Although the model does not address contractor status, in some cases the UN negotiates a separate “Status of Mission” agreement that extends to contractors supporting the UN-authorized operations some SOFA provisions, notably exemption from taxes, duties, and import/export restrictions.

Accordingly, whatever the American general reservations about UN claims of authority, where the United States has had military personnel in a country on the basis of a UN “peacekeeping” mission or under other UN authority, it has been the position of the United States (echoing that of the UN) that U.S personnel (both military and civilian and both government employees and, if there is a special UN agreement in effect for the particular case, contractors) are entitled to very broad jurisdictional, fiscal, regulatory and other immunity.<sup>40</sup>

No Protections. Finally, in practice, the U.S. military has conducted some significant activities without any SOFA agreement, relying on the host country interest in good relations with the United States and on informal “understandings” and established patterns of cooperative interaction with host nation military and law enforcement authorities to ensure protection of critical U.S. interests. An example is Thailand – a nation with which the United States has no explicit SOFA of any kind but enjoys a mutual security relationship embodied in a treaty, and with which the United States has extensive and long-standing military relationships. These include conducting the annual Cobra Gold exercises, which brings thousands of U.S. military personnel to Thailand. Despite the lack of an explicit status agreement, there have, according to the command, been no significant status-related problems.

In other cases (not necessarily in Thailand) where an incident has arisen and there is no SOFA, the command has sometimes resorted to the expedient of quickly removing the accused from the country, thereby getting him out of the reach of host country authorities. This approach, while no doubt sometimes necessary and frequently effective, has obvious drawbacks in terms both of being able to assure successful evacuation and of its impact on relations with the host country if a controversial issue arises, when it carries a risk of making a bad situation worse.

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<sup>40</sup> An overview of the UN model and the issues it raises is provided in “Status of Forces Agreements and U.N. Mandates: What Protections Do They Provide to U.S. Personnel?” the Hearing before the Subcommittee on International Organizations, Human Rights, and Oversight, of the Committee on Foreign Affairs, U.S. House of Representatives, February 28, 2008, No. 110-153.

Given that the coverage of SOFAs is significantly less than universal, even for countries with which the United States has good and even close security relations, issues arise of whether to send U.S. forces into a country without any SOFA agreement. Under DoD procedures<sup>41</sup> the relevant regional Commander must, before approving any activity that involves the presence in a foreign country of U.S. military personnel under his command, determine that there are adequate jurisdictional and other protections for U.S. military personnel. Normally, this determination is made on the basis of legal advice as to the terms of an existing SOFA agreement. However, where there is no agreement, the relevant Combatant Commander has the authority (and responsibility) to choose either to decline to carry out the activity or to issue<sup>42</sup> a waiver of the requirement for SOFA protection and direct the operation to go forward when the risks are judged to be minimal or outweighed by other priorities.<sup>43</sup> In some cases this has worked well, in others not so well.<sup>44</sup>

## **VII. Internal U.S. Process: Agency Roles, Circ. 175 and the Global SOFA Template**

### *Agency Roles*

The State Department leads the negotiation of new SOFAs. DoD and State legal advisers constitute the core of the negotiating teams and in providing legal advice define the legal parameters within which these teams can work. DoD sets policy goals and requirements for needed protections. DoD and State regional bureaus and desks – and, to some degree, embassies – provide important insights into

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<sup>41</sup> As set forth in SecDef Message “Importance of Obtaining Status Protections in Host Nations,” July 11, 2006.

<sup>42</sup> The commander issuing such a waiver must inform the Office of the Under Secretary of Defense for Policy. It is not clear from the SecDef instruction cited above whether, in practice, that office must concur, or simply be informed.

<sup>43</sup> SOUTHCOM has a structured procedure for making such determinations, including, for example, a numerical guideline for how many “person-days” of presence in a country presumptively necessitates SOFA protection. So far as could be determined, other commands rely on a less formalized system.

<sup>44</sup> According to some of the people interviewed for this study, legal advisers have sometimes felt pressure to rely on doubtful grounds for advising the commander that adequate SOFA protections are in place, thereby permitting the activity to proceed without requiring a recommendation for a waiver of the protection requirement. Others interviewed have disputed that such pressure exists.

national and regional factors that can inform a decision on whether to initiate a negotiation and how to craft negotiating solutions once engaged.

At State, the SOFA Negotiator is a senior diplomat who has oversight responsibilities and is well positioned to work with an OSD counterpart to develop solutions to emerging problems in negotiations. At DoD SOFA issues are handled primarily by members of the OSD and Joint Staff legal offices, with some input from the relevant regional offices in Policy. At one time, the Office of the Under Secretary of Defense for Policy included a senior long-time career official who headed a small staff with overall responsibility for SOFAs as well as other DoD rights in foreign countries. This official reported directly to the USDP. That position and its small supporting staff were eliminated many years ago and there has been little or no comprehensive senior policy oversight of SOFAs at OSD for over ten years.

The State Department staff responsible for SOFA negotiations, located in the Bureau of Political-Military Affairs, is tiny and transient. This makes any continuity of operations extremely difficult. The State Negotiator's office, headed by a relatively senior State officer and reporting to the PM Principal Deputy Assistant Secretary is staffed, in principle, with two officers in addition to the Negotiator. In practice, these are active duty military detailees, as is the legal adviser who handles SOFA issues in State/L. Although these are highly skilled professionals, they usually rotate out within two to three years, as does the State Negotiator. The result is that there is an absence of continuity and institutional memory at the State Department.

Embassies are involved in negotiations to some degree and, of course, have primary State responsibility for implementation. However, they tend to assign a low priority to SOFA issues and the State Department provides little or no training to pol-mil officers on SOFA matters. In practice, this arrangement means that the Washington end of negotiations is heavily influenced by State and, especially, DoD legal staffs at some cost to policy involvement from either Department.



### *Circ. 175 Procedure and the Global SOFA Template*

The negotiation of SOFAs, like that of other international agreements, is governed by the Circular 175 Procedure. This sets out the process by which the United States authorizes negotiations of treaties and executive agreements, including SOFAs and is intended to ensure that negotiated agreements that bind the United States are fully coordinated among interested agencies and consistent with national policy.<sup>45</sup> The purpose is to ensure that the making of treaties and international agreements is carried out within constitutional, legal, and other appropriate limits, and reflects U.S. interests, policies, and principles, both those specific to the particular negotiation and more generally.

For SOFAs, there are three options available under Circ. 175 with regard to the negotiation of new agreements. One can seek approval to: 1) initiate a negotiation; 2) conclude a negotiation; or, 3) both initiate and conclude a negotiation.

- Approval to initiate entails, among other things, interagency clearance of a negotiating text to be proposed. Interagency clearance is required if, in the course of negotiations, the text is modified in significant ways.
- Approval to conclude requires, among other things, interagency clearance of any significant changes to the negotiating text that have been accepted ad ref in the course of negotiations.
- The third option includes the authority to initiate and conclude an agreement on the basis of an interagency agreed negotiating text. Among other things, the “initiate and conclude” procedure requires interagency clearance of any significant changes from the text, normally the GST, as initially placed before the host government.

The text approved for use under the third – initiate and conclude – option is commonly referred to as the Global SOFA Template (GST).<sup>46</sup> (The GST text is at

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<sup>45</sup> The original Circular 175 was a 1955 Department Circular prescribing a process for prior coordination and approval of treaties and international agreements. This title has been retained; the applicable procedures have been revised.

<sup>46</sup> The Circ. 175 procedure permits the development under this option of a text tailored to a particular negotiation, but that has seldom been the practice in recent years.

Appendix A).<sup>47</sup> It is derived from a document put together in 2003 by the U.S. interagency, which sought to establish a uniform standard for new SOFAs.

