

THE FUTURE OF CRIMINAL JURISDICTION OVER THE DEPLOYED AMERICAN SOLDIER: FOUR MAJOR TRENDS IN BILATERAL U.S. STATUS OF FORCES AGREEMENTS

INTRODUCTION

Prison abuse in Iraq rapidly became global news when the Abu Ghraib photographs surfaced in the spring of 2004.¹ In one photograph, a hooded inmate wears nothing but a tattered blue shawl and stands hunched over with his arms outstretched and his fingers affixed to electric wires.² In another, a nineteen-year-old female Army private smiles atop a triangular pile of nude, blindfolded prisoners.³ In perhaps the most infamous photograph, the same private holds a leash tied around the neck of a nude male prisoner who is sprawled on the prison floor.⁴

While some degree of criminal conduct by a large population of visiting forces may be inevitable, the Abu Ghraib prison scandal was particularly outrageous. The United States, which has exclusive criminal jurisdiction over its forces in Iraq,⁵ is trying its servicemembers in military tribunals for these abuses.⁶ However, it is atypical for a large, visiting military force to have exclusive criminal jurisdiction over its members in the long-term.⁷ Under most contemporary treaties or agreements on criminal jurisdiction, a nation that hosts a visiting force shares jurisdiction over that force with visiting military

¹ Larry Seaquist, *US Military's Bad-Guy Dragnet—A Terrible Way to Win a War*, CHRISTIAN SCI. MONITOR, May 5, 2004, at 9.

² CBS News, *Abuse of Iraqi POWs by GIs Probed*, Apr. 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.

³ *Id.*; see also Eric Schmitt, *The Conflict in Iraq: Body in a Mosque; Marine Set for Questioning in Death of Wounded Iraqi*, N.Y. TIMES, Nov. 17, 2004, at A12 (describing incident involving a U.S. Marine who shot a disarmed Iraqi combatant in a mosque in Falluja, Iraq).

⁴ CBS News, *supra* note 2.

⁵ Order 17, issued by the Coalition Provisional Authority (CPA), provides immunity to U.S. forces from Iraqi laws. United Press International, *Analysis: U.S. Forces Status in Iraq Ambiguous*, Apr. 23, 2004, <http://www.washtimes.com/upi-breaking/20040423-034144-4829r.htm>.

⁶ Thom Shanker & Dexter Filkins, *The Struggle for Iraq: Army Punishes 7 with Reprimands for Prison Abuse*, N.Y. TIMES, May 4, 2004, at A1.

⁷ See *infra* Part III.

authorities. History suggests that the immunity American troops currently enjoy in Iraq may grow more controversial with time.

I. THE EMERGING QUESTION OF CRIMINAL JURISDICTION OVER AMERICAN SOLDIERS DEPLOYED OVERSEAS

Uncertainty over the status of U.S. forces in Iraq is not the only cause for concern. Washington plans to deploy troops to a number of locations where the United States has historically had little or no military presence.⁸ Pentagon officials recently conducted a Global Posture Review, in which they determined that the current U.S. base structure is ill-suited to meet the challenges of “radical Islam [and] Third World regimes such as North Korea and Iran that are bent on acquiring a nuclear arsenal.”⁹ Consequently, Washington plans to deploy forces currently stationed near the former Soviet Union to so-called “lily pad” bases that will be small, self-sufficient, and isolated from host communities.¹⁰

For Pentagon officials, Turkey’s refusal to allow U.S. soldiers access into Iraq during the 2003 invasion, as well as Saudi Arabia’s similar unwillingness to permit attacks from its soil, demonstrate the need for more installations near the Middle East.¹¹ Defense officials predict that repositioning will be a “rolling process” developing over the next ten years.¹² Prospective locations include the African nations of Senegal, Uganda, Djibouti and Ethiopia, as well as the Baltic states of Latvia, Lithuania and Estonia.¹³ In Central Asia, the United States has already deployed at least 800 troops to Uzbekistan and 1,200 U.S.-led troops to neighboring Kyrgyzstan.¹⁴

⁸ See generally Andrew Krepinevich, *The New Pax Americana: Restructure Base Strategy, Defense Program*, DEF. NEWS, Sept. 20, 2004, available at <http://www.chinfo.navy.mil/navpalib/www/rhumblines/rhumblines536.doc>.

⁹ *Id.*

¹⁰ See *id.*

¹¹ *Id.*

¹² Associated Press, *U.S. Expands Military Outposts Worldwide*, Sept. 22, 2004, <http://msnbc.msn.com/id/6072771>.

¹³ *Id.*; ANNI P. BAKER, AMERICAN SOLDIERS OVERSEAS: THE GLOBAL MILITARY PRESENCE 173 (2004); see also Ann Scott Tyson, *New US Strategy: ‘Lily Pad’ Bases*, CHRISTIAN SCI. MONITOR, Aug. 10, 2004, available at <http://www.globalpolicy.org/empire/intervention/2004/0810lilypad.htm>.

¹⁴ Associated Press, *Uzbekistan Reconsiders Hosting U.S. Air Base: Foreign Ministry Says Base Was Intended Only for Post Sept. 11 Efforts*, July 7, 2005, <http://www.msnbc.msn.com/id/8499519>.

When the United States builds large military installations overseas, it generally negotiates a Status of Forces Agreement (SOFA) with the nation receiving American forces.¹⁵ SOFAs address a variety of issues related to the deployment and basing of American forces.¹⁶ These include the provision of facilities and training areas to U.S. forces, tax and toll exemptions, utilities, driver licensing, entry and exit procedures, contracting, civil claims, and criminal jurisdiction.¹⁷ SOFA provisions on criminal jurisdiction are often controversial.¹⁸ Under customary international law, countries have jurisdiction over all crimes committed on their territory, committed by citizens and foreign nationals alike.¹⁹ Thus by signing a SOFA, host nations voluntarily relinquish a degree of their sovereign authority.

The North Atlantic Treaty Organization (NATO) SOFA²⁰ is a model for bilateral U.S. agreements on criminal jurisdiction.²¹ The NATO SOFA divides the power to prosecute visiting soldiers among the sending state and the receiving (host) state. By dividing this authority, the NATO SOFA eases a tension arising from each state's inherent interest in criminal jurisdiction.²² In theory, this allocation of criminal jurisdiction permits the sending state to maintain discipline over its force and allows the receiving state to exercise its inherent right to prosecute all individuals, including foreign soldiers, who commit offenses on its territory.²³ The NATO SOFA represents the agreement of forty-eight nations on how to best accommodate these competing sovereign interests.²⁴

¹⁵ "Status of Forces Agreements" as referred to in this Comment includes exchanges of notes, defense cooperation agreements or arrangements, and other bilateral or multilateral agreements dealing with the status of visiting armed forces while deployed or stationed in the territory of a host nation.

¹⁶ Mayur Patel, *The Legal Status of Coalition Forces in Iraq After the June 30 Handover*, ASIL INSIGHTS, Mar. 2004, http://www.asil.org/insights/insigh129.htm#_edn3.

¹⁷ See generally THE HANDBOOK OF THE LAW OF VISITING FORCES (Dieter Fleck ed., 2001).

¹⁸ Patel, *supra* note 16.

¹⁹ See Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 171 (1994).

²⁰ North Atlantic Treaty: Status of Forces, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA].

²¹ Youngjin Jung & Jun-Shik Hwang, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT'L L. REV. 1103, 1116 (2003).

²² See Lepper, *supra* note 19, at 171.

²³ See generally *id.*

²⁴ NATO SOFA, *supra* note 20, art. VII. There are currently twenty-six Parties to the NATO SOFA and thirty-two Parties to the Agreement of the States Parties to the North Atlantic Treaty and Other States Participating in the Partnership for Peace Regarding the Status of Their Forces, June 19, 1995, entered into force January 13, 1996, T.I.A.S. No. 12,666 [hereinafter PFP SOFA]. Ten of the thirty-two Parties to the PFP SOFA are also Parties to the NATO SOFA. Article I of the PFP SOFA extends the provisions of the NATO SOFA to all Parties to the PFP SOFA.

American officials in Iraq were eager to negotiate a SOFA²⁵ after sovereignty was transferred to the Interim Government by the Coalition Provisional Authority.²⁶ However, negotiations were postponed after concerns surfaced about the validity of any agreement signed by appointed members of the Interim Government.²⁷ Grand Ayatollah Ali Sistani, Iraq's top Shi'a cleric, publicly stated that only a directly elected Iraqi government can negotiate treaties.²⁸ Consequently, the SOFA negotiations were rescheduled for sometime after Iraq elects its government and ratifies²⁹ its constitution.³⁰

A comprehensive study of foreign criminal jurisdiction is particularly appropriate as the United States contemplates a significant realignment of its military resources. This Comment examines the revision and negotiation history of U.S. criminal jurisdiction agreements and arrangements with a number of non-NATO host countries since the end of World War II. It identifies four major trends that will shape the future of criminal jurisdiction over the deployed American soldier.

Part II of this Comment provides important background on the common law history of foreign criminal jurisdiction as well as the structure and substance of the NATO SOFA. Part III identifies four trends in bilateral U.S. agreements on criminal jurisdiction since 1945. Section III.A observes that the United States generally does not deploy large numbers of peacetime troops overseas without first negotiating a SOFA. Section III.B observes that host nations threatened by imminent armed attack are more willing to yield to U.S. criminal jurisdiction. Section III.C examines the amendment and renegotiation of U.S. SOFAs with the Philippines, the Republic of Korea (ROK), and Japan. Based on these findings, Section III.C argues that criminal jurisdiction agreements covering large numbers of U.S. troops stationed in peacetime are increasingly taking the form of the NATO model. Section III.D, however, observes that highly publicized crimes may draw challenges to the basic and

²⁵ Some politicians in Iraq favor a SOFA as well. According to Ahmed Chalabi, head of the Iraqi National Congress: "We need the American forces here . . . we should have a status of forces agreement." *Morning Edition: Ahmed Chalabi Talks About His and His Country's Relationship with the United States* (National Public Radio broadcast, Feb. 1, 2005).

²⁶ Robin Wright & Colum Lynch, *U.N. Iraq Resolution a Tough Sell*, WASH. POST, Apr. 26, 2004, at A1.

²⁷ *Id.*; see also *All Things Considered: Nathan Brown Discusses Where the Iraqi National Assembly Goes from Here* (National Public Radio broadcast, Feb. 14, 2005).

²⁸ Wright & Lynch, *supra* note 26.

²⁹ *Id.*

³⁰ At the time of this writing, the United States has a sizable military presence in Iraq and Afghanistan.

essential tenets of NATO criminal jurisdiction. In Part IV, this Comment examines the implications of these trends for future U.S. base agreements.

II. THE NATO STATUS OF FORCES AGREEMENT: A PARADIGM

A. *The Historical Development of Foreign Criminal Jurisdiction*

Judicial decisions and international agreements before 1945 extended sovereign immunity to visiting military forces under what became known as “the law of the flag.”³¹ Under this doctrine, a military force “operating on foreign soil is in no way subject to the territorial sovereign and exercises an exclusive right of jurisdiction over its members.”³² After World War II, the law of the flag gave way to a broader conception of host jurisdiction.³³ The NATO SOFA, signed in 1951, establishes a division of criminal jurisdiction that permits host authorities to prosecute visiting soldiers for certain offenses.³⁴

The U.S. Supreme Court’s decision in *The Schooner Exchange v. McFaddon* was one of the earliest commentaries on foreign criminal jurisdiction.³⁵ In *The Schooner Exchange*, the plaintiff sued to recover a commercial vessel (the “Exchange”) that was confiscated by the French during the Napoleonic war, converted into a warship, and renamed the “Balaou.”³⁶ The original American owners initiated the lawsuit after the ship had to put in to Philadelphia for repairs.³⁷ The Court recognized exclusive and absolute U.S. jurisdiction over its territory, though it held for the French on sovereign

³¹ Lepper, *supra* note 19, at 170–71; see Paul J. Conderman, *Jurisdiction*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 99, 99–101 (Dieter Fleck ed., 2001) (observing the extension of sovereign immunity to visiting military forces in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), *Coleman v. Tennessee*, 97 U.S. (7 Otto) 509, 515 (1878), *Tucker v. Alexandroff*, 183 U.S. 424, 433 (1901), as well as the Panama Supreme Court case, *Republic of Panama v. Schwartzfinger* (1925), and the Bustamonte Code, which was annexed to the 1928 Convention on Private International Law and subsequently adopted by most nations in Latin America); DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 186–87 (2001) (noting that the “key” to Chief Justice Marshall’s extension of sovereign immunity in *The Schooner Exchange* was the fact that the French vessel was considered a “public armed ship”).

³² See Lepper, *supra* note 19, at 171 (quoting S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 12 (1971)).

³³ Conderman, *supra* note 31, at 101.

³⁴ *Id.* The Brussels Agreement, signed by France, the United Kingdom, and the Benelux countries in 1949, does not recognize the principle of visiting force immunity. Instead, all offenses committed by the visiting force were subject to the jurisdiction of the host nation under the Agreement. *Id.*

³⁵ Lepper, *supra* note 19, at 170.

³⁶ 11 U.S. (7 Cranch) 116 (1812).

³⁷ BEDERMAN, *supra* note 31, at 187.

immunity grounds.³⁸ Chief Justice John Marshall observed that the ship was “under the immediate and direct command of the sovereign” and was “employed . . . in national objects.”³⁹ He reasoned that military forces should be immunized because they are the representatives of a sovereign nation and because, as a practical matter, commanders must have sole authority to discipline their ranks.⁴⁰

The decision in *The Schooner Exchange* also recognized the principle of territorial sovereignty. In dictum, Chief Justice Marshall observed that a foreign commercial vessel should not be immunized, since it would be “inconvenient and dangerous to society, and would subject the laws to continual infraction” if foreigners “did not owe . . . local allegiance.”⁴¹ To maintain law and order, nations must be able to enforce criminal law within their territories, over both citizens and foreigners.⁴² Chief Justice Marshall’s distinction between commercial and public acts suggests that if the Exchange was a foreign commercial vessel as opposed to a warship under the command of the French government, immunity would not have applied.⁴³

As a general rule, foreign military forces had exclusive jurisdiction over their members in the 150 intervening years between *The Schooner Exchange* and World War II.⁴⁴ However, after World War II, nations slated to host foreign military forces increasingly asserted their sovereign rights.⁴⁵ A growing sense of national sovereignty and pride undoubtedly contributed to shared jurisdiction in the NATO SOFA.⁴⁶ Nonetheless, this factor was not necessarily predominant considering the unique circumstances that gave rise to the NATO alliance.

³⁸ Lepper, *supra* note 19, at 170.

³⁹ *The Schooner Exchange*, 11 U.S. at 144.

⁴⁰ See Lepper, *supra* note 19, at 171.

⁴¹ *The Schooner Exchange*, 11 U.S. at 144.

⁴² See Lepper, *supra* note 19, at 171; BEDERMAN, *supra* note 31, at 187. The important distinction between *ius imperii* (public acts) and *ius gestionis* (commercial activity) was born in *The Schooner Exchange*. Commercial activity undertaken by a state is often not covered by sovereign immunity. *Id.*

⁴³ BEDERMAN, *supra* note 31, at 187. Chief Justice Marshall also reasoned that receiving states waive their territorial sovereignty by accepting foreign forces. See Dieter Fleck, *Introduction to THE HANDBOOK OF THE LAW OF VISITING FORCES* 3, 4 (Dieter Fleck ed., 2001) (quoting Chief Justice Marshall’s statement that a “case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions”).

⁴⁴ Lepper, *supra* note 19, at 171.

⁴⁵ See *id.*; BEDERMAN, *supra* note 31, at 188 (noting that the conception of the state changed after World War II and consequently the principle of absolute sovereign immunity came under attack).

⁴⁶ Conderman, *supra* note 31, at 101; Lepper, *supra* note 19, at 17.

After the Iron Curtain descended in 1945, sizable contingents of American troops were stationed around the periphery of the Soviet Union.⁴⁷ Peter Rowe describes the Cold War as an “unusual situation” in which “large numbers of the members of a visiting force . . . [were] present in the territory of another state during peacetime and with the consent of the host state”⁴⁸ Prior to 1945, military forces conducting peacetime operations generally traveled to foreign lands only in transit,⁴⁹ for temporary deployments, or to conduct limited military duties.⁵⁰ In contrast, the NATO Treaty contemplated a near-permanent stationing of foreign forces to deter a Soviet invasion of Western Europe.⁵¹ Therefore, while an upswell in nationalism certainly contributed to the development of shared jurisdiction over foreign military forces, this model grew out of an unprecedented strategic necessity.

