

## Guidebook

# Drafting Status-of-Forces Agreements (SOFAs)

Dieter Fleck



**DCAF**

a centre for security,  
development and  
the rule of law



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## About DCAF

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) promotes good governance and reform of the security sector. The Centre conducts research on good practices, encourages the development of appropriate norms at the national and international levels, makes policy recommendations and provides in-country advice and assistance programmes. DCAF's partners include governments, parliaments, civil society, international organisations and various security and justice providers such as police, judiciary, intelligence agencies, border security services and the military. Further information on DCAF is available at: [www.dcaf.ch](http://www.dcaf.ch)

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# Part I: Introduction to the Toolkit

Legislating for the security sector is a complex and difficult task. Many lawmakers thus find it tempting to copy legislation from other countries. This expedites the drafting process, especially when the texts are available in the language of the lawmaker, but more often than not, the result is poor legislation.

Even after being amended, the copied laws are often out of date before coming into effect. They may no longer be in line with international standards or they may not fully respond to the requirements of the local political and societal context. Copied laws are sometimes inconsistent with the national legislation in place.

In some cases, there is simply no model law available in the region for the type of legislation that is needed. This has been the case in the Arab region, where the security sector has only slowly begun to be publicly debated. It is thus difficult to find good model laws for democratic policing or for parliamentary oversight of intelligence services.

It is therefore not surprising that many lawmakers in the Arab region have felt frustrated, confused, and overwhelmed by the task of drafting legislation for the security sector. They found it difficult to access international norms and standards because little or no resources were available in Arabic. Many of them did not know where to search for model laws and several were about to give up. Some eventually turned to DCAF for assistance.

The idea of a practical toolkit for legislators in the Arab region came when practitioners began looking for a selection of standards, norms and model laws in Arabic that would help them draft new legislation. Experts from the Arab region and DCAF thus decided to work together and develop some practical tools.

## Who is this toolkit for?

This toolkit is primarily addressed to all those who intend to create new or develop existing security sector legislation. This includes parliamentarians, civil servants, legal

experts and nongovernmental organisations. The toolkit may also be helpful to security officials and, as a reference tool, to researchers and students interested in security sector legislation.

## What is in the toolkit?

The bilingual toolkit contains a number of booklets in English and Arabic that provide norms and standards, guidebooks as well as practical examples of model laws in various areas of security sector legislation.

The following series have been published or are being processed:

- Police legislation
- Intelligence legislation
- Military Justice legislation
- Status of Forces Agreements

Additional series will be added as the needs arise. The existing series can easily be expanded through the addition of new booklets, based on demand from the Arab region.

For the latest status of publications please visit: [www.dcaf.ch/publications](http://www.dcaf.ch/publications)

## What is the purpose of this toolkit?

The toolkit seeks to assist lawmakers in the Arab region in responding to citizens' expectations. Arab citizens demand professional service from police and security forces, which should be effective, efficient and responsive to their needs. They want police and security organisations and their members to abide by the law and human right norms and to be accountable for their performance and conduct. The toolkit thus promotes international standards in security sector legislation, such as democratic oversight, good governance and transparency.

The toolkit offers easy access in Arabic and English to international norms as well as examples of

legislation outside the Arab region. This allows to compare between different experiences and practices.

The scarcity of Arab literature on security sector legislation has been a big problem for lawmakers in the Arab region. The toolkit seeks to address this deficiency. One of its aims is to reduce time lawmakers spend on searching for information, thus allowing them to concentrate on their main task. With more information becoming available in Arabic, many citizens and civil society groups may find it easier to articulate their vision of the type of police and security service they want and to contribute to the development of a modern and strong legal framework for the security sector.

### **Why is it important to have a strong legal framework for the security sector?**

A sound legal framework is a precondition for effective, efficient and accountable security sector governance because it:

- Defines the role and mission of the different security organisations;
- Defines the prerogatives and limits the power of security organisations and their members;
- Defines the role and powers of institutions, which control and oversee security organisations;
- Provides a basis for accountability, as it draws a clear line between legal and illegal behaviour;
- Enhances public trust and strengthens legitimacy of government and its security forces.

For all these reasons, security sector reform often starts with a complete review and overhaul of the national security sector legislation. The point is to identify and address contradictions and the lack of clarity regarding roles and mandates of the different institutions.

# Part II: Understanding SOFAs

## 1. What is the aim of this guidebook?

This guidebook provides concise information on Status-of-Forces Agreements (SOFAs) with a view to assist in their negotiation. It includes an inventory of relevant questions, discusses possible solutions, and offers expertise for the preparation and adoption of relevant texts. Those negotiations are an important step in the decision whether to deploy military forces on foreign territory or to receive foreign troops in one's own country. Parties to the negotiations should identify and freely discuss all relevant issues and develop practical solutions. For SOFAs, however, a lack of experience, on one side or both sides, often affects negotiations. This guidebook seeks to provide the basis to start negotiations on an even and informed footing.

## 2. What does this guidebook contain?

This guidebook is divided into six parts. Part I provides a brief overview of the DCAF toolkit series *'Legislating for the Security Sector'*. It discusses why it is important to have a strong and coherent legal framework governing the security sector. The present Part II discusses what a SOFA is and why it is important for both the sending and the receiving states to conclude SOFAs when deploying a foreign visiting force. Part III provides an overview of the main principles guiding SOFAs. Part IV sets out common topics dealt with in SOFAs that should be considered by drafters and negotiators of sending and receiving states. Part V of this guidebook discusses important steps to be considered by persons involved in negotiating SOFAs. Part VI provides a table of references.

## 3. Who is this guidebook for?

This guidebook is designed for people interested in understanding how SOFAs should be negotiated, but who do not have an expert understanding of the subject. More specifically, the guidebook addresses three main groups of users. First, it is for those directly involved in

negotiating SOFAs. This includes, among others, civil servants of the ministries of defense, foreign affairs, interior and justice (see below, Part V, Section 1) involved in the negotiation process. Second, this guidebook is for members of parliament and their staff who will have to discuss and approve SOFAs (see below, Part V, Section 2.a). Finally, this guidebook hopes to provide civil society and the media with a tool for reviewing and discussing in public SOFAs, which the government is planning to conclude.

## 4. What is a SOFA?

A Status-of-Forces Agreement (SOFA) is the legal framework that defines the rights and obligations of a foreign visiting force in a receiving state's territory. It is thus an agreement between two or more countries, which are not at war with one another.

### Box 1: Common terms used in this Guidebook

- **'Sending state'** refers to a state that deploys members of its armed forces to a foreign territory.
- **'Receiving state'** refers to a state that accepts, or invites, members of a foreign armed force to its territory.
- **'Foreign visiting force'** refers to armed forces, which are present on the receiving state's territory with the consent/upon invitation of the receiving state.
- **'Peace operation'** refers to military action by the United Nations, regional bodies such as the African Union, a group of states or individual states for the purpose of peace-building, peace-enforcement, peace-keeping and peace-monitoring.
- **'Parties'** refers to states that have agreed to be bound by a SOFA.

Foreign visiting forces serve different purposes and missions in a receiving state. Thus, the content of every SOFA is likely to be unique. There is no standard SOFA text. Even a model SOFA will need to be amended to fulfil the specific requirements of the particular sending state and receiving state. In addition, not all SOFAs are legally binding. While some SOFAs are concluded as binding treaties, others represent politically-binding arrangements between the two sides, such as a Memorandum of Understanding or Exchange of Diplomatic Notes.

