

International Criminal Jurisdiction Issues for the United States Military

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Introduction

United States military forces are permanently, or relatively permanently, stationed on bases all over the world. In this era of “force projection” doctrine, American service members also find themselves temporarily deployed to foreign soil—Haiti, Somalia, Bosnia, and Kosovo are but a few recent examples. United States military personnel serving overseas are often accompanied by both family members and a civilian workforce.

The presence of American forces and accompanying civilians in foreign countries raises questions as to whether the sending nation or the receiving nation has criminal jurisdiction over American citizens who break the law. Where U.S. forces are involved, a status of forces agreement (SOFA) typically defines the legal status of American military personnel and accompanying family members and civilians. While most of the criminal jurisdictional issues are clearly spelled out by SOFAs, some jurisdictional gaps have developed over the years.

This article focuses on current criminal jurisdiction issues confronting the U.S. military overseas. These issues include the military’s lack of jurisdiction over American family members and civilian workers, and the impact of changing attitudes among U.S. allies on SOFA criminal jurisdiction concerns like pre-trial custody, death penalty offenses, and environmental crimes. It does not propose to offer solutions to these problems; instead, this article seeks to make the military lawyer aware of the problem areas likely to be encountered overseas. Before delving into these issues, this article provides some background on SOFAs and their jurisdictional tenets.

Status of Forces Agreements

The end of World War II and the start of the Cold War ushered in a new era for the U.S. military. This new era saw for the

first time large numbers of U.S. forces permanently forward-deployed around the globe to enforce a policy of Communism containment. Status of forces agreements were created between the United States and host nations “to define the rights, immunities, and duties of the force, its members, and family members.”¹ While a major feature of a SOFA is apportioning criminal jurisdiction between the United States and the receiving nation, the SOFA also addresses civil jurisdiction, claims, taxes, duties, services provided by each party, and procuring supplies and local employees.² The United States, as the nation with the greatest number of overseas-deployed troops,³ currently has 105 SOFAs with 101 foreign countries.⁴ Status of forces agreements can be either bilateral or multilateral like the North Atlantic Treaty Organization (NATO) SOFA. Though SOFAs vary in their terms slightly from one nation to the next, all are very similar and are patterned after the original NATO SOFA, except in one important regard. The NATO SOFA is one of the few reciprocal SOFAs that the United States is a party to, most others are non-reciprocal.

Status of forces agreements divide criminal jurisdiction according to which nation’s laws have been violated—U.S. law, host nation law, or both. Where the violation is strictly of U.S. law, the United States has sole criminal jurisdiction. Where the violation is strictly of host nation law, the host nation has sole criminal jurisdiction. Host nations never exercise exclusive jurisdiction over U.S. military personnel, however. By violating host nation law, the service member’s conduct brings discredit upon the armed forces—a violation of General Article 134 of the Uniform Code of Military Justice (UCMJ).⁵ When the violation is of both nations’ laws, a concurrent criminal jurisdiction situation exists.

A formula exists to allocate jurisdiction in these concurrent cases. When the criminal act violates the laws of both states, the receiving state has primary jurisdiction, except in two situations: official duty cases and “inter se” cases. In official duty

1. Colonel Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 137, 140 (1994).

2. J. Holmes Armstead, Jr., *Crossroads: Jurisdictional Problems for Armed Service Members Overseas, Present and Future*, 12 S.U. L. REV. 1, 4 (1985).

3. Keith Highet et al., *Jurisdiction—NATO Status of Forces Agreement—U.S. Servicemen Charged with Criminal Offenses Overseas—European Convention on Human Rights*, 85 AM. J. INT’L L. 698, 702 (1991).

4. INTERNATIONAL & OPERATIONAL LAW DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. AIR FORCE, INTERNATIONAL NEGOTIATION & AGREEMENT HANDBOOK, tab 18 (2000).

5. UCMJ art. 134 (LEXIS 2000).

cases (when the act occurs during the performance of official duties) the sending state has primary jurisdiction.⁶ Article VII of the NATO SOFA, for example, states that the United States has primary criminal jurisdiction over a member of the force in relation to any offense arising out of any act or omission that occurred in the performance of an official duty *and* that is punishable according to the laws of both the sending and receiving state.⁷ What is deemed an “official duty” is a unilateral decision made by the United States, though foreign nations can resort to diplomatic negotiations to resolve disputes. Regardless, the granting of official duty certification in dubious cases by U.S. officials undermines the cooperative nature of SOFAs and is viewed by host nations as a deprivation of their jurisdictional right. Inter se cases—those where the only victim is the sending state or a person from the sending state who is covered under the SOFA—also vest primary jurisdiction in the sending state.⁸ Simply put, the nation with the greatest interest in the case has the primary right to exercise jurisdiction. But in keeping with an early Senate directive to maximize U.S. jurisdiction whenever possible, the United States has negotiated supplemental agreements with several host nations giving it primary jurisdiction even when the victim is from the host nation.⁹

Even in the absence of such agreements, it is standard U.S. policy to request that host nations waive their primary jurisdiction over U.S. service members, family members, and civilians employed by the military. The Judge Advocate General of the Army reported 13,128 concurrent jurisdiction offenses over which the foreign country had the primary right in 1990.¹⁰ In 11,751 of these cases, U.S. military authorities obtained a waiver of foreign jurisdiction, for a worldwide waiver rate of eighty-nine percent.¹¹

As comprehensive as the SOFA criminal jurisdiction provisions seem, post-SOFA decisions by the Supreme Court have left the U.S. military overseas incapable of prosecuting family

members and civilians employed by the military for violations of U.S. law.

