Vanderbilt Journal of Transnational Law

Volume 24
Issue 5 *Issue 5 - 1991*

Article 1

1991

Short v. The Kingdom of The Netherlands: Is it Time to Renegotiate the NATO Status of Forces Agreement?

Steven J. Lepper

Vanderbilt Journal of
Transnational Law

VOLUME 24 | 1991 | NUMBER 5

Short v. The Kingdom of The Netherlands: Is it Time to Renegotiate the NATO Status of Forces Agreement?

*Steven J. Lepper**

ABSTRACT

Major Lepper examines an apparent irreconcilability between the NATO Status of Forces Agreement (SOFA) and the European Convention on Human Rights (ECHR) as reflected in the recent Dutch High Court decision of Short v. The Kingdom of the Netherlands. *Staff Sergeant Short, a member of the United States Air Force, was charged with the murder of his wife. Under the SOFA, the Netherlands was obligated to surrender Short to the United States. It refused, basing its actions on its adherence to the ECHR and its concerns about the possible implementation of the death penalty in the United States.*

The ECHR prohibits the extradition of anyone facing "inhuman or degrading treatment or punishment." Although the original ECHR did not prohibit capital punishment, a later amendment to the ECHR, the Sixth Protocol, does prohibit capital punishment. The Dutch High Court relied heavily on the European Court on Human Rights interpretation of

* B.S., United States Air Force Academy, 1979; J.D., Duke University, 1984; LL.M. (International and Comparative Law), Georgetown University, 1991. Major Lepper is currently an Air Force judge advocate assigned to the International and Operations Law Division, Office of the Judge Advocate General, Headquarters United States Air Force, Washington, D.C. The author expresses his gratitude to Mr. Johnathan T. Fried, formerly Adjunct Professor of Law, Georgetown University, for his assistance in the preparation of this Article. The views expressed herein are the author's own and do not necessarily reflect those of the United States Air Force.

the ECHR in the Soering *case as the basis for its decision.*

The Dutch High Court agreed that the NATO SOFA required surrendering SSgt Short to the United States, but determined that the perceived conflict between the SOFA and the ECHR must be resolved by applying the ECHR. The author identifies flaws in the High Court's finding that the ECHR afforded protection for SSgt Short, a finding that created the conflict between the SOFA obligation to surrender the prisoner and the ECHR mandate to shield him from capital punishment. Citing European Court precedent and the Vienna Convention's conflicting treating rules, the author finds that the SOFA and the ECHR can be read consistently and suggests that renegotiation of the SOFA is neither necessary nor inevitable.

The author next evaluates the Dutch position in Short. *Because that position is grounded in the emerging jurisprudence of human rights, the author reviews Dutch human rights law and policy and the applicable portions of the ECHR. The assertion that international human rights laws supersede other international laws is analyzed in the context of international law's practice of ranking certain norms as "fundamental." Finding that capital punishment does not violate a peremptory norm, the author then analyzes the claim that it violates a fundamental right. If the right not to face capital punishment is indeed fundamental, the issue becomes whether the NATO SOFA or a customary regional norm prevails. The author considers arguments supporting each position and the suggestion that international treaty law justifies a revision of the NATO SOFA. Major Lepper, however, concludes that similar cases should be decided on a case-by-case basis so that both countries' policies can be maintained: strong alliance, military disciplinary control, and human rights. This case-by-case basis must include a mutual willingness to reach a compromise such as the one agreed to in* Short: *the United States agreed to forego the option of capital punishment in order to retain disciplinary control over its military personnel.*

TABLE OF CONTENTS

I. INTRODUCTION

The Berlin Wall has fallen; the Cold War is over. Not since World War II has Europe seen as much political and military change as has occurred during the two past years. Certainly, almost everyone on both sides of the former "Iron Curtain" will agree that the changes have been for the better.

Despite the apparent consensus among the North Atlantic Treaty Organization (NATO) nations that their alliance must still anticipate and be ready to parry the military force of the former Soviet Union, also becoming clear is that significant change is inevitable. Indeed, the United States has responded to these developments by pledging to reduce the number of its troops in Western Europe.[1]

1. *See* Alan Riding, *NATO Struggling to Redefine Itself,* N.Y. TIMES, Sep. 24,

As the size and structure of NATO's military force changes, the question has arisen whether the conditions of its presence in Western Europe should also change. In particular, recent events have prompted suggestions that the entire matter of stationing foreign forces in NATO states be reconsidered. One smaller aspect of that issue is the question whether the changes in Europe—both recent ones and those that have taken place gradually over the past forty years—compel re-examination and possible renegotiation of the NATO Status of Forces Agreement (SOFA). The thesis of the 1991 Brussels Congress of the Society for Military Law and Law of War (the Society) was that re-examination of the SOFA is certainly in order.[2]

In its "background paper" designed to stimulate debate among its attendees, the Society recognized an evolving problem: "Sending states . . . are increasingly confronted with changed policies of host nations claiming that their national legislation should prevail over the rights and duties laid down in stationing agreements in situations where interests of the host nation are affected."[3] Because the resulting difficulties are seemingly irreconcilable, it suggests that agreements like the NATO SOFA be reconsidered. The main purpose of this Article is to consider one aspect of that proposition and its bases. Following the Society's lead, this Article examines the area of greatest divergence between the United States and its European allies: human rights. In that context, one recent case will be of particular interest.

At the end of 1990, the Dutch High Court enjoined its government from surrendering to the United States a member of the United States Air Force accused of murdering his wife. Although that may not look unreasonable at first glance, it actually involved considerable debate and diplomatic wrangling between the United States and the Netherlands. The crux of the problem was that the Dutch Court's decision resulted in the Netherlands violation of the NATO SOFA. According to that treaty, the United States serviceman, Staff Sergeant (SSgt) Charles Short, should have been prosecuted by United States military court-martial for his offense. Because that trial might have led to a death sentence, Dutch adherence to the European Convention on Human Rights (ECHR) prompted the Court to protect him from that possibility.

Although this case represents only a small part of the question

---

1990, at A5.

2. Society for Military Law and Law of War General Affairs Commission, Background Paper for the Brussels 1991 Congress (1990) (unpublished manuscript) [hereinafter Society Background Paper].

3. *Id.* at 1.

whether the NATO SOFA ought to be reconsidered, it raises numerous international legal issues, which range from the binding nature of treaties to the status of human rights in international law. This Article examines the United States and Dutch positions in this matter and the arguments that either have been or could be used to support them. One goal of this Article is to demonstrate that the continued success of the NATO SOFA, or its undoing, could lie at the heart of this single case.

This Article begins by examining the *Short* case in more detail. Then it will briefly consider the *Soering* case—the recent decision from the European Court of Human Rights upon which the Dutch High Court relied heavily. The next two sections focus on the United States and Dutch positions respectively. The United States arguments come first because they are based on traditional black-letter notions of international law. Therefore, they are much easier to understand. The Dutch position, in contrast, reflects the emergence of human rights as international norms. As a more contemporary and less well-settled body of jurisprudence, it is understandably controversial. The Article then concludes by considering whether these two positions can be resolved and, if so, how. Whether the resolution requires the NATO SOFA's renegotiation is the ultimate issue the Article will address.

II. *SHORT* AND *SOERING*: THE BACKGROUND TO THE NATO SOFA PROBLEM

The United States military tradition of stationing troops on friendly foreign soil is relatively new, dating primarily to World War I. The principle of peaceful military occupation, however, can be traced to the eighteenth-century practice of peaceful transit of armies through the territory of friendly states[4] and to the long-accepted naval practice of peaceful passage through their territorial waters and into their ports.[5]

Since its first foreign ventures, one of the United States primary concerns has been the extent to which members of its armed forces located abroad may be subject to the receiving state's criminal jurisdiction.[6] In

4. *See* SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 8 (1971). Since Prussian territories were not contiguous, its forces had to pass through friendly states in order to move from one garrison to another. Armies always conducted these forays with the express permission of the sovereign of the state transited; its scope was generally very narrow, restricting the military force's size, the duration of its transit, and the conditions under which its transit was authorized. *Id.*

5. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW 673 (4th ed. 1928).

6. *See generally id.* at 19; G.P. Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction*, 1950 BRIT. Y.B. INT'L L. 186.

recent years, those concerns typically have been addressed in bilateral or multilateral status of forces agreements. The first among contemporary agreements was the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces," or the "NATO SOFA."[7] Both during and after the United States NATO SOFA ratification process, some lawmakers voiced fears that subjecting GIs to foreign criminal prosecution might lead to "cruel and inhuman punishment."[8] Military authorities expressed concern that without exclusive jurisdiction over their troops, discipline would be impossible to enforce.[9] Although some commentators have argued that the concept of shared jurisdiction incorporated in the NATO SOFA and similar agreements has rendered these concerns "largely academic,"[10] the apparent reluctance of some parties to enforce these treaties recently may have resurrected them.

Within the past two to three years, increasing European interest in the international protection of human rights has led to what one recent article called "an ironic dilemma for an American military justice system that generally prides itself in its success in securing broad protections for

---

7. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

8. *See Status of Forces of the North Atlantic Treaty: Supplementary Hearings Before the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 7 (1953) [hereinafter cited as Supplementary SOFA Hearings] (statement of Sen. Bricker). In these hearings and others during the Japanese prosecution of Spec. 3 Girard, the Senate was concerned that United States military personnel stationed abroad would not be accorded rights similar to those guaranteed by the United States Constitution. To be tried without minimum due process guarantees was unthinkable to the Senate. *See also* Wilson v. Girard, 354 U.S. 524 (1957); H.R. REP. NO. 678, 85th Cong., 1st Sess. 25 (1957) [hereinafter *SOFA Revision Hearings*]. Generally, status of forces agreements deal with the problems arising from the stationing of the armed forces of one state in the territory of another. As an example, the NATO SOFA "defines the status of these forces when they are sent to another NATO country; it does not of itself create the right to send them in the absence of a special agreement to that effect." *NATO Agreements on Status: Travaux Preparatoires*, 1961 NAVAL WAR C. INT'L L. STUD. at 3.

9. *See* Archibald King, *Jurisdiction Over Friendly Foreign Armed Forces*, 36 AM. J. INT'L L. 539 (1942). Colonel King argued that "the intervention of the courts of a foreign even if friendly country in the discipline of an army would be destructive of that discipline and inconsistent with the control which any sovereign nation must have of its own army." *Id.* at 548.

10. JOSEPH M. SNEE & A. KENNETH PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION 9 (1957). In SOFA parlance, a "sending state" is the party stationing its troops within the borders of the "receiving state."

the individual rights of its accuseds."[11] Specifically, several European NATO allies have expressed or demonstrated their unwillingness to allow United States military personnel to face capital charges for offenses arising under the NATO SOFA. These states are also parties to the ECHR,[12] which the European Court of Human Rights recently interpreted to prohibit the extradition of persons accused of capital offenses.[13] The irony in this, of course, is that this sounds strangely like the United States long-held view that it must maximize its jurisdiction over its own military forces abroad in order to avoid exposing them to possible cruel and unusual punishment.

A. Short v. The Kingdom of the Netherlands

The facts of a recent case briefly illustrate the tension between human rights and the NATO SOFA On March 30, 1988, the Dutch Royal Marechaussee (military police) arrested Staff Sergeant Charles D. Short, a member of the United States Air Force stationed at Soesterberg Air Base in the Netherlands, as a suspect in the murder of his wife, a Turkish national.[14] At some point during his Dutch interrogation, SSgt Short admitted killing his wife, dismembering her, and placing her remains in plastic bags by a dike near Amsterdam. Although the NATO SOFA clearly vested criminal jurisdiction in the United States,[15] the Dutch authorities refused to turn SSgt Short over to his superiors at Soesterberg Air Base. Their rationale for not following this treaty, to which both the United States and the Netherlands are parties, was that to do so would subject SSgt Short to the risk of capital punishment.[16] This, the Dutch authorities said, would violate their domestic and international commit-

---

11. MAJOR JOHN E. PARKERSON, JR. & MAJOR CAROLYN S. STOEHR, *The U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments*, 129 MIL. L. REV. 41 (1990).

12. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

13. *See* Soering Case, 161 Eur. Ct. H.R. (ser. A) at 50 (1989). Aspects of that case—the *Soering* case—will be examined in more detail below. *See infra* notes 31-42 and accompanying text.

14. Serious Incident Report Message from 32d TFS/JA to HQ USAF/JACI (Mar. 31, 1988). Throughout this Article, messages dispatched by one United States government agency to another will be referred to. This is the routine method by which information is transmitted between military units and State Department entities. The author has copies on file of all cited messages.

15. *See infra* notes 100-132 and accompanying text.

16. Judgment of Mar. 30, 1990, Hoge Raad der Nederlanden [Highest Court], The Hague, 1990, Nos. 13.949, 13.950, slip op. at 10 (unofficial translation by United States Department of State).

ments to abolish the death penalty.[17] Although the United States continued to assert that Dutch refusal to release SSgt Short violated its treaty obligations, those efforts were uniformly unsuccessful.

The manner in which the Dutch handled the case is most interesting.[18] Shortly after SSgt Short's arrest and confinement by local police, United States military authorities at Soesterberg Air Base requested his immediate surrender. The Dutch government held a preliminary hearing to consider the request. At this and subsequent proceedings, Short's Dutch defense counsel argued the following: first, that the United States had waived its primary right to jurisdiction; second, that it had no legal judicial authority in the Netherlands; and, finally, that Netherlands law prohibits the surrender of any accused who may face capital punishment.[19]

Although the District Court at the Hague acknowledged the United States primary jurisdiction, it accepted the defense argument that his surrender would violate Dutch human rights law. Therefore, it ordered that Short not be surrendered until the government could obtain assurances from the United States that a possible death sentence would not be carried out.[20] After this initial decision, the United States rejected numerous Dutch diplomatic efforts to obtain either a waiver of its primary jurisdiction or assurances that Short would not be sentenced to death. United States military policy prevents waiver of jurisdiction[21] and the Uniform Code of Military Justice (UCMJ) prohibits giving these

---

17. An in-depth discussion of the various Dutch judicial decisions that resulted in this conclusion is beyond the scope of this Article. Essentially, the Dutch criminal courts ultimately agreed that the United States, indeed, did have primary criminal jurisdiction over this offense, and therefore, that the Dutch could not prosecute Short. The civil courts, however, have continued to resist United States efforts to return him to its military control. The primary bases for its decision are the Netherlands adherence to the European Convention on Human Rights and the recent opinion by the European Court of Human Rights in *Soering*. Both of these authorities state unequivocally that parties to the European Convention may not participate in any decision likely to result in the application of capital punishment.

18. Unlike the *Soering* case cited above and described below, this case never reached the European Commission or Court; it was handled entirely by the Dutch courts. How it got there and how it was handled should be issues of the greatest United States interest and concern.

19. *See* Special Interest Case Update Message from 32d TFS/JA to HQ USAF/JACI (Apr. 22, 1988).

20. Judgment of May 9, 1988, District Court, The Hague, 1988, Nos. 88/614, 88/615 (unofficial translation by 32d TFS/JA of an unpublished opinion).

21. *See infra* notes 196-219 and accompanying text.

guarantees.[22]

While the Dutch Ministry of Justice appealed the district court decision, a Dutch criminal court convicted Short of manslaughter and sentenced him to six years imprisonment.[23] Shortly thereafter, the civil appellate court in the Hague reversed the initial district court decision, but did not address the criminal conviction.[24] In its decision, the appeals court again acknowledged that the SOFA allocates primary jurisdiction to the United States.[25] Instead of interpreting Dutch law and the ECHR as superseding the SOFA, it construed them as consistent; since the SOFA exempted Short from Dutch criminal jurisdiction, it also removed him from its civil and ECHR jurisdiction. Thus, the latter laws and treaty did not apply.

Obviously, the criminal and civil appeals court decisions conflicted. Both were appealed. The criminal appeals court reversed the trial court, holding that since the United States had jurisdiction, Dutch courts lacked authority to hear the criminal case.[26] The Dutch High Court in the Hague reversed the civil appeals court, ruling that the Netherlands obligations under the ECHR must prevail over conflicting SOFA allocations of jurisdiction.[27] At that point, unless either decision was somehow reversed, the ultimate result would be that SSgt Short—a brutal murderer—would be a free man in the Netherlands. Ultimately, the Dutch released him to the United States military at the end of 1990. His surrender came after the United States Air Force assured the Dutch government that he would be tried only on noncapital charges.[28] Although the immediate problem is gone, deep concerns remain about how future cases will be handled.

The opinion in this tangle deserving the most attention is the Dutch High Court's decision. The Court divided its meager analysis into three distinct parts. As a threshold matter, it considered whether the ECHR even applied to SSgt Short. Because he "reside[d] on the territory of the

22. *See* Message from HQ USAFE/JA to American Embassy, The Hague (July 12, 1988).

23. *See* Message from CINCUSAFE to USCINCEUR (Oct. 18, 1988).

24. *See* Message from 32d TFS/JA to HQ USAF/JACI (Nov. 21, 1988).

25. *Id.*

26. *See* Memorandum from HQ USAF/JACI to HQ USAF/JAC (Jan. 2, 1990).

27. *See* Judgment of Mar. 30, 1990 at 10.

28. Letter from Colonel Richard Hagelin, United States Country Representative, to Mrs. Y.A.T. Kruyer, Public Prosecutor (Oct. 24, 1990). This highly unorthodox guarantee was given only after an investigatory hearing conducted under article 32 of the UCMJ determined that SSgt Short did not meet the elements of proof required by the capital statute.

state"[29] and the Dutch government exercised "actual power over and responsibility"[30] for him, the Court held that it did apply.

This threshold decision joined the conflict between the ECHR and the NATO SOFA. Recognizing that the SOFA required SSgt Short's surrender and that, after *Soering*, the ECHR prohibited the extradition of anyone facing possible capital punishment, the High Court then searched for a principle in international law that might resolve this impasse. Finding none, it finally resorted to public policy arguments to tip the scales in the ECHR's favor.

The High Court relied heavily on the *Soering* case. Although *Soering* dealt with matters that arose under an extradition treaty with provisions significantly different from the SOFA, the High Court considered the SOFA applicable. The Court also understood that its decision would force its government to violate the SOFA. This conflict between the United States and European views of human rights generally, and of capital punishment in particular, is what has prompted the Society's call for the SOFA's re-examination. Having seen one result of this conflict, the Article will now consider how it began.

B. *The* Soering *Case*

In March 1985, Jens Soering, an eighteen year-old West German citizen, was an undergraduate student at the University of Virginia. While there, he fell in love with Elizabeth Haysom, a fellow student. Their relationship apparently became quite intense, described by psychiatrists later as a *folie a deux*. This is a situation in which one partner is psychotic and the other "is suggestible to the extent that he or she believes in the psychotic delusions of the other."[31] Haysom was severely mentally disturbed and had a "stupefying and mesmeric effect" on Soering.[32]

Apparently, Haysom's parents, who lived nearby in Bedford County, disapproved of her relationship. Haysom's solution was for her and Soering to kill them. On March 30, 1985, they rented a car in Charlottesville, Virginia, drove to Washington, D.C. to set up an alibi and returned to the Haysoms' house. After a discussion during which the Haysoms repeated their objections to the relationship, an argument ensued. Soering ended it quickly by killing both Mr. and Mrs. Haysom

---

29. *See* Judgment of Mar. 30, 1990 at 7.

