

The Handbook of the Law of Visiting Forces

Second Edition

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Afghanistan

I. Introduction

The status of international forces in Afghanistan since the US-led invasion in October 2001 presents a case study that is perhaps the most complex and confusing example of a legal regime governing visiting forces in a Receiving State that exists. To fully appreciate how the governments of Afghanistan and the US, and the government of Afghanistan and NATO arrived at the current SOFAs, it is not enough to merely look at the terms of earlier agreements and chart their development over time, as might be done with the NATO SOFA itself. The original agreements were negotiated rather quickly, and in exigent circumstances. On the one hand, the international community endeavoured to create a new Afghan State that could rightfully resume its place among the other sovereign nations of the world. Simultaneously, the SOFAs themselves contained terms that allowed Sending State military actions, such as air strikes and the detention of Afghan nationals that worked to undercut the development of Afghan sovereignty in the interests of operational necessity, at least in the perception of some Receiving State officials.

This chapter first examines the Bonn Agreement that marked the start of the creation of the new Afghan State, and the status and development of the multinational military organization that was created at almost the same time to provide the security conditions conducive to the new State taking root, the International Security Assistance Force (ISAF). Next, this chapter looks at the status and development of the parallel military mission undertaken by the US-led coalition, known as Operation Enduring Freedom (OEF), to destroy al-Qaeda, an international terrorist organization that had found a home in Afghanistan under the fundamentalist Islamic rule of the former Taliban government. Because of the way in which the missions of ISAF and OEF became blurred together in very real senses as the war in Afghanistan wore on, this chapter then considers the challenges posed to the effective operation of the two SOFA regimes, and how these challenges impacted and informed the new agreements that became effective in 2015.

II. The Bonn Agreement

1. US Invasion

In 1996, Usama bin Laden, a wealthy Saudi Arabian who had fought with the Afghan *mujahedeen* against Soviet forces in the 1980s, moved his terrorist organization al-Qaeda from Sudan to Afghanistan.¹ By this time the Taliban, a fundamentalist Islamic group originating in Kandahar Province, Afghanistan, had effectively seized control of much of the country as a result of civil war among the *mujahedeen* factions.² An Islamic fundamentalist himself, and well-known because of his support for the *mujahedeen* in the

¹ S. Coll, *Ghost Wars* (London: Penguin Books, 2005) 326–8.

² S. Bowman and C. Dale, 'War in Afghanistan: Strategy, Military Operations, and Issues for Congress', *Congressional Research Service* (Report No. 40156) (9 December 2009) 7. The Taliban is dominated by the Pashtun, the largest ethnic group in Afghanistan. *Ibid.*

war against the Soviets, bin Laden was welcomed by the Taliban.³ With bin Laden's support, the Taliban soon captured Kabul and established a *de facto* government.⁴ In the wake of the al-Qaeda attacks on US embassies in East Africa in 1998, the UN Security Council designated al-Qaeda as a terrorist organization and established a sanctions regime against the Taliban.⁵ As of 2001, only three countries recognized the Taliban government: Pakistan, Saudi Arabia, and the United Arab Emirates.⁶

On 7 October 2001, US armed forces invaded Afghanistan after the Taliban government refused to turn over bin Laden to the US in the wake of the terrorist strikes at the Pentagon and in New York and Pennsylvania. The US rejected the Taliban government's offer to try bin Laden in Afghanistan under Islamic law.⁷ Joined by allied forces, and linked with Afghan Northern Alliance units, the US-led invasion quickly caused the Taliban government to fall, and many of its leaders and soldiers to retreat across the border in the ethnic Pashtun areas of Pakistan.⁸ Bin Laden escaped capture by coalition forces.⁹

Although on 12 September 2001 the UN had condemned the al-Qaeda attacks in the US as a threat to international peace and security, and stated 'its readiness to take all necessary steps to respond to the terrorist attacks . . . and combat all forms of terrorism . . .',¹⁰ OEF was not specifically authorized by the UN. At the time of the invasion's launch, both the US and the UK addressed letters to the UN Security Council president informing him that they viewed their uses of force in Afghanistan as lawful self-defence measures under Art. 51 of the UN Charter.¹¹ In its later resolution authorizing the expansion of ISAF outside the Kabul area, the UN Security Council called upon ISAF to 'continue to work in close consultation with the Afghan Transitional Authority and its successors and the Special Representative of the Secretary-General as well as with the Operation Enduring Freedom Coalition in the implementation of the force mandate',¹² but it did not authorize OEF.

2. Establishing the government of Afghanistan

Largely successful in its initial stages, the US-led coalition's invasion paved the way for international efforts to establish a democratic Afghan government. Meeting under UN auspices in Bonn in early December 2001, UN, international and Afghan representatives negotiated a process framework leveraging traditional Afghan decision-making bodies to craft a new constitution, create a new government—with a legislature, an executive, and an independent judiciary—and hold popular elections to choose the legislative and executive officials.¹³ This was to occur under UN auspices, and the UN was given a major

³ S. Coll, (n. 1) 332–3. ⁴ Ibid. ⁵ SC Res. 1267 (15 October 1999).

⁶ S. Coll, (n. 1) 345. Saudi Arabia and the United Arab Emirates withdrew their recognition after the al-Qaeda attacks on the US on 11 September 2001.

⁷ 'U.S. rejects Taliban offer to try bin Laden', *CNN* (7 October 2001), <http://www.cnn.com/2001/US/10/07/ret.us.taliban/index.html?_s=PM:US>.

⁸ S. Bowman and C. Dale (n. 2) 8.

⁹ Ibid. Bin Laden was eventually killed in an assault by US Special Forces in Abbottabad, Pakistan, in 2011. See M. Phillips, 'Osama Bin Laden Dead', *The White House* (2 May 2011), <<https://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead>>.

¹⁰ SC Res. 1368 (12 September 2001).

¹¹ Letter from Ambassador John Negroponte, Permanent Representative of the USA to the UN in New York, to the President of the Security Council, S/2001/946, 7 October 2001; Letter from Stewart Eldon, Charge d Affaires, UK Mission to the UN in New York, to the President of the Security Council, S/2001/947, 7 October 2001.

¹² SC Res. 1510 (13 October 2003), para. 2.

¹³ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, Bonn (5 December 2001) [hereinafter Bonn Agreement], copy attached to Letter dated 5 December 2001 from the Secretary-General addressed to the President of the Security Council, S/2001/1154 (5 December 2001). Taliban representatives were not invited.

role in moving the process forward.¹⁴ The UN Security Council endorsed this plan on 6 December 2001,¹⁵ and the Afghan Interim Authority created by the agreement officially became the 'repository of Afghan sovereignty' on 22 December 2001.¹⁶

The United Nations Assistance Mission in Afghanistan (UNAMA) was established three months later by the UN Security Council.¹⁷ Led by the UN Special Representative of the Secretary-General (SRSG) for Afghanistan, UNAMA was tasked with leading 'the international civilian efforts' to promote 'more coherent support by the international community to the Afghan Government', and to 'strengthen cooperation with ISAF at all levels'.¹⁸ Unfortunately, as the security situation in Afghanistan failed to improve over time, the under-staffed and under-resourced UNAMA found it difficult to effectively play this role.¹⁹

In accordance with the Bonn Agreement, a large, traditional meeting of Afghan representatives (a *Loya Jirga*, or Grand Assembly) was convened in June 2002, and Hamid Karzai, an ethnic Pashtun whose family had resisted the Taliban, was elected as the head of the new Afghan Transitional Authority.²⁰ Under the Transitional Authority, a new Afghan constitution was promulgated in January 2004.²¹ The Supreme Court of Afghanistan had been created under the Transitional Authority, and continued its operations under the mandate of the new constitution.²² Presidential elections were held in October 2004, and Karzai was elected President of Afghanistan. Completing the path to fully establishing the new Afghan government, elections for representatives were held in September 2005.²³

III. The International Security Assistance Force

The Bonn Agreement noted that because 'some time may be required for a new Afghan security force to be fully constituted and function', the participants in the Bonn negotiations requested the UN Security Council to consider the deployment of a UN mandated International Security Force to Afghanistan.²⁴ The purpose of this force was to 'assist in the maintenance of security for Kabul and its surrounding areas', but if appropriate, it could 'be progressively expanded to other urban centres and other areas'.²⁵ The UN Security Council authorized ISAF's creation on 20 December 2001, and the UK agreed to be the force's initial lead nation.²⁶ Importantly, although ISAF was authorized by the UN, it was not to be a UN-led force. The UN Security Council accepted the recommendation of the SRSG for Afghanistan, Lahkdar Brahimi, that a peacekeeping force not be used as ISAF because it would take too long to assemble and the security situation in Afghanistan did not lend itself to peacekeeping.²⁷

¹⁴ Bonn Agreement, Annex II. ¹⁵ SC Res. 1383 (6 December 2001).

¹⁶ Bonn Agreement, Art. I, para. 3. ¹⁷ SC Res. 1401 (28 March 2002).

¹⁸ See SC Res. 1806 (20 March 2008), paras. 4a, b.

¹⁹ S. Bowman and C. Dale, (n. 2) 13 fn. 3 (Interview with UN Special Representative of the Secretary-General Kai Eide).

²⁰ *Ibid.*

²¹ The Constitution of Afghanistan (3 January 2004), <http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english241201294958325553325325.pdf>.

²² Constitution of Afghanistan, Art. 116.

²³ K. Katzman, 'Afghanistan: Politics, Elections, and Government Performance', *Congressional Research Service* (Report No. 21922) (12 January 2015), 20.

²⁴ Bonn Agreement, Annex I, para. 3. ²⁵ *Ibid.*

²⁶ SC Res. 1386 (20 December 2001). The UK was followed by Turkey, SC Res. 1413 (23 May 2002), and then Germany, SC Res. 1444 (27 November 2002).

²⁷ Briefing to the UN Security Council, Lahkdar Brahimi Special Representative of the Secretary-General for Afghanistan (13 November 2001), <<http://www.un.org/news/dh/latest/afghan/brahimi-sc-briefing.htm>>.

1. ISAF mandate

Acting under Chapter VII of the UN Charter, the UN authorized ISAF to operate for six months to 'assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment'.²⁸ Nations participating in ISAF were authorized 'to take all necessary measures to fulfil its mandate',²⁹ and were also tasked with providing 'assistance to help the Afghan Interim Authority in the establishment and training of new Afghan security and armed forces'.³⁰

In its letter to the UN agreeing to become the first ISAF lead nation, the UK noted that 'the responsibility for providing security and law and order throughout Afghanistan resides with the Afghans themselves'.³¹ Further, the UK noted that although ISAF would 'have the support of the United States', it would 'have a particular mission authorized by a Security Council resolution that is distinct from Operation Enduring Freedom'.³² Importantly, however, the UK noted that the US Central Command would 'have authority over the International Security Assistance Force to deconflict' ISAF and OEF 'activities and to ensure that International Security Assistance Force activities do not interfere with the successful completion of' OEF.³³

2. The military technical agreement

ISAF and the Interim Administration (a component of the Afghan Interim Authority) then negotiated a SOFA for the ISAF mission and troops in January 2002.³⁴ Under the terms of the Military Technical Agreement (MTA), the Interim Authority was responsible for security and law and order, and it was to return all Afghan military units to their barracks and to undertake no military action in the Kabul area.³⁵ To 'discuss current and forthcoming issues and to resolve any disputes that may arise', a Joint Co-ordinating Body was established, composed of Interim Administration officials and senior ISAF representatives.³⁶

The MTA afforded great latitude to ISAF in the conduct of its operations. First, the ISAF commander was authorized, 'without interference or permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission'.³⁷ Second, ISAF was allowed 'complete and unimpeded freedom of movement throughout the territory and airspace of Afghanistan'.³⁸ Third, the ISAF commander was 'authorized to promulgate appropriate rules for the control and regulation of surface military traffic throughout' the ISAF area of responsibility, in consultation with the Interim Administration.³⁹ Fourth, ISAF enjoyed the 'right to utilise such means and services as required to ensure its full ability to communicate and will have the right to the unrestricted use of all of the electromagnetic spectrum, free of charge...'.⁴⁰ Perhaps most importantly, the ISAF commander was given 'the final authority regarding interpretation' of the MTA.⁴¹ The specific measures to implement the MTA were found in its first annex.

²⁸ SC Res. 1386 (2001), para. 1.

²⁹ *Ibid.* para. 3.

³⁰ *Ibid.* para. 10.

³¹ Annex to the letter dated 19 December 2001 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland addressed to the Secretary-General, S/2001/1217.

³² *Ibid.*

³³ *Ibid.*

³⁴ Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan ('Interim Administration') [hereinafter MTA].

³⁵ MTA, Art. III, paras. 1–3.

³⁶ MTA, Art. III, para. 4.

³⁷ MTA, Art. IV, para. 2.

³⁸ MTA, Art. IV, para. 3.

³⁹ MTA, Art. IV, para. 4.

⁴⁰ MTA, Art. IV, para. 5.

⁴¹ MTA, Art. VII, para. 1.

(a) *Criminal jurisdiction*

With regard to jurisdiction, ISAF and its 'supporting personnel, including associated liaison personnel', were to be treated as UN experts on mission.⁴² Further, ISAF personnel were 'subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan'.⁴³ The Interim Administration agreed to 'assist the ISAF contributing nations in the exercise of their respective jurisdictions',⁴⁴ and accordingly, ISAF personnel were 'immune from personal arrest or detention' and not to be 'surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation'.⁴⁵

(b) *Movement*

As to entry into and departure from Afghanistan, ISAF personnel were allowed movement in and out of the country with only 'military identification and collective movement and travel orders'.⁴⁶ This was a very important right, because ISAF defined its personnel very broadly as 'all military personnel ... as well as the civilian components of such forces, air and surface movement resources and their support services'.⁴⁷ As will be discussed later in this chapter, ISAF's expansive definition of its personnel, to include contractors working for it, would become a friction point between it and the Afghan government.

(c) *Tolls, fees, duties, and taxes*

ISAF was 'exempt from providing inventories or other routine customs documentation on personnel' and equipment entering, leaving or transiting Afghanistan.⁴⁸ ISAF was also exempt from licensing, registration and commercial insurance requirements for its equipment, as well as 'duties, dues, tolls or charges' for using airports or roads.⁴⁹ Although ISAF would not claim exemption from the payment of 'reasonable charges for services requested and received', its operations, movements and access could not be 'impeded pending payment for such services'.⁵⁰ ISAF personnel were exempt from income taxation by Afghan authorities,⁵¹ as well as taxes on property 'imported into or acquired in Afghanistan'.⁵²

(d) *Force support activities*

Regarding activities ISAF conducted to support itself as a force, ISAF was not subject to duties or restrictions on its ability to import and export 'equipment, provisions and supplies necessary for the mission ...'.⁵³ It also was allowed to operate its own mail and telecommunications services free of charge, and to contract directly with vendors for 'services and supplies in Afghanistan without payment of tax or duties'.⁵⁴ As to claims,

⁴² MTA, Annex A, s. 1, para. 1.

⁴³ MTA, Annex A, s. 1, para. 3.

⁴⁴ MTA, Annex A, s. 1, para. 3.

⁴⁵ MTA, Annex A, s. 1, para. 4.

⁴⁶ MTA, Annex A, s. 2, para. 5.

⁴⁷ MTA, Art. I, para. 4d.

⁴⁸ MTA, Annex A, s. 3, para. 7.

⁴⁹ MTA, Annex A, s. 3, para. 7. Similarly, the Interim Administration agreed to 'accept as valid, without tax or fee, drivers licences and permits issued to ISAF and supporting personnel ... by their respective national authorities'. MTA, Annex A, s. 4, para. 15.

⁵⁰ MTA, Annex A, s. 3, para. 7.

⁵¹ MTA, Annex A, s. 3, para. 8.

⁵² MTA, Annex A, s. 3, para. 9. See also DoD fact sheet of 28 March 2011, <http://www.acq.osd.mil/dpap/pacc/cc/docs/Contractors_in_Afgh-Iraq-Assistance_in_Responding_to_Qs_RE_Taxation_under_Resective_SOFAs.pdf>.

