# INTERNATIONAL LAW AND CRIMINAL JURISDICTION OVER VISITING ARMED FORCES: RECONCILING THE CONCURRENT JURISDICTION DISCONTINUITY

Many Americans once thought that members of the United States armed forces were not accountable under the laws of the foreign nation where they were stationed.[1] Many Americans still believe that United States servicemen[2] should be subject only to the laws of the United States for criminal acts committed in foreign nations.[3] In fact, such was the case in most countries where United States forces were stationed during or immediately after the Second World War.[4] Since that time however, the situation has changed considerably.[5]

Customary international law[6] offers no solution as to which State has primary criminal jurisdiction[7] over a visiting armed force when both the host and sending nations[8] assert their jurisdiction[9] over an offender. As a result, a predicament often arises in the absence of a treaty or other agreement.[10] The sending State may as-

1. Many letters from constituents and interested parties regarding U.S. retention of jurisdiction over its visiting forces were submitted into the Congressional Record in July 1953 during debate on the North Atlantic Treaty Organization (NATO). 99 CONG. REC. 8737-41 (1953).

2. It is recognized that women are comprising an increasing percentage of today's armed forces. However, in the interest of brevity, this Comment will refer to servicepeople in the masculine form.

3. 99 CONG REC. 8737-41 (1953).

4. S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 26-29 (1971); 99 CONG. REC. 8764-65 (1953).

5. Agreements between two or more nations have been used to delineate rules for criminal jurisdiction regarding visiting force members. *See infra* text accompanying notes 131-218.

6. Customary international law is defined as "a general practice accepted as law." J. BRIERLY, THE LAW OF NATIONS 60 (6th ed. 1963).

7. Jurisdiction as used in this Comment refers to the powers of a State to prescribe and enforce rules of conduct.

8. The meaning of "sending," "receiving," and "host" nations is indicated by the following example. When the U.S. deploys a visiting force of Marines to Lebanon, the U.S. is the sending State and Lebanon is the receiving State, host nation or territorial State.

9. When both nations have a recognized basis upon which to assert their claim, it is said that concurrent jurisdiciton exists. S. LAZAREFF, *supra* note 4, at 160.

10. Stanger, *Criminal Jurisdiction Over Visiting Armed Forces*, 52 U.S. NAVAL WAR C. INT'L L. STUDIES 1, 155 (1965).

sert the need to maintain discipline and control over its forces at all times and in all locations.[11] Conversely, the receiving State may assert its vital interests of maintaining public order and controlling events which affect the safety of its populace.[12] Any attempt to reconcile these two diametrically opposed principles of jurisdiction can result in international conflicts.[13]

The extent of the problem regarding criminal jurisdiction over visiting military forces is not always readily apparent. Insight into the magnitude of the problem may be gained by examining a recent Department of Defense report.[14] In a twelve month period, American military personnel reportedly committed 64,101 offenses in foreign nations.[15] Nearly 25,000 of these cases involved concurrent jurisdiction.[16] During this same period 43,609 American service personnel were tried and convicted by foreign courts for violations of the host nation's laws.[17] When the total number of military personnel serving in foreign States is considered, the true proportions of the jurisdictional problem may be seen.

When a member of a visiting armed force commits a criminal act such as homicide, the act may violate the laws of both the sending and the receiving nations.[18] The stage is thus set for an international confrontation should both nations assert jurisdiction to prosecute the offender.[19] If a status of forces agreement or other treaty is in force, the problem may be resolved by reference to the controlling document.[20] In the event that no such agreements are applicable, and concurrent jurisdiction exists, there is a discontinuity in international law.[21] No rule prevails regarding which nation should succeed in its jurisdictional claim or which basis of jurisdic-

11. S. LAZAREFF, *supra* note 4, at 57; *see also* Stanger, *supra* note 10, at 84-85.

12. Stanger, *supra* note 10, at 4, 102.

13. S. LAZAREFF, *supra* note 4, at 9. The controversies arise primarily over which nation has the right to first exercise jurisdiction over the offending member of the visiting force.

14. DEPT. OF DEFENSE, REPORT OF STATISTICS ON THE EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS OVER UNITED STATES PERSONNEL, 1 December 1980-30 November 1981 (1981) [hereinafter cited as DOD Statistics]. *See infra* text accompanying notes 205-212.

15. *Id.*

16. *Id.*

17. *Id.*

18. For an example of such a conflict see Wilson v. Girard, 354 U.S. 524 (1957), discussed in detail *infra* at text accompanying notes 193-202.

19. *See generally* Stanger, *The Status of Forces*, ESSAYS ON INTERNATIONAL JURISDICTION 74-75 (1961).

20. S. LAZAREFF, *supra* note 4, at 160-61.

21. Stanger, *supra* note 10, at 264.

tion is supreme.[22]

To fill this gap, this Comment will suggest that there exists a need to codify international law into a convention regarding the status of visiting armed forces. The discussion will initially focus on the principles which have evolved regarding jurisdictional questions over visiting military units. These doctrines include territorial principles, immunities, and the law of the flag. Illustrative cases and incidents will be used to indicate the past and current status of international law in this field. The utility and effectiveness of status of forces agreements will also be reviewed with particular emphasis on the criminal jurisdiction provisions of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA).[23] Due to its long usage and various salient attributes, the NATO SOFA will be examined as a basis for a universally acceptable convention on jurisdiction over visiting armed forces. The benefits such a convention could provide as a means to lessen the problems and uncertainties created when concurrent jurisdiction exists will then be explored. Finally, this Comment will recommend that the United States propose such a convention through the United Nations.

## I. SOURCES OF INTERNATIONAL LAW

It is generally agreed that there are three primary sources of international law: (1) recognized international conventions (also known as treaties), (2) international custom, and (3) general principles of law recognized by most nations.[24] Conventions are part of the supreme law under the United States Constitution.[25] Customary international law is also a viable part of American jurispru-

22. *See generally* H. JACOBINI, INTERNATIONAL LAW 135-39 (rev. ed. 1968), indicating there are five bases of jurisdiction for the enforcement of criminal law which are *sometimes* recognized internationally: (1) the territorial principle, determining jurisdiction by reference to the place where the offense is committed; (2) the nationality principle, where jurisdiction is determined by the nationality of the accused; (3) the protective principle, determining jurisdiction by reference to the national interest injured by the offense; (4) the universality principle, where jurisdiction is determined by which state has custody of the accused; and (5) the passive personality principle, determining jurisdiction by the nationality of the person injured.

23. The North Atlantic Treaty Organization, Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter cited as NATO SOFA].

24. I.C.J. STAT. art. 38. According to the Statute of the Court of International Justice, the primary sources of International law are:

a. international conventions, whether general or particular, establishing rule expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations. . . . *Id.*

25. U.S. CONST. art. VI.

dence according to the Supreme Court's decision in *the Paquete Habana*.[26] General principles of law recognized by civilized nations have not been used as often as the first two sources.[27] Reliance on such principles requires comprehensive research in comparative law, a task which discourages its use in the United States.[28]

Although these sources of law are used daily in the international arena, they do not necessarily offer solutions for all situations. In the absence of a treaty, customary international law offers little assistance in resolving jurisdicitonal disputes concerning visiting armed forces.[29] Problems arise because of the conflicting bases of criminal jurisdiction which have evolved in international law.[30] These divergent bases must be understood in order to comprehend the nature of jurisdiction over visiting armed forces.

## II. BASES OF CRIMINAL JURISDICTION OVER ARMED FORCES UNDER CUSTOMARY INTERNATIONAL LAW

The status of military forces in the absence of an agreement is one of the most controversial points in international law.[31] The controversy is fueled by disputes over which nation has the power to try a member of a visiting force who has offended laws of the host nation. There are two primary bases for criminal jurisdiction over armed forces when customary international law is applied.[32] These are: (1) territorial jurisdiction, and (2) the law of the flag.[33]

### *A. Territorial Jurisdiction*

Territorial jurisdiction is an important basic attribute of a sovereign State in international law.[34] Generally, it provides that a

26. 175 U.S. 677, 700 (1900). The Court, in deciding that coastal fishing vessels were exempt from capture as prizes of war, held that international law is part of U.S. law and that in the absence of a treaty, legislative, or executive act, resort to customs and usages of civilized nations was appropriate.

