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THE INCIDENT AT CAVALESE AND STRATEGIC COMPENSATION

W. MICHAEL REISMAN & ROBERT D. SLOANE

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NOTES AND COMMENTS

THE INCIDENT AT CAVALESE AND STRATEGIC COMPENSATION

Penny wise, pound foolish.
—Benjamin Franklin, *Poor Richard's Almanack*

In 1953 the United States ratified the North Atlantic Treaty Organization's Status of Forces Agreement of 1951 (SOFA),¹ which set forth "conditions and terms which will control the status of forces sent by one state, party to the Agreement, into the territory of another state, party to the Agreement."² The drafters foresaw that the presence and training of foreign military forces within and between their territories would probably, if not inevitably, cause injury to civilians, giving rise to claims that, if not settled quickly and satisfactorily, could spark incidents disruptive to their cooperation in mutual defense. To this end, the SOFA established a jurisdictional regime designed to minimize the political friction these incidents threatened to generate, by providing prompt and manifestly fair settlement procedures. The SOFA's jurisdictional framework protects nationals of a foreign military force from the criminal processes of the alien jurisdiction in which they reside and train, yet permits injured citizens of the host state to pursue civil damages for the tortious acts of foreign forces without fear that their claims might receive prejudicial treatment in the foreign state's local courts.

Year in, year out over the past half century, the SOFA has contributed to maintaining good relations with the people in NATO host states. This result was vital to NATO's operations, for, in democratic host states, popular toleration, if not support, is a political *conditio sine qua non* for the transnational stationing of foreign military forces. But context is important to understanding and effectively implementing any legal instrument and its jurisdictional regime. The SOFA was enacted in the midst of the Cold War. Its jurisdictional regime presumes that the public within NATO states perceives the presence and training exercises of foreign military forces in its midst as serving national security. The end of the Cold War has eroded this presumption in the popular mind, even though security specialists, who must systematically project and assess a wider range of contingencies, continue to appreciate the geostrategic value of the transnational stationing of NATO forces. Unquestionably, the SOFA still serves many of the values—regularity, efficiency, predictability, cooperation in the investigation of transnational incidents, and so forth—for which it was designed. But transposed to the post-Cold War context, the jurisdictional and compensatory regimes it established may no longer suffice in every situation to preserve the delicate political preconditions NATO states once took for granted.

¹ Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces, June 19, 1951, 4 UST 1792, 199 UNTS 67 [hereinafter SOFA]. The United States ratified the SOFA on July 24, 1953, subject to Senate reservations intended to ensure that no "person subject to the military jurisdiction of the United States" would be tried by a foreign court under a legal regime that neglected "procedural safeguards contained in the Constitution of the United States." *Statement Included in the Instrument of Ratification of the United States of America*, 199 UNTS at 68.

² Murray L. Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 COLUM. L. REV. 1091, 1091 (1953).

Perhaps no event in recent memory makes this point more clearly than the tragedy inadvertently caused by a U.S. aircraft at Cavalese, Italy, in February 1998. This incident and its aftermath offer a paradigm for rethinking the post-Cold War operation of the SOFA and for understanding how changes in the political context in which it operates may now counsel a more flexible—or, at least, less exclusive—application of its formal terms.

I. THE INCIDENT AND ITS AFTERMATH

On February 3, 1998, at approximately 3:15 P.M., a U.S. Marine EA-6B Prowler engaged in a low-level training flight in the northern Italian Alps severed a cable-car line at the Cermis ski resort in Cavalese. The attached gondola plummeted over three hundred feet, killing twenty people³ from six states: eight Germans, five Belgians, three Italians, two Poles, one Dutchman, and one Austrian.⁴ The U.S. aircraft had been “redeployed at Aviano air base as part of Operation Deliberate Guard in support of the multinational Stabilization Force (SFOR) in Bosnia.”⁵ At the time of the accident, its pilot, Capt. Richard J. Ashby, had been flying one of dozens of daily low-level training missions in the region. NATO deemed these missions necessary to prepare pilots “to fly below enemy radar and maneuver in mountainous terrain, such as that in Bosnia-Herzegovina.”⁶

The incident did not come as a complete surprise to local residents. Since the 1980s, residents of Cavalese had protested against NATO training operations, which both Italian and U.S. aircraft conduct routinely. On four prior occasions, unidentified warplanes had hit ski-lift cables in the region, but there had been no casualties. Mauro Gilmozzi, the mayor of Cavalese, had lodged a formal protest, but NATO authorities, including the Italian Air Force, responded that the training “was safe and in the interest of national defense.”⁷

The Cavalese incident ignited immediate political and legal explosions. On the political front, the Communist Refoundation Party, which had long opposed the American military presence, seized on the issue and demanded closure of the Aviano base.⁸ A public prosecutor, Francantonio Granero, initiated a preliminary investigation pursuant to Article 112 of the Italian Constitution, and on May 27, 1998, he indicted the four-man crew and three of its supervisory officers on charges of manslaughter and negligent endangerment of the safety of public transport. But on July 13, 1998, at the preliminary hearing at the Court of Trento, the Italian judge, citing Article VII, paragraph 3(a) (ii) of the SOFA, found that primary criminal jurisdiction for this matter had been assigned to the United States; accordingly, he dismissed the case.⁹

³ See *U.S. Military Blamed for Fatal Crash at Italy Resort; Alps: Up to 20 Killed When Low-Flying Marine Plane Cuts Cable*, L.A. TIMES, Feb. 4, 1998, at A12. According to Senator Robb, a former marine who subsequently introduced a bill to compensate the victims directly:

Just minutes from [the plane's] scheduled return to base, the pilot suddenly caught a glimpse of a yellow gondola off to his right at eye level.