SOFAs vary in length and specificity. For example, the SOFA between the United States and Bangladesh consists of five clauses and is written on one page. The SOFA of the former permanent sending states to Germany (Belgium, Canada, France, the Netherlands, the United Kingdom and the U.S.), which supplements the NATO SOFA, exceeds 200 pages. There are various types of SOFAs: standing or permanent SOFAs are different from mission-specific SOFAs. And while the texts of many SOFAs are publicly available, others remain classified.

Table 1: Types of SOFAs

<b>SOFAs for Peace Operations</b>	Time-limited but renewable mandates
<b>SOFAs for Military Cooperation</b>	Long-term (alliance) activities for general purposes or <i>ad hoc</i> missions for specific cooperation projects
<b>SOFAs for a Unilateral Use of Training and Exercise Facilities</b>	Single or recurrent missions for unilateral use of specific facilities

## 5. Why establish a SOFA?

There may be different reasons for sending states and receiving states to determine that it is in their common interest to deploy a foreign visiting force. A receiving state may invite foreign troops to conduct peace operations to provide peace support or post-conflict peace building on its soil. Still within the framework of peace operations, other states may offer their infrastructure for the transit of foreign troops. However, the presence of foreign troops is not restricted to the context of

peace operations. Receiving states are sometimes interested in long-term military cooperation with another state or a group of states, involving the permanent presence of foreign troops on their territory. For example, states may agree on the joint use of specialised or expensive infrastructure, including for military training or exercises.

The principal purpose of a SOFA is to translate a joint commitment into a practical and reliable form. SOFAs often set out what the parties hope to achieve from the deployment, provide clear goals, such as the re-establishment of the rule of law in the case of peace operations and provide for mechanisms for settling disputes.

Experience shows that the success of a mission often depends on whether the military personnel's rights and obligations have been well-defined, procedures of cooperation are clearly established and effective dispute settlement mechanisms are in place. A carefully drafted SOFA is therefore key to achieving the objectives of both the sending and receiving states.

Finally, for some sending states, agreeing on a SOFA is fundamental before deploying military forces abroad. As such, SOFAs often include a paragraph stating that *"the government of state X requests the assistance of the defence forces of state Y"*.

## 6. What does a SOFA provide?

A SOFA provides a framework for the deployment of the foreign visiting force. The text of a SOFA is, however, not easily to be standardised. Every SOFA needs to respond to the specific requirements of a sending state and a receiving state. A SOFA can define the mandate of the mission, including why the foreign visiting force is present and for how long. More specifically, SOFAs are used to set out the rights and obligations of visiting forces operating on foreign soil and how they should interact with the authorities of the receiving state.

SOFAs can also limit disagreements between parties by exactly defining rights and obligations and establishing principles and procedures for dispute settlement. Importantly, SOFAs regulate criminal jurisdiction over the sending state's forces, its military and civilian personnel and their dependents (see below, Part IV, Section 7). In many cases, SOFAs also regulate civil jurisdiction

and the settlement of claims (see below, Part IV, Section 8). SOFAs may also regulate the right to wear uniforms and to carry weapons, or the use of radio frequencies, postal services, and exemptions from customs and taxes. Finally, a SOFA also allows the receiving state to stipulate by which time the foreign visiting forces stationed on foreign territory on a temporary basis will need to depart from this territory.

In some cases, the parties decided to supplement an existing general SOFA with specific rules. This is for example the case when a sending state provides its armed forces with specific rules to assist in fulfilling the objectives of the deployment set out in the SOFA. Thus, a SOFA may include a provision that a foreign visiting force is able to use lethal force. In such case, Rules of Engagement will set out when, where, against whom and how such force may be used. Rules of Engagement are often only fully known to the members of the force.

### 7. What is the current international practice?

There is no uniform international practice as regards the mutual agreement between a sending and receiving state to deploy troops. To this day, many military deployments take place without a SOFA. However, receiving and sending states increasingly tend to establish SOFAs, to provide for legal certainty and transparency. The established practice of the UN and other international organisations, such as the European Union, the African Union, the Economic Community of West African States (ECOWAS), and the North Atlantic Treaty Organization (NATO), is to conclude SOFAs with the receiving state. These organisations use widely-accepted standards, such as those included in the UN *Draft Model Status-of-Forces Agreement*,<sup>1</sup> which serves as a basis for agreements between the UN and states where peace operations are deployed. Furthermore, the European Union (EU) and the North Atlantic Treaty Organization (NATO) have concluded standing SOFAs for member states to deploy military forces within the territory of another member state, for instance for training and exercises. SOFAs are even agreed for operations that commence at short notice. If negotiations are not completed in time, states can seek to retroactively make SOFAs binding, so that they apply from the beginning of the deployment.

### 8. A brief history of the law of foreign visiting forces

Before and during the Second World War, military deployments into foreign territories mostly aimed at supporting the receiving state during an armed conflict. For example, U.S. Forces were stationed in the UK, in France and Belgium during the Second World War. In these cases, the receiving state was often in a weak bargaining position. As a result, the sending state was authorised to apply the law of its choice, often its own national law, without limitations by the law of the receiving state.

After the Second World War, the situation had changed and the first permanent 'visiting forces agreement', the NATO SOFA,<sup>2</sup> was concluded as a reciprocal and lasting arrangement for peacetime deployments on allied territories. This SOFA was designed to generally remain in force even in the event of hostilities. This was made possible in part due to rather similar legal systems of the participating states and the desire by all parties to define their rights and responsibilities in a balanced way. In the Warsaw Pact, bilateral SOFAs were used for the deployment of Soviet forces, most particularly in the German Democratic Republic.

Since the end of the Cold War, UN peacekeeping operations have led to a new development in the law of foreign visiting forces. The Security Council has adopted resolutions under Chapter VII of the UN Charter, which led to deployments of peacekeeping forces to certain areas without the consent of the receiving state. However, on other occasions receiving states have made a request to the UN or another regional body, such as the African Union, to deploy forces to their territory for peace operations. To address this second set of situations, the UN General Assembly adopted in 1990 the UN Model SOFA.<sup>3</sup>

Future trends in the law of foreign visiting forces will depend on developments in the global and regional security architecture and methods and means of military operations. States and international organisations deploying military forces abroad are likely to use SOFAs to exactly define rights and obligations. For example, given the increasing role of civilian contractors for military operations of a sending state, SOFAs are now also used to set out the roles, rights and responsibilities of these contractors (see below,

Part IV, Section 3). Furthermore, the obligations of the foreign visiting forces to protect human rights and the environment will likely become more important in the near future and could lead to important provisions in SOFAs.

# Part III: Principles Guiding SOFAs

## 1. What does international law provide on the deployment of foreign visiting forces?

International law contains both norms concerning the justification for deploying foreign forces as well as for their conduct and status during deployment.

States are generally free to agree on sending military forces abroad or accepting a foreign military presence on their territory. Furthermore, the United Nations or a regional organisation may invite a sending state to participate in a peace support operation in agreement with the receiving state. Finally, a sending state may perform a peace enforcement mission under Chapter VII of the UN Charter without consent of the receiving state or in the exercise of its right to self-defence.

International law also provides norms for the conduct of the foreign visiting forces and its consequences. Its sources are treaties, customary law and general principles of international law. The most relevant branches of international law relate to state responsibility, state immunity, human rights, and international criminal law.

A SOFA can refer to such international law principles or supplement them for the mission under consideration.

