

CHAPTER 7

INTERNATIONAL AND STATUS OF FORCES AGREEMENTS

REFERENCES

1. 1 U.S.C. § 112a. United States treaties and other international agreements; contents; admissibility in evidence.
2. The Case-Zablocki Act, Pub. L. 92-403, 1 U.S.C. § 112b. United States international agreements; transmission to Congress.
3. Coordination, Reporting, and Publication of International Agreements, 22 C.F.R. Part 181.
4. 11 FAM 720 (Circular 175 Procedure). Negotiation and Conclusion.
5. Status of Forces Policies and Information, 32 C.F.R. Part 151.
6. U.S. DEP'T OF DEFENSE, DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (28 Apr. 2003; certified current as of 24 Nov. 2003).
7. U.S. DEP'T OF DEFENSE, DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION (7 Aug. 1979; incorporating through change 2, 2 July 1997; certified current as of 21 Nov. 2003).
8. U.S. DEP'T OF DEFENSE, INSTR. 5525.03, CRIMINAL JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES AND SENDING STATES IN THE UNITED STATES (30 Mar. 2006; certified current as of 3 Dec. 2010).
9. U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS (11 June 1987; incorporating change 1, 18 Feb. 1991; certified current as of 21 Nov. 2003).
10. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 2300.01D, INTERNATIONAL AGREEMENTS (5 Oct. 2007; current as of 27 Sep. 2013).
11. U.S. DEP'T OF ARMY, REG. 27-50 STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (15 Dec. 1989).
12. U.S. DEP'T OF ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS (2 May 2008).
13. U.S. DEP'T OF AIR FORCE, POLICY DIR. 51-7, INTERNATIONAL LAW (5 Feb. 2009; certified current 27 Mar. 2012).
14. U.S. DEP'T OF AIR FORCE, INSTR. 51-701, NEGOTIATING, CONCLUDING, REPORTING, AND MAINTAINING INTERNATIONAL AGREEMENTS (16 Aug. 2011).
15. U.S. DEP'T OF AIR FORCE, INSTR. 51-703, FOREIGN CRIMINAL JURISDICTION (6 May 1994; supplemented 22 Nov. 2002).
16. U.S. DEP'T OF AIR FORCE, INSTR. 51-705, JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES IN THE UNITED STATES (5 Feb. 2009).
17. U.S. DEP'T OF AIR FORCE, J. INSTR. 51-706, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (15 Dec. 1989; supplemented 6 Oct. 1997; certified current 21 Dec. 2010).
18. U.S. DEP'T OF NAVY, OFF. OF THE CHIEF OF NAVAL OPERATIONS INSTR. 5710.25A, INTERNATIONAL AGREEMENTS (13 Aug. 2007).
19. U.S. DEP'T OF NAVY, SECNAVINST. 5710.25B, INTERNATIONAL AGREEMENTS (23 Dec. 2005).

I. INTRODUCTION

A. This chapter does not attempt to discuss specific international agreements that may affect military operations. There are simply too many agreements, and numerous agreements are classified. Instead, this chapter focuses on the role of the judge advocate (JA) in this area. The operational JA may face the following tasks relating to international agreements: determining the existence of an agreement, assisting in drafting a request for authority to negotiate and conclude an agreement, assisting in the negotiation and conclusion of an agreement, and implementing or ensuring compliance with an agreement.

B. Under domestic law, the United States divides international agreements into two general categories (1) "Treaties" and (2) "International Agreements Other Than Treaties". "Treaties" are international agreements whose entry into force for the United States takes place only after two-thirds of Senate gives advice and consent and the President submits the required ratification documents. "International Agreements Other Than Treaties" includes agreements that *may* enter into force upon signature and do not require the advice and consent of the Senate. The executive branch has the constitutional authority to negotiate and conclude an international agreement under one of

three bases: (1) an existing treaty authorizes the agreement; (2) legislation authorizes the agreement; or (3) the agreement falls under the President’s constitutional authority (“sole executive agreements”).¹

II. DETERMINING THE EXISTENCE OF AN INTERNATIONAL AGREEMENT

A. Determining the existence of an international agreement is more challenging than one might think. Unfortunately, a JA must comb multiple databases and conduct extensive research to determine (1) whether an agreement exists and (2) how to locate the actual text of the agreement. The sources discussed below may help.

B. The U.S. Department of State (DoS) is the domestic repository for all international agreements to which the United States is a party.² Federal law (1 U.S.C. § 112a) requires DoS to publish annually a document entitled *Treaties in Force* (TIF), which contains a list of all treaties and other international agreements in force as of 1 January of that year.³ Note, however, that TIF is merely a list of treaties and other international agreements. It does not include the full text of each agreement listed in it. Practitioners must locate the full text of an agreement listed in TIF using the citation(s) found within the TIF entry for each agreement.⁴ The TIF may include citations to the United States Treaties and Other International Agreements (UST),⁵ the Treaties and Other International Agreements (TIAS) series,⁶ or the United Nations Treaty Series (UNTS).⁷ However, many agreements in the TIF have no citations. A lack of a citation indicates that the agreement is not yet published in one of the treaty series or it may have an “NP” cite which indicates that the Department of State determined that it will not publish that particular agreement. Also keep in mind that the TIF and TIAS are unclassified series and do not contain classified agreements. Consequently, while TIF and the TIAS are a good place to start when looking for an international agreement, they often fail to offer a complete solution. Here is an excerpt from a TIF.⁸

