

# Status of Visiting Forces Agreement with the Philippines

## Introduction

- 3.1 The Status of Visiting Forces Agreement with the Philippines<sup>1</sup> was signed on 31 May 2007 by the Australian Minister for Defence, the Hon. Dr Nelson MP, and the Philippines Secretary of National Defense, the Hon. Hermogenes E. Ebdane, Jr, during the visit of President Gloria Macapagal-Arroyo to Australia.<sup>2</sup> It is a reciprocal document affording the same rights to Australian Defence Force (ADF) personnel in the Philippines and armed forces of the Philippines personnel in Australia.<sup>3</sup>

## Background

- 3.2 Defence engagement with the Philippines is currently covered by the Memorandum of Understanding (MOU) between the Philippines and Australia on Cooperative Defence Activities, which came into effect on 22 August 1995. It does not make provision for the status of forces in a host country and is not legally binding in international law.<sup>4</sup> The

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1 Full title: *Agreement between the Government of Australia and the Government of the Republic of the Philippines concerning the Status of Visiting Forces of Each State in the Territory of the Other State.*

2 Mr Ben Coleman, *Transcript of Evidence*, 13 August 2007, p. 15.

3 Mr Ben Coleman, *Transcript of Evidence*, 13 August 2007, p. 16.

4 NIA, para 5.

Status of Visiting Forces Agreement (SOVFA) will be binding in international law and help to strengthen Australia's already strong defence relationship with the Philippines.<sup>5</sup>

- 3.3 Australia and the Philippines have a long history of defence cooperation dating back as far as World War II. More recently, Australia and the Philippines have worked together successfully in coalition operations, such as in East Timor.<sup>6</sup>

Our defence ties extend from the 1940s, when President Manuel L Quezon established his government-in-exile in Australia during the Japanese occupation of the Philippines. During the campaign to liberate the Philippines in 1944-45, over 4,000 Australians fought alongside their Philippines counterparts.<sup>7</sup>

## Purpose of the Agreement

- 3.4 The Agreement sets the legal framework, rights, responsibilities and procedures between the visiting forces and the host government on matters including: what occurs in the event that a criminal act is committed by a member of the visiting force, the circumstances in which a uniform is worn, taxation and customs relief, environmental protection requirements, immigration procedures and liability issues. The Agreement affords the same rights to the armed forces of each country when in the other country. It will not authorise either country to deploy troops or conduct operations in the other's territory, but will establish the status of such forces when Australia and the Philippines arrange to send and receive forces to the other country.<sup>8</sup>
- 3.5 The proposal to negotiate a SOVFA was made by the Philippines in February 2004. The Agreement is significant because it will allow Australia's defence cooperation with the Philippines to deepen, particularly in the area of combined exercises. The Australia-Philippines Defence Cooperation relationship has been growing in recent years, with a focus on counter-terrorism, maritime security, and assistance to the Philippines Defence Reform program.<sup>9</sup>

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5 NIA, para 6.

6 NIA, para 7.

7 Mr Ben Coleman, *Transcript of Evidence*, 13 August 2007, p. 16.

8 NIA, para 8 and see Mr Ben Coleman, *Transcript of Evidence*, 13 August 2007, p. 16.

9 NIA, para 9.

The Philippines noted that a SOVFA was essential for it to broaden its defence engagement with Australia, as its constitution requires a treaties-status agreement before allowing Australia to undertake more extensive defence activities in Philippines territory. Article 18 of the Philippines constitution states that foreign military bases, troops or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the senate, and recognised as a treaty by the other contracting state. This treaty will allow our defence cooperation with the Philippines to deepen, particularly in the area of combined exercises.<sup>10</sup>

## Obligations

- 3.6 The provisions in the Agreement are similar to those contained in other SOVFAs to which Australia is a party. The Agreement sets out standard conditions concerning the rights and obligations of forces of the Philippines or Australia and the status of those forces when in the country of the other. These conditions include the following matters:<sup>11</sup>
- Respect for local laws (Article 2): Members of the visiting force must respect local laws and abstain from activity inconsistent with the Agreement.
  - Notification of size of force (Article 3): The Sending State must notify the Receiving State the size of, and if practicable the names of members of the visiting force.
  - Entry and departure (Article 4):
    - ⇒ Members of the visiting force are exempt from visa requirements but must have a passport, photo identity card and travel orders.
    - ⇒ Members of the visiting force are exempt from regulations on the registration and control of non-citizens and are also exempt from emigration clearance certificate requirements of the Receiving State.
    - ⇒ The Agreement provides for the removal of an individual at the request of the Receiving State or of an individual who ceases to be a member of the visiting force.