Jurisdiction over Civilians

While members of the military are subject to the UCMJ wherever deployed, the same is no longer true for family members and civilian workers that accompany the military abroad. Promulgated in 1951, the UCMJ preserved the military’s traditional *wartime* jurisdiction over all “persons serving with or accompanying an armed force in the field.”¹² Furthermore, because of the large number of family members and civilians accompanying U.S. forces stationed abroad to wage the Cold War, Article 2(a)(11) made the following persons subject to the UCMJ in *peacetime*: “persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.”¹³ Being “subject” to the UCMJ meant trial by courts-martial for these classes of civilians.

By the mid-1950s, Article 2(a)(11) was under heavy constitutional attack. Military jurisdiction over family members charged with capital crimes was the first to be struck down. In the 1957 case of *Reid v. Covert*,¹⁴ which involved two habeas corpus petitions from wives convicted by courts-martial of the premeditated murders of their servicemen husbands, the Supreme Court held that Article 2(a)(11) could not be constitutionally applied in peacetime.¹⁵ Peacetime for the Supreme Court is defined as a time other than during a congressionally declared war.¹⁶ Three years later, in *Kinsella v. United States ex rel. Singleton*,¹⁷ the Court extended its holding in *Reid* to family members charged with non-capital crimes.¹⁸

Meanwhile, the Court was coming to the same conclusions in regard to crimes committed by the military’s civilian work-

6. INTERNATIONAL & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, STATUS OF FORCES AGREEMENTS (SOFAs) 4 (1999) [hereinafter SOFAs].

7. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 7 U.S.T. 1792, T.I.A.S. No. 2845.

8. SOFAs, *supra* note 6.

9. Highet, *supra* note 3, at 699.

10. Report of the Judge Advocate General of the Army October 1, 1990 to September 30, 1991, 34 M.J. XCII, XCVI (1992).

11. *Id.*

12. UCMJ art. 2(a)(10) (LEXIS 2000).

13. UCMJ art. 2(a)(11).

14. 354 U.S. 1 (1957).

15. *Id.*

16. United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970).

17. 361 U.S. 234 (1960).

ers. In *Grisham v. Hagen*,¹⁹ another habeas corpus petition in a premeditated murder case involving a civilian employee, the Court could find no appreciable distinction between family members and employees and thus ruled the military's jurisdiction unconstitutional. The same result was reached for a civilian employee in a non-capital crime in the companion case of *McElroy v. Guagliardo*.²⁰

The *Reid-Kinsella* and *Grisham-McElroy* line of decisions, and Congress's subsequent failure to take remedial action, have many implications for the military overseas. When family members or civilian employees violate strictly U.S. law, they are immune from military prosecution. The local military commander can do nothing more than take administrative action against the offender. The most severe action entails sending the accused party back to the United States. Concurrent jurisdiction offenses where the host nation has primary jurisdiction, must be reported to the host nation and present military authorities with a difficult choice—permit, or request, that the host nation prosecute the offender, or request a waiver of jurisdiction from the host nation. If a waiver is granted, the most an offender could receive is administrative punishment. This choice becomes less difficult where the host nation's justice system assures a fair trial, but this is not the case everywhere. If a waiver is granted, once again, the military cannot prosecute. Thus, for the military, the choice is between local prosecution and no prosecution.²¹ Sometimes, even local prosecution is foreclosed because host nations "often decline this authority for offenses committed by Americans against other Americans."²²

In deployment scenarios where SOFAs tend not to exist, the military commander can turn civilians over to the host nation for prosecution, but typically must accept no prosecution by default. In Haiti and Rwanda, for example, these "host nations" did not have a functioning court system to conduct a trial.

The military's inability to prosecute takes on additional significance considering current trends in military strength and operations. Continual manpower cuts have left today's military significantly smaller than it was just a few years ago. As a result, the military has been forced to rely more heavily on civilian employees to perform support jobs—both at permanent

overseas installations and on temporary force projection deployments. The danger for the military, which is built on order and discipline, is in becoming reliant upon civilian employees over whom it cannot exercise criminal jurisdiction.