Asplit second later, he spotted the two cables that carried the gondola, and, fearing for his life, he put the plane into a dive. His actions probably saved the lives of the four-member crew, but it was not enough to prevent the wingtip from clipping the cables.

....

The plane's wing had stretched and then snapped the cables supporting the gondola, which was then 307 feet above the valley floor.

145 CONG. REC. S3076-02, *S3086 (daily ed. Mar. 23, 1999) (statement of Sen. Charles S. Robb).

⁴ The deceased included a Polish mother and her 14-year-old son, seven German friends, and five Belgian friends, including a recently engaged couple. See 145 CONG. REC., *supra* note 3, at *S3086.

⁵ Annalisa Ciampi, Case Note, Public Prosecutor v. Ashby, 93 AJIL 219, 219 (1999).

⁶ Paul Richter, *Cohen Calls for Review of NATO Flights; Military: U.S. Defense Chief Meets with Italian Counterpart in Wake of Italian Ski-Lift Crash*, L.A. TIMES, Feb. 8, 1998, at 19 (home ed.).

⁷ Richard Boudreaux, *Tolerance Is Low for Low-Flight Training*, L.A. TIMES, Feb. 23, 1998, at A1.

⁸ See *U.S. Military Blamed for Fatal Crash at Italy Resort*, *supra* note 3.

⁹ See Ciampi, *supra* note 5, at 219–21.

Article VII of the SOFA allocates criminal jurisdiction between the “sending State,” the party to which the force belongs, and the “receiving State,” the party “in the territory of which the force or civilian component is located, whether it be stationed there or passing in transit.”¹⁰ It distinguishes crimes punishable (1) under the laws of the sending state with respect to persons subject to that state’s military law; (2) under the laws of the receiving state with respect to persons subject to that state’s territorial jurisdiction; (3) under the laws of the sending but not the receiving state; and (4) under the laws of the receiving but not the sending state.¹¹ With respect to the latter two categories, the SOFA vests exclusive jurisdiction in whichever state’s laws have been violated.¹² Where concurrent jurisdiction exists, however, the allocation of criminal jurisdiction becomes a function of the nature of the crime. The military authorities of the sending state enjoy the “primary right to exercise jurisdiction” in relation to (i) offenses against the property or security of that state, including that of its forces, its civilian components, and their respective dependents; and (ii) offenses “arising out of any act or omission done in the performance of official duty.” The receiving state maintains jurisdictional primacy with respect to all other offenses.¹³ Applying these terms to the prosecution’s indictment request, the Italian judge had found that the offenses at issue arose out of “acts or omissions done in the performance of official duty.” Thus, primary jurisdiction vested in the United States.

Quite independently of the jurisdictional allocations described above, however, authorities of the receiving and sending NATO states undertake to cooperate in the investigation of criminal offenses governed by the SOFA.¹⁴ Accordingly, shortly after the incident, a board composed of six U.S. Marine Corps officers, one U.S. Air Force officer, and one Italian Air Force officer conducted an investigation.¹⁵ On March 3, 1998, the board published its report. It found that, although ground supervisors had neglected to advise the aircrew of the two-thousand-foot low altitude restriction applicable to training flights in the Cavalese region, principal blame for the incident remained with Captain Ashby and his crew, for “[t]he aircrew aggressively maneuvered their aircraft, exceeded the maximum airspeed and flew well below 1000 feet.”¹⁶ In view of its findings, the board referred the four crew members for pretrial investigation pursuant to Article 32 of the U.S. Uniform Code of Military Justice but recommended only “disciplinary action” for the crew’s supervisors.¹⁷ Captain

¹⁰ SOFA, *supra* note 1, Art. I(d)–(e).

¹¹ *See id.*, Art. VII(1)–(2).

¹² *See id.*

¹³ *Id.*, Art. VII(3)(a)(i)–(ii). Article VII(3)(c) stipulates, however, that the state enjoying primary jurisdiction shall give “sympathetic consideration” to requests from other states for jurisdictional waiver “in cases where that other State considers such waiver to be of particular importance.”

¹⁴ *See id.*, Art. VII(6).

¹⁵ *See Ciampi, supra* note 5, at 220.

¹⁶ Findings of the board, annexed to prosecutor’s request for committal to trial, *quoted in* Ciampi, *supra* note 5, at 220; *see also* Steven Lee Myers, *Pentagon Blames Jet’s Crew for Ski-Lift Disaster in Italy*, N.Y. TIMES, Mar. 12, 1998, at A1 (summarizing the board’s findings). Myers reported that the

Pentagon has concluded that the American pilot and crew were responsible for the accident last month that killed 20 people when a Marine Corps jet struck a ski lift’s cable in Italy

. . . [T]he Marine jet, an EA-6B Prowler, was flying too low and too fast when it sheared the cable near the resort town of Cavalese, sending a gondola full of skiers hurtling more than 300 feet to the ground

Id.

¹⁷ *See Ciampi, supra* note 5, at 220. Ciampi argues that, under the terms of the SOFA, the judge correctly dismissed Granero’s request for an indictment of the four crew members in deference to the formal proceedings initiated against them under Article 32 of the U.S. Uniform Code of Military Justice. But with respect to the three supervisors, Italy arguably retained jurisdiction, for

[w]hen the sending state’s action is limited to disciplinary measures, there is reason to doubt whether the receiving state is barred from exercising its subordinate right to prosecute. It is even more doubtful that a bar to subsequent trial arises from a decision not to prosecute that has been reached after only an informal investigation.