⁵³ MTA, Annex A, s. 4, para. 11.

⁵⁴ MTA, Annex A, s. 4, paras. 12, 14.

neither ISAF nor its personnel were 'liable for any damages to civilian or government property caused by any activity in pursuit of the ISAF mission'. Claims resulting from other damages, however, were to be submitted through the Interim Administration to ISAF. Finally, the Interim Authority was not allowed to charge for the facilities provided to ISAF.⁵⁵

IV. Operation Enduring Freedom

At the time of the US-led invasion in the early autumn of 2001, the conflict in Afghanistan could be fairly characterized as international in nature. In that regard, since the US-led coalition was engaging in combat with the *de facto* Taliban government, it is not surprising that there was no immediate regularization of the status of the coalition's operations in Afghanistan. As the development of ISAF shows, however, the nature of the conflict began moving, if unevenly, in the direction of becoming more of a non-international armed conflict as early as the end of 2001. It is perhaps somewhat surprising then the status of the OEF forces in Afghanistan did not become fully regularized until 2003. In an exchange of notes between the US Embassy in Kabul and the Afghan Ministry of Foreign Affairs that began on 26 September 2003, the US proposed that its forces' 'personnel be accorded a status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States under the Vienna Convention on Diplomatic Relations'.⁵⁶ Interestingly, this status was to be 'without prejudice to the conduct of ongoing military operations by the United States'.⁵⁷ The US also proposed in the exchange of notes to cover a number of ordinary SOFA matters. Afghan authorities accepted the US proposals without amendment on 28 May 2003.⁵⁸ Effective 8 October 2008, all US forces (except for special operations forces) serving in Afghanistan fell under the command of US Forces Afghanistan (USFOR-A), a new headquarters unit that was commanded by the same US general officer commanding ISAF.⁵⁹

1. Movement, licences, and wear of uniform

Consistent with the status of embassy technical and staff personnel, the US personnel were allowed to enter and exit Afghanistan with collective movement or individual travel orders. Afghanistan agreed it would accept US-issued driving licences or permits without a driving fee or test for US personnel, and that US personnel were allowed to wear uniforms and carry weapons while performing official duties.⁶⁰

2. Tolls, fees, duties, and taxes

Afghanistan also allowed US vehicles and aircraft to transit and operate within Afghanistan without the payment of fees and tolls and free of inspections by Afghan authorities.

⁵⁵ MTA, Annex A, s. 4, para. 13.

⁵⁶ Embassy of the United States of America, Diplomatic Note No. 202 1 (26 September 2002).

⁵⁷ *Ibid.*

⁵⁸ Letter to the Embassy of the United States of America in Kabul, from the Transitional Islamic State of Afghanistan, America and Canada Political Affairs Division, Document No. 93 (28 May 2003).

⁵⁹ US Secretary of State and others, 'Progress Toward Security and Stability in Afghanistan, Report to Congress in accordance with the 2008 National Defense Authorization Act (section 1230, Public Law 110-181)' (January 2009), 27.

⁶⁰ Embassy of the United States of America, Diplomatic Note No. 202 1 (26 September 2002).

Neither US government personnel nor its contractors and contractor personnel would be subject to any taxes in Afghanistan, and they were allowed to import into and export out of Afghanistan 'any personal property, equipment, supplies, materials, technology, training or services' necessary to implement the US mission without any fees or inspections. In addition, contracts awarded by the US government in Afghanistan were to be made 'in accordance with the laws and regulations' of the US, and were not to be taxed or have duties levied upon them by Afghanistan.⁶¹

3. Criminal jurisdiction and force support activities

The US were confirmed to execute the right to maintain exclusive criminal jurisdiction over its personnel, and to prevent any US personnel from being 'surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state' without US consent. The US was also allowed to use the electromagnetic spectrum without cost, and Afghanistan agreed that it could operate its own telecommunications system. Finally, the two countries waived claims against each other for injuries and damages to their personnel and property caused by the other, and to have third party claims for damages 'at the discretion of the United States government, be dealt with and settled ... in accordance with United States law'.⁶² The criminal jurisdiction aspect of the exchange of notes was amplified by the bilateral immunity agreement into which Afghanistan and the US entered in September 2002, in which the two States agreed to not transfer the nationals of each other to the International Criminal Court (ICC) absent the State of nationality's consent.⁶³

V. ISAF Mission Change and Blurring of Roles with OEF

As US forces were reduced in Afghanistan in 2003 as a different US-led coalition invaded Iraq, the Taliban and associated insurgent groups reconstituted themselves in certain areas of Afghanistan and began conducting military operations against the Afghan government and Sending State forces.⁶⁴ In light of these developments, after several iterations of ISAF as a predominately NATO Troop Contributing Nation-led force, NATO itself assumed responsibility for the force in August 2003.⁶⁵ Thereafter, until the ISAF mission was completed at the end of December 2014 and the succeeding Resolute Support mission was established, the UN Security Council continued to approve annual extensions of ISAF's mandate in Afghanistan.⁶⁶

The UN also approved an Afghan request to have ISAF assist outside the Kabul area given the worsened security situation in different parts of Afghanistan, particularly in the south and east of the country,⁶⁷ and it expanded the area covered by the ISAF mandate.⁶⁸

⁶¹ Ibid 2.

⁶² Ibid 3. OEF claims in Afghanistan were discussed in greater detail in Chapter 22.

⁶³ Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the Surrender of persons to the International Criminal Court (Washington, DC, 20 September 2002), <<http://www.law.georgetown.edu/library/research/guides/upload/Afghanistan03-119.pdf>>.

⁶⁴ See Office of the Prosecutor, 'Report on Preliminary Examination Activities (2016)', ICC, 43-4, <https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf>. [hereinafter ICC 2016 Report].

⁶⁵ Letter from the Secretary-General of the North Atlantic Treaty Organization (NATO), Lord Robertson of Port Ellen, to the Secretary-General of the United Nations (2 October 2003) S/2003/970.

⁶⁶ See final mandate for ISAF mission, SC Res. 2120 (10 October 2013).

⁶⁷ Letter from the Minister for Foreign Affairs of Afghanistan to the Secretary-General of the United Nations (10 October 2003) S/2003/986, annex.

⁶⁸ SC Res. 1510 (2003), para. 1.

The UN Security Council directed ISAF to continue its work with the Afghan Transitional Authority, the Special Representative of the Secretary-General at UNAMA, and the OEF coalition.⁶⁹ Beginning with its assumption of command over the German-led Provincial Reconstruction Team in Kunduz Province in the north of Afghanistan in 2003, ISAF successively assumed command over forces in the rest of northern Afghanistan, then western and southern Afghanistan in the summer of 2006, and finally eastern Afghanistan in October 2006.⁷⁰

Combat operations in Afghanistan continued to intensify. From 2007 to 2008, ISAF noted a 33% increase in the number of attacks against Afghan or international security forces.⁷¹ Unfortunately, civilian casualties began to mount as well. In August 2008, after US air strikes killed perhaps as many as 90 civilians during a US Special Forces-led raid in Azizabad, President Karzai called for a review of the presence of international forces in Afghanistan and the completion of formal SOFAs.⁷² Likely mindful of the contentious SOFA negotiations that had occurred between Iraq and the US shortly before this time,⁷³ the Karzai Administration apparently sent a draft SOFA to NATO and ISAF in January 2009. The draft included provisions that ‘would establish rules of conduct for NATO-led troops and require that additional NATO troops and their locations be approved by the Afghan government’, as well as prohibit searches of Afghan homes by ISAF forces.⁷⁴

In a major policy announcement at the US Military Academy at West Point in December 2009, US President Obama announced that the US would send an additional 30,000 troops to Afghanistan in 2010, but that this force level would begin to drop in 18 months as the lead responsibility for security in Afghanistan was increasingly assumed by Afghan forces themselves.⁷⁵ The Obama Administration looked to its ISAF allies to send additional troops to support this reinforcement.⁷⁶ Afghan officials, however, were concerned that the timetable was unrealistic.⁷⁷

As the new ISAF units poured into Afghanistan, the combat became even more intense in the southern and eastern parts of the country. In August 2008, there were approximately 1,500 total ‘kinetic events’, that is, small arms fire, direct fire, indirect fire, and improvised explosive device events reported by Sending State forces. In August 2009 this number had increased to approximately 3,250. In August 2010, with most of the reinforcements now on the ground in Afghanistan, this number jumped to almost 5,000.⁷⁸ ISAF forces made significant progress in wresting back populated areas and territory controlled by the Taliban, creating opportunities for Afghan forces to reach their necessary combat

⁶⁹ *Ibid.* paras. 2, 3.

⁷⁰ ‘ISAF’s mission in Afghanistan (2001-2014) (Archived)’, NATO website, <http://www.nato.int/cps/en/natohq/topics_69366.htm>.

⁷¹ ‘Metrics Brief—2007–2008, ISAF’ and Wikileaks press release (16 February 2009), <https://wikileaks.org/wiki/A1>.

⁷² See K. DeYoung, ‘Only a Two-Page ‘Note’ Governs U.S. Military in Afghanistan’, *Washington Post* (28 August 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/27/AR2008082703628_2.html>.

⁷³ See G. Bruno, ‘U.S. Security Agreements and Iraq’, *Council on Foreign Relations* (23 December 2008), <<http://www.cfr.org/iraq/us-security-agreements-iraq/p16448>>.

⁷⁴ See Associated Press, ‘Afghanistan Seeks More Control of NATO Troops’, *Los Angeles Times* (21 January 2009), <<http://articles.latimes.com/2009/jan/21/world/fg-afghan21>>.

⁷⁵ Author’s notes.

⁷⁶ P. Spiegel and others, ‘Obama Bets Big on Troop Surge’, *Wall Street Journal* (2 December 2009), <<http://www.wsj.com/articles/SB125967363641871171>>.

⁷⁷ *Ibid.*

⁷⁸ A. Cordesman, ‘The War in Afghanistan: Key Trends in the Fighting and ANSF Development in the November 2010 1230’, *Center for Strategic & International Studies* (report) (24 November 2010) 5, <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/101124_AfghanNov2010Dod_1230.pdf>.

effectiveness,⁷⁹ but it was both costly and slow.⁸⁰ By the end of September 2012, the last US reinforcements had left the country.⁸¹ Although the military situation in Afghanistan was generally viewed as being stalemated at the time,⁸² the ISAF Troop Contributing Nations continued the drawdown of their forces. At the end of 2014, US President Obama declared an official end to combat operations for US troops.⁸³

VI. SOFA Challenges under ISAF and OEF

So long as ISAF was essentially just securing the Kabul area, and the US-led coalition forces were pursuing Taliban and al-Qaeda forces into remote areas of Afghanistan, the tensions inherent between internationally recognized Afghanistan sovereignty and the broad discretionary powers carved out under the MTA and the Afghanistan-US Exchange of Notes appears to have presented few meaningful problems. However, once the Taliban reconstituted and again launched military attacks, as ISAF in response both expanded its geographical area of responsibility to cover all of Afghanistan and received large-scale reinforcements, and the US continued its coalition (primarily Special Forces) operations against the Taliban and remnants of al-Qaeda, points of friction became increasingly apparent. This friction eventually led to calls by Afghanistan for the status of Sending State forces to be renegotiated.

There were six primary areas of status-related issues. The first, claims, is examined in detail in Chapter 22. Of the remaining five areas, two are what would ordinarily be considered more typical SOFA issues: logistics issues related to Sending State contractors in general and customs and taxes concerns. Three areas, however, were completely outside of the NATO SOFA experience: the use of private security companies in an almost para-military capacity, detention operations focused on Receiving State nationals, and large-scale kinetic combat operations conducted by the Sending States in the Receiving State. A brief review of these areas of controversy provides a useful background for this chapter's later discussion of the new SOFAs that were concluded after the formal end of the ISAF and OEF combat missions in Afghanistan.

1. Logistics: Contractors and private security contractors

(a) Contractors

Both ISAF and OEF operations in Afghanistan were dependent upon civilian contractors to perform basic functions to sustain the forces. This was a result of two primary factors. *First*, after the Cold War, NATO forces had significantly reduced their military logistics and support capabilities to cut costs.⁸⁴ *Second*, with Afghanistan being a landlocked

⁷⁹ Department of Defense, 'Report on Progress Toward Security and Stability in Afghanistan' (report) (December 2012) 1-6, <https://www.defense.gov/Portals/1/Documents/pubs/1230_Report_final.pdf>.

⁸⁰ See I. Pannell, 'Progress slow and messy in Afghanistan' BBC (28 January 2010) <http://news.bbc.co.uk/2/hi/uk_news/8483047.stm>.

⁸¹ M. Mount, 'U.S. official: Afghanistan surge over as last of extra troops leave the country' CNN (21 September 2012) <<http://www.cnn.com/2012/09/20/world/asia/afghanistan-us-troops/index.html>>.

⁸² A. Gearan, 'Biden, in Leaked Memo, Told Obama War Plan Flawed' AP (25 June 2012) <<http://www.military.com/daily-news/2012/06/25/biden-in-leaked-memo-told-obama-war-plan-flawed.html>>.

⁸³ Office of the Press Secretary, 'Statement by the President on the End of the Combat Mission in Afghanistan', *The White House* (28 December 2014) <<https://www.whitehouse.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan>>.

⁸⁴ M. Schwartz and J. Church, 'Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress', *Congressional Research Service* (Report No. R43074) (17 May 2013) 1.

country, political sensitivities in the countries through which supplies needed to flow did not make the use of NATO military logistics units feasible, as with Pakistan, for example.⁸⁵

The scope of this dependence was both surprising and underappreciated in terms of its consequences for the effective functioning of the SOFA agreements. Surprisingly, in March 2011, for example, there were 90,339 US Department of Defense 'contractor personnel, compared to approximately 99,800 uniformed personnel'.⁸⁶ Of these contractors, 51% were Afghan,⁸⁷ and 20,413 were US citizens.⁸⁸ By March 2013, the number of US forces' contractors had grown—the US Department of Defense estimated that there were approximately 108,000 contractor employees in Afghanistan, representing 62% of the total US force deployed at that time.⁸⁹ What was underappreciated in terms of the US dependence on these companies and persons was the impact upon them of operating in what was essentially a combat theatre. Losses among civilian contractors hauling freight and fuel for ISAF and OEF were severe. In 2009, for example, just among fuel convoys, 119 civilian contractors were killed, 267 were wounded, and 63 vehicles were destroyed by insurgent forces.⁹⁰

Given the concurrent need to build capacity in the Afghan government so that it could become more self-sustaining, the use of contractors also probably provided an example where the Sending State forces purposefully chose to waive one of the favourable SOFA provisions they had obtained from the Afghan government. Both the OEF exchange of notes and the ISAF MTA established that contractors for these military organizations were not required to pay Afghan government fees, such as business registration fees. Afghanistan first began requiring companies to pay these fees in 2008,⁹¹ and they ranged from \$100 to \$1,000 for ordinary contractors depending on the lines of business in which they were engaged.⁹² Although contractors were technically exempt, both the US⁹³ and ISAF⁹⁴ agreed with Afghanistan that these fees should be paid. Similarly, the Afghan government began requiring non-Afghan contractor personnel to obtain work permits, and charging fees for these documents as well.⁹⁵

(b) Private security contractors

Because of the security situation in Afghanistan, ordinary contractors often found they needed to hire armed private security contractors simply to be able to deliver their contracted goods and services. The legal status of these companies under Afghan law became complicated and opaque. Understandably in light of the civil war that had brought the Taliban to power, the Bonn Agreement provided that 'all mujahidin, Afghan armed forces and armed groups in the country shall come under the command and control of the Interim Authority, and be reorganized according to the requirements of the new Afghan security and armed forces'.⁹⁶ As a step towards at least gaining oversight of the

⁸⁵ M. J. Evans and S. W. Masternak, 'The Silent Revolution Within NATO Logistics: A Study in Afghanistan Fuel and Future Applications' (unpublished thesis, Monterey: US Naval Postgraduate School, 2012), 55.