27. Carnahan, *International Law in the United States Court of Military Appeals*, 3 B.C. INT'L & COMP. L. REV. 314-15 (1980).

28. *Id.* at 315.

29. Stanger, *supra* note 10, at 109-10. In this event, territorial and law of the flag jurisdiction come into conflict.

30. S. LAZAREFF, *supra* note 4, at 9.

31. *Id.* at 11.

32. Beesley, *The Law of the Flag, the Law of Extradition, the NATO Status of Forces Agreeement, and Their Application to Members of the United States Army National Guard*, 15 VAND. J. TRANSNAT'L L. 183, 185 (1982).

33. S. LAZAREFF, *supra* note 4, at 11.

34. J. BRIERLY, *supra* note 6, at 162.

State retains jurisdiction over all persons, things and acts within its borders to the exclusion of other States.[35] The host nation's jurisdiction may range from jurisdiction which is absolute to relatively limited.[36] The latter situation occurs when the host nation grants some degree of foreign sovereign immunity to a visiting military force,[37] for example, where visiting NATO forces are stationed under the NATO SOFA.

Introduction of a foreign military force into a host nation during peacetime is often subject to an agreement between the two nations involved.[38] The agreement normally defines the rights and obligations of the members of the visiting force.[39] Where no formal agreement exists, the gap must be filled, when necessary, by international law as applied by the courts.[40]

In the absence of an agreement, a sending nation often claims immunity for the acts of its military personnel. The military commander must maintain discipline or control over the visiting force at all times to legitimately claim immunity.[41] However, the host nation can assert, with equal validity, that the foreign force is absolutely subject to the laws of the receiving State.[42] By claiming jurisdiction over a breach of the receiving nation's laws by a foreign soldier, the host nation attempts to assert its absolute territorial sovereignty.[43] A clash of wills is the result.[44]

1. *Absolute Territorial Sovereignty.* Under this theory, no foreign State is allowed to exercise its own sovereignty within the host nation's territory.[45] Strict adherence to the absolute theory of territorial sovereignty over a visiting armed force subjects force members to complete jurisdiction of the host nation.[46] Concomitantly, it also takes effective control away from the commander of the visiting force.[47]

35. *Id.*
36. Beesley, *supra* note 32, at 184.
37. S. LAZAREFF, *supra* note 4, at 17-18.
38. Beesley, *supra* note 32, at 184.
39. *Id.*
40. *Id.*
41. Stanger, *supra* note 10, at 84.
42. Carnahan, *supra* note 27, at 329.
43. S. LAZAREFF, *supra* note 4, at 17. Absolute territorial sovereignty, by definition, permits only the territorial host to exert sovereignty within its boundaries. *See infra* text accompanying notes 45-54.
44. Stanger, *supra* note 19, at 74-75.
45. S. LAZAREFF, *supra* note 4, at 17.
46. *Id.*
47. Stanger, *supra* note 10, at 84.

The failure by a receiving nation to assert jurisdiction over a breach of the law within its territory amounts to a violation of its own sovereignty.[48] In such a case, the host nation has the right to grant or deny entry to friendly military forces.[49] The host nation also has a duty to determine the jurisdictional status of anyone within its territory.[50] In theory, the receiving nation could treat the visiting military force members as ordinary foreigners.[51] However, this theoretical standard has never prevailed.[52] Efforts to assert the territorial principle as the exclusive basis of jurisdiction have not succeeded[53] because almost all States extend their jurisdiction to certain types of offenses committed outside their own territory.[54]

2. *Immunity From Jurisdiction.* The opposite of a claim of absolute territorial sovereignty as a basis for asserting jurisdiction is a claim of immunity from jurisdiction.[55] Claims of immunity are usually based on the official character of the acts underlying the alleged offense, or the status of the accused as an agent of the State.[56]

Many of the acts of an armed forces member are carried out in the performance of his official duties.[57] It is sometimes asserted by the force member's commander that an accused subordinate is immune from the jurisdiction of the host nation under the theory that he is an agent of the sending State.[58] The commander can thereby assert that any acts done by the accused in the performance of his duties are immune from the host nation's prosecution.[59] An international incident may result if the commander has custody of the accused and refuses to waive the sending State's jurisdiction.

3. *Restrictive Theory of Immunity.* State immunity is still a viable concept, although the doctrine's effect has been limited by

48. S. LAZAREFF, *supra* note 4, at 17.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*; *see also* Stanger, *supra* note 10, at 8.

53. Stanger, *supra* note 10, at 8.

54. 1 C. HYDE, INTERNATIONAL LAW 727 (2d ed. rev. 1947); *see also* Stanger *supra*, note 10, at 8 n.21.

55. It has been suggested that in determining a jurisdictional question, both claims should be taken into account. *See e.g.*, Stanger, *supra* note 10, at 25.

56. Acts done as an agent of a State while in the performance of official duties sometimes enjoy immunity. Acts of Consuls and Ambassadors have such immunity. *Id.*

57. *Id.*

58. *Id.* Such an assertion presupposes the absence of a treaty regarding such claims.

59. The Commander can base his claim to jurisdiction on the "law of the flag." *See infra* text accompanying notes 73-82.

statutes and court decisions in many nations. A growing number of States have adopted the restrictive theory of immunity,[60] due to the growth of commercial activities of foreign governments.[61] As the acting Legal Advisor of the Department of State wrote in the Tate Letter, "the Department feels that the widespread and increasing practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."[62]

The restrictive approach to immunity was officially adopted by the United States Department of State in 1952,[63] and was endorsed by the American Law Institute in 1965.[64] Under the restrictive theory of immunity, the immunity of a sovereign would only be recognized in regard to sovereign public acts (*jure imperii*) and not private acts (*jure gestiones*).[65] However, attempts to distinguish between public and private acts which trigger immunity have not resulted in any clear-cut definitions of the two terms.[66]

The Foreign Sovereign Immunities Act of 1976[67] was intended to clarify when a State could claim immunity based on its public acts. The legislative history of the Act indicates that its intention was not to provide a foreign State with sovereign immunity when a lawsuit is based on a commercial transaction or some other private act of the foreign State.[68] However, where a service member is performing an act in the course of his official duties in a foreign State, his conduct appears to fall under the category of a public act of his State.[69] The United States and most authorities support immunity for offenses committed in the line of duty by military personnel.[70]

60. J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM 301-02 (1981)[hereinafter cited as J. SWEENEY].

61. *Id.* at 304

62. The Tate Letter notified the Attorney General that The Department of State was officially adopting the restrictive approach to territorial sovereign immunity. The restrictive approach only accords immunity to public acts and not to commercial acts. 26 DEP'T. ST. BULL., 984-85 (1952).

63. *See infra* note 100 for further amplification of this point.

64. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 69 (1965) [hereinafter cited as RESTATEMENT].

65. *See supra* note 62.

66. *See* Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1200 (2nd Cir. 1971), *cert. denied*, 404 U.S. 985 (1971).

67. Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891 (1976) (amending Title 28 United States Code); *see also* J. SWEENEY, *supra* note 60, at 310.

68. *Id.*

69. S. LAZAREFF, *supra* note 4, at 17.

70. *Id.* at 18.

In practice, the theory of absolute territorial sovereignty has not become the predominant standard in the international community.[71] Too many States extend their jurisdiction to offenses committed outside their own boundaries and in the territory of another State.[72] Full or restricted immunity for official State acts in foreign nations is substantially more commonplace.

### *B. Law of the Flag*

The basis for asserting jurisdiction under the law of the flag theory is that an armed forces member serving in a foreign nation is a representative of his sovereign.[73] As such a representative he is therefore accountable only to the law of the flag under which he serves.[74]

A United States Armed Forces member who disobeys a lawful order of his superiors commits the same offense regardless of whether he is in the territory of a foreign nation or in the United States.[75] He can be punished according to the rules of the Uniform Code of Military Justice (U.C.M.J.).[76] This procedure is ordinarily of no interest to the receiving State, however, and is not considered to affect its sovereignty.[77]

In contrast, when the laws of the host nation are broken by a member of a visiting force, the situation is far more complex.[78] In these instances there is a real conflict under the law of the flag between the territorial jurisdiction of the host and the jurisdiction of the sending flag nation.[79] One view holds that the law of the flag does not grant the host nation jurisdiction to punish in such a circumstance.[80] Only the commanding officer or home State has au-

71. Stanger, *supra* note 10, at 8.

72. *Id.* at 8 n.21.