After the United States declared war against Germany and its allies in December of 1941, American authorities claimed exclusive jurisdiction over military units being sent to the United Kingdom. In need of American troops to defend them from German attack, the British Parliament conceded exclusive jurisdiction to U.S. authorities in 1942.⁵² However, by 1946 it became clear that “what might have been accepted in wartime would not be accepted in peacetime.”⁵³ In nations like the United Kingdom, local jurisdiction over crimes committed by U.S. servicemembers was completely ousted.⁵⁴ To permit the stationing of large numbers of foreign forces during peacetime, the NATO SOFA allocated criminal jurisdiction between the sending and receiving states.

B. Criminal Jurisdiction in the NATO SOFA

While sending states traditionally had exclusive jurisdiction over their deployed forces under the law of the flag, the relevance and importance of territorial sovereignty grew in the years following World War II. It is

⁴⁷ See Peter Rowe, *Historical Developments Influencing the Present Law of Visiting Forces*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 11, 20 (Dieter Fleck ed., 2001) (stating that, in relation to the NATO SOFA discussions, “what might have been accepted in wartime would not be accepted in peacetime”).

⁴⁸ *Id.* at 19.

⁴⁹ See *Coleman v. Tennessee*, 97 U.S. (7 Otto) 509, 515 (1878); *Tucker v. Alexandroff*, 183 U.S. 424, 433 (1901).

⁵⁰ Conderman, *supra* note 31, at 101.

⁵¹ See Rowe, *supra* note 47, at 21.

⁵² *Id.* at 17–18.

⁵³ *Id.* at 20.

⁵⁴ *Id.*

generally recognized today that nations have the exclusive right to punish individuals for committing crimes within their borders, unless they explicitly or implicitly consent to surrender jurisdiction.⁵⁵ The NATO SOFA reconciles “the principles of territorial sovereignty with the principle that the sending state has the right to try its own personnel.”⁵⁶ Under Article VII of the NATO SOFA, criminal jurisdiction over a visiting military force and its civilian component is allocated between the host state and the sending state.⁵⁷ This jurisdictional framework has become the paradigm for modern SOFAs.⁵⁸

In *The Handbook of the Law of Visiting Forces*, Paul J. Conderman provides a succinct overview of criminal jurisdiction under the NATO SOFA:

Both the sending and receiving states are generally given exclusive jurisdiction over offenses which violate their own law, but not the law of the other state. Where a crime violates the law of both jurisdictions, a system of priorities is established. The sending state is given the primary right to exercise jurisdiction over its personnel as to offenses arising out of the performance of official duty and offenses solely against its security, property, or personnel. The host nation has primary jurisdiction in all other cases. In cases of particular importance to one state, a waiver of jurisdiction may be obtained.⁵⁹

In addition to jurisdiction, Article VII of the NATO SOFA addresses criminal investigations, arrests, and custody transfers. It mandates that the receiving state provide the accused with procedural protections and it limits the sending

⁵⁵ *Wilson v. Girard*, 354 U.S. 524, 529 (1957); *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 20 (1965) (“A state has jurisdiction to enforce within its territory a rule of law validly prescribed by it.”). Two notable exceptions exist under customary international law. First, the receiving country has no jurisdictional power over an occupation force. *Bennett v. Davis*, 267 F.2d 15, 17 (10th Cir. 1959) (U.S. court-martial appropriate for crime committed in Austria because the country was occupied by Allied Powers at the time). Second, the receiving country cannot prosecute enemy soldiers for crimes committed during wartime. *Dow v. Johnson*, 100 U.S. 158, 158 (1879) (holding that when two countries are at war, one nation cannot extend criminal jurisdiction over the other); *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878) (holding that the State of Tennessee had no jurisdiction over a Union soldier who committed a murder in Tennessee during the Civil War); *In re Lo Dolce*, 106 F. Supp. 455, 455 (W.D.N.Y. 1952) (holding that an American soldier could not be extradited to Italy for his alleged crime during World War II because when the crime was allegedly committed Italy was an enemy of the United States).

⁵⁶ Conderman, *supra* note 31, at 103.

⁵⁷ *See* Lepper, *supra* note 19, at 171.

⁵⁸ Conderman, *supra* note 31, at 108.

⁵⁹ *Id.* at 103.

state in carrying out capital punishment. The following analysis examines Article VII of the NATO SOFA in detail.

1. *Exclusive Jurisdiction*

Under paragraph 2 of Article VII of the NATO SOFA:

- (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.⁶⁰
- (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.⁶¹

Under paragraph 2(a), the sending state has exclusive jurisdiction over crimes recognized by its laws but not recognized by the laws of the receiving state. For example, an American soldier stationed in Germany will be subject to exclusive U.S. jurisdiction if he deserts the military or goes Absent Without Leave (AWOL).⁶² The Uniform Code of Military Justice (UCMJ) recognizes these acts as crimes, yet they have no counterpart under German criminal law. Under paragraph 2(b), the receiving country has exclusive jurisdiction for crimes recognized by its laws but not recognized by the military laws of the sending country.⁶³ For example, Singapore once made it illegal to import or sell chewing gum.⁶⁴ If Singapore and the United States signed a SOFA with provisions identical to Article VII, paragraph 2(b) of the NATO model, then an American soldier accused of selling chewing gum would be subject to the exclusive jurisdiction of Singapore.⁶⁵

⁶⁰ NATO SOFA, *supra* note 20, art. VII, para. 2(a).

⁶¹ *Id.* art. VII, para. 2(b).

⁶² Lepper, *supra* note 19, at 172–73.

⁶³ NATO SOFA, *supra* note 20, art. VII, para. 2(b).

⁶⁴ Lepper, *supra* note 19, at 173.

⁶⁵ *Id.*

2. *Concurrent Jurisdiction*

Under paragraph 1 of the NATO SOFA:

- (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State.
- (b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.⁶⁶

Jurisdiction is concurrent when the conduct in question falls within the criminal or disciplinary jurisdiction of the sending state, as well as the criminal jurisdiction of the host state. In these cases, either the sending or receiving state will have the primary right to prosecute depending on the nature of the alleged crime.

Paragraph 3 establishes which state has primary jurisdiction in concurrent cases:

- (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
 - (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
 - (ii) offences arising out of any act or omission done in the performance of official duty.
- (b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.⁶⁷

⁶⁶ NATO SOFA, *supra* note 20, art. VII, para. 1.

⁶⁷ *Id.* art.VII, para. 3.

Sections (a)(i) and (a)(ii) establish when the sending state will have primary jurisdiction. Section (a)(i) refers to *inter se* crimes, defined as offenses that are committed solely against the property or security of the sending country and crimes where the perpetrator and victim are citizens of the sending country. Section (a)(ii) grants the sending state jurisdiction over acts or omissions done in the performance of official duty.⁶⁸ In concurrent jurisdiction cases where the crime is not *inter se*⁶⁹ and did not arise from official duty,⁷⁰ the receiving country has the primary right to exercise jurisdiction.⁷¹

The official duty provision is the most controversial aspect of concurrent jurisdiction.⁷² Two issues are central: “(1) whether a particular offense arises out of the performance of official duty” and “(2) who makes this determination.”⁷³ Generally accepted examples of official duty crimes include speeding and reckless driving involving military vehicles operated in the line of duty by visiting force personnel. Sending states often issue certificates as to whether a particular offense arose from an official duty.⁷⁴ Receiving states may give these certificates differing weight, although sending state determinations of official duty are accepted in the vast majority of cases.⁷⁵

a. Waiver of the Primary Right to Exercise Jurisdiction

The NATO SOFA also permits the sending and receiving states to waive their primary right to prosecute in concurrent cases.⁷⁶ States holding the primary right must give “sympathetic consideration” to a waiver request so long as the requesting state considers the “waiver to be of particular importance.”⁷⁷ When the state having the primary right to prosecute decides

⁶⁸ This provision echoes Chief Justice Marshall’s distinction between commercial activity and public acts in *The Schooner Exchange*. See BEDERMAN, *supra* 31, at 187.

⁶⁹ NATO SOFA, *supra* note 20, art. VII, para. 3(a)(i).

⁷⁰ *Id.* art. VII, para. 3(a)(ii).

⁷¹ *Id.* art. VII, para. 3(b).

⁷² See Conderman, *supra* note 31, at 111.

⁷³ *Id.*

⁷⁴ See *id.* at 111–12.

⁷⁵ Lepper, *supra* note 19, at 176.

⁷⁶ NATO SOFA, *supra* note 20, art. VII, para. 3(c). The “State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.” *Id.*

⁷⁷ *Id.* European countries receiving U.S. troops have historically waived their primary jurisdiction in the vast majority of cases. Lepper, *supra* note 19, at 176.

not to exercise jurisdiction, it must notify the authorities of the other state “as soon as practicable.”⁷⁸

3. Arrest, Custody, and Rights of the Accused

Under the NATO SOFA, the sending and receiving states will assist each other “in the carrying out of all necessary investigations[,] . . . the collection and production of evidence,”⁷⁹ and “in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State.”⁸⁰ After a foreign soldier is arrested, he or she will be handed over to “the authority which is to exercise jurisdiction.”⁸¹ However, if the accused is in the custody of the sending state, he or she will remain there until charged⁸² by local authorities.⁸³

The NATO SOFA also mandates that a receiving country afford the accused certain procedural protections. These include a prompt and speedy trial, legal representation, an interpreter, and a compulsory process for obtaining witnesses in favor of the accused.⁸⁴ In addition, the sending state

⁷⁸ NATO SOFA, *supra* note 20, art. VII, para. 3(c).

⁷⁹ *Id.* art. VII, para. 6(a).

⁸⁰ *Id.* art. VII, para. 5(a).

⁸¹ *Id.*

⁸² There has been some scholarly confusion on this point. See Jung & Hwang, *supra* note 21, at 1122 (under the NATO SOFA the sending state retains custody until case is finally decided); Jaime M. Gher, Comment, *Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to Be Learned from the United States-Japan Agreement*, 37 U.S.F. L. Rev. 227, 235 (2002) (under the NATO SOFA the “United States may take and retain physical custody of an accused serviceman until final resolution of the criminal case by the host nation”). The NATO SOFA provides that the sending state retains custody only until the accused is “charged” by the receiving state. Under the plain language of the agreement, the United States does not have the right to retain custody until the case is finally decided:

The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is *charged* by the receiving State.

NATO SOFA, *supra* note 20, art. VII, para. 5(c) (emphasis added).

In practice, the United States will often seek custody of its soldiers pending completion of all judicial proceedings since host investigation, interrogation, and detention of criminal suspects may not accord with American notions of due process. Conderman, *supra* note 31, at 121. As Gher and other commentators correctly point out, military regulations “[call] for the United States to maximize jurisdiction to the extent permitted by the applicable SOFA.” Gher, *supra* note 82, at 234; see Conderman, *supra* note 31, at 121 n.114 (pointing out similar policies expressed in U.S. Army, Navy, and Air Force regulations). However, under the NATO SOFA the host state may obtain custody immediately after its investigation and filing of charges.

⁸³ NATO SOFA, *supra* note 20, art. VII, para. 5(c).

⁸⁴ *Id.* art. VII, para. 9(a)-(g). The NATO SOFA mandates that the receiving state afford the following protections to the sending state’s personnel:

cannot carry out a death sentence in the receiving state when “legislation of the receiving State does not provide for such punishment in a similar case.”⁸⁵

III. FOUR MAJOR TRENDS IN BILATERAL U.S. STATUS OF FORCES AGREEMENTS

A. *Large U.S. Bases Overseas Require a Criminal Jurisdiction Agreement*

1. *The U.S. Interest in SOFAs*

The United States is not likely to build large military installations without a SOFA in place that grants the military a degree of jurisdictional authority over its troops.⁸⁶ As expressed in *The Schooner Exchange*, a foreign military force has a strong interest in maintaining order and discipline in its ranks.⁸⁷ Towards this end, U.S. authorities seek maximum jurisdiction over troops deployed overseas.⁸⁸ This policy originates from the Senate Resolution accompanying ratification of the NATO SOFA in 1953.⁸⁹ Specifically, the Resolution mandates that U.S. commanders request a waiver of host state jurisdiction when “there is a danger that the accused will not be protected because of the absence or denial of Constitutional rights he would enjoy in the United States.”⁹⁰ Several U.S. courts have expressed a preference for military court-

- (a) to a prompt and speedy trial;
- (b) to be informed, in advance of trial, of the specific charge or charges made against him;
- (c) to be confronted with the witnesses against him;
- (d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
- (e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
- (f) if he considers it necessary, to have the services of a competent interpreter; and
- (g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

Id.

⁸⁵ *Id.* art. VII, para. 7(a).

⁸⁶ See Rowe, *supra* note 47, at 27 (“Where the armed forces of one country are present with consent in the territory of another some form of status of forces agreement will need to be concluded.”).

⁸⁷ 11 U.S. (7 Cranch) 116, 144 (1812).

⁸⁸ Maj. Mark R. Ruppert, *Criminal Jurisdiction over Environmental Offenses Committed Overseas: How to Maximize and When to Say “No,”* 40 A.F. L. REV. 1, 8 (1996). *E.g.*, Gher, *supra* note 82, at 234 (Army Regulation 27-50 “calls for the United States to maximize jurisdiction to the extent permitted by the applicable SOFA”). See also Lepper, *supra* note 19, at 179.

⁸⁹ Ruppert, *supra* note 88, at 8.

⁹⁰ *Id.* See generally NATO SOFA, *supra* note 20.

martials as opposed to foreign proceedings that do not provide defendants with the protections⁹¹ of the U.S. Constitution.⁹² Derived from these sources, the U.S. military has established a fundamental and long-standing rule that the United States will seek maximum jurisdiction over its deployed forces in all cases.⁹³

The NATO SOFA and its variants shield deployed American servicemembers from unconstitutional methods of interrogation, prosecution, and punishment. Where troops are deployed without the protections of a SOFA, either through practice or informal assurances, the host nation often waives its jurisdiction over offenses committed by American military personnel on their soil, in exchange for U.S. assurances that the individual will be dealt with appropriately under U.S. criminal law.⁹⁴ Through diplomatic and common sense methods, American commanders routinely negotiate criminal jurisdiction over U.S. servicemembers.⁹⁵

⁹¹ Under the Fifth Amendment of the U.S. Constitution, no:

person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. V. The Sixth Amendment provides that in:

all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. In addition, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” under the Eighth Amendment of the U.S. Constitution. U.S. CONST. amend. VIII.

⁹² Ruppert, *supra* note 88, at 8 (citing *Williams v. Froehlke*, 490 F.2d 998, 998 (2d Cir. 1974) and *Gallagher v. United States*, 423 F.2d 1371, 1374 (Ct. Cl. 1970)).

⁹³ Lepper, *supra* note 19, at 179 (“United States will maximize its exercise of jurisdiction in all FCJ [foreign criminal jurisdiction] cases”).

⁹⁴ *E.g.*, Maj. Brian H. Brady, *The Agreement Relating to a United States Military Training Mission in Saudi Arabia: Extrapolated to Deployed Forces?*, 1995 ARMY LAW. 17 (1995) (Saudi Arabian authorities customarily waive criminal jurisdiction over visiting U.S. forces, though no formal SOFA exists). Jurisdictional arrangements may also be effectuated by lower level agreements than SOFAs. Hiroshi Honma et al., *United States Forces in Japan: A Bilateral Experience*, in *THE HANDBOOK OF THE LAW OF VISITING FORCES* 367 (Dieter Fleck ed., 2001). Laws or regulations of the respective states may interpret or apply a SOFA provision in a manner that is not mutually accepted. *Id.* There are few references to these agreements, regulations, or laws, yet they nonetheless affect the operation of foreign criminal jurisdiction in a particular nation. *See id.*

⁹⁵ *See* Lepper, *supra* note 19, at 187.

The United States generally does not maintain a large, standing military presence in nations where a SOFA has not been signed.⁹⁶ Customary international law gives nations exclusive authority to prosecute foreign soldiers, unless this sovereign right is waived in a SOFA or comparable agreement. This potential exercise of exclusive host jurisdiction is unfavorable for the U.S. military, especially when the host nation does not recognize constitutional guarantees for accused.⁹⁷ Consequently, the United States generally deploys relatively small numbers of military personnel on a temporary basis to nations that have not signed a SOFA.

