



UvA-DARE (Digital Academic Repository)

The status of foreign forces in Afghanistan post 2014

Voetelink, J.E.D.

Publication date

2015

Document Version

Final published version

Published in

Militair Rechtelijk Tijdschrift

[Link to publication](#)

Citation for published version (APA):

Voetelink, J. E. D. (2015). The status of foreign forces in Afghanistan post 2014. *Militair Rechtelijk Tijdschrift*, 108(1), 1-19.

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

The Status of Foreign Forces in Afghanistan post 2014.

BY COLONEL DR. MR. J.E.D.VOETELINK¹

On 30 September 2014 the long-awaited Bilateral Security Agreement (BSA) between Afghanistan and the US and the post-2014 Status of Forces Agreement (SOFA) between Afghanistan and NATO were signed, ending a process that dragged on for almost two years. While the media often stress that the agreements allow the US and NATO to continue their military presence in the country, the two agreements actually define the legal rights and obligations of the foreign forces in Afghanistan post 2014. The two agreements, although not dramatically different from their predecessors, reflect to a certain extent the character of the new military mission and the changing relations between Afghanistan and the international community supporting the country.

Introduction

On 21 September 2014 presidential candidates Dr. Abdullah Abdullah and Dr. Ashraf Ghani signed an agreement, naming Dr. Ghani president of the Islamic Republic of Afghanistan, while Dr. Abdullah will hold the newly created position of Chief Executive Officer. This power-sharing agreement brings closure to the electoral crisis,² as both men have now joined together in a national unity government.³

Moreover, it removed the final obstacles for signing the *Bilateral Security Agreement (BSA)* between Afghanistan and the United States⁴ (US) and the post-2014 Status of Forces Agreement (SOFA) between Afghanistan and the North Atlantic Treaty Organisation⁵ (NATO SOFA AFG).

¹ Associate Professor of Military Law at the Netherlands Defence Academy (NLDA). I am grateful to Frank van Dijk, Paul Ducheine and Terry Gill for their helpful comments. The present article is part of the author's research under the auspices of the Amsterdam Center for International Law and the NLDA as part of the research program The Role of Law in Armed Conflict and Peace Operations. The author has written it in a personal capacity and it does not necessarily reflect the views the Dutch Ministry of Defence. Parts of this article are based on: Joop Voetelink, 'Status of Forces: Exercise of Criminal Jurisdiction over Military Personnel in International and Operational Legal Perspective', Springer, forthcoming.

² It took several months before the Independent Election Commission could declare Dr. Ghani the winner of the presidential elections, as the second round of the elections were marred by allegations of fraud, causing Dr. Abdullah to contest the validity of the preliminary results.

³ Statement by the Press Secretary on Signing of a Political Agreement Regarding the Electoral Crisis in Afghanistan; 21 September 2014 <www.whitehouse.gov/the-press-office/2014/09/21/statement-press-secretary-signing-political-agreement-regarding-electora> Accessed 23 September 2014.

⁴ *Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America*; Kabul, 30 September 2014 <mfa.gov.af/Content/files/BSA%20ENGLISH%20AFG.pdf> Accessed November 2014).

⁵ *Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan*; Kabul, 30 September 2014 (NATO Doc PO(2014)0652 | October 2014 and <mfa.gov.af/Content/files/SOFA%20ENGLISH.pdf> Accessed November 2014).

Both agreements are critical for continuation of the foreign military presence in Afghanistan after 31 December 2014.

On 29 September Dr. Ghani was sworn in as Afghanistan's 13th president and within 24 hours of taking office he authorized ratification of the two agreements. That same day the National Security Advisor signed them on behalf of Afghanistan. The US ambassador to Afghanistan then put his signature under the BSA, as did the Senior Civilian Representative of NATO with respect to the *NATO SOFA AFG*, bringing to an end a process that lasted almost two years.

Negotiations between Afghanistan and the US on the BSA had already started in late 2012. When the negotiators finally managed to reach an agreement in November 2013, the then president, Hamid Karzai, refused to sign the document. Allegedly, he was angered by the way US forces operated in his country by, inter alia, conducting searches of Afghan houses at night and by the substantial number of civilian casualties which occurred as a result of encounters with Taliban forces in general. He also accused the US of only serving its national interests. As the *NATO SOFA AFG* was to be closely coordinated with the BSA,⁶ no progress could be made on this agreement either.

A number of NATO and non-NATO States, including the Netherlands,⁷ contribute to NATO's post 2014 Resolute Support Mission (RSM) in Afghanistan. All participating foreign forces are subject to the provisions of the *NATO SOFA AFG*. This particular agreement, together with the BSA on which it was based, is critical to all States involved in RSM. The present article aims to shed light on a number of the issues the SOFA addresses and will compare the newly concluded agreements with their predecessors, taking into account some of the questions that were raised in the negotiations.

After introducing the issue of the status of armed forces stationed abroad, the SOFAs that were in place in Afghanistan until 2014 will be briefly discussed. Next, the development of the present agreements will be reviewed and subsequently a number of elements of the two agreements will be elaborated upon. The article will conclude with a few remarks.

A brief remark is required with respect to foreign military personnel participating in other, non-military missions in Afghanistan, like the EU Police Mission (EUPOL) and the UN Assistance Mission in Afghanistan (UNAMA). As their status has another legal basis⁸ that is not directly related to the post-2014 military mission in Afghanistan, it will not be further discussed in the present article.

⁶ As key player and largest contributor of foreign forces in Afghanistan the US would first negotiate its agreement with Afghanistan, which would then be the basis for the *NATO SOFA AFG*. A similar scenario was envisaged in 2010, when negotiating the post 2010 SOFAs with Iraq; see below.

⁷ *Dutch Parliamentary Papers II* 2013/14, 29 521 nr. 254; Letter on the Dutch contribution to Resolute Support Afghanistan (Art. 100 [Dutch] Constitution).

⁸ Agreement between the European Union and the Islamic Republic of Afghanistan on the Status of the European Union Police Mission in Afghanistan, EUPOL AFGHANISTAN; Kabul, 14 October 2010 (OJ L 2010, 294/2).

The Status of Forces Stationed Abroad

Distinct from wartime situations where States have occupied parts of other States, or are operating on enemy territory,⁹ the legal status of military personnel stationed abroad with the host State's consent,¹⁰ is usually laid down in international instruments, today mostly referred to as Status of Forces Agreements (SOFAs). Viewed from a legal perspective, SOFAs delineate the rights and obligations of military personnel while present on foreign territory: *jus in praesentia*.¹¹ From a military operational law perspective SOFAs are also instrumental to the sending States' military mission and accommodate the deployment of military units by expediting their entry into host State territory and facilitating day-to-day operations during their foreign presence.

There is no internationally accepted model-SOFA. Therefore, SOFAs can take different forms and their contents may vary, depending on the purpose of the foreign military presence. The larger part of contemporary SOFAs are international agreements in accordance with the *Vienna Convention on the Law of Treaties*.¹² These agreements are binding under international law, providing the sending States with the legal certainty they require for their troops serving abroad.