<p>TIMOR-LESTE</p> <p>DEFENSE</p> <p>Agreement regarding grants under the Foreign Assistance Act of 1961, as amended, and the furnishing of defense articles, related training to include training related to defense articles under the International Military and Education Training program, and other defense services from the United States of America to the Government of the Democratic Republic of East Timor.</p> <p><i>Exchange of notes at Dili July 8 and 10, 2002.</i> Entered into force July 10, 2002. TIAS 02-710.</p> <p>Status of forces agreement.</p> <p><i>Signed at Washington October 1, 2002.</i> Entered into force October 1, 2002. TIAS 02-1001.</p>	<p>DEFENSE</p> <p>Agreement concerning the loan of U.S. Government equipment and provision of logistic support services to the Economic Community of West African States (ECOWAS) and its members in support of the ECOFORCE peacekeeping operation in Cote d'Ivoire.</p> <p><i>Exchange of notes at Lome January 22 and February 5, 2003.</i> Entered into force February 5, 2003. TIAS 03-205.</p> <p>Agreement regarding grants under the Foreign Assistance Act of 1961, as amended, or successor legislation, and the furnishing of defense articles, defense services and related training, including pursuant to the United States International Military Education and Training (IMET) Program.</p>	<p>INTERNATIONAL CRIMINAL COURT</p> <p>Agreement regarding the surrender of persons to the International Criminal Court.</p> <p><i>Signed at Lome June 13, 2003.</i> Entered into force January 15, 2004. TIAS 04-115.</p> <p>JUDICIAL ASSISTANCE</p> <p>Procedures for mutual assistance in connection with matters relating to the Gulfstream American Corporation, formerly known as Grumman American Aviation Corporation.</p> <p><i>Signed at Washington January 30, 1979.</i> Entered into force January 30, 1979. 30 UST 3477; TIAS 9401; 1180 UNTS 199.</p> <p>PEACE CORPS</p> <p>Agreement relating to the establishment of a</p>
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C. Within DoS, the Country Desk responsible for the country to which the unit is set to deploy may be able to help. You can find a complete list of phone numbers for each Country Office at <http://www.state.gov/documents/organization/115480.pdf>. Since these offices are located in Washington, D.C., they are usually easily accessible. Somewhat less accessible, but equally knowledgeable, is the Military Group for the

¹ Volume 11, Foreign Affairs Manual, Chapter 720, *Negotiation and Conclusion*. (Sep. 25, 2006).

² 1 U.S.C. § 112a.

³ The U.S. Department of State also maintains an online chronological list of U.S. treaty actions. *Treaty Actions*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/c3428.htm> (last visited Apr. 28, 2014).

⁴ A good place to start looking for the official text of an international agreement to which the U.S. is a party is the Department of State website. *Texts of International Agreements to which the US is a Party (TIAS)*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/tias/index.htm> (last visited Apr. 28, 2014).

⁵ The United States Treaties and Other International Agreements (UST) is a bound compilation that was published between 1950-1982 and is since discontinued. We are not aware of an on-line repository for the UST. You can find old publications of the UST in federal depository libraries, U.S. DEP’T OF STATE, <https://www.state.gov/s/l/treaty/text/index.html> (last visited Apr. 28, 2014).

⁶ See *Treaties and Other International Acts Series (TIAS)*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/tias/index.htm> (last visited Apr. 28, 2014).

⁷ See *United Nations Treaty Collection*, UNITED NATIONS, <https://treaties.un.org/Home.aspx> (last visited Mar. 28, 2014).

⁸ U.S. DEP’T OF STATE, *TREATIES IN FORCE* (2013), available at <http://www.state.gov/s/l/treaty/tif/index.htm>.

country. A listing for these overseas phone numbers can be found at <http://www.usembassy.gov>. Either the Country Desk or the Military Group should have the most current information about any agreements with “their” country.

D. Within the DoD, JAs have a number of other options. First, start with your operational chain of command, and work your way to the legal office for the combatant command covering the country at issue. Combatant commands are responsible for maintaining a list of agreements with countries within their area of responsibility. These lists often are posted on the classified SIPRNET. Other options are the International and Operational Law Divisions of each service. For example, the Army Office of the Judge Advocate General, International & Operational Law Division, has an online document library that contains many unclassified international agreements.⁹ You may also find international agreements elsewhere on the Internet, such as on the United Nations or NATO websites.

III. AUTHORITIES

A. General. An international agreement binds the U.S. under international law. The President has Constitutional powers that authorize the executive branch to negotiate and conclude certain international agreements. In comparison, Congress has the power to provide advice and consent to the President prior to the ratification of treaties and the power to regulate international agreements through legislation. Accordingly, any power the Department of Defense has to negotiate or conclude international agreements is delegated from the President’s executive power or provided by legislation from Congress. Judge advocates should look for a specific grant of authority authorizing the Department of Defense to enter into an international agreement.

B. Delegation of Authority.

1. Most international agreements related to DoD interests flow from authority possessed by the Secretary of Defense (SECDEF) through executive branch delegation or direct Congressional authorization. For example, 22 U.S.C. § 2770a, Exchange of Training and Related Support, provides: “the President may provide training and related support to military and civilian defense personnel of a friendly foreign country or an international organization” and goes on to require an international agreement to implement the support. In Executive Order 13637, the President delegated his agreement authority under 22 U.S.C. § 2770a to the SECDEF.¹⁰ Cross-Servicing Agreements pursuant to 10 U.S.C. § 2342 authorizes SECDEF to enter into certain agreements with specified countries for logistics support, supplies, and services.