For example, Thailand hosts U.S. forces but has not signed a SOFA.⁹⁸ Under the Thai Penal Code, accused persons are detained relative to the gravity of the charge.⁹⁹ For example, a U.S. servicemember charged with homicide could be detained for up to eighty-four days while local authorities conduct an investigation.¹⁰⁰ In addition, Thai criminal procedures do not recognize a right to trial by jury or a right to appointed counsel except for the most serious offenses.¹⁰¹ By not signing a SOFA, Thailand retained its sovereign right to prosecute visiting American forces. In turn, the United States does not have a significant military presence in the country. A small contingent of U.S. Marines travel to Thailand for approximately two weeks every year to conduct Cobra Gold,¹⁰² a joint military training exercise.¹⁰³

Yemen is another nation that has not signed a SOFA with the United States but nonetheless receives U.S. forces.¹⁰⁴ As in Thailand, Yemeni criminal justice varies significantly from the U.S. system. The three primary sources of Yemeni law are Urf custom, Sacred Law (Shari'ah), and the Koran.¹⁰⁵ Urf is

⁹⁶ See *id.* at 172 (“The United States generally concludes SOFAs with nations in which it maintains a relatively large military presence.”).

⁹⁷ The U.S. policy of maximizing jurisdiction over American forces is undermined by the exercise of this right under customary international law.

⁹⁸ Lt. Col. W. A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 11.

⁹⁹ *Id.* at 12.

¹⁰⁰ *Id.*

¹⁰¹ Stafford, *supra* note 98, at 13.

¹⁰² See Exercise Cobra Gold 2004 Homepage, <http://www.apan-info.net/cobragold/> (last visited Nov. 4, 2005). In 2005, Thai, U.S., Japanese, and Singaporean armed forces participated in the exercise.

¹⁰³ The United States also has military personnel stationed in Thailand to conduct medical research. Armed Forces Research Institute of Medical Sciences Homepage, <http://www.afirms.org/> (last visited Nov. 4, 2005). In addition, some Marine Expeditionary Units temporarily visit Thailand while en route to destinations in Africa and the Middle East. Stafford, *supra* note 98, at 10.

¹⁰⁴ Stafford, *supra* note 98, at 14.

¹⁰⁵ *Id.*

an unwritten legal system that assigns criminal liability based on a notion that tribal bloodlines are unified.¹⁰⁶ As a result, if one commits a homicide, for example, that individual's entire family is jointly responsible for the crime.¹⁰⁷ Furthermore, under Sacred Law the accused has no right to trial by jury and counsel may only be appointed for serious offenses.¹⁰⁸ Methods of punishment can be severe. Capital punishment in Yemen may be carried out by crucifixion, stoning, decapitation, or by firing squad; penalties for lesser offenses include flogging and the severing of the right hand or leg.¹⁰⁹ The United States has a transient military presence in Yemen; American naval vessels dock at Yemeni ports only to refuel.¹¹⁰

The U.S. policy of maximizing jurisdiction over its forces thus derives in part from concerns that local criminal justice systems, such as those in Thailand and Yemen, will not afford accused American soldiers with a minimum of due process. From the U.S. perspective, SOFAs are beneficial because they permit U.S. authorities to exercise jurisdiction in a number of circumstances. SOFAs can benefit host nations as well. While states receiving U.S. forces waive their exclusive right to exercise jurisdiction over visiting American soldiers by signing a SOFA, a measure of local prosecutorial power is usually retained. Furthermore, nations often host U.S. forces to seek the economic, technological, and security benefits of a close relationship with the United States. SOFAs facilitate these relationships.

2. *A Case Study of the Bahrain SOFA*

a. *Historical Background*

For twenty years, the United States operated military installations and facilities in the Kingdom of Bahrain under the auspices of a SOFA governing criminal jurisdiction. The history of the U.S. military in Bahrain reveals the importance of SOFAs for the long-term stationing of American forces overseas.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 15.

¹¹⁰ *See id.* at 14. The *USS Cole* was attacked by terrorists while refueling in Yemen in 2000.

Since 1949, the U.S. Middle East Force¹¹¹ had been at docked in Jafair, Bahrain. However, when Bahrain became independent from British colonial rule in 1971, the status of American forces came into question.¹¹² To secure the continued stationing of the Middle East Force in Jafair, the United States negotiated a SOFA with Bahrain.¹¹³ Under Article 11 of the 1971 Bahrain SOFA, U.S. authorities exercised exclusive criminal jurisdiction over their military forces.¹¹⁴

However, by 1974 the United States was increasing its military activities in and around Bahrain.¹¹⁵ The aircraft carrier *Constellation* and two escort ships deployed to the Persian Gulf as part of CENTO¹¹⁶ exercises in the Indian Ocean, and in January of 1975, the United States reportedly requested the use of an undeveloped airfield on Masirah Island, Oman, prompting concern from Arab states.¹¹⁷ In light of U.S. support for Israel in the October War of 1973, as well as the higher profile of U.S. forces in the Persian Gulf, the governments of Egypt, Syria, and Libya urged Bahrain to suspend docking privileges for the U.S. Middle East Force.¹¹⁸ Bahraini authorities instead negotiated a 600% increase in annual rent for its Jafair facilities and renegotiated the U.S.-Bahrain SOFA to provide a measure of local jurisdiction over American forces.¹¹⁹

b. The 1975 Bahrain SOFA

In 1975, Bahrain and the United States reached an agreement establishing a shared system of criminal jurisdiction.¹²⁰ In several respects, the 1975 agreement is similar to the NATO SOFA. For example, both agreements permit the host nation to exercise exclusive criminal jurisdiction over certain

¹¹¹ The U.S. Middle East Force included aircraft, the flagship, and support facilities located in Bahrain. Deployment in Bahrain of the United States Middle East Force, U.S.-Bahr., Dec. 23, 1971, 22 U.S.T. 2184 [hereinafter 1971 Bahrain SOFA]; FRED A. LAWSON, BAHRAIN: THE MODERNIZATION OF AUTOCRACY 119 (1989).

¹¹² LAWSON, *supra* note 111, at 119.

¹¹³ 1971 Bahrain SOFA, *supra* note 111.

¹¹⁴ Article 11 states that in "particular cases, however, the authorities of the two governments may agree otherwise." *Id.*

¹¹⁵ LAWSON, *supra* note 111, at 120.

¹¹⁶ CENTO is an abbreviation for The Central Treaty Organization.

¹¹⁷ LAWSON, *supra* note 111, at 120.

¹¹⁸ *See id.*

¹¹⁹ *Id.*; Deployment in Bahrain of the United States Middle East Force, U.S.-Bahr., July 31, 1975, 26 U.S.T. 3027 [hereinafter 1975 Bahrain SOFA].

¹²⁰ *See generally* 1975 Bahrain SOFA, *supra* note 119. The 1975 Bahrain SOFA explicitly references the 1971 agreement. Criminal jurisdiction provisions were based on "several years experience with the implementation of Article 11 and . . . consultations between the two Governments." *Id.* pmbl.

offenses,¹²¹ and both permit the sending state to exercise jurisdiction over *inter se* crimes and crimes arising from the performance of official military duties.¹²² The 1975 Bahrain SOFA and NATO SOFA also provide the accused with similar procedural protections in local court proceedings.¹²³

However, there are also several notable differences between the two SOFAs. Bahrain's exclusive jurisdiction is limited to security offenses, a qualification¹²⁴ not contained in the exclusive jurisdiction language of the NATO SOFA.¹²⁵ In addition, the 1975 Bahrain SOFA required local authorities to notify the United States within fourteen days of learning of an American soldier's alleged criminal activity or else waive jurisdiction over the case.¹²⁶ In contrast, the NATO SOFA does not impose a statute of limitations on the host state. Provisions on custody transfers also vary; under the 1975 Bahrain SOFA, U.S. authorities transferred custody of the accused after a case

¹²¹ Compare 1975 Bahrain SOFA, *supra* note 119, para. 1 ("The Government of Bahrain shall have the exclusive right to exercise jurisdiction over members of the U.S. Force with respect to security offenses against the State of Bahrain punishable by the law of Bahrain when the acts or omissions giving rise to the alleged offense do not also constitute an offense under the law of the United States."), with NATO SOFA, *supra* note 20, art. VII, para. 2(b) ("The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.").

¹²² Compare 1975 Bahrain SOFA, *supra* note 119, para. 2(A) (The United states has jurisdiction over "those cases in which all the victims are members of the United States Force . . . [and] those cases which arise from an act or omission done in the performance of official duty."), with NATO SOFA, *supra* note 20, art. VII, paras. 3(a)(i)-(ii) (The sending state has "the primary right to exercise jurisdiction over a member of a force . . . in relation to . . . offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent . . . [and] offenses arising out of any act or omission done in the performance of official duty.").

¹²³ Compare 1975 Bahrain SOFA, *supra* note 119, paras. 3(A)-(I), with NATO SOFA, *supra* note 20, art. VII, paras. 9 (a)-(g) (listing procedural protections owed to members of the sending state's force by the receiving State authorities).

¹²⁴ Despite this limitation on exclusive jurisdiction, Bahraini officials could still secure jurisdiction over a deployed American soldier by issuing a formal certificate of fact to U.S. officials, so long as the crime in question was "of particular importance" to Bahrain and did not qualify as an *inter se* offense, or an offense arising from official military duty. 1975 Bahrain SOFA, *supra* note 119, para. 2.

¹²⁵ Compare 1975 Bahrain SOFA, *supra* note 119, para. 1 ("The Government of Bahrain shall have the exclusive right to exercise jurisdiction over members of the U.S. Force with respect to security offenses against the State of Bahrain punishable by the law of Bahrain when the acts of omissions giving rise to the alleged offense do not also constitute an offense under the law of the United States."), with NATO SOFA, *supra* note 20, art. VII, para. 2(b) ("The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.").

¹²⁶ See 1975 Bahrain SOFA, *supra* note 119, paras. 2(A)-(B). The SOFA provides for a fourteen-day extension upon Bahraini request. *Id.* para. 2.

was finally decided,¹²⁷ while under the NATO SOFA the sending state relinquishes custody after the host state issues its indictment.¹²⁸ Furthermore, under the 1975 agreement there is no mechanism for Bahrain to request a waiver of U.S. jurisdiction.¹²⁹

As in the NATO SOFA,¹³⁰ the 1975 agreement affords U.S. soldiers certain procedural protections in Bahraini criminal courts.¹³¹ Both agreements provide that U.S. defendants have the right to a prompt trial, legal representation, and advance notice of pending charges.¹³² However, the Bahrain agreement lists several additional protections not enumerated in the NATO SOFA. The 1975 SOFA bans self-incrimination, improperly obtained confessions, and corporal punishment.¹³³ The agreement also requires that American servicemembers receive a public trial and the opportunity to cross-examine their accusers.¹³⁴ Jurisdiction in the 1975 Bahrain SOFA models the NATO SOFA in several

¹²⁷ *Id.* para. 4.

¹²⁸ NATO SOFA, *supra* note 20, art. VII, para. 5(c).

¹²⁹ 1975 Bahrain SOFA, *supra* note 119. *But cf.* NATO SOFA, *supra* note 20, art. VII, para. 3(c) (“The authorities of the State having the primary right [to exercise jurisdiction] shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.”).

¹³⁰ *See generally* NATO SOFA, *supra* note 20.

¹³¹ 1975 Bahrain SOFA, *supra* note 119, paras. 3(A)-(I). American personnel accused of crimes by Bahriani authorities have following rights:

- (A) To be tried as promptly as possible;
- (B) To be informed, in advance of trial, of the specific charge or charges made against him;
- (C) To be confronted with and to cross-examine the witnesses against him;
- (D) To have legal representation of his own choice for his defense, or, at his election, to have legal representation appointed by the Court at no cost to him under the same terms and conditions applicable to Bahraini citizens;
- (E) To be present at his trial which, consistent with public order and morality, shall be public;
- (F) To have the burden of proof placed upon the prosecution;
- (G) To be protected from the use of confession or other evidence obtained by illegal or improper means;
- (H) Not be compelled to testify against or otherwise incriminate himself;
- (I) Not to be subjected to any corporal punishment.

Id.

¹³² *Compare* NATO SOFA, *supra* note 20, paras. 9(a), (b), (c), (e) (stating that the accused is entitled to a speedy trial, to be informed of the charges in advance of trial, to be confronted with witnesses against him, and to have legal representation of choice or appointed counsel), *with* 1975 Bahrain SOFA, *supra* note 119, para. 3(A)-(D) (granting U.S. servicemembers “most favorable application of the rights of an accused under Bahraini law,” to include the right to be “tried as promptly as possible,” to be informed of specific charges in advance of trial, to “be confronted with and to cross-examine the witnesses against him,” and to have legal representation of choice or appointed counsel).

¹³³ 1975 Bahrain SOFA, *supra* note 119, paras. 3(G)-(I).

¹³⁴ *Id.*, paras. 3(C), (E). Local prosecutors have the burden of proof. *Id.* para. 3(F).

key respects, though on issues of waiver, custody, and procedural protection, the 1975 agreement is more favorable for the United States.¹³⁵ In 1977, the basing agreement for the Middle East Force expired, though the 1975 provisions on criminal jurisdiction were retained to cover the deployment of an Administrative Support Unit to Bahrain.¹³⁶

The U.S.-Bahrain defense relationship has strengthened during the last several decades. In 1987, the U.S. military upgraded its facility at Jafair and increased the number of destroyers attached to the Middle East Force.¹³⁷ In October of 1991, the United States and Bahrain signed a defense pact that was renewed in 2001.¹³⁸ Headquarters for the U.S. Navy's Fifth Fleet is located in Bahrain and is staffed by approximately 3,000 American military personnel.¹³⁹ Since the mid-1980s Bahrain has purchased F-16C fighter aircraft, M60A3 main battle tanks, Advanced Medium-Range Air-to-Air Missiles (AMRAAM), STINGER shoulder-fired anti-aircraft missiles, and Army Tactical Missile Systems from the United States.¹⁴⁰ Bahrain hosted 17,500 U.S. troops and 250 combat aircraft during Operation Desert Storm in 1991.¹⁴¹ The country also supported Operation Enduring Freedom¹⁴² and Operation Iraqi Freedom by hosting between 4,000 and 4,500 American troops.¹⁴³ The 1971 and 1975 SOFAs were precursors to the expansion of U.S. forces in Bahrain and facilitated the now close defense relationship¹⁴⁴ shared by the two nations.

B. Host Nations Threatened by Armed Attack Will Likely Yield to U.S. Criminal Jurisdiction

U.S. forces often deploy overseas to provide security for the host nation. The history of bilateral U.S. SOFAs suggests that when host nations are threatened by a superior military force they are more willing to yield to U.S. criminal jurisdiction. The United States has, for example, deployed forces to

¹³⁵ However, procedural protections added to the 1975 Bahrain SOFA are recognized and enforced in the legal systems of many NATO SOFA signatories.

¹³⁶ See Personnel, U.S.-Bahr., June 28, 1977, 28 U.S.T. 5313.

¹³⁷ LAWSON, *supra* note 111, at 121.

¹³⁸ KENNETH KATZMAN, CONG. RESEARCH SERV., BAHRAIN: KEY ISSUES FOR U.S. POLICY 4 (2005), available at www.fas.org/sgp/crs/mideast/95-1013.pdf. The details of this agreement are classified. *Id.*

¹³⁹ *Id.* at 3.

¹⁴⁰ *Id.* at 5.

¹⁴¹ Operation Desert Storm refers to the U.S. operation to drive Saddam Hussein out of Kuwait in 1991.

¹⁴² Operation Enduring Freedom refers to the U.S. campaign to oust the Taliban regime in Afghanistan. Operation Iraqi Freedom refers to the U.S. invasion of Iraq to depose Saddam Hussein.

¹⁴³ KATZMAN, *supra* note 138, at 4.

¹⁴⁴ *Id.* U.S. President George W. Bush designated Bahrain a "major non-NATO ally" in March of 2002.

Bahrain, Saudi Arabia, and the ROK during periods where each state was threatened by a neighboring country. These deployments were covered by defense agreements that granted the United States exclusive jurisdiction over its military forces.