73. *Id.* at 25.

74. Beesley, *supra* note 32, at 185.

75. *Id.*

76. Uniform Code of Military Justice, 10 U.S.C. § 802, 805, 818 (Supp. 1981).

77. Beesley, *supra* note 32, at 185.

78. The debate regarding whether the "law of the flag" limits the jurisdictional powers of the territorial State has been a continuing one. Since there have been few modern cases on the subject, any new decisions relevant to the visiting force's status are of import. For this reason, several cases decided by the United States Court of Military Appeals are examined in Part III of this Comment.

79. *Id.*

80. 1 L. OPPENHEIM INTERNATIONAL LAW § 445 (7th ed. Lauterpact 1948). Oppenheim, an influential German writer, wrote:

> Whenever armed forces are on foreign territory in the service of their home state, they are considered extraterritorial and remain, therefore, under its jurisdiction. A

thority to take such action while the member or the visiting force is on duty.[81] However, if the soldier leaves the confines of the garrison for recreational purposes, the host nation has jurisdiction to punish him for crimes committed while outside the scope of military duty.[82]

A different view holds that necessity and convenience prevent the host nation's exercise of jurisdiction over a visiting force.[83] Scholars advocating this position[84] contend that when a member of the force commits an offense in the host nation's territory, he can be prosecuted only by the authorities of the sending nation.[85] The receiving nation can punish the offender only if the sending nation voluntarily relinquishes jurisdiction.[86]

The position of the United States on the law of the flag doctrine was originally set forth in *The Schooner Exchange v. McFaddon*.[87] The Supreme Court's opinion held that a visiting foreign warship[88] was not subject to the jurisdiction of United States

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crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home state.

However, note that he added an important qualification:

This rule, however, applies only in case the crime is committed, either within the place where the force is stationed, or in some place where the criminal was on duty; it does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime. The local authorities are in that case competent to punish them . . .

*Id.* (emphasis in original).

81. *Id.*

82. *Id.* Oppenheim's support for the law of flag was further qualified in the eighth edition of his treatise. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW § 445 (8th ed. Lauterpact 1955).

83. 1 C. HYDE, INTERNATIONAL LAW 819 (2d ed. rev. 1947).

84. S. LAZAREFF, *supra* note 4, at 11. Lazareff quotes a French writer's statement of the law of the flag doctrine, who states that:

Strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign organized military force which, with the consent of the territorial sovereign, enters its domain. Members of the force who there commit offenses are dealt with by the military or other authorities of the State to whose service they belong, unless the offenders are voluntarily given up.

*Id.*

85. *Id.*

86. *Id.*

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

88. *Id.* at 116-34. The *Exchange*, while on a voyage from Baltimore to Spain, had been seized on the high seas from its American owners by a French man-of-war. It was reassigned to the French navy as an armed naval vessel. When a storm drove it into Philadelphia for repairs, the American owners filed a libel in U.S. District Court attempting to regain possession. The District Court dismissed the libel, and the Circuit Court reversed the dismissal.

Courts.[89] In often cited dictum, the Chief Justice spoke of the situation in which a nation allows troops of a foreign sovereign to pass through its territory: "the grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require."[90] The Supreme Court followed the *Schooner Exchange* doctrine in several subsequent cases.[91]

For law of the flag advocates, this statement in the *Schooner Exchange* reiterates the principle that friendly forces on foreign soil are immune from the jurisdiction of that foreign nation.[92] However, not all courts or writers agree with this interpretation and would more narrowly construe the *Schooner Exchange* dictum.[93] Proponents of the NATO SOFA argued during its debate in the Senate that Chief Justice Marshall's remarks applied only to troops during their passage, and not to military forces stationed on a semi-permanent basis in a foreign nation.[94]

Despite this opposition, American political leaders fought for the law of the flag principle prior to adoption of the NATO SOFA.[95] Their reasoning was partly based on the concern that American soldiers might be deprived of their constitutional rights by trials in foreign courts. Law of the flag proponents argued that these rights should follow United States troops wherever they go.[96] It was further contended that there were strong grounds of convenience and necessity for military commanders to maintain discipline

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The Supreme Court reinstated the dismissal of the libel and the American owners did not regain possession.

89. *Id.* at 135-36.

90. *Id.* at 135.

91. *E.g.*, in Coleman v. Tennessee, 97 U.S. 509 (1879), the Court said "It is well settled that a foreign Army permitted to march through a friendly country, or to be stationed in it, by permission of its Government or Sovereign, is exempt from the civil and criminal jurisdiction of the place. . . ." The Court in Tucker v. Alexandroff, 183 U.S. 424 (1901), stated, "If foreign troops are permitted to enter or cross our territory, they are still subject to the control of their own officers and escape from local jurisdiction."

92. S. LAZAREFF, *supra* note 4, at 15

93. *See generally id.* at 15-16; *see also* Beesley, *supra* note 32, at 189.

94. 99 CONG. REC. 8733-34 (1953). Senator Knowland argued during debate that since the quasi-permanent stationing of Allied Forces within a foreign nation was unknown at that time, Chief Justice Marshall's dicta could only have been meant to apply to the transit of military units. Senator Wiley further cited an Australian Court case interpreting Marshall's opinion buttressing this position.

95. 99 CONG REC. 8731-82 (1953) (statements of Senators Wiley, Dirksen and McCarran); NATO SOFA, *supra* note 23, at 1792.

96. 99 CONG. REC. 8743 (1953).

and control over their forces, without which the force could lose its combat capabilities.[97] The law of the flag adherents therefore thought that all offenses by a visiting force should be dealt with by the authorities of the sending State, unless the offenders were voluntarily turned over to the local authorities.[98]

This position was generally supported by American writers and authorities until approximately the end of the occupation after the Second World War. At that time the strength of the law of the flag principle in the United States began to wane as the restrictive theory of sovereign immunity began gathering impetus.[99] The demise of the law of the flag was hastened by the United States Department of State's official adoption of the restrictive theory of sovereign immunity in 1952.[100]

As the law of the flag principle lost support, the United States Court of Military Appeals (C.M.A.)[101] was given the task of deciding a series of cases affecting jurisdiction over visiting military forces. The holdings are noteworthy because of the paucity of recent cases on this aspect of international law. These decisions interpreted customary international law on the status of forces as applied to the United States Military and its civilian employees.

## III. THE CURRENT STATUS OF VISITING AMERICAN FORCES UNDER CUSTOMARY INTERNATIONAL LAW

Application of the law of the flag principle collided with the territorial sovereign immunity theory in a series of cases in the 1950's and the 1960's. In those cases the C.M.A.[102] decided a

97. *Id.*

98. *Id.* Senator Bricker quoted from 1 HYDE, INTERNATIONAL LAW, § 247 as follows:

> Strong grounds of convenience and necessity prevent the exercise over a foreign organized military force which with the consent of the territorial sovereign enters its domain. Members of the force who there commit offenses are dealt with by the military or other authorities of the State to whose service they belong, unless the offenders are voluntarily given up.

99. J. SWEENEY, *supra* note 60, at 301-04.

100. 26 DEP'T. ST. BULL. 984-985 (1952). Letter from the Acting Legal Advisor of the Dept. of State to the Dept. of Justice, May 19, 1952. In the letter, Jack B. Tate reviewed the trend among other nations toward use of the restrictive theory of sovereign immunity as opposed to the classical or absolute theory of foreign sovereign immunity. He stated that thereafter the State Department would follow the restrictive theory of sovereign immunity. Under this theory only sovereign or public acts of a State would be given immunity. Private acts would not be immune. *See supra* notes 62-63 and accompanying text.

101. Carnahan, *supra* note 27, at 311. The Court of Military Appeals was created in 1950 by Congress as a "supreme" court for the military justice system. The court consists of three judges appointed from the civilian community.