2. In DoDD 5530.3, SECDEF delegated much of his power to enter into international agreements to the Under Secretary of Defense for Policy (USD(P)), and delegated specific powers further. Matters that are predominately the concern of a single Service are delegated to the Service Secretaries. SECDEF delegated agreements concerning the operational command of joint forces to the Chairman, Joint Chiefs of Staff (CJCS). Additional special authorities are delegated to various defense agencies.

3. In CJCSI 2300.01D, CJCS delegated much of his authority in this area to the Combatant Commanders. Re-delegation to subordinate commanders is permitted and as directed by a Combatant Commander’s regulation. Similarly, the Service Secretaries have published regulations or instructions that delegate some portion of the Secretaries’ authority.

4. The Department of Defense retains the authority to negotiate agreements which have “policy significance”. The term “policy significance” is interpreted very broadly. The DoDD 5530.3 provides the following non-inclusive list of examples of agreements which are considered to have “policy significance”.

8.4. Notwithstanding delegations of authority made in section 13, below, of this Directive, all proposed international agreements having policy significance shall be approved by the USD(P) before any negotiation thereof, and again before they are concluded.

8.4.1. Agreements “having policy significance” include those agreements that:

8.4.1.1. Specify national disclosure, technology-sharing or work-sharing arrangements, co-production of military equipment or offset commitments as part of an agreement for

⁹ The Office of the Judge Advocate General, International & Operational Law Division Document Library, *available at* <https://www.jagcnet2.army.mil/Sites/io.nsf/homeLibrary.xsp> (last visited May 1, 2014).

¹⁰ Exec. Order No. 13,637, 78 Fed. Reg. 16, 127 (Mar. 8, 2013), *available at* <https://www.federalregister.gov/articles/2013/03/13/2013-05967/administration-of-reformed-export-controls> (last visited Apr.28, 2014).

international cooperation in the research, development, test, evaluation, or production of defense articles, services, or technology.

8.4.1.2. Because of their intrinsic importance or sensitivity, would directly and significantly affect foreign or defense relations between the United States and another government.

8.4.1.3. By their nature, would require approval, negotiation, or signature at the OSD or the diplomatic level.

8.4.1.4. Would create security commitments currently not assumed by the United States in existing mutual security or other defense agreements and arrangements, or that would increase U.S. obligations with respect to the defense of a foreign government or area.

5. In general, *delegations are to be construed narrowly*. Generally, judge advocates should refer questions about whether an authority has been delegated through their technical chain to the higher authority for resolution.

C. Seeking Authority: The Circular 175 Procedure¹¹.

1. Department of Defense strictly prohibits personnel from negotiating or concluding an international agreement without the prior written approval of the responsible DoD official.¹² All approvals must be in writing.

2. There is a specific procedure for requesting authority to negotiate or conclude an international agreement. The DoD component will send the request to the USD(P). The request must include a draft of the proposed agreement, a legal memorandum, and a fiscal memorandum. The legal memorandum must trace the Constitutional or statutory authority to execute each of the proposed obligations and address any other legal considerations.¹³ When USD(P) does not have the blanket authority to negotiate and conclude an agreement, the Department of the Defense will submit a Circular 175 packet to the Department of State, Treaties Affairs Office in accordance with the procedures set forth in Volume 11, Foreign Affairs Manual, Chapter 720.

D. Coordination. In addition to the approval requirements summarized above, Congress created coordinating and reporting requirements through the Case-Zablocki Act.¹⁴ Section (c) of that Act provides: “Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State.” The Secretary of State published procedures to implement the Case-Zablocki Act in 22 C.F.R. Part 181¹⁵ and Volume 11, Foreign Affairs Manual, Chapter 720 (11 FAM 720). 22 C.F.R. Part 181.4(a) specifically deals with the consultation requirement. It initially refers the reader to Circular 175 procedures, but those procedures are largely digested in the remainder of Part 181.4. Unless otherwise delegated within DoDD 5530.3, USD(P) has the responsibility to coordinate with DoS. Such coordination is generally not below the Secretariat or Combatant Commander level.

IV. NEGOTIATING AND CONCLUDING INTERNATIONAL AGREEMENTS

A. Although judge advocates may be involved in the negotiation and conclusion of an international agreement, it is likely that the State Department will lead the negotiation team. Accordingly, this section is rather summary, but still important for the following reasons:

1. The international agreement negotiations process is governed by very detailed rules that require significant interagency coordination.

¹¹ The term “Circular 175 procedures” refers to Department of State Circular No. 175, Dec. 13, 1955 governing the proper process for concluding international agreements that bind the United States government. “Circular 175” or “C175” refers to the State Department’s procedures for prior coordination and approval of treaties and other international agreements. Although the current procedures have been codified at 22 C.F.R. 181.4 and 11 FAM 720, the “C175” reference remains as the descriptor for those procedures. *See generally Circular 175 Procedure*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/index.htm> (last visited Apr. 29, 2014).

¹² U.S. DEP’T OF DEFENSE, DIRECTIVE 5530.3, INTERNATIONAL AGREEMENTS para. 8.2; 8.4 (11 Jun. 1987) [hereinafter DODD 5530.3].

¹³ *Id.* at para. 9.3.

¹⁴ 1 U.S.C. § 112b, reprinted as enclosure 4 to DoDD 5530.3.

¹⁵ Reprinted as enclosure 3 to DoDD 5530.3.

2. It is essential for judge advocates to know what constitutes an international agreement and what constitutes the “negotiation” or “conclusion” of an international agreement to help commanders and staff avoid inadvertently action without the proper authority.