1. *Bahrain During the Persian Gulf War*

In 1990, Iraqi dictator Saddam Hussein invaded Kuwait. The United States deployed approximately 500,000 troops to the Middle East to liberate the country from occupying forces. Approximately 17,500 U.S. troops were stationed in Bahrain to conduct Operation Desert Storm and to defend the small country from the Iraqi military.¹⁴⁵ On January 13, 1991, both countries signed a defense agreement granting the United States exclusive criminal jurisdiction over its forces in Bahrain, replacing the framework of shared jurisdiction under the 1975 and 1977 SOFAs.¹⁴⁶ The 1991 defense agreement references a growing regional threat.¹⁴⁷ Under its terms, U.S. forces were deployed to “assist in deterring . . . aggression” against Bahrain and to “preserve [its] territorial integrity” in light of the “unsettled conditions in the Gulf area, which threaten the security and safety of Bahrain.”¹⁴⁸ In return for its security services, the U.S. military secured exclusive jurisdiction.

2. *Saudi Arabia After World War II*

After World War II, King Ibn Saud of Saudi Arabia perceived neighboring Hashemites as a threat to his nation’s security.¹⁴⁹ The Saudi Arabian monarchy had displaced Hashemite groups from the emirate of Hijaz, which encompassed the holy cities of Mecca and Medina.¹⁵⁰ In the late 1940s, Great Britain was training and supporting forces in Iraq and Jordan, states both ruled by kings of the Hashemite dynasty.¹⁵¹ In a telegram to the U.S. Secretary of State, the King described “hostilities all around” and predicted that “[w]ar may

¹⁴⁵ *Id.*

¹⁴⁶ Agreement Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Deployment of United States Forces, U.S.-Bahr., cl. 5, Jan. 13, 1991, T.I.A.S. No. 12,236 [hereinafter 1991 U.S.-Bahrain Agreement]. The “Government of the United States shall exercise criminal jurisdiction over members of the United States forces except as may be otherwise agreed by the Governments of both countries.” *Id.*

¹⁴⁷ See 1991 U.S.-Bahrain Agreement, *supra* note 146.

¹⁴⁸ *Id.*

¹⁴⁹ See Josh Pollack, *Saudi Arabia and the United States: 1931-2002*, MIDDLE EAST REV. OF INT’L AFF., Sept. 2002, at 79, available at <http://meria.idc.ac.il/journal/2002/issue3/pollack.pdf>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

be with us very soon.”¹⁵² Further, he stated that if “Americans are really my friends . . . [they] must help me as the British are helping the Hashemites.”¹⁵³ In the late 1940s, Britain was also supporting the Trucial states in what is now the United Arab Emirates, which were in turn engaging Saudi forces in border skirmishes.¹⁵⁴

These security concerns led Saudi Arabia to conclude a defense agreement with the United States in 1951 that established basing rights for the Dhahran Air Base (DAB).¹⁵⁵ This agreement granted the United States exclusive jurisdiction over its forces¹⁵⁶ who committed offenses inside the facility.¹⁵⁷ Saudi authorities had the right to arrest U.S. servicemembers suspected of criminal conduct off the air base, but upon conducting a “preliminary investigation” local authorities were to relinquish custody of the accused servicemember to U.S. authorities for “trial and punishment under American military jurisdiction.”¹⁵⁸ Saudi officials told the Americans to “think of Saudi Arabia as your own territory in elaborating your defense plans.”¹⁵⁹

3. *The Republic of Korea in 1950*

Before the outbreak of hostilities on the Korean peninsula in June of 1950, a bilateral agreement between the ROK and the United States granted U.S. authorities exclusive criminal jurisdiction over a small military advisory group stationed in the country.¹⁶⁰ As U.S. troops began pouring into the ROK to

¹⁵² Brady, *supra* note 94, at 15 n.16.

¹⁵³ *Id.* at 16 n.22.

¹⁵⁴ *Id.*

¹⁵⁵ Saudi Arabia Air Base at Dhahran, U.S.-Saudi Arabia, June 18, 1951, 2 U.S.T. 1466 [hereinafter DAB Agreement].

¹⁵⁶ This immunity from local prosecution did not extend to American civilian personnel accompanying the U.S. force. These individuals were subject to the criminal jurisdiction of Saudi Arabia. *Id.* para. 13(b).

¹⁵⁷ *Id.* para. 13(c)(i). “If any member of the armed forces of the United States commits an offense inside Dhahran Airfield he will be subject to United States military jurisdiction.” *Id.*

¹⁵⁸ *Id.* para. 13(c)(ii). It should be noted that in 1953 the United States and Saudi Arabia concluded a superceding defense agreement that provided for exclusive Saudi criminal jurisdiction outside designated U.S. training facilities. Mutual Defense Assistance, United States Military Assistance Advisory Group to Saudi Arabia, U.S.-Saudi Arabia, para. 7(C)(II), June 27, 1953, 4 U.S.T. 1482. However, Saudi Arabia has customarily waived criminal jurisdiction under this provision. Brady, *supra* note 94, at 17. Furthermore, small numbers of U.S. forces have deployed to Saudi Arabia under agreements granting them jurisdictional immunity. *E.g.*, Defense: Privileges and Immunities for United States Personnel Under F-5 Aircraft Maintenance and Training Program, U.S.-Saudi Arabia, July 5, 1972, 23 U.S.T. 1469; Defense: Construction of Military Facilities, U.S.-Saudi Arabia, May 24, 1965, 16 U.S.T. 895.

¹⁵⁹ Brady, *supra* note 94, at 15.

¹⁶⁰ Executive Agreement Concerning Interim Military and Security Matters During the Transitional Period, U.S.-S. Korea, Aug. 24, 1948, 79 U.N.T.S. 57; *see* Soon Sung Cho, *Status of Forces Agreement*

repel the invading North Korean Army, their legal status was uncertain.¹⁶¹ The two countries concluded an agreement on July 12, 1950 in Taejon that permitted the “United States courts-martial . . . [to] exercise exclusive jurisdiction over the members of the United States Military Establishment in Korea.”¹⁶² As with Bahrain in 1991 and Saudi Arabia in 1951, the ROK yielded to exclusive U.S. criminal jurisdiction at a time when its security was seriously threatened.¹⁶³

C. Concerning the Peacetime Deployment of U.S. Forces, Criminal Jurisdiction Provisions Are Becoming More Favorable for the Host Nation and Closer in Form to the NATO Model

When a host nation’s security is imminently threatened by a superior military force it is more likely to concede expansive jurisdiction to U.S. authorities. However, host nations are generally less inclined to grant the United States wide jurisdictional authority in peacetime. The conclusion of World War II witnessed a paradigm shift in foreign criminal jurisdiction, in which concurrent jurisdiction agreements like the NATO SOFA developed in response to the stationing of large, standing armies of foreign soldiers throughout Western Europe.¹⁶⁴ A number of commentators maintain that the NATO SOFA is now the global standard for criminal jurisdiction over visiting forces.¹⁶⁵ This argument is supported by the Partnership for Peace Status of Forces Agreement (PfP SOFA), a multilateral agreement originally signed in 1995 that binds signatories to the provisions of the NATO SOFA.¹⁶⁶ Thirty-

Between the Republic of Korea and the United States: Problems of Due Process and Fair Trial of U.S. Military Personnel, in U.S. STATUS OF FORCE AGREEMENTS WITH ASIAN COUNTRIES: SELECTED STUDIES 49, 50 (Charles L. Cochran & Hungdah Chiu eds., 1979); see also Donald A. Timm, *Visiting Forces in Korea*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 448 n.31 (Dieter Fleck ed., 2001).

¹⁶¹ Cho, *supra* note 160, at 50.

¹⁶² Jurisdiction over Offenses by United States Forces in Korea, U.S.-S. Korea, July 12, 1950, 5 U.S.T. 1408.

¹⁶³ Mutual Defense Treaty Between the United States and the Republic of Korea, U.S.-S. Korea, Oct. 1, 1953, 5 U.S.T. 2368, 2371 [hereinafter “Mutual Defense Treaty”].

¹⁶⁴ See *supra* Part III.A.1.

¹⁶⁵ Jung & Hwang, *supra* note 21, at 1116; Col. Richard J. Erickson, USAF (Ret.), *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 137, 141 (1994); see Lepper, *supra* note 19, at 172 (“The NATO SOFA . . . is still the blueprint for all other U.S. status of forces agreements worldwide.”); Dieter Fleck, *Present and Future Challenges for the Status of Forces (ius in praesentia)*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 47 (Dieter Fleck ed., 2001) (the “NATO SOFA represents a widely accepted approach to regulating the status of foreign forces.”).

¹⁶⁶ Fleck, *supra* note 165, at 49.

two states have ratified the PfP SOFA.¹⁶⁷ In total, forty-eight nations are currently bound by the criminal jurisdiction language in Article VII of the NATO SOFA.¹⁶⁸

The evolution of several bilateral U.S. SOFAs reflects a consistent trend that underscores the paradigmatic status of the NATO SOFA. Specifically, the United States has incrementally granted more jurisdictional authority to its non-NATO allies that host large numbers of peacetime forces. U.S. SOFAs with the ROK, the Philippines, and Japan were modified and amended over the past several decades to more closely accord with the NATO model of criminal jurisdiction.

1. U.S. Forces in the Republic of Korea

a. Political Background

Following the cease-fire between the North and South, the United States maintained a large military presence in the ROK. U.S. forces were immune from local criminal jurisdiction under the Taejon Agreement and later, the Mutual Defense Treaty, which was signed in 1953.¹⁶⁹ Because the ROK lacked a tradition of enforcing Western judicial rights, the United States was hesitant to negotiate a SOFA that subjected U.S. military personnel to Korean criminal justice.¹⁷⁰ However, the Rhee government was overthrown in 1960 by a student movement intent on restoring democracy and national pride to the ROK.¹⁷¹ As justification, leaders of the coup cited the government's unwillingness or inability to punish U.S. soldiers for committing serious crimes against Koreans.¹⁷² However, despite the flux in political leadership, most Koreans continued to regard the U.S. presence as essential for their security.¹⁷³

American officials were concerned over the growing anti-American sentiment in the ROK and agreed to compromise with the new government by negotiating a SOFA.¹⁷⁴ An important Cold War front, the ROK had immense

¹⁶⁷ *Id.* at 48 n.6.

¹⁶⁸ *See supra* note 24 and accompanying text.

¹⁶⁹ Cho, *supra* note 160, at 50. *See generally* Mutual Defense Treaty, *supra* note 163.

¹⁷⁰ Cho, *supra* note 160, at 49.

¹⁷¹ *Id.* at 51.

¹⁷² *Id.*

¹⁷³ Jung & Hwang, *supra* note 21, at 1115.

¹⁷⁴ Cho, *supra* note 160, at 51.

strategic importance to the United States. Though the SOFA would terminate exclusive U.S. jurisdiction, the agreement would also strengthen the alliance between the two countries and promote the development of a stable, democratic ROK capable of countering regional communist influences.¹⁷⁵ Members of Congress and others in the United States demanded, however, that U.S. servicemembers be afforded “due process and fair trial guarantees roughly congruent to those accorded in the United States or Western European jurisprudence.”¹⁷⁶ On July 9, 1966, the United States signed a SOFA with the ROK that replaced exclusive U.S. criminal jurisdiction with a concurrent scheme similar to the NATO SOFA.¹⁷⁷ The 1966 Korean SOFA establishes a framework of exclusive and concurrent jurisdiction, provides for waiver of jurisdiction, mandates mutual cooperation in the investigation and arrest of criminal suspects, and ensures procedural rights for the accused. In 1991 and 2001, the United States and the ROK revised the Korean SOFA to more equitably share the “sovereign prerogative” of criminal jurisdiction.

b. Modification of Official Duty and Waiver Provisions

The NATO and Korean SOFAs have identical provisions on exclusive and concurrent jurisdiction.¹⁷⁸ Regarding the primary right to exercise concurrent jurisdiction, both agreements provide that the United States as the sending state will have this right over *inter se* offenses or offenses arising out of official duties.¹⁷⁹ The 1966 SOFA further provides that competent military authorities of the United States will issue a certificate if the offense in question arises

¹⁷⁵ See *id.* at 50–51.

¹⁷⁶ Timm, *supra* note 160, at 457.

¹⁷⁷ Facilities and Areas and the Status of United States Armed Forces in Korea, U.S.-S. Korea, July 9, 1966, 17 U.S.T. 1677, available at <http://www.korea.army.mil/sofa/docs.htm> [hereinafter 1966 Korean SOFA].

¹⁷⁸ Compare *id.* art. XXII, paras. 1-3 (providing for exclusive and concurrent jurisdiction over visiting U.S. forces), with NATO SOFA, *supra* note 20, art. VII, paras. 1-3 (providing for exclusive and concurrent jurisdiction over visiting forces).

¹⁷⁹ Compare 1966 Korean SOFA, *supra* note 177, art. XXII, para. 3(a)(i)-(ii) (granting the United States the primary right to exercise jurisdiction over “offenses solely against the person or property of another member of the United States armed forces” and “offenses arising out of any act or omission done in the performance of official duty.”), with NATO SOFA, *supra* note 20, art. VII, para. 3(a)(i)-(ii) (granting the sending state the primary right to exercise jurisdiction over “offenses solely against the person or property of another member of the force” and “offenses arising out of any act or omission done in the performance of official duty”).

from an official duty.¹⁸⁰ Though the NATO SOFA is silent on who determines official duty, this certificate procedure is typical among NATO countries.¹⁸¹

The NATO SOFA is also silent on the definition of official duty. The Agreed Minutes of the Korean SOFA provide that an official duty is an act “required” by military duty and does not necessarily apply to all acts performed while on duty.¹⁸² While this language seems to construe the exception narrowly, it is counterbalanced by the 1966 Agreed Understandings, which state that to be considered outside official duty, the conduct must be a “substantial departure” from required military duties.¹⁸³

The United States and the ROK terminated the 1966 Agreed Understandings in 1991.¹⁸⁴ Much of the 1966 language is reproduced in the 1991 Understandings on Implementation of the Korean SOFA, including definitions of official duty. However, the 1991 revision permits “Republic of Korea authorities . . . [to] discuss, question, or object to any United States armed forces official duty certificate,” and U.S. officials must in turn give “due consideration” to their arguments.¹⁸⁵ Significantly, the 1991 Understandings also establish a diplomatic procedure for resolving disagreements over duty certificates.¹⁸⁶ Specifically, the 1991 Understandings permit Korean authorities to refer these disputes to a U.S.-ROK Joint Committee or its Criminal Jurisdiction Subcommittee.¹⁸⁷ If the matter is not resolved by these

¹⁸⁰ Agreed Minutes to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, U.S.-S. Korea, art. XXII, re para. 3(a), July 9, 1966, 17 U.S.T. 1677, 1768 [hereinafter Korean SOFA Agreed Minutes].

¹⁸¹ Jung & Hwang, *supra* note 21, at 1141.

¹⁸² Korean SOFA Agreed Minutes, *supra* note 180, art. XXII, re para. 3(a)(1).

¹⁸³ Agreed Understandings to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea and Related Agreed Minutes, U.S.-S. Korea, July 9, 1966, 17 U.S.T. 1677, 1813, agreed minute re para. 3(a)(1) [hereinafter 1966 ROK Agreed Understandings].

¹⁸⁴ Understandings on Implementation of the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea and Related Agreed Minutes, U.S.-S. Korea, Feb. 1, 1991, available at <http://www.korea.army.mil/sofa/docs.htm> [hereinafter 1991 ROK Understandings].

¹⁸⁵ *Id.* art. XXII, agreed minute re para. 3(a)3(a). Under the 1966 Agreed Understandings, the United States was only required to give “due consideration” to the objections of the Chief Prosecutor for the Republic of Korea regarding official duty certificates. 1966 ROK Agreed Understandings, *supra* note 183, art. XXII, agreed minute re para. 3(a)3(a). In contrast, the 1991 revision mandates “due consideration” of arguments posited by any “authority” in the ROK. 1991 ROK Understandings, *supra* note 184, art. XXII, agreed minute re para. 3(a)3(a).

¹⁸⁶ 1991 ROK Understandings, *supra* note 184, art. XXII, agreed minute re para. 3(a)3(b).