The GST contains a comprehensive list of desired SOFA provisions. The GST, if agreed, has the significant virtue of incorporating an ideal outcome from the U.S. point of view. It affords U.S. military personnel and civilian DoD employees in the host country all the SOFA provisions that were at that time currently in use or envisioned for the future. The GST, by affording “equivalent A&T” status provides full criminal immunity and also immunity from civil and administrative jurisdiction for acts within official duties. (The GST does not rely only on its A&T clause, but adds explicit provision for exclusive U.S. criminal jurisdiction.) It also provides for entry and exit on the basis of U.S. identification documents or military orders (i.e., without passports or visas), recognition of U.S. professional and driving licenses, authorization to wear uniforms and carry arms, and exemption of covered personnel from taxes and from import and export duties, inspections, licenses, and ‘other restrictions’ associated with import or export of equipment, supplies, or services in connection with military activities. It also exempts DoD vehicles, aircraft, and vessels from tolls, port, airport, and overflight charges, authorizes contracting under U.S. laws, affords free movement in the host country, broad access to radio spectrum and freedom to operate telecommunications systems, and resolution of claims against the U.S. government under U.S. law. The jurisdictional provisions do not apply to contractors, but contractors are exempt from taxes, duties, licenses, restrictions, and charges in connection with their activities under the agreement. The GST is not reciprocal.

The effect of the 2006 authority is that when it is proposed to seek a SOFA agreement with a new country the GST can be presented to the host country without initiating a new Circ. 175 process each time. Furthermore, if the host country agrees to the GST as proposed, the negotiator is authorized to sign it “ad ref”, that is subject to approval in capitals but with a good faith understanding that such approval will be forthcoming. (The final version, after governmental approval is normally signed for the United States by the U.S. ambassador in the country.)

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<sup>47</sup> In principle, the text approved for proposal and signature would not need to follow the GST pattern, but could be more tailored to the particular case, and the Recommendations include a suggestion along that line.

In theory the process is straightforward – the GST is the agreement the United States would ideally prefer, and it can be agreed with any nation willing to accept it. It covers the entire range of fields in which protection is a U.S. interest. However, so far, the United States has only reached agreement on the Global Sofa Template with a small number of countries, mostly those that are able to be indifferent to sovereignty issues and/or that are very anxious to have a U.S. military presence.

The defect in the GST model is that it ignores the awkward reality that in negotiations it is sometimes necessary to consider the views of the other party. When the GST is proposed to a host country, that nation’s negotiators regularly raise sovereignty and other objections, in part due to its extremely broad scope and the absence of reciprocity.<sup>48</sup> They often refuse to accept specific substantive provisions.

At that point, the GST model usually collapses because, when – as is very often the case – the host country negotiators balk at signing the GST, and the U.S. negotiator seeks permission to offer some concession, the process runs aground on the rule that any “significant change” to the text requires interagency clearance through a full Cir. 175 review process specific to that proposed agreement. The agencies that must concur are the relevant State regional bureau, the Bureau of Political Military Affairs, the State Legal Adviser, DoD Office of General Counsel, the relevant OSD Policy regional offices and the Joint Staff.

That a negotiated compromise should require review before acceptance is an unexceptionable principle. Since the GST covers the entire range of fields in which protection is a U.S. interest (with the arguable exception that it does not cover contractor jurisdiction), any departure from the model represents some compromise of an established and approved U.S. government policy. The problem is that the review process is often very prolonged, and, moreover, according to State negotiators, there has been the tendency of the Defense Department to view *any* negotiated changes to the GST – including omitting detailed financial and administrative provisions that may be of little relevance in light of likely activities in the host country as “significant” and, not merely requiring review in

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<sup>48</sup> One negotiator interviewed recounted that the representatives of a generally friendly country, when presented a copy of the GST text, read it, tossed it on the table and said, “You have got to be kidding.”

Washington, but presumptively unacceptable. According to State officials interviewed, the ideal terms embodied in the GST have become the minimum acceptable terms, not just an initial negotiating position or a menu from which to pick those points sufficiently critical to be insisted upon.

The overall result is that in practice, the GST model does not work effectively as a framework for SOFA negotiations. A system set up with the best of intentions to facilitate agreement has too often become a straitjacket for negotiators – and left commanders forced to choose between foregoing valuable activities or risking going ahead without any agreed status arrangements.

To be sure, there is a case for consistency among agreements and standardized format not least because of the reality that host country negotiators are likely to know the provisions of other nation's SOFAs, so there is a "Most Favored Nation effect," whereby omission or modification of a standard provision in a case where it is genuinely marginal may be taken by another country – where the protection would be a real importance – as justification for refusing to accept the provision. However, inflexibility about variations from the GST model has, according to State negotiators, made it extremely difficult to engage in a real negotiation with host governments and impossible to contemplate compromise without triggering a drawn-out and contentious Circ. 175 review process

The small number of officials in both State and DoD dedicated to SOFA work – and the absence of a single coordinating authority in DoD – have, at least according to State officials responsible for negotiations, meant that the process drags on a long time without resolution. In a number of cases, this has meant that no agreement could be reached in time to establish *any* protections for U.S. forces that were to engage in planned activities. This is a particular problem when the planned activities were small and/or short-term so that if an agreement cannot be reached in timely fashion, a delayed agreement becomes irrelevant. The result is either that desirable operations were cancelled or they went forward without the more limited, but still probably adequate, protections that a more flexible and responsive negotiating system might have agreed to.

In short, the quest for consistency and adherence to principle has hampered negotiations and blocked agreements without actually producing much in the way

of consistency or agreement to our ideal provisions. Notwithstanding the establishment of the Global SOFA Template as a standard for new agreements, the wide variation among SOFAs that existed when the GST was promulgated continues to be the case. The wide variation in form is not necessarily a problem; it simply reflects the differences in host country circumstances and U.S. operational requirements.

### *Archives/Data base*

The U.S. government operates its SOFA efforts without a comprehensive and readily accessible archival data base of all existing agreements. As a result, there is a surprising degree of uncertainty about what status agreements are in force and their terms. In part this is because there is no comprehensive collection or archive of the agreements that the U.S. government, or elements of it, regard as affording status protection to U.S. forces. In some cases, different parts of the U.S. government disagree about whether agreements exist with a particular nation, whether agreements are still in force, and what their terms are.

The publicly available Treaties in Force series maintained by the State Department nominally lists all treaties and executive agreements, including those effected through an exchange of diplomatic notes, but excluding those that are classified. It is, however, simply a list of agreements by title. It does not identify which of the listed agreements address status issues, and it is by no means clear that the list includes all of the many specific supplementary and implementing agreements – or even all the diplomatic notes on which U.S. commanders rely in determining the adequacy of protections.<sup>49</sup> In any case, the Treaties in Force series is not a data-base; it does not provide links to the documents listed.

Various offices in Washington, the regional Combatant Command headquarters, and embassies have individual files of agreements, but there is no comprehensive catalogue of these holdings, much less a way to access them. Moreover, an indeterminate number of agreements covering status protections on which U.S. officials believe they can rely have apparently been agreed via more informal methods, e.g. via note verbale or memorandum of conversation. And, reportedly,

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<sup>49</sup> The determinant of whether a document is listed in TIF appears to be whether it has been reported to Congress as an international agreement of the United States.

there have been cases in which exchanges of diplomatic notes have not been filed with the State Department, as required.

A particular issue is that, despite the efforts of the State Department treaty office to keep track of impending expirations, agreements reportedly can and do expire by their terms without any assessment of the utility of an extension or follow-on agreement. Importantly, without a reliable archive it is impossible to develop a clear, comprehensive picture of evolving practice to inform negotiations or establish a public (or even an internal government) record that provides transparency and accountability.

In short, in some cases, there is a difference of view within the U.S. government over which agreements are in effect – and of course, there is no assurance that the host countries agree with the U.S. position on the existence or terms of agreements. Moreover because agreements are often not easily accessible, they may or may not be available to negotiators as they prepare to begin a new negotiation – or to posts and commands as issues arise regarding implementation. Nor is it possible to develop a complete picture of the variations in terms of existing agreements, or of practices and precedents under them.