## 2. What is the form and legal nature of SOFAs?

A SOFA can take many different forms. It can be a legally binding instrument, such as a treaty or agreement, which must be signed and ratified by the parties. Alternatively, it can be an expression of a political commitment set out in a 'Memorandum of Understanding' or an 'Exchange of Diplomatic Notes'. SOFAs can be concluded bilaterally between one sending state and one receiving state. They may also take the form of a multilateral arrangement between a number of parties, especially when the armed forces of more than one sending state are operating in the receiving state. SOFAs can be designed for a specific mission

or for recurring/permanent missions in one or all of the participating states.

Once a SOFA is formally adopted, parties must implement and comply with it. This derives from the fundamental principle of international law, which states that *"treaties must be complied with"*.<sup>4</sup> However, SOFAs, like many treaties, are not automatically part of the national law of either the receiving or the sending state. Each participating state will have its own constitutional mechanisms regulating how international agreements become domestically binding. Most states will need to adopt rules and provisions at the national level (see below, Part IV, Section 10.a). Certain SOFA provisions are declaratory in nature in that they reaffirm obligations which already exist. Others have a constitutive character: they establish or amend rights and obligations.

Experience from peace operations shows that sending states often face unforeseeable challenges and changes in the character of the mission. This in turn can give rise to new legal and policy issues. A SOFA should therefore be as flexible as possible and remain open for adaptations as necessary.

## 3. What are the key principles of the law of foreign visiting forces?

The law of foreign visiting forces consists of three general principles:

- a. Functional immunity for the sending state's forces
- b. Respect for the law of the receiving state
- c. Compliance with a defined mandate
- d. These principles can be confirmed and further developed in SOFAs. While each of the three principles is essential, they may at first glance seem contradictory. The sending and receiving states will need to consider carefully how the three principles will operate in practice.

**a) Functional immunity**

Military forces operating on foreign territory have a special legal status. As organs of their sending state, they enjoy sovereign immunity from legal proceedings in another state, such as in the receiving or any transit state.<sup>5</sup> This immunity does not depend on the receiving or transit state's permission. It derives from the principle of state sovereignty as recognised in customary international law. The purpose of such privileges and immunities is not to provide benefits to individuals in private affairs, but rather to ensure an unimpeded performance of their official functions. The immunity of the sending state's military in the receiving state is crucial for its mission (see below, Part IV, Sections 6 and 7). While state immunity does not depend on the conclusion of a SOFA, such an agreement can be used to confirm the principle.

It is important to note that immunity does not imply impunity for any crimes committed by members of the military forces of a sending state. It also does not limit the accountability of that state for any wrongful act (see below, Part IV, Sections 7 and 8). Rather, it bars the receiving state from taking direct action against the members of a foreign visiting force. Thus any matter of concern should be solved in cooperation with the sending state.

**b) Respect for the law of the receiving state**

A foreign visiting force is not free to disregard the laws of the receiving state. Some of these laws, for example traffic rules, will apply to personnel of the foreign visiting force. However, other laws do not apply, for example rules on the use of firearms or on taxation. For this reason, it is useful to define in the SOFA what laws of the receiving state will be binding on the foreign visiting force and what procedures will apply if these laws are breached (see below, Part IV, Section 6).

**c) Compliance with the mandate**

It is important to clearly define the mandate of the foreign visiting force in the SOFA. This serves two main purposes. First, it confirms the obligation for the receiving state to respect and support the operations performed by

the foreign visiting force under the mandate. Second, it limits the operations of the foreign visiting force to those required to execute the mandate.

## 4. Do SOFAs apply in wartime?

A SOFA is an agreement between states that are not at war with one another. In some cases, agreeing on a SOFA marks the transition between an occupation and a peace building operation. As SOFAs deal with peacetime scenarios, they normally do not address issues of international humanitarian law applicable in armed conflicts.

The existence of a SOFA does not affect or diminish the parties' inherent right of self-defence under international law. In the event of an armed conflict between the parties, the terms of the SOFA will be subject to changes. A SOFA may state this expressly in its provisions on termination. However, even without such provisions, a SOFA could be terminated in the event of armed conflict.<sup>6</sup>

However, even in the case of an armed conflict, some provisions of the SOFA may continue to apply, such as for example any outstanding claims and dispute settlement procedures. Hence, in the event one or all parties become involved in an armed conflict, a case-by-case assessment will be necessary to identify any continuing obligations of the parties.

# Part IV: The Content of a SOFA

International law contains both norms concerning the justification for deploying foreign forces as well as for their conduct and status during deployment.

## 1. General and opening provisions

SOFAs can begin by setting out in general terms the nature of the relationship between the sending and receiving state that has led to the deployment of the foreign visiting force. For example, the preamble could state that the close bilateral relationship between the two states and mutual interests have led to the conclusion of the SOFA for joint military training activities. Alternatively, the SOFA could state that the receiving state has requested the deployment of the sending state's forces for peace operations. Such opening paragraphs will set the framework for the SOFA and may provide guidance for interpreting subsequent provisions.

In particular, opening paragraphs could describe:

- a. The mandate of the mission of the foreign visiting force (such as to restore peace and security under the rule of law, conduct joint training activities, protect the sending states' embassy or other property etc.);
- b. The basis of the mission (such as the close bilateral relationship, mutual interests, the conduct of a peace operation, implementation of a UN Security Council Resolution etc.);
- c. The timelines for the mission.

## 2. Members of the force, civilian components, and dependents

A key issue for any SOFA negotiation is to identify clearly to whom the agreement is intended to apply to (i.e., the personal scope of the SOFA). Three groups of persons must be considered in this respect:

- a. Members of the armed forces of the sending state
- b. Civilian personnel employed or contracted by

the sending state

- c. Dependents of members of the sending state's armed forces

A SOFA can define whether it covers the armed forces of a sending state without further specification, or only certain individuals, units or formations. Civilian components can include personnel of different nationalities, including nationals of the receiving state, who may be hired by the sending state or by one of its private contractors. The status, tasks and responsibilities of civilian contractors require particular consideration (see below, Part IV, Section 3). Dependents are often excluded altogether from rights and duties allocated under the SOFA to members of armed forces, unless the mission is of a longer duration or a permanent cooperative arrangement.

## 3. Private contractors – including private security companies

Sending state's military or police forces often hire private companies to fulfil a range of functions. These companies need to be covered by an agreement in order to enjoy functional immunity (see above, Part III, Section 3.a). In the absence of an agreement, their status is that of foreign workers in the receiving state.

Private companies may be contracted to perform security tasks, but these should be limited to a strictly civilian function. The human resources management should observe that certain activities are inherently governmental and must be executed by the armed forces. The regulatory regime for private security companies is often unsatisfactory, in particular if the sending state's legislation does not apply to their performance abroad. Thus, if private security companies are likely to be involved in a mission, it is useful to include specific provisions in the SOFA, including what type of private security companies can be used, accountability, and oversight requirements. This can help to ensure that they are bound by the rule of law.

A number of international instruments and initiatives offer guidance on the proper conduct of private security companies and may be referred to in SOFAs. The *Montreux Document on Private Military and Security Companies*<sup>7</sup> of 2008 describes pertinent international legal obligations and good practices for states. An international code of conduct for private security companies – the *Code of Conduct for Private Security Companies and Private Military Companies* – has been developed by the Swiss government in collaboration with US and UK government experts and representatives of the private security industry.<sup>8</sup> This code of conduct incorporates internationally recognised human rights standards and promotes best practices in supervision and accountability of private contractors. In addition, a working group set up by the Human Rights Council is engaged in the elaboration of a new legal instrument for regulating the activities, oversight and monitoring of private military and security companies under international law. It should be in the interest of both the receiving state and the sending state to address the role of private security companies in the SOFA and provide for cooperative solutions of contentious issues which may arise in this context.