30. *Id.*

31. Soering Case, 161 Eur. Ct. H.R. (ser. A) at 14 (quoting a psychiatric report by a forensic psychiatrist).

32. *Id.*

with a knife.[33]

In October 1985, Soering and Elizabeth Haysom fled to the United Kingdom, where they were apprehended for check fraud in April 1986. During their detention by British authorities, an investigator from the Bedford County Sheriff's Department traveled to England and obtained Soering's confession to the murders. In June 1986, a grand jury of the Circuit Court of Bedford County indicted Soering for murder. The United States requested his extradition shortly thereafter.[34]

The United Kingdom apparently handled the extradition process quite routinely, beginning with the issue of a warrant for Soering's arrest and a request, through diplomatic channels, for assurances from the United States that he would not be subject to the death penalty if convicted of murder. The United States-United Kingdom extradition treaty requires these assurances. Without them, it gives the United Kingdom the discretion not to surrender an accused who might face a death sentence. In due course, the Attorney for Bedford County—the official responsible for Soering's ultimate prosecution—agreed. Rather than guaranteeing that Soering would not face the death penalty, the attorney merely stated that he would make a representation to the judge at sentencing that "it is the wish of the United Kingdom that the death penalty should not be imposed or carried out."[35] Although the British government considered that sufficient, the European Court of Human Rights ultimately disagreed.[36]

As the United States extradition process continued, it encountered some opposition. First, the Federal Republic of Germany submitted its own extradition request. Although it maintained that it, too, had jurisdiction over the offense and the offender, the British Director of Public Prosecutions denied the request on the basis that Germany could not sustain the necessary prima facie case.[37] Second, Soering petitioned the British courts not to extradite him to the United States. Instead, he wanted to go to West Germany, a state that also had abolished the death penalty. His request also was denied, and on August 3, 1988, the Secretary of State ordered his surrender to United States authorities.[38] Before the surrender warrant could be executed, Soering petitioned the European Commission of Human Rights.[39] Having satisfied the ECHR's ad-

33. *Id.* at 11.
34. *Id.* at 11-12.
35. *Id.* at 13.
36. *Id.*
37. *Id.* at 12-13.
38. *Id.* at 15.
39. *Id.* at 15.

missibility rules, Soering's complaint made its way to the European Court of Human Rights. On July 7, 1989, after a full hearing and in a lengthy opinion, the Court enjoined the United Kingdom from extraditing him to the United States.

The core of the Court's decision is its analysis of the conditions in the prison in which Soering would be held in the event he received the death penalty. It concluded that those conditions would subject him to a phenomenon it called "death row syndrome." It considered Soering's description of this syndrome as it might apply to him:

> [The death row phenomenon consists of] the delays in the appeal and review procedures following a death sentence, during which time he would be subject to increasing tension and psychological trauma; the fact . . . that the judge or jury in determining sentence is not obliged to take into account the defendant's age and mental state at the time of the offence; the extreme conditions of his future detention on "death row" in Mecklenburg Correctional Center, where he expects to be the victim of violence and sexual abuse because of his age, [race] and nationality; and the constant spectre of the execution itself, including the ritual of execution.[40]

Because it recognized that the ECHR itself does not prohibit capital punishment, the Court limited its inquiry to the question of whether Soering might be subjected to "inhuman or degrading treatment or punishment" contrary to article 3 of the ECHR.[41] While the Sixth Protocol to the ECHR specifically calls for the abolition of the death penalty, it did not apply to this case because the United Kingdom had not ratified it.[42] After considering all arguments, the Court decided that the ECHR proscribed the inhuman and degrading death row syndrome.[43] The possibility that Soering could be subjected to this treatment in the United States prevented the United Kingdom from extraditing him there.[44]

Even without the Sixth Protocol, the Court found a way to prevent Soering's exposure to capital punishment. This Court's convoluted and sometimes tortured reasoning occasionally lacked objectivity. That, however, supports further the notion that opposition to the death penalty is more than a legal issue in Europe. It is also a moral issue, and the Sixth Protocol merely adds legal reinforcement. Judging from the *Short* case, it also has become a pillar of Dutch public policy.

---

40. *Id.* at 41.
41. *Id.* at 40.
42. *Id.*
43. *Id.* at 44-45.
44. Other aspects of the European Court's rationale will be considered in more detail later, *see infra* notes 134-45.

III. THE UNITED STATES POSITION: RELIANCE ON "BLACK LETTER" INTERNATIONAL LAW

Jurisdictional conflicts between sending states and receiving states are not new phenomena. A similar dispute almost forty years ago led to the negotiation of the NATO SOFA. With the common experience of World War II behind them, the NATO nations understood many of the problems both sending states and receiving states might confront when military forces are stationed on foreign soil.[45] The NATO SOFA is a reflection of their common attempt to anticipate and deal with those issues. Primarily because of the spirit of cooperation that has marked NATO's overall success, that treaty has remained remarkably noncontroversial.[46]

The NATO SOFA is already a treaty of significant compromise. In *Short*, the compromise failed. Before considering whether the SOFA's failure here supports the proposition that it should be renegotiated, understanding the treaty, its history and evolution, and its provisions is important. After that brief review, this section focuses on the SOFA provisions and principles involved both in *Short* and in two fundamental United States arguments: first, that the High Court violated the NATO SOFA; and second, that its violation was not justified under international law. Finally, it considers United States policy in anticipation of the Dutch argument that the Dutch SOFA violation was based on its public policy.

A. *A Brief History of the NATO SOFA*

Any analysis of criminal jurisdiction over visiting military forces must begin and end with the principle of territorial sovereignty. In this context, that fundamental principle states that the admission of a force in peacetime is always subject to the consent of the territorial sovereign and to the conditions the sovereign imposes.[47] One of the first commentators on this subject, Chief Justice John Marshall, addressed it in *The Schooner Exchange v. McFaddon*.[48] That case involved an attempt by the United States owners of a ship to recover the ship after it had been captured by the French and appropriated to use as a warship. In dismissing the suit, Marshall emphasized that "[t]he jurisdiction of [a] na-

45. *See generally* G.P. Barton, *Foreign Armed Forces: Qualified Jurisdictional Immunity*, 1954 BRIT. Y.B. INT'L L. 341.

46. *See generally* SNEE & PYE, *supra* note 10 and accompanying text.

47. *See* LAZAREFF, supra note 4, at 8.

48. 11 U.S. (7 Cranch) 116 (1812).

tion within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[49] Nevertheless, when the vessel entered the territorial jurisdiction of the United States, it did so pursuant to a traditional waiver of that jurisdiction with respect to the public armed ships of a foreign sovereign.[50]

Although his classic formulation of territorial sovereignty established that it is "exclusive and absolute," Marshall also recognized that it may be self-limited. He described three situations in which nations traditionally had limited their territorial sovereignty: the immunity afforded foreign sovereigns, diplomatic immunity, and the immunity of foreign troops in transit with the territorial sovereign's consent.[51] While his opinion is perhaps best known as one of the first authoritative expressions of the absolute theory of foreign sovereign immunity,[52] its corollary principle of absolute immunity of visiting forces is also important. Actually, the latter served as the basis of the rule that guided United States foreign and military policy for almost 150 years thereafter: United States forces abroad were subject only to "the law of the flag."[53]

1. The "Law of the Flag"

For quite some time after *The Schooner Exchange*, many scholars and international lawyers held the view that 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."[54] License to enter or

---

49. *Id.* at 136.

50. *Id.* at 145.

51. *Id.* at 137-40.

52. *See* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 336 (1989).

53. *See, e.g.*, LAZAREFF, *supra* note 4, at 13.

54. *See id.* at 12 (quoting Aline Chalufour, Le statut juridique des Forces alliées pendant la guerre 1914-1918 (1927) (unpublished thesis, Paris)). In contrast, some commentators dispute whether international law ever recognized a state's exclusive criminal jurisdiction over its forces abroad. In the extensive hearings leading to the United States Senate's ratification of the NATO SOFA, some lawmakers argued that its formula for shared sending-state and receiving-state jurisdiction reflected a departure from customary international law. *See, e.g., Supplementary SOFA Hearings, supra* note 8, at 56 (statement of Senator Bricker). They suggested that the United States would have more jurisdiction over its troops on foreign soil without a treaty because customary international law would then vest exclusive jurisdiction in their commanders. The United States Attorney General disagreed. In an often cited opinion to the Senate Foreign Relations Committee, the Attorney General argued that customary international law never conferred exclusive jurisdiction to the sending state. Construing Chief Justice Marshall's opinion extremely narrowly, he stated that "*The Schooner Exchange*, . . . which is the chief

to cross a foreign nation necessarily carried with it an express or implied right to maintain military discipline free from the territorial sovereign's interference.[55] This, in turn, was translated into two separate but equally important concepts: absolute immunity of individual military members from the criminal jurisdiction of the receiving state[56] and the immunity of the sending state's disciplinary processes from the receiving state's supervisory jurisdiction.[57]

One of Chief Justice Marshall's fundamental assumptions in *The Schooner Exchange* was that the need to maintain discipline forms a cornerstone of military doctrine.[58] Without the authority or ability to impose punishment within a unit, the commander would soon lose control; the "forces would cease to be an army and would become a mob."[59] Indeed, universal recognition of this has been one of the few constants throughout this debate and perhaps is the central theme of the "law of the flag" theory.

Exclusive sending-state jurisdiction over one's military forces evolved before and after *The Schooner Exchange* as a result of international practice. Since most of it was based on the brief transit of those forces through foreign territory, this concession from the receiving sovereign almost always was only implied.[60] As the practice evolved to permanently stationing forces abroad, agreements and their jurisdictional arrangements became more formal.[61] The earliest of these agreements arose during wars. In World War I, "[a] series of agreements concluded by France . . . granted exclusive jurisdiction to the military tribunals of the armed forces of the Allied Powers in France over the members of those forces."[62] After the war, the United Kingdom continued to exercise ex-

---

reliance of those who contend that the visiting forces are entitled to absolute immunity, stands for no such proposition." *Supplementary SOFA Hearings, supra* note 8, at 38 (Department of Justice Memorandum of Law); *see also SOFA Revision Hearings, supra* note 8, at 9. While the Attorney General may have been correct—Marshall's opinion may have been read too broadly—the practice of the United States and other nations and the writings of scholars accepting absolute immunity as a principle of international law sufficiently proves that it did exist. *See, e.g., The Paquete Habana*, 175 U.S. 677 (1900).

55. *See, e.g.*, King, *supra* note 9, at 562.

56. *Id.*

57. *See infra* notes 96-99 and accompanying text.

58. The Schooner Exchange, 11 U.S. at 140.

59. King, *supra* note 9, at 548.

60. *See The Schooner Exchange*, 11 U.S. at 139.

61. *See generally* Edward D. Re, *The NATO Status of Forces Agreement and International Law*, 50 NW. U. L. REV. 349, 383-90 (1955).

62. *Supplementary SOFA Hearings, supra* note 8, at 41 (Department of Justice

clusive criminal jurisdiction over its forces in Egypt[63] and, together with the United States, negotiated immunity from receiving-state jurisdiction during World War II.[64] In recognition of this widespread practice, some scholars continued to regard exclusive jurisdiction as a necessary characteristic of stationing forces abroad.[65]

As the absolute theory of sovereign immunity began to give way to the restrictive theory, the scope of "the law of the flag" also began to narrow. Courts and writers began limiting its formerly infinite breadth, whittling away at its edges.[66] Despite these attempts to interpret more narrowly the exclusivity of sending-state jurisdiction, the United States continued to apply the broader "law of the flag" concept in its foreign affairs. Thus, as mentioned above, in World Wars I and II the United States insisted upon, and generally received, the right to discipline its troops exclusive of receiving-state criminal jurisdiction and free from its

---

Memorandum of Law). In his argument that international law never supported the "law of the flag" theory, the Attorney General distinguished these agreements by suggesting that they recognized the status of British and United States forces as occupation powers in complete control over the territory they occupied. That should be distinguished from the status of a force as an invited guest during peacetime. In the latter situation, he argued, international law does not accord the sending state the same prerogatives. *Id.* at 41-49.

63. *See* LAZAREFF, *supra* note 4, at 23.

64. *See, e.g., Supplementary SOFA Hearings, supra* note 8, at 42 (Department of Justice Memorandum of Law). In his submission to the Senate Foreign Relations Committee, the Attorney General conceded that during World War II, the United States was not the only Allied power to obtain exclusive jurisdiction over its forces abroad. While the United States insisted on these rights in the United Kingdom, the United Kingdom itself obtained the same rights in Belgium, China, Ethiopia, and Portugal.

65. *See, e.g.*, King, *supra* note 9.

66. Thus, Oppenheim acknowledged in his international law treaties:

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

To this restatement of the theory of exclusive jurisdiction, 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.

1 OPPENHEIM, *supra* note 5, at 670; *see also* 1 CHARLES C. HYDE, International Law 432-34 (1922).

interference.[67] While some saw this insistence as a departure from generally-accepted concepts of international law,[68] others considered it consistent with the still-viable "law of the flag."[69]

Faced with the need to maintain an effective security apparatus in Europe following World War II, the NATO states[70] recognized the need for a treaty that established the rights and obligations of visiting forces. To that end, the Brussels Treaty powers—Belgium, France, Luxembourg, the Netherlands, and the United Kingdom—signed the Status of Members of the Armed Forces of the Brussels Treaty Powers agreement in 1949.[71] To many, this treaty signalled an end to the concept of exclusive sending-state jurisdiction.[72] Although it recognized continued sending-state jurisdiction over members of the sending state's military force, it also subjected those members to prosecution in the courts of the receiving state.[73] While this particular treaty never entered into force, it "al-

---

67. *See supra* notes 52-65 and accompanying text.

68. *See* Barton, supra note 6, at 198-201.

69. *See, e.g.*, Re Exemption of U.S. Forces From Canadian Criminal Law, 1943 S.C.R. 483, 501-02 (Can.) (Kerwin, J., concurring).

70. The original NATO SOFA signatories were Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States. NATO SOFA, *supra* note 7, at 1792, 199 U.N.T.S. at 67.

71. *Supplementary SOFA Hearings, supra* note 8, at 45 (Department of Justice Memorandum of Law).

72. Barton states:

> In contributions which have been made in recent years to the subject of the liability of members of a visiting force to criminal proceedings in a local court for an offence against the local law, writers have assured their readers that almost all of the Western European states are firmly committed to the view that under international law there is no such liability. To support this contention reference is made to the jurisdictional agreements concluded by the Governments of Belgium and France during the First World War, to the writings of British, French, and Netherlands international lawyers, and, for confirmation of British state practice, to a statement of the Attorney-General in the House of Commons. . . . According to such a view it would be a foregone conclusion that any arrangement between Western European states for the visit and sojourn of their armed forces abroad in one another's territory would make provision for the absolute immunity of members of those forces from criminal jurisdiction in the local courts.
>
> Contrary to this supposition, the multilateral Agreement concluded in the form of a treaty between . . . Belgium, France, Luxembourg, the Netherlands, and the United Kingdom . . . provided that members of a visiting force would, without exception, be subject to the exercise of criminal jurisdiction by the local courts.

Barton, *supra* note 6, at 205-06.

73. *See Supplementary SOFA Hearings, supra* note 8, at 45 (Department of Justice Memorandum of Law). Article 7(2) of that agreement provided:

lowed its . . . members to define a common attitude on the subject, an attitude which allowed them to go to the London negotiations on the Status of the NATO Forces with a common approach."[74] Of course, that approach advocated shared jurisdiction.

Although the United States delegation to the NATO SOFA negotiations continued to adhere to the "law of the flag" theory in principle,[75] its initial draft conceded an allocation of jurisdiction not significantly different from that of the Brussels Treaty.[76] Thus, this draft and the ultimate agreement established a formula for sharing criminal jurisdiction over the members of visiting forces between the sending and receiving states.

Members of a "foreign force" who commit an offense in the "receiving state" against the laws in force in that state can be prosecuted in the courts of the "receiving state."

When the act is also an offense against the law of the "sending state," the authorities of the "receiving state" will examine with the greatest sympathy any request, received before the court has declared its verdict, for the transfer of the accused for trial before the courts of the "sending state."

Where a "member of a foreign force" commits an offense against the security of, or involving disloyalty to, the "sending state" or an offense against its property, or an offense against a member of the force to which he belongs, the authorities of the "receiving state" where the offense was committed will prosecute only if they consider that special considerations require them to do so.

The competent military authorities of the "foreign force" shall have, within the "receiving state," any jurisdiction conferred upon them by the law of the "sending state" in relation to an offense committed by a member of their own armed forces. *Id.*

74. LAZAREFF, *supra* note 4, at 45.

75. *See* Summary Record of a Meeting of the Working Group on Status, MS-R(51) 4 (Jan. 31, 1951), *reprinted in NATO Travaux Preparatoires*, *supra* note 8, at 64.

Commenting on Article VI of the draft prepared by his Delegation, the United States Representative drew the attention of the Working Group to the following points. Article VI [dealing with jurisdiction over the visiting forces] was based on the principle that the jurisdiction of the receiving State applied to "foreign forces and civilian personnel," . . . . This principle, on which the United States draft was based, differed from international law, which provided that—in the absence of any special agreement—the sending state retained the right of jurisdiction over its forces stationed outside the national territory. The international law on the subject was largely inspired by the decision of Chief Justice Marshall in the case of *The Schooner Exchange v. McFaddon* . . . .

Id.

76. *See* Status of Forces Agreement—Draft Submitted by the United States Deputy, D-D(51) 23 (Jan. 23, 1951), *reprinted in NATO Travaux Preparatoires*, *supra* note 8, at 345.

2. Exclusive Receiving-State Jurisdiction

The United States ratification of the NATO SOFA marked the end of its adherence to the notion of exclusive sending-state jurisdiction.[77] As a result, the United States apparently no longer seriously considers the "law of the flag" theory to be a viable principle of international law.

During the ratification process, United States legislators understood that the SOFA would replace exclusive jurisdiction in the NATO states. Many contended, however, that the "law of the flag" would continue when no status of forces treaty existed.[78] The United States Attorney General disagreed. In his often-cited and comprehensive memorandum to the Senate Foreign Relations Committee, the Attorney General examined customary international law and concluded that in the absence of a SOFA, United States military forces would be subject to the receiving-state's exclusive criminal jurisdiction.[79] Although his was just another opinion among many on both sides of this debate, it was particularly persuasive. Ultimately, it not only secured the NATO SOFA's ratification, it also helped prevent later Senate efforts to withdraw from it.[80]

The principle of territorial sovereignty formed the basis for the Attorney General's view that the sending state would possess no jurisdiction over its troops in the absence of a contrary agreement. He said, "[a]ll exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory."[81] In a contemporary world that views states as equals and regards their sovereignty highly, this view carries great weight. Although the NATO SOFA and similar treaties have made this a moot issue, without them, this is the view that would probably prevail today.[82]

---

77. *See generally* Barton, *supra* note 45, at 364-65.

78. *See e.g., Supplementary SOFA Hearings, supra* note 8, at 2 (statement of Sen. Bricker).

79. *Id.* at 38 (Department of Justice Memorandum).