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10 Mr Ben Coleman, *Transcript of Evidence*, 13 August 2007, p. 16.

11 NIA, para 13 and Articles 2-25 of the Agreement.

- ⇒ The Agreement contains procedures for entry of military aircraft, motor vehicles or vessels including presentation of declarations of health and quarantine inspections.
- ⇒ The Receiving State may prevent a member of the visiting force from leaving by issuing a hold departure order in connection with a civil, criminal or administrative inquiry.
- Training (Article 5): The visiting force may use mutually determined land and sea areas, air space or facilities for combined training, exercises, etc.
- Use of public services and facilities (Article 6): Visiting forces may use areas and facilities as mutually determined. Visiting forces may use public services and facilities on no less favourable terms than those available to others in like circumstances.
- Movement of forces, vessels, aircraft and motor vehicles (Article 7):
  - ⇒ The visiting force and its aircraft, vessels and vehicles have freedom of ingress to and egress from land and sea areas, air space and facilities subject to the Receiving State's right to prescribe the routes. Vessels of the visiting force may visit ports with the Receiving State's consent, with movement in accordance with international practice. Members of the visiting force have freedom of movement for the purpose of lawful activities.
  - ⇒ With prior consent of the Receiving State, the Sending State may transport explosives (including ammunition) through the territory of the Receiving State, in compliance with applicable laws. The Sending State indemnifies port authorities and the Receiving State in respect of claims arising out of transportation or storage of explosives, and must pay compensation for damage.
  - ⇒ The visiting forces, aircraft, vessels and vehicles may move through the Receiving State under comparable conditions to forces of the Receiving State in respect of pilotage, harbour charges and tolls, etc.
- Mortuary affairs (Article 7A): The Sending State may take charge of all matters relating to identification, processing, repatriation and disposal of the remains of a deceased member of the visiting forces subject to the Receiving State's laws, policies and procedures including coronial proceedings.

- Uniforms (Article 8): Visiting forces may wear national uniform on duty and wear civilian dress under the same conditions as forces of the Receiving State.
- Carriage of arms (Article 9): Members of the visiting force are entitled to possess and carry arms when authorised by their orders, and where permitted by the Receiving State's authorities. Carriage of arms outside training facilities and areas used by the force are to be mutually determined.
- Security (Article 10): The visiting force may maintain service police for the maintenance of discipline and may take reasonable measures, consistent with the law of the Receiving State, to protect the security of the force.
- Criminal jurisdiction (Article 11):
  - ⇒ The authorities of the Receiving State have jurisdiction over visiting forces with respect to offences committed within the Receiving State and punishable by the law of the Receiving State. Concurrently, service authorities of the Sending State have the right to exercise all criminal and disciplinary jurisdiction conferred on them by the law of the Sending State over all personnel subject to the service law of the Sending State.
  - ⇒ Where there is concurrent jurisdiction the Sending State has the primary right to exercise jurisdiction in relation to offences solely against its own property or security, offences solely against the person or property of another member of the visiting forces, or offences in the course of official duty. The Receiving State has primary jurisdiction over all other offences. There are procedures for waiver of primary jurisdiction and a requirement for sympathetic consideration of a request for waiver.
  - ⇒ There are procedures for co-operation, subject to the laws of the parties, in the arrest of offenders, investigation of offences, collection and production of evidence and custody, detention and confinement of personnel. The parties must notify each other of the arrest or detention of personnel. Persons taken into custody, detained or prosecuted will be afforded all procedural safeguards established by the law of the jurisdiction.
  - ⇒ Visiting personnel will not be subject to trial in military or religious courts of the Receiving State. Visiting personnel will not be subject to the service law of the Receiving State unless mutually determined. A sentence of death will not be carried out by either party.