Such criminal jurisdiction problems disappear, however, when U.S. forces engage in a declared war. During World War II, for example, U.S. courts consistently upheld the military's claims of jurisdiction over civilians as a constitutional war power that changed the reach of courts-martial jurisdiction.²³ However, this caveat seems to be of little current value because the United States has not declared war since World War II. Any future value is likewise diminished due to the military's focus on operations other than war. One author observed that "Operations other than war and the delicacies of politics and diplomacy, particularly under the [United Nations (UN)], preclude formal declarations of war and restrain the President in his ability to recognize a 'time of war.'"²⁴ Consequently, any jurisdictional provisions that apply only in "time of war" are obsolete.

When the United States becomes involved in UN operations, the UN's Model SOFA²⁵ dictates the criminal jurisdiction over civilians accompanying the force. Unfortunately, the UN's Model SOFA does not rectify the U.S. military's lack of jurisdiction over its civilian employees. Because U.S. law does not allow for military jurisdiction over civilians, under the terms of the UN Model SOFA the military is once again left with the choice of either local (host nation) prosecution or no prosecution. While this SOFA does provide for arbitration of jurisdictional disputes, the military has no bargaining power as it has nothing more to offer than immunity from prosecution.²⁶ In addition to these difficulties under the UN Model SOFA, the military may run afoul of such international agreements as the Geneva Conventions and Protocol I.

The Geneva Conventions require that all signatory nations, including the United States, "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention" and to bring such offenders "before its own courts."²⁷ "Grave breaches" are crimes against persons protected by the Convention, including murder, torture, willful

18. *Id.*

19. 361 U.S. 278 (1960).

20. 361 U.S. 281 (1960).

21. Major Steven J. Lepper, *A Primer On Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 181 (1994).

22. Captain James K. Lovejoy, *USAREUR Regulation 27-9, "Misconduct By Civilians,"* ARMY LAW., June 1990, at 16, 18.

23. Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 126 (1995).

24. *Id.* at 134.

25. *Model Status of Forces Agreement for Peace-Keeping Operations*, UN GOAR, 45th Sess., Agenda item 76, UN Doc. A/45/594 (1990).

26. *Id.*

assault, depriving a prisoner of war or a civilian of a fair trial, and unlawful deportation or transfer of civilians. Furthermore, Protocol I to the Geneva Conventions requires military commanders to take action against those “under their command and other persons under their control” that violate either the Conventions or Protocol I.²⁸

The Senate ratified the Geneva Conventions in 1955 with the understanding that the UCMJ criminalized many of the offenses found in the Conventions, and also provided for the courts-martial of civilians accompanying the force overseas.²⁹ As previously discussed, however, judicial decisions handed down between 1957 and 1960 barred the military from prosecuting civilians under the UCMJ, except during a time of congressionally declared war. Thus, the United States cannot technically fulfill its obligations under the Geneva Conventions, e.g. in cases where a civilian accompanying the force commits a war crime during circumstances where the Convention applies, but Congress has not declared war. Once again, the military must choose between prosecution by another signatory nation and no prosecution when one of its civilians violates a criminal law.

Congressional action is needed to remedy the jurisdictional gaps faced by the military overseas. Now, after nearly forty years, congressional action is taking shape. On 13 April 1999, Republican Senator Jeff Sessions of Alabama introduced Senate Bill 768. Titled the Military and Extraterritorial Jurisdiction Act of 1999, Senate Bill 768 is meant to “establish court-martial jurisdiction over civilians serving with the Armed Forces during contingency operations, and to establish Federal jurisdiction over crimes committed outside the United States by former members of the Armed Forces and civilians accompanying the Armed Forces outside the United States.”³⁰ Part one of the bill would amend the UCMJ, while part two would extend federal criminal statutes overseas.³¹ It passed the Senate with one amendment on 1 July 1999, and proceeded to the House of Representatives on 12 July 1999, where it was referred to both the Armed Services and Judiciary Committees.³² The House version, House Bill 3380, which does not seek to amend the UCMJ, but only to extend federal criminal

statutes overseas, was reported out of the Judiciary Committee on 27 June 2000.³³

SOFA Jurisdiction and Changing International Attitudes

In recent years, several factors have contributed to changing attitudes among United States’ allies and SOFA partners. This includes the end of the Cold War, an enhanced notion of sovereignty in other nations, and conflicting values and priorities among former Cold War partners. All of these factors have had an impact on SOFA criminal jurisdiction.

The end of the Cold War prompted both the United States and its SOFA allies to rethink their national security arrangements in light of the diminished threat of armed conflict and communist expansion from the former “Evil Empire.” As previously mentioned, the U.S. military is much smaller now and maintains a greatly reduced permanent presence overseas. In Europe, for example, whole Army divisions have left Germany and returned to the United States.³⁴ Meanwhile, the United States’ SOFA allies are now less likely to view the presence of large numbers of U.S. troops as a necessity, and are more likely to see them as infringing on sovereignty.

Status of forces agreements were originally negotiated in the aftermath of World War II. While they were negotiated agreements, it cannot be said that they were negotiated between nations with equal bargaining power. The United States emerged from World War II as the most powerful nation in the world, both militarily and economically. Many of the nations that became party to a SOFA were either liberated from Axis occupation by the United States, or were the actual Axis powers themselves, defeated and occupied by the U.S. military. The exercise of sovereignty, especially among this latter group of nations, was very much family members upon United States acquiescence.