80. *See SOFA Revision Hearings, supra* note 8, at 20 (Department of State memorandum).

81. *Supplementary SOFA Hearings, supra* note 8, at 50 (quoting The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 143 (1812)).

82. Interestingly, despite this contemporary view that sending-state jurisdiction is an exception to the rule of territorial sovereignty, an amicus curiae brief filed by a Dutch attorney to the *Short* appeals court argued that the "law of the flag" theory still prevails. *See* Amicus Brief for the United States, Short v. The Kingdom of the Netherlands, Gerechtshof (Aug. 29, 1988). This attorney was retained by the United States to present the Dutch law that supported United States jurisdiction. Apparently, his surprising reliance on exclusive sending-state jurisdiction as the rule modified by the SOFA was a reasonable Dutch interpretation of international law. The court of appeals agreed with the argu-

B. *The Netherlands Violated the NATO SOFA's Text: Some Jurisdictional Arguments*

The NATO SOFA represents the most recent innovation in the progress of extraterritorial military criminal jurisdiction. As a treaty of significant compromise, until recently it also has occupied successfully the middle ground between the prior "law of the flag" and exclusive receiving-state theories of jurisdiction. Cases like *Short*, however, suggest that this evolution is incomplete.

As *Short* demonstrated, United States and European views of capital punishment differ, a divergence that affects the NATO SOFA and vice versa. Following is a discussion of the language and concepts at the core of the NATO SOFA compromise, their jurisdictional framework, and how each conflicts with the Dutch High Court's *Short* decision. Together, they form the basis of the United States argument that the High Court violated this treaty—a treaty that for forty years has been black-letter international law.

1. Judicial Jurisdiction Under the NATO SOFA

The Restatement (Third) of the Foreign Relations Law of the United States recognizes that international law limits states' exercise of three types of jurisdiction: prescriptive, enforcement, and adjudicative.[83] Adjudicative or judicial jurisdiction, the focus here, is the state's authority to "subject persons or things to the process of its courts."[84] Traditionally, one of those limits held that a state could not exercise its jurisdiction beyond its borders. Today, however, this tradition has many exceptions.

In the context of extraterritorial exercise of jurisdiction, judicial juris-

---

ment, and the High Court did not expressly reject it. *See* Judgment of Mar. 30, 1990, Hage Raad der Nederlanden [Highest Cort], The Hague, 1990, Nos. 14,449, 13,950 slip op. The Dutch representative to the NATO SOFA negotiations argued against the Italian view that sending-state jurisdiction ought to be characterized as an exception to the receiving state's right of jurisdiction. The Dutch representative "regarded the rule of the right of jurisdiction of the receiving-state to be an exception to the principle of the right of jurisdiction of the sending-state; military acts fell normally within the competence of the military authorities. In his opinion, this was the rule adopted by international law." Summary Record of a Meeting of the Working Group on Status (Juridical Subcommittee), MS(J)-R(51) 2 (Feb. 8, 1951), *reprinted in NATO Travaux Preparatoires, supra* note 8, at 94. Thus, while the United States has conceded that it may no longer exercise exclusive jurisdiction over its troops abroad, apparently the states in which they are stationed do not agree uniformly.

83. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986) [hereinafter RESTATEMENT].

84. *Id.* § 401(b).

diction assumes two different forms. The first, and most common, focuses on a court's power to decide issues concerning matters or parties outside its territorial reach. As a rule, state courts may adjudicate only those offenses committed within the state.[85] As a corollary, that reach extends only to violations of that state's criminal law; international consensus is that states do not enforce the penal laws of other states.[86] More important for this discussion, however, is a second form of judicial authority: the ability of a state's courts to conduct trials within another state. Although the United States and other nations have exercised throughout history this aspect of judicial authority extraterritorially, the world community today widely accepts that the sovereignty of other states prohibits that practice.[87] The only recognized exception is the military court-martial conducted pursuant to a status of forces treaty.[88]

The NATO SOFA establishes its concept of shared jurisdiction over visiting forces in the first paragraph of article VII:

> 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.[89]

This clearly recognizes the rights of both sending and receiving states to punish military members for violations of their respective criminal laws. More important, however, is that paragraph 1(a) grants the sending state the right to exercise that authority within the borders of the receiving state. This has been interpreted, during the negotiations[90] and

---

85. *See* S.S. Lotus Case (Fr. v. Turk.) 1927 P.C.I.J. (ser. A), No. 9, at 20 (Sept. 7) (acknowledging that while the territorial character of criminal law is fundamental, many states have exceptions that extend the reach of their criminal laws).

86. *See* RESTATEMENT, *supra* note 83, § 422(1).

87. *See supra* notes 76-81 and accompanying text.

88. *See* RESTATEMENT, *supra* note 83, § 422 Reporter's Note 5.

89. NATO SOFA, *supra* note 7, art. VII, para. 1, at 1798, 199 U.N.T.S. at 76.

90. *See* Summary Record of a Meeting of the Working Group on Status (Juridical Subcommittee), MS(J)-R(51) 4 (Feb. 16, 1951), *reprinted in NATO Travaux Preparatoires, supra* note 8, at 99-100. The parties appeared to take for granted that sending-state military authorities could, under the Agreement, conduct courts-martial within the borders of the receiving state. Removing all doubt, this subcommittee extended the definition of "military authorities" to include civilian judicial authorities "who might

through subsequent practice, to allow sending states to convene courts-martial within the receiving state. Those who advocated continuing United States exclusive jurisdiction over its military abroad probably did not regard this express grant of sending-state judicial jurisdiction as significant because it did not change United States practice up to that point. In this respect, article VII arguably merely codified customary international law. Nonetheless, those who recognized that the exercise of judicial jurisdiction within the borders of another state is a substantial intrusion into its territorial sovereignty must have appreciated its importance.

In the first of his three articles during this period on the status of visiting forces, Dr. G.P. Barton, a British international law scholar, discussed this customary practice as it existed prior to the SOFA.[91] To enforce military law, visiting forces traditionally carried their courts with them. At the same time, many Western nations also operated what were known as "consular courts." In "non-Christian states," these courts often exercised "complete civil and criminal jurisdiction . . . over the privileges, life, and property of their countrymen."[92] Needless to say, the latter courts were extremely unpopular among receiving states and were considered, even at that time, contrary to the principles of international law.[93] As a result, they were eventually eliminated.[94] In contrast, courts-martial survived, apparently resting on firmer foundations.[95]

---

be brought within the territory of the receiving-state for the application of the present Agreement." *Id.* at 100.

91. *See* G.P. Barton, *Foreign Armed Forces: Immunity From Supervisory Jurisdiction*, 1949 BRIT. Y.B. INT'L L. 380.

92. 1 OPPENHEIM, *supra* note 5, at 668.

93. *See id.*

94. *See* Reid v. Covert, 354 U.S. 1, 12 (1957).

95. *See* 1 OPPENHEIM, *supra* note 5, at 669-70. Thus, Barton concluded that customary international law supported this extraterritorial exercise of sending-state judicial authority:

> The consent of a state to the presence in its territory of the armed forces of a friendly foreign State implies an obligation to allow the service courts and authorities of that visiting force to exercise such jurisdiction in matters of discipline and internal administration over members of that force as are derived from their own law.

Barton, *supra* note 91, at 412. Nevertheless, he also admitted that it was, indeed, a significant intrusion into the sovereignty of the receiving-state: "The right of service courts and authorities of a foreign state to exercise their jurisdiction in the territory of the local state comprises a significant exception to the sovereignty of the latter state over its territory." *Id.* at 412-13. The fact that courts-martial flourished supports the idea that article VII's establishment of sending-state judicial jurisdiction is merely a codification of customary international law. This conclusion is supported by the writings of other international law scholars of Barton's and earlier eras. *See, e.g.*, 1 HYDE, *supra* note 66, at

Although the proposition that the United States, or any other sending state, may convene military courts-martial in the territory of consenting receiving states is now well-settled, that authority clearly has limits. The portion of article VII quoted above suggests that one limit is the receiving state's concurrent judicial jurisdiction. Not only does that provision allow the sending state to try its military members within the receiving state, but it also vests the same authority in the latter's courts. The conflict inherent in this overlapping jurisdiction is resolved by the rest of article VII, which further allocates to each court the types of offenses it can adjudicate. This is the concept of shared criminal jurisdiction, which is examined below.

That sending-state courts-martial operate on foreign soil only because its forces are permitted to be there raises the additional question whether their jurisdiction also may be limited by the receiving state or its courts. This is an important issue raised in the *Short* case.

Barton concludes that a receiving state's courts have no supervisory jurisdiction over sending-state military courts. Supervisory jurisdiction is one court's power to limit another's exercise of authority.[96] Within a single state, superior courts routinely assert that power over inferior courts.[97] In the international context, however, Barton suggests that this relationship between courts of different states would violate the sovereignty of the state whose courts' authority was limited.[98] As between them, he concludes that receiving-state consent to allow visiting force

---

432; OPPENHEIM, *supra* note 5, at 669. Thus, the operation of United States military courts-martial in the Netherlands is based on customary international law and the NATO SOFA. Both, in turn, depend on Dutch consent to the presence of United States forces. In this case, the extraterritorial exercise of United States military judicial jurisdiction rests on solid international legal foundations.

96. Barton, *supra* note 91, at 381. He defines that jurisdiction by example:

> [I]f the Swiss [sending-state] courts-martial were recognized as inferior judicial tribunals by English [receiving-state] law, and if Y [a member of the Swiss visiting forces] could show some excess of jurisdiction or other irregularity in the proceedings of the court-martial trying him, it would appear that the writs of prohibition or *certiorari* would be available as an effective means of preventing the apprehended wrong. By exercising jurisdiction in these ways the English courts would be supervising the exercise of the powers given to the service courts and authorities of the visiting force in matters of discipline and internal administration by the law of the state to which they belong.

Id.

97. *See, e.g.*, Kenneth N. Vines, *The Role of Courts of Appeals in the Federal Judicial Process*, *in* COURTS, JUDGES, AND POLITICS 90 (Walter F. Murphy & C. Herman Pritchett eds., 3d ed. 1979).

98. *See generally* Barton, *supra* note 91, at 412.

courts-martial "effectively implies an obligation to secure the immunity of the visiting forces from the supervisory jurisdiction of the local courts."[99] Logically, visiting forces' courts-martial should operate independently. Any other conclusion would allow receiving-state courts to protect foreign military personnel from prosecution, violate the sending-state's sovereignty, and undermine the SOFA's allocation of criminal jurisdiction.

The applicability of this principle to *Short* is obvious. By basing its refusal to surrender SSgt Short on the possibility that he may face the death penalty, the High Court limited the exercise of a court-martial's authority in exactly the manner Barton and reasonableness condemn; the Court anticipated a military court's judgment and substituted its own.

2. Criminal Jurisdiction Under the NATO SOFA

Because concurrent judicial jurisdiction does not mean that a receiving-state court has supervisory jurisdiction over a sending-state court, it necessarily does mean that each body has its own sphere of authority. That notion is the basis for the SOFA's second area of shared jurisdiction: criminal jurisdiction. In SOFA parlance, the term criminal jurisdiction encompasses the other forms of jurisdiction recognized by the Restatement—enforcement and prescriptive—as well as the other aspect of judicial jurisdiction: the power to adjudicate violations of criminal law.[100]

Article VII defines two types of criminal jurisdiction. First, receiving-states and sending-states enjoy exclusive jurisdiction over acts violating the criminal laws of one state, but not the other.[101] Second, when a military member violates the laws of both states, the criminal jurisdiction of each is concurrent and the SOFA further identifies which state has the primary right to prosecute.[102] By defining the boundaries between the receiving-state and sending-state courts in terms of exclusive and primary concurrent jurisdiction, the SOFA reinforces the principle that neither has authority over the other. Only one court has the independent power to prosecute any one case at any time.

The NATO SOFA still recognizes the concept of exclusive jurisdiction. While it is not applied nearly as broadly as the United States exercised it before and during World War II, the SOFA nevertheless acknowledges that sending states and receiving states each have special

---

99. *Id.*

100. *See* RESTATEMENT, *supra* note 83, § 401.

101. *See infra* notes 103-10 and accompanying text.

102. *See infra* notes 111-28 and accompanying text.

interests codified in their criminal laws.[103] Article VII, paragraph 2, establishes the right of each to pursue its interests:

> 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 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.[104]

Thus, when an act violates the law of one state, but not the other, the offended state has the exclusive right to prosecute and punish the offender.

One question that arose during the Senate Foreign Relations Committee's NATO SOFA hearings was whether any receiving state's laws were considerably different from the Uniform Code of Military Justice (UCMJ).[105] The committee's obvious concerns were that not only would these laws be unfamiliar to the average United States military personnel, they would form the basis for extensive receiving-state exclusive jurisdiction. The State Department Legal Adviser's replied that because the UCMJ has a "clause which really incorporates into our military code all crimes of the locality in which the troops are operating,"[106] a particular act most likely will not violate only receiving-state law. Although military courts have since determined that not every violation of local law is also an offense under the UCMJ, almost forty years of experience have demonstrated that the scope of exclusive receiving-state jurisdiction is quite narrow.[107]

Despite some concern prior to its ratification, the NATO SOFA has not significantly undermined discipline within United States visiting forces.[108] Since most purely military offenses have no counterparts in

---

103. For a discussion of the notion that agreements such as the SOFA allocate jurisdiction as a function of prevailing-state interests, see *Barton*, *supra* note 45, at 362.

104. NATO SOFA, *supra* note 7, art. VII, para. 2, at 1798, 199 U.N.T.S. at 76.

105. *See Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters: Hearings Before the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 64 (1953) [hereinafter *NATO SOFA Hearings*].

106. *Id.*

107. *See, e.g.*, SNEE & PYE, *supra* note 10, at 32-33.

108. *See SOFA Revision Hearings*, *supra* note 8, at 15 (statement of General Lauris Norstad, Supreme Commander, Allied Powers, Europe).

receiving-state criminal laws, the sending state retains exclusive jurisdiction over them.[109] This, combined with the sending state's retention of a sort of residual jurisdiction to prosecute violations of military discipline arising out of concurrent jurisdiction offenses,[110] means that commanders still exercise considerable punitive authority.

In the *Short* context, the allocation of exclusive criminal jurisdiction is of little direct importance. SSgt Short's crime of murder is clearly a violation of the criminal laws of both the sending state and receiving state.

When an act violates the laws of both the sending and receiving states, it is subject to neither's exclusive jurisdiction. Rather, a SOFA formula seeks to balance the interests of each state in the offense and the offender. Recalling the discussion of supervisory jurisdiction, this formula recognizes that although both states have jurisdiction to prosecute the offense, only one may do so practically. Article VII, paragraph 3 states:

> 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 . . . 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.[111]

This provision gives the receiving state the primary right to exercise jurisdiction in all but two situations. First, the sending state has the primary right when the offense is directed against sending-state property or security or when its victim is another member of the visiting force or persons accompanying it. These are called *inter se* offenses.[112] The second category consists of offenses committed in the performance of official military duties.

---

109. Most nonmilitary criminal codes do not address offenses like AWOL, desertion, or conduct unbecoming an officer, which are examples of offenses that would fall to the sending state's exclusive jurisdiction to prosecute.

110. *NATO SOFA, supra* note 7, art. VII, para 8, at 1802, 199 U.N.T.S. at 80. This provision allows the sending state to prosecute a member of its force "for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party." *Id.*

111. *Id.* Art. VII, para. 3, at 1800, 199 U.N.T.S. at 77-78.

112. *See* Roland Stanger, *Criminal Jurisdiction over Visiting Armed Forces*, 1957-58 NAVAL WAR C. INT'L L. STUD. 185 (1957).

This was the area of greatest compromise for the United States. Until the SOFA entered into force, its troops were prosecuted under the UCMJ for almost all offenses.[113] Faced with the certainty of losing this privileged status, this formula emerged from the negotiations as the one most capable of protecting the interests of all parties.[114] Since each NATO nation would likely be both a sending and receiving-state, the SOFA had to address concerns in both areas. The primary sending-state concerns were to maintain military discipline and, therefore, to maximize jurisdiction over their own forces. As receiving states, their efforts to take away the special privileges that traditionally cloaked visiting forces pulled in exactly the opposite direction. Article VII's formula represents a middle ground that generally preserves the military's ability to prosecute offenses most likely to prejudice good order and discipline, while it gives the receiving state authority over offenses affecting its public order.[115]

The official duty exception reflects traditional military concern that its official operations must not be subject to the influence of forces outside the chain of command. The exception elicited considerable debate during the SOFA negotiations, primarily because it was perceived as having the capacity to transform shared jurisdiction back into exclusive sending-state jurisdiction.[116] Although most attempts to limit the definition of "official duty" were not incorporated into the treaty itself, subsequent practice has proven this exception to be fairly narrow.[117] In practice, the determination by sending-state officials that an offense arose out of official duty creates a rebuttable presumption to that effect.[118] This exception to the receiving state's general primary right of jurisdiction has caused few problems during the SOFA's history. Some of those problems, however, such as in *Wilson v. Girard*, created substantial controversy.[119]

The *inter se* exception recognizes the sending state's greater interest in prosecuting offenses committed entirely within its own military community.[120] This concept seems to have evolved from the customary right of military forces to exercise exclusive jurisdiction on its ships and within

113. *See generally NATO SOFA Hearings, supra* note 105, at 26.
114. *See, e.g., id.* at 5.
115. *See, e.g., id.*
116. *See* Stanger, *supra* note 112, at 222.
117. *See* SNEE & PYE, *supra* note 10, at 47.
118. *See id.* at 51-52.
119. *See id.* at 49-50. Professors Snee and Pye describe the *Girard* case as underlining the divergence of views on what constitutes "an offense arising out of an act or omission done in the performance of official duty." *Id.* at 49.
120. *See*, Stanger, *supra* note 112, at 185-89.

its military installations.[121] Although the SOFA's formula eliminates the distinction between crimes committed within or outside bases, it still defers to the sending state when the offender is a member of its military and the victim is military, a member of its civilian component, or a dependent.

In addition to the textual commitment of certain cases to the primary jurisdiction of either the sending or receiving state, the SOFA contains a clause that allows both parties to change this formula on an ad hoc basis. Recognizing that applying the SOFA formula mechanically may not account accurately for the interests of parties in particular cases, the negotiators included article VII, paragraph 3(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.[122]

This allows either state to waive its primary right if it considers the other state's prosecution motives to be more important.[123] The United States military's experience in Europe suggests that many receiving states will waive their primary right unless they have particular, important reasons for asserting them.[124] The United States, in contrast, rarely waives its primary right.[125] This may be due in part to the narrow limit of its primary right to cases in which it always has important prosecution interests.[126]

In many NATO states in which United States forces are stationed, this formula has been modified. For example, the Netherlands and the United States agreed to the following expression of intent regarding the waiver of primary concurrent jurisdiction:

> The Netherlands authorities, recognizing that it is the primary responsi-

---

121. *See id.* at 186.

122. NATO SOFA, *supra* note 7, art. VII, para. 3(c), at 1800, 199 U.N.T.S. at 78.

123. *See* Stanger, supra note 112, at 240-43.

124. *See* Parkerson & Stoehr, *supra* note 11, at 50. For example, 1988 Department of Defense statistics show that the Netherlands waived 97.8% of its primary concurrent jurisdiction cases involving United States military personnel. *Id.*

125. *See id.* at 48.