¹⁸⁷ *Id.*

bodies within twenty days, it may be “referred for resolution through diplomatic channels.”¹⁸⁸ However, if after thirty days the impasse remains, the U.S. military will proceed with jurisdiction “to ensure that the accused is not deprived of the right to a prompt and speedy trial.”¹⁸⁹

In addition to introducing a mechanism for resolving “official duty” disagreements, the 1991 Understandings made significant changes to waivers of jurisdiction under the Korean SOFA. These modifications favor the ROK. Specifically, an exchange of notes¹⁹⁰ between the Korean Minister of Foreign Affairs and the U.S. Ambassador in 1966 instituted an advance waiver.¹⁹¹ This understanding waived in advance the ROK right¹⁹² to exercise primary concurrent jurisdiction.¹⁹³ The United States thus had jurisdiction in all concurrent cases, which unburdened American authorities from having to individually request a waiver of Korean jurisdiction in specific instances. The 1966 agreement allowed Korean authorities to withdraw the advance waiver upon showing that a specific case had “particular importance.”¹⁹⁴ However, the 1991 Understandings implement a more equitable arrangement. This agreement terminates the Korean advance waiver and instead requires that the United States make individual waiver requests.¹⁹⁵

c. Revision of Custody Language

Recent revisions to SOFA custody language also weigh in favor of the ROK. Prior to 2001, when American servicemembers suspected of crimes were in U.S. military custody they would remain in U.S. custody until all trials and appeals concluded.¹⁹⁶ Only when a guilty verdict was finalized would the

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Exchange of Notes Between U.S. Ambassador Winthrop G. Brown and ROK Minister of Foreign Affairs Tong Won Lee, U.S.-S. Korea, July 9, 1966, 17 U.S.T. 1677, 1830 [hereinafter 1966 ROK Exchange of Notes].

¹⁹¹ The advance waiver in the ROK is modeled after a similar provision contained in the U.S.-Netherlands SOFA, which provides that the Netherlands waives its primary right to exercise concurrent jurisdiction in all cases, but may withdraw the waiver in cases of “particular importance” to the Netherlands. Timm, *supra* note 160, at 458 n.84.

¹⁹² 1966 Korean SOFA, *supra* note 177, art. XXII, para. 3(c).

¹⁹³ 1966 ROK Exchange of Notes, *supra* note 190.

¹⁹⁴ *Id.*

¹⁹⁵ 1991 ROK Understandings, *supra* note 184, art. XXII, para. 3(c)(1). If either the United States or the ROK has the primary right to exercise concurrent jurisdiction but ignores a waiver request, the requesting state may exercise its concurrent jurisdiction. *Id.* para. 3(c)(4).

¹⁹⁶ 1966 Korean SOFA, *supra* note 177, art. XXII, para. 5(c). This provision only applies when the ROK has the right to exercise jurisdiction. *Id.*

United States transfer custody of the servicemember to the ROK to serve his or her sentence. In cases where Korean authorities were the first to arrest and detain the accused, he or she would be transferred back to the military authorities of the United States, pending the completion of all trials and appeals.¹⁹⁷ These provisions differ from custody language in the NATO model. Under the NATO SOFA, visiting military authorities that have custody over the accused will retain custody until the host state issues an indictment.¹⁹⁸ In effect, the U.S. military could retain custody of its servicemembers longer under the Korean SOFA¹⁹⁹ than under the plain language of the NATO model.²⁰⁰ It should be noted, however, that a number of NATO countries have signed supplementary agreements with the United States that—like the 1966 Korean SOFA—grant the United States custody over its forces pending the completion of all judicial proceedings.²⁰¹

In 2001, the United States and the ROK changed their arrangement on custody.²⁰² Under the renegotiated Korean SOFA, the United States retains custody of American suspects until the ROK issues an indictment.²⁰³ This is

¹⁹⁷ *Id.*

¹⁹⁸ NATO SOFA, *supra* note 20, art. VII, para. 5(c).

¹⁹⁹ The 1966 ROK custody provision authorizes “continuing American custody, in most cases, until finality of any verdict is established on appeal.” Conderman, *supra* note 31, at 122.

²⁰⁰ It should be noted that the NATO custody provision only applies when the accused is in the hands of visiting military authorities and is silent on custody rights in cases where the host nation initially arrests and detains the accused servicemember. NATO SOFA, *supra* note 20, art. VII, para. 5(c).

²⁰¹ Timm, *supra* note 160, at 460 n.94.

²⁰² The 1966 custody provision came under fire in 1992, when a U.S. Army private brutally raped and murdered a local waitress in the ROK. BAKER, *supra* note 13, at 160. The soldier, Kenneth Markle, was arrested by local law enforcement officers and promptly delivered to U.S. military authorities. *Id.* Korean investigators interrogated him on a U.S. Army base, where he remained until he was convicted by a local court. *Id.* The horrific circumstances of the crime enraged locals, along with the circumstances of the investigation. *See id.* The victim’s “body was found naked, her legs spread wide, a Coke bottle pushed into her vagina and an umbrella 11 inches in her rectum. Powdered laundry detergent was scattered on her face and body. She had been beaten and stabbed to death.” *Id.* Some criticized the custody language for giving special treatment to American suspects. *See id.* at 161. Koreans argued that Markle should have been treated like any other criminal suspect and held by local investigators pending trial. *Id.* In response, U.S. authorities defended the existing SOFA by arguing that Korean jails and methods of interrogation failed to meet American standards. *Id.* at 160.

²⁰³ Agreement Between the United States of America and the Republic of Korea Amending the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding the Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea of July 9, 1966, As Amended, U.S.-S. Korea, art. I, Jan. 18, 2001, *available at* <http://www.korea.army.mil/sofa/docs.htm> [hereinafter 2001 ROK SOFA Revision]. “The custody of an accused member of the United States armed forces or civilian component, or of a dependent, over whom the Republic of Korea is to exercise jurisdiction shall remain with the United States until he is indicted by the Republic of Korea.” *Id.*

consistent with the corresponding NATO SOFA provision.²⁰⁴ In addition, the 2001 revision included a new Agreed Minute that defines when the United States or the ROK may request custody transfers.²⁰⁵ The 2001 Minute equitably balances competing U.S. and ROK interests. After arresting a U.S. servicemember, Korean authorities will transfer custody upon request.²⁰⁶ However, the United States agrees not to request transfer when Korean authorities arrest the accused in “immediate flight” from the crime, there is “adequate cause” to believe that “a heinous crime of murder or an egregious rape” occurred, and there is “necessity to retain” custody because the accused may destroy evidence or intimidate a witness.²⁰⁷ This provision allows Korean authorities to retain pre-indictment custody over visiting American forces. Under most U.S. SOFAs, the United States retains custody over its servicemembers leading up to trial and often throughout the entire judicial proceedings.²⁰⁸ The opportunity to retain pre-indictment custody of American troops is a unique provision that weighs in favor of the ROK.

However, the 2001 revisions limit U.S. transfers of custody at the time of indictment. Korean authorities may request custody following indictment when the offense has “sufficient gravity”²⁰⁹ and when “adequate cause and

²⁰⁴ Compare *id.* art. I (“The custody of an accused member of the United States armed forces or civilian component, or of a dependent, over whom the Republic of Korea is to exercise jurisdiction shall remain with the military authorities of the United States until he is indicted by the Republic of Korea.”), with NATO SOFA, *supra* note 20, art. VII, para. 5(c) (“The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.”).

²⁰⁵ Amendments to the Agreed Minutes of July 9, 1966 to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces, As Amended, U.S.-S. Korea, Agreed Minute re para. 5(c), Jan. 18, 2001, [hereinafter 2001 ROK Agreed Minutes], available at <http://www.korea.army.mil/sofa/docs.htm>.

²⁰⁶ 2001 ROK Agreed Minutes, *supra* note 205, re para. 5(c)(1).

²⁰⁷ *Id.* re para. 5(c)(2). However, U.S. authorities may seek custody regardless when there is “legitimate cause to believe that a failure to request custody would result in prejudice to an accused’s right to a fair trial.” *Id.*

²⁰⁸ U.S. SOFAs with the Netherlands, Greece, China, and Germany provide that the United States will retain custody pending completion of all judicial proceedings. Timm, *supra* note 160, at 457.

²⁰⁹ Cases falling within the following categories have sufficient gravity under the 2001 Agreed Minutes:

- (a) murder; (b) rape . . . ; (c) kidnapping for ransom; (d) trafficking of illegal drugs; (e) manufacturing illegal drugs for the purposes of distribution; (f) arson; (g) robbery with a dangerous weapon; (h) attempts to commit the foregoing offenses; (i) assault resulting in death; (j) driving under the influence of alcohol, resulting in death; (k) fleeing the crime scene after committing a traffic accident resulting in death; (l) offenses which include one or more of the above-referenced offenses as lesser included offenses.

necessity exist[] for such custody.”²¹⁰ In addition, the revised Korean SOFA safeguards fairness and due process for American servicemembers detained in local facilities and subject to Korean methods of investigation and interrogation. Specifically, it places time limits on Korean pre-trial or pre-indictment detention, guarantees access to U.S. officials, provides a right to counsel during interrogation, ensures the presumption of innocence applies to all investigations and judicial proceedings, and guarantees that local facilities meet prescribed standards.²¹¹

In summary, exclusive U.S. jurisdiction in wartime gave way in 1966 to a Korean SOFA consistent with NATO model provisions on exclusive and concurrent jurisdiction. The ROK advance waiver has been repealed to conform to the plain language of the NATO SOFA, as has the arrangement on custody of U.S. personnel. The Korean SOFA establishes a diplomatic procedure for resolving official duty disagreements and provides conditions for local authorities to retain custody of U.S. personnel before an indictment is presented. The gradual expansion of host jurisdiction and increasing reliance on the NATO model is not unique to the Korean peninsula. The revision histories of U.S. SOFAs with the Philippines and Japan evince a similar pattern.

2. *U.S. Forces in the Philippines*

a. *1947 Military Bases Agreement*

The United States ruled the Philippines as a colonial holding from 1898 to 1946.²¹² Following their independence on July 4, 1946, the Philippines concluded a Military Bases Agreement with the United States.²¹³ The U.S. government in turn extended “desperately needed reconstruction aid” to the Philippines.²¹⁴

2001 ROK Agreed Minutes, *supra* note 205, re para. 5(c)3(a)-(l).

²¹⁰ *Id.*

²¹¹ Understandings to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding the Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea and Related Agreements, as Amended, U.S.-S. Korea, para. 5(c), Jan. 18, 2001, *available at* <http://www.korea.army.mil/sofa/docs.htm> [hereinafter 2001 Understandings].

²¹² BAKER, *supra* note 13, at 110.

²¹³ Agreement between the United States of America and the Republic of the Philippines Concerning Military Bases, U.S.-Phil., art. XIII, Mar. 14, 1947, T.I.A.S. 1775, [hereinafter Military Bases Agreement]; *see also* BAKER, *supra* note 13, at 113.

²¹⁴ BAKER, *supra* note 13, at 113.

The Military Bases Agreement adopted what at least one commentator refers to as the “Oppenheim” model of foreign criminal jurisdiction.²¹⁵ Similar to the NATO SOFA, this model uses a system of concurrent jurisdiction that gives sending states the primary right to exercise jurisdiction over *inter se* and official duty offenses.²¹⁶ However, the Oppenheim model also gives the sending state exclusive or primary jurisdiction over offenses committed within its military installations.²¹⁷ The Military Bases Agreement was consistent with this model. Regarding off-base crimes, the U.S. military had jurisdiction over offenses in which both victim and perpetrator were members of the U.S. force, crimes against U.S. security, and official duty crimes.²¹⁸ However, the United States had near exclusive jurisdiction over crimes committed on U.S. bases. Specifically, U.S. authorities had jurisdiction over all such offenses except those involving Philippine perpetrators and victims, as well as crimes directed against the security of the Philippines.²¹⁹ Under this provision, the United States could exercise jurisdiction over U.S. personnel suspected of committing crimes against Philippine base employees that were unrelated to official duty.²²⁰ It also authorized the United States to exercise jurisdiction over Philippine nationals suspected of criminal activity on U.S. bases.²²¹ The NATO SOFA,²²² in contrast, expressly prohibits the exercise of sending state jurisdiction over local citizens.²²³

Though on-base jurisdiction in the Military Bases Agreement strongly favored the United States, other provisions apparently favored the Philippines. For example, the Agreement authorized Philippine officials to determine when an off-base crime committed by a U.S. servicemember fell within the “official duty” exception to Philippine criminal jurisdiction.²²⁴ The Military Bases

²¹⁵ Timm, *supra* note 160, at 458 n.83.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Military Bases Agreement, *supra* note 213, paras. 1(b)-(c), 4(a).

²¹⁹ *Id.* para. 1(a).

²²⁰ *But cf.* NATO SOFA, *supra* note 20, art. VII, para. 3 (receiving states have the primary right to exercise jurisdiction in all cases that do not involve *inter se* offenses and offenses arising from the performance of official duty).

²²¹ The United States could exercise jurisdiction in these cases, as long as the victim was not also a citizen of the Philippines and the crime was not directed at Philippine security. Military Bases Agreement, *supra* note 213, art. 1(a)(1).

²²² The NATO SOFA was signed four years after the Military Bases Agreement.

²²³ NATO SOFA, *supra* note 20, art. VII, para. 4. This Article “shall not imply any right for the military authorities of the sending state to exercise jurisdiction over persons who owe nationals of or ordinarily resident in the receiving State” *Id.*

²²⁴ Military Bases Agreement, *supra* note 213, art. XIII, para. 4(b).

Agreement favored the Philippines in this regard, since American officials make this determination under most U.S. SOFAs.²²⁵ However, this concession was likely not significant in practice. Under the terms of the Agreement, duty status only had relevance for off-base crimes,²²⁶ and the vast majority of these cases involved Filipinos employed to drive U.S. vehicles.²²⁷ Most off-base crimes thus did not involve U.S. soldiers and, accordingly, Philippine determinations of official duty were probably rare.²²⁸

b. 1965 U.S.-Philippine SOFA

Closer defense ties with the United States benefited the Philippines economically. In addition to extending foreign aid to the Philippines, the U.S. government was the largest employer in the country.²²⁹ Estimates suggest that the United States injected a total of \$507 million into the local economy each year.²³⁰ However, Filipinos were sensitive about the colonialist implications of a standing U.S. military presence in their country.²³¹ Local concern over foreign installations was exacerbated by the brothels and other social ills that surrounded U.S. camptowns.²³² Many Philippine citizens also resented the extra-territorial authority wielded by the United States under the Military Bases Agreement.²³³ In one incident, for example, an Air Force sentry shot and killed a Filipino who was roaming a U.S. target range in search of scrap metal.²³⁴ The United States retained custody of the sentry and exercised its on-base jurisdiction.²³⁵ Locals held marches and protests when they learned that over a twelve-year period thirty Filipinos were killed by American sentries yet all defendants were fully exonerated and returned to the United States.²³⁶

²²⁵ See Conderman, *supra* note 31, at 111–12; Lepper, *supra* note 19, at 176.

²²⁶ See Military Bases Agreement, *supra* note 213, art. XIII, paras. 4(a)-(b) (referencing Philippine jurisdiction over off-base crimes, except those committed by U.S. personnel “while engaged in the actual performance of a specific military duty”).

²²⁷ XV FOREIGN RELATIONS OF THE UNITED STATES, 1958–1960 at 915 (1992).

²²⁸ See *id.*

²²⁹ BAKER, *supra* note 13, at 118.

²³⁰ *Id.* In turn, “Filipinos enthusiastically followed American current events, sports, and culture.” *Id.* at 111.

²³¹ See *id.* at 110–11.

²³² *Id.* at 111. Child prostitution ran rampant in the Philippines, attracting “sex tourists” from Japan, Europe, Australia, and the United States. *Id.* at 119. Some estimates suggest that the majority of sex trade consumers in the Philippines were U.S. servicemembers. *Id.* at 119.

²³³ See XV FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 227, at 915.

²³⁴ BAKER, *supra* note 13, at 116.

²³⁵ *Id.*

²³⁶ *Id.*

The United States and the Philippines began diplomatic talks in 1958 to revise the Military Bases Agreement.²³⁷ During this same period, U.S. and Japanese officials were renegotiating the status of U.S. forces in Japan.²³⁸ Philippine leaders were concerned that Japan would secure more favorable provisions than those under the Military Bases Agreement.²³⁹ During the renegotiation, Philippine officials sought criminal jurisdiction over crimes committed on and off American bases.²⁴⁰ The Philippine Foreign Secretary requested “equal treatment” with other U.S. allies, though he routinely proposed terms more favorable than those in the NATO SOFA.²⁴¹ Officials from the U.S. Department of Defense privately expressed concern that more favorable provisions would set an unwelcome precedent for future negotiations with other allies.²⁴² They worried that, in the future, nations seeking the favorable base agreements would cite the Philippines as an example.²⁴³

Base negotiations stalled until 1964.²⁴⁴ In 1965, the United States and the Philippines concluded a SOFA similar to the NATO model.²⁴⁵ The agreement adopted NATO definitions of exclusive and concurrent jurisdiction²⁴⁶ and repealed controversial provisions under the Military Bases Agreement. The 1965 SOFA made no distinction between on-base and off-base crimes.²⁴⁷ It applied the NATO framework for primary concurrent jurisdiction, which gave the Philippines broader jurisdiction over offenses committed on U.S. military installations compared to the existing arrangement.²⁴⁸ In addition, American officials were no longer authorized to exercise jurisdiction over Philippine

²³⁷ XV FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 227, at 917.