#### 4. Entry and exit

Members of the foreign visiting force, its civilian component and dependents (if they are included in the scope of the SOFA) must be given the right to enter into, reside in, and leave the receiving state. Typically, the receiving state exempts these persons from passport and visa regulations, as well as immigration inspection. However, each member of the sending state must have a personal identity card and show it on demand to competent authorities of the receiving state. For that purpose, the SOFA should provide what sort of personal identity documents will be issued by the sending state.

To be able to perform their mission, foreign visiting forces must also have a certain freedom of movement within the receiving state. However, SOFA provisions can impose restrictions on access to certain routes and areas, e.g. for reasons of public order and security, or the protection of the environment.

Members of a foreign visiting force, its civilian component and dependents have no right to permanent residence in the receiving state.

#### 5. Safety and security

The safety and security of a foreign visiting force, including its civilian component and dependents, is essential for the success of any mission. While strictly speaking safety and security may have a different meaning,<sup>9</sup> both terms are often used interchangeably. The 1994 UN Safety Convention and its 2005 Optional Protocol are not limited to safety issues, but deal with both security and safety.<sup>10</sup> Under the Convention all parties are obliged to ensure the safety and security of United Nations and associated personnel and take appropriate steps to protect such personnel deployed in their territory. The Optional Protocol extends that obligation to the protection of operations delivering humanitarian, political and development assistance. These principles apply for any deployment hosted in a receiving state, irrespective of the fact whether it is operating under a UN mandate or not.

Receiving states are rarely able to ensure the safety and security of the foreign visiting force. Hence this responsibility needs to be shared by the sending state. For this reason, the sending state will have to ensure the safety of its personnel through the use of its military and police forces and/or employ private security companies (see above, Part IV, Section 3).

The SOFA should reflect this shared responsibility for safety and security and identify competent authorities on both sides, describe their respective tasks, and arrange for cooperation.

#### 6. Respect for the law of the receiving state

As discussed in Part III, Section 3.b, the extent to which the law of the receiving state applies to foreign visiting forces forms an important part of SOFA negotiations. Foreign visiting forces are not automatically subjected to all the laws of the receiving state. For instance, it would not make sense for the receiving state to seek to regulate matters such as the command structure, terms of

service and salaries of the members of the foreign visiting force. Furthermore, the foreign visiting force is entitled to establish the education and training programmes of its schools in accordance with its own national requirements. However, the receiving state's requirements may be relevant for building regulations and fire precautions, particularly where there are local employees. This scenario is comparable to that of foreign diplomatic or consular personnel in a receiving state.<sup>11</sup> Therefore, SOFA negotiations should identify the laws of the receiving state that will apply to the foreign visiting forces, and both receiving and sending states should agree to cooperate on these issues.

### Box 2 : Respect for the law of the receiving state

It is the duty of members of the visiting force and its civilian members as well as their dependents:

- to respect the law of the receiving state, and
- to abstain from any activity inconsistent with the force's mandate, especially political activity in the receiving state.

It is the duty of the sending state to take necessary measures to ensure that its personnel deployed under the SOFA as well as their dependents respect these obligations.

The NATO SOFA (1951) for instance aims to ensure respect for the law of the receiving state in its Article II.<sup>12</sup> Yet, there are different interpretations of the duty to 'respect'. Some view this duty as an obligation to apply and act in conformity with the law of the receiving state. Another view is that Article II of NATO SOFA does not provide for the direct application of receiving state law, but only requires the sending state to respect that law in general. Usually, the receiving state cannot directly take action against a sending state that broke its law, as it has no jurisdiction or powers of enforcement over the forces or civilian components of a sending state. Yet, any particular case can be raised by the receiving state in discussions with the authorities of the sending

state and, should the two sides be unable to reach an agreement, the procedures for settling disputes may be used (see below, Part IV, Section 10. c).

Respect for the law of the receiving state includes respect for the obligations of that state under international law. This is of particular relevance for human rights obligations of the receiving state. When deploying foreign visiting forces abroad, sending states are bound to comply with their own obligations under international law, including international human rights. However, these human rights obligations of sending states will apply extraterritorially only to acts committed within their jurisdiction.<sup>13</sup> Yet, to ensure the success of the mission, sending states should also take a sensitive approach to the human rights commitments of the receiving state. The parties may wish to clarify this in the SOFA.

## 7. Exercise of jurisdiction in criminal matters

If members of a foreign visiting force are suspected of a crime, they are generally indicted by a competent national court of the sending state. The receiving state may also exercise jurisdiction if the sending state agrees to waive its member's immunity (see above Part III, Section 3.a).

A SOFA should provide when the receiving state can exercise jurisdiction over criminal matters and when the sending state may waive immunity. Jurisdiction may be either exclusive or concurrent. In the former case, only one state exercises jurisdiction, while in the latter one state has the primary right to exercise jurisdiction, but may decide to waive it upon the other state's request. In the absence of relevant SOFA provisions, the sending state has exclusive jurisdiction over its personnel under customary international law.

An important exception to the sending state's right to exercise exclusive jurisdiction is found in international criminal law. Article 27 of the Statute of the International Criminal Court (ICC)<sup>14</sup> provides that immunities do not bar the ICC from exercising its jurisdiction on crimes against humanity, war crimes and the crime of aggression. However, Article 98 of the ICC Statute provides that the Court may not proceed with a request for

surrender or assistance, unless it can first obtain the cooperation of the respective state for a waiver of its immunity. It will be important for negotiators to consider this in SOFA negotiations.

**a) SOFA provisions where the sending state has exclusive jurisdiction**

There are different types of arrangements for determining who will have criminal jurisdiction over a sending states' military forces and civilian components. Most SOFAs, especially those applicable to peace operations, confirm the exclusive right of the sending state to exercise jurisdiction over its military and civilian personnel. Only exceptionally does the receiving state exercise jurisdiction. This can happen for long-term cooperation, where both states have similar legal systems, or as a political compromise on contentious issues.

**Box 3 : Exclusive jurisdiction**

The **sending state** has the exclusive right to exercise full jurisdiction over its military and civilian personnel. This includes:

- Immunity of the sending state from legal process in the receiving state
- A need for cooperation between competent authorities of the sending and receiving states

An example of a SOFA providing for exclusive jurisdiction of the sending state is the UN Model SOFA (1990), which states that:

'All members of the United Nations peace-keeping operation including locally recruited personnel shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue even after they cease to be members of or employed by the United Nations peace-keeping operation and after the expiration of the other provisions of the present Agreement.'<sup>15</sup>

If under such a SOFA, the receiving state suspects any member of the foreign visiting force of a criminal offence, it should inform

the force commander and present to him any evidence available. The UN Model SOFA states that military members of a UN peacekeeping operation shall be subject to the exclusive jurisdiction of their sending state and the receiving state can institute proceedings against members of the civilian component only with the agreement of the force commander.<sup>16</sup>

The agreements concluded between NATO and Bosnia-Herzegovina and Croatia are examples of SOFAs providing for exclusive jurisdiction of the sending state, without, however, addressing the status of civilian personnel in this respect.<sup>17</sup>

Such differences between military and civilian members of a force may create problems for both sides. Recognising this, the SOFAs on the NATO-led missions in Kosovo and Afghanistan provide for the exclusive jurisdiction of the sending state in respect of military personnel, civilian personnel and even local personnel and contractors.<sup>18</sup>

The EUFOR Model SOFA provides that all EUFOR personnel, both military and civilian (with the exception of local personnel and private contractors), shall enjoy immunity from the criminal jurisdiction of the receiving state under all circumstances, whether or not the alleged offence was committed in the performance of official duty.<sup>19</sup>

**b) SOFA provisions where jurisdiction is concurrent**

For the sending and receiving state to exercise concurrent jurisdiction, three provisions would have to be included in the SOFA: First, a definition of those situations for which the receiving state may exercise jurisdiction; second, a definition of those other situations for which jurisdiction rests with the sending state; and third, a call for cooperation between the competent authorities of both states.