102. *Id.*

number of key issues regarding visiting United States forces under principles of customary international law.

### *A. Cases Illustrating the Current Status of Visiting United States Forces*

In *United States v. Weiman*,[103] the C.M.A. decided the issue of whether United States military jurisdiction could be exercised in the territory of another State.[104] The Court held that the weight of international law supported a nation's right to exercise authority over its military forces while located in a foreign nation.[105] The Court based its decision on its previous holdings in *The Schooner Exchange*[106] and *Coleman v. Tennessee*.[107] In those cases the Court held that international law did not prevent the exercise of jurisdiction by the accused soldier's nation.[108] *Weiman* was subsequently upheld in *United States v. Robertson*.[109] The *Robertson* court held that a United States military court was permitted to exercise jurisdiction over its visiting forces within the territory of another State.[110]

In *United States v. Sinigar*,[111] the Court was presented with the issue of whether visiting forces are immune from local jurisdiction. The Court first held that Canada and the United States had concurrent jurisdiction over the accused.[112] Reasoning that Canada's jurisdiction derived from the territorial principle, the Court stated that the United States also had jurisdiction based on its personal supremacy under the law of the flag.[113] However, the Court decided that the Canadian authorities were competent to punish the accused, who had left his base in Canada and committed an offense while off duty.[114] The Court's reasoning was grounded on what it

103. 3 C.M.A. 216,11 C.M.R. 216 (1953). In this case, the accused were Polish nationals and quasi-military members of the U.S. Army in France.

104. 3 C.M.A. 218, 11 C.M.R. 218.

105. 3 C.M.A. 219, 11 C.M.R. 219.

106. 11 U.S. (7 Cranch) 116 (1812), *as cited in* Weiman, *supra* note 102, at 219.

107. 97 U.S. 509 (1879), *as cited in* Weiman, *supra* note 102, at 219.

108. 3 C.M.A. 219, 11 C.M.R. 219.

109. 5 C.M.A. 806, 19 C.M.R. 102 (1955). Robertson was a merchant-seaman on a Military Sea Transport Service ship which carried cargo to the U.S. armed forces in Japan. The Court held he was subject to military jurisdiction as a person accompanying the armed forces. He was tried and convicted for a homicide which occured in Japan.

110. *Id.*

111. 6 C.M.A. 330, 20 C.M.R. 46 (1955).

112. 6 C.M.A. 331, 20 C.M.R. 47.

113. 6 C.M.A. 337, 20 C.M.R. 52.

114. *Id.*

considered to be a general rule that the law of the flag did not apply when a soldier serving in a foreign nation left his camp or post for recreation and later committed an offense.[115] In that case, therefore, the local authorities were competent to punish the soldier.[116]

The Court eventually dismissed the charges against Sinigar because of insufficient evidence.[117] However, it is significant that the Court took pains in its lengthy dicta to lay down for future use the rule that visiting forces are not immune from local jurisdiction for offenses committed against the host nation while off duty.[118]

In the final decision in this series of cases, the Court of Military Appeals again took up the issue of concurrent jurisdiction. In *United States v. Cadenhead*[119] the Court held that American armed forces personnel stationed in Japan on a permanent basis could be tried and punished by Japan for offenses committed within its territory.[120] This full recognition of the host nation's criminal jurisdiction over foreign military forces refuted any blanket claim of immunity for United States forces. As authority for its position, the Court relied on *Girard v. Wilson*,[121] in which the United States Supreme Court had earlier recognized the exercise of foreign jurisdiction over American forces abroad under certain conditions.

Generally, since *Cadenhead* and *Wilson*, American authorities and courts no longer advocate the position that members of visiting armed forces are absolutely immune from local jurisdiction. However, at least one authority has expressed reservations regarding this view when internal discipline of the force is involved.[122]

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115. *Id.* The Court cited 1 L. OPPENHEIM, INTERNATIONAL LAW § 445 (7th ed. Lauterpact 1948) as authority. *See supra* note 80 for the full text of the rule.

116. 6 C.M.A. 330, 337, 20 C.M.R. 46, 52 (1955).

117. 6 C.M.A. 338, 20 C.M.R. 54.

118. 6 C.M.A. 337, 20 C.M.R. 53.

119. 14 C.M.A. 271, 34 C.M.R. 51 (1963). Cadenhead, a minor, was a member of the U.S. Air Force stationed in Japan. He was accused of robbing a Japanese taxi driver. The Japanese asked for and received jurisdiction but released Cadenhead after a Japanese Family Court Judge held that it would be impossible to apply the "educative" policy of Japanese family law. Cadenhead was subsequently tried and convicted by a U.S. court-martial.

120. 14 C.M.A. 272-73, 34 C.M.R. 52-53.

121. 354 U.S. 524 (1957).

122. RESTATEMENT, *supra* note 64, § 59, Comment a, which states:

> Extent of waiver in general. As stated in § 56, unless otherwise expressly indicated, military courts of a foreign force are entitled to exercise their jurisdiction in matters of discipline. This exercise of jurisdiction may include trial of a member of the force for an act that also violates the local criminal law. As indicated in § 57, this right to exercise jurisdiction is not exclusive, and courts of the territorial state retain the right to try a member of a force for offenses against its criminal law.

### *B. Summary of the United States' Position Regarding the Status of Forces*

The aforementioned cases indicate that the present position of the United States on the status of visiting forces under customary international law can be stated as: (1) military courts of visiting forces are permitted to exercise jurisdiction over force members while in the territory of the host State, and (2) host nation authorities may also exercise jurisdiction over members of the visiting force for off-duty offenses committed outside the post.[123] This position is logical when considered in light of the Supreme Court's holding in *Girard v. Wilson*,[124] and the impact of the Department of State's position set forth by the Tate letter.[125]

To summarize, restricted territorial sovereignty has prevailed over the doctrines of the law of the flag and absolute territorial sovereignty. Concurrent jurisdiction exists under customary international law when an off-duty member of a visiting force performs a criminal act which simultaneously breaks the laws of the host State and the sending nation.[126] As previously indicated, international law does not offer a solution to the question of which nation may *first* exercise jurisdiction over such an accused.[127]

At the end of the Second World War, many allies of the United States indicated that the circumstances regarding United States forces stationed in their territory would change drastically.[128] These nations emphasized that their grant of exclusive jurisdiction to the United States over its forces was brought about as a result of the exigencies of war.[129] The Allies viewed this concession as at an end with the termination of hostilities.[130] Consequently, it became imperative to find a solution to the concurrent jurisdiction dilemma caused by the gap in international law. The answer was found in the use of formal international agreements.

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123. Carnahan, *supra* note 27, at 336.

124. Wilson v. Girard, 354 U.S. 524 (1957). In Girard, the Court recognized foreign jurisdiction over an American soldier under criminal indictment for breaking the laws of the receiving State when the U.S. agreed to waive jurisdiction.

125. *See supra* notes 62 and 100 and accompanying text.

126. Carnahan, *supra* note 27, at 336.

127. S. LAZAREFF, *supra* note 4, at 9.

128. Stanger, *supra* note 10, at 141-42.

129. *Id.*

130. *Id.*

## IV. INTERNATIONAL AGREEMENTS CONCERNING JURISDICTION OVER VISITING FORCES

The United States and many of its allies maintained a substantial number of forces abroad after World War II. It became a common practice for these nations to utilize formal agreements to define the legal status of the visiting forces.[131] The United States alone, for example, has entered into more than 50 bilateral agreements with other nations regarding the legal status of its forces.[132] One agreement in particular, the NATO SOFA,[133] has had a great impact regarding the status of forces.