126. Another reason why the United States almost never waives its primary right is because the "sense of the Senate," as part of its resolution giving advice and consent to the NATO SOFA treaty, is interpreted by United States military authorities as a requirement to maximize United States jurisdiction. *See id.*

> bility of the United States authorities to maintain good order and discipline where persons subject to United States military law are concerned, will, upon the request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, except where they determine that it is of particular importance that jurisdiction be exercised by the Netherlands authorities.[127]

If the basic article VII formula allocates general primary concurrent jurisdiction to the receiving state, this "Netherlands Formula" shifts it de facto to the United States.[128] Although practice supports this observation, it is only because the spirit of cooperation between these two states has been particularly strong. This blanket waiver is clearly meaningless if the Netherlands expands its view of the cases it considers "of particular importance."

3. Summary of the NATO SOFA Jurisdictional Arguments

Article VII's concurrent jurisdiction formula assigns the primary right to prosecute to the state with the presumed greater interests in doing so. If those interests weigh more heavily in favor of the other state in a particular case, the waiver provision allows the primary right to be reassigned.

Short arose under article VII's *inter se* exception. Thus, its mechanical application vests the primary right to prosecute SSgt Short in the United States. The United States is presumed to have greater interests in cases of this type.[129] Should that presumption have prevailed against the Netherlands concerns about capital punishment? Clearly, the SOFA text gives the United States the right to make that decision. First, as matters of both law and practice, the interests of the state without the primary right to prosecute are considered only in the context of article VII's waiver provision. In this particular case, the Dutch government twice requested a waiver of the primary right from the United States. Both were refused. The United States considered its interest paramount and, under the rules of the SOFA, maintained its presumption. The goals of uniform and predictable justice are important ones, especially for a state whose forces in the absence of a SOFA would be subject to many diverse foreign legal systems. These goals are advanced only if the SOFA is

---

127. Agreement With Annex Between the United States of America and the Netherlands Regarding Stationing of United States Armed Forces in the Netherlands, Aug. 13, 1954, U.S.-Neth., annex, para. 3, 6 U.S.T. 103, 106 [hereinafter Netherlands Supplement].

128. *See* Stanger, *supra* note 112, at 243-44.

129. *See supra* notes 120-21 and accompanying text.

enforced.

A second reason why Dutch concerns about capital punishment should not automatically take precedence is rooted in article VII's basic concept of shared jurisdiction. As discused above, one of article VII's most important concessions is its recognition of the sending state's "right to exercise within the receiving [s]tate all criminal and disciplinary jurisdiction . . . over all persons subject to the military law of that [s]tate."[130] Again, this means that military courts should be able to operate within the receiving state free of its supervisory jurisdiction. If that were not the case, jurisdiction would not truly be shared; the sending state's exercise of jurisdiction would be subject to the receiving state's indirect control. Certainly, one of the factors the receiving state may consider when deciding whether to waive its primary right is the sentence an offender might receive in the sending state's court.[131] The receiving state must recognize that once it has waived that right, its lack of supervisory authority over that court places any trial outcome—including sentence—beyond its control.[132] When article VII gives the primary right to the sending state in the first instance, the receiving state has nothing to waive, and the result is the same. Since article VII vests the primary right over SSgt Short's offense in the United States, its implied assurance that this jurisdiction may be exercised without Dutch interference makes sentence irrelevant.

C. *The NATO SOFA After* Soering

The High Court's opinion and the Dutch Advocaat-Generaal's particularly well-reasoned and persuasive brief[133] conceded many of the argu-

---

130. NATO SOFA, *supra* note 7, art. VII, para. 1(a), at 1798, 199 U.N.T.S. at 76.

131. *Contra* Parkerson & Stoehr, *supra* note 11, at 52. These authors argue that, at least under the German SOFA supplement, "officials in the host nation who are responsible for the administration of justice may not when making waiver decisions be guided by whether a[n United States] military court might impose the death sentence in particular cases." This position is unreasonable. Waiver has long been understood as an exercise of discretion. Although the SOFA itself commits certain offenses to the exclusive or primary concurrent jurisdiction of the sending or receiving state, it places no binding constraints on the exercise of waiver.

132. *See* Whitley v. Aitchison, 26 I.L.R. 196 (Fr. Ct. of Cassation 1958), *reprinted in* NOYES E. LEECH ET AL., THE INTERNATIONAL LEGAL SYSTEM 469, 472 (1973). There, the court stated that when:

> the authorities of the State which has the right of primary jurisdiction have, at the request of the other State, waived that right, their decision is final, and the criminal courts of the State concerned can no longer exercise jurisdiction over facts in respect of which there has been a waiver.

133. *See* Opinion of Advocaat-Generaal Strikwerda, Short v. The Kingdom of the Netherlands, 29 I.L.M. 1375, 1378 (1990) [hereinafter Advocaat-Generaal's Brief].

ments above. Nevertheless, the Court declined to follow them. Section IV will consider the Society's suggestion that public policy and the fundamental status Dutch law accords the ECHR might have greatly affected its decision. Indeed, the Advocaat-Generaal's recommendation that SSgt Short not be surrendered was based almost squarely upon those grounds.

As the role of human rights in European law has grown stronger, perhaps another reason for the High Court's opinion was that European regard for the SOFA has become correspondingly weaker. Unfortunately, its brief and narrow decision sheds little light on this question. Even if that factor were not part of its unpublished reasoning, recent events—particularly *Soering*—at least potentially undermine the SOFA's authority in this area. Indeed, those events quite likely will form the basis for future SOFA assaults.[134]

After *Soering*, two particular areas have emerged in which the SOFA is likely to be narrowly construed or misinterpreted. First, because *Soering* considered criminal immunity irrelevant to the issue of surrender, some domestic courts may regard the SOFA as merely conferring criminal immunity and thus consider it entirely inapplicable. The *Short* Court, however, did not do that. Second, *Soering* held that the ECHR prevails over extradition treaties. Thus, states that have abandoned capital punishment will be tempted to equate SOFA and extradition treaty surrender obligations and find, by analogy, that *Soering* should apply similarly to both. Neither of these propositions is correct.

1. The NATO SOFA: Immunity "Plus"

The NATO SOFA lies somewhere between the two extreme "law of the flag" and exclusive receiving-state sovereignty theories of visiting-forces jurisdiction.[135] The article VII language involved in the current controversy further demonstrates that the SOFA truly is, or at least was intended to be, a compromise.[136] In particular, its notions of exclusive and concurrent jurisdiction incorporate mutually favored aspects of both theories. Although some scholarly attention has been devoted to defining the status of visiting forces in the absence of agreements like the SOFA, relatively little has addressed how the nature of that status changed after the SOFA—particularly article VII's allocation of jurisdiction—entered

134. For an interesting analysis of the *Soering* decision and its likely future effects, see Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991). Although this comment did not consider the effects it might have on the United States military abroad, *Short* is clearly one of the many progeny *Soering* will spawn.

135. *See supra* notes 68-82 and accompanying text.

136. *See supra* notes 82-83 and accompanying text.

into force.

Perhaps one reason why the nature of article VII has not been examined more thoroughly is that it is a case of first impression. Those who have studied the NATO SOFA and its operation generally have concluded that it confers a limited immunity upon members of visiting forces.[137] To the extent that they are subject to the sending state's exclusive or primary concurrent jurisdiction, they are immune from receiving-state prosecution.[138] This explanation apparently has been considered satisfactory because it accurately describes the mechanics of the SOFA process; whenever an offense is committed by a member of a visiting force, the sending and receiving-state authorities determine whose right to prosecute prevails. The accused would then be considered immune from prosecution by the state without jurisdiction. Indeed, the Dutch criminal and civil courts of appeals reached this conclusion in their *Short* decisions.[139]

In *Soering*, the European Court ordered the United Kingdom not to extradite Jens Soering to the United States because he faced the risk of capital punishment. In its analysis, the Court recognized that British courts could not prosecute the young man because the murders he allegedly committed occurred outside its criminal jurisdiction.[140] Nevertheless, *Soering*'s immunity from British prosecution was considered irrelevant to the question of whether he should be extradited. Although the Court acknowledged the British argument that its decision would "leave[] criminals untried, at large and unpunished,"[141] the additional facts that the United Kingdom exercised control over Soering, had the discretion to deny extradition,[142] and was obligated to protect his human rights under the ECHR prevented it from extraditing him. Therefore, the question this conclusion raises is: Will European states now also regard the SOFA as irrelevant?

Although the Dutch High Court acknowledged SSgt Short's immunity from its criminal jurisdiction, it did not end its analysis there.[143] To its

---

137. *See, e.g.*, SNEE & PYE, *supra* note 10, at 61 (analogizing immunities enjoyed by members of visiting forces with diplomatic immunity); Stanger, *supra* note 112, at 189, 224.

138. *See* Stanger, *supra* note 112, at 158 n. 4.

139. *See* Message from 32 TFS/JA to HQ USAF/JACI (Nov. 21, 1988) (civil appeal); Message from American Embassy, The Hague, to United States State Department (Mar. 30, 1990) (criminal appeal).

140. Soering Case, 161 Eur. Ct. H.R. (ser. A) at 16.

141. *Id.* at 33.

142. *See id.* at 17.

143. *See* Judgment of Mar. 30, 1990, Hoge Raad der Nederlanden [Highest Court],

credit, it also recognized its absolute SOFA duty to surrender SSgt Short to United States authorities. Indeed, that is the very conflict the court attempted to resolve. Although the SOFA accurately describes the allocation of criminal jurisdiction between sending and receiving states, viewing it exclusively in terms of criminal immunity does not address whether or to what extent the state without jurisdiction is obligated to surrender the accused to the state with jurisdiction.

2. The "Plus": The NATO SOFA's Duty to Surrender

Once the parties have determined how article VII allocates jurisdiction in a particular case, the additional matter arises of transferring the accused when the other state exercises custody. Typically, this is not a problem. The surrender is generally performed very informally, usually between the states' law enforcement authorities.[144] Although the process is easy, the underlying obligation to surrender forms the difficult crux of *Short.*

Part of the basis for the High Court's decision not to surrender SSgt Short was its interpretation of Dutch domestic public policy as established in its approach to extradition.[145] The Court compared its opposition to capital punishment to the death penalty exception in the extradition treaty between the United States and the Netherlands:

> In view of the great importance that must be attached to the right not to undergo the death penalty, that balancing [of our interests in complying with either the SOFA or the ECHR] cannot turn out otherwise than in favor of Short. This also accords with the thought which forms the basis of the practice followed by the State, which is natural for states in which the death penalty is not known, when concluding extradition treaties with states where that penalty is known, of including therein a proviso such as is set forth in Art[icle] 8 of the Extradition Act, as also occurred in Art[icle] 7 of the Extradition Treaty with the [United States].[146]

Status of forces agreements definitely are not extradition treaties, and, beyond its value as evidence of Dutch public policy, this analogy is somewhat misplaced. Indeed, the Advocaat-Generaal's brief acknowledged the

---

The Hague, 1990, Nos. 14.949, 13.950, slip op. at 10 (unofficial translation by United States Department of State).

144. The Netherlands Supplement to the NATO SOFA allows the United States to retain custody of military members subject to Dutch exclusive or primary jurisdiction. *See* Netherlands Supplement, *supra* note 127, at annex, para. 3, at 106; Stanger, *supra* note 112, at 254.

145. *See infra* note 326 and accompanying text.

146. Judgment of Mar. 30, 1990 at 10.

differences.[147] The danger after *Soering* is that European nations will be more likely to regard extradition treaties and the SOFA as imposing equivalent duties to surrender.

The concept of extradition in customary international law was often regarded as a matter "of imperfect obligation"[148] because, in the absence of treaty or domestic statute, the law imposed upon the requested state neither a duty to surrender, nor a duty not to surrender. Extradition between states without a treaty is purely a matter of reciprocity or courtesy.[149] Even with a treaty, the obligation between parties to turn over an accused is not much clearer. Indeed, most treaties contain so many exceptions and grant the requested state so much discretion that any duty of surrender that might exist is far from definite. One particularly relevant and common exception pertains to capital punishment. A good example is the following provision in the European Convention on Extradition:

> If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offense the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.[150]

As the Dutch High Court pointed out, a similar provision exists in the extradition treaty between the Netherlands and the United States.[151] Against this background of uncertain duties and the exceptions that often consume them, regarding the NATO SOFA's duty to surrender as equally weak would not be difficult. If, despite the Advocaat-Generaal's opinion to the contrary, this was the High Court's view, the strength of Dutch public policy overpowered its obligation to enforce the SOFA. Again, the flaw in this approach is that the SOFA is not an extradition treaty.

Whereas many extradition treaties begin with an overall rule of sur-

---

147. *See* Advocaat Generaal's Brief, *supra* note 133, at 1380-81. The brief states that although the duty to surrender is unqualified, this distinction between the SOFA and the United States-Netherlands extradition treaty is irrelevant. *Id.* at 1381. Under *Soering*, any act by the state that exposes someone to capital punishment violates the ECHR.

148. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 353 (10th ed. 1989).

149. *See id.*

150. European Convention on Extradition, Dec. 13, 1957, art. 11, 359 U.N.T.S. 274, 282.

151. Judgment of Mar. 30, 1990 at 10.

render followed by numerous exceptions and qualifications, article VII, paragraph 5(a), of the NATO SOFA states simply:

> 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.[152]

Thus, when article VII assigns jurisdiction to one state, this clause creates an unqualified duty of surrender in the other.[153] The SOFA contains no exceptions, and, as the Advocaat-Generaal admits, the surrendering state has no discretion.[154] The absolute nature of this duty to surrender is what makes this conflict between the SOFA and the ECHR seemingly irreconcilable.

D. *The* Short *Decision as a Violation of International Law*

1. Restriction of Sovereignty by Treaty: Are the NATO SOFA and the ECHR Really Inconsistent?

Relying on two principal arguments, the Advocaat-Generaal concluded that the SOFA and ECHR are irreconcilably inconsistent. First, he conceded that the NATO SOFA requires the Netherlands to surrender SSgt Short to United States authorities. He agreed that the United States had the primary right to prosecute SSgt Short and, consequently, that the Dutch government had no choice but to surrender him to his superiors at Soesterburg Air Base.[155]

His second argument was that the ECHR also applied and that it prevented SSgt Short's surrender.[156] Article 1 of the ECHR provides that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Conven-

---

152. NATO SOFA, *supra* note 7, art. VII, para. 5(a) at 1800, 199 U.N.T.S. at 78.

153. In addition to the Advocaat-Generaal's brief, United States federal court decisions interpreting this and similar SOFA provisions persuasively support this conclusion. Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), *cert. denied* 409 U.S. 869 (1972); *see also* Williams v. Rogers, 449 F.2d 513, 521 (8th Cir. 1971). In *Williams*, two United States servicemen fled back to the United States from West Germany, where they had been assigned and where they had committed offenses under German law. In an effort to prevent their surrender to West German authorities under the NATO SOFA, both sought judicial protection in a United States district court. The District Court for the District of Columbia denied their petition and the court of appeals affirmed.

154. *See* Advocaat-Generaal's Brief, *supra* note 133, at 1380.

155. *See id.* at 1380-81.

156. *Id.* at 1381-84.

tion."[157] The European Commission, he asserted, has interpreted this to include anyone under a party's "actual authority and responsibility."[158] Although the SOFA gives the United States primary criminal jurisdiction over Short, the Advocaat-Generaal argued that this did not divest the Netherlands of its secondary concurrent jurisdiction.[159] Because it still retained this residual jurisdiction, he considered SSgt Short to be within the Netherlands "actual authority and responsibility" and, therefore, subject to the ECHR's protection. Thus, the *Soering* Court's injunction that no one may be extradited on capital charges applies here despite that the SOFA's duty to surrender is not extradition.

Because the High Court did not discuss as fully its bases for ruling that the ECHR applies to SSgt Short and that this conflict exists, the Court presumably accepted the Advocaat-Generaal's conclusions and rationale.[160] Despite the apparent logic of the Adocaat-Generaal's position, it has two possible problems. Either of them, if corrected, might allow the ECHR and SOFA to be read consistently.

The Advocaat-Generaal's key premise was that the Netherlands retains a sort of residual criminal jurisdiction even after the state with the primary right has attempted to exercise it. First, this view conflicts with the idea that the SOFA renders a member of the visiting force immune from receiving-state jurisdiction unless the sending-state waives its primary right.[161]

A second and more fundamental problem is that his premise is too limited. Viewing the SOFA only in terms of the immunity it may confer fails to account for the duty to surrender.[162] Although he acknowledged that duty and admitted that it is unqualified, he did so only before and after deciding that the ECHR applies to Short. He did not consider it as he determined whether Short was within the Netherlands "actual authority and responsibility." Had he considered in this context both Dutch criminal jurisdiction over Short and its duty to surrender him, he might have found that the ECHR does not apply.

The Advocaat-Generaal cited Serge Lazareff's book, *The Status of Military Forces Under Current International Law*, to support his proposition that the Netherlands enjoyed some residual jurisdiction over

---

157. European Convention, *supra* note 12, at 224.

158. Advocaat-Geneaal's Brief, *supra* note 133, at 1382.

159. *Id.*

160. The High Court did render a brief opinion regarding the ECHR's application to SSgt Short. Judgment of Mar. 30, 1990 at 6-7. The Court clearly agreed with the Advocaat-Generaal's analysis.

161. *See supra* notes 135-41 and accompanying text.

162. *See supra* notes 143-54 and accompanying text.

SSgt Short. Lazareff does contend that in its exercise of unlimited territorial sovereignty, a receiving state enjoys "a general right of jurisdiction over members of a [visiting] force, on the assumption that a sovereign-state could not accept not to punish an offence committed on its territory, lest it be a violation of its sovereignty."[163] The SOFA limitations on these general receiving-state rights, however, suggests that it somehow also limits its territorial sovereignty.

The examination of exclusive receiving-state jurisdiction and immunity supports a view that allocation of authority between sending and receiving states is a zero-sum[164] task. In other words, to the extent that one sovereign allows another to exercise jurisdiction within its borders, no matter how narrow the grant of jurisdiction, the state's territorial sovereignty, exercise, or both are equally restricted.[165] This notion of restrictive sovereignty is not revolutionary.[166] Indeed, Chief Justice Marshall's rationale for the inability to attach a foreign warship in *The Schooner Exchange* was that otherwise "exclusive and absolute" territorial sovereignty may be self-limited.[167] Also, the principle that receiving-state courts have no supervisory jurisdiction over sending-state courts-martial is based, at least in part, on the idea that they are authorized acts of visiting sovereigns. Finally, this phenomenon is apparent in the context of the NATO SOFA's article VII: to the extent that an accused is subject to the criminal jurisdiction of the sending state, the accused also is immune from prosecution from the receiving state, and vice versa.

Against this background, a reasonable argument is that a state that signs a treaty with an unconditional duty to surrender places yet another restriction on its sovereignty. Under the zero-sum analogy, adding the duty to surrender to the constraints already imposed by the sending state's primary right should limit even further the receiving state's otherwise-plenary territorial jurisdiction. Together, they carve out an area

---

163. LAZAREFF, *supra* note 4, at 17.

164. "In game theory, designation of a situation, competition [] in which a gain for one must result in a loss for another or others." WEBSTER'S NEW WORLD DICTIONARY 1653 (2d College ed. 1974).