Over fifty years later, this is no longer the case. Former Axis nations, Germany and Japan, for example, are world class economic powers in their own right. Both maintain defense forces that are well equipped and adequate to defend each nation’s

27. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, T.I.A.S. 3364.

28. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 87, 16 I.L.M. 1391, 1125 U.N.T.S. 3.

29. Gibson, *supra* note 23, at 142.

30. S. 768, 106th Cong. (1999).

31. Letter from Judith A. Miller, General Counsel, Department of Defense, to Senator John W. Warner, Chairman, Committee on the Armed Services, subject: Views of the Department of Defense on S. 768 (undated) (on file with author).

32. See Thomas—Legislative Information on the Internet, Bill Summary and Status for the 106th Congress (visited 20 July 2000) <<http://thomas.loc.gov/>>.

33. *Id.*

34. See Fort Stewart, *History of the 3d Infantry Division* (visited 21 July 2000) <<http://www.stewart.army.mil/3dHistory/htm>>.

interests in the diminished threat environment of the post-Cold War world. In light of such developments, the presence of U.S. troops in SOFA nations and the military's predominant exercise of criminal jurisdiction over its members are seen by some elements in these nations as an affront to their sovereignty.

This feeling is most prevalent in nations with a non-reciprocal SOFA. As previously mentioned, the NATO SOFA is one of the few reciprocal SOFAs to which the United States is a party. Commenting on non-reciprocal SOFAs and jurisdiction issues in the post-Cold War era, Adam B. Norman noted:

When the threat of communism was high, many non-NATO allies accepted these non-reciprocal SOFAs because the American presence and protection were worthwhile to them. Protection from the communist threat was worth the cost of partial waiver of jurisdiction over American troops without reciprocal rights for their troops in the United States. However, "[w]ith the end of the Cold War, the need for United States military presence, . . . may not seem as obvious to [these] foreign [nations]." In the future, foreign politicians might not be so willing to acquiesce to U.S. demands on non-reciprocal SOFAs. The United States might have to offer reciprocity in exchange for the jurisdictional concessions it wants from the receiving state.³⁵

While the United States views non-reciprocity as partial compensation for bearing the brunt and cost of protecting other nations, these nations see non-reciprocity as diminishing their notions of sovereignty. Over the past several years, sovereignty and criminal jurisdiction issues became particularly sensitive in such non-reciprocal Asian nations as Japan and the Philippines.

The SOFA with Japan

The problems in Japan came to a head in the fall of 1995 when three U.S. service members raped a twelve-year-old Japanese girl on the island of Okinawa. The crime caused an

uproar on the island, which is a Japanese prefecture. Anti-American sentiment, which had been growing with each of the 4700 crimes committed by U.S. military personnel since the island's reversion to Japan in 1972, surged to new heights.³⁶ On 21 October 1995, 85,000 Japanese took part in the largest protest ever against U.S. military bases overseas.³⁷ The island's governor and many local assemblies called for a revision of the SOFA with the United States³⁸

At the heart of the SOFA controversy is Article 17, paragraph 5(c) of the larger Treaty of Mutual Cooperation and Security. This paragraph states: "custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan."³⁹ Thus, in keeping with this SOFA provision, U.S. military authorities would not turn over the suspected rapists to Japanese custody in 1995.

The Japanese felt dissatisfaction with this SOFA provision on two grounds, both related to their sovereignty. First, the Japanese saw the United States' refusal to turn over its criminal suspects, even in cases where the Japanese had the primary jurisdictional right to prosecute, as a means to impede their investigations and enable U.S. service members to escape justice. Perceiving that the United States was purposefully thwarting their law enforcement abilities, the Japanese believed that the United States was directly infringing on their rights as a sovereign nation.

Furthermore, the Japanese felt an additional slight to their status as an equal sovereign in the differences between the SOFA with Japan and the NATO SOFA. Not only is the Japanese SOFA non-reciprocal, but the NATO SOFA does not contain the impediments to host nation criminal custody found in the SOFA with Japan. Thus, there exists "a feeling that the United States is biased toward European governments, and biased against . . . Asian . . . people and governments."⁴⁰ Being subjected to less favorable terms than their European counterparts left the Japanese feeling less than equal and ran counter to the belief that "equal sovereign states should treat each other with mutual respect, even if one nation is more powerful than the other."⁴¹

35. Adam B. Norman, *The Rape Controversy: Is a Revision of the Status of Forces Agreement with Japan Necessary?*, 6 IND. INT'L & COMP. L. REV. 717, 733 (1996).

36. *Id.* at 722 (citing Peter Landers, *Okinawa's Governor Steps Up Pressure Despite Handover of U.S. Suspects*, ASSOCIATED PRESS, Sept. 29, 1995).