**Box 4 : Concurring jurisdiction**

Both the sending and the receiving state can exercise jurisdiction in what is called concurrent jurisdiction. The three following provisions should be included in a SOFA:

- Description of situations for which the receiving state may exercise jurisdiction
- Description of other situations for which the sending state may exercise jurisdiction
- A need for cooperation between competent authorities of the sending and receiving state

The principles of exclusive and concurrent jurisdiction can also be combined. The most well known example of this is the NATO SOFA. It gives both the sending and the receiving state exclusive jurisdiction in the case of an offence that violates the law of one state, but not the law of the other state. For crimes violating the law of both states, the NATO SOFA establishes a system of priorities: The *sending state* has the primary right to exercise jurisdiction over its personnel for offences committed during official duty and offences that only affect its security, property or personnel. The *receiving state* has primary jurisdiction in all other cases. If a case is of particular importance to one state, the other state may waive its jurisdiction.

Should the parties agree on concurrent jurisdiction, or give the receiving state exclusive jurisdiction in some areas, the sending state may wish to set out in the SOFA how it would expect its personnel to be treated by the receiving state. For example, the NATO SOFA provides that whenever a military or civilian representative of the sending state, or a dependent, is prosecuted under the jurisdiction of a receiving state, he or she is entitled:

- a. to a prompt and speedy trial;
- b. to be informed, in advance of trial, of the specific charge or charges made against him;
- c. to be confronted with the witnesses against him;
- d. to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving state;
- e. to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving state;
- f. if he considers it necessary, to have the services of a competent interpreter; and
- g. to communicate with a representative of the government of the sending state and when the rules of the court permit, to have such a representative present in his trial.<sup>20</sup>

Such regulation contributes to close cooperation and confidence-building between both states. It is most beneficial in cases where forces are stationed on a long-term basis in a receiving state with a legal system comparable to that of the sending state.

The exercise of concurrent jurisdiction can also be imposed by political sensitivities. For instance, the US-Iraqi SOFA<sup>21</sup> assigned jurisdiction over offences committed by U. S. personnel based on the location of the offence. Iraq has primary jurisdiction over off-duty members of the U.S. Forces and civilian components who have committed 'grave premeditated felonies' outside U.S. installations. These major crimes were defined by a joint U.S.–Iraqi committee and the U.S. retained the right to determine whether or not its personnel were on or off-duty. Furthermore, the agreement gives Iraq primary jurisdiction over U.S. contractors.<sup>22</sup>

### c) Police powers executed by sending states

A SOFA should grant the sending states policing powers within the premises assigned to them (i.e., on their military bases and installations). However, in today's military operations, foreign visiting forces often need to perform basic policing functions outside their premises. This may include the identification, arrest and detention of suspects. A SOFA will need to provide that the foreign visiting force has the powers to fulfil these functions, in particular the power of arrest and detention. Thus, a SOFA should address the situation of police powers both within and outside the sending state's premises, considering that in both cases not only

members of the force, but also third persons may be affected.

### Box 5 : Police powers

It is important that a SOFA addresses police powers. Sending states may need to exercise police powers:

- Inside their premises;
- Outside their premises (perhaps limited to maintaining discipline and order of their forces);
- In the entire territory (in cooperation with the local police)

For example, the NATO SOFA provides that the foreign visiting force may take all appropriate measures to maintain order and security on their premises. Outside those premises, such measures must be executed jointly with the authorities of the receiving state and limited to what is necessary to maintain discipline and order among members of the foreign visiting force.<sup>23</sup>

However, these NATO regulations would hardly be sufficient for peace operations. Accordingly, the UN Model SOFA contains a detailed framework for the arrest of criminal suspects by the military police of a UN peacekeeping operation. It regulates the transfer of custody of a detainee to the nearest appropriate official of the receiving state, and calls for mutual assistance during criminal investigations.<sup>24</sup>

In practice, peace operations often take place in post-conflict environments with weak state institutions. The receiving state's police will often lack experienced personnel, facilities and equipment for dealing adequately with suspects handed over by the UN peacekeeping forces. Circumstances often require that the policing powers of peacekeeping forces are further extended to include other aspects of the criminal justice process, such as investigation and gathering evidence for trial. Sometimes the foreign visiting forces are expressly or implicitly tasked to execute police functions in support of the competent authorities of the receiving state. In any SOFA negotiation, a discussion of the powers of

a foreign visiting force to exercise police functions is as important as the discussion on the exercise of criminal jurisdiction.

## 8. Settlement of claims and civil jurisdiction

The settlement of claims is an important part of the operations of the sending state's force. A SOFA should deal with two types of claims: First, those brought by one of the parties against the other and, second, those brought by third parties (such as citizens or residents of the host country). The relevant principles and procedures of settlement for these two cases should be specified in the SOFA.

The provision regarding the settlement of claims should regulate third party claims for cases of death, injury, damage or loss caused in the performance of official duty. It is also important that the provisions regulate the voluntary settlement of claims on behalf of the sending state for losses or damages resulting from acts or omissions outside the performance of official duties.

The parties may also agree to waive the liability of the sending state for specific cases. In other cases, the receiving state may accept responsibility for settling certain claims brought by a third party against the foreign visiting forces.

For example, under Article VIII of the NATO SOFA, both the sending state and the receiving state waive all claims against each other in the case of the death or injury of any member of its armed services in the performance of official duties. The same waiver applies for damage to property owned, provided such damage was caused in connection with a NATO operation. Furthermore, the NATO SOFA also provides that third party claims against a sending state are settled by the receiving state and the costs incurred are shared between the sending and receiving state.

Where the sending and receiving state cannot agree on such cooperative measures, the processing and settlement of all claims is the responsibility of the sending state. It is in the interest of both parties that any claims connected with the deployment are settled expeditiously. Any undue delay or unjustified denial of responsibility might negatively affect the mission of the sending state and its cooperation with the receiving state. Hence it is important that the

question of responsibility is properly addressed during the negotiations. The SOFA should also include information on the competent authorities and the applicable procedures.

Unless otherwise stated in the SOFA, the national courts of the receiving state do not have jurisdiction over disputes arising between the sending and receiving states. Additionally, a national court will not have jurisdiction over third-party claims brought against a sending state. The parties may wish to consider during negotiations whether the SOFA should provide a process to appeal a sending state's claims decisions.