### **VIII. Agreements in Effect**

As noted, there is some uncertainty about what agreements are in effect and no single data base that purports to include them all. The following description of the coverage in each Combatant Command is, therefore, based on information received from the various commands, and is not necessarily fully authoritative or up to date. But it gives a general picture of the situation.

**CENTCOM** has twenty countries in its area of responsibility (AOR), with eleven of which the United States has agreements in various forms that address status issues. There are no such agreements with several nations in the region with which the United States has significant military relationships. Some of the most active current U.S. military operations are ongoing in the AOR. These conditions present special SOFA problems, since CENTCOM carries out combat activities that are presumptively covered by the Law of Armed Conflict, which gives exclusive jurisdiction to the sending state. However, these activities as well as routine

presence of U.S. units in practice often raise issues with host governments over alleged misconduct by U.S. personnel. The Command also conducts a very active program of training, engagement, presence activities, and extensive logistics and other support for U.S. forces – i.e., the type of thing that normally calls for status protection agreements with the host government. Moreover, this AOR presents a fuller than usual menu of concerns arising from cultural differences, sensitivity to foreign presence, and security/force protection issues as well as the inevitable potential for incidents arising from both U.S. combat operations and routine presence (e.g., vehicle accidents).

In the CENTCOM AOR, the cases of Iraq and Afghanistan are special cases of both current importance and implications for the future.

***Iraq.*** In 2003, after Saddam Hussein was removed from power, the UN Security Council recognized the Coalition Provisional Authority (CPA). CPA among other actions defining its role, issued an order (CPA #17) establishing immunity for coalition personnel, military and civilian, from all legal processes within Iraq and allocated exclusive jurisdiction to the sending states. CPA #17 also established the same immunities for contractors. The authority for CPA #17 derived from both the UN authorization and the basic law of occupation.

In June 2004 agreement the CPA order was revised to reflect the impending transfer of sovereignty to an Iraqi government. The revised order provided for very broad immunity for Coalition forces, including their contractors. The agreement whereby CPA ended the formal occupation regime and turned full sovereignty over to the Government of Iraq provided that CPA orders, which of course included CPA #17, would remain in effect unless revoked or modified by the Iraqi government. During the 2004-08 period, therefore, U.S. forces had status protection under both the unrevoked CPA #17 and the UN authority for international support for the transition in Iraq, which, under UN doctrine, carried with it extensive immunities for personnel (including contractors).

In 2008, the United States and Iraq signed a Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States and the Republic of Iraq and an Agreement On the Withdrawal of U.S. Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq

(Security Agreement). The Security Agreement provided for a form of concurrent jurisdiction which allowed Iraqi jurisdiction over U.S. forces for “grave premeditated felonies ... committed outside duty status and outside agreed facilities” but undertook to provide due process protections. The United States had effective authority under the agreement to decide what constituted duty status in a particular case.

The 2008 Security Agreement expired on Dec. 31, 2011, the date set in 2008 for all U.S. combat forces to leave Iraq, with it the status arrangements expired as well. The United States and Iraq were unable to agree on a follow-on SOFA regime for a continued post- 2011 presence.

However, in June, 2014, in the aftermath of ISIS advances, the United States exchanged diplomatic notes with Iraq that provide “A&T equivalence” immunity from criminal and civil jurisdiction for U.S. forces which have been sent as advisers to Iraq to assist in addressing the current crisis.

*Afghanistan.* Status arrangements in Afghanistan are complicated by the simultaneous existence of the NATO ISAF operation (which has explicit UN authorization) and a separate bilateral U.S. operation (which does not have explicit UN authorization, although various UNSC resolutions recognize its legitimacy). U.S. troops participate in both ISAF and the separate U.S. operation.

Under a 2002 military technical agreement with NATO regarding ISAF, Afghanistan agreed that ISAF forces and all of their support personnel, including contractors, would be subject to the exclusive jurisdiction of their own governments. Under the terms of a separate 2002 agreement with the United States, Afghanistan agreed to accord U.S. forces administrative and technical equivalent status (which provides immunity from criminal prosecution by Afghan authorities and immunity from civil jurisdiction except for acts committed outside official duties). The U.S.-Afghanistan agreement does not accord A&T equivalent status to contractors.

Recently, NATO has negotiated a new SOFA to cover its mission to train, advise and assist Afghan forces after the scheduled end of the NATO ISAF operation in December 2014. According to press reports, the SOFA provides immunity from



criminal prosecution for NATO forces, and exempts NATO forces from NATO's taxes on imports and from the requirement for an Afghan visa or entry permit.

The United States and Afghanistan negotiated a Bilateral Security Agreement between the United States and Afghanistan (BSA) as the framework for continued U.S. support for Afghanistan's security forces. The BSA's terms provide, in substance, for continuation of the earlier bilateral U.S.-Afghan status arrangements.<sup>50</sup> This agreement has now been approved by the new president of Afghanistan.

***Other CENTCOM countries.*** CENTCOM's activities are not limited to Iraq and Afghanistan. Counter-terrorism operations are conducted in a number of nations in the AOR, substantial U.S. forces are stationed more or less permanently in several GCC<sup>51</sup> countries; there are extensive arms sales and training relationships with several nations in the AOR; port visits are made to several AOR nations; and supplies for forces in Afghanistan flow through several countries in the AOR. There are no comprehensive agreements in the AOR. In some cases, Defense Cooperation Agreements and agreements effected via exchanges of diplomatic notes provide for some SOFA protections, usually covering criminal and civil jurisdiction and taxes and fees. The scope – and indeed the continuing existence – of some of these diplomatic note arrangements is uncertain.

In general, the CENTCOM command does not pursue SOFA agreements actively through the interagency process on the grounds that conflict is ongoing, agreement is unlikely, and, in any event, informal understandings and cooperation have worked reasonably well to resolve problems when they arise (as they have). The command's view is that most existing engagements are in places where hosts believe they are getting a good benefit, so they are willing to agree to de facto SOFA protections. However, there have been incidents involving attempted host nation detention and trial of U.S. personnel.

**EUCOM** has fifty-one countries in its AOR, including Israel, most of them either NATO allies or Partnership for Peace (“PfP”) members. Thus, the NATO or

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<sup>50</sup> Conclusion of the BSA was a precondition of the NATO SOFA taking effect.

<sup>51</sup> Gulf Cooperation Council – member countries are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates.

Partnership for Peace SOFA is in place for 45 European nations – much of the AOR.<sup>52</sup> In addition, there are many detailed implementing agreements (often the product of prolonged and contentious negotiation) with NATO and PfP members addressing specific issues.<sup>53</sup> There is a bilateral SOFA with Israel. Four of the no-SOFA countries are ‘micro-states’ with which the command does not regard the absence of an agreement as an issue.

Long experience has developed a generally cordial and workable system for dealing with day-to-day issues. However, problems still sometimes arise, partly because of the sheer scale and complexity of interactions between the U.S. military and the nations in the AOR. A current example is that EUCOM has experienced some difficulties with implementation of financial terms that arise from EU insistence on EU nations collecting and then reimbursing VAT taxes, the U.S. position being that under the SOFA, they are not to be collected in the first place. In addition, since some countries joined the EU before joining NATO, they have had to contend with an EU rule that overrides subsequent bilateral agreements – including SOFA obligations to exempt NATO partners from taxes, duties, licensing requirements, etc.

**PACOM** has thirty-six countries in its AOR with twelve SOFA agreements, including comprehensive agreements with Japan, the Republic of Korea, Australia and the Philippines. Six other SOFA-type agreements effected through diplomatic note exchanges providing A&T equivalent coverage. Some of these were entered into on an urgent basis in connection with U.S. assistance in responding to humanitarian disasters, and their applicability to other activities is uncertain. A few important countries have no formal protections but are the venues for significant engagement activities. These include Thailand and India, as well as Hong Kong, where ship visits have continued, after British rule ended and Hong Kong reverted to Chinese sovereignty.