²³⁸ See Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Training Areas and the Status of United States Armed Forces in Japan, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652, T.I.A.S. No. 4,510 [hereinafter 1960 Japan SOFA].

²³⁹ See XV FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 227, at 917.

²⁴⁰ *Id.* at 915.

²⁴¹ *Id.* at 917.

²⁴² *Id.* at 915.

²⁴³ *Id.*

²⁴⁴ XXVI FOREIGN RELATIONS OF THE UNITED STATES, 1964–1968 at 651, 653 (2001).

²⁴⁵ Military Bases in the Philippines: Criminal Jurisdiction Arrangements, U.S.-Phil., Aug. 10, 1965, 16 U.S.T. 1090 [hereinafter 1965 Philippine SOFA].

²⁴⁶ Compare *id.*, art. XIII, paras. 1-2 (providing for exclusive and concurrent jurisdiction over U.S. forces stationed in the Philippines), with NATO SOFA, *supra* note 20, art. XIII, paras. 1-2 (providing for exclusive and concurrent jurisdiction over visiting forces).

²⁴⁷ See generally 1965 Philippine SOFA, *supra* note 245.

²⁴⁸ Compare *id.*, art. XIII, paras. 2-3 (providing exclusive and concurrent jurisdiction consistent with the NATO model), with Military Bases Agreement, *supra* note 213, para. 1(a) (limiting Philippine jurisdiction over on-base crimes to those involving a Philippine perpetrator and victim).

citizens.²⁴⁹ The 1965 agreement also adopted a narrow definition of “official duty” that favored the Philippines. Similar to the Agreed Minutes in the ROK SOFA, the 1965 Philippine SOFA provided that “official duty” was “not meant to include all acts” performed while on-duty, but only those “which are required or authorized to be done as a function of that duty which the individual is performing.”²⁵⁰ Custody provisions, however, were consistent with the 1947 Military Bases Agreement; the United States continued to retain custody over its accused servicemembers pending trial and final judgment.²⁵¹

c. Expiration of the U.S.-Philippine SOFA in 1991

Local opposition to U.S. bases in the Philippines intensified in the years following 1986.²⁵² A group of Communist insurgents that called themselves the New People’s Army (NPA) used violence to intimidate visiting Americans and their Philippine supporters.²⁵³ As the U.S. basing agreement approached expiration in the late 1980s, the NPA warned: “We will not stop until U.S. imperialism has finally been driven from our shores.”²⁵⁴ In a statement sent through local news agencies, the group told U.S. forces to “go home or suffer the agony of attrition.”²⁵⁵ The NPA assassinated several American servicemembers and civilians in the months leading up to the base negotiations.²⁵⁶ Though most Philippine Senators were also opposed to U.S. bases, popular opinion was more difficult to gauge.²⁵⁷ One poll, for example, revealed that two out of three Manila residents favored a continued U.S. presence.²⁵⁸ In 1989, 2,000 anti-American protesters were met by 10,000 pro-

²⁴⁹ Compare 1965 Philippine SOFA, *supra* note 245, art. XIII, para. 4 (using NATO model language to prohibit U.S. authorities from exercising jurisdiction over Philippine nationals), with Military Bases Agreement, *supra* note 213, para. 1(a) (providing that the United States will have exclusive jurisdiction over “[a]ny offense committed by any person within any base . . .”). However, the 1965 SOFA also shifted authority to make official duty determinations from Philippine authorities to U.S. commanders. 1965 Philippine SOFA, *supra* note 245, Agreed Official Minutes, para. 3.

²⁵⁰ 1965 Philippine SOFA, *supra* note 245, Agreed Official Minutes, para. 2.

²⁵¹ Compare *id.*, Agreed Official Minutes, para. 5 (providing that U.S. authorities will retain custody “pending investigation, trial and final judgment . . .”), with Military Bases Agreement, *supra* note 213, para. 5 (providing that U.S. authorities will retain custody “pending trial and final judgment . . .”).

²⁵² See BAKER, *supra* note 13, at 121–22.

²⁵³ *Id.*

²⁵⁴ *Id.* at 125.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 124–25.

²⁵⁷ *Id.* at 127.

²⁵⁸ *Id.*

base activists.²⁵⁹ Leading up to the expiration of the base agreement, violent demonstrations against Americans increased in frequency and duration though they were often countered by pro-base rallies.²⁶⁰

Philippine officials were critical of criminal jurisdiction provisions in the existing SOFA during base talks in 1990.²⁶¹ As in the 1950s, Philippine negotiators pressed for jurisdiction more favorable than under the NATO SOFA.²⁶² They proposed that local courts, rather than U.S. commanders, determine whether the official duty exception applied in specific cases.²⁶³ Additionally, while the 1965 SOFA required local investigators to obtain a security clearance before entering U.S. military installations, Philippine negotiators proposed open access to bases for the purpose of criminal investigation.²⁶⁴ In addition, Philippine officials wanted local jurisdiction to extend to cases involving “chastity and honor.”²⁶⁵ U.S. authorities rejected these proposed revisions and submitted a SOFA nearly identical to the NATO model to the Philippine Senate.²⁶⁶ The agreement was rejected in 1991, and U.S. forces withdrew shortly thereafter.²⁶⁷

d. 1998 U.S.-Philippine SOFA

In 1998, U.S. and Philippine negotiators concluded an agreement regarding the treatment of U.S. military personnel and accompanying civilians that visit the Philippines.²⁶⁸ The Visiting Forces agreement adopts the exclusive and concurrent jurisdiction provisions of the NATO SOFA.²⁶⁹ Like the NATO model, the agreement also gives the United States the primary right to exercise

²⁵⁹ *Id.* at 123. These pro-base activists were accompanied by a band that played “God Bless America.”
Id.

²⁶⁰ *Id.* at 127.

²⁶¹ See Eichelman, *supra* note 165, at 28–29.

²⁶² *Id.* at 28.

²⁶³ *Id.* Thus, this modification would have revived the official duty provision in the 1947 Military Bases Agreement. Military Bases Agreement, *supra* note 213, art. XIII, para. 4(b).

²⁶⁴ Eichelman, *supra* note 165, at 29.

²⁶⁵ *Id.*

²⁶⁶ *Id.*; BAKER, *supra* note 13, at 128. The United States also reduced its proposed aid package by 157 million dollars. *Id.*

²⁶⁷ Eichelman, *supra* note 165, at 29; BAKER, *supra* note 13, at 129.

²⁶⁸ Agreement Regarding the Treatment of United States Armed Forces Visiting the Philippines, U.S.-Phil., Feb. 10, 1998, Temp. State Dep’t No. 99-78, 1998 U.S.T. LEXIS 158 [hereinafter Visiting Forces Agreement].

²⁶⁹ Compare NATO SOFA, *supra* note 20, art. VII, paras. 1-2 (providing for exclusive and concurrent jurisdiction over visiting forces), with Visiting Forces Agreement, *supra* note 268, art. V, paras. 1-2 (providing for an exclusive and concurrent jurisdiction scheme consistent with the NATO model).

concurrent jurisdiction over *inter se* offenses and offenses arising from official duties.²⁷⁰ The only significant difference between the Visiting Forces agreement and the NATO model involves custody. Like the 1947 Military Bases Agreement and the 1965 U.S.-Philippine SOFA, the United States retains custody of the accused pending the completion of all judicial proceedings.²⁷¹

Criminal jurisdiction over U.S. forces in the Philippines has evolved from an Oppenheim model to a concurrent model consistent with the NATO SOFA. Under the 1947 Military Bases Agreement, U.S. authorities had near-exclusive jurisdiction over crimes committed on base and could try accused Filipinos in military tribunals. The 1965 SOFA ended these practices by establishing a system of shared jurisdiction consistent with the NATO model in all aspects except for custody. Though U.S. and Philippine officials could not agree on terms extending the lease for U.S. installations, the 1998 SOFA covering American troops who visit the Philippines today is generally consistent with the NATO SOFA.

3. U.S. Forces in Japan

a. Exclusive Criminal Jurisdiction Following Occupation

Japan signed a multilateral Treaty of Peace after being defeated in World War II.²⁷² It called for the withdrawal of Allied occupation forces,²⁷³ notwithstanding bilateral arrangements providing for a continued presence of foreign military forces in Japan.²⁷⁴ In accordance with this provision, the United States and Japan signed a Security Treaty that same day, which authorized the continued presence of the U.S. military in order to “deter armed

²⁷⁰ Compare NATO SOFA, *supra* note 20, art. VII, paras. 3(a)(i)-(ii) (providing that the sending state has the primary right to exercise jurisdiction over offenses against its security, against the person or property of another member of its force, and over acts or omissions done in the performance of official duty), with Visiting Forces Agreement, *supra* note 268, art. V, paras. 3(b)(1)-(2) (granting U.S. authorities the primary right to exercise jurisdiction over offenses against U.S. security, against the person or property of another member of the U.S. force, and over acts or omissions done in the performance of official duty).

²⁷¹ Visiting Forces Agreement, *supra* note 268, art. V, para. 6.

²⁷² Treaty of Peace with Japan, U.S.-Japan, Sept. 8, 1951, 3 U.S.T. 3169 [hereinafter Peace Treaty].

²⁷³ By June of 1945, U.S. forces had completely occupied the Ryukyu Islands in Japan. Honma et al., *supra* note 94, at 369. They remained on the islands to supervise the demilitarization of Japan and its transformation to a fully democratic nation. *Id.* The Island of Okinawa in particular remained in U.S. control until 1972 and was particularly important in supporting U.S. military operations on the Korean peninsula in the 1950s. *Id.* at 373, 376.

²⁷⁴ Peace Treaty, *supra* note 272, ch. III, art. 6(a).

attack upon Japan.”²⁷⁵ Concerning the legal status of U.S. forces, the treaty provided that “the conditions which shall govern the disposition of armed forces of the United States . . . shall be determined by administrative agreements between the two Governments.”²⁷⁶ An Administrative Agreement was in fact signed by the two countries in February of 1952 and provided that following ratification of the NATO SOFA, “the United States will immediately conclude with Japan, at the option of Japan, an agreement on criminal jurisdiction similar to the corresponding provisions of that Agreement.”²⁷⁷ Pending these proceedings to adopt a criminal jurisdiction agreement similar to the NATO SOFA, the Administrative Agreement granted the United States exclusive jurisdiction over all offenses committed by U.S. forces in Japan.²⁷⁸

b. U.S.-Japan SOFA

Following the outbreak of hostilities on the Korean peninsula in 1950, Japan provided critical base support to the United States.²⁷⁹ After the NATO SOFA was signed in 1951, Japan insisted on similar provisions on account of its status as a strong U.S. ally.²⁸⁰ The United States and Japan agreed to a SOFA in 1960.²⁸¹ The U.S.-Japan SOFA contains provisions on exclusive and concurrent jurisdiction, waiver, custody rights, and procedural protections that are identical to the NATO model language.²⁸² The Agreed Minutes to the SOFA, for example, provide that U.S. authorities will have custody of the accused after being arrested by local authorities, but will transfer custody after the issuance of an indictment.²⁸³ Overall, the Japan and NATO SOFAs are consistent.

U.S. General Douglas MacArthur, appointed Supreme Commander for the Allied Forces (SCAP) after World War II, supervised significant changes to

²⁷⁵ Security Treaty, U.S.-Japan, pmbL, Sept. 8, 1951, 3 U.S.T. 3329 [hereinafter 1951 Security Treaty].

²⁷⁶ *Id.* art. III.

²⁷⁷ Administrative Agreement Under Article III of the Security Treaty, U.S.-Japan, art. XVII, para. 1, Feb. 28, 1952, 3 U.S.T. 334 [hereinafter Administrative Agreement].

²⁷⁸ *Id.* art. XVII, para. 2.

²⁷⁹ Honma et al., *supra* note 94, at 384.

²⁸⁰ *Id.* The Administrative Agreement expressly contemplated that the United States and Japan would conclude a SOFA with language “similar” to the NATO model. Administrative Agreement, *supra* note 277, art. XVII, para. 1.

²⁸¹ 1960 Japan SOFA, *supra* note 238.

²⁸² *Id.* See generally NATO SOFA, *supra* note 20.

²⁸³ 1960 Japan SOFA, *supra* note 238, Agreed Minutes, art. XVII, re para. 5.

the Japanese legal system.²⁸⁴ The new Japanese Constitution provided for representative government, secured individual rights, and prescribed functions for the legislative, executive, and judicial branches of government.²⁸⁵ U.S. officials were more confident that accused servicemembers would be tried in accordance with American notions of fairness and due process under the reformulated Japanese legal system, and thus agreed to extend Japan a degree of jurisdictional authority enjoyed by their allies in Western Europe.²⁸⁶

However, Japanese courts have narrowly interpreted the statutory and constitutional reforms enacted after World War II.²⁸⁷ Today, confession and apology are encouraged for their rehabilitative effects and in fact constitute a moral obligation in Japan.²⁸⁸ Cultural pressures compel criminal suspects to seek the mercy of prosecutors, police officers, and judges in order to reconcile with society and avoid dishonoring the family and other social associations.²⁸⁹ Consequently, investigators rely primarily on confessions, as opposed to extrinsic evidence.²⁹⁰

The “concept of individual freedom and liberty is secondary to the perceived necessity for public safety and social control” in Japan.²⁹¹ Authorities may use physical force in conducting interrogations and may isolate suspects for twenty-three days without access to legal counsel or family members.²⁹² Investigators may question suspects in excess of ten hours per day, during which they may barter with “privileges” such as “food, water, or bathroom visits.”²⁹³ Japanese courts have upheld the police practice of continually denying access to counsel during investigations.²⁹⁴ Accordingly, the Agreed Minutes to the U.S.-Japan SOFA supplement the procedural guarantees enumerated under the NATO SOFA.²⁹⁵ These include the right to immediately be informed of charges following arrest, the right to a public and impartial trial, the right not to testify against oneself, a full opportunity to

²⁸⁴ Honma et al., *supra* note 94, at 379–82.

²⁸⁵ *Id.* at 382.

²⁸⁶ *Id.* at 384–85.

²⁸⁷ 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, 726 (1996).

²⁸⁸ *Id.* at 730–31.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 727.

²⁹¹ *Id.* at 731.

²⁹² *Id.* at 726–27.

²⁹³ *Id.* at 728–29.

²⁹⁴ *Id.*

²⁹⁵ 1960 Japan SOFA, *supra* note 238, Agreed Minutes, art. XVII, re para. 9.

examine all witnesses, and a prohibition on cruel and unusual punishments.²⁹⁶ Through informal arrangement, Japan also adopted an advance waiver similar to the pre-1991 Korean SOFA.²⁹⁷ In summary, criminal jurisdiction over American forces in Japan evolved from U.S. exclusivity to a shared arrangement. As a general trend, host jurisdiction in the ROK, the Philippines, and Japan has expanded over time to closely accord with the NATO model today.

D. In Response to Controversial U.S. Crimes, Local Citizens Challenge Basic Premises of Concurrent Jurisdiction

The United States and nations hosting large numbers of peacetime forces are increasingly looking to the NATO model as the appropriate template for criminal jurisdiction. However, while this is the trend among governments and their diplomatic arms, popular opinion in response to serious and publicized crimes does not always follow suit. Recent controversies in the ROK and Japan involved popular challenges to the fundamental tenets of concurrent criminal jurisdiction.

1. Minesweeper Vehicle Controversy in the Republic of Korea

a. The Incident

On June 13, 2002, U.S. Army Sergeants Fernando Nino and Mark Walker were driving an armored minesweeper vehicle near the Korean village of Uijongbu.²⁹⁸ Two girls were walking along the side of the road, on their way to a friend's birthday party, when they were crushed to death by the Army vehicle.²⁹⁹ U.S. officials initially considered the incident an unfortunate accident and chose not to pursue criminal charges against Walker and Nino.³⁰⁰ In response, thousands of Koreans held mass protests and demanded that the United States permit local courts to prosecute the soldiers.³⁰¹

²⁹⁶ *Id.*

²⁹⁷ Honma et al., *supra* note 94, at 384–85; 1966 ROK Exchange of Notes, *supra* note 190.

