



## **ASSESSMENT OF SOFA AGREEMENT: COMPARISON OF U.S-JAPAN SOFA AND U.S-SRI LANKA DRAFT SOFA**

*J.M. Sulakshana Nadeeshani Kumari Jayasinghe\**

*University of Colombo*

### **INTRODUCTION**

The Status of Forces Agreement is an Agreement between two or more countries that are not at war with each other that governs the relationship between the sending state's military personnel and the receiving state's legal and governmental structure. The first long-lasting 'visiting force agreement', the North Atlantic Treaty Organization Status of Forces Agreement is an Agreement that was concluded as a reciprocal and lasting arrangement for peacetime deployments on allied territories. Status of Forces Agreements are peacetime documents and therefore, do not address the rules of war; the laws of armed conflict such as Humanitarian Law or Law of the Sea, thus provide the framework for legal protection and rights of the United States armed forces while positioned abroad. There are three key principles of the law of foreign visiting forces: Functional immunity for the sending state's forces, Respect for the law of the receiving state, and compliance with the mandate. The purpose of this research paper is to discuss the reasons behind countries entering into the Status of Forces Agreements and to evaluate the positive and negative impacts of the Status of Forces Agreement with special reference to the United States-Japan Status of Forces Agreement and United States-Sri Lanka Draft Status of Forces Agreement. The research objectives are included to discuss the reasons behind countries entering into Status of Forces Agreements and to evaluate the positive and negative impacts of the Status of Forces Agreement by comparing the United States-Japan and the United States-Sri Lanka Draft Status of Forces Agreements. The central formulation of the study is based on the questions; the reasons behind countries entering into Status of Forces Agreements and the positive and negative impacts of the Status of Forces Agreement with special reference to the United States-Japan and the United States-Sri Lanka Draft Status of Forces Agreement.

### **METHODOLOGY**

In exploring the above-mentioned dimensions, the descriptive method is followed, using the qualitative research method to conduct the research. Accordingly, the author based the documented data which can further be classified as secondary sources. Along with the United States-Japan Status of Forces Agreement, the United States-Sri Lanka Draft Status of Forces Agreement, books, journal articles, Hansard Report of the Parliament of Sri Lanka, newspaper articles, and web blogs were referred to. The author collected documented data following the thematic analysis of the research by referring to books for the research introduction part as well as journal articles, newspaper articles, and web blogs for the results and discussion part, comparison part, and conclusion part of the research. Here, the author has limited the scope of the study to the Status of Forces Agreements of the countries of Japan and Sri Lanka. Moreover, the author has adopted the comparison study methodology by using only the jurisdiction of two Status of Forces Agreements of the United States-Japan and the United States-Sri Lanka. Further, this study has been restricted by using the United States-Sri Lanka Draft Status of Forces Agreement of 2018.



## RESULTS AND DISCUSSION

### Reasons Behind Countries Entering Status of Forces Agreements

There may be various reasons for sending and receiving states to determine that it is in their common interest to deploy a foreign visiting force. A receiving state may invite foreign troops to conduct peace operations to provide peace support on its soil. Agreeing on a Status of Forces Agreement is fundamental for some sending states before deploying military forces abroad. As such, Status of Forces Agreements often include a paragraph stating that the government of the receiving state requests the assistance of the defense forces of the sending state. However, the presence of foreign troops is not restricted to the context of peace operations. Receiving states are sometimes interested in long-term military cooperation with another state involving the permanent presence of foreign troops on their territory. The principal purpose of the Status of Forces Agreement is to translate a joint commitment into a practical and reliable form. States have sent their armed forces into the territory of another since the dawn of modern international law. The presence of foreign troops in the territory of another state raised a range of legal questions. The states have entered into international agreements to regulate the presence of foreign armed forces on their territory for centuries. The first agreement drafted for the sole purpose of defining the legal position of friendly forces was concluded during World War I.