However, in the absence of a binding treaty, other international instruments can offer an adequate alternative. States sometimes set out the status of forces in so-called Memoranda of Understanding (MOUs), which have a definite political impact, but are generally considered not to be legally binding on the participants.¹³ MOUs are proven a reliable instrument in international relations especially in the field of military cooperation. Therefore, when the conclusion of an international agreement is not acceptable to a State,¹⁴ an MOU can be a suitable option. For instance, several States supported military operations in Afghanistan using military bases in the Gulf-region. Arrangements with these host States on the status of visiting forces often took the form of MOUs.¹⁵ Because of the non-legally binding character of MOUs there is neither an obligation to publish them under international law nor, generally, under national law. As a result, little information is available on the contents of these status arrangements.

⁹ In this situation the legal status of the armed forces is governed by the law of armed conflict.

¹⁰ Host State consent cannot be implied, but must be expressed explicitly; e.g., Aurel Sari, 'The Status of Foreign Armed Forces Deployed in Post-Conflict Environments: Search for Basic Principles.' In: Carsten Stahn, Jennifer S. Easterday and Jens Iverson (eds.), *Jus Post Bellum. Mapping the Normative Foundations*. Oxford University Press 2014, p. 43 (on-line version <www.aurelsari.co.uk/2014/03/jus-post-bellum-and-the-status-of-foreign-armed-forces/> Accessed November 2014).

¹¹ D. Fleck, 'The Development of the Law of Stationing Forces in Germany: Five Decades of Multilateral Cooperation'. In: Fleck D (ed.), *The Handbook of the Law of Visiting Forces*. Oxford University Press, Oxford 2003, p. 351.

¹² *Vienna Convention on the Law of Treaties*; Vienna, 23 May 1969 (Vol. I 1155 UNTS 1980, No. 18232).

¹³ In contrast to treaties MOUs are not subject to international law and, as a result, are not legally binding; see A. Aust, *Modern Treaty Law and Practice*. Cambridge University Press, Cambridge 2007, pp. 20-21.

¹⁴ E.g., most legal systems require some kind of Parliamentary involvement to conclude international agreements. If, however, the subject matter of the proposed arrangements does not necessarily require parliamentary involvement under national law, a MOU may be an alternative option.

¹⁵ MOUs are seldom published. Reference to these MOU's is frequently made in Dutch *Parliamentary papers*; e.g. *Parliamentary Papers*, TK 2001–2002, 27 925, nr. 63 on deployment of a naval patrol aircraft to the United Arab Emirates.

The vast majority of SOFAs are consensual in nature. On occasion, however, SOFAs take the shape of unilateral instruments. For instance, in 2003 during the occupation of Iraq by a US led coalition force, the status of the foreign forces in Iraq was covered by an order issued by the Coalition Provisional Authority of Iraq.¹⁶ More importantly, the UN Security Council sometimes provisionally deals with the status of forces by resolution, when it is expected that it will not be possible to conclude a mission specific SOFA in time.¹⁷ The present article refers to all these instruments with the generic term SOFA.

SOFAs can cover a host of subjects. The most distinctive features of SOFAs are the provisions on exercise of criminal jurisdiction over the sending States' armed forces on host State territory,¹⁸ which basically answer the question: which State can prosecute sending States' servicemen suspected of committing offences on host State territory? Thus, SOFAs, taking into account international practices and customary law,¹⁹ have to strike a balance between the sending States' interest in exercising all authority over their deployed forces, including criminal jurisdiction, and the host States' right, based on the principle of territorial jurisdiction, to exercise that jurisdiction with respect to all persons on their territory.²⁰

In addition to criminal jurisdiction, SOFAs address other issues that expedite entry into host State territory and facilitate operations of the visiting units. If the scope of the foreign deployment is limited in time, place and number of forces, for instance, in case of a one-time training event of a military unit abroad, basic SOFAs will be sufficient, covering a limited number of issues, such as civil jurisdiction, settlement of claims, tax facilities, immigration requirements and customs duties, the bearing of arms and the wearing of uniforms. To expedite the process it is sometimes agreed to grant visiting forces the same privileges and immunities as are accorded to members of the administrative and technical staff of a diplomatic mission under the provisions of the *Vienna Convention on Diplomatic Relations*.²¹ As a result, sending States' forces enjoy full immunity from the criminal, and also partly from the civil and administrative, juris-

¹⁶ *CPA Order 17 (rev.): Coalition Provisional Authority Order Number 17 (revised): Status of the Coalition Provisional Authority, MNF-Iraq, Certain missions and Personnel in Iraq*; 27 June 2004 (<www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf> Accessed November 2014). Another example is the *Regulation on the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo*; Regulation No. 2000/47, UNMIK/REG/2000/47, 18 August 2000, International Law Reports, Volume 133, p. 20.

¹⁷ See for example, the United Nations Mission in the Central African Republic (MINURCA), *UN Doc S/RES/1158 (1998)*, par. 19. This practice is followed frequently; a recent example being the UN Multidimensional Integrated Stabilization Mission in Mali (UNISMA) (*UN Doc S/RES/2100 (2013)*), par. 33.

¹⁸ One of the first agreements that can be labeled a SOFA was concluded right after the start of World War I and exclusively dealt with criminal jurisdiction (*Agreement between Belgium and France relative for the Better Prosecution of Acts Prejudicial to the Armed Forces*, Brussels, 14 Augustus 1914, Vol. 220 *Consolidated Treaty Series 1914-1915*, p. 274).

¹⁹ The present article will not elaborate on customary rules vis-à-vis military personnel.

²⁰ Richard J Erickson, 'Status of Forces Agreements: a sharing of sovereign prerogative', *The Air Force Law Review* (1994), p. 140, summarizes it as: "The purpose of a SOFA is to share the sovereign prerogative between the receiving and the sending state".

²¹ Art. 37(2) and Art. 29 – 35, *Vienna Convention on Diplomatic Relations*; Vienna, 18 April 1961 (Vol. 500 UNTS 1964, Nr. 7310).

diction of host State courts.²² In situations involving longer or recurrent deployments abroad more comprehensive SOFAs are often concluded, which may include, in addition to the issues mentioned above, provisions on logistical and medical matters, licenses and exemptions, the use of infrastructure and means of communication etc.