For example, under the NATO SOFA (Article VIII paragraphs 2 and 8), final and conclusive decisions on claims disputes may be taken by an arbitrator. This arbitrator should be selected by agreement between the sending and receiving state and be a national of the receiving state who holds or has held high judicial office. As for the UN Model SOFA (Sections 51-54), it provides for a mixed claims commission and a tribunal of three arbitrators to solve remaining disputes. These institutions and the procedures they apply should be clearly set out in the SOFA (see below, Part V Section 2.c).

## 9. Miscellaneous provisions

Some SOFA provisions look at first sight rather technical. Yet, they may gain considerable practical and political importance during the deployment of the foreign visiting force. Such provisions may include uniforms and arms; permits and licences; taxation and other fiscal issues; the use of communication lines; the operation of vehicles; and logistic support in general.

### a) Uniforms and arms

Military members of armed forces traditionally wear uniforms to distinguish themselves from the civilian population and to identify the unit or formation they belong to. International humanitarian law prescribes that during armed conflict combatants must distinguish themselves from the civilian population, at the very least when they are involved in hostilities.<sup>25</sup> For peacetime deployments on foreign territory, wearing uniforms must be permitted by the receiving state. That permission is normally granted and regulated in the SOFA.

According to the UN Model SOFA (Section 37), while performing official duties, the military members and civilian police of a peacekeeping operation should wear the national military or police uniform of their respective state with standard UN accoutrements, and UN security officers and field service officers may wear the UN uniform.

The military members of the foreign visiting force must be allowed to possess and carry arms. The use of these arms outside the sending state's premises should be regulated in the SOFA.

### b) Permits and licences

It is essential that the receiving state recognises driving and pilot permits issued by the sending state to its personnel, without imposing additional tests or fees. For identification purposes, the receiving state may issue its own documents (i.e., documents recognising the validity of a sending state's permit or licence), provided there are no additional tests or fees.

For example, the UN Model SOFA states in its Section 38 that permits and licences issued by the UN Commander or Special Representative are accepted as valid by the receiving state.

### c) Taxation and other fiscal provisions

According to the principle of sovereign immunity, no state is to pay taxes to another state. This principle also applies to mutual defence obligations and peace operations regulated by a SOFA.

Article X of the NATO SOFA provides tax exemptions for members of the visiting force and its civilian component. These include salaries paid by the sending state and movable property temporarily brought into the receiving state. The equipment of the force and reasonable quantities of provisions and supplies for the force are exempt from duties under Article XI (4) of the NATO SOFA. Further exemptions can be granted in supplementary agreements to the SOFA. However, the sending state must normally pay customs duties on importation or exportation of goods.

The UN Model SOFA (Sections 29-31) exempts members of the foreign visiting force from direct taxes. However, services by

private contractors or state actors, such as communication, logistics, rentals, etc., are subject to taxes.

**d) Communications**

Having in place an efficient communication system is indispensable to military operations. For this reason, a SOFA should grant the sending state access to a range of communications (such as radio-wave frequencies, internet access etc.) At the same time, a sending state should cooperate with the communication authorities of the receiving state in order to avoid any interruption or breakdown of communications in the host country.

In practice, this may involve agreements with the communication authorities of the receiving state to ensure adequate postal and telecommunication services and broadband networks.

**e) Vehicles**

The service vehicles and aircraft of a foreign visiting force may enjoy broad exemptions from the requirements of the law of the receiving state (e.g. a foreign military force may use left-hand drive vehicles in a right-hand drive receiving state). A SOFA may require that the vehicles of the foreign visiting force be marked with a distinctive sign that would readily identify them. The SOFA can also require the sending state to ensure adequate safety measures and registration of vehicles.

Vehicles owned privately by personnel of the sending state are generally subject to the law of the receiving state. However, the SOFA may allow the sending state to arrange for their registration.

**f) Logistic support**

The logistic support of the receiving state is of particular significance for any military deployment. Even well-equipped military forces have to rely on local assistance in logistic matters, at least to some degree. The receiving state itself may be interested to provide such support or to facilitate its provision, as this would help to limit the deployment and is likely to benefit the local economy. Thus, a SOFA may include regulations on logistic

support, address relevant legal requirements (including health and environmental protection) and provide for a fair distribution of costs. Regarding this last issue, a guiding principle may be that the sending state is financially responsible and that the receiving state should not earn profits from deployments that serve its national security interests.

## **10. Final clauses**

**a) Entry into force**

As mentioned in Part III, Section 2, SOFAs can be either legally binding or an expression of political commitment. Either type of SOFA should include a clear provision on its entry into force. In practice, it is often difficult to provide a precise date because of the lengthy process that is required to make the provisions of a SOFA binding both under the national law of the receiving state and that of the sending state. Many SOFA provisions may affect the national law of the parties and additional legislation may be needed to ensure their implementation. It can take some time for legislation to be drafted, discussed, adopted and enacted by parliament. In divided societies parliamentary approval becomes particularly important and symbolises a receiving state's commitment to the mission.

For example, Article XVIII (2) of the NATO SOFA states that the Agreement should come into force '[t]hirty days after four signatory States have deposited their instruments of ratification'. This process took two years to be completed by the first four NATO states. Many other signatory states still had not ratified the SOFA by that time, and for each of them the Agreement entered into force at a later date. The situation may be different for SOFAs that do not go beyond the scope of executive agreements, i. e. agreements on matters falling within the authority of the participating governments without requiring parliamentary approval.

**b) Provisional application**

As the entry into force of a SOFA can take a long time, pragmatic solutions should be investigated for deployments that must take

place before the SOFA's entry into force. For the UN missions in Ethiopia and Eritrea, the Security Council requested both governments to conclude SOFAs within thirty days. Pending conclusion, the UN Model SOFA of 9 October 1990 applied provisionally.<sup>26</sup> While UN member states are bound by such a solution under Article 25 of the *UN Charter*, it may be difficult to implement without a Security Council decision. It must be considered here that there is a difference between validity under international law and legal effects at the national level. While state parties agreeing on the provisional application of their international treaties will be bound to such commitments under international law, they must fulfil the constitutional requirements of their domestic legal system before a provisionally applied treaty can prevail at the national level, for example before a national court. Yet, notwithstanding the legal limitations of each state, the provisional application of a treaty or of parts of the treaty may be agreed between the parties.<sup>27</sup> If the deployment takes place before the SOFA enters into force, the SOFA should state that its provisions will apply retroactively from the beginning of the deployment.

**c) Settlement of disputes**

It follows from the character of SOFA rules that any evolving dispute is to be settled by negotiation rather than judicial decision. A typical settlement-of-disputes clause would provide that any dispute will be resolved by negotiation at the level of Government officials and be submitted to higher authorities in case no solution can be reached.

As an example, Article XVI of the NATO SOFA provides that differences shall be settled by negotiation 'without recourse to any outside jurisdiction' and 'differences which cannot be settled by direct negotiation shall be referred to the North Atlantic Council'. In NATO's history, it has never been necessary to appeal to the North Atlantic Council for this purpose, as NATO member states have always been able to solve such issues bilaterally.

Sections 51-54 of the UN Model SOFA include more specific provisions on the settlement of disputes. It calls for the parties to establish a

standing claims commission and a tribunal of three arbitrators to review claims and take final and binding decisions. In practice, most disputes are settled in negotiations between representatives of the UN Secretary-General and the host government. In any case, as spelled out in Section 56 of the UN Model SOFA, provisions should be made in any SOFA for taking 'appropriate measures to ensure close and reciprocal liaison at every appropriate level'.

