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Before

**The Committee on Foreign Affairs: Subcommittee on International Organizations,
Human Rights, and Oversight**

United States House of Representatives

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on

**“Status of Forces Agreements and UN Mandates:
What Authorities and Protections Do They Provide to U.S. Personnel?”**

Chairman Delahunt, Ranking Member Rohrbacher, and Distinguished Members of the House Subcommittee,

My name is Chuck Mason, I am a Legislative Attorney with the American Law Division of the Congressional Research Service. I'd like to thank you for inviting me to testify today regarding Status of Forces Agreements (SOFAs) and the authorities and protections that they provide to U.S. Personnel.

Traditionally, a SOFA is an executive agreement that establishes the legal framework under which U.S. military personnel operate in a foreign country. SOFAs may include many components, but the most common issue addressed is which country may exercise criminal jurisdiction over U.S. personnel. The United States has concluded agreements where it maintains exclusive jurisdiction over its personnel, but more often the agreement calls for shared jurisdiction with the receiving country. A SOFA does not authorize specific exercises, activities, or missions. Rather, it provides the framework for legal protections and rights while U.S. personnel are present in a country for agreed upon purposes. A SOFA is not a mutual defense agreement. A SOFA is not a security agreement. A SOFA does not impact or diminish the inherent right of self-defense under the law of war. Today, I would like to provide you with a brief overview of the form and content of non-classified SOFAs between the United States and other countries.

With the exception of the multilateral SOFA between the U.S. and North Atlantic Treaty Organization (NATO) countries, a SOFA is specific to an individual country and is in the form of an executive agreement with that country. The Department of State and the Department of Defense, working together, identify the need for a SOFA with a particular country and will then negotiate the terms of the agreement. The NATO SOFA¹ is the only SOFA that was concluded as part of a treaty.² The Senate ratified the NATO SOFA on March 19, 1970, subject to reservations. The ratification included a statement

that nothing in the Agreement diminishes, abridges, or alters the right of the United States to safeguard its own security by excluding or removing persons whose presence in the United States is deemed prejudicial to its safety or security, and that no person whose presence in the United States is deemed prejudicial to its safety or security shall be permitted to enter or remain in the United States.³

The Senate reservations to the NATO SOFA include four conditions: (1) the criminal jurisdiction provisions contained in Article VII of the agreement do not constitute a precedent for future agreements; (2) when a servicemember is to be tried by authorities in a receiving state, the commanding officer of the U.S. armed forces in that state shall review the laws of the receiving state with reference to the procedural safeguards of the U.S. Constitution; (3) if the commanding officer believes there is danger that the servicemember will not be protected because of the absence or denial of constitutional rights the accused

¹ 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67. Signed at London, June 19, 1951. Entered into force August 23, 1953.

² See, e.g., Agreement under Article VI of the Treaty of Mutual Cooperation and Security Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 11 U.S.T. 1652, entered into force Jun. 23, 1960.

³ 32 C.F.R. § 151.6

would receive in the United States, the commanding officer shall request that the receiving state waive its jurisdiction; and, (4) a representative of the United States be appointed to attend the trial of any servicemember being tried by the receiving state and act to protect the constitutional rights of the servicemember.⁴

Department of Defense Directive 5525.1 provides policy and information specific to SOFAs.⁵ The Department of Defense policy is “to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.”⁶ The directive addresses the Senate reservations to the NATO SOFA by stating even though the reservations accompanying the NATO SOFA ratification only apply to countries where it is applicable, comparable reservations shall be applied to future SOFAs. Specifically, the policy states that “the same procedures for safeguarding the interests of U.S. personnel subject to foreign jurisdiction” be applied when practicable in overseas areas where U.S. forces are stationed.⁷

There are not formal requirements governing the content, detail, and length of a SOFA. A SOFA may address, but is not limited to, criminal and civil jurisdiction, the wearing of uniforms, taxes and fees, carrying of weapons, use of radio frequencies, licenses, and customs regulations. The United States has concluded SOFAs as short as one page and others in excess of 200 pages. For example, the United States and Bangladesh exchanged notes⁸ providing for the status of U.S. armed forces in advance of a joint exercise in 1998.⁹ The agreement is specific to one activity/exercise, consists of 5 clauses, and is contained in one page. The United States and Botswana exchanged notes providing for the status of forces “who may be temporarily present in Botswana in conjunction with exercises, training, humanitarian assistance, or other activities which may be agreed upon by our two governments.”¹⁰ The agreement is similar in its scope to the agreement with Bangladesh and is contained in one page. In contrast, in documents exceeding 200 pages, the United States and Germany entered into a supplemental agreement to the NATO SOFA,¹¹ as well as additional agreements and exchange of notes related to specific issues.¹²

⁴ *Id.*

⁵ Available at [<http://www.dtic.mil/whs/directives/corres/pdf/552501p.pdf>].