B. The elements of an international agreement are: (1) an agreement with one or more foreign government (including their agencies, instrumentalities, or political subdivisions) or international organizations; (2) is signed or agreed to by representatives of any Department or Agency within the U.S. Government; and (3) signifies the intention of the parties to be bound under international law. Generally, if a document satisfies the requirements listed above, it is an international agreement. Oral agreements are also international agreements; however they must be subsequently reduced to writing. Similarly, the actual status or position of the signer is not as important as the representation that the signer speaks for his government.

C. The title or form of the agreement is of little consequence. International agreements may take the form of a memorandum of understanding or memorandum of agreement, an exchange of letters, an exchange of diplomatic notes (“Dip Notes”), a technical arrangement, a protocol, a *note verbale*, an *aide memoire*, etc. Forms that usually are not regarded as international agreements include contracts made under the FAR, credit arrangements, standardization agreements (STANAG), leases, agreements solely to establish administrative procedures, and Foreign Military Sales (FMS) letters of offer and acceptance. There are exceptions, however. A memorandum that merely sets out standard operating procedures for de-conflicting radio frequencies is generally not an international agreement, while a “lease” that includes status provisions would likely rise to the level of an international agreement. Form is not as important as substance.

D. Negotiation.

1. It is important for judge advocates and their commands to understand that the negotiation of an international agreement cannot begin without first completing the proper approval and coordination processes described above. Consequently, it is also important for judge advocates and their commands to understand what constitutes negotiation. DoDD 5530.3 defines “negotiation” as:

Communication by any means of a position or an offer, on behalf of the United States, the Department of Defense, or on behalf of any officer or organizational element thereof, to an agent or representative of a foreign government, including an agency, instrumentality, or political subdivision thereof, or of an international organization, in such detail that the acceptance in substance of such position or offer would result in an international agreement. The term “negotiation” includes any such communication even though conditioned on later approval by the responsible authority. The term "negotiation" also includes provision of a draft agreement or other document, the acceptance of which would constitute an agreement, as well as discussions concerning any U.S. or foreign government or international organization draft document whether or not titled "agreement." The term "negotiation" does not include preliminary or exploratory discussions or routine meetings where no draft documents are discussed so long as such discussions or meetings are conducted with the understanding that the views communicated do not and shall not bind or commit any side, legally or otherwise.¹⁶

2. If the proposed agreement has been approved and coordinated, the authorized official may begin negotiating the agreement with foreign authorities. At this point, the process is much like negotiating any contract. The objectives of the parties, the relative strengths of their positions, and bargaining skills all play a part. Once the parties finalize the negotiations, the DoD official may not sign or otherwise concluded the agreement unless they received the specific approval to do so. The official can request the approval to conclude the agreement through the same procedures discussed above in Section III, unless the initial written approval included the authority to both negotiate and conclude the agreement.

E. Reporting Requirements.

¹⁶ DODD 5530.3, *supra* note 12 at encl. 2, para. E2.1.2.

1. Once an international agreement is concluded, The Department of Defense must comply with procedural reporting requirements under the Case-Zablocki Act (as implemented in 22 C.F.R. Part 181). The Case-Zablocki Act requires an agency to transmit the text of a concluded international agreement to the Office of the Assistant Legal Adviser for Treaty Affairs as soon as possible, but no later than twenty days after the agreement was signed.¹⁷

2. To comply with the Case-Zablocki Act, DoDD 5530.3 requires the DoD component responsible for the agreement to send the original or a certified copy to the Assistant Legal Adviser for Treaty Affairs and to the DoD General Counsel Office no later than 20 days after the agreement enters into force. If the agreement is concluded using delegated authority, the delegating authority must also receive a copy of the agreement.¹⁸ For example, CJCSI 2300.01D requires the concluding authority to forward a copy of the agreement to the Secretary, Joint Staff. On the other hand, if the agreement was negotiated and concluded using delegated authority from the Secretary of the Army, the organizational element is required to forward four copies to HQDA (DAJA-IO) within ten days of signing the agreement.¹⁹ Judge advocates should also consult applicable Combatant Commander regulations to ensure compliance with any additional reporting requirements.

IV. IMPLEMENTING & ENSURING COMPLIANCE WITH AN INTERNATIONAL AGREEMENT

A. The judge advocate on a staff can expect to be the principal player when implementing or ensuring compliance with international agreements. Some areas, such as foreign criminal jurisdiction (FCJ), will fall within the JA's ambit anyway. Others, such as logistics agreements, are handled by experts in other staff sections with JA support. In areas in which the United States has been exercising an agreement for a long time, such as the NATO Acquisition and Cross-Servicing Agreement, the subject-matter experts will require little legal support. Infrequently-used or newly-concluded agreements may require substantial JA involvement.

B. Common subjects of international agreements include: SOFAs, logistics support, pre-positioning, cryptological support, personnel exchange programs, and defense assistance programs (to include security assistance). Deploying judge advocates will most frequently reference SOFAs, or other agreements establishing jurisdictional protections.²⁰ However, judge advocates will also find logistics support agreements, such as acquisition and cross-servicing agreements (ACSAs) of critical importance.