⁸⁶ M. Schwartz and J. Swain, 'Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis', *Congressional Research Service* (Report No. R40764) (13 May 2011), 6.

⁸⁷ *Ibid.* 8. ⁸⁸ *Ibid.* 11. ⁸⁹ M. Schwartz and J. Church, (n. 86) 2.

⁹⁰ M. J. Evans and S. W. Masternak, (n. 85) 57, figure 10. ⁹¹ *Ibid.* 99–100.

⁹² 'SIGAR Alert 13-3', Office of the Special Inspector General for Afghanistan Reconstruction (report) (28 June 2013) 2, <<https://sigar.mil/pdf/alerts/SIGAR%20Alert%2013-3.pdf>>. [hereinafter 'SIGAR Alert 13-3'].

⁹³ *Ibid.* 12, fn. 16.

⁹⁴ M. J. Evans and S. W. Masternak, (n. 84) 99–100. ⁹⁵ SIGAR Alert 13-3 (n. 92) 2.

⁹⁶ Bonn Agreement, Art. 5(1).

private security industry in Afghanistan, the Ministry of the Interior (MOI) established a 'procedure for regulating activity of private security companies' in 2008 which included a database of companies that had been licensed.⁹⁷ It appears, however, that the Afghan government's enforcement of this procedure was at best uneven.⁹⁸ In 2009, there were reportedly approximately 40 licenced private security companies that employed over 20,000 persons. Some estimates placed the total number of individuals working for private security contractors as high as 70,000, but not all of these persons were believed to be working with licenced contractors.⁹⁹

The scope and nature of the private security industry posed significant problems for the nascent Afghan government and Sending State security efforts. There were grave concerns that Afghan private security contractors were not only corrupt, but actively collaborating with the Taliban as well. For example, the errant air strike in Azizabad in August 2008 (discussed earlier from a claims perspective in Chapter 22) that resulted in numerous civilian casualties and so damaged Afghan-US relations, was part of a raid that targeted a senior Taliban commander who was supposed to be meeting at the home of the chief of the company that provided security for a US airbase in Shindand district.¹⁰⁰ A US Army investigation afterwards found that some of the insurgents engaged in the raid by US Special Forces may actually have been employed as security personnel.¹⁰¹

The proliferation of private security groups also had another counterproductive effect—Afghan National Army soldiers and Afghan National Police officers often left these organizations, which were so crucial to building up Afghan capacity to provide internal security, for better paying positions with the private security contractors.¹⁰² Further, the companies themselves were often fronts for local warlords who were seeking to maintain their own private armies and avoid control of the central government.¹⁰³ Finally, a number of these private security companies were found to have made payments to the Taliban to let the supply convoys they were ostensibly protecting transit Afghan highways.¹⁰⁴

The actions of employees of these companies, whether they were Afghan or Sending State, were often politically difficult to handle. For example, firefights between insurgents and private security contractors guarding supply convoys would sometimes leave the highway and spread into neighbouring villages, resulting in civilian casualties.¹⁰⁵ Sending State employees of these companies, generally US, also engaged in individual criminal activities during the course of their employment. For example, one private security contractor was convicted in a US federal district court of voluntary manslaughter after he executed an Afghan detainee who had killed a US Human Terrain Team anthropologist

⁹⁷ E. Krahnmann, 'NATO Contracting in Afghanistan: The Problem of Principal-Agent Networks', 92 *International Affairs* (4 November 2016) 1410–11, <<http://onlinelibrary.wiley.com/doi/10.1111/1468-2346.12753/pdf>>.

⁹⁸ *Ibid.* 1411.

⁹⁹ M. Schwartz, 'The Department of Defense's Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress', *Congressional Research Service* (Report No. R40835) (29 September 2009) 3.

¹⁰⁰ 'Inquiry into the role and oversight of private security contractors in Afghanistan, Report, Together with additional views of the Committee on Armed Services', *US Senate Committee on Armed Services* (28 September 2010) iii.

¹⁰¹ *Ibid.* iii.

¹⁰² *Ibid.* vii, ix.

¹⁰³ *Ibid.* ix; E Krahnmann, (n. 97) 1408–09.

¹⁰⁴ A. Roston, 'How the US army protects its trucks—by paying the Taliban', *Guardian* (12 November 2009), <<https://www.theguardian.com/world/2009/nov/13/us-trucks-security-taliban>>.

¹⁰⁵ Krahnmann, (n. 97) 1409.

by dousing her with gasoline and setting her on fire.¹⁰⁶ Two private security contractors were later convicted in the same US district court of involuntary manslaughter when they opened fire on passers-by in Kabul while tending to a flat tyre on their vehicle. Contrary to US policy, these individuals had armed themselves with assault rifles,¹⁰⁷ and their vehicle experienced its mishap while they were on an unauthorized convoy.¹⁰⁸

The Afghan government became increasingly troubled by the role that private security contractors had carved out for themselves in the distorted Afghan war economy. President Karzai appointed a special committee to investigate the issues surrounding the use of private security contractors, which found that 16 had committed very serious infractions, including 'the illegal use of weapons, illegal hiring, vehicle offences and tax evasion'.¹⁰⁹ Frustrated with the actions of certain of the private security contractors, President Karzai decided to act unilaterally in August 2010 by issuing a presidential decree that sharply curtailed the freedom of action that they had enjoyed in conducting their business in Afghanistan.

Under Presidential Decree No. 62, individual employees of private security contractors were to be registered with the MOI and integrated into police or MOI units.¹¹⁰ Foreign private security contractors were required to sell their equipment to the Afghan government, otherwise their visas would be cancelled, and they would be required to take their equipment out of the country.¹¹¹ As for private security contractors that had not registered with the MOI, they were to be dissolved and their equipment and supplies were to be confiscated.¹¹² Finally, the MOI would provide external security for all embassies, international organizations, and NGOs 'and provide security for all logistical transportations of international troops from province to Kabul, districts and vice-versa in cooperation with MoD and NDS'.¹¹³

President Karzai's decree to essentially shut down the private security industry in Afghanistan and transfer its functionality to the Afghan Public Protection Force was greeted with scepticism and disbelief by the international community. As stated by one industry participant, 'The Afghan security forces don't have the resources, the ability or the training to take over. And most importantly, they are not trusted by our clients who would sooner pull out than be protected by the Afghan police'.¹¹⁴ From the perspective of many in the industry, Afghan government efforts to regulate the private security market was driven by official corruption.¹¹⁵

¹⁰⁶ US Attorney for the Eastern District of Virginia, 'Civilian Contractor Pleads Guilty to Voluntary Manslaughter of Afghan Detainee' (press release) (3 February 2009), <<https://www.justice.gov/sites/default/files/criminal-hrsp/legacy/2010/07/29/02-03-09ayala-plea.pdf>>.

¹⁰⁷ Under the applicable US Central Command arming policy, the standard weapon that contractors in Afghanistan were allowed to carry was a government approved sidearm. Other weapons, such as longarms, could only be approved by a very senior officer. CENTCOM memorandum, Subject: Modification to USCENTCOM Civilian and Contractor Arming Policy and Delegation of Authority for Iraq and Afghanistan (7 November 2006) para. 6. These weapons were only to be used for individual self-defence 'when there is a reasonable belief of imminent risk of death or serious bodily harm'. *Ibid.* para. 4.d.1.

¹⁰⁸ Department of Justice, Office of Public Affairs, 'Two Contractors Convicted of Involuntary Manslaughter for Death of Afghan National in Kabul, Afghanistan' (press release) (11 March 2011), <<https://www.justice.gov/opa/pr/two-contractors-convicted-involuntary-manslaughter-death-afghan-national-kabul-afghanistan>>.

¹⁰⁹ E. Krahmann, (n. 97) 1411.

¹¹⁰ President of Islamic Republic of Afghanistan Decree No. 62, About dissolution of Private Security Companies, 17 August 2010, Art. 2 [hereinafter Presidential Decree No. 62].

¹¹¹ Presidential Decree No. 62, Arts. 3, 4. ¹¹² Presidential Decree No. 62, Art. 5.

¹¹³ Presidential Decree No. 62, Art. 7. NDS stands for the National Directorate of Security, the Afghan domestic and international intelligence agency.

¹¹⁴ J. Boone, 'Karzai to scrap booming private security industry in Afghanistan', *Guardian* (16 August 2010), <<https://www.theguardian.com/world/2010/aug/16/karzai-ends-private-security>>.

¹¹⁵ *Ibid.*

Three months after issuing Presidential Decree No. 62, President Karzai extended the deadline by two months after billions of dollars' worth of development projects threatened to shut down,¹¹⁶ and then in December 2010 the MOI announced that although 54 firms had been dissolved in recent weeks, most of the remaining 52 licenced companies, mainly Afghan, would retain their licences.¹¹⁷ As a result of pressure from the civilian and military organizations impacted by the decree, a bridging strategy was developed that allowed for a longer transition period before private security contractors were to be dissolved. ISAF, for example, was allowed to continue to hire private security contractors at its bases until March 2013.¹¹⁸

The bridging strategy¹¹⁹ employed significant financial incentives for private security contractors, particularly foreign firms, to stay in good graces with the Afghan government. For example, instead of the perhaps \$1,000 business registration fees that ordinary contractors would have to pay, private security contractors had to pay \$113,000 per company for a business registration certificate.¹²⁰ Further, these companies needed to provide a surety amount of \$378,000 to be held by the Afghan government, which would serve as liquidated damages in the event of a security incident.¹²¹ The bridging strategy also provided for the assessment of fines on private security contractors who exceeded their government-dictated caps on the number of employees they hired. One private security contractor used by both ISAF and OEF paid more than \$1,200,000 in penalties for exceeding its cap.¹²²

The Afghan Public Protection Force developed very slowly.¹²³ Insufficient training and a lack of qualified personnel led to allegations of exhibiting unprofessional behaviour towards civilians. This led not only to continuing extensions being granted to private security contractors, but also to the subcontracting of security work by the Afghan Public Protection Force to private security contractors.¹²⁴ By 2014, the Afghan Public Protection Force was employed in securing only five of the 43 US military bases in Afghanistan at that time.¹²⁵ Finally, in March 2014, the MOI announced that the Afghan Public Protection Force would be dissolved, and its functions would be folded into the Afghan National Police.¹²⁶ Concurrent with the failure of the Afghan Public Protection Force, the security vacuum in Afghanistan continued to grow as Sending States reduced their troop levels in anticipation of the complete turnover of security to the Afghan forces. Accordingly, in September 2014, the Afghan government and ISAF signed an agreement to create a 5,000 member Facilities Protection Force to guard ISAF installations that had been turned over to Afghanistan as ISAF forces withdrew. Although the Facilities Protection Force was to be part of the Ministry of Defence, it was not to be part of the Afghan National Army.¹²⁷

¹¹⁶ J. Partlow, 'Karzai Gives Private Security Firms a Temporary Reprieve from Order to Disband', *Washington Post* (27 October 2010), <<http://www.washingtonpost.com/wp-dyn/content/article/2010/10/27/AR2010102705720.html>>.

¹¹⁷ 'Karzai abandons plan to scrap private security firms', *BBC* (6 December 2010), <<http://www.bbc.com/news/world-south-asia-11925855>>.

¹¹⁸ E. Krahmann, (n. 97) 1411.

¹¹⁹ See 'Risk Management Company Procedure', Islamic Republic of Afghanistan, Ministry of Interior Affairs, Afghan Public Protection Force and Security Enterprise (2013), <<http://appf.gov.af/downloads/documents/Policies%20and%20Procedures/RMCPROCEDURES%20ENGLISH.pdf>>.

¹²⁰ SIGAR Alert 13-3 (n 92) 2. <<https://sigar.mil/pdf/alerts/SIGAR%20Alert%2013-3.pdf>>.

¹²¹ *Ibid.* ¹²² *Ibid.*, 12, fn. 18. ¹²³ E. Krahmann, (n. 97) 1411.

¹²⁴ *Ibid.* 1421. ¹²⁵ *Ibid.* 1411.

¹²⁶ N. Hodge, 'Afghanistan to Disband Crucial Guard Force', *Wall Street Journal* (4 March 2014), <<http://www.wsj.com/articles/SB10001424052702304585004579418730552246724>>.

¹²⁷ J. Trevithick, 'It's Possible Afghanistan Can't Protect Its Own Bases: Kabul wants a new force to guard former NATO sites', *Warisboring.com* (11 December 2014), <<https://warisboring.com/its-possible-afghanistan-cant-protect-its-own-bases-53a5e34cf33#.rerdncnro>>.

2. Logistics: Customs and taxes

(a) *Customs*

Given the number of international civilian personnel continuously entering and exiting Afghanistan to conduct business in support of the different missions in that country, it is not surprising that Afghan border and customs officers were often confused as to exactly what travel documents were required for different individuals. Under the MTA, for example, ISAF civilian employees and contractors were allowed to enter and leave Afghanistan on the basis of their identification cards and travel documents.¹²⁸ By 2008, however, border and customs officers at Kabul International Airport were requiring these personnel to obtain travel visas, which was a cumbersome and expensive process. At the recommendation of a Romanian former legal advisor, the ISAF Legal Office began issuing numbered visa exemption certificates to civilian employees and contractors that explained why visas were not required, signed by the Chief Legal Advisor, and decorated with a number of official-looking stamps and seals.¹²⁹ The travel certificates were immediately successful, and the ISAF Travel Office eventually took over the visa exemption certificate function.¹³⁰

Achieving consistency in Receiving State treatment of Sending State personnel transiting Afghanistan's borders was one thing, forcing the Afghan government to adhere to the SOFA exemptions for shipping materiel in and out of the country was quite another. Beginning in 2009, although the US and Afghanistan exchanged a number of diplomatic notes regarding the importation of US military materiel into Afghanistan, and had established a process to import these items free of tariffs and customs duties, the Afghan government required that commercial carriers purchase an exemption packet for covered shipping containers.¹³¹ Further, the Afghan government imposed fines on contractors for late or unprocessed customs paperwork, and disagreement between the Afghan government and ISAF and OEF over the propriety of the Afghan charges continued to fester.¹³² By May 2013, the total amount of these fees had grown to at least \$1,003,000.¹³³ Further, the US estimated that fines assessed by the Afghan government for late or unprocessed customs declaration forms between 2009 and 2013 totalled more than \$150,000,000.¹³⁴ At various times until this dispute was resolved, the Afghan government shut its borders to non-conforming contractors hauling goods for OEF, ISAF and the Afghan security forces.¹³⁵

As the surge of in-bound cargo through Afghanistan's borders ebbed, and then reversed as Sending State forces were withdrawn, a new SOFA interpretation issue arose. In July 2013, Afghanistan demanded that the US pay \$1,000 for each shipping container leaving Afghanistan that did not have a validated customs form. The Afghan customs agency stated that the US had already incurred \$70,000,000 in fines for failure to meet this requirement. The director-general of the customs department stated that his government was concerned that much of the materiel shipped out by the US was actually being diverted

¹²⁸ MTA, s. 2, Art. 5. The US-Afghanistan exchange of letters does not include such language.

¹²⁹ Author's notes.

¹³⁰ See Headquarters, International Security Assistance Force (HQ, ISAF), Kabul, Afghanistan, Visa Exemption Certificate, Ivar Johansen (undated, but apparently issued no earlier than 2011), <<http://www.ivarjohansen.no/dmdocuments/isaf07122012.pdf>>.

¹³¹ SIGAR Alert 13-3 (n. 92) 6. Border control officers would not allow cargo to pass that was manifested only on a US tariff exemption memorandum. *Ibid.* 7.

¹³² See *ibid.* 8.

¹³³ *Ibid.* 1.

¹³⁴ *Ibid.* 1-2.