165. *See* Stanger, *supra* note 112, at 91. Conceivably, two states could exercise jurisdiction simultaneously or consecutively with respect to an individual offender. The NATO SOFA, however, has rendered that extremely difficult. *See* NATO SOFA, *supra* note 7, art. VII, para 8, at 1802, 199 U.N.T.S. at 80. This provision prevents an accused, who has been tried and acquitted or convicted in the courts of either state, from suffering prosecution again at the hands of the other. This makes the zero-sum analogy even stronger.

166. *See supra* notes 48-53 and accompanying text.

167. *See supra* notes 45-55 and accompanying text.

over which the receiving state's discretion and authority no longer extend. The Dutch appeals courts, by holding that the Netherlands lack of criminal jurisdiction also deprived it of jurisdiction under the ECHR, recognized that this case fell within that area.

The decisions of several international tribunals, including the European Commission of Human Rights, support this view. Despite the Advocaat-Generaal's conclusion that the Commission has expanded the scope of ECHR protection,[168] these cases demonstrate that the convention does not apply to situations in which its parties have no independent authority or discretion.

In a 1975 case, *Hess v. United Kingdom*,[169] the Commission considered whether it could order the United Kingdom to release Nazi war criminal Rudolf Hess from Spandau Allied Prison in Berlin. After World War II, the four major Allies—the United States, the United Kingdom, France, and the Soviet Union—agreed to administer the prison on a rotating basis and to require unanimous agreement before effecting any changes. Although three of the four parties agreed that Hess should be released, the Soviet Union's veto continued his imprisonment. This arrangement, the Commission decided, gave the United Kingdom the right to participate in the prison's joint administration. Even during the United Kingdom's annual three-month supervision of the prison, the four-power agreement constrained its discretion and prevented it from unilaterally releasing Hess. Because it was bound by this agreement, the Commission rejected the application as a matter not " 'within the jurisdiction' of the United Kingdom, within the meaning of Article 1 of the Convention."[170]

The European Commission dealt similarly with another case involving the question whether the Federal Republic of Germany was responsible for the decisions of the Supreme Restitution Court, an international tribunal established in West Germany after World War II to adjudicate war claims.[171] Although Germany was a member of the tribunal, the Commission held that the ECHR did not apply because that nation's discretion in matters before that court was limited by its agreement with its other members. As support for its decision, the Commission pointed to the *Salem Case* in the United States-Egyptian Mixed Arbitral Tribu-

168. *See supra* notes 156-59 and accompanying text.

169. Application No. 6231/73, 2 Eur. Comm'n H.R. Dec. & Rep. 72 (1975).

170. *Id.* at 74.

171. X v. The Federal Republic of Germany, No. 235/56, 1958-1959 Y.B. Eur. Conv. on H.R. 256 (Eur. Comm'n on H.R.).

nal of 1932 (the Tribunal).[172] Faced with a similar issue, the Tribunal held that Egypt was not responsible for the decisions of the mixed courts established by agreements between Egypt and foreign nations to hear cases involving foreigners. The court stated:

> The jurisdiction of the Mixed Courts was instituted and is continued not only through the will of the Egyptian State, but by conventions concluded with the Capitulatory Powers. Both parties, by executing these conventions, sacrificed part of their sovereignty. The Capitulatory Powers gave up a part of their jurisdictional prerogative on Egyptian territory by waiving the civil jurisdiction of their consults. The Egyptian Government gave up a part of its sovereignty by undertaking to accept in civil cases . . . the jurisdiction of a court composed of a majority of foreigners. The responsibility of a state can only go as far as its sovereignty in the same measure as the latter is restricted, that is to say as the state cannot act in a free and independent manner, the liability of the state must also be restricted.[173]

The *Hess* case addresses another important conflict-of-treaties concern. The Commission recognized that an issue justiciable under the ECHR might arise if, after entering the ECHR, a member state also became party to an international agreement that limited its discretion in a manner inconsistent with its prior obligations. In other words, it considered that the ECHR might prevail over a later-conflicting treaty. It agreed, however, that the Allies concluded the four-power prison agreement well before the ECHR and understood that, despite the conflict, "unilateral withdrawal from [the prison] agreement [would not be] valid under international law."[174] Thus, the Commission did not demand that the conflict be resolved in favor of the ECHR. Importantly, the Netherlands ratified the NATO SOFA on November 18, 1953[175] and the ECHR on August 31, 1954.[176]

Since the Advocaat-Generaal and the High Court relied heavily on *Soering*, the question remains whether it has changed this restrictive sovereignty principle. It has not. The European Court in *Soering* was just

---

172. X v. Federal Republic of Germany, 1958-59 Y.B. Eur. Conv. on H.R. at 296 *quoting* The Salem Case, (U.S. v. Egypt), 6 Ann. Dig. 188, 198.

173. The Salem Case, 6 Ann. Dig. at 198. These opinions are clear: When international agreements place situations outside a particular state's discretion, international tribunals, including the European Commission, consistently have considered them also outside their authority. When that state's later actions are consistent with those agreements, but inconsistent with the ECHR, the Commission has decided that the ECHR does not apply.

174. Hess v. United Kingdom, 2 Eur. Comm'n H.R. Dec. & Rep. at 74.

175. 199 U.N.T.S. at 68 n.1.

176. 213 U.N.T.S. at 222 n.1.

as conscious of the United Kingdom's conflicting treaty obligations as was the European Commission in the two cases above. States have far more discretion not to surrender an accused under an extradition treaty than under the NATO SOFA.[177] Recognizing the extent of that discretion, the European Court stressed in its opinion that the United States-United Kingdom extradition treaty allowed the British government not to surrender Soering unless it received adequate assurances that he would not face capital punishment.[178] Although denying the United States request would frustrate the objectives of extradition and allow Soering's considerable crimes to go unpunished,[179] the United Kingdom could avoid that, too, by surrendering him to West Germany. Thus, the European Court held that the United Kingdom, faced with these options under its extradition treaties, must select one consistent with its ECHR obligations.[180]

Soering and the cases above teach the same lesson: When a state has the discretion to act in a manner consistent with the ECHR, it must do so. When, as in *Soering*, a state has the right to refuse to extradite someone facing the death penalty, the ECHR requires it to exercise that right. When, as in *Hess*, an earlier agreement limits the state's discretion, the ECHR does not apply because the matter is not within the state's "actual authority and responsibility." The SOFA's allocation of jurisdiction and duty to surrender clearly put *Short* into this latter category. This category is one in which both the SOFA and ECHR can still coexist peacefully.

---

177. *See supra* notes 144-50 and accompanying text.

178. Soering Case, 161 Eur. Ct. H.R. (sev. A) at 17-18, 35. "[T]he decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3." *Id.* at 35.

179. *Id.* at 35.

180. *Id.* at 35-36. The ECHR and the United States-United Kingdom extradition treaty, however, were not really inconsistent at all. The Society did not lose sight of this when it acknowledged that:

> [i]t must be stressed that in the *Soering* case there was no obligation to put the individual at the disposal of the [United States] judicial authorities. Moreover[,] the bilateral extradition treaty also provided for the possibility for the extraditing state to request a guarantee that the death penalty would not be carried out. The issue of possibly conflicting treaty obligations was therefore not at stake.

Society Background Paper, *supra* note 2, at 13.

2. International Treaty Law: The Vienna Convention on Treaties and Customary International Treaty Law

Because the SOFA limits the Netherlands discretion not to surrender SSgt Short, ample precedent supports construing the ECHR as inapplicable to his case. After *Hess* and *X v. Federal Republic of Germany*, that is one way the two treaties can be read consistently. It is also one reason why the SOFA's renegotiation should not be considered inevitable. Several other reasons also exist.

Putting the restrictive sovereignty argument aside, to assume that the SOFA and ECHR both apply and conflict also is to conclude that international law offers no solution. In particular, the Advocaat-Generaal, the Dutch High Court, and the Society each inquired to varying degrees whether the Vienna Convention on the Law of Treaties[181] offers an answer. All agreed that it did not.[182] *Hess* contained one pre-Vienna Convention suggestion that a state should not be held accountable for its actions inconsistent with the ECHR when a prior treaty limits its discretion. Perhaps another look at the Vienna Convention or customary international treaty law will reveal something equally enlightening to support the United States position.[183]

In 1969 at Vienna, the United Nations Conference on the Law of Treaties adopted the Vienna Convention on the Law of Treaties. The treaty did not enter into force for eleven years and, to this date, the United States still has not ratified it. Despite this, President Nixon acknowledged in his letter transmitting it to the Senate for ratification that it "is already generally recognized as the authoritative guide to current

---

181. Vienna Convention on the Law of Treaties, May 22, 1969, 8 I.L.M. 697 [hereinafter Vienna Convention]. The treaty, although adopted by the United Nations Conference on the Law of Treaties on May 22, 1969, did not enter into force until January 27, 1980. *See* RESTATEMENT, *supra* note 83, at 144.

182. Of these three inquiries, the most superficial was the High Court's inquiry. Its opinion jumped almost directly from discussing the treaty conflict to deciding how it could be resolved under its own public policy and domestic law. Its opinion devoted little analysis to the question whether the Vienna Convention might provide a solution. Its failure to discuss the issue might have resulted because the Advocaat-Generaal directed more effort to that area. In the discussion that follows, this Article will use his brief as a springboard to consideration of the international treaty law aspects of this problem.

183. By its terms, the Vienna Convention does not apply to the two treaties here. Article 4 of the Convention states that it "applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States." Vienna Convention, 8 I.L.M. at 682. Nevertheless, the convention's character as codification of customary international treaty law gives it persuasive and independent legal authority.

treaty law and practice."[184] Thus, although the United States may not take advantage of the Vienna Convention's dispute resolution system in situations like this, it does recognize the persuasive and legal authority of its rules.

Perhaps the most widely recognized and accepted principle of international treaty law is the concept of *pacta sunt servanda*. Article 26 of the Vienna Convention codifies this principle, stating that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[185] Unfortunately, starting our inquiry here offers no hope of resolving this conflict. The Advocaat-Generaal came to the same conclusion when he confronted this principle at the end of his analysis. Since both the ECHR and SOFA are treaties, *pacta sunt servanda* does nothing more than remind us that both are "binding" and "must be performed . . . in good faith." Indeed, that is the dilemma.

Greatest hope for a solution lies in the Vienna Convention's conflict of treaties rules. During its preparatory work, the International Law Commission (the Commission) understood that the proliferation of treaties someday would likely result in both intentional and unintentional conflicts.[186] Among the rules it drafted to deal with them was one based on the principle *pacta tertiis non nocent*: "[I]n the relations between a state that is a party to both [conflicting] treaties and a state that is a party only to the earlier treaty, the earlier treaty prevails."[187] In describing its customary law basis, the Commission said that this principle "can hardly be open to doubt, as [it is] the assumed basis of law upon which many revisions of multilateral treaties . . . have taken place."[188] Another draft rule codified the principle *lex posterior*: "[I]n the relations between a State that is a party to both treaties, and a State that is party only to the later treaty, the later treaty prevails."[189]

At the time of the Vienna Convention's formal adoption, the Commission proposed that both rules be applied only to conflicts arising out of successive treaties relating to the same subject matter. In its final draft to the Law of Treaties Conference, the Commission commented that these

---

184. S. EXEC. DOC. L., 92d Cong., 1st Sess. 1 (1971), *quoted in* RESTATEMENT, *supra* note 83, at 145.

185. Vienna Convention, *supra* note 181, at 690.

186. *See generally* Draft of the Convention on the Law of Treaties, [1964] 2 Y.B. Int'l L. Comm'n 40-43, U.N. Doc. A/CN.4/SER.A/1964/Add.1 [hereinafter 1964 Draft Convention].

187. *Id.* at 40.

188. *Id.*

189. *Id.* An almost identical provision is codified at article 30 of the Vienna Convention. Vienna Convention, *supra* note 181, at 691.

principles should be limited to avoid any risk that the rule codifying *lex posterior* might be misinterpreted as allowing "the conclusion of a treaty incompatible with obligations undertaken towards another state under another treaty."[190] In other words, it wanted to avoid the negotiation of later, inconsistent treaties. Clearly, its goal was to maintain the integrity of *pacta sunt servanda.* Unfortunately, limiting *lex posterior* in this way also limited *pacta tertiis non nocent,* a principle already in accord with that objective. In their limited form, both are now part of article 30 of the Vienna Convention.[191]

The Advocaat-Generaal concluded that since the ECHR and SOFA do not relate to the same subject matter, article 30's codification of *pacta tertiis non nocent* does not apply. He ended his discussion there. He did not inquire whether the underlying principle might apply independently of the Vienna Convention.

Clearly, the watered-down article 30 does not apply to this situation. *Pacta tertiis non nocent,* however, should. The Vienna Convention does not address every possible treaty issue that might arise. Therefore, the lacunae must be filled by customary international law. The Commission recognized the strong basis of *pacta tertiis non nocent* in customary international law, as it was applied in *Hess.*[192] After determining that article 30 did not apply, the Advocaat-Generaal also referred to customary law. His analysis, however, focused only on the concept of *lex posterior.* After correctly concluding that it also does not apply here, his inquiry ended. It ended too soon.

One aspect of article 30, paragraph 4(b) is that parties to a later treaty may not deprive earlier treaty partners of their rights without their consent.[193] That is also the purpose of the customary *pacta tertiis non nocent.*[194] The only difference between them is that article 30 is

---

190. 3 United Nations Conference on the Law of Treaties at 34, U.N. Doc. A/CONF.39/11/Add.2, U.N. Sales No. E.70.V.5 (1969) [hereinafter 1969 Vienna Conference].

191. Article 30, paragraph 4(b), states that when "the parties to the later treaty do not include all the parties to the earlier one . . . as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations." Vienna Convention, *supra* note 181, art. 30, para. 4(b), at 691.

192. *See supra* notes 169-176, and accompanying text. In *Hess,* the European Commission recognized the conflict between the four-power prison agreement and the ECHR. It deferred to the earlier four-power treaty, but added that it probably would not have done so had the ECHR been concluded first.

193. See 1969 Conference, *supra* note 190, at 36.

194. *See* 1964 Draft Convention, *supra* note 186, at 40.

limited artificially. While article 30's terms prevent it from resolving this conflict, its underlying principle survives in customary international law. This principle should be applied here. If applied, it would render the ECHR inapplicable to the extent that it conflicts with the earlier SOFA.[195]

E. *United States Policy*

The crux of the High Court's decision in *Short* was that Dutch public order demanded that it protect SSgt Short from the risk of capital punishment.[196] Just as the Netherlands has its own public order based upon its domestic and international human rights obligations, the United States has public policy concerns underlying its objection to the *Short* decision and its likely reluctance to renegotiate the NATO SOFA. Although the High Court performed a ritualistic balancing of its ECHR and NATO SOFA obligations, its approach left little doubt that the former would prevail. The Society's focus is similar. Both appear to be concerned about whether the NATO SOFA still is consistent with the Netherlands interests. If this were a treaty about to be signed or if the issue was whether the Netherlands ought to remain a party to it, this one-sided debate might be acceptable. This treaty, however, has been in force for almost forty years. Therefore, any discussion of its re-examination and possible renegotiation ought to take into account the interests of its other parties. In the context of the *Short* case, the other relevant party is the United States.

1. The NATO SOFA Negotiations: The Original United States Concerns

The SOFA's relatively smooth operation today stands in distinct contrast to the controversy it generated during and immediately after its negotiation. Throughout World War II, the United States held sacred the fundamental principle that its military forces, wherever deployed, were

---

195. In the *lex posterior* context, the Netherlands arguably violated its obligations to its ECHR partners by deferring to the SOFA. While this is true, the Commission was careful to add to its codification of both the *lex posterior* and *pacta tertiis non nocent* principles that they apply "in the relations between a state that is party to both treaties" and a state that is party only to the later or earlier treaties, respectively. In the *Short* situation, the relations are between the Netherlands and the United States. Thus, the SOFA—the earlier treaty to which both are parties—applies to the exclusion of the ECHR. No other state is involved.

196. *See supra* Section II and *infra* Section IV.

subject to its exclusive criminal jurisdiction.[197] Given the United States favored status, none of the Allies disputed that claim.[198] After the war, however, some of the Western European nations that were to become the members of NATO, faced with the prospect of having foreign troops on their soil for the foreseeable future, insisted that jurisdiction over them be shared.[199]

Just as strongly as NATO's European alliance considered shared jurisdiction necessary to preserve its own public order from the possible excesses of foreign troops, the United States balked at the prospect of losing any measure of control over its forces. While the rest of the treaty drew only passing notice during its Senate ratification hearings, article VII raised considerable concern.[200] After a long history of maintaining exclusive jurisdiction over its troops—a history that included its recent victory in the largest war to date—the NATO SOFA would subject its military personnel to the courts of another nation. To some in Congress, that idea was unthinkable.[201]

At the NATO SOFA negotiations, the primary United States concerns were that its military members should not be exposed to the risk of cruel and unusual punishment at the hands of foreign criminal laws and judicial systems and that discipline must be maintained.[202] Maximizing United States jurisdiction over our military members abroad would satisfy both. While the interests of the Europeans obviously have changed significantly over the past forty years, the United States interests have not. Although the United States does not worry about cruel and unusual punishment in most of Europe, as the predominant sending state within NATO, its concerns about uniform treatment remain essentially the same, and the SOFA's formula still meets them. Thus, the United States

197. *See supra* notes 54-77 and accompanying text.

198. *See* Barton, *supra* note 6, at 200.

199. *See id.* at 205-07.

200. *See generally Supplementary SOFA Hearings, supra* note 8.

201. In the ratification hearings, the SOFA's primary opponent appeared to be Senator Bricker. His objection to the treaty focused on its jurisdictional provisions. His opposition was reflected in the reservation he proposed:

> The military authorities of the United States as a sending State shall have exclusive jurisdiction over the members of its force or civilian component and their dependents with respect to all offenses committed within the territory of the receiving state and the United States as a receiving state shall, at the request of a sending state, waive any jurisdiction which it might possess over the members of a force or civilian component of a sending state and their dependents with respect to all offenses committed within the territory of the United States.

Id. at 3.

202. *See supra* notes 6-10.

probably would be reluctant to renegotiate it.

How the NATO SOFA would be changed to accommodate Europe's human rights concerns is unclear. Two likely possibilities would be either to specifically prohibit capital punishment in cases arising under the SOFA or to further limit the jurisdiction of sending states whose laws still provide death penalties. For the following reasons, both probably would meet United States opposition.

2. The Death Penalty

The *Short* decision represents an ironic reversal of positions in the NATO SOFA: the United States allies now worry that the United States will subject its citizens to cruel and unusual punishment. A critical question in any debate about changing the NATO SOFA to prevent capital punishment is whether the United States is willing to change the status quo. Although a similar debate over the death penalty rages within the United States, most of its criminal justice systems—including the military's system—clearly still consider the death penalty important.