Id. at 223–24. Whether or not U.S. disciplinary proceedings against the supervisory officers divested Italy of criminal jurisdiction over them, Ciampi’s observation highlights the broad dispersal of responsibility that distin-

Ashby and his navigator, Capt. Joseph Schweitzer, were indicted for negligent homicide and involuntary manslaughter, charges that, if proven, carry a life sentence in military prison. A subsequent investigation, which revealed that Schweitzer and Ashby had collaborated in attempting to destroy videotaped evidence, led to a second court-martial on charges of obstruction and conspiracy to obstruct justice.¹⁸ In March 1999, Ashby was acquitted of responsibility for the accident itself,¹⁹ though both he and Schweitzer pleaded guilty to obstruction of justice.²⁰

Ashby clearly benefited from the criminal evidentiary standard of "beyond reasonable doubt" codified in Article 51(c) of the U.S. Uniform Code of Military Justice.²¹ But his acquittal on the twenty counts of manslaughter nonetheless shocked sectors of popular opinion in many NATO allies, especially those whose nationals had perished in the crash.²² The verdict particularly aroused the Italian public, some of whom were led to question the integrity of the process that culminated in Ashby's acquittal.²³ Some Italian officials reacted even more vehemently.²⁴ Achille Occhetto, who presided over the lower house's foreign affairs committee, called the verdict an "act of arrogance and prevarication";²⁵ and Undersecretary of Defense Paolo Guerrini requested that, in light of the verdict, the Italian parliament reconsider those SOFA provisions that had vested primary jurisdiction in the United States.²⁶

The Clinton administration's initial response to this indignation appeared sympathetic and conciliatory. Speaking at a joint press conference with Italian Prime Minister D'Alema, President Clinton stated that "the United States must clearly and unambiguously shoulder

gushes the circumstances surrounding the Cavalese tragedy. Blame for the incident may have resided not only with the aircrew, but also with its supervisors and, perhaps most critically, those responsible for drafting and updating the air maps relied upon by Ashby's crew. See Estes Thompson, *Flawed Map Cited in Ski Gondola Deaths*, PHILA. INQUIRER, Feb. 1, 1999 (noting that Ashby's defense counsel argued that, had he not relied upon a dated map—which failed to indicate the resort cables even though the system had been built in 1966—he would not have flown into the Cavalese valley at all); see also Matthew L. Wald, *U.S. Maps Become Legal Issue in Alpine Cable Accident*, N.Y. TIMES, Mar. 13, 1999, at A3 (speculating that, perhaps to deflect culpability from the U.S. government, the Defense Department has refused to update the maps in the wake of the incident and insisted on their adequacy). Skepticism about the accuracy of the maps appears to have figured prominently in Ashby's ultimate acquittal.

¹⁸ See *Marine Fliers Tried to Hide Evidence, Prosecutors Say*, L.A. TIMES, Sept. 22, 1998, at B4.

¹⁹ See Richard J. Newman, *An Accident, an Acquittal*, U.S. NEWS & WORLD REP., Mar. 15, 1999, at 43, available in 1999 WL 8432404. The military jury acquitted Ashby largely because "of mistakes beyond his control, including the Marine Corps's failure to mark the ski lift on aviation maps." *Id.* In May the jury sentenced Ashby to six months' imprisonment and a dishonorable discharge for helping to destroy the videotape evidence. See Estes Thompson, *Ski Tragedy Pilot Sentenced*, ATLANTA J. & CONST., May 11, 1999, at A3. Ashby was released on October 12, 1999, approximately one month early, "for good behavior," according to Marine Corps spokesman Bill Lisbon. See *US Pilot Who Caused Italian Gondola Disaster Gets Early Release from Prison*, Agence France-Presse, Oct. 12, 1999, available in 1999 WL 25123088.

²⁰ See *Marine Guilty in Gondola Crash*, CINCINNATI POST, Mar. 30, 1999, at 2A; Richard Serrano, *Marine Pilot in Gondola Deaths Gets Six Months and Discharge*, BUFFALO NEWS, May 11, 1999, at A2.

²¹ 10 U.S.C. §851 (1994).

²² Lothar Naumann, mayor of the German city of Burgstaedt, where seven of the eight Germans killed were members of a ski club, stated, "Until now, I have been a convinced supporter of the American justice system. But this is incomprehensible." *Marine Pilot Ashby Acquitted on All Cavalese Charges*, Deutsche Presse-Agentur, Mar. 4, 1999, available in LEXIS, News Group File, Most Recent Two Years. Sindy Renkewitz, whose father and sister died in the crash, said she was "shocked" and could not "understand that the man who killed 20 people . . . is not guilty." Henriette Lowisch, *Jury Acquits Marine Pilot in Italian Ski Lift Disaster*, Agence France-Presse, Mar. 5, 1999, available in 1999 WL 2557811.

²³ An editorial in *La Repubblica* characterized the verdict as "impunity of the mighty" and evidence of the power of America's "military-industrial complex." See Suzette Bloch, *Italy Shocked by Acquittal of U.S. Pilot over Ski Lift Disaster*, Agence France-Presse, Mar. 5, 1999, available in 1999 WL 2558483. Klaus Stampfl, the son of Maria Steiner, a 60-year-old retired shopkeeper who died in the crash, attended Ashby's court-martial at the U.S. Marine base at Camp Lejeune, North Carolina. At its conclusion, he reportedly remarked, "It's a shameful verdict . . . It was certainly not a serious trial, not as serious as it would have been in Italy." *Italian Reaction Decidedly Bitter: Families, Officials Decry Injustice*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 5, 1999, at A14.