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<sup>52</sup> All 28 NATO members are parties to the NATO SOFA, and 17 of the 22 of the Partnership for Peace nations are parties to the PfP SOFA. Of the PfP countries in EUCOM’s AOR only Ireland, Malta, and Belarus have not adhered to the Partnership for Peace SOFA. (Malta may be preparing to sign.) Russia’s signature is so qualified as, in the view of the United States and some other allies, to render SOFA protections inoperable.

<sup>53</sup> The supplementary agreement for Germany is some 120 pages long, and addresses everything from procedures for resolving disputes over waiver of jurisdiction to marriage licenses for marriages between Germans and foreigners covered by the NATO SOFA.

**AFRICOM** has fifty four countries in its AOR, six GST-based SOFAs, and twenty four other agreements (mainly diplomatic note exchanges providing A&T equivalency). There are no agreements with another twenty four AOR countries, although there are significant engagement with at least 12 of them. Given U.S. plans to expand engagement in Africa, AFRICOM would like to do more to establish agreed protections, including A&T equivalent status, the ability to bear arms, measures to ease entry, and waivers of claims.

**SOUTHCOM** has thirty-one countries in its AOR, and eighteen have some form of agreement. Most military interactions with Latin American countries have been limited in scale. There are, however, other SOUTHCOM activities, notably some counter-narcotics operations, that are extensive, long-term, and even may involve substantial continuing quasi-combat operations.

Most of the SOFA protections that exist are embodied in diplomatic notes providing status rules – generally “equivalent to A&T” for a specific activity to be conducted, but usually also state that their terms apply to “other activities as agreed.”<sup>54</sup> For historical reasons, sovereignty issues inherent in any status agreements with the United States are particularly sensitive in this AOR.

SOUTHCOM, apparently uniquely among the regional commands, has developed a detailed and structured risk assessment process as part of its planning cycle for engagement activities to help guide decision making on when status protections are required, what protections exist, when it is prudent to proceed without agreed status rules, and when it is necessary to refrain from activity because of the lack of protection. The process includes a numerical scoring system for evaluating the need for status protection and the adequacy of existing agreements.

Many SOUTHCOM activities are judged to be sufficiently small in scale and to present sufficiently few risks as not to require protections. These include small-scale training and short term joint exercises. However some SOUTHCOM activities are of the type for which status protections are important, such as port calls with crew liberty and counter-narcotics operations.

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<sup>54</sup> As noted above, the United States normally takes the position that in such a case, A&T equivalence applies to all future activities without a need for explicit agreement on status issues.

**NORTHCOM** has only Canada, Mexico and Bahamas as foreign countries in its AOR. Canada is covered by the NATO SOFA. **NORTHCOM** would like to be able to establish protections in Mexico and the Bahamas for planned training activities and cooperation with law enforcement authorities, but this has not been a priority.

In general, **COCOM** military lawyers with responsibility for SOFA issues interviewed for this study agreed that it might be useful to have more flexibility to pursue SOFA negotiations within a broad framework that allows for variations in response to conditions on the ground and the character of likely U.S. military presence. They also suggested that providing some form of reciprocity might help mitigate sovereignty concerns expressed by host governments. Finally, they recommend that more authority be delegated to embassies to advance negotiations, while also maintaining and strengthening policy leadership at State and DoD.

## **IX. Recommendations**

A number of issues in connection with the negotiation and implementation of SOFAs have become evident. These include the necessary content and scope of a particular SOFA, the utility of reciprocity, the need for flexibility in framing and carrying out negotiations, appropriate assessment of the costs and risks of going without protection, proper handling of the special cases of combat zones and post-conflict transitional status protections, the need for archival and classification procedures that provide accountability, and the day-to-day challenges to effective enforcement.

### **1. Give High Priority to SOFA Negotiations**

Status issues are not merely legal niceties. Adequate agreed protections are important if U.S. engagement is to occur under clear rules of behavior and accountability. They also contribute to amicable resolution of disputes, which, in the absence of an agreed framework can undermine important strategic relationships, and they can provide significant financial savings and reductions in administrative burdens.

Conducting military activities in foreign countries without adequate SOFA protections runs significant risks and costs. Where no agreed protection exists, but commands (and posts) believe military activities serve important U.S. interests, there is a temptation to proceed with the activity anyway, relying on resolving issues if they arise on the basis of sound informal relations with host country authorities, host nation interest in the links to the U.S. military, discipline of troops, and, in extremis, rapid action to get offenders out of the country. For the most part, this approach works, but the attitude that “it’s not a problem until it’s a problem” or “we’ll work it out somehow” is risky and even imprudent. Incidents can cause serious breakdowns in bilateral relations and create impediments to the overall U.S. national strategy of engagement and, indeed, to overall relations, not just to security links. U.S. personnel are at risk of unfair treatment and worse in poor judicial systems. The financial costs of functioning without agreed protections and exemptions will certainly be higher, and the effort to solve the resulting implementation problems without an agreed legal framework will likely encounter significant red tape and long delays.

There are, however, still significant countries with which no SOFAs exist. While there may be situations in which it is certain that no agreement is possible, it should be a U.S. government-wide priority to fill those gaps wherever possible. To do this requires giving more priority to the issue, more resources, and more flexibility in deciding when and how to negotiate a SOFA and in managing the negotiations.

## **2. Tailor Negotiations to Individual Country Conditions**

Assessments of the risks of operating without protection and the type and scale of protections needed vary according to the circumstances in which a Combatant Command is operating, and the U.S. negotiating system should reflect that reality. Although the Circ. 175 procedures are contentious, a system for centralized review of terms is important and necessary. However, if the United States is to secure additional needed status protections, the process needs to be streamlined.

SOFA issues arise in different national and regional contexts and in connection with an increasingly varied array of military activities. For example, current SOFAs cover everything from long-term peacetime garrisons (e.g. in Europe,

Japan and the Republic of Korea) to short-term, small engagement operations (e.g. in Africa and Latin America). In the Middle East, SOFAs cover combat and near-combat conditions as well as substantial continuing, if not permanent, presence. In many places around the world, U.S. forces are engaged in cooperative activities with host governments involving counter-terrorism, anti-narcotics, and weapons proliferation problems. In others, port visits, exercises, humanitarian efforts, training, and other military activities bring U.S. personnel into contact with host nation communities with the inevitable risk of incidents.

In addition, the U.S. military is increasingly engaged in countries with widely differing cultures and social values; the quality of judicial and regulatory systems in partner countries varies tremendously as well. The history of U.S. and Western engagement in certain regions and countries, such as in Latin America and Africa, tends to color host government and public attitudes toward agreements that require significant concessions of sovereignty. For a variety of reasons, other nations are less willing today than they were in the past to defer to U.S. wishes on status issues.

The range of activities in countries without status agreements is virtually as broad as with countries where there are agreements. This poses challenges for negotiating agreements to fill the existing gaps. As one interviewee said “Every SOFA requires some compromise of sovereignty and each country has a culture that drives what they can accept. We have forces overseas with the indulgence of our hosts; this is not without costs.” Others commented that the United States would do better to develop a capacity for compromise in SOFA negotiations so as to build a basis for trust with new SOFA partners and ensure that implementation can be managed without undue stress to the bilateral relationship or damage to the U.S. strategy of engagement.

There is an understandable impulse to seek to have every agreement meet maximum U.S. desires – if only because hosts will tend to treat concessions to other countries as justification for insisting on the same concessions to them. A consistent, indeed a uniform, high standard of protection is, in theory, a fine principle, and it is one of the main arguments for resisting any variation from the GST model. U.S. interests would, however, be better served by a more flexible system which authorized and facilitated negotiation of more tailored agreements,

geared to the nature of the host country's relationship with the United States, the quality of its judicial and other legal systems, the scale of U.S. military involvement, and other relevant considerations.