### *A. The NATO SOFA*

The genesis of the NATO SOFA provisions was the multilateral agreement between members of the Brussels Pact, of which the United States was not a member.[134] The Brussels Pact, which was joined by a majority of the future NATO countries, provided that any criminal acts committed by visiting forces within the host nation's territory were within that nation's jurisdiction.[135] In the event of a request from the sending nation for a waiver of jurisdiction, the host nation was only obliged to give sympathetic consideration to the request.[136] The criminal jurisdiction arrangements of the Pact became the basis for article VII of the NATO SOFA on the same subject.[137]

The main objecitves in devising the NATO SOFA were as follows. First, the signatories wanted to ensure that the presence of the visiting friendly forces in the host nation would be accompanied by all possible good will on the part of the nations concerned.[138] Second, they wanted to enhance the mobility of NATO forces by uniformly minimizing national border restrictions.[139] Finally and most importantly, the NATO powers wanted to resolve

131. Stanger, *supra* note 10, at 148.

132. S. LAZAREFF, *supra* note 4, at 1. As of 1982 there were 165 independent nations in the world. This indicates that there are more than *one hundred* nations with which the United States has no such pacts. 1 U.S. DEPT. OF STATE, COUNTRIES OF THE WORLD YEARBOOK 139 (1982).

133. S. LAZAREFF, *supra* note 4, at 3, 128.

134. *Id.* at 64. Belgium, France, Great Britain, Luxembourg, and the Netherlands were the members of the Brussels Pact.

135. Stanger, *supra* note 10, at 145.

136. *Id.* at 145 n.11.

137. S. LAZAREFF, *supra* note 4, at 64.

138. 99 CONG. REC. 8731 (1953) (statement of Senator Wiley).

139. *Id.*

the question of priority in situations where concurrent criminal jurisdiction existed.[140] It should also be noted that according to some American political leaders, an additional purpose of the NATO SOFA was to safeguard the constitutional rights of United States forces when a foreign nation had jurisdiction to try them for criminal offenses.[141]

### *B. History of the NATO SOFA*

The NATO SOFA was signed in London on June 19, 1951. The Senate's advice and consent was given on July 15, 1953, and the pact was ratified by the President on July 24, 1953.[142] While the Agreement contained twenty articles, the preponderance of the criticism during the debate over ratification was directed at Article VII,[143] the provision on criminal jurisdiction.[144]

Detractors of the proposed Agreement argued that the United States gave up more rights than was required under customary international law.[145] As a result of both these objections and considerable public pressure, the Senate attached a reservation[146] to the NATO SOFA. The reservation was intended to clarify the position of the United States concerning criminal jurisdiction. The reservation directs a commanding officer to request the receiving State to waive jurisdiction if, in his opinion, the accused's constitutional rights might be endangered by a trial in the receiving State.[147] If such a request is denied, the commanding officer is to ask the Department of State to press for a waiver through diplomatic channels.[148] In addition, a United States representative is to attend such

140. *Id.*

141. *Id.* at 8732 (statement of Senator McCarran).

142. NATO SOFA *supra* note 23, at 1792. The Senate vote was 72 to 12. 99 CONG. REC. 9088 (1953).

143. 99 CONG REC. 8731-82 (1953); NATO SOFA *supra* note 23, at 1792. The other 19 Articles include: I. Definitions; II. Duty to obey laws of the host nation; III. Travel document requirements; IV. Driver licensing; V. Uniform apparel regulations; VI. Carrying of firearms; VIII. Damage claims; IX. Supplies, facilities and services; X. Local tax exemption; XI. Import duties; XII. Customs exemptions; XIII. Sending state assistance to customs; XIV. Foreign exchange procedures; XV. Application of the Agreement in the event of hostilities; XVI. Procedures for interpretation of the Agreement; XVII. Provisions for revision of the Agreement; XVIII. Ratification of the Agreement; XIX. Denunciation procedures; XX. Territorial coverage of the Agreement.

144. NATO SOFA, *supra* note 23, at 1798, art. VII.

145. 99 CONG. REC. 8732-33 (1953). The detractors believed that visiting forces were immune from local criminal jurisdiction under customary international law.

146. NATO SOFA, *supra* note 23, at 1828.

147. *Id.*

148. *Id.* Additionally, in the event of a denial, the Executive Branch was to notify the

trials and report whenever a violation of the due process provisions of Article VII are perceived.[149] Following this report, the senior commander can then request further diplomatic assistance.

The challenge to Article VII of the NATO SOFA was renewed in 1955 by its detractors in the Senate and House. House Joint Resolution (HJR) 309 was introduced in May 1955.[150] Its purpose was to seek revision of the SOFA so that host countries could not continue to exert criminal jurisdiction over American armed forces personnel.[151] However, the resolution failed to pass.[152]

Prior to the adoption of the NATO SOFA, there was considerable disagreement and confusion regarding the immunity from criminal jurisdiction of members of the visiting force for offenses committed in the host nation's territory.[153] There were those in the United States who advocated the position that the United States retained absolute jurisdiction over its deployed forces.[154] This attitude reflected a desire to adhere to the wartime rules which formerly prevailed.[155] With the advent of peace, however, many allies were no longer willing to allow the United States to retain exclusive jurisdiction over its forces abroad.[156] Another solution had to be found, and the provisions of Article VII were the result.

### *C. Summary of the Criminal Jurisdiction Provisions of the NATO SOFA*

During the Second World War, the dominant consideration regarding jurisdiction over allied foreign forces was the necessity to

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Armed Services Committees of the Senate and House of Representatives. Furthermore, a representative of the U.S. was to be appointed to attend such trials and report any denial of due process under Article VII, paragraph 9 to the senior commander of the U.S. Forces in the receiving State.

149. *Id.*

150. H.J.R. 309, 84th Cong., 1st. Sess., 101 CONG. REC. 6581 (1955).

151. *Id.*

152. 101 CONG. REC. 12679 (1955). A serious Congressional challenge to the adequacy of the NATO SOFA criminal jurisdiction provisions has not arisen since. Congress appears satisfied with the operation of Article VII. *See generally* 102 CONG. REC. 9899-9906 (1956).

153. Stanger, *supra* note 10, at 143 n.10.

154. 99 CONG. REC. 8731-32 (1953).

155. According to Stanger, *supra* note 10, at 140, "The United States had exclusive jurisdiction over its forces in most, though not all, foreign countries in World War II.

156. Stanger, *supra* note 19, at 84-85; *see also* Stanger, *supra* note 10, at 146-47. This unwillingness is due to a number of factors such as less urgency for the presence of troops in peacetime, less danger and hardship being endured by the troops in peacetime, and an increase in nationalism in recent years.

avoid interference with the force's combat operations.[157] This resulted in the sending State's desire to retain exclusive jurisdiction. The need to address this problem during peacetime conditions resulted in the solution provided for in Article VII of the NATO SOFA.[158]

Article VII is the key article of the NATO SOFA and is the most controversial of the twenty articles in the agreement.[159] It delineates the allocation of criminal jurisdiction and the cooperation expected between signatories in criminal matters. Its key components are summarized below.

1. *Paragraph one.* This paragraph sets forth the basic guidelines for exercising concurrent jurisdiction.[160] It notes that the receiving and sending States often have concurrent jurisdiction over members of the visiting force.[161] Subsection (a) of paragraph one recognizes the right of the sending State to exercise a degree of authority in an extraterritorial manner. Conversely, an objective of subsection (b) is to make it clear that the host nation retains very broad jurisdictional powers, due to the fact that it is the territorial sovereign State.

2. *Paragraph two.* There are two situations under which Article VII grants exclusive jurisdiction.[162] Paragraph two sets forth these exceptions.[163] First, if the act is a security related offense punishable only by the military law of the sending nation and not the law of the receiving State, the sending State has exclusive juris-

157. Stanger, *supra* note 10, at 88.

158. 99 CONG. REC. 8729 (1953) (statement of Senator Wiley).

159. Beesley, *supra* note 32, at 202; S. LAZAREFF, *supra* note 4, at 128.

160. Paragraph 1 of Article VII of the NATO SOFA provides:

> 1. Subject to the provisions of this Article,
>
> (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 offences committed within the territory of the receiving State and punishable by the law of that State.

NATO SOFA, *supra* note 23, at 1798.