¹³⁵ *Ibid.* 9.

to the black market.¹³⁶ In August 2013, the Afghan government approved the Ministry of Finance's recommendation that penalties and fines associated with the customs transit documentation be waived.¹³⁷

(b) Taxes

Taxation of contractors proved to be a matter of SOFA controversy between Afghanistan and the Sending States as well. The US estimated that between 2008 and 2012, the Afghan government levied approximately \$93,000,000 in taxes on business receipts and annual corporate income of contractors providing goods and services to the US military—although both governments agreed that these items were tax exempt.¹³⁸ However, Afghanistan argued that the SOFAs only exempted 'contractors' from Afghan taxes—not 'subcontractors'.¹³⁹ In 2011, using his authority under the MTA, the ISAF commander, who was also the commander of US forces in Afghanistan, issued a letter of interpretation to the Minister of Finance that the term 'contractor' included 'subcontractors'.¹⁴⁰ Therefore, 'subcontractors to contractors were also exempt from taxes or duties on the goods, materials, supplies acquired and provided for use of NATO/ISAF, NATO and non-NATO member participating in the mission'.¹⁴¹

Perhaps in the spirit of realistic compromise, the ISAF commander did agree that local Afghan contractors could be properly taxed on the profits they had earned on ISAF contracts.¹⁴² Under the OEF Exchange of Notes, however, there was no authority granted to the US commander in Afghanistan to make such interpretive rulings. Therefore, in 2013 the US took the position that although local contractors were subject to being taxed on their profits earned from ISAF contracts, '[i]n general, if a contract is governed exclusively by Diplomatic Note 202, DOD contractors and subcontractors cannot include any Afghanistan taxes in their contract price'.¹⁴³

Given the blurred role that ISAF and OEF likely had in the eyes of both Afghan officials and contractors by this point in time, distinguishing between these different types of contracts for accounting and taxation purposes could not have been easy. The Ministry of Finance's frustration in this regard perhaps rippled into some of its tax enforcement efforts. For example, three employees of one particular contractor were arrested in January 2013 during a meeting with Afghan revenue authorities to discuss their company's unpaid tax assessments. The employees were released three days later, even though the assessment

¹³⁶ E. Londono and K. Sieff, 'Flow of U.S. military gear across Afghan borders disrupted amid dispute', *Washington Post* (17 July 2013).

¹³⁷ Ghanizada, 'Afghanistan-ISAF reach agreement to waive customs fines, penalties', *Khaama Press* (1 August 2013) <<http://www.khaama.com/afghanistan-isaf-reach-agreement-to-waive-customs-fines-penalties-1717>>.

¹³⁸ Office of the Special Inspector General for Afghanistan Reconstruction, 'Taxes: Afghan Government Has Levied Nearly a Billion Dollars in Business Taxes on Contractors Supporting U.S. Government Efforts in Afghanistan', SIGAR Audit 13-8 (report) (May 2013) 6, <<https://sigar.mil/pdf/audits/2013-05-14-audit-13-8.pdf>> [hereinafter SIGAR Audit 13-8].

¹³⁹ See 'Defense Federal Acquisition Regulation Supplement: Taxes—Foreign Contracts in Afghanistan (DFARS Case 2014-D003)', 80 *Federal Register* 81468 (30 December 2015).

¹⁴⁰ Letter to Minister of Finance, Hazrat Omar Zakhilwal, from Commander, ISAF, 2011 COMISAF Letter of Interpretation (9 March 2011) 2, <<https://www.ahg.af/aaa/COMISAF%20Letter%20of%20Interpretation.pdf>>.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Memorandum for Heads of Contracting Activities (HCAs), Subject: Head of the Contracting Activity (HCA) Bulletin 13-02, Taxation of Department of Defense (DOD) Contractors Performing in Afghanistan, from Commander, CENTCOM Joint Theater Support Contracting Command (21 January 2013) 1, <<https://www.ahg.af/aaa/HCA%20Bulletin%2013-02.pdf>>.

issues had not been solved.¹⁴⁴ Other companies with unpaid assessments found that Afghan revenue authorities had frozen their corporate bank accounts, and in many cases contractors were required to provide surety amounts against their unpaid tax assessments to be able to continue performing their contracts for ISAF and OEF forces.¹⁴⁵

3. Detention operations

It is one thing perhaps for a Receiving State and a Sending State to have different, competing interpretations of specific SOFA terms. It is an entirely different matter when the authority of the Sending State to engage in a particular activity is not explicitly addressed in the SOFA. Here, the detention of Receiving State nationals by the Sending State for indefinite and extended periods of time, challenging ordinary notions of the Receiving State's sovereignty, was at issue. Neither the OEF Exchange of Notes nor the MTA mention the detention of Afghans by the Sending States. Whilst the authority to detain during the course of military operations could reasonably be found in the UN Security Council's approval of ISAF under Chapter VII of the UN Charter,¹⁴⁶ the OEF Exchange of Notes merely makes mention of the ongoing US-led coalition's military activities in Afghanistan.¹⁴⁷

(a) *Background: 2001–2006*

Despite the lack of specificity about this incredibly important facet of the status of visiting forces in Afghanistan, detention operations by OEF and to a lesser degree ISAF continued from the invasion in 2001 until the change of mission in 2014. During this time, the US forces generally took the lead in conducting detention operations.¹⁴⁸ The US-led coalition began using the Bagram airfield northeast of Kabul in November 2001, and in early 2002, it started using an old Soviet aircraft machine shop as a detention centre, which in time became known as the Bagram Detention Facility. In July 2005 it held approximately 500 detainees.¹⁴⁹ A new set of buildings with greater capacity, the Parwan Detention Facility, was completed in 2009 and significantly improved the living standards for the detainees held there.¹⁵⁰ When a large portion of the Parwan Detention Facility was transferred to Afghan control in September 2012, it housed 3,182 Afghan detainees.¹⁵¹

Two Afghan detainees died at the Bagram Detention Facility in late 2002 after being abused by US Army guards at the facility.¹⁵² After the *New York Times* published the results of its investigation into the deaths in 2003,¹⁵³ the US military finally began investigating the deaths as homicides. In 2004, the renewed criminal investigation into the detainees'

¹⁴⁴ SIGAR Audit 31-8 (n. 138) 9. ¹⁴⁵ *Ibid.* 9–10.

¹⁴⁶ 'All necessary measures', SC Res. 1386 (2001), para. 3.

¹⁴⁷ 'Without prejudice to the conduct of ongoing military operations', Embassy of the United States of America, Diplomatic Note No. 202 1 (26 September 2002).

¹⁴⁸ M. C. Waxman, 'The Law of Armed Conflict and Detention Operations in Afghanistan', 85 *International Law Studies* (2009) 343, 344.

¹⁴⁹ Associated Press, 'Four Escape U.S. Bagram Base; Navy SEAL Found Dead', *Fox News* (11 July 2005), <<http://www.foxnews.com/story/2005/07/11/four-escape-us-bagram-base-navy-seal-found-dead.html>>.

¹⁵⁰ Colonel J. M. Prescott, 'Detention Status Review Process in Transnational Armed Conflict: *Al-Maquleh v. Gates*, and the Parwan Detention Facility', 5 *University of Massachusetts L Rev* (2010) 34, 39.

¹⁵¹ 'US transfers Bagram jail to Afghans' *Aljazeera* (10 September 2012), <<http://www.aljazeera.com/news/middleeast/2012/09/201291094118439921.html>>.

¹⁵² H. Shamsi (author), D. Pearlstein (ed), *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (Human Rights First: New York, 2006) 14.

¹⁵³ C. Gall, 'Threats and Responses: Prisoners: U.S. Military Investigating Death of Afghan in Custody', *New York Times* (4 March 2003), <<http://www.nytimes.com/2003/03/04/world/threats-responses-prisoners-us-military-investigating-death-afghan-custody.html>>.

deaths led to a report that recommended charges be brought against dozens of US Army personnel, including a number of officers, on charges ranging from dereliction of duty to involuntary manslaughter.¹⁵⁴ A number of courts-martial were eventually held, and resulted in a few convictions with generally light sentences.¹⁵⁵ The only officer actually charged with criminal offences (lying to investigators and dereliction of duty) had his charges dismissed after a pre-trial inquiry.¹⁵⁶ Importantly, detainees taken by US forces that were not part of ISAF fell under separate US detention rules.¹⁵⁷

Nearly a year after NATO took over command of ISAF and the mission began to expand, the Taguba Report into the abuses committed by US Army soldiers against Iraqi detainees at Abu Ghraib was published.¹⁵⁸ The international outcry was intense,¹⁵⁹ and likely informed NATO's decision-making as to how to deal with detained Afghan nationals in the course of the ISAF mission.¹⁶⁰ From the beginning of ISAF until 2005, it appears that a number of ISAF detainees were transferred to OEF.¹⁶¹ NATO adopted guidelines in December 2005 that called for detainees to be transferred to Afghan authorities within 96 hours of their capture.¹⁶² This time limit became embedded in ISAF standard operating procedures at least as early as August 2006.¹⁶³

(b) ISAF and OEF detention operations

Under ISAF SOP 362, ISAF forces could detain individuals for up to 96 hours so long as it was determined that detention was 'necessary for ISAF force protection; for the self-defence of ISAF or its personnel; for accomplishment of the ISAF mission'.¹⁶⁴ The ISAF commander was authorized to extend the period of detention 'where it is deemed necessary in order to effect his release or transfer in safe circumstances. This exception is not authority for longer-term detentions but is intended to meet exigencies such as that caused by local logistical conditions ...'.¹⁶⁵ ISAF SOP 362 was very detailed in terms of the standards to be met in detaining individuals, and provisions for conducting searches of detainees,¹⁶⁶ separating adults from juveniles,¹⁶⁷ detainee rights advisements in Dari and Pashto,¹⁶⁸ movement and transfer of detainees,¹⁶⁹ detention procedures,¹⁷⁰ medical support

¹⁵⁴ T. Golden, 'Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates', *New York Times* (8 January 2006), <<http://www.nytimes.com/2006/01/08/world/asia/case-dropped-against-us-officer-in-beating-deaths-of-afghan.html>>.

¹⁵⁵ H. Shamsi (n. 152) 14, fn. 209. ¹⁵⁶ T. Golden (n. 154).

¹⁵⁷ P. Muggleton and B. Oswald, 'Counterinsurgency and Certain Legal Aspects: A Snapshot of Afghanistan', *Asia Pacific Civil-Military Centre of Excellence* (May 2011) 24, fn. 22 ('The authority for USFOR-A serving under Operation Enduring Freedom (OEF) to detain is found in OEF Rules of Engagement and guidance issued by the US Department of Defence and Central Command'), <<http://www.slideshare.net/CivMilCoE/civilmilitary-occasional-paper-52011-counterinsurgency-and-certain-legal-aspects-a-snapshot-of-afghanistan>>.

¹⁵⁸ Major General A. M. Taguba, Investigating Officer, 'AR 15-6 Investigation of the 800th Military Police Brigade (27 May 2004), <https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DODDOA000248.pdf>.

¹⁵⁹ S. L. Myers, 'The Reach of War: Abuse Investigations; Military Completed Death Certificates for 20 Prisoners Only After Months Passed', *New York Times* (31 May 2004), <http://www.nytimes.com/2004/05/31/world/reach-war-abuse-investigations-military-completed-death-certificates-for-20.html?_r=0>.

¹⁶⁰ See A. Deeks, 'Detention in Afghanistan' Center for Strategic & International Studies' (August 2013) 1, <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/080213_deeks_afghanistan.pdf>.

¹⁶¹ 'Afghanistan: Detainees transferred to torture: ISAF complicity' *Amnesty International* (report) (11 November 2007) 5, <<https://www.amnesty.org/download/Documents/ASA110112007ENGLISH.PDF>> [hereinafter *Amnesty International*].

¹⁶² Waxman, (n. 148) 345.

¹⁶³ ISAF Standard Operating Procedure 362, Detention of Non-ISAF Personnel (31 August 2006), <<https://info.publicintelligence.net/ISAF-DetaineeSOP.pdf>> [hereinafter ISAF SOP 362].

¹⁶⁴ ISAF SOP 362, Detention of Non-ISAF Personnel (31 August 2006) paras. 3b, 3c.

¹⁶⁵ *Ibid.* para. 8. ¹⁶⁶ *Ibid.* Annex A, para. 1.e. ¹⁶⁷ *Ibid.* Annex A, para. 1.e(2).

¹⁶⁸ *Ibid.* Annex A, Appendix 2. ¹⁶⁹ *Ibid.* Annex B. ¹⁷⁰ *Ibid.* Annex C.

to detainees,¹⁷¹ transfer to Afghan authorities,¹⁷² investigations into allegations of abuse against detainees,¹⁷³ and the independent inspection regime establishing the role of the ICRC regarding ISAF detention.¹⁷⁴

Because of concerns among certain ISAF Troop Contributing Nations regarding the treatment of detainees they had transferred to Afghan authorities, there were a number of bilateral agreements between them and Afghanistan setting conditions for visiting transferred detainees still held in Afghan custody.¹⁷⁵ In the autumn of 2007, the US joined Canada, the UK, the Netherlands, Norway, and Denmark in signing an exchange of letters with the Afghan government intended to establish a common approach to these detainee transfers. The letters provided that officials from each government should have access to Afghan detention facilities 'to the extent necessary to ascertain the location and treatment of any detainee transferred by that government to the Government of Afghanistan' and, on request, access to interview any transferee in private.¹⁷⁶ The letters guaranteed 'the same access for the International Committee of the Red Cross (ICRC), UN human rights bodies and the Afghan Independent Human Rights Commission'.¹⁷⁷

As the surge of ISAF reinforcements in 2009 became imminent, the US Central Command began reassessing the efficacy of the 96 hour rule and discussing this with ISAF legal advisors.¹⁷⁸ There was increasing concern that the 96-hour rule was counter-productive operationally, because once detainees were turned over to the NDS about 25% were often immediately released.¹⁷⁹ In one 2008 case, a US Army officer was discharged from the service for abusing detainees. His unit had detained a number of Afghans who worked on his base, including his interpreter, who were apparently in communication with Taliban insurgents via their cell phones. The evidence had been collected electronically, and was too sensitive to provide to Afghan officials. Near the end of the 96 hour period, he fired shots near some of the detainees, who then made statements implicating themselves and others. The detainees were then turned over to NDS without the electronic evidence, which then released them.¹⁸⁰

In March 2010, the US decided to allow its forces to hold detainees for up to 14 days, with the possibility of longer detention if necessary.¹⁸¹ The UK and Canada had also declared 'caveats'¹⁸² to ISAF permitting them to transfer within 14 days.¹⁸³ As the fighting intensified following the flow of ISAF reinforcements into Afghanistan, more Afghans were detained. Against this operational backdrop, however, Afghanistan continued to press its position that detention of Afghans should be under Afghan control.

As early as 2005 the US and Afghanistan had reached diplomatic agreements to gradually transfer Afghan detainees to the full custody of the Afghan Government.¹⁸⁴ The US had been unwilling to complete this process, however, because of concerns as to 'the

¹⁷¹ Ibid. Annex C, Appendix 1.

¹⁷² Ibid. Annex D.

¹⁷³ Ibid. Annex E.

¹⁷⁴ Ibid. Annex F. ¹⁷⁵ *Amnesty International* (n. 161) 21.

¹⁷⁶ N. Shah, 'U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK and Canada', *Human Rights Institute, Columbia Law School* (20 December 2010) 6.

¹⁷⁷ Ibid. ¹⁷⁸ Author's notes.

¹⁷⁹ A. Boudreau and S. Zamost, 'U.S. reviewing Afghanistan detainee policy', CNN (18 February 2010), <<http://www.cnn.com/2010/WORLD/asiapcf/02/18/afghanistan.detainees/>>.

¹⁸⁰ Ibid.

¹⁸¹ A. Boudreau and S. Zamost, 'U.S. to end 96-hour rule for Afghan detainees' CNN (17 March 2010), <<http://www.cnn.com/2010/WORLD/asiapcf/03/17/afghanistan.nato.detainees/index.html>>.