- Environmental protection (Article 12): The parties commit to environmental protection measures and there is a requirement on the Sending State to remedy contamination caused by visiting forces.
- Importation and exportation (Article 13):
  - ⇒ The customs and taxation laws and regulations of the Receiving State will apply to members of the visiting force.
  - ⇒ Official documents under official seal are exempt from customs inspection and there are exemptions from import and export duties for equipment, material, motor vehicles, etc. intended for official use. There are procedures for disposition of items imported free of duty.
  - ⇒ The service authorities of the Sending State are exempt from import and export duties for all fuel, oil and lubricants intended for exclusive use in official motor vehicles, aircraft and vessels. Visiting personnel may import military uniforms free of import duties.
- Classified information (Article 14): Classified information is to be dealt with in accordance with each party's national security laws and procedures. There are procedures specified for protection of classified information and a requirement to investigate suspected cases of loss or unauthorised disclosure of classified information.
- Communications (Article 15): Visiting forces may only use frequencies allocated by the Receiving State. Items are not to be posted in contravention of the postal laws of the Receiving State.
- Motor vehicles (Article 16): Official motor vehicles, excluding hired vehicles, must carry a distinctive nationality mark, a registration number issued in the Sending State, be registered if required and are not exempt from payment of toll fees or taxes. Privately owned motor vehicles are to be registered under and subject to local law.
- Driving licences and laws (Article 17): The Receiving State will accept driving permits or licences issued by the Sending State, for visiting forces driving official motor vehicles in the course of official duty. Local laws will apply in all other respects to the driving of motor vehicles.
- Local purchases (Article 18): The Sending State commits to purchase local goods and commodities.

- Employment of local civilians (Article 19): The Sending State commits to employing local labour, if available and suitably qualified and to employ in accordance with local labour laws.
- Personal taxation (Article 20): Liability of personnel for any taxes and duties will be determined by existing agreements in relation to taxes and duties.
- Claims (Article 21):
  - ⇒ Government-to-government claims are waived for: damage arising from the performance of official duties to property used by the forces of either party, maritime salvage for vessels and cargo used in connection with activities under the Agreement, and injury or death suffered by a member of the visiting forces while engaged in performance of official duties.
  - ⇒ Claims for loss or damage of property not used by forces of either party arising from the performance of official duties, or maritime salvage for vessels and cargo not used in connection with activities under the Agreement, will be borne according to a mutually determined apportionment of liability.
  - ⇒ Third party claims are to be handled under the laws of the Receiving State with respect to claims arising from activities of visiting personnel, unless mutually determined otherwise.
  - ⇒ The Sending State must assist the Receiving State to take possession of any property of the visiting forces which is subject to levy under the law of the Receiving State and within an area or facility used by the visiting personnel.
  - ⇒ The parties must cooperate in procurement of evidence for a fair hearing and disposal of claims. The Sending State may not request immunity from the civil jurisdiction of courts for visiting forces.
- Exchange control (Article 22): The foreign exchange regulations of both parties apply concurrently for acts done in the territory of the Receiving State.
- Abuse of privileges (Article 23): The Sending State is to cooperate to prevent abuse or misuse of privileges and ensure proper discharge of obligations.
- Dispute resolution and consultation (Articles 24 and 25): Disputes are to be settled amicably by consultation and negotiation.

- 3.7 The Agreement does not differ significantly from other SOVFAs Australia has in place with other countries although there are some minor differences.

...there is an article about environmental protection and I suppose that just reflects the modern world where people are more aware of the environment and environmental issues...that and the mortuary affairs would be the only substantially new articles.<sup>12</sup>

## Issues raised in Submissions

- 3.8 The Committee received two submissions on the Agreement from the Hon. Paul Lennon, Premier of Tasmania, and Dr Ben Saul, Director, Sydney Centre for International and Global Law. The Committee held an additional hearing on the Agreement on 17 September 2007 to seek the Commonwealth Government's response to the issues raised in each submission.
- 3.9 The Premier of Tasmania's submission raised a specific issue in relation to Article 11 of the Agreement recommending "that a provision be included in paragraph 10(h) to provide that the court may close the court if the relevant legislation permits or requires the court to be closed to the public."<sup>13</sup> The Attorney-General's Department informed the Committee that Article 11 of the Agreement, which deals with criminal jurisdiction, does not contain any provisions that would prevent a court applying legislation that permitted or required a court to be closed to the public in certain circumstances and that it would be entirely consistent with the Agreement for a court to be closed to the public in accordance with relevant legislation of the jurisdiction.<sup>14</sup>
- 3.10 Dr Ben Saul raised a number of issues, principally around affirming respect for and observance of human rights in the Agreement. The Government representatives informed the Committee that the preamble to the Agreement acknowledges all of Australia's and the Philippine's existing international commitments including commitments under the International Covenant on Civil and Political

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12 Ms Marianne Martin, *Transcript of Evidence*, 13 August 2007, p. 16.