Experience has shown that there is rarely an alternative to dispute settlement by negotiation, regardless of the foreign visiting force's mandate. In fact, SOFAs can expressly exclude any judicial recourse.<sup>28</sup> There is no international jurisprudence on this matter.

**d) Termination**

Even if SOFAs are intended to operate indefinitely, they should contain clauses on termination. In the usual course, a SOFA can be terminated or suspended by any party, if they follow the steps set out in the treaty. The SOFA can also be terminated any time by mutual consent after consultation between all the parties.<sup>29</sup> For practical reasons, the SOFA should provide that any termination is effective only after all forces of the sending state leave the territory of the receiving state and all outstanding claims issues have been settled. Even after the SOFA is terminated, the dispute settlement procedures it established may still be relevant. For this reason, the text of the SOFA should state that these procedures remain in force even after the SOFA is terminated.<sup>30</sup>

# Part V: Negotiating SOFAs

## 1. Where to start?

Each party should select prior to the first negotiation round experts and a chief negotiator to lead its delegation. To ensure a good representation of all interests, the sending and the receiving states may need to involve the

- ministry of defence;
- ministry of foreign affairs (including its embassy in the receiving state);
- ministry of interior (in the event of police participation), and
- ministry of justice (to advise on issues of jurisdiction).

The receiving state may need to involve additional ministries, such as finance, and environment.

To ensure full coordination at the national level, the sending state and the receiving state should ensure that all interested and relevant political actors and agencies are consulted. The involvement of those groups can be direct or indirect. A number of experts may have to be consulted but do not need to be part of the negotiating delegation.

For all parties, internal consultations involving national ministries as well as other stakeholders are necessary to develop a shared position and explore fall-back options. Such discussions are often kept confidential. Different opinions are a normal occurrence in this process, as the

various administrative branches of government and organisations may have different interests. The presence of foreign visiting forces may be perceived differently by different ministries and even more so by different parts of the society. Acknowledging these different opinions before negotiating a SOFA is important, as it may lead to broader support in the negotiation process as well as in the subsequent implementation of the SOFA.

In the subsequent negotiations, a common understanding of applicable treaties or customary law can help both parties in conducting successful negotiations. Therefore, the identification of relevant treaty obligations and binding customary rules is an important part of the preparations. In the actual negotiation process, experience shows that it can be very useful for each party to brief the other on its legal obligations and constitutional processes at the beginning of SOFA negotiations. Existing obligations to protect human rights and the environment may be particularly relevant as they are fundamental to the conduct of operations in the receiving state.

In order to ensure that negotiating procedures are effective and lead to success in good time, both parties should agree on a timetable and work plan for the negotiations. Although the dynamics and challenges of a SOFA negotiation can never be completely anticipated, good preparation is necessary. Heads of delegations should devote some time to planning. They may also encourage smaller workshops and informal meetings in addition to formal sessions in plenary.

Table 2: Organisation of SOFA Negotiations

Phase 1: Initial contact between the sending and the receiving states	Phase 2: Clarification of needs regarding the presence of the visiting force	Phase 3: Elaboration of a first draft of the SOFA	Phase 4: Formal negotiations	Phase 5: Approval process
<b>Actors:</b> foreign and defence ministries	<b>Actors:</b> foreign and defence ministries	<b>Actors:</b> foreign and defence ministries, coordination with other ministries	<b>Actors:</b> foreign and defence ministries as well as further ministries, such as interior, finance, justice, environment	<b>Actors:</b> all concerned ministries, parliament
<b>Important issues:</b> Which other actors have to be informed? E.g. Parliament, other ministries, media, etc.	<b>Important issues:</b> Which types of concerns are to be anticipated? E.g. Political, legal or constitutional, economic, etc.	<b>Important issues:</b> Who is in charge? Who has to be consulted?	<b>Important issues:</b> Are competing interests involved? How to reconcile competing interests?	<b>Important issues:</b> Is parliamentary approval required? Does it involve legislative acts? Is a provisional application feasible?

## 2. Points to keep in mind

Throughout the negotiation process the parties should pay attention that the different provisions of the SOFA can be implemented in practice once the SOFA enters into force. This also concerns the incorporation of SOFA provisions into their national legal system and the establishment of mechanisms for dispute settlement.

### a) Incorporation into domestic law

Most SOFAs require the adoption of specific national legislation, at least in the receiving state (see above, Part IV, Section 10.a). After all legislative requirements have been met, the parties express their consent by a formal act of ratification. As the legislative process may take time and military deployment may have to start before the formal entry into force of the SOFA, both parties should discuss procedures for the provisional application of the SOFA (see above, Part IV, Section 10.b).

### b) Competent authorities

The authorities in charge of ensuring the implementation of a treaty are often different from the negotiators. Negotiators should take this into account and inform the other party on request.

### c) Dispute settlement

All SOFAs should include provisions on dispute settlement mechanisms (see above, Part IV, Section 10.c). As a minimum, the parties should provide points of contact to ensure that open issues and potential controversies are discussed in a timely manner. This can help to build confidence and to avoid any unnecessary escalation of problems.

## 3. The need for pragmatism

Considering the complexity of the issues involved and time constraints, all parties should concentrate on finding pragmatic solutions to the problems identified.

In the preparatory phase and during the actual negotiations, each party may wish to seek expert advice at the national and international level. This could help identify the interest of each branch of government of the other party (i.e., the interests of the Ministry of Defence, taxation authorities, customs and border control agencies etc.) and formulate negotiating strategies. Such information may prove to be useful during negotiations.

Although certain information may be kept classified for security reasons, the parties should respect fundamental principles of good governance, such as transparency and democratic control.<sup>31</sup>

Political control of and support for the negotiators, based on a willingness to reach practical solutions and compromise, secures its acceptance in both states and thus greatly affects the outcome of negotiations.

## Part VI : Resources

A general overview of relevant literature and international instruments is provided below. Yet, each SOFA negotiation process needs to take into account the very specific circumstances driving the need for a SOFA. Existing treaties may provide useful models, but they should be examined in light of the interests involved and expected results. Hence, examples from other treaties should be used with caution. It will be most important that the negotiators concentrate on identifying their interest, make their own assessment of possible alternatives and discuss these with the other party.

### Literature

P. J. Conderman, 'Status of Armed Forces on Foreign Territory Agreements (SOFA), in: *Max Planck Encyclopedia of Public International Law*, [www.mpepil.com](http://www.mpepil.com).

D. Fleck, 'Securing Status and Protection for Peacekeepers', in: Roberta Arnold/Geert-Jan Alexander Knoops, *Practice and Policies of Modern Peace Support Operations Under International Law* (Ardsey, NY: Transnational Publishers: 2006), 141-56.

D. Fleck (ed.), *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001).

T. Gill/D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press, 2010, paperback edition 2011).

M. J. Matheson, 'Status of Forces Agreements and UN Mandates: What Authorities and Protections Do They Provide to U.S. Personnel?' (Statement before the House of Representatives Committee on Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight, 28 February 2008), <http://foreignaffairs.house.gov/110/mat022808.htm>.

### Documents

*Draft Model Status-of-Forces Agreement Between the United Nations and Host Countries*, UN Doc A/45/594 (9 October 1990), <http://www.ilsa.org/jessup/jessup09/basicmats/UNsofa.pdf>.

*Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State*, 11894/07 (20 July 2007) and Corr. 1 (5 September 2007), <http://register.consilium.europa.eu/pdf/en/07/st11/st11894.en07.pdf>.