⁶ *Id.*

⁷ *Id.*

⁸ Diplomatic notes are used for correspondence between the U.S. Government and a foreign government. The Secretary of State corresponds with the diplomatic representatives of foreign governments in Washington, DC, and foreign offices or ministries abroad. See [<http://foia.state.gov/masterdocs/05fah01/CH0610.pdf>]

⁹ T.I.A.S. Exchange of notes at Dhaka, August 10 and 24, 1998. Entered into force August 24, 1998. (Providing U.S. armed forces status equivalent to Administrative and Technical Staff of the U.S. Embassy).

¹⁰ T.I.A.S. Exchange of notes at Gaborone, January 22 and February 13, 2001. Entered into force February 13, 2001. (Providing U.S. forces status equivalent to Administrative and Technical Staff of the U.S. Embassy).

¹¹ 14 U.S.T. 531; T.I.A.S. 5351. Signed at Bonn, August 3, 1959. Entered into force July 1, 1963.

¹² 14 U.S.T. 689; T.I.A.S. 5352; 490 U.N.T.S. 30. Signed at Bonn, August 3, 1959. Entered into (continued...)

Criminal Jurisdiction

The issue commonly addressed in a SOFA is the legal protection that will be afforded U.S. personnel. The agreement establishes which party to the agreement is able to assert criminal and/or civil jurisdiction. The United States has entered agreements where it maintains exclusive jurisdiction; but the more common agreement results in shared jurisdiction between the United States and the country signing the agreement. The right to exert jurisdiction over U.S. personnel is not solely limited to when an individual is located on a military installation. It may cover individuals off the installation as well. The right to exert jurisdiction can result in complete immunity from the laws of the receiving country while the individual is present in that country.

Example of Exclusive Jurisdiction

The United States entered into an agreement regarding military exchanges and visits with the Government of Mongolia.¹³ As part of the agreement, Article X addresses criminal jurisdiction of U.S. personnel located in Mongolia. The language of the agreement provides, “United States military authorities shall have the right to exercise within Mongolia all criminal and disciplinary jurisdiction over United States [p]ersonnel conferred on them by the military laws of the United States. Any criminal offenses against the laws of Mongolia committed by a member of the U.S. forces shall be referred to appropriate United States authorities for investigation and disposition.”¹⁴ The agreement allows the government of Mongolia to request the United States waive its jurisdiction in cases of alleged criminal behavior unrelated to official duty.¹⁵ There is no requirement for the United States to waive jurisdiction, only to give “sympathetic consideration” of any such request.¹⁶

Example of Shared Jurisdiction

The NATO SOFA, applicable to all member countries of NATO, is an example of shared jurisdiction. Article VII of SOFA provides the jurisdictional framework for the member countries.¹⁷ The SOFA allows for a country not entitled to primary jurisdiction to

¹² (...continued)
force July 1, 1963.

¹³ T.I.A.S., *Agreement on Military Exchanges and Visits Between The Government of the United States of America and The Government of Mongolia*, agreement dated June 26, 1996.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67. Article VII:

“1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.

(continued...)

request the country with primary jurisdiction waive its right to jurisdiction. There is no requirement for the country to waive jurisdiction, only that it gives “sympathetic consideration” of the request.¹⁸ Under the shared jurisdiction framework, each of the respective countries is provided exclusive jurisdiction in specific circumstances, generally when an offense is only punishable by one of the country’s laws.¹⁹ In that case, the country whose law has been offended has exclusive jurisdiction over the offender. When the offense violates the laws of both countries, concurrent jurisdiction is present and additional qualifications are used to determine which country will be allowed to assert jurisdiction over the offender.²⁰

Status Determinations

While the NATO SOFA provides extensive language establishing jurisdiction, the United States has entered numerous SOFAs that appear to have a very basic, but no less

¹⁷ (...continued)

2. -- (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses, including offenses relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
 - (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian components and their dependents with respect to offenses, including offenses relating to the security of that State, punishable by its law but not by the law of the sending State.
 - (c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include
 - (i) treason against the State;
 - (ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.
3. In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:
 - (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
 - (i) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent;
 - (ii) offenses arising out of any act or omission in the performance of official duty.
 - (b) In the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction.
 - (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.
4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.”