The Global SOFA Template – now nominally the standard by which to negotiate new SOFA agreements – has sometimes become a straitjacket for U.S. negotiators. It is more often used as a 'floor' than a 'ceiling' for negotiated agreements and it has proved extremely difficult to clear variation from the original text within the U.S. interagency.<sup>55</sup> The main consequences include significant disagreements with host governments, a succession of negotiating impasses, and, in some cases, a lack of effective protection for U.S. forces or cancellation of valuable planned activities.

State and DoD should work together to develop a more targeted approach to negotiations, which distinguishes among various types of operations and pursues a set of protections calibrated to the different requirements in different countries. One approach would be to authorize negotiators, if the GST proves unacceptable, to move – without elaborate Washington coordination – to a simpler model, particularly where the activities likely to be undertaken are relatively small, short-term “engagement” operations.

There are at least two possible, parallel approaches to streamlining the process, while still assuring proper interagency coordination and oversight. The first would entail abandoning the idea that the whole Global SOFA Template is the only text that can be proposed initially in virtually all cases, and instead develop interagency-approved variations from that text that could facilitate conclusion of agreements which secure less comprehensive protections appropriate to the circumstances. The second (which is not inconsistent with the first) is to organize a system of interagency review of possible modifications of the text originally proposed that will be faster and more responsive – probably by assigning more people in both State and DoD to the task and/or vesting a senior official in each department with responsibility and authority to take agency positions, resolve disputes between the two departments, and, if they cannot, secure a resolution at a still higher level.

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<sup>55</sup> This perception is not universal, but it is the view of some of the senior officials involved in recent years both in Washington and in the field.

### **3. Maintain Priority for Securing Criminal Jurisdiction Provisions Under Which Most Cases Will Be Resolved in U.S. Systems.**

Immunity from criminal jurisdiction is historically the highest priority in negotiating a SOFA. Consequently, DoD policy seeks to maximize the exercise of jurisdiction over U.S. forces by U.S. authorities, whatever the form of the SOFA agreement – comprehensive, A&T equivalence, or other ad hoc protections. From this perspective, explicit agreement on exclusive U.S. jurisdiction is ideal. When SOFAs contain concurrent criminal jurisdiction provisions, DoD policy seeks to ensure that, as a practical matter, the host will waive jurisdiction, so that effective exercise of jurisdiction over U.S. forces is maintained.

In most “concurrent jurisdiction” situations, the host nations are prepared to waive jurisdiction in routine cases.<sup>56</sup> However, under these procedures there is always the possibility of a highly controversial case involving strong host nation public outrage at the (alleged) commission by U.S. personnel of a particularly vicious crime or one in which the victims are particularly sympathetic. In such cases, the host government may come under public pressure to retain jurisdiction, especially if the SOFA agreement specifies concurrent jurisdiction, or limits U.S. jurisdiction to offenses arising in the line of duty.<sup>57</sup> The very fact that the crime has aroused strong public attention, however, carries with it the risk that U.S. personnel could be unjustly accused or convicted – and it is virtually certain that the host nation judicial system will depart in significant ways from U.S. constitutional standards.<sup>58</sup> In all such cases, there is a much better chance of a fair outcome if the U.S. and the host government have developed a relationship of trust and cooperation in which U.S. jurisdiction is the norm, if not the exclusive outcome. Even host nations with

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<sup>56</sup> The U.S. military authorities have devoted years of effort and expertise to developing the relationships of trust and cooperation with host nation law enforcement and military authorities needed for making the concurrent jurisdiction regimes work as well as they do.

<sup>57</sup> The issue is not always “jurisdiction” in the technical sense of what courts will hear the case. Related issues that may arise include pre-indictment or pre-trial custody – which raise questions not only of the physical conditions of confinement, but investigative procedures. There can also be issues of post-conviction confinement.

<sup>58</sup> Many of the “concurrent jurisdiction” SOFAs require that host nations guarantee U.S. personnel tried in their courts a list of significant procedural protections, such as right to counsel. The most notable difference from U.S. constitutionally required procedural protections is probably that most foreign criminal justice systems do not provide for jury trials. Of course, the normal forum in which U.S. military personnel would face U.S. jurisdiction is a court martial under the UCMJ, which also does not provide for jury trials, but the UCMJ does incorporate extensive (and in significant respects, constitution-based) procedural protections that would not necessarily apply in foreign jurisdictions.



what we may regard as good criminal justice systems will differ from the U.S. system, so the proper handling of sensitive criminal cases will require special care.<sup>59</sup>

At the same time, there will be instances where the nature of the alleged crime arouses strong local objections to the host country yielding its primary jurisdiction. In those cases, the U.S. military and diplomatic authorities will be better able to manage an inevitably difficult issue if there is a clear agreement on jurisdiction.

For all these reasons, the United States should continue, in most cases, to seek exclusive criminal jurisdiction, but where the local judicial system is a sound one and there is reason to believe the host will normally waive jurisdiction, a concurrent jurisdiction regime should normally be acceptable.

#### **4. Seek Protections for Contractors on a Case-by-Case Basis.**

Whether to insist on contractor immunity – and how broadly and for what sort of contractor – would best be done on a case by case basis. No doubt contractors will take the risk of exposure to foreign legal systems into account in setting their price, so there is always some financial interest in contractor protection. However, given that the United States often has little control over the actual supervision, screening, and oversight of contractor employees and their activity, the United States should not, in every case, seek the same jurisdictional privileges and immunities for them as those given to U.S. government personnel/employees.

Nonetheless, there will be instances where the United States has a strong interest in protection for contractors.<sup>60</sup> The U.S. military is often heavily dependent on contractor services. Special considerations arise in the case of large scale deployments that entail a very substantial and continuing U.S. military presence –

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<sup>59</sup> It is worth noting that the interests of the U.S. service member accused and those of the U.S. military are not invariably wholly aligned. For example, foreign sentences for equivalent crimes may be shorter. The U.S. military as an institution has an independent interest in uniform – and strict – application of the UCMJ to U.S. military personnel.

<sup>60</sup> A related issue that may be of greater significance in the future is that of personnel who are working closely with military engagement and other activities (e.g., counter-narcotics or counter-proliferation) but are employed, not by DoD, but by the other civilian U.S. government agencies. With very few exceptions, the only civilians covered by SOFAs are those directly employed by DoD.

which in current conditions means a high degree of dependence on and integration of contractor activities with direct DoD operations. Those considerations arise all the more strongly where contractors are deeply integrated into core military operations and mission tasks. Where that is likely to be the case, contractor protection is worth insisting on.<sup>61</sup>

There will be other situations where that is not appropriate, either because contractors are unlikely to be involved on a significant scale in the U.S. military's activities in the country, or because their involvement will not be closely linked to the military mission.<sup>62</sup> Particularly where contractor involvement (and therefore the scale of charges and the risk of incidents) is likely to be limited, not closely integrated with mission performance, and not subject to close governmental supervision, it may be wise to accept a SOFA that means the U.S. government has to absorb the costs of no immunity for contractors rather than forego the activity or conduct it with inadequate jurisdictional protections for military personnel and their activities.

## **5. Be Prepared to Offer Some Form of Reciprocity.**

SOFA negotiations involve issues of national pride and sovereignty as well as a host of practical details. One of the chief obstacles to getting agreements and fostering a productive environment for negotiation details and implementing agreements in force appears to be that the United States has not been willing to agree to extend to host nations forces in the United States the protections it seeks for our own forces in the host country.

The result is that our negotiators are in the awkward position of asking for far-reaching immunities for U.S. military personnel and activities in the host country, while being effectively barred from offering the same immunity – or even a reduced version – to host country militaries' activities in the United States.

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<sup>61</sup> As a negotiating matter, as well as on the merits, it may be useful to seek, not across the board protection for all DoD contractors, but only for a limited class, defined in the agreement to cover those non-profit, strongly government-linked entities that are most likely to be tasked with mission-critical tasks.