²⁹⁸ Yoon-Ho Alex Lee, *Criminal Jurisdiction Under the U.S.-Korea Status of Forces Agreement: Problems to Proposals*, 13 FLA. ST. J. TRANSNAT'L L. & POL'Y 213, 215 (2003); *College Student Arrested on Charge of Assaulting GIs*, KOREA HERALD, Oct. 8, 2002, at 3. The girls were walking to a party when they were killed. Phil Reeves, *Protesters Turn on US Troops in South Korea*, NEW ZEALAND HERALD, Dec. 18, 2002, at B4.

²⁹⁹ Lee, *supra* note 298, at 215.

³⁰⁰ *Id.*

³⁰¹ *Id.*

The United States then changed course. U.S. military authorities asserted primary concurrent jurisdiction over the case based on the official duty provision in the Korean SOFA. Identical to the NATO model, the Korean SOFA grants visiting U.S. authorities the primary right to exercise jurisdiction over “offenses arising out of any act or omission done in the performance of official duty.”³⁰² To be outside the scope of official duty under the agreement, the alleged crime must be a “substantial departure from the acts a person is required to perform in a particular duty.”³⁰³ U.S. authorities issued an official duty certificate since the two soldiers were en route to a military training exercise when their vehicle struck the two girls.³⁰⁴ An official duty certificate under the Korean SOFA is conclusive, unless local authorities refer the matter to the U.S.-ROK SOFA Joint Committee or its Criminal Jurisdiction Subcommittee.³⁰⁵

For the first time in thirty-six years, the Korean Ministry of Justice formally requested the United States to waive primary concurrent jurisdiction.³⁰⁶ The request was denied.³⁰⁷ Sergeants Walker and Nino were subsequently charged with negligent homicide, stood trial in two separate U.S. military proceedings, and were ultimately acquitted.³⁰⁸ The outcome angered a number of Koreans, who viewed the tribunals as inherently biased.³⁰⁹ Nightly candlelight vigils and protests involving nearly 50,000 people followed the trials.³¹⁰ Korean-Americans held protests outside the White House and attempted to deliver a petition signed by 1.3 million Koreans to U.S. President George W. Bush.³¹¹ American soldiers stationed in the ROK were subjected to harassment and violence.³¹² Three Army soldiers, for example, were assaulted

³⁰² 1966 Korean SOFA, *supra* note 177, art. XXII, para. 3(a)(ii). *Compare id.*, with NATO SOFA, *supra* note 20, art. VII(3)(a)(ii) (providing that the sending state has the primary right to exercise jurisdiction over “offenses arising out of any act or omission done in the performance of official duty.”).

³⁰³ Understandings on the Implementation of the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding the Facilities and Areas of the Status of United States Armed Forces in the Republic of Korea and Related Minutes, U.S.-S. Korea, Agreed Minute re para. 3(a)(1), Feb. 1, 1991, T.I.A.S. No. 6,127 [hereinafter 1991 ROK Understanding Agreed Minute].

³⁰⁴ Lee, *supra* note 298, at 215.

³⁰⁵ 1991 ROK Understanding Agreed Minute, *supra* note 303, para. 3(a)3(b).

³⁰⁶ Lee, *supra* note 298, at 215.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Reeves, *supra* note 298, at B4.

³¹¹ Lee, *supra* note 298, at 256.

³¹² *Id.* at 215.

by a group of university students in a subway station after the soldiers refused to take a flyer that publicized a memorial service.³¹³ The increase in anti-American protests following the incident may be partly attributable to domestic politics. Rallies were allegedly organized to strengthen the political platform of then-presidential candidate Roh Moo Hyun.³¹⁴ Nevertheless, controversy over the incident continued through Hyun's election in December of 2002, when on the first anniversary of the tragic deaths 20,000 Koreans staged a protest rally.³¹⁵

b. Local Challenges to Concurrent Jurisdiction

Historically, local response to crimes by American forces stationed in the ROK has tended to be mild.³¹⁶ However, despite public apologies by President Bush, Secretary of State Colin Powell, and Secretary of Defense Donald Rumsfeld, thousands of Koreans publicly gathered to express their indignation when Walker and Nino departed for California after being exonerated by a U.S. military tribunal.³¹⁷ Popular response to the acquittals suggests that by shielding visiting soldiers from the full impact of local law, concurrent jurisdiction agreements like the NATO and Korean SOFAs may stir considerable controversy.

The history of U.S. deployments overseas suggests that while countries often have economic and security incentives to host American forces, they must in turn waive a degree of sovereign authority by signing a SOFA. SOFAs allow U.S. soldiers to side-step domestic prosecution, a privilege "that no other ordinary foreigners or locals possess" in a host nation.³¹⁸ Under customary international law, Korea could have immediately seized and prosecuted Sergeants Walker and Nino.³¹⁹ However, the framework for concurrent jurisdiction is premised on the notion that military jurisdiction is appropriate when visiting forces commit crimes arising from their official duties. Derived from Justice Marshall's distinction between commercial and public acts in *The Schooner Exchange*, military duties are attributable to the acts of the foreign sovereign government; authority over crimes incident to these duties remains

³¹³ College Student Arrested on Charge of Assaulting GIs, *supra* note 298, at 3.

³¹⁴ Lee, *supra* note 298, at 217.

³¹⁵ *Id.* at 215; BOSTON GLOBE, June 14, 2003, at A14.

³¹⁶ Lee, *supra* note 298, at 216.

³¹⁷ BAKER, *supra* note 13, at 163.

³¹⁸ Jung & Hwang, *supra* note 21, at 1126.

³¹⁹ Lee, *supra* note 298, at 219.

with the sending state even when the crimes are committed in a foreign land. By signing a concurrent jurisdiction agreement, the Korean government waived its sovereign right to prosecute Walker and Nino.³²⁰

However, controversy arising from the minesweeper tragedy was significant and, to be properly understood, it must be contextualized within the current state of U.S.-ROK relations. The end of the Cold War has “eroded the public perception that the presence of foreign military forces serves national security” in the ROK.³²¹ Koreans exhibit more open frustration with deployed U.S. troops today than when the Soviet Union posed a threat.³²² Although Communist North Korea still threatens its southern neighbor, hostility towards U.S. forces is on the rise.³²³ Some Korean shopkeepers, for example, refuse to admit U.S. soldiers, posting signs that read “AMERICANS NOT WELCOME HERE.”³²⁴ In addition, several American bases have been subjected to fire bomb attacks.³²⁵ A declining interest in collective security has also contributed to unrest over the U.S. military in the ROK. Young adults born after the Northern invasion are likely to consider the United States an impediment to reunification.³²⁶ The older generation, which negotiated the 1966 Korean SOFA, viewed the United States as a defender from communist invasion.³²⁷ During that time, “the national interest . . . strongly dictated keeping the U.S. military presence in Korea at all costs.”³²⁸ For example, the first prison sentence handed down to an American soldier by a local court in the ROK involved the rape of a Korean girl,³²⁹ in which the accused was sentenced to less than three years of confinement in a detention room specially remodeled to meet the standards of a third-class American hotel.³³⁰ Fewer Koreans today consider their northern neighbor a credible threat.³³¹ As the perceived need for American security has waned in the ROK, local tensions over the presence of U.S. troops have increased.³³²

³²⁰ Lee, *supra* note 298, at 233; Jung & Hwang, *supra* note 21, at 1123.

³²¹ Jung & Hwang, *supra* note 21, at 1142.

³²² Lee, *supra* note 298, at 214.

³²³ Jung & Hwang, *supra* note 21, at 1143; Lee, *supra* note 298, at 240.

³²⁴ Lee, *supra* note 298, at 240.

³²⁵ *Id.*

³²⁶ *Id.* at 215.

³²⁷ *Id.*

³²⁸ Cho, *supra* note 160, at 55.

³²⁹ *Id.* at 54–55.

³³⁰ *Id.*

³³¹ See BAKER, *supra* note 13, at 163.

³³² See *id.*; Cho, *supra* note 160, at 54–55.

In recent decades, the United States and its non-NATO allies have expanded local jurisdiction over deployed American forces. Nonetheless, popular opinion seems more openly hostile to the U.S. presence than in decades past. Following the minesweeper tragedy, a segment of the Korean population demanded exclusive criminal jurisdiction over crimes perpetrated against their fellow citizens. This is at odds with the NATO SOFA and other concurrent jurisdiction agreements. The long-term viability of SOFAs partly depends on the willingness of a host country to relinquish inherent jurisdictional rights in order to secure the benefits of a foreign military presence. Citizens less inclined to host U.S. forces are more likely to voice opposition to basic tenets of concurrent jurisdiction when they suspect Americans of committing egregious crimes against their fellow citizens. This is especially true when the victims are children.

2. *Rape in Okinawa, Japan*

a. *The Incident*

In the fall of 1995, a U.S. servicemember deployed to Okinawa approached a Japanese girl who was walking alone.³³³ She was twelve years old, had just begun the sixth grade, and was traveling to a nearby store to purchase a notebook.³³⁴ It was 8:00 P.M.³³⁵ The American approached the girl and pretended to ask for directions, while another U.S. servicemember grabbed her from behind and bound her hands and legs.³³⁶ They covered her eyes, taped her mouth, threw her in the back seat of a rented Subaru, and inflicted wounds to her face that would require two weeks of medical treatment.³³⁷ Following the beating, she was raped.³³⁸

The incident touched off a firestorm of protest. The Okinawan government purchased a large ad in the *New York Times* requesting Americans to help “reduce and realign” U.S. bases on the island.³³⁹ Criminal custody was a central issue. Under a provision identical to the NATO SOFA, the Japan SOFA grants the United States custody of an accused U.S. servicemember

³³³ Norman, *supra* note 287, at 717.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Gher, *supra* note 82, at 242.

until he is charged by Japan.³⁴⁰ U.S. military officials retained pre-indictment custody over the accused servicemembers, prompting 85,000 Japanese citizens to stage the largest anti-base rally in Japanese history.³⁴¹ Opponents argued that military custody afforded the accused special treatment since local investigators could not conduct a traditional Japanese interrogation.³⁴² Nevertheless, the accused were transferred to Japanese custody following their indictment and were ultimately convicted and sentenced by a Japanese court after confessing their crimes.³⁴³

b. Local Challenges to Custody Under the NATO and Japan SOFAs

Like many Koreans after the minesweeper tragedy of 2002, Japanese citizens challenged a NATO model provision after American authorities confined the accused servicemembers in a U.S. brig. Generally, the United States resists granting pre-indictment custody rights out of a concern that Japanese interrogation methods violate U.S. notions of due process. Just as the NATO SOFA provision for official duty jurisdiction drew criticism in the ROK following the minesweeper tragedy, the 1995 rape led some Japanese to challenge the NATO custody provision.³⁴⁴ In both the ROK and Japan, tragic events focused local populations on the sovereign trade-off inherent in NATO criminal jurisdiction.

Members of the Philippine Senate had reservations with NATO criminal jurisdiction, which contributed to their rejection of the proposed U.S. basing agreement. However, in the minds of many Japanese citizens, a complete withdrawal of American forces would create a dangerous power vacuum in the region.³⁴⁵ Though segments of the population are opposed to the U.S. presence, this sentiment is not necessarily representative of the entire

³⁴⁰ Compare NATO SOFA, *supra* note 20, art. VII(5)(c) (“The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall . . . remain with that State until he is charged by the receiving State”), with 1960 Japan SOFA, *supra* note 238, art. XVII(5)(c) (“The custody of an accused member of United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall . . . remain with the United States until he is charged by Japan.”).

³⁴¹ Gher, *supra* note 82, at 242.

³⁴² BAKER, *supra* note 13, at 138.

³⁴³ *Id.* at 140.

³⁴⁴ This response also stemmed from incorrect information on the nature of U.S. military custody. William K. Lietzau, *Using the Status of Forces Agreement to Incarcerate United States Service Members on Behalf of Japan*, ARMY LAW., Dec. 3, 1996, at 3. Some Japanese erroneously believed that the accused could freely roam the base until the indictment was issued. *Id.* In actuality, the servicemembers under investigation in 1995 were confined in a brig for twenty-five days before being handed over to the Japanese. *Id.*

³⁴⁵ BAKER, *supra* note 13, at 74, 132.

population; a 2001 survey showed that 46% of Japanese citizens regarded the U.S. presence as “necessary,” while 44% regarded the presence as “unnecessary.”³⁴⁶ In both Japan and the ROK, host citizens exhibited strong opposition to concurrent jurisdiction in prominent and emotional cases, yet these controversial applications have not outweighed the relative value of a U.S. presence.³⁴⁷ American forces continue to operate in both nations.

IV. CONSIDERATIONS FOR CRIMINAL JURISDICTION IN FUTURE U.S. SOFAS

One and a half million U.S. forces are poised to undertake the largest military repositioning since the Korean War.³⁴⁸ The United States is likely to conclude new agreements on criminal jurisdiction as this process unfolds. Negotiators on both sides must recognize novel challenges posed by this new strategy, decide how historic trends may serve as a guide, and draft provisions that will best accommodate the competing sovereign interests of the United States and its host.³⁴⁹

A. *Anti-Terrorism and U.S. Basing Policy*

New mandates in U.S. foreign policy pose added challenges for American forces operating overseas.³⁵⁰ The primary enemy of the United States is no longer another sovereign power, but instead a shadowy terror movement that exists apart from territorial constraints.³⁵¹ Providing collective defense against a sovereign adversary is no longer the U.S. military’s primary mission.³⁵² Unlike prior deployments to affluent, industrialized nations like the ROK and Japan, the United States is sending forces to more impoverished and unstable areas.³⁵³ During the Cold War, a relatively small number of U.S. soldiers were stationed in more impoverished societies, yet these deployments had a disproportionate share of the military-civilian conflict during this period.³⁵⁴

³⁴⁶ *Id.* at 149.

³⁴⁷ *See supra* Part III.D.1.

³⁴⁸ Tyson, *supra* note 13.

³⁴⁹ *See* BAKER, *supra* note 13, at xii.

³⁵⁰ *See id.*

³⁵¹ *Id.* at xii.

³⁵² *See id.*

³⁵³ *See id.* at xi (noting that most nations receiving U.S. forces during the Cold War were relatively affluent and enjoyed political stability and the rule of law). Future American soldiers may be forced to remain on base for a longer duration “to avoid confrontation with civilians of uncertain loyalty” and thus may have less opportunity to participate constructively in the traditions and culture of the host country. *Id.* at xiv.

³⁵⁴ *Id.* at xii.

History reveals that local tensions increase when Americans and their hosts have sharp economic disparities and fundamentally different cultural values.³⁵⁵ This has been the case with the U.S. military presence in Saudi Arabia.

1. *U.S. Forces in Saudi Arabia*

The Saudi government refuses to sign a formal SOFA with the United States³⁵⁶ and instead maintains a defense arrangement that grants the United States exclusive jurisdiction, yet permits Saudi officials to limit the number of American troops present in the Kingdom.³⁵⁷ However, during the Persian Gulf War, large numbers of U.S. combat troops flooded into the country to defend the Kingdom from Iraq, yet most left by July of 1992. The American presence in Saudi Arabia during this period inflamed cultural tensions, especially over U.S. customs with respect to women. American servicewomen served as tank mechanics, cargo-plane pilots, doctors, and nurses in a country where it was unheard of for women to hold such positions.³⁵⁸ They dressed in battle fatigues, entered public places, and stood beside Saudi women³⁵⁹ who are required by ancient edicts to be fully veiled in public and are forbidden to travel anywhere without the permission of husbands or male relatives.³⁶⁰ The visible presence of female servicemembers implicitly challenged local customs, traditions, and religious teachings.³⁶¹

Many Saudis wanted U.S. forces to withdraw completely following the defeat of Saddam in 1991, yet the U.S. and Saudi governments agreed to a continued military presence when it became clear that the Iraqi dictator would remain in power and continue to threaten the Kingdom.³⁶² Approximately 5,000 Americans thus remained in the country, which prompted deep

³⁵⁵ See *id.* at xiii.

³⁵⁶ Lepper, *supra* note 19, at 181.