²⁴ See *Marine Pilot Ashby Acquitted on All Cavalese Charges*, *supra* note 22.

²⁵ *Italian Reaction Decidedly Bitter*, *supra* note 23.

²⁶ See *id.*; see also *Pilot's Acquittal Stuns Italy*, AP, Mar. 4, 1999, available in 1999 WL 1383487.

the responsibility for what happened,”²⁷ a proposal strongly endorsed editorially by the *New York Times*, which called for “substantially increased compensation without delay.”²⁸ While U.S. Secretary of Defense William Cohen denied official knowledge of tampering with the evidence, he pledged that “the United States, which ha[d] offered \$100,000 to the families of victims to defray some immediate expenses, also intend[ed] to quickly honor other claims that ha[d] been brought by the victims’ families under the NATO treaty with Italy.”²⁹

Secretary Cohen’s statement referred to Article VIII of the SOFA, which provides that, where claims arise out of “acts or omissions of members of a force or civilian component done in the performance of official duty” and that “caus[e] damage in the territory of the receiving State to third parties,” the receiving state shall settle these claims in accordance with its domestic law.³⁰ Subsequently, the costs incurred in satisfying the adjudicated claims shall be distributed between the receiving and the sending states according to a scale that varies on the basis of their respective responsibility for the injury. Where, as here, “one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 per cent. chargeable to the receiving State and 75 per cent. chargeable to the sending State.”³¹ At no time did the United States repudiate this formal legal obligation.

In May 1999, however, Congress rejected an amendment to the Emergency Supplemental Appropriations Act, sponsored by Senator Charles S. Robb of Virginia, that had been introduced in early March, immediately after Ashby’s acquittal. The measure would have allocated \$40 million to the Secretary of Defense, empowering him to make payments of up to \$2 million to each victim’s family, solely for settling “claims arising from the deaths caused by the accident involving a United States Marine Corps EA-6B aircraft on February 3, 1998, near Cavalese, Italy.”³² The amendment did not purport, either directly or by implication, to modify the operation of the SOFA. To the contrary, it clarified its purpose by stating that “[a]ny amount paid to a person under this section is intended to *supplement* any amount subsequently determined to be payable to the person under [domestic legislation enabling payments under the SOFA].”³³

Senator Robb, a former marine who had been attempting to persuade the Pentagon to compensate the victims’ families since the previous summer,³⁴ urged his colleagues to endorse the bill so as to “restore our nation’s credibility around the world and maintain the honor and integrity of the United States Marines While compensation cannot replace the lost children, husbands and wives, it can demonstrate that we accept complete responsibility for their deaths.”³⁵ The senator also noted that, even if the SOFA provides the exclusive remedy for injuries caused by U.S. forces abroad acting in their official capacity, it would not preclude alternative, still less supplementary, compensation schemes. After all, much of the evidence produced at the court-martial implicated not only the crew, but the United States military authorities more broadly. In a letter to his colleagues, Senator Robb emphasized that

²⁷ *Joint Press Conference of the President and Prime Minister D’Alema of Italy*, M2 Presswire, Mar. 9, 1999, at 3–4, available in LEXIS, News, Publications.

²⁸ *America’s Obligation in Italy*, N.Y. TIMES, Mar. 10, 1999, at A18.

²⁹ Richter, *supra* note 6; see also SOFA, *supra* note 1, Art. VIII (setting forth compensatory provisions).

³⁰ SOFA, *supra* note 1, Art. VIII(5).

³¹ *Id.*, Art. VIII(5) (e) (i). This division serves to prevent the host state from exploiting accidents in which the sending state is principally at fault by authorizing potentially outrageous damage awards. By apportioning a 25% share to the host state, the SOFA regime seeks to ensure that the host state’s courts or legislative processes calculate any resultant civil damage award in an equitable and unbiased manner.

³² Emergency Supplemental Appropriations Act of 1999, Robb (and others) Amendment No. 131, S. 544, 106th Cong. §203(a) (1999).

³³ *Id.* §203(e) (emphasis added); see also 10 U.S.C. §127 (1994) (authorizing the Secretary of Defense to make “emergency and extraordinary expenses”).

³⁴ See *Gondola Victims’ Redress Dropped*, ATLANTA J. & CONST., May 15, 1999, at A6.

³⁵ Open Letter from U.S. Sen. Charles S. Robb (Va.) to the U.S. Senate (Mar. 10, 1999) (on file with authors).

there is plenty of fault to go around: the map we supplied the pilot did not show the cable crossing the valley at 500 feet—even though it had been there *for 30 years*, the equipment in the plane had a history of malfunctioning; orders regarding the proper speed and altitude were never adequately communicated to pilots. While it may never be clear exactly which *individual* act caused the accident, it is clear that ultimate responsibility lies with the United States.³⁶

More critically, Senator Robb pointed out that failure to compensate the victims' families carried broad political ramifications. Some of the Cavalese victims' families had "been pushed nearly into poverty, having lost their primary means of financial support."³⁷ Viewed against the backdrop of Ashby's acquittal, the perceived U.S. refusal to acknowledge responsibility by directly compensating the victims conveyed an international image antithetical to "the honor of the United States and the honor of the United States Marine Corps."³⁸ With U.S. armed forces stationed on foreign territories throughout the globe, the damage to its reputation that the United States would incur among its allies, Robb argued, would prove far more costly than the comparatively trivial sum required to compensate the victims' families. Indeed, while the proposed amendment requested \$40 million in reparations, "[t]o put that into some perspective, the plane involved in this accident cost some \$60 million, and fortunately for us neither the plane nor the crew were lost."³⁹