The status of forces deployed abroad is primarily a national responsibility. Therefore, the majority of SOFAs are bilateral agreements between a sending State and a host State. Nevertheless, a few multilateral agreements have been concluded between States cooperating within an alliance or partnership, the best known example probably being the *NATO SOFA*.²³ With respect to crisis management operations led by international organisations, like the UN, NATO, the European Union (EU) and the African Union (AU), a different practice has evolved. These organisations conclude mission specific SOFAs with the States on whose territory the missions takes place, which will then govern the status of the participating forces.²⁴ As negotiating SOFAs can be a lengthy and contentious process, the UN and the EU have adopted model SOFAs to accelerate the process.²⁵

SOFAs are of paramount importance to States when deciding to deploy their armed forces abroad. Failure to sign a SOFA that adequately regulates the status of their forces, can lead to suspension or even cancellation of foreign military activities. Crucial in negotiations is the core provision on criminal jurisdiction. A case in point is the withdrawal of US and NATO forces from Iraq in 2011.²⁶ As the 2008 SOFA between Iraq and the US²⁷ was due to expire on 31 December 2011, the two States started negotiations on a post-2011 SOFA. The US insisted on full immunity and exclusive criminal jurisdiction over its forces in accordance with preceding arrangements. Iraq, however, viewed the continued immunity of foreign forces on its territory as an infringement of its sovereignty and refused to grant US forces full immunity, resulting in withdrawal of all US forces by the end of 2011. As a consequence the SOFA that NATO needed with respect to the NATO Training Mission-Iraq (NTM-I) could not be concluded either, as it

²² A recent example is the *Agreement between the Kingdom of the Netherlands and Ukraine on the International Mission for Protection of Investigation*; Kiev, 28 juli 2014 (*Dutch Treaty Series 2014, 135*). Art. 6.1. reads: "Personnel of the Mission shall be accorded the status equivalent to that accorded to the administrative and technical staff of a diplomatic mission of a state that is a party to the Vienna Convention on Diplomatic Relations of 18 April 1961".

²³ This reciprocal agreement regulates the status of Member States' forces on each other's territory; *Agreement between the parties to the North Atlantic Treaty regarding the status of their forces*; London, 19 June 1951 (Vol. 199 UNTS 1954, No. 2678).

²⁴ The procedure to make SOFAs applicable to the participating forces depends on the organisation. The UN, for instance, concludes bilateral agreements with each troop contributing State in which these States accept the SOFA, while SOFAs concluded by the EU are binding upon the Member States pursuant to Art. 216(2) *Treaty on the Functioning of the European Union*; Rome, 25 March 1957 (Consolidated version: OJ 2012, 326/47).

²⁵ *Model Status-of-Forces Agreement for Peace-Keeping Operations*, Report of the Secretary-General, UN Doc A/45/594 van 9 October 1990 and *Model Agreement on the status of the European Union-led forces*, EU Doc (11894/07), and EU Doc 11894/07 COR 1).

²⁶ See M.D. Fink, 'De ontwikkeling van de strafrechtelijke rechtsmacht over het personeel van de NAVO-Trainingsmissie in Irak (NTM-I): een kleinschalige missie beëindigd', *Militair Rechtelijk Tijdschrift* 2013, p. 261-264.

²⁷ *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*; Baghdad, 17 November 2008. <www.state.gov/documents/organization/122074.pdf> Accessed November 2014.

was supposed to build on *the Iraq-US SOFA*, resulting in termination of the NTM-I as well. When negotiations between Afghanistan and the US concerning the BSA dragged on, this so-called 'zero-option' was frequently referred to.

The Status of Forces in Afghanistan 2001-2014

In response to the al-Qaeda attacks on the Twin Towers and the Pentagon in September 2001 the US launched Operation Enduring Freedom (OEF) against al-Qaeda and the Taliban regime in Afghanistan within the framework of its so-called Global War on Terror.²⁸ Starting on 7 October 2001 an international coalition of states under US command and supported by the Afghan Northern Alliance gained control over large swaths of the country.

On 5 December 2001 a group of leading Afghans met in Bonn under auspices of the UN and signed the *Bonn-Agreement, inter alia*, establishing the Interim Administration for Afghanistan,²⁹ which formally marked the end of the Taliban regime over the country. Annex I to the *Bonn-Agreement* envisaged an international security force, which was established shortly thereafter by Resolution 1386 of the UN Security Council³⁰ as the International Security Assistance Force (ISAF), which was led by NATO from 11 August 2003.³¹

American led OEF continued its fight against al-Qaeda and Taliban elements after the establishment of ISAF, resulting in two military missions being in part conducted simultaneously within one State. As the preceding paragraphs made clear, OEF and ISAF had different legal bases³² resulting in not just different tasks for the participating forces, but a different legal status for the members of the forces as well.

After the Interim Administration led by Hamid Karzai had formally taken over power in Afghanistan, the US concluded an international agreement on the status of the US armed forces with the newly established government through an exchange of diplomatic notes.³³ It was agreed that members of the US Forces-Afghanistan (USFOR-A) were accorded a status equivalent to that accorded to the administrative and technical staff of the US Embassy under the *Vienna Convention on Diplomatic Relations* and that the US was authorized to exercise criminal jurisdiction over them. Some States that participated in OEF, such as Canada and the United

²⁸ As from 2009 the term 'War on Terror' is officially not in use any more, as the preferred term is now the more neutral wording 'overseas contingency operations'; S. Wilson & A. Kamen, "Global War On Terror' Is Given New Name", *Washington Post*, 25 March 2009.

²⁹ *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*; Bonn, 5 December 2001 (<www.un.org/news/dh/latest/afghan/afghan-agree.htm> Accessed November 2014).

³⁰ *UN Doc S/RES/1386* (2001) of 20 December 2001.

³¹ Initially ISAF was a coalition of States under the rotating command among the participating States; e.g., the United Kingdom and Germany/the Netherlands.

³² OEF was based on the right of self-defence (Art. 51 UN Charter) and ISAF on a Security Council Resolution.

³³ *Agreement regarding the status of United States military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities*; 26 September and 12 December 2002 and 28 May 2003; 28 May 2003 (6192 KAV i).

Kingdom, allegedly followed suit and concluded a SOFA with Afghanistan,³⁴ while other States that had also deployed armed forces to Afghanistan as part of OEF, refrained from doing so. In view of the ongoing hostilities the latter group of States presumably took the view that the law of armed conflict covered the status of their troops.

The status of ISAF personnel had a different basis and is governed by the provisions of the *Military Technical Agreement (MTA)* concluded by Commander ISAF and the Interim Administration on 4 January 2002.³⁵ Pursuant to Annex A of the MTA, *Arrangements regarding the status of the International Security Assistance Force*, ISAF personnel remains subject to the exclusive criminal jurisdiction of the sending States.³⁶

The two agreements preclude Afghanistan as host State from exercising its criminal jurisdiction over foreign military personnel. Today it is generally accepted that when armed forces can get involved in military action, involving the use of force, operational necessity requires sending States to retain the widest control possible over its deployed forces, including the exclusive right to exercise criminal jurisdiction.³⁷ The visiting forces have to be able to conduct their operations without outside interference, especially from host State authorities. Host State consent to the foreign armed forces' presence should, therefore, imply "a waiver of all jurisdiction over the troops".³⁸ In other words, the sending States' interests outweigh the impact the waiver of jurisdiction may (be felt to) have on host State sovereignty. As a result, all mission specific SOFAs contain provisions similar to the ones included in the SOFAs concluded with the US and NATO.