*Draft Model Agreement on the Status of the European Union Civilian Crisis Management Mission in a Host State (SOMA)*, 17141/08 (15 December 2008), <http://register.consilium.europa.eu/pdf/en/08/st17/st17141.en08.pdf>.

*Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan* (4 January 2002), <http://www.operations.mod.uk/fingal/isafmta.pdf>, Annex A; see also Draft Technical Agreement between the Government of the Islamic Republic of Afghanistan and the North Atlantic Treaty Organization a Framework to Improve Methods and Procedures for the Prosecution of the Global War on Terrorism to ensure Our Joint Success (10 January 2009), [http://thecable.foreignpolicy.com/posts/2009/02/24/afghanistan\\_seeking\\_sofa\\_lite#sofa\\_docs](http://thecable.foreignpolicy.com/posts/2009/02/24/afghanistan_seeking_sofa_lite#sofa_docs).

*Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC)* of 4 June 2004, <http://www.africa-union.org/DARFUR/Agreements/soma.pdf>.

*United Nations Convention on the Safety of United Nations and Associated Personnel* of 15 December 1994, <http://www.un.org/law/cod/safety.htm>, and Optional Protocol to the Convention of 8 December 2005, [http://untreaty.un.org/English/notpubl/XVIII-8a\\_english.pdf](http://untreaty.un.org/English/notpubl/XVIII-8a_english.pdf).

*Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces (NATO SOFA)* of 19 June 1951, [http://www.nato.int/cps/en/natolive/official\\_texts\\_17265.htm](http://www.nato.int/cps/en/natolive/official_texts_17265.htm).

*Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces (PfP SOFA) of 19 June 1995; with Additional Protocol of 19 June 1995 relating to the prohibition to carry out death sentences and Further Additional Protocol of 19 December 1997 relating to the application of the Paris Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty of 28 August 1952, [www.aschq.army.mil/gc/sofas/Partnership.rtf](http://www.aschq.army.mil/gc/sofas/Partnership.rtf).*

*Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) of 17 November 2003, <http://www.statewatch.org/news/2009/mar/eu-uk-military-staff-agreement.pdf>.*

*Convention on the Privileges and Immunities of the United Nations of 13 February 1946, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/C8297DB1DE8566F2C1256F2600348A73/\\$file/Convention%20P%20&%20I%20\(1946\)%20-%20E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/C8297DB1DE8566F2C1256F2600348A73/$file/Convention%20P%20&%20I%20(1946)%20-%20E.pdf).*

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# Endnotes

1. *Draft Model Status-of-Forces Agreement Between the United Nations and Host Countries*, adopted by General Assembly Resolution A/45/594 (9 October 1990).
2. *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces* (NATO SOFA) of 19 June 1951.
3. See note 1 above.
4. The principle that *treaties must be complied with* is one of the long-standing and universally recognised principles of international law. Article 26 of the Vienna Convention on the Law of Treaties (1969) provides that '[e]very treaty in force is binding upon the parties to it and must be performed in good faith'.
5. While transit states may not be parties to a SOFA, they must abide by the general legal principles regulating state immunity as prescribed by customary international law.
6. It will generally be assumed during the negotiations that the agreement reached is concluded for circumstances foreseen and regulated in the agreement. A fundamental change of these circumstances may give rise to a unilateral denunciation or suspension of a treaty. This principle is recognised in international customary law. It is confirmed and specified in Art. 62 of the *Vienna Convention on the Law of Treaties* (1969).
7. *Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict of 17 September 2008*, UNGA Doc. A/63/467 and UNSC Doc. S/2008/636 (6 October 2008), [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/Montreux-Documents-eng.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/Montreux-Documents-eng.pdf).
8. *International Code of Conduct for Private Security Providers*, signed by industry representatives on 9 November 2010, <http://www.dcaf.ch/News/International-Code-of-Conduct-for-Private-Security-Providers-Officially-Signed>
9. Security issues are comprising external threats ranging from military assault to petty crime. Safety issues include any hazards of deployment, including e.g. the handling of equipment or exposure to tropical diseases.
10. *United Nations Convention on the Safety of United Nations and Associated Personnel of 15 December 1994, and Optional Protocol to the Convention of 8 December 2005*.
11. See Art. 41 (1) of the *Vienna Convention on Diplomatic Relations* (1961) and Art. 55 (1) of the *Vienna Convention on Consular Relations* (1963): 'Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.'
12. Art. II of the NATO SOFA: 'It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving State. It is also the duty of the sending State to take necessary measures to that end.' Similarly, Art. 6 of the *UN Safety Convention* (*supra*, n. 10) provides that United Nations and associated personnel shall '(a) Respect the laws and regulations of the host State and the transit State; and (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.'
13. See e. g. Art. 2 (1) of the *International Covenant on Civil and Political Rights* (1966).
14. *Rome Statute of the International Criminal Court* of 17 July 1998.
15. Section 46 of the *UN Draft Model Status-of-Forces Agreement for Peacekeeping Operations* (1990).
16. *Ibid.*, Section 47.
17. Section 7 of the Agreement between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organization Concerning the Status of NATO and its Personnel (21/23 November 1995), <http://www.nato.int/ifo/gfa/gfa-ap1a.htm>.
18. See Section 2 *Regulation No. 2000/47 On the Status and Immunities of KFOR and UNMIK and their Personnel in Kosovo* (18 August 2000), Annex A: Section 1 (3) of the *Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan* (4 January 2002), <http://www.unmikonline.org/regulations/2000/reg47-00.htm>.
19. See *Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State*, (Council of the European Union, 2007), Arts. 1 (3) (f) and 6 (3), <http://register.consilium.europa.eu/pdf/en/07/st11/st11894.en07.pdf>
20. Art. VII (3) and (9) of the *NATO SOFA* (1951).
21. Full name: "Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq"
22. Art. 12 of the Agreement between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq of 17 November 2008, <http://www.cfr.org/publication/17880>.
23. Art. VII (10) of the NATO SOFA states that: '(a) Regularly constituted military units or formations of a force shall have the right to police any camps, establishment or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises.'

(b) Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.'

24. Sections 40-45 of the *UN Draft Model Status-of-Forces Agreement for Peacekeeping Operations* (1990).
25. Art. 44 (3) of *Protocol I Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts* (8 June 1977).
26. SC Res. 1320 (15 September 2000), para. 6.
27. Art. 25 of the *Vienna Convention on the Law of Treaties* (1969): 'Provisional application 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed. 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.'
28. For an example, see: *Accord entre le Gouvernement de la République française et le Gouvernement du Royaume du Maroc relatif au statut de leurs forces* (16 mai 2005), <http://www.assemblee-nationale.fr/12/projets/pl3276.asp>. Article 18 of this document states that each dispute arising from the interpretation or application of the agreement must be settled by negotiation between the parties.
29. Art. 54 of the *Vienna Convention on the Law of Treaties* (1969).
30. See Section 60 of the *UN Model SOFA* (1990).
31. For an example, see the definition used by the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP): 'Good governance has eight major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. [...]': Available at: <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>. See also V.-Y. Ghebali and A. Lambert, *The OSCE Code of Conduct on Politico-Military Aspects of Security. Anatomy and Implementation* (Leiden: Nijhoff, 2005); H. Hänggi, 'Good Governance of the Security Sector: Its Relevance for Confidence-Building', DCAF conference paper, <http://www.dcaf.ch>.

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