Although death is a possible punishment for some federal crimes,[203] under the United States federal-state system, most criminal law is defined and enforced by the individual states. The federal government, which would negotiate any NATO SOFA amendments, has become involved in the capital punishment debate primarily through its judicial decisions. In the 1972 case of *Furman v. Georgia*, the United States Supreme Court went so far as to invalidate Georgia's death penalty statute.[204] The Court's ruling that this statute was unconstitutional had the added effect of striking down death penalty statutes in all other states then permitting capital punishment.[205] Although *Furman* struck a strong blow against the death penalty, the most significant aspect of subsequent events was the haste with which these states corrected their statutes' constitutional defects, thereby re-establishing their capital punishment schemes.[206]

The states that retain capital punishment today do so despite constant challenges and opposition. Their persistence is evidence of the death penalty's perceived value. The military has encountered and overcome simi-

---

203. *See, e.g.*, 21 U.S.C. § 848 (1988) (providing the possibility for the imposition of the death sentence for intentional killings occurring in the course of a continuing criminal enterprise).

204. Furman v. Georgia, 408 U.S. 238 (1972).

205. *See* Kevin K. Spradling & Michael D. Murphy, *Capital Punishment, the Constitution, and the Uniform Code of Military Justice*, 32 A.F. L. REV. 415 (1990).

206. *See id.* at 416.

lar obstacles. Its capital punishment provisions are contained in the Uniform Code of Military Justice (UCMJ), a federal statute,[207] and the Manual for Courts-Martial, 1984, an Executive Order.[208] They were revised most recently in 1984 after the United States Court of Military Appeals struck down the previous manual's death penalty provision in *United States v. Matthews*.[209] Although no military member has been executed under the UCMJ since 1961,[210] the armed forces, like the states, want to keep this option available.

3. The Expansion of Military Criminal Jurisdiction

Any suggestion that the NATO SOFA should be changed to limit United States jurisdiction over capital crimes would run headlong into the current trend of expanding military jurisdiction within the United States. For eighteen years—between 1969 and 1987—military court-martial jurisdiction was limited. Outside of the United States, it was, and continues to be, constrained by the many SOFAs to which the United States is a party. In a 1969 opinion, *O'Callahan v. Parker*,[211] the United States Supreme Court held that the Constitution further limited court-martial jurisdiction over military personnel to crimes that are "service connected." Specifically, it ruled that a military person's off-base sexual assault on a civilian with no military connection could not be tried by court-martial.[212] In 1987, however, the Court reversed *O'Callahan* in *Solorio v. United States*.[213]

The *Solorio* court held that the only requirement for court-martial jurisdiction is that the accused must have been "a member of the Armed Services at the time of the offense charged."[214] The basis for the Court's expansion of military jurisdiction was its recognition that Congress is responsible for determining what courts-martial may consider and that Congress had determined that the accused's military status was the only relevant jurisdictional factor.[215] The Court also recalled that George Washington seems to have shared this view.[216] Since 1987, all military

207. *See* 10 U.S.C. §§ 801-940 et. seq. (1988).

208. *See* Exec. Order No. 12773, *amended by* Exec. Order No. 12484, 49 Fed. Reg. 28,825 (1984), *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984.

209. 16 M.J. 354 (C.M.A. 1983).

210. *See* Message from HQ USAF/JAJM to HQ USAFE/JA (July 27, 1988).

211. 395 U.S. 258 (1969).

212. *Id.* at 273.

213. Solorio v. United States, 483 U.S. 435 (1987).

214. *Id.* at 451.

215. *See id.* at 440-441; *see also* Burns v. Wilson, 346 U.S. 137 (1953).

216. In a General Order dated February 24, 1779, President Washington stated that

members, wherever located, have been subject to the UCMJ. The only limits now are those imposed by the allocations of jurisdiction in agreements like the NATO SOFA.[217]

One of the objectives of the Uniform Code of Military Justice is to provide uniform criminal standards for all United States military members.[218] This goal, however, is achievable only if the UCMJ is enforced against as many military members in as many situations as possible. That, of course, is also an objective of SOFAs. The fairness that the relationship between uniformity and maximizing jurisdiction seeks to achieve would be jeopardized by prohibiting capital punishment or curtailing United States jurisdiction under the NATO SOFA. Unless the death penalty is abolished entirely under the UCMJ, either of these suggestions might cause a fairness problem of constitutional proportions: all military members except those in Europe would risk death for capital crimes.

IV. THE DUTCH POSITION: THE ROLE OF HUMAN RIGHTS IN INTERNATIONAL LAW

The United States position in *Short* is based in large part on well-accepted principles of black-letter international law.[219] In contrast, the Dutch view is more controversial because it is based on the emerging jurisprudence of human rights—a body of international law that was in its infancy when the NATO SOFA entered into force.

Much of Section III focused on how the Netherlands violated the NATO SOFA procedurally and substantively. It also argued that a narrower reading of the ECHR was not only appropriate, but that it also would have avoided the violation of either treaty. Given the strong basis of those propositions in international law, two of the few remaining arguments supporting the Dutch position are that the norms embodied in

---

"[a]ll improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other." *Solorio,* 483 U.S. at 445 n.10, (quoting 14 WRITINGS OF GEORGE WASHINGTON 140-41 (J. Fitzpatrick ed. 1936)).

217. Although all military members within the United States are subject to the UCMJ, they may not actually be tried by court-martial for every serious offense. Military authorities still share jurisdiction with local authorities, and, depending on the nature of the offense, the case may be tried by either. Manual For Courts-Martial, United States (1984) (as amended), R.C.M. 201(d)(2).

218. *See, e.g.,* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 2-3 (2d ed. 1987).

219. *See supra* Section I.

the ECHR are superior to the SOFA's or that the latter treaty is no longer binding in cases like *Short*. Together, they form the basis of the Society's proposal that the SOFA be revised.

This Section briefly introduces the European human rights system as established under the ECHR, the foundation of the Dutch position. Next, it will examine the status of that system and its enumerated rights in international law. In that context, three questions are relevant: Has opposition to capital punishment reached the level of *jus cogens*? If not, can it be considered as a higher norm in some sort of hierarchy of international norms? Third, what is its role and effect as a principle of Dutch public policy? Unfortunately, the Dutch High Court's decision in *Short* provided little analysis. Therefore, the answers to these questions are derived from arguments that were made to the Court, the Society's propositions, and attempts to fill in the gaps. Finally, this Section will explore the treaty law principle of changed circumstances to determine whether evolving human rights law justifies the High Court's avoidance of the NATO SOFA.

A. *Human Rights Generally: A Background*

After *Short*, the Netherlands clearly considers members of visiting forces subject to the ECHR. Also, the Society contends that during the thirty-seven years both the NATO SOFA and the ECHR have been in force, they have evolved in opposite directions. To resolve this resulting conflict, it concludes that the SOFA must be reconsidered. This argument reflects the increasing role of human rights law in Europe. To better understand the Dutch perspective, an understanding of European human rights is necessary.

1. The Human Rights Movement

The appearance of human rights in international law occurred primarily as a result of the "atrocities committed against humanity by the fascist powers during the Second World War."[220] Before and during that war, various groups and individuals, shocked by the heinous acts of the Nazis, began the process that ultimately resulted in the adoption of the United Nations Universal Declaration of Human Rights (UDHR).[221] Having opened the floodgates, this declaration ultimately led to the mul-

220. Imre Szabo, *Historical Foundations of Human Rights and Subsequent Developments*, *in* THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS 11, 21 (UNESCO ed., 1982).

221. *Id.*

tiple treaties now governing human rights.

To supplement the individual human rights treaties that have been negotiated under the auspices of the United Nations, some states have united on a regional basis to improve the conditions of their peoples. In addition to the European regional system,[222] the Americas and Africa have also established frameworks in which human rights have been established and enforced.[223]

The speed and vigor with which the international community has pursued the establishment of international human rights law has led some to question whether it is progressing too fast. Whereas most of the rights that have been proclaimed by the United Nations or by human rights treaties have evolved from the pursuit of liberty, the world is now approaching the point at which its thirst for new rights is almost insatiable.[224] This, together with the reality that many states that are parties to these human rights treaties have abysmal human rights records, has strained the system's credibility. Perhaps these are reasons why the United States has been reluctant to ratify many of the human rights treaties that have been negotiated.[225]

Despite the United States "unilateral stance on the subject of human rights,"[226] it is sensitive to its own record and the compliance records of other nations. This is most evident in its foreign policy.[227] Overall, the United States and the Netherlands feel equally strong about the importance of human rights. Their only differences, perhaps, lie in their definitions of what those fundamental rights are and in how they manifest their concern.

---

222. *See infra* notes 219-30.

223. *See, e.g.*, Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights, in* 2 HUMAN RIGHTS IN INTERNATIONAL LAW 439 (Theodor Meron ed., 1984).

224. *See, e.g.*, Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984) (examining the problem of declaring new rights by the United Nations and offering suggestions on how to regulate procedurally the declarations of rights).

225. *See* RICHARD B. LILLICH, INVOKING INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS 8 (noting the United States has "an exceptionally poor ratification record insofar as international human rights treaties are concerned").

226. DAVID P. FORSYTH, HUMAN RIGHTS AND UNITED STATES FOREIGN POLICY 2 (1988).

227. *See id.*

2. The European Human Rights System

Dutch human rights law and policy are based primarily on the European Convention on Human Rights.[228] That treaty, which the Netherlands signed on November 4, 1950 and ratified on August 31, 1954,[229] is one of the cornerstones of the European Community. It also is widely considered to be the world's most effective regional human rights enforcement system.[230] Although its success has been attributed mainly to the homogeneity of its Western European parties,[231] their common World War II experiences no doubt also contributed greatly to their resolve.

The ECHR is divided into two primary parts. First, it lists the rights and freedoms its contracting parties must secure for "everyone within their jurisdiction."[232] This language is extremely important because it defines the scope of the ECHR's protection, which the Dutch High Court construed broadly to cover SSgt Short.[233] Second, the ECHR establishes a structure within which those rights and freedoms may be enforced.[234] While the ECHR's enumerated rights and freedoms are similar to those found in other major human rights documents, its enforcement system distinguishes the European model from all others.

The ECHR established two organs and incorporated a third to form the nucleus of its enforcement mechanism. The European Commission of Human Rights, the European Court of Human Rights, and the pre-existing Committee of Ministers—the governing body of the Council of Europe—work independently, but in concert, to consider and act upon state and individual complaints of human rights violations. The Commission is the first body to receive the complaints. If it regards a state or individual petition "admissible," it investigates the underlying allegations and establishes its findings in a report to the Committee of Ministers. Judging the admissibility of a complaint is an important aspect of this process because it is the threshold that separates frivolous from substantial petitions. Although complaints must satisfy several requirements, the two most important are: first, that the state or individual complainant

228. *Id.* at 222 n.1.

229. European Convention, *supra* note 12.

230. *See* European Convention on Human Rights, *in* 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 184, 191 (1985).

231. *See id.*

232. European Convention, *supra* note 12, arts. 1, 2-17, at 224-234.

233. *See supra* notes 156-60 and accompanying text.

234. European Convention, *supra* note 12, arts. 19-56, at 234-48.

must have exhausted all domestic remedies,[235] and, second, that the individual complainant must claim to be a victim of a human rights violation committed by one of the ECHR's parties.[236] The Dutch High Court in *Short* considered that SSgt Short might satisfy both criteria if the Court decided to surrender him to United States authorities.[237]

If, after the Commission's investigation, the parties are unable to settle their dispute informally, the Commission submits its final report to the Committee of Ministers.[238] The ECHR then provides the Commission and any interested state party a three-month period during which they may refer the matter to the European Court of Human Rights (the Court).[239] If the matter is referred to the Court, it decides whether the ECHR was violated. Otherwise, the Council of Ministers renders final judgment.[240]

3. Capital Punishment and the ECHR

Ironically, when the ECHR entered into force on September 3, 1953,[241] it did not prohibit capital punishment. Rather, listed first among the document's protected human rights is a "right to life" provision that specifically allows the death penalty: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."[242] Because the NATO SOFA entered into force less than two weeks earlier,[243] on August 23, 1953, much of Western Europe presumably shared this view of capital punishment during the ECHR's negotiation.

During the SOFA negotiations, the states knew that sending-state courts-martial might sentence offenders to death for certain offenses. Although neither international nor European law prohibited capital punishment, some European receiving states had either formally abolished or discontinued it in peace, war, or both. Thus, hope was expressed that sending states would not carry out death sentences within their territo-

---

235. *Id.* art. 26, at 238.

236. *Id.* art. 25, at 237-38.

237. Indeed, the Dutch Advocaat-Generaal concluded that the Netherlands would commit a "tort" against SSgt Short if it turned him over to the United States. *See* Advocaat-Generaal's Brief, *supra* note 133, at 1387.

238. European Convention, *supra* note 12, art. 31, at 240.

239. *Id.* art. 32, at 240.

240. *Id.*

241. *See id.* at 222 n.1.

242. *Id.* art. 2, at 224.

243. SNEE & PYE, *supra* note 10, at 7.

ries.[244] In deference to these states, the final treaty contained article VII, paragraph 7(a): "A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case."[245] Under this compromise, the NATO allies understood that when the sending state has jurisdiction to prosecute, it has the right to impose any sentence its laws deem appropriate; the SOFA limits only its execution within a receiving state whose laws do not allow "such punishment in a similar case." Until *Short*, no objection to the imposition of a death sentence had ever been sustained.

Although the ECHR originally allowed capital punishment, the 1983 Sixth Protocol (the Protocol) called for its abolition. The Protocol stated simply that "the death penalty shall be abolished. No one shall be condemned to such penalty or executed."[246] To date, many European NATO nations, including the Netherlands, have signed or ratified it. Issues exist, however, of whether this development supports the Society's argument that Western Europe's view of human rights has changed sufficiently to warrant corresponding changes in the SOFA and whether the SOFA no longer requires receiving states to surrender members of visiting forces who risk execution under sending-state law.

B. *Is the Right Not to Face the Death Penalty Normatively Superior to the SOFA's Duty to Surrender?*

1. Normative Superiority as a Matter of International Law

The first of the Society's two principal arguments favoring re-evaluation of the NATO SOFA is that the "influence of international agreements with relation to human rights within the legal system[s] of states [has] increase[d] steadily."[247] Not only has the influence of international human rights law increased, but many argue that it also has grown in stature. One particular view that has recently become prominent, albeit controversial, is that some international human rights norms are actually

---

244. *See, e.g.*, Status of Forces Agreement—Norwegian Note on the Death Penalty under Article VI of the Draft, MS-D(51) 10, (Feb 16, 1951), *reprinted in NATO Travaux Preparatoires, supra* note 8, at 383.

245. NATO SOFA, *supra* note 7 at art. VII, para. 7(a), at 1800, 199 U.N.T.S. at 80.

246. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Europ. T.S. No. 114, art. 1, at 2.

247. Society Background Paper, *supra* note 2, at 5.

superior to other international laws.[248]

The basic idea that international law ranks some norms ahead of others is not a new one. The idea's most widely-accepted form is the familiar principle of *jus cogens*. Codified at article 53 of the Vienna Convention on the Law of Treaties, *jus cogens* contemplates that treaties at variance with certain universal "peremptory norms" are automatically void.[249] Such norms are "rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character."[250] In other words, they take precedence over all other international laws.

Professor Weil of the University of Paris argues that *jus cogens* is gradually leading to the further "graduated normativity" of international law.[251] Historically, international norms created either by treaty or by custom were equally binding. "There was no distinction . . . to be made between one legal norm and another."[252] The principle of *jus cogens*, however, "with its distinction between peremptory and merely binding norms,"[253] has now led to the question whether a hierarchy among nonperemptory norms also exists. Professor Meron suggests this hierarchy within international human rights law may exist and describes two possible levels: fundamental rights and ordinary rights.[254]

The concept of fundamental rights is an international transplant from domestic law. National constitutions commonly describe those rights that a government may not abridge. Also common are domestic rights of lesser status. United States law provides good examples of both. On the one hand, the United States Constitution gives great deference to fundamental rights; any government interference with them is subject to "strict scrutiny" by the courts.[255] On the other hand, courts review the abridgement of rights not regarded as fundamental—ordinary rights—under a much less stringent standard.[256] Although this same dichotomy may exist in international law, it is not nearly so well-defined. Since international law does not have a constitutional or legislative process by which some

248. *See id.* at 12-13.

249. *See* Vienna Convention, *supra* note 181, art. 53, at 698-99.

250. 1969 Vienna Conference, *supra* note 190, at 67.

251. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

252. *Id.* at 421.

253. *Id.*

254. Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 5 (1986).

255. John E. Nowak, et al., CONSTITUTIONAL LAW 384 (1978).

256. *Id.*

rights are classified as "fundamental" and others as "ordinary," the distinction is blurred.[257]

Meron suggests two ways to distinguish fundamental rights from ordinary international human rights. One necessary, but insufficient, attribute of fundamental rights is that they are obligations *erga omnes*.[258] A second characteristic, closely related to the first, is that they "must be firmly rooted in international law."[259] Meron adds that "mere claims or goals, important as they may be, would not qualify."[260] On the surface, these standards seem straightforward. The problem, however, is that they suffer the same plight as the standards defining peremptory norms: How does the international community determine whether a particular norm satisfies them?[261] Unfortunately, a definite answer does not appear to exist.

Assuming that rights can be considered peremptory, fundamental, or ordinary, the next challenge is to determine the consequences of classification.[262] *Jus cogens* makes peremptory norms superior to all others.[263] Thus, in conflicts between peremptory and other norms, the former will always prevail. When fundamental rights conflict with ordinary rights or other international norms, authorities are split as to what law will prevail. In 1983, the Institute of International Law convened at Cambridge to discuss, among other matters, the relationship between human rights and extradition.[264] The conferees' consensus appeared to be that customary international law has evolved to the point at which "the duty to protect human rights . . . justif[ies] non-extradition."[265] One conferee narrowed this slightly by defining human rights as "basic rights of the human person"—in other words, fundamental human rights.[266] Despite the arguments underlying the United States position, some support exists for the proposition that some human rights fall short of peremptory status but still supersede other international norms. The crucial question

257. *See* Commentary to Draft Articles on State Responsibility, [1976] 2 Y.B. Int'l L. Comm'n, pt. 2 at 73, 85-86, *reprinted in* Meron, *supra* note 254, at 8.

258. *See* Meron, *supra* note 254, at 8-9. In other words, they are obligations owed by every state to all other states. *See also* RESTATEMENT, *supra* note 83, § 702, cmt. o.

259. Meron, *supra* note 254, at 11.

260. *Id.*

261. *See id.* at 18.

262. *See id.* at 22.

263. *See supra* notes 249-50 and accompanying text.

264. *New Problems of the International Legal System of Extradition With Special Reference to Multilateral Treaties*, 60 Y.B. INST. INT'L L. 213 (1983).

265. *Id.* at 214.

266. *Id.* at 234 (statement of H. Mosler).

for our purposes is whether SSgt Short's right not to suffer capital punishment supersedes the Netherlands SOFA duty to surrender him. The Dutch answer, of course, is that it does.

2. *Jus Cogens* and International *Ordre Public*

If the right not to face capital punishment were a peremptory norm, the *Short* case would not have triggered a dispute. That right clearly would have taken precedence over the SOFA duty to surrender, and the case would have closed without comment. That this did not happen strongly suggests that the *jus cogens* principle does not apply here. To determine when the right not to face capital punishment does apply, a consideration of why it is not a peremptory norm is useful.