¹⁸² In the ISAF context, a 'caveat' was a national position on some aspect of operations that differs from the ordinary authority or procedures implemented by the headquarters. Ordinarily, a caveat would be a national prohibition, such as not conducting night operations with helicopters. These detention caveats, however, actually expanded the nations' authority to hold detainees beyond that approved by the North Atlantic Council.

¹⁸³ N. Shah, (n. 176), 6.

¹⁸⁴ Waxman, (n. 148) 352.

shakiness of Afghan security institutions and inability to install domestic legal authorities and processes capable of handling or prosecuting captured militants'.¹⁸⁵ Even after the two countries signed the 2012 agreement to turn US detention facilities over to Afghanistan,¹⁸⁶ the US was still concerned that Afghanistan would release detainees that it believed still posed a danger to its forces.¹⁸⁷

Although the US argued that international law allowed administrative detentions under the circumstances, an Afghan judicial panel disagreed and held that holding a person without formal charges being brought against them was illegal under Afghan law.¹⁸⁸ Eventually, the Afghan government agreed with the US position.¹⁸⁹ The US stated that it interpreted the agreement that was finally negotiated as giving it a veto over the release of particular detainees—Afghanistan disagreed and considered the release process to be wholly within Afghanistan's control.¹⁹⁰ By the beginning of 2013, Afghanistan had released approximately 1,000 of the detainees at the Bagram Detention Facility that had been turned over by the US.¹⁹¹ Regardless, the US completed the transfer and closure of detention facilities in Afghanistan by December 2014.¹⁹²

(c) *International Criminal Court's preliminary examination*

Afghanistan acceded to the Rome Statute on 10 February 2003, thereby giving the ICC the ability to exercise its jurisdiction over crimes prohibited under the Rome Statute as of 1 May 2003.¹⁹³ The ICC commenced its preliminary examination into the Afghanistan conflict in 2007,¹⁹⁴ and in its 2016 Report on Preliminary Examination Activities, it concluded that there was a reasonable basis to believe that crimes under the Rome Statute were committed by US armed forces and the US Central Intelligence Agency against detainees related to the Afghan conflict in Afghanistan and in Poland, Lithuania, and Romania (all three both NATO members and ISAF partners), 'principally in the 2003-2004 period, although allegedly continuing in some cases until 2014'.¹⁹⁵ Specifically with regard to allegations against the US forces, the Office of the Prosecutor concluded that the abuses against detainees 'appear to have been committed as part of approved interrogation techniques in an attempt to extract "actionable intelligence" from' them.¹⁹⁶ The Office of the Prosecutor stated that it was 'concluding its assessment of factors ... and will make a final decision on whether to request the Pre-Trial Chamber authorisation to commence

¹⁸⁵ Ibid.

¹⁸⁶ Memorandum of Understanding between The Islamic Republic of Afghanistan and the United States of America On Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan, 8 April 2012 [hereinafter Detention Facility MOU].

¹⁸⁷ AP, 'U.S. military hands over jail to Afghans', *USA Today* (25 March 2013), <<http://www.usatoday.com/story/news/world/2013/03/25/us-hands-prison-over-to-afghans/2017173/>>.

¹⁸⁸ Ibid.

¹⁸⁹ C. Savage and G. Bowley, 'U.S. to Retain Role as a Jailer in Afghanistan' *New York Times* (5 September 2012), <<http://www.nytimes.com/2012/09/06/world/asia/us-will-keep-part-of-afghan-prison-after-handover.html>>.

¹⁹⁰ R. Nordland and C. Savage, 'U.S. Again Delays Transfer of Bagram Prison to Afghan Forces' *New York Times* (9 March 2013), <<http://www.nytimes.com/2013/03/10/world/asia/us-delays-transfer-of-bagram-prison-to-afghan-forces.html>>.

¹⁹¹ A. Ahmed and H. Zahori, 'Afghanistan Frees Detainees in Show of Sovereignty Before Karzai Visits US' *New York Times* (4 January 2013), <<http://www.nytimes.com/2013/01/05/world/asia/afghanistan-releases-detainees-ahead-of-trip-by-karzai-to-washington.html>>.

¹⁹² J. Miklaszewski and A. Johnson, 'U.S. Closes Bagram Detention Center, Hands Over Last Afghan Prisoners' *NBC News* (10 December 2014), <<http://www.nbcnews.com/storyline/cia-torture-report/u-s-closes-bagram-detention-center-hands-over-last-afghan-n265851>>.

¹⁹³ ICC Report (n. 64) 43.

¹⁹⁴ Ibid. 43

¹⁹⁵ Ibid. 44.

¹⁹⁶ Ibid. 47.

an investigation into the situation in Afghanistan imminently.¹⁹⁷ As of June 2017, this decision had not been announced.¹⁹⁸

If the Pre-Trial Chamber were to begin an investigation into the allegations of detainee abuse against the US military, it is unclear at the time of this writing what the eventual result would be. The US has not ratified the Rome Statute, and is not likely to cooperate in any meaningful way in the investigation. Afghanistan has acceded to the Rome Statute, but not only is it unlikely to have much meaningful information about US detention operations during the 2003–2004 period, in 2009 it passed the ‘Law on Public Amnesty and National Stability’. This law ‘provides legal immunity to all belligerent parties including “those individuals and groups who are still in opposition to the Islamic State of Afghanistan”, without any temporal limitation to the law’s application or any exception for international crimes’.¹⁹⁹ Finally, even if US soldiers who were alleged to have committed the abuses were deployed to Afghanistan again at some point in the future, the Bilateral Immunity Agreement with the US suggests that Afghanistan would be reluctant to turn them over to the ICC.

(d) Domestic Sending State litigation involving detention

Although the likelihood of proceedings regarding conditions of detention by Sending State forces in Afghanistan coming before the ICC is perhaps remote, these same questions have been litigated fairly extensively in domestic Sending State courts on a variety of grounds. Cases from Canada, the UK, and the US present a wrinkle in SOFA implementation not ordinarily seen in the NATO SOFA context—are the activities of the Sending State forces in carrying out their operational missions in the Receiving State legal under Sending State law? In a Canadian case, the question before the court was whether Canada was conforming to its obligations under the Convention Against Torture in transferring its Afghan detainees to Afghan authorities because of concerns of abuse by Afghan detention officials. This question was also raised in one UK case, and in another, the legality of the UK caveat allowing for extended detention was challenged. Finally, in a US case, the question before the court was whether non-Afghan detainees could be held in Afghanistan by US forces without triggering the application of the habeas corpus statute. If triggered, this statute would allow a US federal court to review whether continued detention was in conformance with US law rather than the US Department of Defense determining whether continued detention was appropriate operationally under international law. Each of these cases, decided under different authorities, addresses the interface between international humanitarian law and human rights law in modern non-international armed conflict.

(i) Canada

As noted previously, Canada was one of the ISAF Troop Contributing Nations that had concluded bilateral agreements with Afghanistan to ensure that Canadian officials retained the ability to visit detainees transferred to Afghan authorities and determine whether they had suffered abuse while in Afghan custody. The first agreement was the

¹⁹⁷ Ibid. 51.

¹⁹⁸ ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation of the Islamic Republic of Afghanistan’ (20 November 2017), <<https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>>.

¹⁹⁹ Office of the Prosecutor, (n. 64) 48.

2005 'Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan', which provided for transfer of detainees to Afghan custody and contained general assurances of humane treatment of Afghan detainees.²⁰⁰ In 2007, after questions had been raised regarding the treatment of those detainees transferred, Canada concluded a second, more stringent agreement with Afghanistan which better specified the conditions under which detainees were to be held, and which set out procedures for supervision of detainees and access to detainees in Afghan prisons.²⁰¹ This included 'measures for monitoring by Canadian diplomats, the Afghan Human Rights Commission and the International Committee of the Red Cross (ICRC) of the treatment of such detainees in Afghan hands'.²⁰²

In 2008, in the case of *Amnesty International Canada v. Canada*,²⁰³ the Canadian Court of Federal Appeal considered a lower court order dismissing an application for judicial review with respect to detainees held by Canadian forces in Afghanistan and to the transfer of these persons to Afghan authorities. The plaintiffs argued that the Canadian Charter of Rights and Freedoms²⁰⁴ applied to the actions of Canadian forces in Afghanistan in detaining non-Canadians, and that even if it would not ordinarily apply, it should when transfer to Afghan authorities exposed them to a substantial risk of torture. The Court of Federal Appeal dismissed the appeal, finding that the Charter of Rights did not apply in a situation where Canadian forces were present in a sovereign country at that country's request, and that country did not agree to an extension of Canadian law over its nationals. Therefore, control over a detention facility was not the same as an effective control of territory by the Canadian forces that would trigger application of the Charter of Rights.²⁰⁵ Further, because international humanitarian law applied to the operations of the Canadian forces, there was no legal vacuum that Canadian law needed to fill regarding detainee transfers.²⁰⁶ The Canadian Supreme Court affirmed the Court of Federal Appeal's decision, and dismissed the appeal on 21 May 2009.²⁰⁷

(ii) UK

Like Canada, the UK signed agreements with the Afghan government to implement its obligations to ensure that detainees transferred to the Afghan authorities were treated humanely. For the UK, the operative authority with which it needed to conform was the European Convention on Human Rights.²⁰⁸ In a memorandum of understanding signed by the two countries in April 2006, the UK Embassy and armed forces were allowed 'full access to question' any detainees transferred by the UK, and the ICRC and 'relevant human rights institutions with the UN system' were allowed to visit them.²⁰⁹ As previously noted, the UK joined a number of ISAF Troop Contributing Nations in the 2007 exchange of letters with Afghanistan reaffirming the ability of those countries to ensure conformance

²⁰⁰ M. Sassoli and M.-L. Tougas, 'International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan', 56 *McGill Law Review* (2011) 959.

²⁰¹ 'Canadian Forces in Afghanistan, Report of the Standing Committee on National Defence', 39th Parliament, (June 2007) 102.

²⁰² Sassoli and Tougas (n. 200) 959.

²⁰³ *Amnesty International Canada v. Canada*, 2008 FCA 401, [2009] 4 F.C.R. 149 [hereinafter *Amnesty International Canada*].

²⁰⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

²⁰⁵ *Amnesty International Canada* (n. 203) paras. 25–8. ²⁰⁶ *Ibid.* para. 36.

²⁰⁷ *Canadian Supreme Court, Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada* (21 May 2009), No. 33029.

²⁰⁸ Shah (n. 176) 44.

²⁰⁹ *Ibid.* 45.

with their legal obligations vis-à-vis the detainees through visitation and monitoring. These undertakings had all been signed by the Afghan Ministry of Defence—in 2009 the NDS objected that it was not bound by them because they were only memoranda of understanding between the ISAF Troop Contributing Nations and the Ministry of Defence that had no binding effect upon it.²¹⁰ In March 2010, however, the NDS director did sign a letter that had been drafted by the UK that established a protocol to ensure UK access to detainees that had been transferred to the NDS.²¹¹

In the 2011 case of *Evans v. Secretary of State for Defence*,²¹² the England and Wales High Court affirmed the UK policy that detainees not be transferred to NDS facilities if there was a real risk of torture and mistreatment. For example, the UK had already placed a moratorium on transferring detainees to the NDS prison in Kabul in 2008 because of such concerns.²¹³ The Court found that this moratorium was proper, but that based on the evidence presented the UK could still continue to transfer detainees to NDS facilities in southern Afghanistan.²¹⁴ This case was not the last word on the standards of treatment at NDS facilities for transferred detainees, however. In September 2011, because of concerns regarding detainee abuse at six NDS prisons and two run by the Afghan National Police, ISAF suspended transfers of detainees to these locations until it could assess a UNAMA report detailing abuses.²¹⁵

However, in the case of *Serdar Mohammed v. Secretary of State for Defence*, discussed from the claims perspective in Chapter 22, although it was brought under the European Convention on Human Rights in part, the delict complained of was not physical abuse per se, but rather the arbitrariness of the detention itself. The England and Wales Court of Appeals found that detention operations by UK forces in Afghanistan were covered by an extraterritorial application of the European Convention on Human Rights. The plaintiff Mohammed had been captured by UK forces on 7 April 2010 and was held on suspicion of being a Taliban commander.²¹⁶ Acting consistent with UK Ministry of Defence policy, under the detention caveat notified to ISAF, the UK forces decided to detain him past the 96 hours detainees would ordinarily have been held.²¹⁷ Further, from 6 May until 25 July 2010, UK forces continued to detain him at the request of the NDS, which was unable to accept him at the time.²¹⁸ The Court of Appeals found that there was no legal authority to detain Mr. Mohammed for this length of time under Afghan, UK, or international humanitarian law.

In the Court of Appeals' view, the notification of the UK detention caveat to ISAF was not the same as ISAF approving detention longer than set out in SOP 362.²¹⁹ Under the pertinent UN Security Council resolution reauthorizing ISAF for the time in question, ISAF was empowered to use all necessary means, which it had established in SOP 362, and the UK had not been given this authority.²²⁰ From an international humanitarian law perspective, the Court of Appeals found that the detention standards applicable in international armed conflict were applicable in the context of the non-international armed conflict in Afghanistan.²²¹ Because Mr. Mohammed had not been given a chance to participate in the review of his detention as set required by international humanitarian law, his detention was arbitrary.²²² Because UK case law held that the European Convention on Human

²¹⁰ Ibid. ²¹¹ Ibid. 46.

²¹² *Evans v. Secretary of State for Defence*, [2010] EWHC 1445 (Admin), [20011] ACD 11.

²¹³ Ibid. para. 32. ²¹⁴ Ibid. para. 35.

²¹⁵ Q. Sommerville, 'Nato halts Afghan prisoner transfer after torture fears', *BBC* (6 September 2011), <<http://www.bbc.com/news/world-south-asia-14809579>>.

²¹⁶ *Serdar Mohammed & Others v. Secretary of State for Defence*, [2014] EWHC 1369 (QB) and [2014] EWHC 3846 (QB) para. 3.

²¹⁷ Ibid. para. 43 vii–viii.

²¹⁸ Ibid. para. 43 x.

²¹⁹ Ibid. para. 153.

²²⁰ Ibid. paras. 145, 149.

²²¹ Ibid. paras. 279, 296, 297.

²²² Ibid. para. 298.

Rights was applicable extraterritorially in situations where the State had authority and control over its agents,²²³ Mr. Mohammed had a legal basis to seek compensation for it.²²⁴ As previously discussed, the UK Supreme Court overturned the lower court's decision in part, finding sufficient authority in SC Res. 1368 (2001) for UK forces to implement their own detention policies.²²⁵

(iii) US

There was a significant amount of litigation in US courts involving detainees being held by the US in Afghanistan. In the US, the 2010 case of *Al-Maquleh v. Gates*²²⁶ for example, challenged the US Department of Defence's authority to hold non-Afghan detainees at the Parwan Detention Facility without affording them an opportunity under the US habeas corpus statute to have their continued detention considered by a federal court. This challenge had its roots in earlier litigation involving individuals detained by US forces at the Guantanamo Naval Station in Cuba on suspicion of belonging to or aiding al-Qaeda. The Bush Administration had decided to establish this detention facility at Guantanamo based in large part on its assessment that under US law, rights under the US Constitution to contest either detentions or possible trials by military commissions²²⁷ would not be afforded to non-US national detainees held on the territory of a foreign State.²²⁸

In the case of *Rasul v. Bush*, the US Supreme Court found otherwise. The Court held that because the habeas corpus statute did not distinguish between US citizens and non-citizens, and because of the special degree of control historically exercised by the US over Guantanamo, federal courts had jurisdiction to hear habeas petitions from non-citizen Guantanamo detainees.²²⁹ This right, albeit on constitutional grounds, was later reaffirmed in the case of *Boumediene v. Bush*, which cleared the path for Guantanamo detainees to challenge their detention in federal courts using the right of habeas corpus.²³⁰

In the 2010 case of *Al-Maquleh v. Gates*, the District of Columbia Court of Appeals reversed a lower court ruling premised on the US Supreme Court's analysis in *Boumediene*, which held that non-Afghan detainees captured outside of Afghanistan and held at the Parwan Detention Facility had the right to have their habeas corpus petitions heard by US courts. The Court of Appeals rejected the lower court's finding that the operation of the Parwan Detention Facility by US forces was analogous to the operation of the prison at Guantanamo, finding that the state of *de facto* US sovereignty that existed at Guantanamo was quite different than the operation of a temporary facility in another sovereign nation, with its permission, in a theatre of combat operations.²³¹ The Court of Appeals' decision did not rely on a new detention review procedure that had been established at the Parwan Detention Facility, which afforded periodic detention reviews and the opportunity for detainees to participate in these reviews, because the plaintiffs had not had their cases reviewed yet under the new procedures.²³² Three years later, five Bagram detainees, including three of the same plaintiffs from the first case, were again in front of the District of Columbia Court of Appeals challenging the denials of their petitions for writs of habeas corpus. Applying the factors set out in *Boumediene* to the

²²³ Ibid. para. 94. ²²⁴ Ibid. para. 9.