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

thorough, jurisdictional determination. These agreements generally contain a single sentence stating that U.S. personnel be afforded a status equivalent to that accorded to the administrative and technical staff of the U.S. Embassy in that country. The Vienna Convention on Diplomatic Relations of April 18, 1961 establishes classes of personnel, each with varying levels of legal protections.²¹ Administrative and technical staff receive, among other legal protections, “immunity from the criminal jurisdiction of the receiving State.”²² Therefore, a SOFA which treats U.S. personnel as administrative and technical staff confers immunity from criminal jurisdiction while in the receiving country.

Authority to Fight

SOFAs do not generally authorize specific military operations by U.S. forces. There is often language defining the scope of the agreement. In the SOFA with Belize, language states that the agreement applies to U.S. personnel “who may be temporarily in Belize in connection with military exercises and training, counter-drug related activities, United States security assistance programs, or other agreed purposes.”²³ The United States had previously entered into two different agreements with Belize related to military training and provisions of defense articles.²⁴ The SOFA itself does not authorize specific operations, exercises, or activities, but provides a framework for legal status and protections of U.S. personnel while in Belize. Under the terms of the agreement, U.S. personnel are provided legal protections as if they were administrative and technical staff of the U.S. Embassy.²⁵ While SOFAs do not generally provide authority to fight, the inherent right of self-defense is not impacted or diminished either. U.S. personnel always have a right to defend themselves, if attacked and/or threatened, and a SOFA does not take away that right.²⁶

Common SOFAs

The NATO SOFA is a multilateral agreement that has applicability among all the member countries of NATO. As of June 2007, 26 countries, including the United States, have either ratified the agreement or acceded to it by their accession into NATO.²⁷ Additionally, another 21 countries are subject to the NATO SOFA through their participation

²¹ 23 U.S.T. 3227; T.I.A.S. 7502. Signed April 18, 1961. Entered into force December 13, 1972. For background see, CRS Report RL33147, *Immunities Accorded to Foreign Diplomats, Consular Officers, and Employees of International Organizations Under U.S. Law*, by Michael John Garcia.

²² *Id.* at art. 37(2), citing art. 31(1).

²³ T.I.A.S. Exchange of notes at Belize City September 4, 2001 and April 24, 2002. Entered into force April 24, 2002.

²⁴ 34 U.S.T. 23; T.I.A.S. 10334. Exchange of notes at Belize and Belmopan December 8, 1981 and January 15, 1982. Entered into force January 15, 1982. T.I.A.S. 11743; 2202 U.N.T.S. 141. Exchange of notes at Belize and Belmopan August 6 and 23, 1990. Entered into force August 23, 1990.

²⁵ T.I.A.S. Exchange of notes at Belize City September 4, 2001 and April 24, 2002. Entered into force April 24, 2002.

²⁶ See CJCSI 3121.01B, Standing Rules of Engagement for US Forces (U), June 13, 2005. (The SROE is a classified document, but portions are unclassified).

²⁷ See [<http://www.state.gov/documents/organization/85630.pdf>].

in the NATO Partnership for Peace (PfP) program.²⁸ The program consists of bilateral cooperation between individual countries and NATO in order to increase stability, diminish threats to peace and build strengthened security relationships.²⁹ The individual countries that participate in PfP agree to adhere to the terms of the NATO SOFA.³⁰ Through the NATO SOFA and those countries participating in the PfP, the United States has a common SOFA with approximately 58 countries. Secretary Rice and Secretary Gates stated that the United States has agreements in more than 115 countries around the world.³¹ The NATO SOFA and NATO PfP SOFA account for roughly half of the SOFAs to which the United States is party.

Classified SOFAs

In any discussion of SOFAs, it must be noted that there are at least 10 agreements that are classified documents. The agreements are classified for national security reasons. Therefore, we cannot comment on their content or the basis upon which they are classified.

²⁸ See [<http://www.nato.int/issues/pfp/index.html>].

²⁹ *Id.*

³⁰ See [<http://www.nato.int/docu/basicxt/b950619a.htm>].

³¹ *What We Need In Iraq*, By Condoleeza Rice and Robert Gates, February 13, 2008, available at [<http://www.washingtonpost.com/wp-dyn/content/article/2008/02/12/AR2008021202001.html>]