161. Beesley, *supra* note 32, at 204.

162. S. LAZAREFF, *supra* note 4, at 151-52.

163. Paragraph 2 of Article VII of the NATO SOFA provides:

> 2. (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.
>
> (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 depen-

diction. Second, the receiving State has exclusive jurisdiction over visiting force members when the offense is related to the security of the host nation and is punishable only by the host nation's law and not by the law of the sending State.[164] Generally, there is a right to exercise concurrent jurisdiction in all other cases.[165]

3. *Paragraph three.* This part of Article VII[166] is designed to fill the gap in international law regarding the issue of which nation has priority to exercise jurisdiction when concurrent jurisdiction is present.[167] This provision sets forth a system of priorities as to the right to exercise jurisdiction.[168]

The category of the offense determines which State has the primary right to exercise jurisdiction. There are two types of offenses which give the military authorities of the sending State the primary right to exercise jurisdiction. The first is an offense solely against the person, property or security of the sending State.[169] The second type of offense is one "arising out of any act or omission done in the performance of official duty."[170] The receiving State has the pri-

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dents 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.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include:

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.

*Id.*

164. *Id.*, sub paragraph (b).

165. Beesley, *supra* note 32, at 205.

166. Paragraph 3 of Article VII of the NATO SOFA provides:

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(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.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of 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.

NATO SOFA, *supra* note 23, at 1800.

167. S. LAZAREFF, *supra* note 4, at 160.

168. *Id.* at 161.

169. *See supra* note 166.

170. *Id.*

mary right to exercise jurisdiction over all other offenses.[171]

Article VII also contains an important provision on waiver procedures.[172] The State with primary jurisdiction is called upon to give sympathetic consideration to a request from the other nation for a waiver of the former's right. Some writers believe this concept is so broadly accepted that it has become a part of customary international law.[173]

4. *Paragraph four.* The main purpose of this paragraph is to resolve the problems of dual nationality.[174] This provision allows the sending State to exercise jurisdiction over a national of the receiving State if the national is a member of the sending State's forces.

5. *Paragraph five.* The duty of the sending and receiving States to assist one another in arresting accused members of a force in the receiving State's territory is covered in this part of Article VII.[175] This paragraph also concerns extraterritoriality by rejecting any right of asylum and making it clear that the military installations of the sending State enjoy no extraterritorial privileges.[176] The United States has a long history of cooperation under this article.[177]

6. *Paragraph nine.* The final section of Article VII contains the due process safeguards accorded the accused when he is prosecuted by a receiving State.[178] Senator Wiley introduced the inclusion of these safeguards while debating before the Senate on the

171. S. LAZAREFF, *supra* note 4, a 161.

172. *See supra* note 166, subsection 3.

173. Carnahan, *supra* note 27, at 336.

174. NATO SOFA, *supra* note 23, art. VII (4).

175. Paragraph 5 of Article VII of the NATO SOFA provides:

> 5. (a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.
>
> (b) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.
>
> (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.

NATO SOFA, *supra* note 23, at 1800.

176. S. LAZAREFF, *supra* note 4, at 238.

177. Beesley, *supra* note 32, at 206-07.

178. Paragraph 9 of Article VII, of the NATO SOFA provides:

NATO SOFA.[179] The Senator offered them as assurances designed to overcome doubts about whether American servicemen would receive a fair trial in the courts of other NATO countries.[180]

### *D. Problems Encountered in Interpreting Status of Forces Agreements*

Article VII grants exclusive jurisdiction to the sending State for offenses arising out of any act or omission done in the performance of official duty.[181] Attempted application of this provision immediately raises two important questions: (1) which authority will make the determination of whether the offense was in the performance of official duty, and (2) what is the actual meaning of the term "performance of official duty." The original NATO Agreement is silent regarding both issues.[182]

The Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany[183] clarified which State shall have the power to decide the question as to what constitutes "performance of official duty." The Agreement states that the duty determination is to be made in accordance with the law of the sending State.[184] It further provides that the highest appropriate authority of the sending State

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9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

(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.

NATO SOFA, *supra* note 23, at 1802.

179. 99 CONG. REC. 8730 (1953).

180. *Id.*

181. NATO SOFA, *supra* note 23, at 1800, art. VII, 3(a)(ii).

182. Stanger, *supra* note 10, at 235-38; S. LAZAREFF, *supra* note 4, at 176.

183. Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262. The Supplementary Agreement was entered into force on July 1, 1963. The signatories were the United States, United Kingdom, France and the Federal Republic of Germany.

184. Article 18 of the NATO Supplementary Agreement provides:

1. Whenever, in the course of criminal proceedings against a member of a force or of a civilian component, it becomes necessary to determine whether an offence has arisen out of any act or omission done in the performance of official duty, such determination shall be made in accordance with the law of the sending State con-

may submit a certificate of its determination to the court hearing the case.[185] Generally, the court is to make its decision in conformity with the certificate.[186] However, in exceptional cases the Agreement also provides for review of the certificate by the receiving State's government, as well as by the diplomatic mission of the sending nation.[187] The result is that once the sending State has decided that an offense has been committed in the performance of official duty, the case is outside the jurisdiction of the receiving State.[188]

The difficulty this Agreement presents is that not all of the SOFAs entered into by the United States contain a provision similar to Article 18 of the West German SOFA. Only the Japanese, Federation of the West Indies, Phillippine, and West German Agreements contain a clause specifically addressing the problem.[189] In practice, the courts of the United Kingdom, France, Italy, and Turkey have generally accepted the military authority's determination as to whether the offense was committed in the performance of duty.[190] Thus there is no general rule regarding this sensitive issue.[191] Consequently the ability to secure a uniform solution to the official duty determination is missing.[192]

A striking example of a difference of opinion between the sending and receiving States on the meaning of "performance of duty" occured in *Wilson v. Girard*.[193] Girard, serving with the United States Army in Japan, caused the death of a Japanese woman.[194] The Administrative Agreement[195] covering the status of

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cerned. The highest appropriate authority of such sending State may submit to the German court or authority dealing with the case a certificate thereon.

2. The German court or authority shall make its decision in conformity with the certificate. In exceptional cases, however, such certificate may, at the request of the German court or authority, be made the subject of review through discussions between the Federal Government and the diplomatic mission in the Federal Republic of the sending State.

*Id.* at 552.

185. *Id.*

186. NATO SOFA, *supra* note 23, at 552, art. XVIII(2).

187. *Id.*

188. S. LAZAREFF, *supra* note 4, at 171.

189. *See generally* Stanger, *supra* note 10, at 235-38.

190. *Id.*

191. *Id.* at 238.

192. S. LAZAREFF, *supra* note 4, at 176-77

193. Wilson v. Girard, 354 U.S. 524 (1957).

194. During maneuvers, Girard had been ordered to guard a machine gun on top of a hill. The victim, along with other Japanese civilians, entered a posted, prohibited area to recover expended brass cartridge cases. Girard was accused of throwing out empty shell cases to entice the Japanese to approach. He denied the allegation. The woman was killed

forces between Japan and the United States had been amended by protocol which incorporated the NATO SOFA provisions regarding concurrent jurisdiction.[196] The Agreement granted the United States military authorities primary jurisdiction for "offenses arising out of any act or omission done in the performance of official duty."[197] The Agreement also provided for a Joint Committee to resolve any disputed matters between the United States and Japan.[198]

The United States authorities insisted on the right to try Girard on grounds that he had acted in the furtherance of an official duty. The claim was certified by Girard's commanding officer, and consequently the United States claimed primary jurisdiction. Conversly, Japan insisted that it had proof that Girard's act was not within the purview of his official duties, and as such the Japanese had the primary right to try him.[199]

The Joint Committee was unable to resolve the dispute and the matter was referred to the highest levels of government. Finally, after extended negotiations, the United States government authorized its Joint Committee representatives to waive whatever jurisdiction it claimed in the case.[200] This act preserved the United States' position that Girard had committed the act in the official performance of duty. Relying on the Executive Branch's position, the Supreme Court affirmed a District Court's denial of a writ of habeas corpus for Girard.[201] He was subsequently tried and convicted by a Japanese court.[202]

### *E. Concurrent Jurisdiction and the Operation of Article VII*

Statistics concerning criminal offenses committed by United States armed forces personnel stationed overseas are kept by the Department of Defense. The statistics pertain only to United

when Girard fired an empty shell from his rifle grenade launcher and it struck her in the back. Girard testified that he had only intended to frighten the woman. *Id.*

195. Administrative Agreement Under Article III Of The Security Treaty Between The United States of American and Japan, February 28, 1952, 3 U.S.T. 3341, T.I.A.S. No. 2492.