²²⁵ *Serdar Mohammed v. Ministry of Defence* [2017] UKSC 2, paras. 30, 38–9, 119, 164, 224.

²²⁶ *Al-Maquleh v. Gates*, 605 F.3d 84 (DC Cir. 2010).

²²⁷ See Lieutenant Colonel J. M. Prescott and Major J. Eldridge, 'Military Commissions: Past and Future', 83 *Military Review* (March/April 2003), 42–51, for the history of the US's use of these tribunals from the Mexican-American War of 1846 through World War II.

²²⁸ J. M. Prescott. (n. 150) 55–6. ²²⁹ *Rasul v. Bush*, 542 US 466, 480 (2004).

²³⁰ *Boumediene v. Bush*, 553 US 723, 828 (2008). ²³¹ *Al-Maquleh v. Gates*, 605 F.3d 97–9.

²³² *Al-Maquleh v. Gates*, 605 F.3d 94, fn. 4.

current conditions of detention, the court again held that Suspension Clause did not apply to the Parwan Detention Facility, and that ‘the Appellants were captured in places to which the Suspension Clause unquestionably does not run and therefore never secured a Suspension Clause right requiring our protection’.²³³

Interestingly, in contrast to the England and Wales Court of Appeals’ holding in *Mohammed* that international law provided no authorization for the UK to detain individuals in Afghanistan, this same appeals court also decided in 2010 in ruling on the denial of a petition for habeas corpus that international law provided no limitation on the power of the US president to authorize detentions of individuals in implementing the Authorization for the Use of Military Force (AUMF)²³⁴ passed by the US Congress in 2001.²³⁵ The AUMF very broadly authorized the US President to ‘use all necessary and appropriate force against those ... he determines planned, authorized, committed, or aided the terrorist attacks ... or harbored such organizations or persons, in order to prevent any future acts of international terrorism ...’.²³⁶ It mentioned nothing about detention specifically.

4. Kinetic operations: Air strikes and night operations

(a) *Air strikes*

In assessing the way in which ISAF undertook measures to avoid civilian casualties, it is important to first appreciate the different perspectives from which the different Troop Contributing Nations viewed the mission over time. In terms of seeking unity of effort, ISAF itself was challenged by the diversity of views regarding the legal characterization of the mission. Many appear to have agreed to participate on the understanding that the focus of ISAF would be on post-conflict stability operations.²³⁷ Germany, for example, did not officially regard its operations in Afghanistan as being part of an armed conflict until 2009.²³⁸ This perception may have been consistent with the reality on the ground in Afghanistan at the beginning of ISAF,²³⁹ and was likely an easier political position domestically for the governments of certain Troop Contributing Nations,²⁴⁰ but from 2006 at the latest, and perhaps even as early as ISAF’s enlargement starting in 2003, its accuracy was doubtful.

It is against this backdrop that the relationship between UNAMA and ISAF should be considered. It often was strained as a result of significant and widely reported attacks that went awry, such as with civilian casualties from air strikes. Whilst this problem often manifested itself in public disagreements between the UN and ISAF on casualty numbers,²⁴¹ for example, analysts of the relationship between the organizations have noted

²³³ *Al-Maqaleh v. Hagel*, 738 F.3d 312, 337 (2013). The petitions of al-Maqaleh and co-plaintiff al-Bakri to the US Supreme Court to have their appeals heard were dismissed on 29 December 2014. 135 S.Ct. 782 (2014). The remaining plaintiffs’ petitions were granted, and the District of Columbia Court of Appeals’ decisions vacated because the cases had become moot—the plaintiffs had in the meantime been transferred to the custody of other nations. 135 S.Ct. 1581 (2015).

²³⁴ Pub. L. No. 107-40, §2(a), 115 Stat. 224, 224 (2001).

²³⁵ *Al-Bihani v. Obama*, 590 F.3d 866, 872 (DC Cir. 2010).

²³⁶ Pub. L. No. 107-40, §2(a), 115 Stat. 224, 224 (2001).

²³⁷ S Bowman and C Dale (n 2) 14.

²³⁸ C. Alessi, ‘Learning to Fight: How Afghanistan Changed the German Military’, *Der Spiegel* (15 October 2013), <<http://www.spiegel.de/international/germany/how-afghanistan-has-changed-the-bundeswehr-german-military-a-927891.html>>.

²³⁹ S. Bowman and C. Dale, (n. 2) 14.

²⁴⁰ T. Noetzel and B. Schreer, ‘NATO’s Vietnam? Afghanistan and the Future of the Atlantic Alliance’, 30 *Contemporary Security Policy* (2009). 529, 533.

²⁴¹ S. Bowman and C. Dale, (n. 2) 32.

there was likely an inherent tension between UNAMA's mandate to coordinate international assistance efforts and help ensure that the international community spoke to the Afghan government with a unified message on the one hand; and on the other, the UN SRSG's role as an advocate for human rights, in which capacity the UN mission may need to preserve a measure of independence from, and the option of critiquing, international military activities'.²⁴²

ISAF was sensitive to the need to avoid civilian casualties. Beginning in 2008, successive ISAF commanders issued tactical directives to their forces to provide guidance on avoiding civilian casualties and respecting Afghan cultural and religious sensibilities. In December 2008, for example, the ISAF commander ordered that 'Unless there is a clear and identified danger emanating from a building and to do otherwise would threaten our ANSF partners and ourselves, all searches and entries of Afghan homes, mosques, religious sites or places of cultural significance will be led by ANSF'.²⁴³ Further, when ISAF forces believed they had caused civilian casualties or property damage, they were to immediately investigate the incident, and if ISAF was the cause, it would immediately acknowledge.²⁴⁴ As another example, in 2011 the ISAF commander issued two public tactical directives, one that concerned civilian casualties and another that addressed the conduct of night operations.²⁴⁵ ISAF apparently also issued 'two additional internal tactical directives concerning convoy protection and entry into medical facilities'.²⁴⁶ Additionally, as discussed in Chapter 22, ISAF instituted measures to better track civilian casualties, and the US created doctrine and training packets to help train forces to better avoid civilian casualties from the start.

However, civilian losses from air strikes remained a crucial friction point in understandings of sovereignty by Afghanistan and ISAF and OEF, and the nations those two military organisations represented. For example, UNAMA assessed that in 2011, air strikes 'remained the tactic that caused the most civilian deaths by Pro-Government Forces' in Afghanistan.²⁴⁷ While 171 civilians had died in air strikes in 2010, this number increased to 187 in 2011. Unfortunately, not only did this form of military operation account for 44% of the total civilian deaths caused by 'Pro-Government Forces' that year, but this increase in deaths occurred despite reduced air operations by ISAF and OEF fixed-wing aircraft and helicopters.²⁴⁸ ISAF and OEF undertook measures to include Afghan government and military officials in the air strike planning process, but when they went awry and civilians were killed, President Karzai (particularly during the period in which the new SOFAs were being negotiated) demanded that air strikes be halted.²⁴⁹

²⁴² Ibid. 13.

²⁴³ Headquarters, International Security Assistance Force, Kabul, Afghanistan, HQ ISAF/COM/08, Subject: Tactical Directive (30 December 2008) para. 4a.

²⁴⁴ Ibid. para. 6.

²⁴⁵ UNAMA, 'Afghanistan: Annual Report 2011, Protection of Civilians in Armed Conflict' (report) (February 2012) 23 [hereinafter 'UNAMA 2011 Report'].

²⁴⁶ Ibid.

²⁴⁷ Ibid. 24.

²⁴⁸ Ibid.

²⁴⁹ See Associated Press, 'Karzai demands end to US air strikes as condition for Afghanistan security deal' *The Guardian* (19 January 2014), <<https://www.theguardian.com/world/2014/jan/19/karzai-us-afghanistan-air-strikes>>.

(b) Night operations

Night operations by ISAF and OEF forces, and especially OEF Special Forces night operations,²⁵⁰ proved particularly problematic from the perspective of Afghan sovereignty. From an ISAF and OEF perspective, night operations against suspected insurgents leveraged these forces' technological advantages and provided tactical results that were otherwise unobtainable.²⁵¹ Ordinarily, these raids were conducted in Taliban-controlled areas that simply would have been inaccessible during the day,²⁵² and caused fewer civilian casualties than air strikes would have.²⁵³ From an Afghan perspective, however, 'night operations carried out by international military forces in particular violate the sanctity of the home, infringe on Afghanistan's sovereignty and fail to respect cultural practices'.²⁵⁴

The arrival of the ISAF and OEF reinforcements beginning in 2009 also resulted in a significant increase in the number of night raids that were conducted. By July 2011, US Special Operations Forces were averaging 300 night raids a month across Afghanistan. These raids captured or killed numerous Taliban leaders and fighters, and forced the Taliban to operate in smaller cells which reduced their effectiveness. Tactically effective against the Taliban, these raids led to thousands of Afghans being detained—but at the cost of civilian casualties and the loss of political support for the Karzai Administration and legitimacy for the international forces.²⁵⁵

In a memorandum of understanding signed between the ISAF/USFOR-A commander and the Minister of Defence, the Afghan military was given the authority to approve and conduct special operations forces' missions in 2012, with substantial advisory and logistical support primarily from US Special Forces.²⁵⁶ Importantly, Afghanistan would decide whether a raid should be conducted, and only Afghan forces were expected to search dwellings.²⁵⁷ In February 2013, however, President Karzai banned the Afghan military from asking for US air support, which led to a significant decrease in these sorts of operations. After Karzai left the presidency in 2014, the new administration of President Ashraf Ghani Ahmadzai reconsidered the Afghan position in the face of increasing Taliban attacks, and began conducting them again, in some cases with US Special Operations Forces personnel in advisory roles.²⁵⁸

²⁵⁰ 'The US maintained a distinct special operations force command structure in Afghanistan from the time of the invasion, which reported back to US Special Operations Command in Tampa, Florida.' S. Bowman and C. Dale, (n. 2), 18.

²⁵¹ R. Nordland and T. Shah, 'Afghanistan Quietly Lifts Ban on Nighttime Raids', *New York Times* (23 November 2014), <https://www.nytimes.com/2014/11/24/world/asia/afghanistan-quietly-lifts-ban-on-night-raids.html?_r=0>.

²⁵² E. Graham-Harrison, 'Afghanistan takes control of night raids from US', *The Guardian* (8 April 2012), <<https://www.theguardian.com/world/2012/apr/08/afghanistan-us-night-raids>>.

²⁵³ 'UNAMA 2011 Report' (n. 245) 25.

²⁵⁴ *Ibid.*

²⁵⁵ C. Gall, 'Night Raids Curbing Taliban, but Afghans Cite Civilian Toll', *New York Times* (8 July 2011), <<http://www.nytimes.com/2011/07/09/world/asia/09nightraids.html>>.

²⁵⁶ Memorandum of Understanding between The Islamic Republic of Afghanistan and the United States of America On Afghanistanization of Special Operations on Afghan Soil (8 April 2012) [hereinafter Special Operations MOU], <<http://afghanistan-un.org/2012/04/memorandum-of-understanding-between-the-islamic-republic-of-afghanistan-and-the-united-states-of-america-on-afghanization-of-special-operations-on-afghan-soil/>>.

²⁵⁷ Special Operations MOU, para. 5.

²⁵⁸ R. Nordland and T. Shah, (n. 251).

5. Summary

As the mission of international forces evolved over time in Afghanistan, the original SOFAs negotiated between the Afghan government and NATO and the US began to be seen as counterproductive by the Afghans. The length of the war against the Taliban, the casualties among civilians, the lack of control over ISAF and OEF operations, and the distortions that rippled through the nascent Afghan economy and governmental infrastructure because of the massive amounts of money being spent to support the war effort of the international forces and the development projects of the international community made it difficult from an Afghan perspective to see Afghanistan as a truly sovereign State. From an ISAF and OEF perspective, widespread corruption throughout the Afghan government and its agencies and a lack of human capital to staff its slowly growing infrastructure made it difficult to view Afghanistan as a truly sovereign State responsible and accountable for its affairs. In fact, in 2010 ISAF went so far as to establish the Combined Joint Interagency Task Force (CJIATF) *Shafafiyat*, which means ‘transparency’ in both Dari and Pashto. This task force was composed of three specialized units, one which focused on private security contractors, a second which addressed the flow of contracting funds to insurgents, and a third that focused on the ‘nexus’ of drug traffickers, insurgents, and corrupt power brokers in southern and southwestern Afghanistan.²⁵⁹

These are not the sorts of activities one would ordinarily associate with a visiting force in an allied, sovereign nation. Even if they were militarily necessary, they are a reflection of the depths of the problems in Afghanistan which convinced Western leaders that Afghanistan was going to need to become truly responsible for its own security and finding Afghan solutions to complicated issues. In the wake of US President Obama’s 2009 joint announcement of the surge of reinforcements and the scheduled end of the combat mission in Afghanistan, the need to address the significant Afghan concerns regarding the status of Sending State forces in its territory became urgent.

VII. Negotiations for New SOFAs

One of the purposes of the uplift of Sending State forces announced by US President Obama in 2009 was to buy time and space for the developing Afghan national security forces to attain the capacity of conducting the national security mission on their own.²⁶⁰ The ISAF planning for the transition to an Afghan lead began in earnest in the spring of 2010.²⁶¹ At the Lisbon Summit in November 2010, NATO and Afghanistan issued a joint declaration setting out an enduring partnership and establishing the way forward for the planning of the transition process from international force lead in security to Afghan lead,²⁶² called *inteqal*, which means ‘transition’ in both Dari and Pashto. The Afghanistan-NATO Partnership Declaration clarified that NATO had no intent to establish a permanent military presence

²⁵⁹ M. Schwartz, (n. 99) 12–13.

²⁶⁰ R. Chandrasekaran, ‘The Afghan Surge Is Over’, *Foreign Policy* (25 September 2016), <<http://foreignpolicy.com/2012/09/25/the-afghan-surge-is-over/>>.

²⁶¹ J. Bexfield and C. Staniec, ‘Allied Information Sharing Support to ISAF and Support to Afghanistan Transition Metrics’ (August 2012) (briefing on NATO Research and Technology Organisation (RTO) System Analysis and Studies (SAS) Panel, Specialist Team SAS-091 Report), <http://ismor.cds.cranfield.ac.uk/29th-symposium-2012/allied-information-sharing-support-to-isaf-and-support-to-afghanistan-transition-metrics/@download/presentation/29ismor_bexfield_staniec.pdf>.