37. David Elsner, *85,000 Okinawans Turn Out to Protest U.S. Presence*, CHI. TRIB., Oct 22, 1995, at C11.

38. Andrew Pollack, *Rape Case in Japan Turns Harsh Light on U.S. Military*, N.Y. TIMES, Sept. 20, 1995, at A3.

39. Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1652.

40. Major Manuel E. F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, ARMY LAW., May 1994, 3, 18-19.

41. Norman, *supra* note 35, at 734.

The United States' reasons for the provisions contained in Article 17, paragraph 5(c) were rooted in concerns over an accused service member's rights in the Japanese criminal justice system—concerns not present in Europe. Unlike Germany, for example, where the coupling of the German Code and the United States-German SOFA provides an accused U.S. service member most of the protections guaranteed by *Miranda*, the same cannot be said of Japan.⁴²

In Japan, confession is considered good for the soul and plays an important part in the criminal justice system and in the rehabilitation of suspects.⁴³ Thus, confessions are highly “encouraged.” The United States' refusal to turn accused service members over to the Japanese until they are formally charged probably stems, in large part, from the fact that suspects can be detained for a total of twenty-three days without being formally charged. Throughout this time, the suspect is isolated from both family and legal counsel and subject to unrestricted police interrogation. During interrogation, a suspect may have to barter with investigators for “privileges” such as food, water, or bathroom visits. The ultimate purpose of the interrogation is to demand and obtain a confession; Japanese police and prosecutors rely on confessions instead of extrinsic evidence gathered through investigative skill.⁴⁴

Furthermore, jury trials are nonexistent and the whole Japanese criminal justice system is predicated on the assumption that the suspect is most likely guilty. Consequently, in cases where a confession cannot be obtained, the yearly acquittal rates for Japanese contested cases can be less than one percent.⁴⁵

Despite the glaring differences in criminal justice system philosophy and practice that inspired the original SOFA protection of accused U.S. service members, the outcry over the rape case prompted the United States to action. Within days of the huge Japanese protest, the United States signed a new pact with Japan dealing with the custody of military criminal suspects. The new agreement allows Japanese officials to request early custody of U.S. military suspects in rape and murder cases, and the United States is to give such requests sympathetic consideration.⁴⁶ This is the same process found in the NATO SOFA, thus having the added benefit of easing some of the Japanese hostility over disparate treatment vis-à-vis the United States'

European allies. While the United States was thus able to salvage a difficult situation in Japan, numerous issues, including sovereignty and criminal jurisdiction, could not be resolved to the satisfaction of the Philippine Senate when it came time to renegotiate the SOFA with the Philippines in 1991.

The SOFA with the Philippines

The United States' SOFA with the Philippines expired on 21 September 1991.⁴⁷ A year prior, formal renegotiation of the SOFA began.⁴⁸ Though many issues were in dispute, sovereignty and criminal jurisdiction figured prominently in the renegotiation. In regard to sovereignty, Filipino critics of the SOFA argued that

because the Philippines was a colony of the United States—and therefore powerless at the time the Agreement was negotiated—it was not a “sovereign” and “independent” nation and therefore could not consent to “waive” part of its sovereignty voluntarily by agreeing to the presence of United States bases and troops in its territory.⁴⁹

Thus, many Filipino politicians believed the original agreement was the product of United States coercion and they viewed the presence of U.S. troops and bases as a continuing infringement on their independence and sovereignty. In light of these opinions, Filipino SOFA negotiators sought a significant revision of the original SOFA, with terms much more favorable to the Philippines.

The United States saw no reason to renegotiate the criminal jurisdiction provisions of the SOFA because they were virtually identical to the provisions in the NATO SOFA. The Philippines disagreed and proposed four major revisions. The first proposed change would have required that Philippine courts, not U.S. military commanders, make the final determination on whether a military offender was acting within the scope of official duty when the crime was committed.⁵⁰ Perceived overuse of official duty certificates in dubious circumstances probably prompted this proposal.

42. James S. Fraser, *Some Thoughts on Status of Forces Agreements*, 3 CONN. L. REV. 335, 347-48 (1971). See *Miranda v. Arizona*, 384 U.S. 436 (1966).

43. Christopher J. Neumann, *Arrest First, Ask Questions Later: The Japanese Police Detention System*, 7 DICK. J. INT'L L. 253, 257-58 (1989).

44. Norman, *supra* note 35, at 727-29.

45. Neumann, *supra* note 43.

46. Teresa Watanabe, *U.S., Japan OK Pact on Military Crime Suspects*, L.A. TIMES, Oct. 26, 1995, at A1.

47. Amendment to Bases Treaty, Sept. 16, 1966, U.S.-Phil., 17 U.S.T. 1212.

48. *Time for Taps in Manila*, NEWSWEEK, Oct. 1, 1990, at 44.