196. Protocol to Amend Article XVII of the Administrative Agreement Under Article III of the Security Treaty Between the United States of America and Japan, September 29, 1953, 4 U.S.T. 1846, T.I.A.S. No. 2848.

197. *Id.* 4 U.S.T. 1846, 1848.

198. 3 U.S.T. 3341, 3361.

199. 354 U.S. 538-39.

200. Stanger, *supra* note 10, at 229 n.34.

201. 354 U.S. 530.

202. Japan v. Girard, 26 I.L.R. 203 (Japan, District Court of Maebashi 1957).

States forces. Although other NATO nations do not promulgate a similar analysis for offenses committed by members of their armed forces,[203] these data nevertheless make possible a useful comparison of the operation of Article VII in NATO countries with countries not covered by an Article VII type provision.[204]

The latest report available covers the period from December 1, 1980 to November 30, 1981.[205] This report reveals that United States military forces stationed world-wide were involved in 64,101 offenses subject to primary or exclusive jurisdiction of foreign tribunals.[206] Of these cases, 38,237 involved traffic offenses including drunken and reckless driving and fleeing the scene of an accident.[207] The report indicates that 24,955 of the cases world-wide involved concurrent jurisdiction. Of these cases, a waiver of local jurisdiction was obtained by the United States in 21,521 (86.1%) of the cases where the host nation had primary jurisdiction,[208]

Of the American military personnel tried world-wide, 382 (.9%) were acquitted, 171 (.4%) were sentenced to confinement, 251 (.6%) received suspended sentences to confinement, and 43,187 (98.2%) were fined or reprimanded. Of those sentenced to confinement for serious crimes, three received life sentences, the most severe sanctions meted out by the foreign courts during this reporting period.[209]

The statistics in this report offer support for the procedures used under Article VII. The local jurisdiction waiver rate for offenses committed by United States military personnel in NATO countries was 96.5% for the reported period.[210] This compares with the 86.1% world-wide rate. The percentage of waivers successfully obtained for United States forces in NATO countries is probably far higher than the drafters of the Agreement ever envisioned.

It is clear that Article VII has had a significant impact on the lives of United States armed forces members. As a result of the NATO Agreement provisions on criminal jurisdiction, many

203. S. LAZAREFF, *supra* note 4, at 256-61.

204. DOD STATISTICS, *supra* note 14, at 1-10.

205. *Id.* at 1.

206. *Id.*

207. *Id.* at 2.

208. *Id.* at 1. Of those cases tried and completed, only 373 were for serious crimes. The report defines serious crimes as murder, rape, manslaughter, arson, larceny and related offenses, burglary and related offenses, forgery and related offenses, and aggravated assault.

209. *Id.* at 1, 3.

210. *Id.* at 10. It is to be noted that 57,213 of the 64,101 total criminal offenses worldwide involved U.S. forces assigned to NATO countries.

American Armed Forces members have been released for disciplinary action under their own system of justice and have not been tried in foreign courts. With a world-wide acquittal rate of less than one percent,[211] trial under the United States' system of justice is a major consideration for American servicemen and women.[212]

### *F. Summary of the NATO SOFA's Effectiveness*

The NATO SOFA attempts to resolve the considerable problems surrounding status of forces jurisdiction. A reading of Article VII[213] and the Supplementary Agreement for West Germany[214] indicates the complexity of individual criminal jurisdiction questions generated by the sheer number of forces involved.[215] In addition, the Agreement has had to function within the vagaries of a fluctuating political environment within the NATO alliance and the world.

Even with its shortcomings, however, there is a general feeling that the NATO SOFA "has, to a remarkable degree, attained its objectives."[216] This is borne out by the fact that the agreement is still in effect after passing the 30th anniversary of its signing.[217] NATO forces operate daily under its provisions as they have for nearly thirty years. Many of the original arguments voiced in the United States against the criminal jurisdiction provisions of the NATO SOFA are no longer heard.[218]

The general success of the NATO SOFA, and specifically its effectiveness in resolving concurrent jurisdiction problems suggests that such a vehicle can be useful outside the sphere of its signatories. A need for a universally acceptable basis for solving concurrent jurisdictional issues has long existed. The NATO SOFA can

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211. *Id.* at 1.

212. An explanation for the low acquittal rate might be that the host nation only prosecutes those cases in which it has a high probability of success.

213. NATO SOFA *supra* note 23, at 1798-1802.

214. *See supra* notes 183-184; *see also* S. LAZAREFF, *supra* note 4, at 3, 261.

215. *See* U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 375 (100th ed. 1979). In 1978, 494,000 U.S. military personnel were stationed abroad or deployed on ships. Of that total, 330,000 were serving in Europe, with 234,000 stationed in Germany.

216. *Id.* at 261.

217. *See supra* text accompanying notes 142-157.

218. Even Senator Bricker, who was vehemently opposed to U.S. relinquishment of exclusive jurisdiction, admitted that the NATO SOFA worked without any injustice to U.S. personnel. S. LAZAREFF, *supra* note 4, at 261. For Senator Bricker's original position see 99 CONG. REC. 4659 (1953).

provide a useful model for an acceptable codification of international law regarding visiting military forces.

## V. CODIFICATION OF INTERNATIONAL LAW REGARDING CONCURRENT JURISDICTION OVER VISITING MILITARY FORCES

The need for codification of international law into a convention on the subject of status of forces is evident in several respects. First, there is the gap in international law regarding which nation should prevail when the sending and receiving States each have a different, but valid basis of jurisdiction.[219] This occurs when a visiting force member commits a criminal offense in the territory of the receiving nation and the offense also violates the laws of the sending State.[220] In such an event, territorial and law of the flag jurisdiction are both applicable.[221] However, there are no general international rules of law for deciding which jurisdictional basis should prevail.[222] In this situation, the two States may choose to negotiate a solution on a case by case basis. In the alternative, the State which has custody of the accused may elect to try him first, regardless of claims of jurisdiction by the other State.[223] The priority procedure for determining jurisdiction adopted by the NATO SOFA provides a system to end such a dilemma.[224]

Secondly, significant numbers of military forces have been stationed on foreign soil since the end of the Second World War.[225] The presence of large numbers of visiting forces in receiving nations causes continuing economic, political and legal effects which must be addressed.[226] Without such attention, the relationship between the sending and receiving States can be placed under a great deal of stress if a serious incident involving an armed forces member occurs.[227]

Finally, international discord is particularly likely to occur

219. Stanger, *supra* note 10, at 155.

220. *See supra* text accompanying notes 18-19.

221. S. LAZAREFF, *supra* note 4, at 9.

222. According to the RESTATEMENT, "If a state has a basis of jurisdiction that is recognized under international law, it may generally exercise its jurisdiction even though another state may also have a recognized basis of jurisdiction." RESTATEMENT, *supra* note 64, § 37, comment a.

223. 2 D. O'CONNELL, INTERNATIONAL LAW 957 (1965).

224. S. LAZAREFF, *supra* note 4, at 161.

225. *Id.* at 1.

226. *Id.*

227. Stanger, *supra* note 10, at xi.

when misunderstandings and tensions develop over criminal offenses involving members of visiting military forces.[228] Criminal jurisdiction involves the basic, primary interest of the State in maintaining public order and safety.[229] The State's interests are balanced against the rights of the individual, but these rights and interests have varying weights of importance in different societies.[230] The potential for international friction when more than one nation has a vital interest in prosecuting a criminal offense can be magnified in the absence of an agreement. In such a case international law does not provide any procedures or absolute rules of priority when there is concurrent jurisdiction over a criminal offense.[231] These factors are all important considerations in support of the need for codification of international law into a convention regarding concurrent jurisdiction over visiting forces.