²⁶² Declaration by the North American Treaty Organization (NATO) and the Government of the Islamic Republic of Afghanistan on an Enduring Partnership, November 21, 2010 [hereinafter Afghanistan-NATO Partnership Declaration].

in Afghanistan,²⁶³ and that the ‘Government of the Islamic Republic of Afghanistan wishes to initiate a discussion on a Status of Forces Agreement with NATO within the next three years’.²⁶⁴ Until then, the MTA would continue to apply, and it would be ‘monitored and reviewed by the Joint Coordinating Body’.²⁶⁵

The programme began officially in March 2011 when President Karzai announced the first tranche of provinces and districts to start the transition.²⁶⁶ Although several ISAF nations concluded bilateral strategic partnership agreements with Afghanistan in 2012 and 2013,²⁶⁷ none of these included any SOFA provisions, and in fact the Afghanistan-Germany agreement noted that the status of military personnel from the two countries in the territory of the other would be addressed in separate agreements.²⁶⁸

In May 2012, Afghanistan and the US signed a strategic partnership agreement that set out the nature of the countries’ security cooperation, and committed them to formally initiate negotiations to conclude a SOFA, the Strategic Partnership Agreement.²⁶⁹ The Strategic Partnership Agreement would supersede the exchange of letters, and would address the ‘nature and scope of the future presence and operations of U.S. forces in Afghanistan’.²⁷⁰ Until it was concluded, ‘The conduct of ongoing military operations shall continue under existing frameworks ...’.²⁷¹

After lengthy negotiations, the Karzai Administration submitted the proposed new Afghanistan-US Strategic Partnership Agreement to the *Loya Jirga*, which then approved it, but President Karzai announced he would not sign it unless the US kept its forces out of Afghan homes and promoted peace talks with the Taliban.²⁷² A month earlier, President Karzai’s office had issued a press release stating that for international troops to be given immunity from Afghan jurisdiction, they would need to first ensure peace and security in Afghanistan.²⁷³

VIII. The New Legal Framework: The Afghanistan-NATO SOFA and Afghanistan-US Bilateral Security Agreement (BSA)

1. Adoption of the new legal framework

In September 2014, Afghanistan elected Ashraf Ghani as the new president.²⁷⁴ On 30 September 2014, just following the election of President Ghani, the new the US-Afghanistan

²⁶³ Afghanistan-NATO Partnership Declaration, para. 6.3.

²⁶⁴ *Ibid.* para. 10.

²⁶⁵ *Ibid.* para. 10.

²⁶⁶ ‘Inteqal: Transition to Afghan Lead’, NATO webpage, <http://www.nato.int/cps/en/natohq/topics_8189.htm>.

²⁶⁷ See Agreement on Strategic Partnership between the Kingdom of Norway and the Islamic Republic of Afghanistan, 5 February 2013; Comprehensive Long-term Partnership Between The Islamic Republic of Afghanistan and Australia (20 May 2012); Agreement Between The Government of the Islamic Republic of Afghanistan And The Government of the Federal Republic of Germany Concerning Bilateral Cooperation (6 May 2012), Art. 2(1) [hereinafter Afghanistan-Germany Agreement].

²⁶⁸ Afghanistan-Germany Agreement, Art. 2(1).

²⁶⁹ Enduring Strategic Partnership Agreement Between The United States of America and the Islamic Republic of Afghanistan (2 May 2012), Art. II.2.b [hereinafter SPA].

²⁷⁰ Strategic Partnership Agreement, Arts. III.2.b, III.6.c.

²⁷¹ Strategic Partnership Agreement, Art. III.2.c.

²⁷² E. Graham-Harrison, ‘Hamid Karzai refuses to sign US-Afghan security pact’, *The Guardian* (24 November 2013), <<https://www.theguardian.com/world/2013/nov/24/hamid-karzai-refuses-to-sign-us-afghan-security-deal>>.

²⁷³ President Karzai: People Condition Foreign Troops Immunity on Peace and Stability in Afghanistan (press release) (18 October 2012), <<http://president.gov.af/en/News/13914>>.

²⁷⁴ Islamic Republic of Afghanistan, European Union Election Assessment Team, Final Report Presidential Election, 5 April and 14 June 2014, <http://www.eods.eu/library/FINAL-REPORT-EUEAT-AFGHANISTAN-2014-c_en.pdf>.

Security and Defence Cooperation Agreement, known as the Bilateral Security Agreement (BSA) was signed between US Ambassador Cunningham and National Security Advisor Mohammad Hanif Atmar.²⁷⁵ Afghanistan ratified the BSA in November 2014, and the US considered the document an executive agreement that did not require Senate ratification.²⁷⁶

Also on 30 September 2014, the Afghanistan-NATO Status-of-Forces Agreement was signed by Mr. Maurits R. Jochems, NATO Senior Civilian Representative in Afghanistan, and National Security Advisor Atmar.²⁷⁷ The Afghanistan-NATO SOFA was effective on 1 January 2015 and was intended to 'supersede the Afghanistan-NATO Exchange of Letters dated 5 September and 22 November 2004' and replace the MTA.²⁷⁸ On 1 January 2015, the BSA also became effective, and it implemented the 2012 Strategic Partnership Agreement and superseded 'the exchange of notes dated September 26, 2002, December 12, 2002, and May 28, 2003'.²⁷⁹ In a March 2015 US visit by President Ghani, the US announced the formation of the Joint Commission to oversee implementation of the BSA.²⁸⁰

Ghani's Administration moved forward in a spirit of cooperation with NATO and US partners. However, actual implementation of the new agreements was delayed by Afghan Presidential Decree No. 38 until 1 June 2015 to allow time for transition.²⁸¹ The implementation delay was extended again until 1 September 2015 to further allow phased transition to application of Afghan law to NATO and US contractors for certain provisions.²⁸² Some provisions required significant administrative assistance by the relevant Afghan government officials, and additional time was necessary to allow the development of procedures for issuance of these required documents from the relevant offices. The Resolute Support (RS) and USFOR-A legal offices served as conduits for information to contractors and provided guidance 'for informational purposes only' to keep parties informed of the updates in implementation. For example, the NATO-led RS Headquarters provided information on SOFA/BSA Implementation 'frequently asked questions' on its public-facing webpage.²⁸³

2. Change in role of NATO and US missions: Resolute Support and Operation Freedom's Sentinel

Following the new SOFA framework, the Resolute Support (RS) mission was launched on 1 January 2015. RS's objective was 'to provide further training, advice and assistance for the Afghan security forces and institutions'.²⁸⁴ SC Res. 2189 (12 December 2014), welcomed the non-combat mission.²⁸⁵ RS provided and continues to provide training, advice and assistance in eight areas: 'multi-year budgeting; transparency, accountability and oversight; civilian

²⁷⁵ K. Katzman and C. Thomas, 'Afghanistan: Post-Taliban Governance, Security, and U.S. Policy', *Congressional Research Service* (Report No. RL30588) (19 May 2017) 27.

²⁷⁶ *Ibid.*

²⁷⁷ 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 [hereinafter Afghanistan-NATO SOFA].

²⁷⁸ Afghanistan-NATO SOFA, Art. 25, para. 2.

²⁷⁹ The Security and Defence Cooperation Agreement Between The Islamic Republic of Afghanistan and The United States of America is referred to as the Bilateral Security Agreement [hereinafter 2015 Afghanistan-US BSA].

²⁸⁰ K. Katzman and C. Thomas, (n. 275) 27.

²⁸¹ Afghan Presidential Decree Number 38, 31 December 2014, <<http://photos.state.gov/libraries/afghanistan/231771/PDFs/DECREE38.pdf>>.

²⁸² Headquarters Resolute Support Afghanistan, BSA/SOFA Implementation FAQs, RS LEGAD/USFOR-A SJA, 18 June 2015 <<https://www.ahg.af/aca/FAQ%2006182015.pdf>> [hereinafter Resolute Support FAQs].

²⁸³ *Ibid.*

²⁸⁴ Resolute Support webpage, <http://www.nato.int/cps/in/natohq/topics_113694.htm>.

²⁸⁵ SC Res. 2189 (12 December 2014).

oversight of Afghan Security Institutions; force generation; force sustainment; strategy and policy planning, resourcing and execution; intelligence; and strategic communications.²⁸⁶

To mark the change in the US mission given the end of major combat operations after 2014, OEF became Operation Freedom's Sentinel (OFS) on 1 January 2015. Under OFS, US forces undertook two missions: counterterrorism operations against al Qaeda and its affiliates and Islamic State affiliate ISIL-K,²⁸⁷ and supporting RS's capacity building efforts.²⁸⁸ At the point of this transition in 2015, the 'Afghan government assumed full responsibility for the security of Afghanistan with limited US or coalition support on the battlefield'.²⁸⁹ RS's mission works in 'close coordination' with the Afghan government, and 'operates out of Kabul and four regional locations: Kandahar, Herat, Mazar-e Sharif, and Jalalabad'.²⁹⁰ 'Four countries serve as framework nations taking the organisational lead in specific geographic areas of Afghanistan: the United States (east and south Afghanistan), Germany (north), Italy (west), and Turkey (Kabul)'.²⁹¹

3. The Afghanistan-NATO SOFA and Afghanistan-US BSA

Concerns on the Afghan side seem to have subsided with the agreements reached in the Afghanistan-NATO SOFA and the Afghanistan-US Bilateral Security Agreement (BSA), as the most contentious and hard-fought negotiations appear to have concluded with the final negotiations of the Karzai Administration. Furthermore, any differences between treatment of NATO and US forces that may have created confusion in implementation have been harmonized. Nearly all of the provisions are identical in the Afghanistan-NATO SOFA and the BSA, so they are addressed together below, with the few differences noted.

Certainly, large differences remain between the treatments of Forces and their civilian components, and the rules applicable to contractors. As of the end of September 2016, there were 25,197 US DoD contractors in Afghanistan, compared to 9,800 US troops.²⁹² At the same time, the US had 3,053 private security contractors in Afghanistan, 813 of whom were categorized as 'armed private security contractors'.²⁹³ 36% of the contractors were US citizens, 23% were third-country nationals, and approximately 41% were Afghan nationals.²⁹⁴ Given that contractor personnel make up 72% of the DoD workforce in Afghanistan, many of whom are Afghan nationals, the differences are important in application.²⁹⁵

With regard to claims, many of the operating principles of the MTA claims arrangement were retained, but there are some important differences. For example, NATO now agrees to 'pay just and reasonable compensation in settlement of meritorious third party claims

²⁸⁶ Resolute Support webpage, <http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_03/20170313_2017-03-RSM-Placemat.pdf>.

²⁸⁷ K. Katzman and C. Thomas, (n. 275) 19; ISIL-K is an Islamic State affiliate that is known as Islamic State-Khorastan Province, ISKP, Islamic State of Iraq, and the Levant-Khorastan, and ISIL-K.

²⁸⁸ Lead Inspector General for Overseas Contingency Operations, Operation Freedom's Sentinel (1 October 2016–31 December 2016) (report) 15, <http://www.dodig.mil/IGInformation/archives/OFS1_Dec2016_Gold_11.pdf>.

²⁸⁹ Ibid.

²⁹⁰ J. Miranda Calha, NATO Parliamentary Assembly Afghanistan—Post-ISAF, Draft Special Report, 28 August 2015, <<http://www.natolibguides.info/transition/reports>> .

²⁹¹ Ibid.

²⁹² H. Peters, M. Schwartz, and L. Kapp, 'Department of Defense Contractor and Troop Levels in Iraq and Afghanistan: 2007–2017', *Congressional Research Service* (Report No. R44116 (28 April 2017) 3.

²⁹³ Ibid. 4.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

arising out of acts or omissions' of its members 'done in the performance of their official duties and incident to the non-combat activities of NATO Forces',²⁹⁶ Further, although claims will be settled under the applicable NATO or Troop Contributing Nation legal policy authorities, NATO forces will now be 'seriously considering the laws, customs and traditions of Afghanistan' in settling claims,²⁹⁷ and NATO will 'take into account any report of investigation or opinion provided to them by Afghan authorities regarding liability or amount of damages'.²⁹⁸ Finally, any issues that arise regarding claims will be handled by the Afghanistan-NATO Implementation Commission, which is co-chaired by the Islamic Republic of Afghanistan and NATO.²⁹⁹ The claims provisions in the new BSA essentially mirror the new Afghanistan-NATO SOFA, and therefore do not really result in any significant changes to how the US conducts its claims program in Afghanistan.³⁰⁰

(a) *Criminal jurisdiction*

Afghanistan acknowledged the 'importance of disciplinary control, including judicial and non-judicial measures' for Sending States over their own forces and respective civilian components.³⁰¹ With respect to jurisdiction for 'any criminal or civil offenses committed in the territory of Afghanistan' for the aforementioned persons, Afghanistan confirmed NATO and US Forces exclusive jurisdiction over their respective members.³⁰² As to powers of arrest and detention, these same categories of individuals 'shall not be arrested or detained by Afghan authorities'.³⁰³ If 'arrested or detained by Afghan authorities for any reason' these person 'shall be immediately handed over to' NATO or US forces as appropriate.³⁰⁴ Similarly, NATO and US Forces 'shall not arrest or imprison Afghan nationals, nor maintain or operate detention facilities in Afghanistan'.³⁰⁵ There do not appear to have been any issues with detention operations since the start of the Afghanistan-NATO SOFA and the BSA, and the agreements seem to have resolved previous tensions that were reflected in the challenging negotiations that led to the SOFAs.³⁰⁶

Importantly, 'Afghanistan maintains the right to exercise jurisdiction' over NATO and US contractors and contractor employees.³⁰⁷ However, there have not been any prominent prosecutions of such persons since the start of the Afghanistan-NATO SOFA and the BSA. Finally, the BSA also includes a provision that 'Afghanistan and the United States agree that members of the force and of the civilian component may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the United States'.³⁰⁸ As noted above, the ICC's November 2016 Preliminary Report on Afghanistan demonstrates the relevance of this particular provision for the US.³⁰⁹

²⁹⁶ *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 1 October 2014 and <mf.gov.af/Content/files/SOFA%20ENGLISH.pdf> [hereinafter Afghanistan-NATO SOFA], Art. 20, para. 2.

²⁹⁷ *Ibid.*

²⁹⁸ Afghanistan-NATO SOFA, Art. 20, para. 3.

²⁹⁹ Afghanistan-NATO SOFA, Art. 20, para. 5.

³⁰⁰ Compare Strategic Partnership Agreement Art. 22, Claims, with Afghanistan-NATO SOFA Art. 20, Claims.

³⁰¹ Afghanistan-NATO SOFA, Art. 11, para. 1; Afghanistan-US BSA, Art. 13, para.1.

³⁰² *Ibid.*

³⁰³ Afghanistan-NATO SOFA, Art. 11, para. 4; Afghanistan-US BSA, Art. 13, para. 4.

³⁰⁴ *Ibid.*

³⁰⁵ Afghanistan-NATO SOFA, Art 4, para. 3; Afghanistan-US BSA, Art. 3, para. 3.

³⁰⁶ K. Katzman and C. Thomas, (n. 275) 27.

³⁰⁷ Afghanistan-NATO SOFA, Art. 11, para. 5; Afghanistan-US BSA, Art. 13, para. 6.

³⁰⁸ Afghanistan-US BSA, Art. 13, para. 5. ³⁰⁹ See n. 64.

(b) Movement

As to entry and exit provisions, ‘Members of the Force and Members of the Civilian Component and NATO Personnel’ and US ‘Members of the force and the civilian component’ are allowed movement in and out of the country with identification cards and either collective or individual movement orders,³¹⁰ and ‘Passports and visas shall not be required’.³¹¹ However, for NATO and US contractors and contractor employees, ‘passports and visas shall be required in accordance with Afghan law’.³¹²

According to Afghan Presidential Decree No. 38, ‘contractors and their employees, who are submitting their visa applications for the first time, are required to pay a one-time US \$200 fee’, in addition to the US \$360 one-year visa processing fee.³¹³ Applicants are also required to provide certification that they are entitled to a visa through either a NATO Letter of Affiliation or US DoD-issued Letter of Authorization.³¹⁴ During the initial implementation delay, contractors were required to carry visa exemption letters, as was the previous procedure.³¹⁵ Reports had indicated that contractors were being improperly asked for work permits at commercial airports, but Presidential Decree No. 38 clarifies that work permits were not required.³¹⁶ After the initial implementation delay planned until 1 June 2015, on 18 June 2015 it was announced that the visa (and business license requirement discussed in more detail below) implementation deadline was further delayed until September 1, 2015.³¹⁷

Afghan authorities retained the right to ‘issue or decline to issue required visas expeditiously’ but in the event an application was denied, the Afghan authorities were to notify the person concerned and their force authorities.³¹⁸ Mindful of earlier bureaucratic challenges, a provision was also included that in the event of ‘exceptional situations’ as may be agreed through the Afghanistan-NATO Implementation Commission or Joint Commission for US personnel, Afghanistan shall seek to put in place and make available to NATO and US contractor employees, ‘a process for the issuance of visas upon their arrival in Afghanistan’.³¹⁹ During the period of delayed implementation, contractors were advised to obtain a certification from the appropriate legal office indicating that the individual is a contractor or contractor employee and thereby effectively documenting the visa exemption.³²⁰ While the language of the new agreements is clear, the process of implementation of these new procedures was delayed for months, requiring temporary solutions that may not have strictly complied with the terms of the agreements.