In addition to the idea that peremptory norms supersede all norms of lesser importance, *jus cogens* sometimes also refers to international *ordre public*, the principle that some public policies exist that states may never violate.[267] The international *ordre public* is comprised of principles and rules that are so vitally important to the world community that any contravention of them by unilateral action or agreement cannot have legal force.[268] The reason for this follows simply from logic: "the law cannot recognize any act either of one member or of several members in concert, as being legally valid if it is directed against the very foundation of law."[269] Although the scholars who have linked *jus cogens* and *ordre public* admit that some differences exist, the critical similarity is that both are concerned with principles that form the "foundation of [international] law."[270] Most agree that the right not to face the death penalty is not an *ordre public.*

The Society itself acknowledges that capital punishment has not achieved that exalted status.[271] The Restatement goes much further, stating that not only is capital punishment not considered a violation of a peremptory norm, but it has not even been "recognized as a violation of the customary law of human rights."[272] It cites article 6 of the Covenant on Civil and Political Rights (the Covenant) as authority for this conclusion. Article 6 states that capital punishment may "be imposed only for the most serious crimes in accordance with the law in force at the time of

---

267. *See* Meron, *supra* note 254, at 19-20; H. MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 17-19 (1980).

268. *Id.*

269. MOSLER, *supra* note 267, at 18.

270. *Id.*

271. *See* Society Background Paper, *supra* note 2, at 12-13.

272. RESTATEMENT, *supra* note 83, § 702, cmt. f.

the commission of the crime."[273] Thus, it recognizes that many states have not abolished the death penalty.

Finally, even the *Soering* court agrees. The European Convention allows capital punishment under conditions similar to the Covenant's.[274] The Sixth Protocol abolishing the death penalty has yet to be accepted fully by all European Community members. Both of these factors led the *Soreing* court to conclude that capital punishment per se does not violate the ECHR.[275]

The Restatement suggests two qualifications of peremptory norms: they must be "recognized by the international community of states as a whole," and their peremptory character must be accepted.[276] Because neither is satisfied here, the right not to face capital punishment is not a peremptory norm.

3. Capital Punishment and Fundamental Rights

The second and final step in the hierarchy analysis focuses on the question whether capital punishment violates a fundamental right. Since it does not violate a peremptory norm, the right not to face the death penalty could not be superior to any other international norms unless it can be considered fundamental.

This step is also very difficult. One of the underlying assumptions thus far has been that the right not to face capital punishment is an international norm at some level. As the previous section demonstrated, this assumption may be incorrect. The Restatement asserts not only that capital punishment violates no peremptory norms, but also that it is not inconsistent with other international laws.[277] Before considering whether this is a fundamental right, it must be determined whether it is even a right.

International law's two primary sources are treaties and custom.[278] Clearly, the Sixth Protocol establishes the right not to face capital punishment as a matter of treaty law within the European Community. The *Soering* court suggests that this right may also be rooted in European customary law.

In its amicus curiae brief to that court, Amnesty International argued

---

273. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 6, 999 U.N.T.S. 171, 174-75.

274. *See supra* notes 241-46, and accompanying text.

275. Soering Case, 161 Eur. Ct. H.R. (ser. A) at 39-41.

276. RESTATEMENT, *supra* note 83, § 331, cmt. e.

277. *See supra* note 272 and accompanying text.

278. *See* Statute of the International Court of Justice, Jun. 26, 1945, art. 38, 51 Stat. 1031, 1061, 3 Bevans 1153, 1187.

that there is a "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice."[279] The court agreed, but held that the Sixth Protocol embodied the European Community's articulation of that premise. If a particular state—like the United Kingdom—did not ratify that protocol, it would not be bound by that customary law.[280] Perplexing though this holding may be, it at least appears to affirm that the abolition of capital punishment is a European norm—an example of a special or regional custom binding at least among the states party to the Sixth Protocol.[281] Among these states, then, the right not to face capital punishment is a right arguably guaranteed by both treaty and custom. This, however, merely raises another preliminary issue: the role of regional norms in international law.

The International Court of Justice (ICJ) considered a similar question in the *Asylum Case* between Colombia and Peru.[282] Colombia sought a judgment compelling Peru to grant safe exit to a Peruvian political opposition leader to whom the Colombian Embassy in Lima had given asylum. One of Columbia's arguments was that the practice of diplomatic asylum had become a customary regional norm of international law. The Court ultimately found that the practice had not crossed the customary law threshold. The Court suggested, however, that if it had, it would have governed the parties' relationship.

The Court's suggestion was implied in the test it used to determine whether diplomatic asylum was customary law. The test, derived from article 38 of the Statute of the ICJ, states that the "party which relies on a custom . . . must prove that [the custom] is established in such a manner that it has become binding on the other party."[283] This is done, in turn, by proving that the rule "is in accordance with a constant and uniform usage" by the other party—practice—and that this practice is the expression of the invoking party's right and the other party's duty—*opinio juris*.[284] Applying this test to the facts in the *Asylum Case*, the ICJ found the parties' practice inconsistent and considered their obli-

279. Soering Case, 161 Eur. Ct. H.R. (ser. A) at 40. Although the European Court did not employ the term "customary law," its discussion suggested that this was the context in which it examined this question.

280. *Id.*

281. For an excellent discussion of the distinctions between "special" and "general" custom in international law, see Anthony A. D'Amato, *The Concept of Special Custom in International Law*, 63 AM. J. INT'L L. 211 (1969).

282. Asylum (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20).

283. *Id.* at 276.

284. *Id.*

gation more a matter of political expediency than of duty. Applying the same test to the right not to face capital punishment in Europe among the states that have adopted the Sixth Protocol, it seemingly is a right based both on treaty and regional customary law.

In Professor Meron's two-part test, two attributes of a fundamental right are its *erga omnes* character and that it is firmly rooted in international law.[285] Within the European Community, the right not to face the death penalty is *erga omnes* as a matter of treaty—all members can enforce it against one another. The strength of its roots presents a more difficult problem. Certainly, many European Community states feel strongly that capital punishment is wrong, including the Netherlands. The *Soering* court, however, suggests that the right's roots are deeper in the Sixth Protocol than in regional custom. The problem is that no one really knows how firmly these rights must be fixed for them to be considered fundamental. If the right not to face capital punishment does not qualify now, perhaps it is only a matter of time before it will. The Dutch have a good argument that it is fundamental now.

Assuming, *arguendo*, that this right is fundamental in European international jurisprudence, the issue still remains whether it outranks the SOFA duty to surrender. The Institute of International Law suggests that fundamental human rights supersede the duty to extradite.[286] The Netherlands could argue that this is also true when those rights are defined only in regional customary or treaty law.[287]

Whether norms are recognized only regionally or generally, their binding effect on states within the region is equally strong. The *Soering* decision is ample proof of that. The Dutch might say that whether this norm binds the United States is irrelevant because its conduct is not at issue here.[288] Since SSgt Short was in Dutch custody, only the Netherlands decision to surrender him is relevant, and this norm limits the

285. *See supra* notes 258-59 and accompanying text.

286. *See supra* notes 264-66 and accompanying text. As a matter of hierarchy of international norms, extradition and the SOFA duty to surrender are identical, but neither could reasonably be considered fundamental in the sense that we have defined that term.

287. On the one hand, the opposing norm—the SOFA's duty to surrender—is also regional in scope. On the other hand, the underlying concept *pacta sunt servanda* is part of general international law, the principle that is arguably at stake here.

288. In the *Asylum Case*, Colombia sought to apply a regional customary norm to regulate Peru's conduct, but the ICJ held that the norm was not sufficiently customary to bind Peru. *See supra* notes 282-84 and accompanying text. Here, however, the Netherlands is not seeking to enforce a regional rule against the United States; it merely recognizes that the rule applies to itself.

Netherlands discretion. The Netherlands might add that violation of this norm could subject it to criticism and, possibly, sanctions from its European Community partners. The standard they would apply is this regional norm. The Dutch High Court has already acknowledged that the SOFA also imposes an obligation, but concluded that it is not of equal stature. The fundamental character of SSgt Short's right not to face capital punishment must prevail.[289]

This argument is appealing, especially from a human rights perspective. It fails to consider, however, that the United States is involved in this matter. Although its conduct is not at issue, its authority over one of its nationals is. The treatment of one state's nationals by another has always been a concern of international law.[290] An equally persuasive argument, then, might be that the validity of the Netherlands acts concerning Short are subject to the law in force between it and the United States. Customary international law would apply unless a special agreement or custom existed between them.[291] Since regional European norms do not bind the United States and a special treaty relationship—the NATO SOFA—does exist, the United States could just as effectively argue that this special or regional custom cannot supersede the SOFA.

C. *Is the Right Not to Face the Death Penalty Superior to the SOFA's Duty to Surrender as a Matter of Intertemporal Law?*

1. The Temporal Element of International Law

Intertemporal law involves the relationship between earlier and later international laws. For example, article 30 of the Vienna Convention on Treaties allows two or more treaty partners to change their mutual obligations by subsequent treaty.[292] The presumption is that more recent

---

289. Although the Dutch High Court did not use this framework to compare the SOFA's duty to surrender and Short's right not to face capital punishment, its holding captured the essence of the distinction between them. It said that "[i]n view of the great importance that must be attached to the right not to undergo the death penalty, that balancing [between that right and the SOFA duty to surrender] cannot turn out otherwise than in favor of Short." Judgment of Mar. 30, 1990, Hoge Road de Nederlanden [Highest Court], The Hague, 1990, Nos. 13.949, 13.950, slip op. at 10 (unofficial translation by United States Department of State).

290. *See, e.g.,* Nottebohm Case (Lich. v. Guat.), 1955 I.C.J. 4 (Apr. 6).

291. *See* D'Amato, *supra* note 281. Professor D'Amato argues that the ICJ in the *Anglo-Norwegian Fisheries Case,* established this rule. It upheld Norway's unilateral delimitation of its fisheries jurisdiction because it was reasonable "in light of general customary practice," and the United Kingdom had no special agreement or custom defining a contrary relationship with it. *Id.* at 221.

292. *See* Vienna Convention, *supra* note 181, art. 30, at 691. No individual party or

norms supersede older, inconsistent ones.

The intertemporal relationship among treaty norms and among customary norms is relatively well established. Just as newer treaties may modify older ones, modern state practice may change old customary international laws.[293] Similarly, the Restatement acknowledges that later custom may supersede earlier inconsistent treaties and vice versa.[294] In this relationship, however, treaties clearly have stronger effects. The Restatement accepts the principle that customary law and treaties are equally authoritative in international law.[295] "Unless the parties evince a contrary intention, a rule established by agreement supersedes for them a prior inconsistent rule of customary international law. . . . A new rule of customary law will supersede inconsistent obligations created by earlier agreement *if the parties so intend and the intention is clearly manifested.*"[296] Thus, the Restatement presumes intent to supersede earlier international law in a treaty, whereas it must be expressed in a new customary rule.

This concept of intertemporal law raises two relevant questions. First, has the ECHR and specifically its Sixth Protocol superseded the NATO SOFA? Second, has the customary human rights law that arguably has evolved from the ECHR modified the SOFA's duty to surrender in capital cases? The first question can be disposed of quickly. Since the United States is not a party to the ECHR or its Sixth Protocol, article 30 prevents either treaty from affecting its SOFA relationship with the Netherlands. The second question, however, is much more difficult.

2. The Temporal Relationship Between Capital Punishment and the SOFA's Duty to Surrender

Recall that the right not to face capital punishment is arguably a European regional norm that binds all parties to the Sixth Protocol.[297] It is also a right the Dutch High Court clearly considers fundamental.[298] Its hierarchical superiority over the SOFA's duty to surrender, the Dutch might contend, makes this latter duty unenforceable. A similar temporal

---

group of parties may conclude a subsequent treaty binding on a state that is party to the earlier treaty, but not the later one.

293. *See generally* Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 11-20 (1988).

294. *See* RESTATEMENT, *supra* note 83, § 102, cmt. j.

295. *Id.*

296. *Id.*

297. *See supra* note 246 and accompanying text.

298. *See supra* note 146 and accompanying text.

argument might also be made.

Although many European nations had already abolished capital punishment before the NATO SOFA entered into force, if it crystallized into a customary regional norm at all, it did so only recently.[299] In addition to being later in time, however, temporal superiority also depends on the clearly manifested intention of the parties that the new customary norm supersede the old treaty.[300] This is the difficult part. The United States is obviously not a party to this new customary regional norm. Also, until *Short*, whether anyone anticipated, much less intended, that the Sixth Protocol would supersede the SOFA is doubtful. Nevertheless, every practice must begin somewhere, and the Dutch might argue that the temporal superiority of the right not to face capital punishment is now clearly manifest.

That the United States is not a party to this new customary norm poses greater problems in the temporal sense than it did in the normative context.[301] In the normative situation, the United States status might not matter because the fundamental nature of the right not to face capital punishment limited the Netherlands actions regardless of its relationship with the United States. Assuming here that this right and the duty to surrender are equal in stature, to say that a new regional custom displaces an earlier nonregional treaty would be to undermine the entire *pacta sunt servanda* principle. This precedent would allow any group of nations to avoid its treaty obligations merely by conjuring up a contrary customary rule. Therefore, this temporal argument probably would not carry much weight in international legal circles and probably is not worth pursuing further.

D. *The Relationship Between Domestic and International Law*

Just as *jus cogens* and international *ordre public* define legal principles deemed vital to the international community as a whole,[302] domestic *ordre public* or public policy is a set of principles fundamental to the domestic legal order. The right not to face capital punishment has not risen to the *jus cogens* level.[303] Therefore, this right is neither a peremptory norm, nor an element of the international *ordre public*. The Society argues, however, that Dutch adherence to the ECHR and other human rights agreements has created a body of domestic law that, in *Short*, ran

299. *See supra* notes 267-73 and accompanying text.
300. *See* RESTATEMENT, *supra* note 83, § 102, cmt. j.
301. *See supra* Section IV(B).
302. *See supra* notes 258-65 and accompanying text.
303. *See supra* notes 268-76 and accompanying text.

counter to its SOFA obligations. The Society raises the question whether that body of domestic law has become such a part of the Dutch domestic *ordre public* that its national judges may ignore contrary international laws or obligations.[304]

The relationship between domestic and international law is a reciprocal one. According to the most widely-accepted view, international law is part—in most cases, a superior part—of the domestic law of each state. That generally is the position shared by the United States and the Netherlands. More controversial, however, is the proposition that domestic law might prevail over contrary international law. That is the basis of the public policy argument.[305]

The "Netherlands Formula" for waiving primary concurrent jurisdiction illustrated that domestic public policy has a role in international law.[306] This supplement to the NATO SOFA between the United States and the Netherlands establishes a blanket Dutch waiver of primary jurisdiction under article VII. The waiver effectively gives the United States primary jurisdiction unless the case is "of particular importance" to the Netherlands.[307] In other words, the United States has primary jurisdiction over most cases unless Dutch public policy concludes otherwise. The United States refusal to waive its primary right in *Short* also exemplifies the role of domestic public policy in international law. The United States principal rationale was that its military policy prevented this waiver.[308]

That domestic law plays a role in international law and vice versa seems obvious. What is of concern in the Dutch position in *Short* and in its future as a NATO partner is the extent to which it can rely on its public policy to insulate it from future cases like this.

1. Domestic Public Policy in International Law

Throughout its history, public policy is a concept that has generated considerable controversy.[309] Although traditionally used as a conflict of

---

304. *See* Society Background Paper, *supra* note 2, at 6-7. *Ordre public* and public policy are slightly different concepts with slightly different origins. The differences, however, are so slight as to be insignificant. Therefore, they will be treated as equivalent concepts and the term "public policy" will be used to refer to both. *See* Ken Murphy, Note, *The Traditional View of Public Policy and* Ordre Public *in Private International Law*, 11 GA. J. INT'L & COMP. L. 591, 592 (1981).

305. *See infra* notes 319-22 and accompanying text.

306. *See supra* note 127 and accompanying text.

307. Netherlands Supplement, *supra* note 127, para. 3, at 106.

308. *See supra* notes 22-23 and accompanying text.

309. *See* Murphy, Note, *supra* note 304, at 592.

laws principle allowing courts not to give effect to foreign law repugnant to domestic morality and social order,[310] the Society suggests that it now may govern the "extent [to] which public international law is applied by national authorities."[311] In either application, the Society has recognized the common concern that "whether a particular foreign rule falls under the ban is a matter of opinion, which can easily become a matter of whim."[312] Because public policy is so subjective and amorphous, and because it has been abused by result-oriented courts,[313] many Western judges and scholars have called for its elimination, restraint, or revision.[314]

Although the Society recognizes that any use of public policy in public international law necessarily must be limited, it also suggests that the doctrine is attractive to states otherwise faced with the unpalatable application of distasteful international legal principles. The Society notes that states have begun to employ public policy-type arguments more frequently "whenever issues of major concern to their national legal order arise."[315] Two bases of the public policy concept illustrate why the Society considers it relevant and applicable to cases like *Short.*

"The earliest and most enduring use of public policy is to reject morally repugnant law."[316] This observation reflects the most basic reason why public policy as a factor of judicial decision-making will never be entirely eliminated. This basis, however, has become less important in recent years because international law has addressed and corrected the most repugnant domestic laws and practices.[317] Nevertheless, capital punishment remains. Therefore, the Society and the Dutch High Court would argue that the domestic use of public policy also must continue.

Another common purpose of public policy is the prevention of injustice to parties before courts.[318] Courts using public policy in this manner seek to avoid unjust results by refusing to apply unjust laws. Obviously, the High Court resolved its dilemma in *Short*—whether to deliver Short to United States authorities, possibly to face death—by refusing to en-

---

310. *See id.* at 591.

311. Society Background Paper, *supra* note 2, at 7.

312. *Id.* at 7 (quoting P.B. Carter, *Rejection of Foreign Law: Some Private International Law Inhibitions*, 1984 BRIT. Y.B. INT'L L. 125).

313. Murphy, *supra* note 304, at 592.

314. *See id.* at 600-03; Society Background Paper, *supra* note 2, at 7.

315. Society Background Paper, *supra* note 2, at 8.

316. Murphy, *supra* note 304, at 607. This observation was made during a 1981 symposium on conflicts of law at the University of Georgia.

317. *Id.*

318. *Id.* at 608.

force the NATO SOFA. Prevention of an unjust result played an important role in that decision.

Clearly, most states, including the Netherlands and the United States, have concepts of *ordre public* or public policy. These fundamental, nonderogable principles often influence courts not to give effect to contrary laws. Whether states ought to invoke public policy against international laws, particularly against their own treaties, will be considered next. The point here is that apparently they do.

2. International Law in Domestic Public Policy: The Netherlands *Ordre Public*

Human rights play important legal and moral roles in the public order of Europe. Recognizing that other European nations likely share its concern, the extent to which these principles have been incorporated in the public policy and domestic law of the Netherlands is of interest here.

Most United States lawyers are familiar with two prevailing schools of thought regarding the efficacy of international law in domestic law. The monist view contends that only one system of law exists, "of which international and domestic law are no more than two aspects."[319] Accordingly, international law is superior to domestic law and, when they conflict, the former will prevail.[320] The dualist view, however, regards the two kinds of law as distinct and separate. When they conflict, domestic law generally will prevail over international law.[321] Although the dualist state recognizes that its failure to abide by its international obligations may give rise to international responsibility,[322] the dualist state's constitution typically makes this result unavoidable. From a public policy standpoint, then, the dualist state seemingly would be far more likely than the monist state to invoke domestic law and public policy as bases for avoiding unattractive international laws or obligations. The Netherlands, however, defies that conclusion.