49. Rafael A. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67, 88 (1992).

The second proposed change would have required the United States to guarantee that civilian and military personnel subject to charges under Philippine law would not leave the country before final adjudication of their cases.⁵¹ Under the original SOFA, the United States only guaranteed that military personnel would not leave the country and civilians would not leave on military aircraft.⁵² Because the U.S. military cannot exercise criminal jurisdiction over its civilian employees and family members, it follows that the military cannot prevent them from leaving the country either. In regard to military personnel, the United States proposed to hold them for one year in an attempt to obviate the extreme length of time consumed by the average Philippine criminal case.⁵³

The third proposed change would have given the Philippines open access to U.S. bases to execute process-serving activities.⁵⁴ The procedure in the original SOFA required clearance through military channels and all Filipino officials were escorted both on, and off the U.S. bases.⁵⁵ Security considerations alone should have counseled against acceptance of such a proposal.

Lastly, the Philippines argued that the original SOFA did not give primary jurisdiction to the United States in all cases involving only Americans. Strangely, the Philippines contended that cases involving "chastity and honor," even when all parties were American, fell under its primary jurisdiction.⁵⁶ The final renegotiated SOFA that went before the Philippine Senate was substantially the same as the original SOFA.⁵⁷ The Philippine Senate rejected the agreement on 9 September 1991.⁵⁸ While the interplay of numerous factors led to the

United States' failure to secure a new SOFA and extended basing rights in the Philippines, one point remains clear. The Philippines sought to gain terms more favorable than those given to the European signatories of the NATO SOFA.

The Death Penalty in Europe

These same European nations possess notions and values at odds with those held by the United States and are presenting new NATO SOFA criminal jurisdiction problems. Of primary concern has been a clash over the possible imposition of the death penalty for U.S. military members convicted of capital crimes overseas. There is growing consensus among European nations against the death penalty. This opposition was voiced in the Sixth Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms.⁵⁹

The European Convention, which entered into force in 1953, is a multilateral treaty under the Council of Europe that sets forth its aim to secure universal recognition and observance of human rights contained in the Universal Declaration of Human Rights.⁶⁰ The United States and Canada are the only parties to the NATO SOFA that have not ratified the European Convention.⁶¹ The Sixth Protocol, which entered into force in 1985, states that the "death penalty shall be abolished. No one shall be condemned to such penalty or executed."⁶² Several European members of NATO have also ratified the Sixth Protocol.⁶³

European nations that are signatories to both the NATO SOFA and the Sixth Protocol to the European Convention

50. FRED GREENE, *THE PHILIPPINE BASES: NEGOTIATING FOR THE FUTURE* 44 (1988).

51. *Id.*

52. *Id.*

53. *Id.* at 45.

54. *Id.* at 44.

55. *Id.*

56. *Id.* at 45.

57. Telephone Interview with Commander Allan Kaufman, Assistant Staff Judge Advocate, U.S. Pacific Command (Dec. 2, 1999) [hereinafter Kaufman Telephone Interview].

58. *Philippine Panel: No U.S. Bases*, PHILA. INQUIRER, Sept. 10, 1991, at A3.

59. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1988, Eur. T.S. No. 114 [hereinafter Protocol].

60. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNT.S. 221 [hereinafter Convention].

61. John E. Parkerson, Jr. & Carolyn S. Stoehr, *The Military Death Penalty in Europe: Threats From Recent European Human Rights Developments*, 129 MIL. L. REV. 41, 61 (1990).

62. Protocol, *supra* note 59.

63. Parkerson & Stoehr, *supra* note 61, at 61.

found themselves caught between conflicting obligations when it came to relinquishing custody of U.S. service members charged with capital crimes. The problem arises because:

Under the Convention the contracting parties agree to secure to “everyone within their jurisdiction” the rights contained in the Convention. As a result, it would seem that all the members of NATO that have ratified the Convention are obliged to secure rights guaranteed under the Convention to everyone within their jurisdiction, including the forces of a sending state stationed in their territory, even if the sending state has not ratified the Convention.⁶⁴

This situation is best illustrated by the 1990 case of *The Netherlands v. Short*.⁶⁵

Staff Sergeant (SSG) Charles D. Short, a member of the U.S. Air Force, murdered his Turkish national wife while stationed at Soesterberg Air Base in the Netherlands—a party to the NATO SOFA. Staff Sergeant Short was arrested by Dutch military police as a suspect and, during his interrogation, he confessed to the murder.⁶⁶ Under the UCMJ, SSG Short could have been charged with capital murder.

The circumstances in SSG Short’s case made it a concurrent criminal jurisdiction offense. The United States had the primary right to exercise jurisdiction in the case for two reasons. First, the United States had a stronger connection to the victim, a Turkish national, because she was married to an American service member. Second, even if the victim had been Dutch, the Netherlands is one of the NATO SOFA nations that signed a supplemental agreement giving the United States primary jurisdiction even when the victim is from the host nation.⁶⁷ Nevertheless, Dutch authorities would not turn SSG Short over to the U.S. military.