1. SOFAs.

a. *Historical Background.* There is very little historical international law governing the stationing of friendly forces on a host nation's territory. Most frequently the countries applied the law of the flag. Since the friendly forces were transiting a territory with host nation permission, it was understood that the nation of the visiting forces retained jurisdiction over its members. After World War II there was a large increase in the number of forces stationed in friendly countries. Accordingly, countries had an increased need for more formal agreements to address the anticipated legal issues and to clarify the relationships between the countries and their forces. Today SOFAs vary in format and length. They range from complex multi-lateral agreements, such as the NATO SOFA and its accompanying country supplements, to very limited, smaller-scale Diplomatic Notes. In addition to criminal jurisdiction, SOFAs also typically cover a large variety of topics.²¹

b. *Status/Foreign Criminal Jurisdiction (FCJ).* One of the most important deployment issues is criminal jurisdiction. The general rule of international law is that a sovereign nation has jurisdiction over all persons found within its borders. There can be no derogation of that sovereign right without the consent of the receiving

¹⁷ *Id.* at encl. 2, para. E4.a.1; 10 U.S.C. § 112b (a).

¹⁸ DoDD 5530.3, *supra* note 12, at para. 7.2.

¹⁹ U.S. DEP'T OF THE ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS para. 9.a. (2 May 2008) [hereinafter AR 550-51].

²⁰ For example, JAs deploying to the Office of Security Cooperation – Iraq (OSC-I) in Iraq, or to a unit in Afghanistan should be aware of the status of forces arrangements provided in those respective countries. In both countries, through different arrangements, American servicemembers enjoy complete immunity from foreign criminal jurisdiction. The United States Department of Defense General Counsel's Office understands servicemembers deployed to the OSC-I receive Administrative & Technical Status (A&T Status), which is covered *infra* Part IV.B.1.d.(3). See Memorandum from Jeh Charles Johnson, Dep't of Defense Gen. Counsel, for The Record on OSC-I Personnel in Iraq (Dec. 31, 2011) (on file with the International and Operational Law Department, TJAGLCS).

²¹ Standard SOFA provisions typically address the following topics: entry and exit, import and export, taxes, licenses or permits, jurisdiction, claims, property ownership, use of facilities and areas, positioning and storage of defense equipment, movement of vehicles, vessels, and aircraft, contracting procedures, services and communications, carrying weapons and wearing uniforms, official and military vehicles, support activities services, currency and foreign exchange.

state (the host nation). Therefore, in the absence of an agreement, personnel of the sending state (the state sending forces into the host nation) are subject to the criminal jurisdiction of the receiving state. It is DoD's policy to protect to the maximum extent possible, the rights of United States personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.²²

c. *Exception.* Combat deployments are an exception to the general rule that unless waived, the receiving state has jurisdiction over personnel within its territory. U.S. forces are generally subject to exclusive U.S. jurisdiction during a combat deployment. As the exigencies of combat subside, however, the primary right to exercise criminal jurisdiction may revert to the receiving state or fall under another jurisdictional structure pursuant to a negotiated agreement.

d. *Types of Criminal Jurisdiction Arrangements.* Beyond a complete waiver of jurisdiction by the receiving state, there are four possible types of arrangements that a deploying judge advocate should understand: Administrative and Technical Status (A&T status); the NATO formula of Shared Jurisdiction; Visiting Forces Acts; and the prospect of deploying without any status protections.

(1) Administrative and Technical Status (A&T Status). Some receiving states may consent to granting U.S. personnel status protections equivalent to those given to the administrative and technical staff of the U.S. embassy, as defined in the Vienna Convention on Diplomatic Relations. This is often referred to as "A&T status". In many cases, the United States can obtain such status by incorporating through reference the status protections already granted to U.S. military personnel under another agreement. For example, the United States may seek to expand a defense assistance agreement that includes personnel assigned to the U.S. embassy or to a Military Assistance Advisory Group (MAAG). A&T status is rarely granted for large-scale and/or long-term deployments.²³ The receiving state typically recognizes the A&T status of the deploying forces through an exchange of diplomatic notes or the like.

(2) Shared Jurisdiction. Article VII of the NATO SOFA provides a scheme of shared jurisdiction between the receiving state and the sending state. This scheme is the model for many other SOFAs as well. All examples below assume a U.S. Soldier committing an offense while stationed in Germany.

(a) *Exclusive Jurisdiction in the Sending State.* Conduct that constitutes an offense under the law of the sending state, but **not** the receiving state, is tried exclusively by the sending state. For example, dereliction of duty is an offense under the UCMJ, but not under German law, so exclusive jurisdiction rests with the United States.

²² U.S. DEP'T OF DEFENSE, DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION, para. 3 (7 Aug. 1979; incorporating through change 2, 2 July 1997; certified current as of 21 Nov. 2003).

²³ A significant exception to this is the case of U.S. forces in Afghanistan under OEF authority. In 2002, the U.S. Government and the Islamic Transitional Government of Afghanistan (ITGA) reached an agreement on the status of U.S. military and DoD civilians present in Afghanistan. See R. CHUCK MASON, CONG. RESEARCH SERV. RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED?, 7-10 (Mar. 15, 2012), available at <http://www.fas.org/sgp/crs/natsec/RL34531.pdf>. The agreement covers "cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities," and accorded designated U.S. personnel "a status equivalent to that accorded to the administrative and technical staff" of the U.S. Embassy under the Vienna Convention on Diplomatic Relations of 1961. *Id.* Consequently, such U.S. personnel are immune from Afghan criminal prosecutions, and are also immune from Afghan civil and administrative jurisdiction for acts conducted in the line of duty (note that the agreement does not appear to immunize contractors). *Id.* The agreement explicitly authorizes the U.S. government to exercise criminal jurisdiction over designated U.S. personnel, and prohibits the government of Afghanistan from surrendering such personnel to the custody of another state, international tribunal, or any other entity without consent of the U.S. government. *Id.* The fully elected Government of the Islamic Republic of Afghanistan has replaced the ITGA and has assumed its legal obligations under this agreement, which remains in force. *Id.* American forces in Afghanistan under International Security Assistance Force (ISAF) authority fall under a different arrangement. The U.N. Security Council-authorized ISAF has its own agreement with the Afghan government. That arrangement is detailed in a Military Technical Agreement annex entitled "Arrangements Regarding the Status of the International Security Assistance Force." See MASON, at n. 52. The agreement subjects "all ISAF and supporting personnel" to the "exclusive jurisdiction of their respective national elements for criminal or disciplinary matters," and immunizes such personnel "from arrest or detention by Afghan authorities." *Id.* Furthermore, Afghan authorities may not turn over any such designated ISAF personnel "to any international tribunal or any other entity or State without the express consent of the contributing nation." *Id.*