13 Premier of Tasmania, *Submission 3*.

14 Ms Kerin Leonard, *Transcript of Evidence*, 17 September 2007, p. 33.



Rights (ICCPR). The Committee was also explicitly informed that there are no provisions in the Agreement which would limit either country's existing international obligations and that it is not necessary to restate obligations under international law in the Agreement because they continue to apply.<sup>15</sup>

- 3.11 In respect of some of the specific issues raised by Dr Saul, the Committee was informed that:
- there is nothing in the Status of Visiting Forces Agreement which contradicts provisions of the *Migration Act 1958* and therefore would prevent a member of visiting Philippine forces making a claim for refugee status;
  - the Philippines is a party to the ICCPR which would oblige it to observe certain minimum standards in respect of the detention of ADF personnel in the Philippines and that Australia would raise non-compliance with these standards with the Philippines; and
  - the Australian Government expects that were Australia to make any representations to the Philippines under the Agreement that the Philippines would take Australia's representations very seriously.<sup>16</sup>
- 3.12 Having sought additional input from the Government on the issues raised in the submissions the Committee is satisfied that the suggested amendments to the Agreement are not necessary.

## Costs

- 3.13 Article 7 clauses (6)(a) and (b) of the Agreement provide for Australia to indemnify the Philippines against any legally enforceable claims arising from the transportation or storage of ADF explosives or damage to property of the port authorities or Government of the Philippines arising from any detonation of such explosives. Article 21 of the Agreement contains a reciprocal procedure for handling claims under which Australia assumes a contingent liability under certain circumstances.<sup>17</sup>

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15 Dr Sheridan Kearnan, *Transcript of Evidence*, 17 September 2007, p. 31.

16 Ms Kerin Leonard, *Transcript of Evidence*, 17 September 2007, p. 32.

17 NIA, para 15.

- 3.14 Defence has conducted a risk assessment on the likelihood that the indemnities will become actual liabilities. However, the probable amount payable if these risks occurred cannot be determined as there is no data on which to base an assessment. However, Defence has assessed that the benefits of the Agreement outweigh the risks of the contingent liabilities which the Commonwealth would be assuming.<sup>18</sup>

## Entry into force and withdrawal

- 3.15 Article 28 of the Agreement provides that it will enter into force when Australia and the Philippines notify each other in writing that all procedures for entry into force have been completed. Article 28 also provides that the Agreement can be terminated on 180 days' written notice by either Party. In the event that the Agreement is terminated, under Article 26 those provisions that confer rights or impose obligations on the Parties concerning claims, indemnities, the protection of classified information or private rights remain in force.<sup>19</sup>

## Legislation

- 3.16 No new primary legislation is required. The matters which require legislation are primarily addressed in the *Defence (Visiting Forces) Act 1963* (Cth) which governs the legal status of certain foreign military forces whilst in Australia. The Act allows the military authorities of visiting foreign forces to apply their military law to their personnel whilst in Australia and provides for a corresponding suspension of Australian jurisdiction over such personnel in certain circumstances. The Australian Customs Service (ACS) has advised that some amendment to by-laws under the *Customs Tariff Act 1995* (Cth) is required and the Department of Defence has requested that those amendments be made. The Agreement will not change the existing roles of the Commonwealth and the States and Territories.<sup>20</sup>

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18 NIA, para 16.

19 NIA, paras 1 and 19.

20 NIA, para 14.

## Consultation

- 3.17 The States and Territories were notified of the Agreement through the Standing Committee on Treaties. The Departments of Foreign Affairs and Trade, Justice and Customs, Immigration and Citizenship, Finance and Administration, Communications, Information Technology and the Arts, Environment and Water Resources, Agriculture, Forestry and Fisheries, Employment and Workplace Relations, Transport and Regional Services, Treasury and the Attorney-General's Department were consulted when drafting the text. All agencies cleared the text, and it was subsequently endorsed by all relevant Ministers. The text of the Agreement was agreed by the Executive Council on 23 May 2007.<sup>21</sup>

## Similar Agreements

- 3.18 Australia has treaties of the same type with France, the Kyrgyz Republic, Malaysia, New Zealand, Papua-New Guinea, Singapore, and the United States of America, as well as the Agreement between the Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the Operations and Status of the Police and Armed Forces and Other Personnel deployed to the Solomon Islands.

## Conclusions and recommendation

- 3.19 The Committee is very supportive of increased defence cooperation with the Philippines, particularly in the areas of counter terrorism and maritime security contemplated by the Agreement. The Agreement will allow Australia and the Philippines to undertake joint exercises and provide an internationally recognised means to resolve any disputes that may arise from the presence of one country's forces in the territory of the other.

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<sup>21</sup> NIA, consultation statement, paras, 1&2.

**Recommendation 2**

**The Committee supports the *Status of Visiting Forces Agreement with the Philippines* and recommends that binding treaty action be taken**