Negotiating the post 2014 Agreements

When the legal basis and operational character of a mission change, the tasks of the participating armed forces will change accordingly, which may affect the legal status of forces. In Afghanistan this process was set in motion when NATO decided at the Lisbon summit in 2010 to gradually transfer the lead responsibility for security to Afghanistan³⁹ resulting in a shift from a combat to a supporting role in the country. The transition process was not meant to bring the foreign military presence in Afghanistan to an end. Both NATO and the US confirmed their

³⁴ These agreements have not been published.

³⁵ *Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan*; 4 January 2002 (<www.operations.mod.uk/isafmta.pdf> Accessed 10 November 2014).

³⁶ When NATO took charge of ISAF in August 2003, it concluded a supplementary agreement with Afghanistan on the status of the forces of NATO; *Exchange of letters between NATO and Afghanistan regarding the status of NATO and its personnel when present on the territory of Afghanistan in the execution of ISAF*; 5 September 2004 and 22 November 2004 (this classified agreement has not been published).

³⁷ Sari describes operational or military necessity in terms of a sliding scale depending on the level of operational risk; Aurel Sari 2014, p. 18.

³⁸ As Chief Justice Marshal considered in the first documented court case on jurisdiction over armed forces abroad, in this particular case, with respect to troops in transit; U.S. Supreme Court 24 February 1812, *The Schooner Exchange v. McFaddon* 11 U.S. 116 (1812) <supreme.justia.com/us/11/116/case.html> Accessed November 2014.

³⁹ Lisbon Summit Declaration, 20 November 2010, par. 4 <www.nato.int/cps/en/natolive/official_texts_68828.htm> Accessed November 2014.

long-term commitment to Afghanistan; NATO in the *Declaration on an Enduring Partnership*⁴⁰ and the US in the *Enduring Strategic Partnership Agreement (Partnership Agreement)*.⁴¹ Both documents provided for a continued foreign military presence in Afghanistan for the purpose of training, advising and assisting the Afghan National Security Forces in order to strengthen their capacity and capabilities. The Afghan-US *Partnership Agreement* also envisaged continuation of the US counterterrorism mission in ‘*combating al-Qaeda and its affiliates*’.⁴²

The transition was completed on 19 June 2013 paving the way for NATO’s Train, Advise and Assist mission Resolute Support in Afghanistan, starting 1 January 2015. The changing purpose of the missions for NATO and USFOR-A brought about that the status of the foreign forces had to be renegotiated, as was specifically mentioned in Article III (2)(b) of the *Partnership Agreement*.⁴³ Even before the first round of negotiations between Afghanistan and the US officially commenced on 15 November 2012, President Karzai hinted at the possibility that “*the people of Afghanistan would [...] not allow their government to offer any judicial immunity to foreign forces*”;⁴⁴ putting the issue of criminal jurisdiction at the top of the agenda. Exercise of criminal jurisdiction is a sovereign attribute of any State. Karzai’s remarks could hardly have come as a surprise, as full respect for Afghan sovereignty and Afghan national interests was one of the guiding principles in the negotiations, and also keeping in mind the failed negotiations on the *Iraq-US SOFA* in 2010. Indeed, disagreement over the issue of criminal jurisdiction continued to complicate matters until the very last moment.

Beside the issue of criminal jurisdiction, a number of other, often contentious issues had to be addressed as well, such as continuing US support to Afghanistan’s economy, guarantees with respect to Afghanistan’s external security, the size of the foreign forces, the number of military bases, and detention of Afghan nationals by foreign forces. Negotiations proceeded slowly, but over the months small successes were reported, for instance the agreement early May 2013 on the use of nine military bases in all of Afghanistan. All in all it was a lengthy and painful process that was fraught with political controversies. For example, as media reported in June that talks on the BSA entered its final stages, President Karzai abruptly suspended negotiations on 19 June after the announcement of the US that peace talks with the Taliban were about to begin in Qatar. Because of the stalled negotiations, US officials in their turn indicated that President Obama was (again) considering the zero option (withdrawal of all US armed forces from Afghanistan)⁴⁵ and stressed the need to have the agreement signed by October 2013.

⁴⁰ Declaration by the North Atlantic Treaty Organization (NATO) and the Government of the Islamic Republic of Afghanistan on an Enduring Partnership; Lisbon 20 November 2010; confirmed at the Chicago Summit: Declaration on Afghanistan Issued by the Heads of State and Government of Afghanistan and Nations contributing to the NATO-led International Security Assistance Force (ISAF), NATO; Chicago, 21 May 2012.

⁴¹ <www.whitehouse.gov/sites/default/files/2012.06.01u.s.-afghanistanspassignedtext.pdf> Accessed November 2014.

⁴² Art. III (6).

⁴³ As early as 2008 the Afghan government had demanded negotiation of a formal SOFA; Kenneth Katzman, ‘Afghanistan: Post-Taliban Governance, Security, and U.S. Policy’, *CRS Report for Congress*, 15 April 2011. Also, see Karen DeYoung, ‘Only a Two-Page ‘Note’ Governs U.S. Military in Afghanistan’, *Washington Post*, 28 August 2008 <www.washingtonpost.com/wp-dyn/content/article/2008/08/27/AR2008082703628.html> Accessed November 2014.

⁴⁴ Press Release, President Karzai: People Condition Foreign Troops Immunity on Peace and Stability in Afghanistan, 18 October 2012 <president.gov.af/en/news/13914> Accessed November 2014

⁴⁵ ‘White House considering total pullout of Afghanistan after 2014’, *Stars and Stripes*, 9 July 2013.

At the end of July negotiations seemed to have been revived and the tone of reports from Kabul and Washington changed, indicating a growing confidence in the BSA. Progress continued to be slow, however, and it was not until mid-October that after 48 hours of negotiations US Secretary of State Kerry and President Karzai managed to reach an accord on many of the outstanding issues. One issue remained, however: the US demand that American troops in Afghanistan after 2014 be immune from prosecution by Afghan Courts and be tried by the US.⁴⁶

As President Karzai had already made clear in a press conference early January 2013, the decision whether US forces staying in Afghanistan after 2014 would be immune from prosecution under Afghan law, should not be his to make, but should be made by a national meeting of elders and other powerful Afghans, known as the Loya Jirga (Grand Council).⁴⁷ The Loya Jirga convened in November and approved the final draft of the BSA on 24 November, recommending to promptly sign the agreement and send it to Parliament for final ratification.⁴⁸ As mentioned above, President Karzai refused to sign the BSA and it was not until the new president took office that the agreement was finally signed.