Robb's amendment passed by unanimous voice vote during the Senate's consideration of the Emergency Supplemental Appropriations Act in March, but the House of Representatives did not pass a corresponding provision and the bill was dropped in conference.⁴⁰ After its rejection by the House, Senator Robb reiterated his concern, noting that " 'the families are the victims, and our allies will continue to interpret this action as an unwillingness' for the United States to bear the consequences of the accident."⁴¹ In May he reintroduced the amendment, with the cosponsorship of Senators Olympia J. Snowe, Jeff Bingaman, Patrick J. Leahy, and J. Robert Kerrey, as an amendment to the National Defense Authorization Act for the fiscal year 2000. This time, however, despite the efforts of its sponsors during June, July, and August, the bill ran afoul of floor politics and the opposition of the Department of Defense.

Immediately prior to Senator Robb's initial introduction of the Cavalese legislation in March, Senator Strom Thurmond, among other interested parties, had been observed to approach Robb on the Senate floor and offer "to deal." Thurmond wanted to condition any payments to German victims of the Cavalese tragedy on the German government's willingness to provide expedited compensation for an unrelated incident: the collision between a United States Air Force C-141 Starlifter aircraft and a German Luftwaffe Tupelov TU-154M aircraft off the coast of Namibia in 1997.⁴² Though Robb considered this linkage inapposite,⁴³ he responded that he would have been open to discussing the matter had it been

³⁶ *Id.*

³⁷ 145 CONG. REC., *supra* note 3, at *S3087.

³⁸ Staff Notes for U.S. Sen. Charles S. Robb on the Robb-Snowe Amendment (on file with authors) [hereinafter Robb Staff Notes].

³⁹ 145 CONG. REC., *supra* note 3, at *S3087.

⁴⁰ See Legislative Notes on the Robb-Snowe Amendment (on file with authors).

⁴¹ *Bargainers in Congress Drop Gondola Payments*, COLUMBIAN (Vancouver, Wash.), May 14, 1999, at A8 (quoting Senator Robb).

⁴² The Namibia crash killed nine U.S. Air Force servicemen, and subsequent separate investigations, conducted by German and U.S. authorities, "both assigned responsibility for the collision and deaths to the German crew, who not only filed an inaccurate flight plan, but were flying at the wrong altitude." Open Letter from U.S. Sen. Strom Thurmond to the U.S. Senate (May 6, 1999) (on file with authors). For a discussion of Thurmond's efforts to condition compensation to German victims of the Cavalese incident on "comparable" payments by the German government for the Namibia incident, see generally Matthew L. Wald, *Claims Collide in 2 Accidents as Next of Kin Await Redress*, N.Y. TIMES, Apr. 25, 1999, §1, at 7.

⁴³ While Senator Thurmond requested "comparable restitution" for the families of the U.S. aircrew killed in the Namibia incident, see Open Letter from Sen. Strom Thurmond, *supra* note 42, several factors distinguish the

raised at an earlier stage. But because Thurmond had broached the issue only seconds before he intended to introduce the Cavalese measure, Robb could not redraft the amendment without further delaying action on the Senate floor. In response, Thurmond subsequently introduced a separate amendment barring payments to German nationals under the Robb bill until Germany provided reparations for the Namibia incident. Both pieces of legislation died in the House in March. However, when Senator Robb again attempted to introduce the Cavalese compensation amendment in May, he chose to accommodate Thurmond's interests by integrating the German contingency into the draft legislation.⁴⁴ But Thurmond's conditions proved to be only one of a panoply of interests that combined to thwart Robb's efforts.⁴⁵

The Department of Defense vigorously opposed the bill. Its position, expressed in a letter from Secretary of Defense William Cohen, was that the "NATO SOFA provides the *exclusive remedy* for claims involving official duties of the U.S. military causing damage in NATO countries."⁴⁶ Among other objections, Secretary Cohen argued that "the precedent that would be set by making payments in settlement of these claims outside of the NATO process would not, in the long run, be in the best interests of the United States or of other NATO countries."⁴⁷ The Defense Department contended that there was no legal authorization for such payments. As a strategic matter, it evidently felt that claimants in future accidents might demand like compensation, causing the eventual atrophy and displacement of the SOFA legal regime, which had operated so effectively to settle similar incidents for the past fifty years: "I share completely your strong desire to see that all the families of the victims in this case are properly and fairly compensated as soon as possible," Secretary Cohen wrote. "I continue to believe, however, that the NATO claims process is capable of doing this, as it has since its inception in 1951."⁴⁸

The Defense Department's legal claim, as Senator Robb had noted in March, was doubtful because negligent acts that had occurred within U.S. territory and contributed to the incident arguably rendered a civil settlement of these claims (outside the formal provisions of

two tragedies; and it is not obvious, as a matter of either law or policy, that they should be resolved in like fashion. Among other salient differences, the SOFA does not, by its terms, govern the claims in the Namibia incident, and the victims of the German-U.S. collision were exclusively military personnel, rather than, as at Cavalese, civilians.

⁴⁴ Indeed, in an effort to address Thurmond's objections, Robb wrote to German Ambassador Jürgen Chrobog and requested that, to ensure timely compensation to German victims of the Cavalese crash, he make every effort "to press for the rapid resolution of the claims [the Namibia incident's victims' families] have filed with your government." Letter from U.S. Sen. Charles S. Robb to Jürgen Chrobog, ambassador of the Federal Republic of Germany (Apr. 22, 1999) (on file with authors). The revised draft of the Cavalese bill that Robb then introduced in May provided:

No payments under this section . . . shall be made to citizens of Germany until the Government of Germany provides a comparable settlement of the claims arising from the deaths of the United States servicemen caused by the collision between a United States Air Force C-141 Starlifter aircraft and a German Luftwaffe Tupelov TU-154M aircraft off the coast of Namibia, on September 13, 1997.