(b) *Exclusive Jurisdiction in the Receiving State.* Conduct that constitutes an offense under the law of the receiving state, but **not** the sending state, is tried exclusively by the receiving state. For example, a given traffic offense may violate German law, but not U.S. law, so Germany has exclusive jurisdiction.

(c) *Concurrent Jurisdiction.* For conduct that constitutes an offense under the laws of both the receiving and sending states, there is concurrent jurisdiction, with primary jurisdiction assigned to one party:

(i) *Primary Concurrent Jurisdiction in the Sending State.* The sending state has primary jurisdiction in two instances. First, the sending state has primary jurisdictions when the sending state is the victim, or a person from the sending state (otherwise covered by the SOFA) is the victim. This is known as *inter se* (“among themselves”). For example, if a U.S. Soldier assaults another U.S. Soldier, it violates both U.S. and German law, but primary jurisdiction rests with the United States because the victim is from the sending state. Second, the sending state has primary jurisdictions when the acts or omissions are committed in the performance of official duty. For example, if a U.S. Soldier hits and kills a pedestrian while driving to another post for a meeting, he or she could be charged with a form of homicide by both the United States and Germany. However, since the offense was committed while in the performance of official duty, the United States retains primary jurisdiction.

(ii) *Primary Concurrent Jurisdiction in the Receiving State.* In all other cases, primary jurisdiction rests with the receiving state. However, it is possible for the receiving state to waive its primary jurisdiction in favor of the sending state, and they often do. The NATO SOFA provides that “sympathetic considerations” shall be given to requests to waive jurisdiction. For example, if a U.S. Soldier assaults a German national, it violates both U.S. and German law, and Germany has primary jurisdiction. Upon request, Germany may waive its jurisdiction, in which case the U.S. may court-martial the Soldier. Supplemental agreements may provide further detail regarding a waiver of jurisdiction.

(3) *Visiting Forces Acts.* If the United States does not have an agreement with a host nation, some nations still extend protections to visiting forces through domestic statutes commonly called Visiting Forces Acts. Commonwealth nations are those most likely to have Visiting Forces Acts (e.g., Jamaica and Belize). In general, these statutes provide a two-part test. First, Visiting Forces Acts require that the domestic law of the receiving state list the sending state in accordance with its domestic law. Second, the jurisdictional methodology is one of two types: a jurisdictional model similar to the NATO SOFA, or protections equivalent to A&T status. In any case, it is essential that the judge advocate acquire a copy of the host nation’s Visiting Forces Act before deploying into that country.

(4) *No Protection.* U.S. forces may also deploy into a country where they are completely subject to the host nation’s jurisdiction. While it is U.S. policy to maximize U.S. jurisdiction over its personnel, jurisdictional protections may not be feasible. However, if a Soldier allegedly commits a crime in such a country, diplomatic negotiations may successfully secure a more favorable treatment for the servicemember. Judge advocates should remember that a lack of status protections is merely a planning factor for commanders, not a legal objection.

e. *The United States as a Receiving State.*

(1) Traditionally, the SOFA issues judge advocates face involve U.S. servicemembers deployed to other countries. In the post-Cold War era, however, foreign forces began coming to the U.S. for training on a routine basis. In fact, some NATO nations have units permanently stationed in the United States.²⁴ The status of these foreign forces in the United States depends on the agreements we have with the sending state. Almost all U.S. SOFAs are non-reciprocal in nature. For example, the Korean SOFA only applies to U.S. armed forces in the Republic of Korea (ROK). Therefore, if ROK soldiers are present in the United States, exclusive jurisdiction would rest with the United States. On the other hand, the United States may have entered into a SOFA that is reciprocal, such as the NATO SOFA and the Partnership for Peace (PFP) SOFA.

(2) There are a number of complicated issues in the area of jurisdiction over foreign forces in the United States. Based on our federal system, if the international agreement under which foreign forces are seeking protection is a treaty, the provisions of the agreement are the supreme law of the land and are binding on both the Federal and State jurisdictions. Conversely, international agreements that are not treaties (executive agreements) are

²⁴ For example, German Tornado fighter aircraft are permanently assigned at Holloman Air Force Base, New Mexico. See, e.g., David Burge, *German Air Force operations leaving Fort Bliss for Holloman*, Alamogordo Daily News, Mar. 11, 2013, available at http://www.alamogordodailynews.com/news/ci_22768935/german-air-force-operations-leaving-fort-bliss-holloman.

binding on the Federal government, but not generally on the states. Absent additional legislation, a state prosecutor is free to charge a visiting service member for a crime under state law, regardless of the provisions of the executive agreement. State prosecutors are typically willing to defer a prosecution as a matter of national interest, but it is a delicate diplomatic situation. Judge advocates must also become familiar with the option of a foreign force to impose discipline on members of their force within the United States. Just as the United States conducts courts-martial in host nation countries, reciprocal countries may wish to do the same in the United States. DoDI 5525.03 addresses some of these issues.