<sup>62</sup> Another question is whether third country nationals who are employed by a contractor as, for example, cooks and drivers (i.e., neither American citizens nor residents of the host country), should benefit from the same coverage as U.S. nationals serving in key functions (e.g., as security guards, technicians for key weapons systems, or regional specialists).

Understandably, this is difficult for some countries to accept, especially as they will know of the reciprocal terms of the NATO and PfP arrangements. And inability to provide some form of reciprocity may provide host nations' negotiators with the basis on which to reject provisions that are important to the United States.

To the extent it could improve the negotiating climate for a SOFA, provide the host government with a politically acceptable route to agreement, and help secure protections for U.S. forces where there otherwise might be none, an offer of reciprocity on the Philippine/Israel model might help achieve protections for U.S. forces. Accordingly, authority to offer such reciprocity should normally be a tool available to U.S. negotiators.

#### **6. Study the Special Case of Jurisdiction and Status generally in Combat Zones.**

A significant special case is the issue of status arrangements for situations where involvement of U.S. forces in combat is likely but the U.S. forces are present as part of a cooperative venture with the foreign country, i.e., not an invasion or occupation. This situation will arise not only where the principal purpose of the deployment is to conduct combat operations, but during still-contested post-conflict operations, as well as counter terrorism and counter-narcotics efforts, counter-insurgency campaigns, peace-keeping operations, and other cases in which U.S. forces are deployed into a potentially dangerous environment and for missions in the execution of which they may need to conduct combat operations that go well beyond force protection.

Often these missions will be undertaken with the consent and cooperation of the host nation, and the host will want U.S. military backing, but as the Iraq and Afghanistan experiences show, the hosts will not readily accept that the United States will have exclusive authority over what they see as misconduct by U.S. forces. None of the existing SOFA models – definitely including those in force in Iraq and Afghanistan – are fully suited to such contexts. Nor is the traditional international law model of exclusive jurisdiction – and effective non-consensual extra-territoriality for the foreign force a workable regime – if only because of the interests of the putatively cooperating host government.

In this sort of situation neither the traditional dichotomy between all-out wartime operations and agreed peacetime presence nor the various SOFA models adequately reflect modern security challenges and political conditions.

The ISAB has not attempted to analyze the range of issues presented by these “quasi-combat” situations, but it is important that government legal officers, military officers with experience in this sort of mission, and policy officials (with the assistance of experts from outside government) turn their attention to such an analysis and develop a set of principles for U.S. policy on the legal regimes that should apply when the United States undertakes such missions. Because the effectiveness of such missions often requires a “whole of government” approach (and may require extensive contractor support), the consideration should not be strictly limited to the status of U.S. military personnel.

#### **7. Tailor Financial and Administrative Provisions.**

Although by far the most sensitive SOFA issues are those dealing with criminal and civil jurisdiction, as a practical matter the financial and administrative protections often have the greatest day-to-day significance. The Global SOFA Template covers the gamut, from driving permits to visas to broadband spectrum access. But these exemptions often prove hard to negotiate for many reasons, including that the fees at issue are often an important source of revenue to host government agencies. At a minimum, the financial clauses mean that host nation agencies – whose financial and policy interests are affected – in addition to necessarily become involved in the negotiations. Those agencies may be less inclined than foreign, defense, and law enforcement agencies in the country to see the need to limit their sovereign authority – and, in many cases, their revenues.

An issue is the relative importance of comprehensive coverage of these non-jurisdictional issues. At a minimum, where financial issues are contentious, it is especially important to include non-military participants in the U.S. SOFA delegations, so as to be able to work constructively to address their counterparts from host nations. It also argues for flexibility on the U.S. side as to how these concerns should be met in the course of SOFA negotiations and whether a compromise might be in order.

## 8. Negotiations, Policy Oversight and Implementation.

The ISAB recommends a range of internal U.S. government actions on process and administration to improve the handling of SOFA issues.

8.1. Strengthen Policy. Articulate a joint State-DoD policy that underscores the importance of securing agreement with host governments on SOFA protections and sets out principles as well as a process for greater policy cooperation between State and DoD to this end. Principles might include the goal of concluding an acceptable if less than ideal agreement in most cases and the importance, once an agreement is in effect, of systematic implementation and building and maintaining relationships of trust and cooperation with host governments. A process for cooperation might consist of both informal and formal consultative channels to strengthen communication between senior officials charged with overseeing SOFA negotiations.

8.2. Evaluate and Train Personnel with Status Responsibilities on SOFA Issues. Embed in State and DoD regional bureau and mission plans a requirement to assess performance on successful achievement of SOFA protections and provide training for relevant foreign service officers and civil servants.

8.3. Increase Embassy Role in Negotiations. Give embassies a greater role in negotiating SOFAs. The current process is highly centralized – and centralized on an understaffed and over-burdened office in Washington. With modern communications, it is not clear why so much of the negotiating effort should be done by a handful of individuals sent out from Washington. According to interviews, embassy roles in SOFA negotiations vary from being central players to leaving the job largely to the Washington office. It should be possible to allocate more of the responsibility to the individual posts, while preserving necessary central policy oversight. No doubt there will be times when it is essential for a special negotiator to intervene. But although high level U.S. attention can be useful in certain circumstances, it may also create the perception that the United States is willing to pay a higher price to reach agreement. It is more likely to be useful in cementing a deal at the final stage and building trust in the U.S. commitment to work cooperatively than to help in resolving routine and detailed negotiating problems.

8.4. Adjust Negotiating Tactics. Even though it is asking for special privileges, the United States has leverage in SOFA negotiations, which derives in very important part from the value the host government attaches to a U.S. military presence. It is clear that negotiating a SOFA is easier when the host government sees a compelling need for the presence of U.S. forces and/or when bilateral relations are generally good. Problems emerge when public attitudes and/or concerns regarding incursions on sovereignty outweigh the perceived need for a U.S. presence. This calculus may change over time, as it has in the Philippines, whose Senate rejected a treaty in 1991 that would have renewed base leasing rights and corresponding status protections. Now, in a new regional security environment and in light of changing public opinion at home, the Philippines has agreed to an Enhanced Defense Cooperation Agreement that includes status protections for U.S. forces, but does not authorize the United States to establish a permanent presence or bases.

The most obvious recent example is the change of position by the Iraqi government. With ISIS at the gates of Baghdad in 2014, Prime Minister Nouri al-Maliki, who had previously refused to agree to a SOFA proved willing to reconsider and afford status protections via diplomatic note so as to bring U.S. troops back.

The inducement for hosts to agree to difficult concessions on status issues is not, of course, limited to immediate security fears. Poland, for example, had important sovereignty and tax/customs concerns about the provisions of the NATO SOFA (and unhappy recent experience with stationing of foreign troops) but decided that the need for NATO membership, a basis for U.S. military presence, and a solid security relationship with the United States should take priority. This makes for a complex implementation process with regard to tax and customs issues but it does provide the basic jurisdictional immunities that the United States requires.

In other cases, the United States will have little leverage. The host government may regard the United States as the demandeur or realize that the relevant Command is committed to carry out a deployment or engagement program and will probably do it even without protections, if necessary. This is particularly likely if there has been a pattern of engagement without status protections in the

past. This circumstance provides little or no leverage – unless the U.S. side is prepared credibly to assert that without an agreement engagement will be cut back or eliminated.

8.5. Strengthen Continuity of Operations at State. The problems of policy and expertise continuity at State should be addressed. One way to do this might be to establish a permanent civil service position in the office of the SOFA Negotiator, whose responsibility would include maintaining knowledge of SOFA negotiating experience and providing advice to the SOFA Negotiator and the Department by drawing on that base of knowledge. It may also be useful to establish a “surge” capability at State that would enable two Negotiators to lead teams simultaneously. This has proved effective recently; legal advisors and other experts were available from DoD and State to help staff the teams. To this same end, there should be designated in both State and OSD a single, policy-focused official to oversee the SOFA process.