³⁵⁷ Saudi Arabia, Military Training Mission, U.S.-Saudi Arabia, Feb. 8, 1977, 28 U.S.T. 2409, T.I.A.S. No. 8,558. "The U.S. Training Mission will consist of that number of U.S. military and civilian employees of the U.S. Department of Defense determined by the Saudi Chief of General Staff and Chief, U.S. Military Training Mission and approved by the Saudi Minister of Defense and U.S. Secretary of Defense." *Id.* art. 3.

³⁵⁸ Kim Stormont, *Female U.S. Soldiers Affecting Saudi Arabia and Vice Versa*, ST. LOUIS POST-DISPATCH, Dec. 23, 1990, at 7B.

³⁵⁹ One female American soldier told a reporter: "I want to stay around Saudi Arabia long enough to see these women throw away their veils." *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

resentment among some Saudis.³⁶³ However, citizens there cannot join political parties, publicly demonstrate, or disseminate media information.³⁶⁴ As a consequence, terrorism has become the primary means of registering opposition to U.S. bases in Saudi Arabia. In 1995, for example, Islamic militants killed five Americans by exploding a car bomb at a U.S. training facility in the Kingdom.³⁶⁵ One year later, nineteen Americans died³⁶⁶ when terrorists bombed the Khobar Towers, a housing compound at the King Abdulaziz Air Base.³⁶⁷ Rhetoric surrounding the 1993 and 2001 attacks on the World Trade Center as well as the *USS Cole* bombing in 2000 pointed to the presence of U.S. soldiers on Saudi holy land as a justification for Jihad.³⁶⁸ These acts and the rhetoric accompanying them suggest that international terror movements like Al Qaida draw from the cultural and religious tensions associated with this small American outpost to further their political objectives.

B. Drawing Prospective Inferences from Four Major Trends in U.S. SOFAs

1. For Large Numbers of U.S. Troops to Be Stationed in Overseas Bases, a SOFA Is Likely Required

SOFAs provide the important legal groundwork for the overseas deployment of U.S. forces. When the United States sends large numbers of troops and military equipment to other nations on a long-term basis, it often concludes a SOFA to address issues such as claims, taxes, licensing, exit and entry procedures, and criminal jurisdiction.³⁶⁹ Following the U.S. invasion of Iraq, for example, American officials were eager to conclude a SOFA with the new government.³⁷⁰ SOFAs facilitate military collaboration and cooperation³⁷¹ and may lead to expansion of the visiting force over time.³⁷²

³⁶³ BAKER, *supra* note 13, at ix. American and Saudi officials have continuously tried to minimize cultural tensions by isolating U.S. personnel from local communities. See Brady, *supra* note 94, at 19. Significantly, there have been no serious crimes perpetrated by American soldiers upon local citizens, in large part due to the well disciplined nature of U.S. military personnel assigned to Saudi Arabia and the lack of access to alcoholic beverages in the Kingdom.

³⁶⁴ Susan Taylor Martin, *Can a Marriage Born of Oil Be Saved?*, ST. PETERSBURG TIMES, July 7, 2002, available at <http://www.sptimes.com/2002/webspecials02/saudiArabia/day5/story1.shtml>.

³⁶⁵ BAKER, *supra* note 13, at 169.

³⁶⁶ The Saudis executed four suspects in June of 2001 before they could be interrogated by U.S. officials. *Id.* at 170.

³⁶⁷ *Id.* at 169.

³⁶⁸ *Id.* at 170–71.

³⁶⁹ See *supra* note 17 and accompanying text (describing the legal and operational issues addressed in a SOFA); Part III.A (observing the correlation between SOFAs and the long-term stationing of U.S. forces).

³⁷⁰ See *supra* note 26 and accompanying text.

2. *Nations Are Likely to Extend Jurisdictional Immunity to U.S. Forces Deployed in Response to an Imminent Security Threat*

When the United States deploys its forces to defend a nation from imminent armed attack, its bargaining position is strong.³⁷³ Under these conditions, the United States is likely to secure exclusive jurisdiction over its military personnel.³⁷⁴ For example, U.S. forces deployed to Saudi Arabia in the 1940s, the Korean peninsula in the 1950s, and Bahrain in the 1990s in response to regional security threats.³⁷⁵ Like Britain during World War II, all three nations immunized visiting American soldiers from local prosecution.³⁷⁶ However, for a large U.S. deployment to endure through long periods of relative peace, a concurrent jurisdiction agreement will need to be concluded.

3. *The NATO Model of Criminal Jurisdiction Will Inform Future SOFA Negotiations that Contemplate the Stationing of U.S. Forces Overseas*

In the last fifty years, nations that hosted large, peacetime contingents of U.S. forces made steady gains in the area of criminal jurisdiction.³⁷⁷ In the ROK, the Philippines, and Japan, bilateral agreements granting the United States wide or exclusive jurisdiction gave way to more equitable SOFAs.³⁷⁸ The revision history in each case reflects a greater reliance on the NATO SOFA as a model and guide for the long-term deployment of American forces overseas. While closer ties with the United States bring economic and security benefits to host nations,³⁷⁹ the United States has nonetheless relinquished wide

³⁷¹ See *supra* Part III.A.2 (describing the history of American forces stationed in Bahrain).

³⁷² See *supra* Part III.A.2. But see *supra* Part III.A.1 (observing that short-term U.S. deployments to Yemen and Thailand are not covered by a SOFA); *supra* notes 356 and 357 and accompanying text (describing how Saudi officials refuse to sign a SOFA with the United States and instead limit the number of American troops present in the Kingdom).

³⁷³ See *supra* Part III.B (observing that the immediate threat of armed attack led Bahrain, Saudi Arabia, and the ROK to concede exclusive criminal jurisdiction to the United States).

³⁷⁴ See *supra* Part III.B.

³⁷⁵ See *supra* Part III.B.

³⁷⁶ See *supra* Part III.B; Part II.A (describing immunity applied to U.S. servicemembers stationed in Britain to defend the country from Nazi Germany).

³⁷⁷ See *supra* Part III.C (describing the revision history of U.S. SOFAs with the ROK, the Philippines, and Japan).

³⁷⁸ See *supra* Part III.C.

³⁷⁹ See *supra* Part III.A.2 (discussing U.S. defense relationship with Bahrain), Part III.C.1 (ROK), Part III.C.2 (Philippines), and Part III.C.3 (Japan).

or exclusive jurisdiction over its forces and concluded NATO-like agreements to solidify alliances and maintain strategically important positions.³⁸⁰

The U.S. reservation to the NATO SOFA states that “the criminal jurisdiction provisions of Article VII do not constitute a precedent for future agreements.”³⁸¹ Despite this language, the NATO SOFA has, in practice, become the controlling framework for criminal jurisdiction over large deployments of U.S. forces in peacetime. The respective bargaining positions of the United States and its allies have forged this paradigmatic status; host governments press for NATO SOFA provisions as the standard for close U.S. allies,³⁸² while American officials generally consider the NATO model as the outer limit of acceptable host jurisdiction,³⁸³ due to the Congressional mandate to preserve the rights of servicemembers under the U.S. Constitution³⁸⁴ and the concern that more favorable host jurisdiction would set an unwelcome precedent for future negotiations.³⁸⁵ As a result, the influence of the NATO model has grown considerably since the end of World War II.

4. The NATO Model Is Flexible Enough to Endure into the Twenty-First Century, Though Future Agreements Must Account for Higher Political Costs Associated with Concurrent Jurisdiction

The NATO SOFA is a creation of the Cold War. It was designed to accommodate strategic needs unique to the latter half of the twentieth century. With a concurrent system of jurisdiction in place, foreign troops could establish long-term outposts on the periphery of the Soviet Union on terms acceptable to host countries. The demise of the Soviet Union, however, has

³⁸⁰ See *supra* Part III.C.1.a (ROK SOFA signed in response to domestic opposition to an exclusive jurisdiction arrangement); Part III.C.2 (describing how near-exclusive U.S. jurisdiction in the Philippines gave way to an agreement resembling the NATO SOFA); III.C.3.b (noting that Japan bases supported Korean War operations).

³⁸¹ NATO SOFA, *supra* note 20, app.

³⁸² See *supra* notes 239–40 and accompanying text (describing how Philippine officials sought jurisdiction similar to the U.S.-Japan SOFA, which approximated the NATO model); see also note 279 and accompanying text (describing how Japanese officials sought NATO jurisdiction considering their status as a strong U.S. ally).

³⁸³ See *supra* note 241 and accompanying text; see also XV FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 227, at 915 (discussing report by the National Security Council stating that the “objective of the United States should be to obtain criminal jurisdiction arrangements with all countries in which US forces are stationed now or in the future, at least as favorable as those contained in the NATO Status of Forces Agreement”).

³⁸⁴ See *supra* Part III.A.1 (describing the U.S. interest in SOFAs).

³⁸⁵ Honma et al., *supra* note 94, at 368 (observing how host nations seek most favorable examples of basing agreements when negotiating with the United States).

not eroded the NATO SOFA as a model for criminal jurisdiction; non-NATO countries are increasingly adopting these provisions to govern U.S. deployments in the post-Cold War era.³⁸⁶

The history of U.S. SOFAs with the ROK, the Philippines, and Japan suggests that there is a good measure of bargaining flexibility within the NATO framework. The United States may request advance waivers of concurrent jurisdiction,³⁸⁷ broad definitions of official duty,³⁸⁸ and favorable duty certificate procedures and custody language.³⁸⁹ Conversely, prospective host nations may press for individualized U.S. waiver requests,³⁹⁰ narrow definitions of official duty,³⁹¹ diplomatic procedures for resolving disagreement over U.S. duty certificates,³⁹² and procedures for securing pre-indictment custody over accused American servicemembers.³⁹³ The United States may concede to custody, waiver, and official duty language favorable to the host nation in exchange for a strong commitment to investigate, interrogate, and prosecute U.S. servicemembers in a manner consistent with American notions of due process.³⁹⁴

An impasse over jurisdiction can be resolved through concessions in other aspects of the basing agreement or through trade, access to U.S. military technology, or foreign aid. American negotiators can, for example, offset potentially unfavorable criminal jurisdiction language through concessions in claims, taxes, licensing, exit and entry procedures, and other aspects of U.S.

³⁸⁶ See *supra* Part III.C (describing the evolution of criminal jurisdiction language in U.S. SOFAs with the ROK, the Philippines, and Japan to now closely accord with the NATO model).

³⁸⁷ See *supra* Part III.C.1.b (describing the advance waiver in pre-1991 Korean SOFA); Part III.C.3.b (describing the advance waiver by informal arrangement in Japan).

³⁸⁸ See 1966 ROK Agreed Understandings, *supra* note 183 and accompanying text (noting how “substantial departure” language created broad definition of official duty under the 1966 Korean SOFA).

³⁸⁹ See *supra* note 127 and accompanying text (noting that U.S. authorities have custody over their servicemembers until the case is finally decided under the 1975 Bahrain SOFA); *supra* note 271 and accompanying text (noting that U.S. authorities have custody over their servicemembers until the conclusion of all judicial proceedings under three distinct U.S.-Philippine SOFAs).

³⁹⁰ See 1991 ROK Understandings, *supra* note 195 and accompanying text (describing how the 1991 Understanding for U.S.-ROK SOFA repealed the advance waiver and instead requires U.S. officials to make individualized requests for waivers of concurrent jurisdiction).

³⁹¹ See 1965 Philippine SOFA, *supra* note 250 and accompanying text (describing the narrow official duty language in the 1965 U.S.-Philippines SOFA).

³⁹² See *supra* Part III.C.1.b (noting that the 1991 revision to Korean SOFA implemented diplomatic resolution of disagreements over duty certificates).

³⁹³ See *supra* Part III.C.1.c (describing the 2001 Korean SOFA custody revisions).

³⁹⁴ See *supra* Part III.C.3.b (observing how the U.S.-Japan SOFA instituted procedural protections for U.S. servicemembers in addition to the NATO model provisions); see also Part III.A.2.b (describing added procedural protections in the 1975 U.S.-Bahrain SOFA).

deployments addressed in a SOFA. In addition, the United States may offer access to lucrative domestic markets or provide U.S. Foreign Military Financing (FMF) and International Military Education and Training (IMET) funds to a prospective host country.

Nonetheless, local citizens may grow dissatisfied with visiting U.S. forces for a number of reasons. Common complaints include noise from military aircraft, vehicular accidents, and damage to the local ecology resulting from munitions testing or other military operations.³⁹⁵ To some, concurrent jurisdiction agreements like the NATO SOFA inconvenience local investigators and displace domestic legal systems.³⁹⁶ Highly publicized crimes by U.S. servicemembers against local citizens involving particularly egregious circumstances often focus criticism on the criminal provisions of a SOFA. The decline of Communism has seen an accompanying decrease in the value of shared security in several nations that host U.S. forces,³⁹⁷ strengthening the local response to controversial applications of concurrent jurisdiction. Governments have no reason to assume these burdens without sufficient economic and security incentives. Thus, greater concessions by American negotiators may be required to secure long-term outposts in the future.³⁹⁸

CONCLUSION

Major trends in bilateral U.S. agreements on criminal jurisdiction will likely affect the negotiation and revision of future SOFAs. Policymakers and commentators are advised to consider these trends as the United States contemplates a global realignment of its military forces.

Future deployments will likely require a SOFA of some kind. While nations facing an imminent security threat may welcome large numbers of U.S. troops under a grant of immunity, history suggests that such an arrangement is not likely to endure. Bilateral criminal jurisdiction agreements over sizable numbers of deployed U.S. forces have evolved over time to closely accord with the NATO SOFA today. The NATO model equitably allocates criminal jurisdiction over visiting forces among the sending and receiving nations. In

³⁹⁵ See BAKER, *supra* note 13, at 61–62.

³⁹⁶ See *id.* at 138.

³⁹⁷ See *supra* Part III.D.1 (describing increased hostility to U.S. forces in the ROK); BAKER, *supra* note 13, at xi–xii.

³⁹⁸ *E.g.*, Associated Press, *supra* note 14 (describing how Uzbek officials are reconsidering U.S. bases in part because of deficient U.S. compensation).

considering the substance of future agreements, the NATO SOFA is a flexible and enduring template. Controversy over the application of NATO provisions in Japan and the ROK should be understood in context. Publicized crimes by American soldiers may temporarily amplify popular opposition to U.S. bases in the receiving country. Specifically, vocal and organized minority groups may use such an occasion to rally support for the expulsion of U.S. forces, an outcome that may be contrary to the collective will of the host population.

Public sentiment towards deployed U.S. forces is, however, a relevant concern for the United States.³⁹⁹ The purpose of its planned basing realignment is to facilitate anti-terrorism operations. The fact that terror movements rely on sympathetic populations for safe harbor underscores the need for grassroots alliances.⁴⁰⁰ As one forward-thinking U.S. ambassador has observed:

[W]e need to enhance the *capacity* of all states to fight terrorism. The United States cannot alone investigate every lead, arrest every suspect, gather and analyze all the intelligence, effectively sanction every sponsor of terrorism, prevent the proliferation of weapons of mass destruction, or find and fight every terrorist cell.⁴⁰¹

According to the *National Strategy for Combating Terrorism*, the United States will “not triumph solely or even primarily through military might.”⁴⁰² Law enforcement officers and other government operatives in nations allied with the United States may be in the best position to apprehend suspected terrorists.⁴⁰³

Future basing agreements must provide enough of a benefit to prospective host countries to permit the long-term stationing of American forces. Crimes committed by U.S. servicemembers abroad may prompt destabilizing and politically damaging controversies, most recently evidenced by the Abu Ghraib prison scandal in Iraq. However, by crafting solutions informed by the rich contours of prior and existing agreements and understandings on criminal

³⁹⁹ See *supra* Part IV.A.1 (describing the negative effect of U.S. forces in Saudi Arabia since the Gulf War).

⁴⁰⁰ See Steven R. Weisman & Joel Brinkley, *The Condoleezza Rice Hearing: Foreign Relations; Rice Sees Iraq Training Progress but Offers No Schedule for Exit*, N.Y. TIMES, Jan. 19, 2005, at A8 (affirming the importance of public diplomacy in the U.S. “War on Terror”).

⁴⁰¹ Ambassador Cofer Black, Remarks to the Council on Foreign Affairs (Oct. 30, 2003), <http://www.state.gov/s/ct/rls/rm/2003/26961.htm>.

⁴⁰² THE WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM 1 (2003).

⁴⁰³ See *id.* at 17 (local officers can provide better “source reporting”).

jurisdiction, the United States and its allies may form lasting partnerships in the global struggle against terrorism.

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