f. *Exercise of FCJ by the Receiving State.* If U.S. military personnel are subjected to FCJ under any of situations described above, the United States must take steps to ensure that the servicemember receives a fair trial. Detailed provisions are set out in DoDD 5525.1 and implementing service regulations.

g. *United Nations Missions.* Personnel participating in a United Nations (UN) mission typically will have status protections. In some cases, the receiving state may grant UN forces “expert on mission” status. This refers to Article VI of the Convention on the Privileges and Immunities of the United Nations, and grants complete criminal immunity. Alternatively, the UN may negotiate a Status of Mission Agreement (SOMA). The UN “Model” SOMA provides the sending state exclusive criminal jurisdiction.

h. *Article 98 Agreements and the International Criminal Court (ICC).* After the entry into force of the Rome Statute of the ICC in July 2002, the U.S. began negotiating Article 98 Agreements with other nations.²⁵ These agreements are so named after Article 98 of the ICC Statute, which provides:

(1) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

(2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.²⁶

The United States negotiated and concluded many Article 98 Agreements to protect U.S. servicemembers and other U.S. nationals from being handed over to the ICC. Article 98-type language may be integrated into a SOFA, diplomatic note, etc. to temporarily protect U.S. troops. However, if a SOFA or other international agreement grants the United States exclusive or primary jurisdiction for offenses committed in the course of official duties, U.S. service members are protected from ICC jurisdiction. For example, if the United States has a SOFA with country X that grants A&T Status to U.S. Soldiers (but no Article 98 Agreement exists), the host nation is required to recognize the United States’ jurisdiction over the offense. Well before deployment, judge advocates should check with their technical chain of command regarding the existence of any applicable Article 98 Agreements and the impact of existing SOFAs on potential ICC jurisdiction.

i. *Claims and Civil Liability.* Claims for damages almost always follow deployments of U.S. forces. Absent an agreement to the contrary (or a combat claims exclusion), the United States is normally obligated to pay for damages caused by our forces. It is generally desirable for state parties to waive claims against each other. In addition, it is not uncommon for a receiving state to agree to pay third party claims caused by U.S. forces in the performance of official duties, and release Soldiers from any form of civil liability resulting from such acts. For third party claims not caused in the performance of official duties, the United States may typically pay at its discretion such claims in accordance with U.S. laws and regulations, i.e., the Foreign Claims Act²⁷ (FCA). However, the Soldier may remain subject to host nation civil jurisdiction, which can be mitigated by payments made under the FCA.

²⁵ Although it is not an official U.S. government resource reflective of official U.S. policy, the Georgetown Law Library maintains a useful online guide to Article 98 agreements. Georgetown Law Library, *International Criminal Court - Article 98 Agreements Research Guide*, http://www.ll.georgetown.edu/guides/article_98.cfm (current as of Dec. 2009) (last visited Apr. 29, 2014). Official U.S. status regarding an Article 98 agreement is reflected in DoS’s *Treaties in Force* and *Treaty Actions*. See *supra* Part II.

²⁶ Rome Statute of the International Criminal Court, art. 98, 17 July 1998, available at <http://www.un.org/law/icc/>.

²⁷ 10 U.S.C. § 2734-2736. Keep in mind that the payment of claims under the FCA is based not on legal liability, but on the maintenance of good foreign relations.

j. *Force Protection/Use of Deadly Force.* The general rule of international law is that a sovereign is responsible for the security of persons within its territory. This does not, however, relieve the U.S. commander of his or her responsibility for the safety (i.e., self-defense) of the unit. As part of pre-deployment preparation, the judge advocate should determine whether the applicable agreement includes provisions regarding force protection and review the applicable rules of engagement. While the host nation is generally responsible for the security of persons in its territory, it is common for the United States to be responsible for security internal to the areas and facilities it uses. For example, Article III of the Korean SOFA provides that, in the event of an emergency, the U.S. armed forces shall be authorized to take such measures *in the vicinity of* its facilities and areas as may be necessary to provide for their safeguarding and control.²⁸ The SOFA may also include a provision allowing military police the authority to apprehend U.S. personnel off the installation.

k. *Entry/Exit Requirements.* Passports and visas are the normal instruments for identifying a person's nationality and verifying that the receiving state authorized their entry. But the issuance of passports and visa to large numbers of military personnel is expensive, time consuming, and often impractical in an emergency. The time it takes to process visa requests has a significant impact on operational flexibility. As a result, most SOFAs authorize U.S. personnel to enter and exit the territory of the receiving state with their military identification cards and orders, or provide other expedited procedures.

l. *Customs and Taxes.* While U.S. forces must pay for goods and services requested and received, sovereigns generally do not tax other sovereigns. U.S. forces are normally exempt from paying host nation customs, duties, and taxes on goods and services imported to or acquired in the territory of the receiving state for official use. Likewise, receiving states often exempt Soldiers from paying customs or duties for personal items.

m. *Contracting.* SOFAs will also typically provide U.S. forces the authority to contract on the local economy for procurement of supplies and services which are not available from the host nation government. As noted above, the SOFA should also ideally exempt goods and services brought to or acquired in the host country from import duties, taxes, and other fees. This provision is designed to allow for the local purchase of some or all items needed, but does not alter or obviate other U.S. fiscal and contracting legal requirements.

n. *Vehicle Registration/Insurance/Drivers' Licenses.* SOFAs or other agreements should exempt the U.S. from third party liability insurance requirements and any requirements for U.S. drivers to receive a license under the law of the receiving state.