National Defense Authorization Act for Fiscal Year 2000, Amendment No. 461, S. 1059, 106th Cong. §349(g) (1999) [hereinafter Robb-Snowe Amendment].

⁴⁵ Telephone interview with Herbert S. Cupo, legislative assistant to Sen. Charles S. Robb (Oct. 19, 1999).

⁴⁶ Letter from U.S. Secretary of Defense William Cohen to Sen. Charles S. Robb (July 1999) (on file with authors) (emphasis added). Secretary Cohen's position finds support in case law that precludes certain civil claims that fall within the SOFA's jurisdictional regime. *See, e.g.,* Laskero v. Moyer, No. 89-C-5966, 1990 WL 93276 (N.D. Ill. June 18, 1990) (finding plaintiff's civil action for damages sustained at a British Royal Air Force base barred by the operation of Article VIII(5) of the SOFA). Indeed, U.S. District Judge Malcolm Howard dismissed a civil suit brought by relatives of five Belgians killed in the Cavalese incident on essentially these grounds. *See Belgians' Lawsuit Is Dismissed*, NEWS & RECORD (Greensboro, N.C.), Feb. 9, 2000, at B6A. Echoing Secretary Cohen's concern, Judge Howard wrote that to decline to apply the SOFA "could conceivably undercut the treaty and create a cause of action for any overseas military accident. . . . Such a result would severely impair the viability of the claims procedure provided for in the NATO SOFA." *Id.* It bears emphasizing, however, that Robb's proposal contemplated a one-time *legislative* allocation; it did not purport to authorize civil suits outside the SOFA's jurisdictional regime.

⁴⁷ Letter from Secretary Cohen to Senator Robb, *supra* note 46.

⁴⁸ Letter from U.S. Secretary of Defense William Cohen to Sen. Charles S. Robb (May 12, 1999) (on file with authors).

the SOFA) permissible.⁴⁹ More critically, however, the SOFA nowhere purports to exclude supplementary compensation schemes subsequently authorized by the culpable state's domestic legislative processes. And as Robb observed, even if, as the Department of Defense contended, "the SOFA provides the sole remedy in this case," meaning that the Secretary of Defense would ordinarily lack independent authority to settle the Cavalese claims, "this amendment resolves the question. [It] specifically grants the Department the authority they believe they presently lack"⁵⁰

The department's concern that the Robb amendment would establish a detrimental precedent is understandable as an institutional defense of a multilaterally accepted and routinized procedure of general application to events that will certainly recur. The necessary ongoing training with modern weaponry is inherently dangerous and will inevitably injure innocent civilians. Thus, the Department of Defense, qua defendant, has an interest in a procedure that regularizes the liquidation of damages in a nonpolitical fashion. That interest, unquestionably, is a legislative purpose of the SOFA, but it is not its only legislative purpose. The SOFA was also inspired by a desire to minimize the friction that incidents like Cavalese would generate with foreign publics, whose support for a U.S. military presence in their midst is a *conditio sine qua non*.

The gravamen of Senator Robb's contention was that the latter legislative purpose would be frustrated in this case, because "blind adherence to the perceived requirements of the SOFA is *causing* friction with our NATO allies, not *reducing* it."⁵¹ That seemed to be at least the short-term consequence of the congressional rejection of Robb's initiative; the NATO states that lost nationals at Cavalese deplored Congress's ultimate rejection of the bill.⁵² Moreover, far from expressing concern about its supposed departure from the formal terms of the SOFA, the German, Polish, and Belgian governments endorsed Robb's proposal; the Belgian ambassador plainly stated his view that the "legislative initiative is not incompatible with the SOFA-procedure."⁵³ As a one-time legislative allocation, the Cavalese bill did not threaten to establish a precedent at odds with the SOFA. To the contrary, as Robb noted, the amendment "by its terms affects only this case. It does not bind the DoD to settle other cases—just this case. And to get this done again would require another act of Congress, and I can attest that is no easy feat."⁵⁴ Ironically, a similar "precedent" had been enacted by Con-

⁴⁹ The Federal Tort Claims Act (FTCA), which waives the sovereign immunity to civil suit of the United States for certain torts committed by its agents or employees, ordinarily does not apply to "[a]ny claim arising in a foreign country." 28 U.S.C. §2680(k) (1994); see *Smith v. United States*, 507 U.S. 197 (1993) (holding an FTCA suit for injuries arising out of acts or omissions in Antarctica barred, on the grounds that Antarctica falls within the "foreign country" exception to the FTCA's waiver of sovereign immunity); *Meredith v. United States*, 330 F.2d 9 (9th Cir.), cert. denied, 379 U.S. 867 (1964) (dismissing under the "foreign country" exception to the FTCA a suit for injuries sustained at the U.S. Embassy in Bangkok). Under the "operative effect" doctrine, however, FTCA claims that have their "operative effect" (the injury) in a foreign country can nonetheless be deemed to "arise" in the United States if the negligent acts resulting in injury occurred wholly or principally in U.S. territory. See, e.g., *Sami v. United States*, 617 F.2d 755 (D.C. Cir. 1979) (upholding plaintiff's FTCA claim for false arrest against a §2680(k) challenge because, although the arrest was effected in Germany, the instructions to make the arrest and other operative facts giving rise to plaintiff's injury had occurred in the District of Columbia); see also *Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978).