8.6. Strengthen Local Implementation Efforts. Like other international agreements, SOFAs are only as significant as their enforcement and implementation. Effective enforcement and implementation of SOFAs depends on a good day-to-day relationship between U.S. forces and local authorities, between the embassy and the host government, and between the U.S. military in country and the embassy. Personal relationships play a large role in ensuring effective implementation of a SOFA, both within host countries and between commands and embassies. Most SOFAs that cover a long or large deployment are accompanied by a bilateral commission or committee, which may help resolve disputes. And, as a practical matter, relationships between United States and host country military and law enforcement officials develop over time, the character of which will have a major impact on whether the United States in practice obtains the protections the written agreements purport to provide.<sup>63</sup>

Many of those interviewed for this study stressed the need for sustained embassy commitment to help iron out implementation problems, especially where individual cases present novel issues or have become matters of public

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<sup>63</sup> Indeed, interviews indicated that there are situations in which good working level U.S. military and embassy relationships with host country military and law enforcement officials have produced a sort of de facto “common law” of status protections, even without a written agreement. That does not, however, seem to us to be a satisfactory model for most cases, and likely to be less so in the future.

controversy. It appears to be the case that willingness by the DCM to engage on specific cases at an appropriately high level in the host government can be of considerable importance.

Almost by definition, “hard” SOFA implementation cases are intractable. Our contacts noted that commanders focused on their mission and embassies with competing priorities were sometimes not willing to insist on compliance with a SOFA’s terms for fear of undermining other objectives. Relevant embassy personnel are not often familiar with SOFA issues and are not engaged with them as a day-to-day matter.

However, it is also the case that unclear coverage or applicability of the terms of a SOFA will make enforcement more difficult. This argues for an effort to ensure that SOFA terms are clear and well understood by all of the relevant host government authorities – and it illustrates the risks of relying on very general terms or hoping that incidents will not arise.

## **9. Public Access.**

9.1. Create a SOFA Database. A comprehensive, electronically searchable data base of all agreements on which elements of the U.S. government rely as establishing status rules for U.S. forces should be created, both to facilitate U.S. government activity in the field and to enhance public accountability.

9.2. Make SOFAs Public and Easy to Access in a Central Location. Most SOFA agreements are unclassified and available to the public (if sometimes hard to locate). Roughly ten are classified, sometimes with regard to their existence as well as the contents of the agreement. The reasons for classification generally have to do with host country sensitivities due to the dynamics of domestic politics and the potentially damaging implications of making concessions on sovereignty to the United States. In a few cases, the reason appears to be sensitivity (sometimes felt by both the United States and the host) about the very idea that there are U.S. military personnel in the host country. Some countries may also want SOFAs confidential because they do not want to make public the way their agreement compares to other (public) agreements with regional neighbors or other competitors.



In contrast, host governments may see a rationale for making the agreement public; so as to ensure that the United States is accountable for its obligations under the agreement. From the U.S. point of view, and leaving aside the very rare case where the United States does not want to acknowledge that any U.S. military presence exists, it is desirable that SOFAs be public, so as to have a clear basis for confidence that U.S. jurisdictional and financial interests are protected – and in particular that U.S. jurisdictional rights are established and known so that they can be credibly invoked when U.S. service members might otherwise be subject to unfair judicial and legal systems.

#### **10. Use Public Diplomacy Sparingly.**

While a targeted U.S. public diplomacy effort promoting a SOFA agreement could potentially be useful in specific cases,<sup>64</sup> these are likely confined to a narrow set of circumstances in which the host government sees utility in U.S. public statements and U.S. messaging responds flexibly, sensitively, and constructively to concrete public concerns. The State Department should take the lead for the United States in such efforts because of the compelling need to coordinate closely with host governments and draw on Embassy expertise in assessing and addressing local concerns. A campaign based on boilerplate talking points drafted in Washington risks doing more harm than good.

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<sup>64</sup> Of course, when a controversial individual case arises, it is extremely important that the United States – meaning the embassy, the Command, and Washington – have a well-planned and well-coordinated information strategy that is sensitive to local concerns, and yet true to broader U.S. policy positions. In many cases, where the United States is insisting on its jurisdictional rights, it will be appropriate to emphasize that the U.S. jurisdiction will mean vigorous investigation and prosecution if the case against the accused is valid.

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# Appendix A –Text of Global SOFA Template

## Proposed Model Text of Agreement

(Complimentary Opening) and has the honor to refer to recent discussions between representatives of our two Governments regarding issues related to United States military and civilian personnel (defined as members of the United States Armed Forces and civilian employees of the United States Department of Defense, respectively, hereafter referred to collectively as United States personnel) and United States contractors (defined as non-[name of country] companies and firms, and their employees who are not nationals of [name of country], under contract to the United States Department of Defense) who may be temporarily present in [name of country] in connection with ship visits, training, exercises, humanitarian activities, and other activities as mutually agreed.

As a result of these discussions, the Embassy proposes that United States personnel be accorded the privileges, exemptions, and immunities equivalent to those accorded to the administrative and technical staff of a diplomatic mission under the Vienna Convention on Diplomatic Relations of April 18, 1961; that United States personnel may enter and exit [name of country] with United States identification and with collective movement or individual travel orders; that [name of country] shall accept as valid all professional licenses issued by the United States, its political subdivisions or States thereof to United States personnel for the provision of services to authorized personnel; and that [name of country] authorities shall accept as valid, without a driving test or fee, driving licenses or permits issued by the appropriate United States authorities to United States personnel for the operation of vehicles. The Embassy further proposes that United States personnel be authorized to wear uniforms while performing official duties and to carry arms while on duty if authorized to do so by their orders.

The Government of [name of country] recognizes the particular importance of disciplinary control by United States Armed Forces authorities over United States personnel and, therefore, authorizes the Government of the United States to exercise criminal jurisdiction over United States personnel while in [name of country].

The Embassy further proposes that the United States Department of Defense and United States personnel shall not be liable to pay any tax or similar charge assessed within [name of country] and that the United States Department of Defense and United States personnel may import into, export out of, and use in [name of country] any personal property, equipment, supplies, materiel, technology, training, or services in connection with activities under this Agreement. Such importation, exportation, and use shall be exempt from any inspection, license, other restrictions, customs duties, taxes, or any other charges assessed within [name of country]. The Governments of the United States of America and [name of country] shall cooperate to take such measures as may be necessary to ensure the security and protection of United States personnel, property, equipment, records, and official information in [name of country].

The Embassy proposes that vessels and vehicles operated by or, at the time, exclusively for the United States Department of Defense may enter, exit, and move freely within the territory of [name of country], and that such vehicles (whether self-propelled or towed) shall not be subject to the payment of overland transit tolls. Vessels and aircraft owned or operated by or, at the time, exclusively for the United States Department of Defense shall not be subject to the payment of landing, parking, or port fees, pilotage charges, lighterage, and harbor dues at facilities owned and operated by the Government of [name of country]. Aircraft owned and



### Proposed Model Text of Agreement

operated by or, at the time, exclusively for the United States Department of Defense shall not be subject to payment of navigation, overflight, terminal or similar charges when in the territory of [name of country]. The United States Department of Defense shall pay reasonable charges for services requested and received at rates no less favorable than those paid by the Armed Forces of [name of country]. Aircraft and vessels of the United States Government shall be free from boarding and inspection.

The Embassy also proposes that the United States Department of Defense may contract for any materiel, supplies, equipment, and services (including construction) to be furnished or undertaken in [name of country] without restriction as to choice of contractor, supplier, or person who provides such materiel, supplies, equipment or services. Such contracts shall be solicited, awarded and administered in accordance with the laws and regulations of the Government of the United States of America. Acquisition of articles and services in [name of country] by or on behalf of the United States Department of Defense in connection with activities under this Agreement shall not be subject to any taxes or similar charges in [name of country].