### Historical Background

#### United States-Japan Status of Forces Agreement

The Japanese government signed a surrender agreement, beginning the formal occupation of Okinawa by United States military forces. In 1952, the Japanese government signed the *Japanese-American Security Treaty*, permitting the United States to retain control over Okinawa in exchange for ending the United States' occupation of the Japanese mainland. In 1960, the United States and Japan signed the *Treaty of Mutual Cooperation and Security* as well as the Status of Forces Agreement that supports that treaty and was negotiated to replace earlier agreements such as the Administrative Agreement (Article III of the 1952 Security Treaty between the United States-Japan) and the 1954 Status of Forces Agreement. It sets the conditions under which United States military forces may operate in Japan. This Treaty gave the United States, the use of land, air, and naval facilities in Japan "for the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East." The United States-Japan Status of Forces Agreement delineates the scope of jurisdiction over United States forces in Japan

#### United States-Sri Lanka Draft Status of Forces Agreement

In 1995, when the sudden sinking of two navy vessels by the Liberation Tigers of Tamil Eelam in Trincomalee, shattered the ongoing peace talks and drove the country back into civil war, the need for a formal arrangement between the United States and Sri Lanka first arose. The first United States-Sri Lanka Status of Forces Agreement was signed in mid-1995, a few weeks after the Liberation Tigers of Tamil Eelam declared war, by the government of former President Chandrika Kumaratunga for joint exercise and other official duties. In 2007, then Sri Lankan defence secretary, former President Gotabaya Rajapaksa signed the first United States-Sri Lanka Acquisition and Cross-Services Agreement for a period of ten years. It enabled the United States military access to Sri Lankan ports and airports, but the new Acquisition and Cross-Services Agreement which was signed in 2017, during former President Maithripala Sirisena's



government remains unclear. The United States has requested to extend the former Status of Forces Agreement of 1995 and to include an annexure to expand it, called 'Annex B'. Therefore, the government was discussing a replacement for the 1995 Status of Forces Agreement that would allow the United States military easier access to Sri Lanka. The United States-Sri Lanka Draft Status of Forces Agreement which was proposed on 28<sup>th</sup> August 2018 covers contractors as well.

### **Comparison of the United States-Japan Status of Forces Agreement and United States-Sri Lanka Draft Status of Forces Agreement**

#### **Jurisdiction**

The Japan Status of Forces Agreement's Foreign Criminal Justice provisions, codified in Article XVII of the Agreement, establish the procedures for determining which country bears the authority to prosecute offenses committed by the United States military personnel in Japan. Article XVII of the agreement is regarded as a "shared criminal jurisdictional" regime-i.e., the United States and Japan are each afforded exclusive jurisdiction over certain pre-delineated crimes. In all other cases, the Status of Forces Agreement provides for a concurrent jurisdictional scheme where neither state is granted exclusive jurisdiction. Therefore, the United States-Japan Foreign Criminal Justice is a mixture of both exclusive and concurrent jurisdiction provisions. Like the Japan Status of Forces Agreement, under the exclusive jurisdiction of the Sri Lanka Status of Forces Agreement, both the United States citizens employed in the forces and located in Sri Lanka, as well as the Sri Lankan citizens who are perched in the land granted by Sri Lanka to the U.S, when involved in a crime in the granted land, are subject to United States jurisdiction. Unlike the Japan Status of Forces Agreement, the Sri Lanka Status of Forces Agreement has confusion on concurrent jurisdiction. Under clause eleven of the Sri Lanka Draft Status of Forces Agreement, there have been issues regarding concurrent jurisdiction in the event of prosecution of any United States military personnel for misconduct, injury, or death to any person private or public in Sri Lanka.