The Netherlands, as a signatory to both the European Convention and the Sixth Protocol, would not turn SSG Short over because to do so would likely subject him to the risk of capital punishment. Typically, the local police chief or prosecutor handles waiver of jurisdiction requests—courts are rarely involved.⁶⁸ However, in SSG Short’s case, the first step taken by his appointed Dutch attorney was to secure a local court injunction preventing the surrender of SSG Short to U.S. authorities.⁶⁹ After a full hearing, the civil trial court at The Hague acknowledged that the NATO SOFA gave primary jurisdiction to the United States, but it nevertheless refused to allow the Netherlands to surrender SSG Short due to the provisions of the Sixth Protocol.⁷⁰ The court would only allow the surrender of SSG Short if the United States would guarantee that he would not receive the death penalty. The Commander in Chief, U.S. Air Force in Europe, refused to provide such a guarantee.⁷¹

With the civil trial court’s decision on appeal, a Dutch criminal trial court found SSG Short guilty of manslaughter and sentenced him to six years’ imprisonment. The civil appeals court in The Hague reversed the initial civil court decision, reasoning that because the NATO SOFA gave primary jurisdiction over SSG Short to the United States, he was therefore exempt from both Dutch and European Convention jurisdiction.⁷²

This decision thus conflicted with the criminal trial court’s prosecution of SSG Short and both decisions were appealed. The criminal decision was reversed because the United States should have had primary jurisdiction over SSG Short, while the civil appeals court decision was reversed because the Netherlands’ obligations under the European Convention should have taken precedence over the conflicting SOFA jurisdictional provisions. These two reversals, wholly at odds with one another, would have left SSG Short a free man in the Netherlands had the United States not stepped in to rectify the situation.⁷³

The United States chose not to seek the death penalty for SSG Short, ultimately deciding that, due to psychiatric reasons, he did not meet the criteria for capital punishment under the UCMJ. When this determination was conveyed to the Dutch

64. *Id.* at 62 (quoting Convention, *supra* note 60, art. 1).

65. *The Netherlands v. Short*, 29 I.L.M. 1388 (HR 1990).

66. Parkerson & Stoehr, *supra* note 61, at 59.

67. *See* Agreement Relating to the Stationing of United States Armed Forces in the Netherlands, with Annex, Aug. 13, 1954, U.S.-Neth., annex, para. 3, 6 U.S.T. 103.

68. Highet et. al., *supra* note 3, at 700.

69. *Id.*

70. Protocol, *supra* note 59.

71. Highet et. al., *supra* note 3, at 700.

72. *Id.*

73. *Id.*

government, SSG Short was finally released into U.S. custody.⁷⁴ Thus, the United States did not waive its right to seek the death penalty, as the Dutch wanted, but the distinction is a narrow one.

John E. Parkerson, Jr. and Carolyn S. Stoehr observed how

it appears likely that in cases arising in Europe in which complying with one treaty, such as the European Convention and Protocol No. 6, leads to the abrogation of another treaty, such as the NATO SOFA or an extradition treaty, the European courts will be faced with a construction decision where there is no clear principle of international law as guidance.⁷⁵

The legal gymnastics fostered by *Short* showed the truth of that observation.

Ultimately, the United States' position is that military authorities are not authorized to carry out the death penalty within a host nation unless the host nation's laws provide for similar punishment.⁷⁶ Thus, it would seem that the U.S. military can impose the death penalty, but not actually carry out the execution, in host nations that are a party to the Sixth Protocol. This caveat may be of little help, however, for as *Short* demonstrated, the Dutch refused to surrender SSG Short where there was even the risk of the death penalty being imposed. In Europe, the potential for treaty and ideological conflict still exists in regard to jurisdiction in death penalty cases, but it is not limited to such. Conflicts over violations of environmental law are also emerging.

Environmental Offenses in Europe

The seeds of future environmental conflict were sown in Europe decades ago when the NATO SOFA and its supplements were drafted and signed. Most SOFAs and supplementary agreements were drafted in an era when environmental concerns were not considered and thus reflect an absence of specific provisions regarding compliance with environmental law.

74. *Id.* at 701.

75. Parkerson & Stoehr, *supra* note 61, at 71-72.

76. Erickson, *supra* note 1, at 149.

77. Major Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 31 (1996).

78. *Id.* at 14.

79. *Id.* at 26-27.

80. *Id.* at 13.

81. *Id.* at 30.

Further, excepting possible resort to the assimilative crime provisions of UCMJ Article 134, the UCMJ is silent on the issue of violations of environmental law. According to Major Mark R. Ruppert, "[t]he ability of the UCMJ to address environmental offenses fortunately has been largely untested and unquestioned by host nation authorities, but it desperately needs studied reinforcement to serve as the basis for U.S. military concurrent jurisdiction over environmental offenses."⁷⁷

While the United States has a host of environmental protection laws, they are of no use overseas. The United States' major environmental statutes are designed to punish pollution occurring within the territory of the United States and do not have extraterritorial application.⁷⁸

Thus, over the years, the United States has struggled over what environmental laws to apply overseas. Ultimately, the United States has adopted a country-specific policy of using the host nation's more restrictive environmental laws.⁷⁹ But even this policy has not been without its interpretation and enforcement problems.