The Embassy further proposes that United States contractors shall not be liable to pay any tax or similar charge assessed within [name of country] in connection with activities under this Agreement and that such contractors may import into, export out of, and use in [name of country] any personal property, equipment, supplies, materiel, technology, training, or services in fulfillment of contracts with the United States Department of Defense in connection with activities under this Agreement. Such importation, exportation, and use shall be exempt from any license, other restrictions, customs duties, taxes, or any other charges assessed within [name of country].

The Embassy proposes that United States contractors shall be granted the same treatment as United States personnel with respect to professional and drivers' licenses.

The Embassy proposes that United States personnel shall have freedom of movement and access to and use of mutually agreed transportation, storage, training, and other facilities required in connection with activities under this Agreement.

The Government of [name of country] recognizes that it may be necessary for the United States Armed Forces to use the radio spectrum. The United States Department of Defense shall be allowed to operate its own telecommunication systems (as telecommunication is defined in the 1992 Constitution and Convention of the International Telecommunication Union). This shall include the right to utilize such means and services as required to ensure full ability to operate telecommunication systems, and the right to use all necessary radio spectrum for this purpose. Use of the radio spectrum shall be free of cost to the United States Government.

Further, the Embassy proposes that the Parties waive any and all claims (other than contractual claims) against each other for damage to, loss, or destruction of the other's property or injury or death to personnel of either Party's armed forces or their civilian personnel arising out of the performance of their official duties in connection with activities under this Agreement. Claims by third parties for damages or loss caused by United States personnel shall be resolved by the United States Government in accordance with United States laws and regulations.

Proposed Model Text of Agreement

Finally, the Embassy proposes further that our two governments, or their designated representatives may enter into implementing arrangements to carry out the provisions of this Agreement.

If the foregoing is acceptable to the Government of [name of country], the Embassy proposes that this note, together with the Ministry's reply to that effect, shall constitute an agreement between the two Governments, which shall enter into force on the date of the Ministry's reply.

(Complimentary Closing)

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## Appendix B – Terms of Reference

UNDER SECRETARY OF STATE FOR  
ARMS CONTROL AND INTERNATIONAL SECURITY  
WASHINGTON

August 23, 2013

### MEMORANDUM FOR THE CHAIRMAN, INTERNATIONAL SECURITY ADVISORY BOARD (ISAB)

SUBJECT: Terms of Reference – ISAB Study on Status of Forces Agreements

The ISAB is requested to undertake a study of the strategies for and challenges to U.S. negotiation of Status of Forces Agreements (SOFAs). The United States is party to more than 100 agreements addressing the status of U.S. armed forces while present in a foreign country. SOFAs define the legal status of U.S. Department of Defense personnel and property in the territory of another nation and set forth rights and responsibilities between the United States and the host government.

It would be of great assistance if the ISAB could examine and assess:

- The results and status of recent U.S. efforts to negotiate SOFAs, including – reactions and responses from host nations to sought for U.S. rights, privileges, and immunities, including criminal and civil jurisdiction, the wearing of uniforms, the carrying of arms, tax and customs relief, entry and exit of personnel and property with military identification and travel orders, and resolving damage claims;
- The widening gap between provisions desired by the U.S. Department of Defense and those for which host nations are willing to provide consent;
- Host nation perspectives on U.S. SOFAs and the basis of host nation objections to U.S. SOFA provisions; and
- Improved strategies for U.S. negotiation of future SOFAs, including a view on whether the increased use of public diplomacy would be fruitful.

During its conduct of the study, the ISAB may expand these tasks, as it deems necessary. I request that you complete the study in 270 days. Completed work should be submitted to the ISAB Executive Directorate no later than June, 2014.

The Under Secretary of State for Arms Control and International Security will sponsor the study. The Assistant Secretary of State for Political-Military Affairs will support the study. Ms. Amy Gordon will serve as the Executive Secretary for the study and Mr. Chris Herrick will represent the ISAB Executive Directorate.

The study will be conducted in accordance with the provisions of P.L. 92-463, the "Federal Advisory Board Committee Act." If the ISAB establishes a working group to assist in its study, the working group must present its report or findings to the full ISAB for consideration in a formal meeting, prior to presenting the report or findings to the Department.



Rose E. Gottemoeller



## **Appendix C – Members and Project Staff**

### **Board Members**

Hon. Gary Hart (Chairman)

Hon. Charles B. Curtis (Vice Chairman)

Hon. Graham Allison

Dr. Michael Anastasio

Amb. Brooke Anderson

Hon. Douglas Bereuter

Dr. Bruce Blair

Amb. Linton F. Brooks

BGen. Stephen A. Cheney (USMC, Ret.)

Mr. Joseph Cirincione

Amb. Robert Gallucci

Hon. Sherri Goodman

Amb. Robert E. Hunter

Hon. Shirley Ann Jackson

Dr. Raymond Jeanloz

Dr. David A. Kay

Gen. Lester L. Lyles (USAF, Ret.)

Gen. Montgomery C. Meigs (USA, Ret.)

Rep. Harold P. Naughton Jr.

Hon. William Perry

Mr. Robert N. Rose

Dr. Amy Sands

Lt. Gen. Brent Scowcroft (USAF, Ret.)

Hon. Walter Slocombe

Dr. James A. Tegnalia

Hon. William H. Tobey

Dr. Joan B. Woodard

### **Study Group Members**

Hon. Walter Slocombe (Chairman)

BGen. Stephen A. Cheney (USMC, Ret.)

Rep. Harold P. Naughton Jr.

Dr. James A. Tegnalia

### **Project Staff**

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Executive Director, ISAB

Ms. Amy Gordon  
Executive Secretary

Mr. Christopher Herrick  
Deputy Executive Director, ISAB

Ms. Thelma Jenkins-  
Anthony, ISAB Action  
Officer

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## Appendix D – Individuals Consulted by the Study Group

Charles Allen	Deputy General Counsel, Office of the General Counsel, Department of Defense
CAPT S. Nadeem Ahmad, JAGC, USN	Staff Judge Advocate, EUCOM
Representative, JAGC, USN	Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, Department of Defense
CAPT Timothy Connors, USCG	Staff Judge Advocate, NORTHCOM
COL James Dapper, USAF	Staff Judge Advocate, AFRICOM
Thomas Daughton	Former Negotiator for Security Negotiations and Agreements, Bureau of Political Military Affairs, U.S. Department of State
LTC Todd Dudley, USA	Military Advisor for Security Negotiations & Agreements, Bureau of Political Military Affairs, U.S. Department of State
Joshua Dorosin	Principal Deputy Legal Adviser, Office of the Legal Adviser, U.S. Department of State
Jody Evans (AF, CIV)	Associate Staff Judge Advocate, CENTCOM
LtGen. Wallace “Chip” Gregson (USMC, Ret.)	Senior Advisor, Avascent International, Principal, WC Gregson and Associates

LtCol. Brian Allan Hughes, JA, USA	Deputy Staff Judge Advocate, PACOM
Ambassador Eric John	Negotiator for Security Negotiations and Agreements, Bureau of Political Military Affairs, U.S. Department of State
CDR Elisabeth Jones, JAGC, USN	Office of the Legal Adviser (Political Military Affairs) U.S. Department of State
COL Daniel Lecce, USMC	Staff Judge Advocate, SOUTHCOM
James Miller	Former Under Secretary for Policy, Office of the Secretary of Defense
Robert G. Presler	Office of Strategy, Plans, and Forces, Office of the Secretary of Defense for Policy, Department of Defense
Col. Christopher Spigelmire, USAF	Senior Military Advisor for Security Negotiations and Agreements, Bureau of Political Military Affairs, U.S. Department of State
Shelley Young	Associate General Counsel, Office of the General Counsel, Department of Defense