After the respective internal legal requirements were completed the agreements entered into force on 1 January 2015, succeeding previous agreements. They will remain in force for ten years and beyond, but can be terminated by mutual agreement or upon a two years' notice of either of the parties to the agreements.⁴⁹

With a view to the long drafting process, it could be expected that most issues were dealt with in detail and not much room would be left for further discussion. Indeed, many provisions are quite extensive and more elaborate than similar provisions in other SOFAs, delicately balancing the often sensitive interests of both parties. However, a number of provisions include clauses such as "...unless otherwise mutually agreed", facilitating further arrangements. Of course, treaties do not need to detail all specifics of the agreed cooperation, accepting that implementation of the treaty may take additional arrangements. It is remarkable, however, that the drafters of the BSA even allowed a sensitive issue like the conduct of combat operations by US forces, to be further dealt with at a later date.⁵⁰

The post 2014 Agreements; General Remarks

Drawing heavily upon the BSA, the NATO SOFA AFG did not make the headlines and is in fact virtually identical to the BSA (see Table 1). The main differences between the two agreements

⁴⁶ Matthew Rosenberg, 'Talks Clear Path for U.S.-Afghan Deal on Troops', *The New York Times*, 12 October 2013.

⁴⁷ Scott Peterson, 'Back in Afghanistan, Karzai Shifts Tone on US Troop immunity', *The Christian Science Monitor*, 14 January 2013 <www.csmonitor.com/World/Asia-South-Central/2013/0114/Back-in-Afghanistan-Karzai-shifts-tone-on-US-troop-immunity-video> Accessed November 2014.

⁴⁸ The 19 November draft was published next day <mfa.gov.af/en/news/bsa> Accessed November 2014.

⁴⁹ Art. 26 (1) and 4 BSA and Art. 25 (1)(4) NATO SOFA AFG.

⁵⁰ Article 2 (1) BSA. Implementing Arrangements and procedure to carry out the provisions of the BSA and NATO SOFA AFG may be entered into by either the Joint Commission or the Afghanistan-NATO Implementation Commission: Art. 24 (2) BSA and Art. 22 (2) NATO SOFA AFG. The two agreements can be amended through exchanges of diplomatic notes; Art. 26 (3) BSA and Art. 25 (3) NATO SOFA AFG.

can be explained by the broader scope of the BSA, which aims at a close cooperation between Afghanistan and the US with respect to defence and security, resulting, *inter alia*, in a wider mandate for the US forces in Afghanistan. Both the US and NATO will train, advise and assist the Afghan National Defense and Security Force (ANDSF). In addition, Afghanistan and the US acknowledge in Article 2 (4) of the BSA that in the common fight against terrorism US military operations “to defeat al-Qaeda and its affiliates may be appropriate”. In other words, NATO’s Resolute Support mission is a non-combat mission *pur sang*, while, in addition, US forces can engage in counter-terrorism operations in support of and together with ANDSF.⁵¹ Nevertheless, the operational possibilities for the US are restricted, as it is not allowed to conduct combat operations in Afghanistan, unless otherwise mutually agreed.⁵²

Undoubtedly, the US would have liked to have more authority to independently conduct various types of military operations in Afghanistan. However, Afghans have grown weary and frustrated at the way American and other foreign forces have operated in the past fifteen years, sometimes disrespecting local traditions and causing civilian casualties, and argued that respect of Afghan sovereignty should be reflected in their authority over foreign military operations in the country after 2014. Indeed, Afghan sovereignty was a guiding principle for the talks between Afghanistan and the US and is a recurring theme throughout the BSA. The Preamble stresses, for instance, the “sovereignty, independence, territorial integrity, and national unity of Afghanistan” and refers to sovereignty no less than seven times in the Preamble. The sovereign position of Afghanistan is also reflected by its participation in the Joint Commissions (Art. 25 BSA)/Afghanistan-NATO Implementation Commission (Art. 23 NATO SOFA AFG) that oversee implementation of the agreements. Establishment of these commissions is a clear departure from the past ‘unequal’ relationship between Afghanistan and US/NATO.⁵³

While the US probably feels that its operational possibilities are overly restricted, it should be pointed out that Afghanistan did not get its way on all issues either. One of the major political issues, that also contributed to prolongation of the BSA talks, was Afghan demands for a strong US commitment with respect to country’s external security. Repeatedly the US was pressed for guarantees against external threats, such as an attack by neighboring Pakistan, which the US had vigorously refused. Ultimately the arrangement is very different from a NATO style mutual defence agreement Afghanistan had in mind. In Article 6 of the BSA relating to external security no promise is made of military support to Afghanistan in the event of an attack or other security threat. Instead, the US will “regard with grave concern any external aggression or threat of external aggression against the sovereignty, independence, and territorial integrity of Afghanistan”⁵⁴

⁵¹ Cf. Art. 2 (4) BSA.

⁵² Art. 2 (1) BSA.

⁵³ Cf. Art. VII MTA which stated: “The ISAF Commander is the final authority regarding interpretation of this Military Technical Agreement”. Based on this provision Commander ISAF issued a Letter of Interpretation in 2011, unilaterally establishing the taxation status of categories of individuals mentioned in the MTA and the 2004 Exchange of Notes; <www2.centcom.mil/sites/contracts/Tax%20Exemption%20for%20Afghanistan%20Ministry%20of%20Finance/COMISAF_Ltr%20of%20Interpretation_Tax%20Exempt_9%20March%202011.pdf?Mobile=1&Source=%2Fsites%2Fcontracts%2F_layouts%2Fmobile%2Fmblwp.aspx%3FUrl%3D%252Fsites%252Fcontracts%252FPages%252FGCO.aspx%26CurrentPage%3D1> Accessed November 2014.

⁵⁴ Art. 6 (2) BSA.

and Afghanistan and the US will then “*hold consultations on an urgent basis to develop and implement an appropriate response, including, as may be mutually determined, consideration of available political, diplomatic, military, and economic measures*”.⁵⁵

Because of the broader scope of the Afghan-US agreement, it also includes provisions on developing and sustaining Afghanistan’s defense and security capabilities (Art. 4), committing the US to seek funds to support the training, equipping, advising and sustaining of ANDSF (par. 3) and to cooperate on providing equipment and materiel for ANDSF (par. 4) also aiming to achieve standardization and interoperability with NATO (par. 7). Furthermore, in Article 5 the parties give further guidance to the Working Group on Defence and Security Cooperation, established under the *Partnership Agreement*.

The post 2014 Agreements; Selected Topics

A great number of the provisions common to the BSA and NATO SOFA AFG are nothing out of the ordinary and can be found in many other SOFAs. For instance, the two agreements secure freedom of movement of the visiting forces, allow for the bearing of arms and the wearing of uniforms, provide for entry and exit procedures, regulate importation and exportation, exempt forces from taxes and related charges, and accept as valid the driving and professional licenses of the sending States. These provisions are only different from similar provisions in other SOFAs in the sense that they carefully detail all aspects of the cooperation and are permeated by phrases, reflecting the delicate relationship between the negotiating parties and stressing the sovereign position of Afghanistan. For example, with respect to the wearing of uniforms by visiting forces, an average SOFA would take the issue for granted or simply state that troops are allowed to wear their national uniforms. The 2002 MTA merely included the line: “*ISAF personnel will wear uniforms*” (Article VI). The BSA and NATO SOFA AFG include a similar provision (“*Members of the force may wear uniforms while in Afghanistan*”), but add that sending State authorities “*shall take appropriate measures to ensure that members of the force and of the civilian component are mindful of their presence in public areas*”.⁵⁶

Virtually all SOFAs contain a provision obliging visiting forces to respect local law. The BSA and NATO SOFA AFG are no exception to that practice.⁵⁷ Less common are the next paragraphs of the same provisions. First of all, in paragraph 2 the parties’ right to self defence under international law is recognized. A provision that ordinarily does not appear in a SOFA. Unique is the third paragraph in the BSA stipulating that US forces are not allowed “*to enter Afghan homes for the purpose of military operations and searches except under extraordinary circumstances involving the urgent risk to life and limb of U.S. nationals*.” Furthermore, both US and NATO forces have no authority to “*arrest or imprison Afghan nationals, nor maintain or operate detention facilities in Afghanistan*”. The content of this third paragraph seems a consequence of US and coalition practice in the past few years that had drawn sharp criticism from Afghan officials.