⁵⁰ 145 CONG. REC., *supra* note 3, at *S3086.

⁵¹ *Id.* at *S3087 (emphasis added).

⁵² Italian Justice Minister Oliviero Diliberto said that the United States "ha[s] made fools of us for the second time It's another insupportable slight to the . . . victims of a slaughter that still, today, one year later, hasn't found justice." *Congress Kills Cable Car Reparation Provision*, NEWS & REC. (Greensboro, N.C.), May 15, 1999, at B4A. Cabinet Undersecretary Minniti, expressing the discontent of the Italian public over both the court-martial and the refusal to award direct compensation, stated, "We do not consider this matter closed It is even more upsetting when one considers the two sentences, which created deep dissatisfaction." *Compensation Issue Angers Italy*, Reuters, May 16, 1999, available in 1999 WL 17592214. Senator Robb noted in his floor speech that "[o]ur allies, especially Italy where we have strategically important basing agreements, are outraged by our lack of accountability. They feel angry and betrayed." 145 CONG. REC., *supra* note 3, at *S3087.

⁵³ 145 CONG. REC., *supra* note 3, at *S3087; see also Letter from German Ambassador Jürgen Chrobog to U.S. Sen. Ted Stevens (May 11, 1999) (on file with authors) (expressing support for the Robb-Snowe Amendment).

⁵⁴ Robb Staff Notes, *supra* note 38.

gress the previous year, when it set aside \$20 million to enable Cavalese to rebuild the gondola⁵⁵—a form of compensation wholly “unauthorized” by the SOFA. Paradoxically, this legislation drew no objection from either Congress or the Department of Defense. “Let us show the world,” Robb concluded in his Senate floor speech, that “we care as much about loss of life as we do about loss of property. . . . The honor of the United States is at stake.”⁵⁶ But despite the efforts of Robb and others, the Department of Defense and diverse groups in Congress continued to oppose the amendment. Robb’s initiative to compensate the Cavalese victims’ families directly thus died, a victim of circumstances that reflected less the national attitude of the United States than the unfortunate, but inevitable, consequences of partisan politics and a government of divided powers.

The United States subsequently emphasized, in the words of the U.S. Information Service, that congressional rejection of compensation does not “in any way reduce or alter the commitment of the United States to fulfill its commitment to provide compensation.”⁵⁷ The agency reaffirmed the national commitment, under the SOFA, to reimburse Italy for 75 percent of whatever compensation its courts determine to be appropriate for the claimants’ families.⁵⁸

Notwithstanding U.S. adherence to this legal commitment, the congressional impasse and the strict formalism reflected in the position of the Defense Department evince a policy decision with potentially troubling implications for U.S.-Italian relations—and, in general, for U.S. forces stationed elsewhere around the globe, all of whom rely upon the goodwill of their host state. Ordinarily, in an incident like Cavalese, the victims’ claims, absent congressional authorization of direct compensation, would be relegated to the host state’s courts. And in Italy—which, we can assume, is not unique in this regard—one commentator has noted that domestic courts are “not best known for making swift rulings, with most civil cases such as compensation taking years.”⁵⁹ Consequently, justice delayed in this case, particularly for those families that lost their primary financial supporter in the incident, would have extended and aggravated the indignation and inflicted political costs on the United States.

Although Congress and the Defense Department could not be persuaded of the wisdom of departing from the *exclusive* application of the SOFA, the Italian legislature, recognizing the unusual nature and severity of the Cavalese incident, intervened to expedite compensation. In November 1999, the lower house’s Defense Committee approved a bill to set aside \$42 million (roughly the same amount that Robb’s bill would have authorized) to compensate the twenty families,⁶⁰ and shortly thereafter, this measure passed without difficulty in the Italian Senate.⁶¹ Following its adoption, Ambassador Thomas M. Foglietta affirmed the U.S. commitment to honor its SOFA obligations by paying 75 percent of this compensation.⁶²

The Italian law, and its implementation in accordance with the terms of the SOFA, thus resolved the immediate issue of compensation and alleviated some of the burdens suffered by the victims’ families. But it remains to be seen whether it will repair the Italian public’s perception that America in fact declined, in the words of President Clinton, to “unambigu-

⁵⁵ See 144 CONG. REC. H8657-07, *H8670 (daily ed. Sept. 25, 1998); *id.* at S9695-01, *S9710 (daily ed. July 30, 1998).

⁵⁶ 145 CONG. REC., *supra* note 3, at *S3087; see also Letter from U.S. Sen. Charles S. Robb to U.S. Secretary of Defense William Cohen (Oct. 1, 1998) (on file with authors) (arguing that if “Section 8113 of H.R. 4103 [which authorized payments under the previous year’s Defense Appropriations bill to those who suffered property damage as a result of the Cavalese incident] violates the Status of Forces Agreement,” then “it would appear that as a policy matter we are willing to violate the SOFA for loss of property but not loss of life”).

⁵⁷ *Congress Kills Cable Car Reparation Provision*, *supra* note 52.

⁵⁸ See *id.*

⁵⁹ *Compensation Issue Angers Italy*, *supra* note 52.

⁶⁰ See *Italy: Cable Car Victim Compensation Bill Nears Approval*, World News Connection, Nov. 16, 1999, available in 1999 WL 26463407.

⁶¹ See *Gondola Accident Victims’ Families to Get Damages*, L.A. TIMES, Dec. 2, 1999, at B17; *U.S. Envoy Hails Compensation Law After Italian Ski-Lift Disaster*, Agence France-Presse, Dec. 1, 1999, available in 1999 WL 25153776.