Just as the European Convention and the Sixth Protocol have caused problems for the U.S. military in death penalty cases, so has European Union law caused confusion for the U.S. military in environmental cases. This is because European Union law is binding on its member nations and the European Union has been prolific in continuing to promulgate expansive environmental laws. Thus, United States adherence to the rigorous and comprehensive environmental laws in Germany, for example, could still run afoul of European Union law, which is binding on Germany.⁸⁰ The scope, complexity, and tempo of environmental legislation in Europe are outstripping the U.S. military's ability to keep pace.

Even when the military is able to keep pace in using the host nation's environmental laws, the basis for gaining jurisdiction can be problematic. Over the years, the military has adhered to the position that any act or omission occurring incidental to the performance of an official duty vests jurisdiction with the military. In regard to environmental offenses, U.S. forces fall under this official duty umbrella for offenses involving negligence. But, offenses involving intentional conduct are not as clear.⁸¹

This is because intentional conduct can turn on whether the actor's motivation was official, or personal, in nature. However, in light of the Senate's mandate to maximize criminal jurisdiction, the military may be tempted to issue an official duty certificate even in dubious cases. Such a misuse of official duty certificates to thwart host nation criminal jurisdiction can only further chafe relations with host nations that are increasingly ready, willing, and able to punish environmental offenses.

While an official duty certificate provides military members a shield from host nation criminal prosecution, the same does not hold true for civilians accompanying the force. The military's civilian component is subject to a host nation's environmental law. To shield its civilian employees from local prosecution, the military has instituted policies that direct service members to sign environmental documentation, such as hazardous waste manifests, whenever possible.⁸²

As previously mentioned, the military's basis for all prosecutions, the UCMJ, is silent as to environmental offenses. In the absence of a specific environmental crime article, military personnel that commit environmental offenses overseas are most likely to face charges for disobeying orders, dereliction of duty, destruction of property, or bringing discredit upon the armed forces.⁸³ The disparity between a host nation's environmental sanctions, that could involve several years in jail, and the military's punishment, which may only be administrative, has the potential of galvanizing anti-American sentiment, especially in environmentally conscious nations.

Conclusion

The UCMJ and the provisions of various SOFAs govern U.S. forces stationed around the world. Unfortunately, not all contingencies are covered by these documents. Court decisions have left the U.S. military incapable of exercising criminal jurisdiction over family members and civilian employees overseas during peacetime. Additionally, the military has no environmentally specific article in the UCMJ to prosecute its members for violations of a host nation's environmental laws.

Some of these problems have existed for more than forty years; others have presented themselves more recently. No matter when they originated, the end of the Cold War has exacerbated them all. The military is now smaller and more family members on civilian employees to accomplish its overseas mission. However, there is no effective means to prosecute these employees for crimes they commit overseas. Moreover, host nations no longer see the presence of U.S. forces as a necessity and are now much less willing to subvert their own sovereign interests regarding jurisdiction, the death penalty, and the environment.

Short of not abusing the official duty certification to keep jurisdiction over service members, the military itself can do little to rectify these various problems. Congressional action is required and long overdue to fix the various jurisdictional problems the military is facing. Fortunately, at least in the case of jurisdiction over civilians accompanying the force, help may finally be on its way in the form of Senate Bill 768 or House Bill 3380, now working their way through Congress.

As for sovereignty disputes with host nations over SOFA jurisdiction and reciprocity issues, here too, there are some new and encouraging developments in the Philippines and Eastern Europe. Albeit after the United States vacated its bases in the Philippines and removed its armed forces from the islands, the United States did ultimately negotiate a Visiting Forces Agreement that was ratified by the Philippine Senate in 1999.⁸⁴ In Eastern Europe, the Partnership for Peace (PFP) nations are enjoying reciprocal SOFAs with the United States. Perhaps recognizing the need for greater jurisdictional equality between nations, Congress enacted legislation permitting the President to grant reciprocal SOFA rights to the PFP nations by means of executive international agreements.⁸⁵

Thus, while some international criminal jurisdiction issues are being addressed, others remain, and new ones emerge. The military lawyer overseas must be aware of the jurisdictional gaps and issues, discussed supra, to better balance competing jurisdictional interests, to reduce the risk of potential conflict between states, and to increase the chances of mission success.

82. Lieutenant Colonel Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 75-76 (1996).

83. UCMJ arts. 92, 109, 134 (LEXIS 2000).

84. The Philippine Senate approved a lesser visiting forces agreement on May 25, 1999, that generally gave the United States jurisdiction over U.S. soldiers committing offenses while on duty, and the Philippines have jurisdiction for offenses committed while off duty. Jim Gomez, *Philippine Senators Approve Resolution Endorsing Approval of U.S.*, A.P. WIRE SERV., May 25, 1999.

85. Telephone Interview with Lieutenant Colonel Manuel E. F. Supervielle, Chair, International and Operational Law Department, The Judge Advocate General's School, Charlottesville, Va. (Dec. 2, 1999).