⁵⁵ Ibid.

⁵⁶ Art. 14 (1) BSA and Art. 12 (1) NATO SOFA AFG.

⁵⁷ Art. 3 (1) BSA and Art. 4 (1) NATO SOFA AFG.

Generally, SOFAs only contain the rights and obligations of armed forces abroad; *the jus in praesentia*, and as such do not provide foreign forces the legal right to enter and be present in the host State; the '*jus ad praesentiam*'.⁵⁸ The latter is mostly laid down in other international instruments, like a UN Security Council Resolution establishing an international force or a bilateral treaty on security or military cooperation. The BSA and the NATO SOFA AFG combine these elements, explicitly authorizing the foreign forces' presence in Afghanistan,⁵⁹ and detailing the rights and obligations of the visiting forces.

The Annexes to the agreements list the nine locations of the area and facilities the US and NATO can use for the mission in Afghanistan (annex A) and the official airports and border crossings points to enter and leave the country (Points of Embarkation and Debarcation, Annex B). As earlier in the negotiations Afghan officials had voiced their fear of a permanent US military presence in Afghanistan, the Preamble of the BSA makes clear that the US does not seek permanent facilities. A similar provision does not return in the NATO SOFA AFG. A number of provisions further detail US and NATO rights and obligations with respect to these facilities and areas.⁶⁰

It is interesting to note that the two agreements are clearly responsive to operational circumstances and as such are good examples of military operational law. In that context military operations are not just subject to the law, but can also contribute to shaping the law. For example, the two agreements acknowledge US and NATO security requirements by allowing the conduct of force protection activities at and in the vicinity of the facilities and areas in use by their forces.⁶¹ From a military operational law point of view that is a positive approach, which is, unfortunately, often neglected in contemporary SOFAs. The two agreements also make clear that previous conduct can have a detrimental effect on SOFAs and, subsequently, on operations, as the denial of the authority to arrest Afghan nationals, as discussed in the previous section, shows.⁶²

A topic that did not receive much (public) attention during the negotiations of the BSA was the position of contractors.⁶³ Today military operations are hardly conceivable without private military companies (contractors) supporting the armed forces on the battlefield, carrying out functions traditionally performed by the military itself, such as transport, maintenance, constructing and sustaining bases and even armed tasks, like security and protection. Because of

⁵⁸ The *jus ad praesentiam* and the *jus in praesentia* together constitute the law of visiting forces; D. Fleck, 'The Development of the Law of Stationing Forces in Germany: Five Decades of Multilateral Cooperation'. In: Fleck D (ed.), *The Handbook of the Law of Visiting Forces*. Oxford University Press, Oxford 2003, p. 351 and 253.

⁵⁹ Art. 2 (6) BSA and Art. 2 (3) NATO SOFA AFG.

⁶⁰ The most important provision are Art. 7 and 8 BSA; Art. 5 and 6 NATO SOFA AFG.

⁶¹ Art. 7 (3) BSA and Ar. 5 (3) NATO SOFA AFG.

⁶² Authority to arrest and detain host State nationals can be an essential tool for a commander in case these persons pose a security threat to the mission. On the basis of the two agreements US and NATO forces will now have to rely on Afghans security officials.

⁶³ Art. I (5) BSA defines contractors as: "*persons and legal entities who are supplying goods and services in Afghanistan to or on behalf of United States forces under a contract or subcontract with or in support of United States forces.*".

their often critical contribution to military operations most contemporary SOFAs address their position. As the extensive use of contractors on the battlefield is a relative new phenomenon there is no well-settled SOFA practice yet regarding their status.

In some ways the position of contractors and contractor personnel in the BSA and the NATO SOFA AFG is not very different from that of US and NATO personnel, for example, with respect to property ownership and utilities and communications.⁶⁴ In other ways contractors are less privileged than the armed forces. The most striking provision is Article 13(6) BSA and its equivalent in the NATO SOFA AFG, which reads: “Afghanistan maintains the right to exercise jurisdiction over United States contractors and United States contractor employees”. Although the text does not use the phrase ‘exclusive jurisdiction’ it is beyond doubt that a contractor committing an offence in Afghanistan can be tried by an Afghan court and does not enjoy any form of immunity. This provision reflects the position of contractors as commercial entities whose primary goal is making a profit. As they are not State officials on official business, like deployed military personnel, international law does not accord them any form of immunity from the jurisdiction of foreign courts and neither does the BSA.

Not that long ago a provision like Article 13 (6) BSA would have come as a surprise. Many SOFAs and other international agreements addressing the position of contractors, included some level of immunity.⁶⁵ For example, the 2004 SOFA that applied in Iraq, accorded contractors something similar to functional immunity, stating that they were “immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract”. In practice immunity often implied contractor impunity, as it turned out to be very hard or even impossible to prosecute them for crimes committed abroad.⁶⁶ That proved troublesome as some companies were notorious for the often aggressive behavior of their personnel, drawing a lot of criticism of host State citizens and authorities. Probably as a result thereof the US was rather quick to accept a provision in the 2008 SOFA allowing Iraq the primary right to exercise jurisdiction over US contractors.⁶⁷

A similar provision is now part of the BSA and NATO SOFA AFG.⁶⁸ Other provisions further limit the position of contractors. Contractors need passports and visa to enter Afghanistan,⁶⁹

⁶⁴ Art. 8 and 12 BSA and Art. 6 and 10 NATO SOFA AFG.

⁶⁵ E.g., Sect. 4(3) CPA order 17 (revised), *Status of the Coalition Provisional Authority, MNF-Iraq, Certain missions and Personnel in Iraq*, 27 June 2004.

⁶⁶ One of the few examples of a criminal case against a contractor was the 2007 shooting in Baghdad’s Nusoor Square that left 17 civilians dead. Recently a US jury convicted four ex-members of former Private Security Firm Black Water for their part in the shooting. E.g., Dan Roberts, US jury convicts Blackwater guards in 2007 killing of Iraqi civilians, *The Guardian*, 23 October 2014. <www.theguardian.com/us-news/2014/oct/22/us-jury-convicts-blackwater-security-guards-iraq> Accessed November 2014

⁶⁷ Art. 12 (2) *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*; Baghdad, 17 November 2008.