⁶² See *Gondola Accident Victims’ Families to Get Damages*, *supra* note 61.

ously shoulder the responsibility for what happened"⁶³—particularly in view of Ashby's acquittal on the counts of manslaughter and his early release from the (comparatively trivial) six-month sentence for obstruction of justice.⁶⁴ As Prime Minister D'Alema stated in March 1999, "[The SOFA] is not an American privilege. . . . Naturally, the convention must be respected and complied with, because it exists. But we will be much happier to comply with it if our citizens and our public opinions are reassured that by adopting these procedures, justice is done."⁶⁵

II. APPRAISAL

A general principle of law requires that those who cause injury to others compensate them. Although it is still uncertain whether this principle applies to instances in which the injury is caused in the context of preparation for or conduct of armed conflict and in the absence of criminal responsibility,⁶⁶ the Status of Forces Agreement remains an entirely adequate process for discharging the general legal obligation it establishes. But since legal arrangements are always embedded in political contexts, part of the appraisal of the viability of particular legal arrangements necessarily includes the extent to which they also fulfill indispensable political requirements.⁶⁷

As we observed above, one of the political requirements for the long-term stationing abroad of U.S. military forces and their conduct of readiness exercises is strong popular support in the receiving state, especially one that is a functioning democracy. During the Cold War, when the perception that the presence of U.S. forces benefited the receiving state was likely to be widespread, popular willingness to bear some of the inevitable collateral costs may have been greater, so that the slower pace of liquidation and payment of damages under the SOFA regime would have been politically satisfactory.

With the end of the Cold War, however, the popular perception in many foreign countries of the need for the long-term presence of U.S. forces and the willingness to absorb some of the ineluctable collateral costs appear to have declined,⁶⁸ consequently, the orderly procedure for compensation established by the SOFA may no longer meet the political, as well as the legal, requirements that the SOFA regime serves. The Department of Defense, which defended the exclusivity of the SOFA procedure in the Cavalese incident and resisted, on

⁶³ See note 27 *supra* and corresponding text.

⁶⁴ Ashby's acquittal from individual criminal liability does not, of course, impute any greater legal obligation on the United States to provide civil compensation. But it contributed to a perception that the United States had refused to accept responsibility for the incident, and it therefore bears consideration as part of the overarching political context in which the merits of Senator Robb's supplementary compensation scheme should be evaluated. Independently of its legal ramifications, national policy should evince sensitivity to the potential political impact of Ashby's acquittal.

⁶⁵ *Joint Press Conference of the President and Prime Minister D'Alema of Italy*, *supra* note 27, at 6.

⁶⁶ See W. Michael Reisman, *The Lessons of Qana*, 22 *YALE J. INT'L L.* 381, 397-98 (1997).

⁶⁷ Outside the NATO context, recognition of these political requirements has at times motivated the provision of substantial *ex gratia* payments to foreign nationals injured by U.S. military activities. For instance, during World War II, U.S. planes mistakenly bombed Schaffhausen, a Swiss city located at the Swiss-German border on the north bank of the Rhine. The United States apologized to Switzerland for inadvertently violating its neutrality and provided compensation both for property damage and for the death and wounding of civilians. See Detlev F. Vagts, *Switzerland, International Law and World War II*, 91 *AJIL* 466, 468 (1997) (editorial comment); see also Detlev F. Vagts, *The Role of Switzerland: Neutrality Law in World War II*, 20 *CARDOZO L. REV.* 459, 466 n.32 (1998) (noting the \$14,371,000 U.S. settlement of Swiss claims for civilian deaths and property damage sustained during World War II as a consequence of U.S. military action). More recently, the United States offered to pay compensation to the families of the 290 civilians killed when the USS *Vincennes* mistakenly destroyed an Iranian commercial airliner on a regularly scheduled flight from Bandar Abbas to Dubai. See David L. Peace, *Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis*, 31 *VA. J. INT'L L.* 545, 558-60 (1991).

⁶⁸ The closure of the Clark Air Force Base and the Subic Bay Naval Station in the Philippines is a case in point. See generally Rafael A. Porrata-Doria, Jr., *The Philippine Bases and the Status of Forces Agreement: Lessons for the Future*, *MIL. L. REV.*, Summer 1992, at 67.

principle, any deviation from it, might wish to incorporate such changes in the overall political context into its future calculation. These changes may periodically require the development of supplementary strategic compensation procedures, such as those proposed by Senator Robb.

Unquestionably, preserving the values of predictability and regularity served by the SOFA's compensation scheme remains critical and, from a parochial perspective, perhaps "penny wise." But in the post-Cold War global order, in which popular goodwill in the host state represents, even more than in the past, a *conditio sine qua non* for the continued stationing of U.S. troops in geostrategic allied nations, neglecting its preconditions by focusing solely on the values served by legal formalism could well prove "pound foolish."

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THE FRANCIS DEÁK PRIZE

The Board of Editors is pleased to announce that the Francis Deák Prize for 2000 was awarded to Hannes L. Schloemann of Baker & McKenzie, Berlin, and Stefan Ohlhoff of Wilmer, Cutler & Pickering, Berlin, for their article entitled "*Constitutionalization*" and *Dispute Settlement in the WTO: National Security as an Issue of Competence*, which appeared in the April 1999 issue.

The prize was established by Philip Cohen in memory of Dr. Francis Deák, an international legal scholar and lifelong member of the American Society of International Law, to honor a younger author who has published a meritorious contribution to international legal scholarship in the *American Journal*.