One additional article regarding movement of personnel was also subject to delayed implementation on differing timetables. The SOFA and BSA acknowledged Afghanistan’s ‘full sovereignty over its airspace, territory and waters’ and that ‘management of Afghanistan’s airspace and transportation shall be exercised through relevant Afghan authorities’.³²¹

³¹⁰ Afghanistan-NATO SOFA, Art. 13, para. 1; Afghanistan-US BSA, Art. 15, para. 1.

³¹¹ *Ibid.*

³¹² Afghanistan-NATO SOFA, Art. 13, para. 2; Afghanistan-US BSA, Art. 15, para. 2.

³¹³ Presidential Decree of the President of the Islamic Republic of Afghanistan Concerning the Implementation of the Bilateral Security Agreement and the NATO Status of Forces Agreement, Number 38, dated 31 December 2014, <<http://photos.state.gov/libraries/afghanistan/231771/PDFs/DECREE38.pdf>> [hereinafter Afghan Presidential Decree Number 38]; Resolute Support FAQs (n. 282).

³¹⁴ *Ibid.* ³¹⁵ *Ibid.*

³¹⁶ Afghan Presidential Decree Number 38, para. 9; Resolute Support FAQs (n. 282).

³¹⁷ Resolute Support FAQs (n. 282).

³¹⁸ Afghanistan-NATO SOFA, Art. 13, para. 2; Afghanistan-US BSA, Art. 15, para. 2.

³¹⁹ Afghanistan-NATO SOFA, Art. 13, para. 2; Afghanistan-US BSA, Art. 15, para. 2.

³²⁰ Resolute Support FAQs (n. 282).

³²¹ Afghanistan-NATO SOFA, Art. 8, para. 1; Afghanistan-US BSA, Art. 10, para. 1.

Implementation of NATO Art. 10 and BSA Art. 8 was declared effective June 1, 2015.³²² Implementation of changes to 'aviation practices, procedures, and operations into, out of, and within Afghanistan' were not effective until June 30, 2015.³²³

(c) Tolls, fees, duties, and taxes

With respect to items entering, leaving or transiting Afghanistan, NATO and US forces and contractors are required to provide 'identifying documents' to show 'that such equipment, supplies, material, technology, training, or services being imported' are for their force's purposes rather than 'private commercial purposes'.³²⁴ All NATO and US forces-related personnel 'who are not Afghan nationals, may import into, export out of, re-export out of, transport, and use in Afghanistan personal effects' without payment of duty.³²⁵

NATO and US forces are exempt from licensing and registration requirements for official vehicles.³²⁶ Afghanistan agreed to accept driving licences and permits issued to NATO and US forces 'without a driving test or fee'.³²⁷ Similarly, NATO and US forces and related personnel are exempt from taxation by Afghan authorities, except that NATO and US contractors that are 'Afghan legal entities shall not be exempt from corporate profits tax' from income received due to their status as contractors.³²⁸ Further, NATO or US contractor employees who normally reside in Afghanistan or are Afghan nationals' are 'subject to Afghan requirements regarding employer withholding of personal income tax'.³²⁹

NATO and US contractors who are armed are also required to pay a weapon license fee. 'The Ministry of Interior shall collect a licensing fee from each contractor on behalf of each employee and shall issue weapons permits that each employee is required to carry on their person at all times'.³³⁰ In addition to the other administrative requirements, NATO and US contractors must obtain a certification that the weapon is required in furtherance of their duties.³³¹

The business licence requirement for contractors is a key difference in treatment compared with members of a Force or Civilian Component. Business licences are required to be obtained from the Afghan Investment Support Agency (AISA).³³² The business licence process was onerous, so for the implementation period the RS legal office recommended subcontractors ensure they were covered by the prime contractor's AISA licence to avoid issues.³³³ According to Presidential Decree No. 38, AISA is required to 'prepare procedures to expedite issuance of business licences to contractors within six working days'.³³⁴ Business licences are valid for three years.³³⁵

(d) Force support activities

Regarding activities NATO and the US conduct to support themselves as forces, neither is subject to duties or restrictions on its ability to import and export items and materiel into

³²² Afghan Presidential Decree Number 38, para. 19.

³²³ Ibid.

³²⁴ Afghanistan-NATO SOFA, Art. 14, para. 1; Afghanistan-US BSA, Art. 16, para. 1.

³²⁵ Afghanistan-NATO SOFA, Art. 14, para. 2; Afghanistan-US BSA, Art. 16, para. 2.

³²⁶ Afghanistan-NATO SOFA, Art. 17; Afghanistan-US BSA, Art. 19.

³²⁷ Afghanistan-NATO SOFA, Art. 16, para. 1; Afghanistan-US BSA, Art. 18, para. 1.

³²⁸ Afghanistan-NATO SOFA, Art. 15, para. 3; Afghanistan-US BSA, Art. 17, para. 3.

³²⁹ Afghanistan-NATO SOFA, Art. 15, para. 4; Afghanistan-US BSA, Art. 17, para. 4.

³³⁰ Afghan Presidential Decree Number 38, para. 13.

³³¹ Afghan Presidential Decree Number 38, para. 12.

³³² Afghanistan-NATO SOFA, Art. 9, para. 2; Afghanistan-US BSA, Art. 11, para. 2.

³³³ Resolute Support FAQs (n. 282). ³³⁴ Afghan Presidential Decree Number 38, para. 18.

³³⁵ Afghan Presidential Decree Number 38, para. 17.

or out of Afghanistan. NATO and US forces are allowed to operate their own mail and telecommunications services free of charge.³³⁶ NATO and US force support activities shall not be required to collect or pay taxes or to pay other fees related to their operations.³³⁷

IX. Conclusion

1. Results of the new agreements

The Afghanistan-NATO SOFA and Afghanistan-US BSA clarify and codify practices that have been refined throughout the course of military engagement in Afghanistan since 2001, and introduce completely new provisions acknowledging the lead role of Afghanistan in its own security. The comparability of the two new agreements allows for ease in their application because all personnel of similar status are treated equally. In particular, the provisions applicable to contractors have been more precisely navigated than they were previously. Whilst there are currently fewer NATO and US troops than in the previous decade, challenges remain in application of these new agreements similar to those noted during initial implementation. Over time, however, the new procedures are becoming more widely understood. In fairness, it must be noted that historical and current challenges in SOFA implementation are understandable given the state of national development in Afghanistan and the country's efforts to recreate itself as a viable sovereign nation.

For example, Afghanistan seeks to be able to sustain its own defence budget, but it is still far from that target. The annual cost to support the Afghan defence and security forces is approximately \$5 billion.³³⁸ The US provided funding in 2015 in the amount of \$4.1 billion, and in 2016 it provided \$3.65 billion.³³⁹ Further, the NATO Trust Fund, established under ISAF in 2007, supports additional transportation, equipment, and sustainment costs, to include literacy training for the Afghan soldiers.³⁴⁰ Since its inception, 26 donor nations have contributed over \$1.5 billion to the fund.³⁴¹ The 'Law and Order Trust Fund for Afghanistan' is administered by the UN Development Programme (UNDP) to support the salaries and sustainment of the Afghan National Police.³⁴² At the NATO Summit in Warsaw in July 2017, the US pledged \$1 billion annually for the period of 2017–2020, so it is likely that the high level of financial support for the Afghan security forces will continue for the foreseeable future.³⁴³

Mindful of this tremendous reliance on donor nations, Afghanistan has been seeking to create revenue generating mechanisms, and government assessed taxes, duties and fees are a regularized way that a government would ordinarily use to raise such funds. Conversely though, given the large amounts of money donor nations and the UN are continuing to pour into the country, it is also understandable that these donors would not want to incur additional fees in the course of providing their assistance. In this regard, the current SOFAs have perhaps reached an acceptable compromise.

It should be acknowledged that in areas of continuing concern, such as visa and customs fees, corruption may play a significant role in the difficulties of implementation rather than just government-sanctioned application of the rules by the Afghan side.

³³⁶ Afghanistan-NATO SOFA, Art. 18, para. 1; Afghanistan-US BSA, Art. 20, para. 1.

³³⁷ Afghanistan-NATO SOFA, Art. 18, para. 5; Afghanistan-US BSA, Art. 20, para. 5.

³³⁸ K. Katzman and C. Thomas, 'Afghanistan: Post-Taliban Governance, Security, and U.S. Policy', *Congressional Research Service* (Report No. RL30588) (19 May 2017) 30, <<https://fas.org/sgp/crs/row/RL30588.pdf>>.

³³⁹ *Ibid.* (citing Consolidated Appropriation for FY2016, Public Law 114-113).

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*

While anti-corruption efforts continue, corruption is still being cited as a primary security concern.³⁴⁴ Despite the budget support from foreign donors, for example, Afghan soldiers and police are still not always provided with the ammunition, water, and food they need to conduct security operations.³⁴⁵ However, at the same time corruption issues are impacting the operational capability of Afghan security forces, the Afghan government has increased funding to private militias in order to fill gaps in security that the government forces cannot provide, particularly in remote areas and the northern parts of the country.³⁴⁶ The RS commander has cited corruption as an on-going problem, and as of the end of 2016, 'fixing the corruption and diversion' of supplies remained one of the primary US goals.³⁴⁷

Meanwhile, critically important donor funding is being more carefully monitored and penalties are assessed for failure to correct systemic problems. The smaller aid footprint also allows donors to more carefully monitor and put pressure on the Afghan institutions to correct any deficiencies.³⁴⁸ Certainly there is also a likelihood that the complexity in the number and kind of personnel and the amount of materiel transiting in, out and through Afghanistan, coupled with lack of training and personnel turnover, may have contributed to misunderstandings in appropriate application of the SOFAs. In the future, the Afghanistan-NATO Implementation Commission and Joint Commission for US personnel provide standing dispute resolution mechanisms for addressing these concerns that may prove practicable.

2. The way ahead

In addition to the commitments articulated in the Afghanistan-NATO SOFA and Afghanistan-US BSA which provide the legal framework for maintaining a support presence in the country, the security situation on the ground in Afghanistan suggests that the Sending State presence will hold or even increase in the near term.³⁴⁹ The historical threats of Al Qaeda and the Taliban still exist, but there is also the increased presence of the so-called Islamic State in Afghanistan that must be dealt with.³⁵⁰ The pursuit of Pakistani, Russian, and Iranian national interests in Afghanistan further complicates the security situation, and suggests that the country will continue to be a complex operational environment where NATO and the US will be engaged in support to contain the threats.³⁵¹ At the 2016 NATO Summit in Warsaw, RS was extended beyond 2016 and all indications are that NATO will continue to be stabilizing force in Afghanistan for some time.³⁵² As of March 2017, there were 13,459 NATO troops deployed in Afghanistan from 39 different

³⁴⁴ M. Marshall, 'Afghan Security Reforms Falter, with Tough Fighting Ahead', *New York Times* (8 April 2017), <<https://www.nytimes.com/2017/04/08/world/asia/afghanistan-army-training-corruption.html>>.

³⁴⁵ Office of the Lead Inspector General for Overseas Contingency Operations, 'Operation Freedom's Sentinel', Report to the United States Congress (1 July 2016–30 September 2016) 48, <http://www.dodig.mil/IGInformation/archives/OFS4_Sept2016_Gold_508.pdf>.

³⁴⁶ *Ibid.* 18. ³⁴⁷ *Ibid.* 64.

³⁴⁸ U.S. Department of Defense Inspector General, 'The Combined Security Transition Command—Afghanistan Needs to Strengthen the Controls Over U.S. Direct Assistance Financing' (31 December 2016), <<http://www.dodig.mil/pubs/documents/DODIG-2017-027.pdf>>.

³⁴⁹ Office of the Special Inspector General for Afghanistan Reconstruction, Quarterly Report (30 April 2017) 81, <<https://www.sigar.mil/pdf/quarterlyreports/2017-04-30qr-section3-security.pdf>>.

³⁵⁰ See n. 287.

³⁵¹ Office of the Special Inspector General for Afghanistan Reconstruction, Quarterly Report (30 April 2017), 26, <<https://www.sigar.mil/pdf/quarterlyreports/2017-04-30qr-section3-security.pdf>>.

³⁵² Resolute Support website, <http://www.nato.int/cps/in/natohq/topics_113694.htm>.

Troop Contributing Nations, with the US contributing over one-half of the total.³⁵³ The Afghanistan-NATO SOFA remains in force ‘until the end of 2024 and beyond’, unless otherwise terminated by the parties.³⁵⁴ As of May 2017, NATO reaffirmed its long-term commitment to continuing ‘financial sustainment of the Afghan Security Forces’ through the Afghan National Army Trust Fund.³⁵⁵

The Afghanistan-US BSA contemplates more than a status-of-forces-agreement, as its title ‘Defense Security and Cooperation Agreement’ implies. In addition to provisions typically within the purview of a status-of-forces agreement, the BSA also seeks to lay out the framework for US and Afghan defence and security cooperation ‘to promote interoperability with NATO’.³⁵⁶ The Afghanistan-US BSA directs actions by the Afghanistan-United States Working Group on Defense and Security Cooperation to formalize the understanding and goals of a relationship that is routinely handled through DoD offices by the US Embassy in countries where fewer resources are committed.³⁵⁷ It includes the pledge that the ‘United States shall continue to cooperate with Afghanistan on providing equipment and material’ and to that end, it shall ‘seek funds on a yearly basis to support the training, equipping, advising and sustaining’ of the Afghan national security forces.³⁵⁸ It states that both parties ‘share the goal of Afghanistan taking increasing, and ultimately full, responsibility for funding its defence and security needs and sustaining the national security forces’.³⁵⁹

Both the Afghanistan-NATO SOFA and the Afghanistan-US BSA provide a clear legal framework for the transition to full support of the national security forces by the Afghan government, while affirming the commitments of the partner nations, with full deference to Afghan sovereignty. These frameworks are in large part the result the lessons learned from the evolution of the MTA and the OEF exchange of diplomatic notes over the course of more than a decade of nation-building while fighting a persistent and ruthless insurgency. These frameworks reflect the developing shared understandings between the government of Afghanistan and the Sending States to achieve mutually supporting goals. Over time, although there have been frustrations on both the part of Afghanistan and the Sending States, and very strong cultural, economic and political challenges to making the long-term presence of Sending State forces acceptable both the Afghan government and its people, the SOFA processes have become more widely understood and implemented more effectively. Culture change on both sides takes time to evolve, and the complex multi-national frameworks demonstrate that although the process of arriving at a functional, mutual understanding is slow, and often uneven, it is achievable.

³⁵³ Resolute Support website, <http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_03/20170313_2017-03-RSM-Placemat.pdf>.

³⁵⁴ Afghanistan-NATO SOFA, Art. 25, para. 1.

³⁵⁵ ‘NATO and partners firmly committed to continue supporting the financial sustainment of the Afghan Security Forces’, NATO webpage (2 May 2017), <http://www.nato.int/cps/in/natohq/news_143392.htm?selectedLocale=en>.

³⁵⁶ Afghanistan-US BSA, Art. 4, para. 7.

³⁵⁷ *Ibid.* Art. 5.

³⁵⁸ *Ibid.* Art. 4, paras. 3, 4.

³⁵⁹ *Ibid.* Art. 4, para. 1.