⁶⁸ Afghanistan is very critical of the role of foreign contractors, which is, *inter alia*, reflected in Art. 11 (3) BSA and Art. 9 (3) NATO SOFA AFG, stating that “US [NATO] forces shall give due consideration to concerns and disputes expressed by Afghan authorities regarding US [NATO] contractors. The Parties will work together to improve transparency, accountability, and effectiveness of contracting processes in Afghanistan with a view to preventing misuse and bad contracting practices.”

⁶⁹ Art. 15 (2) BSA and Art. 13 (2) NATO SOFA AFG.

Afghan authorities can inspect their personal effects and verify imported containers⁷⁰ and they are subject to registration in Afghanistan.⁷¹ Furthermore, they are not allowed to wear uniforms and may only carry weapons in accordance with Afghan law.⁷² Contractors providing security services are also subject to relevant requirements of Afghan law.⁷³

For a long time Afghanistan was unwilling to grant foreign armed forces full immunity. However, the US had made it clear from the outset that the issue was non-negotiable, refusing to give in on this particular point and on several occasions hinting at the ‘zero option’, referring to the pull out of Iraq of US and NATO forces after negotiations failed on a new SOFA covering the post-2011 period. Although Afghanistan is fully responsible for security in the country, it still heavily depends on foreign support. Therefore, Afghanistan did not have much choice but to accept the US demands and grant US forces “*the exclusive right to exercise jurisdiction ... in respect of any crime or civil offence*” and authorizing to hold trials in the territory of Afghanistan.⁷⁴

As mentioned above, it has been and still is common practice under operational circumstances to grant visiting forces the exclusive right to exercise criminal jurisdiction over their deployed personnel; i.e., the situation that the armed forces can get involved in military action. Operational necessity then requires sending States to have the widest control possible over their forces to execute their operational task without host State interference. In that respect it is paramount for sending States to be able to exercise criminal jurisdiction over their personnel with the exclusion of host State authorities. When operating from the territory of third States supporting the military operations, but where the actual operation is not taking place, the argument of operational necessity may not always have sufficient weight vis-à-vis the host State and sending States may have to accept a lower level of jurisdiction over their forces.⁷⁵

As the majority of US and all NATO activities post 2014 are non-combat related, it is understandable that Afghanistan is having a hard time accepting the provision. The US will most likely have brought forward other arguments to support their position as well. Any State deploying its forces abroad will want to secure the best protection possible for their forces under the given circumstances. That includes legal protection from a foreign legal system, because that system is different, not fully developed, does not function properly or because a sending State may feel that the host State judiciary is prejudiced towards their forces.

⁷⁰ Art. 16 (4)(5) BSA and Art. 14 (4) and (5) NATO SOFA AFG.

⁷¹ Art. 11 (2) BSA and Art. 9 (2) NATO SOFA AFG.

⁷² Art. 14 (2) BSA and Art. 12 (2) NATO SOFA AFG.

⁷³ Art. 14 (3) BSA and Art. 12 (3) NATO SOFA AFG.

⁷⁴ Art. 13 (1) BSA; a similar provision grants States contributing forces to the NATO-mission, exclusive jurisdiction over their forces; Art. 11 (1) NATO SOFA AFG.

⁷⁵ E.g., Netherlands’ Air Force personnel, participating in air operations over Iraq against the Islamic State, enjoy functional immunity in Jordan, where the unit is based: *Agreement between the Government of the Kingdom of the Netherlands and the Government of the Hashemite Kingdom of Jordan on a temporary deployment of troops of the Kingdom of the Netherlands in Jordan; Amman, 2 October 2014 (Dutch Treaty Series 2014, 175)*.

Notwithstanding that in the case of the Afghan legal system all these reasons are to a certain degree valid,⁷⁶ the US could have been more lenient towards Afghanistan, as the BSA will be in force for the next ten years. An option would have been to give the Joint Commission the possibility to introduce functional immunity for troops conducting non-combat duties at some point in time with the restriction that jurisdiction can only be exercised by the Afghan National Security Justice Center (NSJC) in Parwan, which has been mentored extensively⁷⁷ by US and coalition forces. The US has only met Afghan concerns on some points. On request the US will inform Afghanistan about the progress of criminal proceedings and shall “undertake efforts to permit and facilitate the attendance and observation of such proceedings by representatives of Afghanistan”.⁷⁸ Quite unusual is the provision on Afghanistan’s right to request removal of US personnel from Afghanistan. Every sovereign State has that right, but it is hardly ever put so explicitly in a SOFA.⁷⁹

Final Remarks

The lengthy drafting process of the BSA shows that a legal document, like this international agreement, is not just based on legal considerations, but that politics can have a significant impact on the process, and consequently, the contents of the agreement as well. Clearly, in international relations “law cannot be divorced from politics or power”.⁸⁰ Aside from legal and political considerations operational aspects can play a considerable role. Unfortunately, contributions from the operational level to the drafting of SOFA’s often remain obscure and its impact seems at least to be subordinate to other considerations. This may in part be explained by the fact that international agreements are most of the time negotiated through diplomatic channels and, especially SOFAs, have to be concluded within limited time constraints. For example, on 24 September 2014 the Dutch Government informed Parliament about the decision to contribute six F-16 aircraft to the fight against the Islamic State.⁸¹ It took just over one week to conclude a SOFA with Jordan, where the F-16s are based.

The BSA is a clear exception to the limited operational influence on the drafting of SOFAs, albeit one of the few. It seems probable that the prolonged negotiations enabled closer cooperation between the US Embassy in Kabul, which was in charge of the process on the US side, with the Commander USFOR-A, who was also Commander ISAF, and literally had its headquarters right across the street. Another factor that may have accounted for a greater operational influence on the negotiations, was the fact that military operations

⁷⁶ Islam is an important touchstone for Afghan law (Art. 3 Constitution of Afghanistan 2004); despite all US and coalition efforts of the past years the court system is still far from fully developed and corruption is reportedly still widespread.

⁷⁷ E.g., Senator Graham, Tribute to Combined Joint Interagency Task Force 435, Senate – 18 September 2014, Congressional Record, Vol. 160, No. 134. <www.congress.gov/crec/2014/09/18/CREC-2014-09-18-bk2.pdf> Accessed November 2014.

⁷⁸ Art. 13(2) BSA and Art. 11(2) NATO SOFA AFG.

⁷⁹ Art. 15 (3) BSA and Art. 13 (3) NATO SOFA AFG.

⁸⁰ IGH 20 February 1969, *North Sea Continental Shelf*, Judgement, I.C.J. Reports 1969, p. 3, p. 42-3.

⁸¹ *Dutch Parliamentary Papers II* 2014/15, 27 925, nr. 506.

were still ongoing, raising a lot of criticism and making it paramount to address the operational issues in the BSA.