#### **Positive and Negative Impacts of the United States-Japan Status of Forces Agreement and United States-Sri Lanka Draft Status of Forces Agreement**

According to the Japanese point of view, the Japan Status of Forces Agreement provides security protection including a nuclear umbrella since there is uncertainty in East Asia. Further, Japan was able to quickly carry out economic growth with a minimum defense budget. The United States widely opened its domestic market to exports from Japan as well. However, Japanese critics of the United States-Japan Status of Forces Agreement have viewed the limitations on Japan's jurisdictional authority. And as a non-reciprocal agreement, it could be a fundamental infringement upon Japanese sovereignty. People who supported the proposed United States- Sri Lanka Status of Forces Agreement have seen it as a harmless one and not as a dangerous one. They warn the delay to move forward with the signing could lose economic benefits and major job opportunities for Sri Lanka. There have been arguments that the agreement laid down rules of no base, and no permanent presence of United States troops would be a benefit for both countries. There are fifteen clauses highlighted in the Sunday Times leaked version of the draft United States -Sri Lanka Status of Forces Agreement of 28<sup>th</sup> August 2018. There is confusion in the first clause, which states that United States contractors are under contract with the United States Department of Defense who are temporarily in present and their employees, the same sentence also says '*not under contract with the United States Department of Defense*'.



## CONCLUSION

The United States has been party to multilateral and bilateral agreements which address the status of the United States armed forces while present in a foreign country commonly known as Status of Forces Agreements. Status of Forces Agreements have established the framework under which United States military personnel operate in a foreign country. Through other Status of Forces Agreement provisions, the most common issue of which country may exercise criminal jurisdiction over the United States personnel has been heavily criticized. The reasons are that United States personnel are guarded by this provision and it gives American criminal offenders special treatment. Therefore, the Status of Forces Agreement will be biased and fundamentally unfair. Moreover, the following modifications can be made to make the United States-Japan Status of Forces Agreement and United States-Sri Lanka Draft Status of Forces Agreement balanced.

- Japan Status of Forces Agreement should be altered by changing the non-reciprocal agreement into a reciprocal agreement.
- Modifications to the United States-Sri Lanka Draft Status of Forces Agreement regarding clause one of the privileges of U.S personnel and contractors.
- Modifications regarding clause two, privileges, exceptions, and immunities relating to entry and exit of U.S personnel and contractors of the United States-Sri Lanka Draft Status of Forces Agreement
- Modifications to the United States-Sri Lanka Draft Status of Forces Agreement regarding the liability of personnel and contractors working with the Department of Defense to prosecution under Sri Lankan laws and restrictions for movement within specified areas of the
- Modifications to the United States-Sri Lanka Draft Status of Forces Agreement regarding sufficient identification for U.S forces entry into and exit Sri Lanka
- Both Japan and Sri Lanka Status of Forces Agreements should amend by subjecting United States forces to the domestic laws of Japan and Sri Lanka

On the other hand, no overarching legal framework has been developed in international law to regulate the legal position of foreign armed forces in a comprehensive manner. Future trends in the law of foreign visiting forces will depend on developments in the global and regional security architecture and methods and means of military operations. States and international organizations deploying military forces abroad are likely to use Status of Forces Agreements to accurately define rights and obligations.

## REFERENCES

Fleck, D. (2009). *Guidebook: Drafting Status-of-Forces Agreements (SOFAs)*. Geneva Centre for the Democratic Control of Armed Forces (DCAF).

Gher, M. (n.d.). Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to be Learned from the United States-Japan Agreement.

*University of San Francisco Law Review*, 37, 227-256.

<https://core.ac.uk/download/pdf/216983766.pdf>

Inside story of how Sri Lanka fell into the ACSA-SOFA trap. (2019, July 7). *The Sunday Times*. <https://www.sundaytimes.lk/190707/columns/inside-story-of-how-sri-lanka-fell-into-the-acsa-sofa-trap-357287.html>



McConnel, I. (2006). A Re-Examination of the United States-Japan Status of Forces Agreement. *Boston College International and Comparative Law Review*, 29(1), 165-174.

<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1059&context=iclr>

Tyler, H (2015). Revision of the U.S.-Japan Status of Forces Agreement (SOFA): Relinquishing U.S. Legal Authority in the Name of American Foreign Policy. *UCLA Pacific Basin Law Journal*. 32(2), 105-144. <https://doi.org/10.5070/P8322029213>