(1) The U.S. Government is "self-insured." That is, it bears the financial burden of risks of claims for damages, and the FCA provides specific authority for the payment of claims. As a result, negotiation of any agreement should emphasize that the United States does not need to insure its vehicles.

(2) Although official vehicles may require marking for identification purposes, receiving states should not require the United States to register its vehicles. In many countries, vehicle registration is expensive. Privately-owned vehicles, however, may be required to register with the receiving state upon payment of only nominal fees to cover the actual costs of administration.

(3) A provision for U.S. personnel to drive official U.S. vehicles with official U.S. drivers' licenses expedites the conduct of official business. In the alternative to honoring U.S. drivers' licenses, receiving states may agree to issue a license based on the possession of a valid U.S. license without requiring additional examination.

o. *Communications Support.* When U.S. forces deploy, commanders rely heavily upon communications to exercise command and control. Absent an agreement to the contrary, host nation law governs the commander's use of frequencies within the electro-magnetic spectrum. This includes not only tactical communications, but also commercial radio and television airwaves. This can greatly impact operations, and should be addressed early in the planning process.

2. Logistics Agreements.

²⁸ See Agreed Minutes, Agreed Understandings, and Exchange of Letters, Facilities and Areas and the Status of United States Armed Forces in Korea, art. III, 17 U.S.T. 1677; T.I.A.S. 6127; 674 U.N.T.S. 163. Signed at Seoul July 9, 1966. Entered into force Feb. 9, 1967. available at http://www.usfk.mil/usfk/Uploads/130/US-ROKStatusofForcesAgreement_1966-67.pdf (last visited Apr. 30, 2014).

a. *Pre-Positioning of Materiel.* If the U.S. needs to pre-position equipment or materiel in a foreign country, an international agreement should contain the following provisions:

- (1) Host nation permission for the United States to store stocks there.
- (2) Unimpeded United States access to those stocks.
- (3) Right of removal, without restriction on subsequent use.
- (4) Adequate security for the stocks.
- (5) The host nation must promise not to convert the stocks to its own use, nor to allow any third party to do so (i.e., legal title remains vested in the United States).
- (6) Appropriate status protections for U.S. personnel associated with storage, maintenance, or removal of the stocks.

b. *Negotiation.* In some cases, the DoD General Counsel has allowed some leeway in negotiating pre-positioning agreements, provided that host government permission for U.S. storage in its territory and unequivocal acknowledgment of the U.S. right of removal are explicit. “Legal title” need not be addressed *per se*, if it is clear the host government has no ownership rights in the stocks, only custodial interests, and that pre-positioned stocks are solely for U.S. use. “Access” to the pre-positioned stocks need not be addressed explicitly, unless U.S. access is necessary to safeguard them. There can be no express restrictions on U.S. use. Prior “consultation” for U.S. removal of pre-positioned stocks is not favored, and prior “approval” is not acceptable. “Conversion” need not be specifically addressed, if it is clear that the pre-positioned stocks’ sole purpose is to meet U.S. requirements. “Security” must be specifically addressed only when stores are at risk due to their value. “Privileges and immunities” are required only when it is necessary for U.S. personnel to spend significant amounts of time in the host country to administer, maintain, guard, or remove the stocks.

c. *Host Nation Support.* When a unit deploys overseas, some of its logistical requirements may be provided by the host nation. If so, it is desirable to have an international agreement specifying the material the host nation will provide and on what conditions, such as whether it is provided on a reimbursable basis.

d. *ACSA.* Chapter 138 of Subtitle A of Title 10, U.S.C. also provides authority for government-to-government ACSAs for mutual logistics support. Under 10 U.S.C. § 2341-2350, U.S. forces and those of an eligible country²⁹ may provide logistics support, supplies, and services on a reciprocal basis. Such support, supplies, and services are reimbursed through: replacement in kind; trade of support, supplies, or services of equal value; or cash. There are limits on the total amount of liabilities the United States may accrue under this subchapter, except during a period of active hostilities.³⁰ In addition, units cannot use ACSAs as a substitute for normal sources of supply, or as a substitute for foreign military sales procedures. Prohibited items are those designated as significant military equipment on the U.S. Munitions List. For additional guidance on ACSAs, see DoD Directive 2010.9, *Acquisition and Cross-Servicing Agreements* and the Fiscal Law Chapter of this Handbook.

e. *Cryptologic Support.* 10 U.S.C. § 421 authorizes SECDEF to use funds appropriated for intelligence and communications purposes to pay the expenses of arrangements with foreign countries for cryptologic support. This authority has been frequently used as the basis for agreements to loan communications security (COMSEC) equipment, such as message processors or secure telephones, to allied forces. Judge advocates should be prepared to provide advice on related technology transfer issues and issues surrounding the disclosure of classified information. One of the key provisions of any COMSEC agreement is the assurance that the receiving state’s forces will not tamper with the equipment in an effort to retro-engineer its technology. See CJCSI 6510.01F, *Information Assurance (IA) and Support to Computer Network Defense (CND)*, 9 Feb. 2011, for guidance.

²⁹ Eligible countries include all NATO countries, plus non-NATO countries designated by SECDEF. Criteria for eligibility include: defense alliance with the U.S.; stationing or homeporting of U.S. Forces; pre-positioning of U.S. stocks; hosting exercises; or staging U.S. military operations.

³⁰ See 10 U.S.C. § 2347.

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