Clearly, all these different aspects are interrelated, giving the BSA and hence the NATO SOFA AFG a unique character, reflecting the relations between the parties involved. Nevertheless, the two agreements are to a large extent traditional SOFAs, detailing the rights and obligations of forces deployed abroad, in particular criminal jurisdiction over them. However, both agreements have a wider scope than most SOFAs, authorizing the presence of foreign armed forces in the territory of a host State. Moreover, the BSA is in part also a Defence Agreement, enabling future military cooperation between the two States.

The balanced approach of the two agreements makes them distinct from their predecessors, taking into careful consideration the sovereign position of Afghanistan, as reflected in various provisions of the agreements and the restrictions on the conduct of combat operations of US and NATO forces. Nevertheless, with respect to criminal jurisdiction over the visiting forces the two agreements clearly favor the sending States' position, granting them in effect full immunity from Afghan criminal and civil courts. At first glance, a train, advise and assist mission does not seem to warrant the broad immunities granted to US and NATO forces. However, US operations may include missions involving military actions against terrorist groups, which requires the broadest control over the participating forces. In addition, the Afghan legal system does not meet international standards yet and from the perspective of legal protection of the visiting armed forces, it is fully understandable that US and NATO could not accept host State jurisdiction at this point in time.

However, in my opinion, it would have been an option to give the SOFA a more flexible character by incorporating a possibility to amend the criminal jurisdiction provisions with respect to visiting forces not involved in combat missions, when dedicated Afghan courts, like, for example, the NSJC in Parwan, have proved to be capable to prosecute cases in accordance with international standards.

The rather generous criminal jurisdiction provision is partly offset by the possibility for Afghanistan to be kept informed about the process of legal proceedings, involving personnel suspected of crimes committed in Afghanistan and to request removal of visiting States' personnel. Another provision that is possibly included to compensate for the Afghanistan's limited jurisdiction as sovereign State, is the right to exercise all jurisdiction over contractors.

As the rise of the Islamic State and affiliated entities, and the rapid spreading of fighting in North Africa and South-West Asia show, the international security system is in a flux, making it impossible to predict what the security situation in specific regions, like Afghanistan, will look like in a couple of years. The BSA and the NATO SOFA AFG have secured that the international community will be in a position to support Afghanistan in taking effective action to counter the threat of terrorism. It will be interesting to see how the two agreements will work out in practice and how the parties will further develop their cooperation.

BESCHOUWING

Table 1 Comparison BSA and NATO SOFA AFG

BSA Security and Defense Cooperation & Status of Forces	Comparison	NATO SOFA AFG Status of Forces
Preamble	<i>BSA more elaborate, emphasizing bilateral cooperation</i>	Preamble
Art. 1. Definitions	<i>identical + NATO SOFA also includes specific definitions of NATO, NATO Member States and Operational Partners⁸²</i>	Art. 1. Definitions
	<i>“non-combat training, advising and assistance mission” as well as “all other mutually agreed NATO-led activities”</i>	Art. 2. Activities
Art. 2. Purpose and Scope	<i>authorizations for presence and activities + terms and conditions describing presence: both: train, advice and assist + US: fighting remnants al-Qaeda</i>	Art. 3. Purpose and Scope
Art. 3. Laws	<i>par. 1-3 identical; par. 3 BSA includes extra line, in principle denying the US the right to enter Afghan homes for the purpose of military operations and searches⁸³</i>	Art. 4. Laws
Art. 4. Developing and Sustaining Afghanistan's Defense and Security Capabilities	<i>BSA only</i>	-
Art. 5. Defense and Security Cooperation Mechanisms	<i>BSA only</i>	-

⁸³ “... Except under extraordinary circumstances involving the urgent right to life and limb of U.S. nationals”.

⁸² ‘Operational Partners’ are States other than NATO member States participating in NATO-led activities with the consent of both Afghanistan and NATO (Art. 1 (3.1.) and (3.2.).

BESCHOUWING

Art. 6. External Aggression	<i>BSA only</i>	-
Art. 7. Use of Agreed Facilities and Areas	<i>identical</i>	Art. 5. Use of Agreed Facilities and Areas
Art. 8. Property Ownership	<i>identical</i>	Art. 6. Property Ownership
Art. 9. Positioning and Storage of Equipment and Materiel	<i>identical</i>	Art. 7. Positioning and Storage of Equipment and Materiel
Art. 10. Movement of Vehicles, Vessels, and Aircraft	<i>identical</i>	Art. 8. Movement of Vehicles, Vessels, and Aircraft
Art. 11. Contracting Procedures	<i>identical</i>	Art. 9. Contracting Procedures
Art. 12. Utilities and Communications	<i>identical</i>	Art. 10. Utilities and Communications
Art. 13. Status of Personnel	<i>par 1-4 identical par. 5 BSA: US personnel may not be surrendered to the custody of an int'l tribunal par. 6 BSA and 5 NATO SOFA AFG identical</i>	Art. 11. Status of Personnel
Art. 14. Bearing of Arms and Wearing of Uniforms	<i>identical</i>	Art. 12. Bearing of Arms and Wearing of Uniforms
Art. 15. Entry and Exit	<i>identical</i>	Art. 13. Entry and Exit
Art. 16. Importation and Exportation	<i>identical</i>	Art. 14. Importation and Exportation
Art. 17. Taxation	<i>identical</i>	Art. 15. Taxation
Art. 18. Driving and Professional Licenses	<i>identical</i>	Art. 16. Driving and Professional Licenses
Art. 19. Motor Vehicles	<i>identical</i>	Art. 17. Motor Vehicles

BESCHOUWING

Art. 20. Service Support Activities	<i>identical</i>	Art. 18. Service Support Activities
Art. 21. Currency and Exchange	<i>identical</i>	Art. 19. Currency and Exchange
Art. 22. Claims	<i>identical</i>	Art. 20. Claims
Art. 23. Annexes	<i>identical</i>	Art 21. Annexes
Art 24. Disputes and Implementation	<i>par. 1-2 identical par. 3 BSA: cooperation is subject to laws and regulations of respective Parties par. 4 BSA and 3 NATO SOFA AFG identical</i>	Art. 22. Disputes and Implementation
Art. 25. Joint Commission	<i>par. 1-2 identical par. 3 BSA: coordination between Joint Commission and AFG-US Working Group established under the Partnership Agreement</i>	Art. 23. Afghanistan-NATO Implementation Commission
	<i>NATO SOFA AFG only; respecting existing bilateral agreements and arrangement between AFG and NATO member States/Operational Partners</i>	Art. 24. Bilateral Agreements and Arrangements
Art. 26. Entry into Force, Amendment, and Termination	<i>identical</i>	Art. 25. Entry into Force, Amendment, and Termination
Annex A. Entry into Force, Amendment, and Termination	<i>identical</i>	Annex A. Entry into Force, Amendment, and Termination
Annex B. Official Points of Embarkation and Debarcation	<i>identical</i>	Annex B. Official Points of Embarkation and Debarcation