### *A. Recommendation*

This Comment recommends that the NATO SOFA be updated and utilized as a basis for codifying internatioanal law into a convention regarding status of forces. To date, the NATO SOFA has worked remarkably well in actual practice.[232] With modernization based upon nearly 30 years of experience, such a convention should be eminently satisfactory for world-wide usage. It would not be the first international agreement codified into a convention, nor the first which has served as the basis for a universally acceptable set of rules.[233]

A number of NATO-like agreements have been made by Western nations either among themselves or with States outside the hemisphere. For example, Japan demanded that the status of United States forces in that country should be the same as those in NATO nations. This demand caused an end to exclusive United States jurisdiction there in 1953.[234] The Warsaw Pact nations have

228. *Id.*; *see also* Chiu, *Status of Forces Agreement With the Republic of China: Some Criminal Case Studies*, 3 B.C. INT'L & COMP. L. REV. 67, 77 (1979). Chiu cites the case of the acquittal of a U.S. Master Sergeant by a Court-Martial on a charge of manslaughter of a Chinese National in Taiwan. The acquittal caused such repercussions in the local populace that an angry mob of Chinese sacked the U.S. Embassy in Taipei.

229. Stanger, *supra* note 10, at 102.

230. *Id.*

231. *Id.* at 155.

232. S. LAZAREFF, *supra* note 4, at 261-62.

233. *See* Baxter, *Foreword* to S. LAZAREFF, STATUS OF MILITARY FORCES at i (1971); *see also* J. SWEENEY, *supra* note 60, at 953.

234. Stanger, *supra* note 10, at 145.

also adopted jurisdictional provisions similar to those of the NATO SOFA.[235] According to one authority, this is "the surest indication of its inherent fairness and plausibility."[236] With such a successful SOFA already in existence, it is only logical to consider it as a model for a codification of international law.

### *B. Codification Procedures*

The codification proposal could be brought up in the General Assembly of the United Nations under Article 13 of the United Nations Charter. That Article allows the General Assembly to initiate studies and make recommendations for the purposes of furthering the development and codification of international law. Moreover, under the principles set forth in the Declaration of Universal Participation in the Vienna Convention on the Law of Treaties,[237] such a convention dealing with codification of international law could be opened to accession by invitation to sovereign States.[238] Such codification in the form of a convention could be of interest and use to any nation, whether or not a member of the United Nations. A long-term deployment of a visiting force on foreign soil could thereby be made subject to the convention's terms, provided both nations are signatories.[239]

### *C. Benefits of Codification Into a United Nations Convention*

The potential benefits of a codification of international law concerning status of forces jurisdiction are manifold. Codification would bridge a troublesome gap in international law by providing a predetermined method of ascertaining, according to priorities, the status of a visiting force serving within the territory of another State.

A convention on status of forces would also provide more certainty and uniformity in international relations. It would establish a preexisting standardized status of forces agreement for implementation as required. The convention could also help smaller, less powerful nations achieve more favorable jurisdictional terms that

235. G. VON GLAHN, LAW AMONG NATIONS 199 (1968); Baxter, *supra* note 233, at i.

236. Baxter, *supra* note 233, at i, ii.

237. U.N. Conference on the Law of Treaties Off. Rec., First and Second Sessions 26 Mar. -25 May, 1968 and 9 April-22 May, 1969, Documents of the Conference (U.N. Doc. A/CONF.39/26), at 285, as reported in J. SWEENEY, *supra* note 60, Documentary Supplement at 222.

238. 1 L. OPPENHEIM, INTERNATIONAL LAW § 532 (8th ed. Lauterpact 1955).

239. *Id.* § 512.

are now unavailable to them in the absence of such a convention. At present, less powerful nations are often at a disadvantage in status of forces negotiations because of their weaker bargaining position. A convention setting forth standardized SOFA terms could strengthen the weaker nation's position.

Codification would also be helpful in the case of short-notice deployments of military forces for peace-keeping purposes. Additionally, the convention would be suitable for long-term visiting force arrangements such as those existing in the Warsaw Pact Nations and Japan. The assignment of Italian, French, and American forces to Beruit, Lebanon from 1982 to 1984 is illustrative of a situation in which the proposed convention would have been useful.[240] The Convention could have been approved by the nations involved within a short period of time. The jurisdictional status of the forces involved would then have been readily ascertainable had the need arisen.

Once it was generally accepted, a secondary benefit of a status of forces convention would be its power to reduce the chances of a serious misunderstanding[241] regarding visiting forces. With a set of known rules for determining which State has primary jurisdiction, the chances of a disagreement regarding primary jurisdiction would be greatly reduced.[242] International harmony and peace would thus be enhanced.

## VI. CONCLUSION

Under customary international law, the reconciliation of two applicable but diametrically opposed principles of jurisdiction over visiting foreign military forces can be a source of international friction.[243] The first principle relates to the territorial sovereignty of the host nation.[244] It calls for exclusive jurisdiction over all acts within the host nation's territory[245] to furher the maintenance of public safety and welfare.[246] In contradiction to the territorial principle is the law of the flag.[247] Under this concept, the commanders

240. *See generally* N.Y. Times Aug. 21, 1982, § 1, at 1, col. 1; Sept. 29, 1982, § 1 at 7, col. 7.
241. Stanger, *supra* note 10, at xi.
242. Baxter, *supra* note 233, at ii.
243. Stanger, *supra* note 10, at xi.
244. *See supra* text accompanying notes 45-54.
245. *Id.*
246. *See supra* text accompanying note 12.
247. *See supra* text accompanying notes 73-100.

of the visiting force must have exclusive authority to apply military discipline to members of its own force.[248] Without it the commander is no longer in full control of the force and his effectiveness is thereby derogated.[249]

In the absence of an agreement, it is difficult to strike a balance between these two extremes since no one theory of jurisdiction has prevailed.[250] Concurrent jurisdiction appears to be the equilibrium point for criminal offenses. It represents the position of most States regarding status of forces.[251] However, when concurrent jurisdiction exists, the problem arises as to which State has priority for the exercise of jurisdiction.[252] The solution utilized in the NATO SOFA is the highly useful concept of "primary" and "secondary" jurisdiction.[253] This priority system of dealing with concurrent criminal jurisdiction has been in continuous, successful operation for nearly 30 years.[254] The key to the success of the NATO SOFA lies in Article VII,[255] which grants the sending State primary jurisdiction when the offense is security related or arises out of an act or omission in the performance of official duty.[256] In all other cases the receiving State retains primary jurisdiction.[257] The conflict resolving procedure incorporated in the NATO SOFA has worked so well that it has become the model for status of forces agreements internationally.[258] Many States, including the Warsaw Pact nations, have considered its tenets valuable enough to adopt them.[259]

A proposed convention based on the NATO SOFA would bridge a troublesome gap in international law. Increased certainty and uniformity in the laws governing visiting military forces would be a valuable result.[260] In addition, with proper procedures utilized in the United Nations, the convention could be opened to universal participation by all member nations, and also could be left open to accession by any future new nations.[261]

248. *Id.*
249. Stanger, *supra* note 10, at 84-85.
250. *See supra* text accompanying note 127.
251. Baxter, *supra* note 233, at i.
252. *See supra* text accompanying notes 45-59 and 73-94.
253. *See supra* text accompanying notes 166-171.
254. *See supra* text accompanying note 171.
255. *See supra* text accompanying note 159.
256. *See supra* text accompanying notes 166-171.
257. *See supra* text accompanying note 171.
258. *See supra* text accompanying notes 234-235.
259. *See supra* text accompanying note 235.
260. *See supra* text accompanying notes 250-251.
261. *See supra* text accompanying notes 237-238.

The deployment of the tri-partite force in Lebanon in August and September, 1982[262] continuing into 1984, recently illustrated the current and long term necessity for such a convention. Further impetus for implementation of a uniform convention on status of forces is gained by an examination of the sheer numbers of visiting force components continuously stationed throughout the world.[263]

With many nations already using similar provisions for their status of forces agreements, it appears that codification in this area of international law is in order. A uniform convention under the auspices of the United Nations is therefore proposed under Article 13 of the United Nations Charter,[264] which encourages the development and codification of international law. The United States, either alone, or with the aid of allies, should promptly introduce such a convention for passage in the United Nations General Assembly.

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262. *See supra* text accompanying note 240.
263. *See supra* text accompanying notes 225-235.
264. *See supra* text accompanying notes 237-239.

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