In this scheme, the Netherlands generally is considered to be a monist state. Articles 65 and 66 of its Constitution have been interpreted to require that self-executing international agreements supersede all contrary domestic laws.[323] Its courts agree. Indeed, case law that has developed

---

319. PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 40 (1983).

320. *Id.*

321. *Id.*

322. *See, e.g.*, RESTATEMENT, *supra* note 83, § 115(1)(b) ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation.").

323. *See* ANDREW Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION

since the ECHR entered into force has required Dutch courts to examine all Netherlands laws for compatibility with the convention. The result of this systematic review is that most of the ECHR's provisions are now considered to be superior to domestic law.[324]

As for public policy, states that place international agreements above their own domestic laws arguably should find impeaching them difficult with something as amorphous as domestic public policy. Furthermore, monist states should have no contrary public policy since any agreements they enter into are presumed to be in their best policy interests. These, however, are the Society's points. When it ratified the NATO SOFA, the Netherlands considered the treaty consistent with its public policy. That changed with the development of its public policy against capital punishment. If this policy shift had been due solely to a change in domestic attitudes or law, the High Court might have turned Short over to United States military authorities.[325] Dutch public policy also was based on its adherence to the ECHR, and this gave it overwhelming force.

The High Court clearly relied heavily on two levels of public policy in its refusal to comply with the NATO SOFA.[326] First, it identified the Court's duty to conform to international public policy:

> In the case at hand, consideration should be given in this balancing to Short's interest, on the one hand, in not suffering any violation of his right, guaranteed by the [ECHR] in connection with the Sixth Protocol, not to be exposed to the death penalty . . . and the State's interest, on the

---

IN DOMESTIC LAW 88 (1983). "Self-executing" generally means that the international agreement or its relevant provision must be enforceable without domestic implementing legislation. *See* RESTATEMENT, *supra* note 83, § 111.

324. *Id.* at 89-90.

325. The High Court declined to consider whether article VII of the NATO SOFA was self-executing because it considered that factor irrelevant. Judgment of Mar. 30, 1990, Hoge Raad der Nederlanden [Highest Court], The Hague, 1990, Nos. 13.949, 13.950, slip op. at 9 (unofficial translation by United States Department of State). Nevertheless, its recognition that the SOFA is a treaty the Netherlands is bound to follow suggests that the SOFA should be considered superior to any conflicting domestic law.

326. The most revealing statement in the entire *Short* decision was the High Court's focus on the domestic and international policy interests at issue:

> What [is] at issue . . . is the question of whether, based on all the circumstances of the case, and balancing the interests involved—including the national and international interests which are involved with complying with both treaty obligations—the treaty obligation in question [the NATO SOFA duty to surrender] forms such a weighty obstacle for the State to fulfill its obligation toward the citizen in question [obligations under the ECHR], that fulfilment of its obligation toward that citizen cannot be demanded of it and thus cannot be ordered.

Id. at 9-10.

> other hand, in fulfilling its obligations toward the U.S. derived from the NATO Status [of Forces] Agreement, as well as the international interests which are involved in a more general way in a proper compliance with the NATO Status [of Forces] Agreement. In view of the great importance that must be attached to the right not to undergo the death penalty, that balancing cannot turn out otherwise than in favor of Short.[327]

In the High Court's view, international public policy mandated that priority be given to Short's human rights. The court articulated its view of domestic public policy by pointing to Dutch extradition treaties. Its government's standard practice is to require assurances from requesting states that surrendered fugitives will not be subject to capital punishment.[328] Both domestic and international public policies, as the Court perceived them, required the Court to defer to the ECHR.

In light of *Soering* and Europe's views of human rights, this result is not surprising. These views, however, are significant changes from the pre-Sixth Protocol views of capital punishment. This evolution and the regard that the Netherlands and other European nations show their international obligations as superior to domestic law indicate that it is only a matter of time before the *Short* public policy rationale results in more cases like *Short.*

E. *Arguments in International Treaty Law: The Vienna Convention on Treaties and Customary International Treaty Law*

The High Court's outright rejection of the SOFA has at least two legitimate alternatives with fairly solid foundations in international law. Both, however, would lead to a result contrary to perceived Dutch domestic and international public policy. The Society has pointed to changed circumstances and public policy as reasons why the SOFA must be re-examined and, ultimately, renegotiated. International treaty law addresses both of these reasons.

1. Changed Circumstances

Whereas the principles of *pacta tertiis non nocent* and *lex posterior* are rules of treaty conflict resolution, changed circumstances generally applies only in treaty suspension or termination. Article 62 of the Vienna Convention defines the concept and its effects:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was

---

327. *Id.* at 10.
328. *Id.*

> not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.[329]

The International Law Commission translated this article into five conditions for treaty termination or suspension:

> (1) the change must be of circumstances existing at the time of the conclusion of the treaty; (2) that change must be a fundamental one; (3) must also be one not foreseen by the parties; (4) the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; and (5) the effect of the changes must be radically to transform the scope of obligations still to be performed under the treaty.[330]

Although the Vienna Convention applies these criteria only to treaty termination or suspension, they are also relevant to treaty renegotiation. On the one hand, if changed circumstances fall short of this standard, they will not justify termination or suspension of a particular treaty. They, however, may form a purely optional basis for a treaty's revision. On the other hand, when they are sufficient to terminate or suspend a treaty, changed circumstances also will compel the parties to renegotiate it if they consider their relationship worth maintaining.

The United States would argue that circumstances have not changed sufficiently to compel renegotiation. Assuming that the ECHR's Sixth Protocol is a fundamental change of circumstances that satisfies the second criterion above, any other criteria's application is doubtful. First, the change must also be "of circumstances existing at the time of the conclusion of the treaty." As seen earlier, the NATO allies understood during the SOFA negotiations that some European receiving states had abolished the death penalty.[331] Hence, article VII, paragraph 7(a), provided that death sentences would not be carried out in these states.[332] The Sixth Protocol really goes no farther than that. The only change it imposed was that abolition of capital punishment became an international obligation instead of a purely domestic one. Although that change has now rendered adherence to the SOFA more difficult, the United States might contend that it does not make it impossible. Therefore, the Sixth

329. Vienna Convention, *supra* note 181, art. 62, at 703.
330. 1969 Vienna Conference, *supra* note 190, at 79.
331. *See supra* notes 241-44 and accompanying text.
332. *See supra* note 245 and accompanying text.

Protocol arguably is not a change at all.

The United States might also argue that the third, fourth, and fifth criteria are similarly inapplicable. These criteria raise questions concerning whether the Sixth Protocol's abolition of capital punishment in Europe was foreseeable and whether the absence of this obligation was an assumption underlying the SOFA parties' consent. Because the SOFA and the ECHR were negotiated almost simultaneously, arguing that the former did not contemplate the latter would be difficult.[333] Also, although the Sixth Protocol is relatively new, the SOFA's parties not anticipating its development is extremely unlikely; they had already taken into account the domestic abolition of the death penalty.

Despite all this, the Dutch might still persuasively argue that circumstances have changed sufficiently to compel the SOFA's renegotiation. Although the possibility may be true that the SOFA parties considered and accommodated domestic views of capital punishment, the Dutch could contend that they could not have foreseen that the right not to face death would rise to the level of a fundamental regional human right or become an element of the Netherlands public order. In other words, Europe's view of capital punishment has changed. Little doubt would exist that if the right not to face capital punishment had become a peremptory norm during the past forty years, it certainly would supersede a contrary treaty. That is the principle codified in article 64 of the Vienna Convention.[334] Using this analogy, the change in the depth with which this right is now felt in Western Europe possibly is a fundamental change—a change that might warrant the SOFA's suspension.

Besides its controversial basis, the main problem with this argument is that the Dutch themselves probably would not accept it. Neither the Dutch High Court nor its Advocaat-Generaal even remotely considered the possibility that changed circumstances might terminate the Netherlands participation in the SOFA. Nevertheless, the Society suggests that the *Short* case arising at all is sufficient reason to re-examine the SOFA.[335] Seemingly, that is the proper conclusion. The circumstances surrounding the SOFA have clearly changed to some extent. Though they are probably insufficient to warrant the SOFA's suspension, they can certainly be used as a basis for its voluntary re-examination.

---

333. *See supra* notes 245-48 and accompanying text.

334. Vienna Convention, *supra* note 181, art. 64, at 703.

335. *See* Society Background Paper, *supra* note 2, at 5-6.

2. Reliance on Domestic Law or Public Policy as a Reason for Treaty Violation

Implied in the principle *pacta sunt servanda* is one of the Vienna Convention's most basic rules: parties "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[336] Presumably, this means that a state may not invoke its domestic public policy either. This, however, is still an area of considerable debate.

Although the Society acknowledges that international law does not sanction this agreement, the Society suggests that, as a practical matter, "states already invoke defenses like . . . 'public order' " to avoid specific treaty obligations they do not like.[337] Clearly neither the Vienna Convention, nor customary international treaty law, allows a state to rely on domestic law or policy to avoid its treaties. Thus, no legal justification for the Society's call for SOFA re-evaluation exists. Factually, however, its argument is hard to dispute. Whether legal or not, public policy is and will continue to be of fundamental importance to individual states.

The United States certainly stands upon firm legal ground when it demands Dutch compliance with the SOFA. Perhaps the United States is being hypocritical, however, when it refuses to recognize the important roles public policy and domestic law play in its own treaty relations.

The United States has long been regarded by many states as an often-reluctant treaty partner. Although it always takes its international treaty obligations seriously, its status as a dualist state occasionally compels it to violate them. A dualist state regards international and domestic law as separate regimes. When they conflict, domestic law will prevail.[338] While the United States rarely goes that far, it does maintain that although international agreements are regarded as part of United States law,[339] they can be enforced domestically only if they are self-executing,[340] not contrary to the Constitution,[341] and not inconsistent with any later federal statute.[342] In other words, United States policy as expressed in acts of Congress supersedes inconsistent international agreements. Its international obligations are not thereby relieved.[343] Nevertheless, domestic courts will refuse to enforce prior treaties over later inconsistent domestic

336. Vienna Convention, *supra* note 181, art. 27, at 690.
337. Society Background Paper, *supra* note 2, at 14.
338. *See supra* note 305 and accompanying text.
339. *See* RESTATEMENT, *supra* note 83, § 111.
340. *See id.*
341. *See id.* § 115(3).
342. *See id.* § 115(1)(a).
343. *See id.* § 115(1)(b).

laws.[344]

The United States might violate its international obligations when they conflict with its Constitution or later domestic statutes, but it understands and expects that it may be held responsible by its treaty partners. No doubt the Dutch High Court realized that as well. Indeed, the credibility of international law would suffer greatly if states that violate their treaties are not held accountable. In that context, public policy should not be regarded as a legal excuse for treaty breach. The United States, as part of the international community, has a right to be outraged about the Netherlands SOFA violation in *Short*. Given its own background, however, United States indignation cannot be righteous.

V. CONCLUSION

Professor Richard Lillich recently wrote that "[l]ike the proverbial pebble thrown in the pond, *Soering* will cause ripples for some time to come."[345] Certainly, the same can be said for *Short*. Indeed, *Short* is both one of *Soering*'s ripples and a pebble in itself. Other, like-minded European states likely will consider it a precedent upon which they can rely to advance their own human rights concerns.

A. *Resolving the Arguments: Is the* Short *Decision Valid Under International Law?*

One of this Article's primary objectives is to examine both sides of this complex problem. In that regard, one of the questions considered is whether the *Short* precedent is valid in international law. Although both the United States and the Netherlands have some good arguments supporting their positions, *Short* is not valid. Both states agree that the Dutch High Court decision resulted in violation of the NATO SOFA. *Short* fails because this breach was not legally justified.

Although not actually advanced in *Short*, the primary United States argument should be that the ECHR and the SOFA are not inconsistent treaties. The SOFA, as does the earlier agreement, limits the scope of the later ECHR's application. Since the Netherlands had no discretion over visiting force members over whom it exercised no criminal jurisdiction, it could not regard them as subject to the ECHR's protection. This concept of restrictive sovereignty has been affirmed by the European Commission on Human Rights in at least two cases. Also, customary international law prevents states from enforcing later obligations inconsistent with

344. *See, e.g.*, Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972).

345. Lillich, *supra* note 134, at 128.

prior treaties, and clearly only something quite extraordinary could justify this violation.

The Society argues that both the fundamental nature of human rights and the Netherlands *ordre public* are extraordinary. Certainly, the Dutch could argue persuasively that the right not to face capital punishment has become a fundamental regional norm. As such, the courts of the states within that region may be bound to give it precedence over these ordinary norms as exist in the NATO SOFA. This, however, is essentially the same type of approach the United States takes when its courts are constrained to give effect to its Constitution or later legislation when either conflicts with its international obligations. Since the United States is not bound by that regional custom or treaty, all that this amounts to is an attempt to justify this SOFA violation by reliance on domestic law. It has no basis in international law.

B. *Goals and Possible Solutions*

Despite the conclusion that *Short* has a very weak basis in international law, its practical foundation is quite strong. Indeed, the Society admits that "although there is no purely legal justification available, in practice states already invoke defenses like 'fundamental change of circumstances' and 'public order' in a political sense. The development of such a defense in law might take some time."[346] Even though the United States might stand on solid legal ground, as a practical matter, future situations like *Short* are likely to end in the same way. How can it move beyond this impasse?

A major assumption throughout this Article is that the United States and the Netherlands considered the entire *Short* fiasco unacceptable. Therefore, neither state will ever want to face it again, and some sort of change is necessary. To determine what sort of change both states might accept, their goals first must be identified.

1. The Mutual Goal of Maintaining a Strong Alliance

The one apparent constant in this dilemma is that both the United States and the Netherlands recognize the SOFA's value as a tool that has effectively managed sending and receiving-state relations for forty years. The United States particularly understands that but for the SOFA, it would enjoy no criminal jurisdiction over its troops abroad. The Netherlands probably would admit, and other European NATO allies presumably would agree, that the relationship the SOFA has established has

346. Society Background Paper, *supra* note 2, at 14.

been equally beneficial for them. Therefore, keeping that treaty intact is in everyone's best interests. It is in the United States interest to resist a formal SOFA change because any permanent modification would probably reduce, not increase, its jurisdiction abroad.

To protect this interest of maintaining friendly relations, each side could adopt the extreme measures of fully accepting the other's position. In other words, the United States could consent to a SOFA provision abolishing capital punishment or the Netherlands could discontinue its objection to death sentences in these cases. The mutual anxiety and intransigence that surrounded *Short* indicate that neither alternative is likely. The Society suggests that the SOFA itself provides a potentially acceptable interim solution. Its jurisdiction waiver provision could be invoked by one state to request the other's waiver of its primary right when the prosecution interests of the former are "of particular importance."[347] Unfortunately, the success of this idea is just as remote. Recall that the Dutch twice attempted to secure the United States waiver of its jurisdiction over Short, and both requests were denied. As things stand, the United States apparently will continue to maximize its jurisdiction.

Assuming that neither side will compromise its policies to accommodate the other's, the question remains whether some sort of external standard could be applied objectively to situations like this. Certainly, the NATO SOFA's jurisdictional formula provides one standard. This fails to account for the European aversion to capital punishment. The treaty still would create an impasse in cases like *Short*. Resort to European public policy would no doubt raise equally strong United States objections. The amorphous nature of any standard based on the receiving state's public policy essentially would render any decision totally within its discretion.

2. Accommodating the Unilateral Goals of Human Rights and Military Discipline

Any acceptable solution must accommodate not only the mutual objective of maintaining a strong alliance, but also the unilateral European goal of human rights and the United States goal of maintaining military discipline. None of the above options does that. Taking all of these factors into account, the most practical approach for sending and receiving states is merely to continue handling situations like *Short* on an ad hoc basis.

Not only is this solution practical, it can also be flexible if coupled

---

347. *Id.*

with the sending and receiving states' willingness to compromise. This impasse has been caused not so much by the SOFA's language, as by each state's own internal policies and concerns. These policies and concerns vary among our NATO allies. Therefore, permanent modification of the SOFA's allocation of jurisdiction is unnecessary when this easier, less drastic option is available. Continuing the ad hoc approach will allow the United States, when it negotiates jurisdictional matters with nations less devoted to the abolition of capital punishment, to compromise less and to rely fully on the SOFA as it is currently written. When, however, it deals with states like Germany, Italy, and the Netherlands, compromise probably will be necessary.

Finally, the success of any solution, especially one based on compromise, also will depend ultimately on the access both the sending and receiving states have to the facts of a case. Part of the problem in *Short* was that the Dutch courts refused to allow United States authorities to conduct their own investigation. Ultimately, after the High Court's decision, the United States Air Force was permitted to hold a formal hearing, in which Short's crime was found not to satisfy the capital statute.[348] Much of the two-year delay could have been easily avoided if the Dutch courts had allowed the United States to exercise its treaty rights.

C. *How the Case-by-Case Solution Should Work*

Having advocated compromise, full and fair disclosure, and dealing with situations on an ad hoc basis instead of modifying the SOFA, what kind of compromise is appropriate and how all of these factors should mesh must still be determined.

Today, when a case comes to the attention of either the sending or receiving state, the other is typically informed immediately, and both set upon the task of determining to whom the SOFA allocates primary jurisdiction. In all but potentially capital cases, this will continue unchanged. When a member of the visiting forces has committed a capital crime under *inter se* or official duty circumstances, the SOFA vests primary jurisdiction in the sending state. Its first challenge to securing that jurisdiction will be to overcome whatever concerns the receiving state may harbor regarding capital punishment.

After *Short*, the probability is unlikely that receiving states such as the Netherlands will allow the United States to take custody of a capital offender. In the interest of full and fair disclosure, however, they should allow the sending state to conduct a full inquiry, even a pretrial hearing,

348. *See supra* note 28.

to determine whether charges should be brought and, if so, what those charges should be. In *Short*, this first step might have resulted in non-capital charges. Certainly, that would have avoided all of these problems.

If, after the investigation, the sending state intends to charge the offender with a capital offense, it should use all the arguments available to secure the defendant's custody. Again, this will be easier in some receiving states than in others. In states that refuse to surrender the offender, the sending state is faced with the same choice that faced the United States in *Short*: to forego capital punishment and to prosecute the military member or to allow the soldier to remain in a state that, like the Netherlands, punished a murderer with a six-year sentence.[349] This is when compromise is needed.

The goals of military discipline and justice are advanced only by allowing the sending state to maximize its jurisdiction. Although the SOFA allocates this jurisdiction in only a limited number of cases, the supplementary agreements the United States has negotiated with most receiving states allow it to widen that scope considerably. Comparing this dominant concern that it prosecute its own members with the fact that it has not executed a single person since the early 1960s, the death penalty itself is clearly not as critical to the United States military's maintenance of discipline as is its ability to punish its own. If deterrence is a cornerstone of discipline, capital punishment would enhance discipline far less than a six-year sentence would destroy it. All things considered, when faced with a situation like *Short*, the United States compromise ought to be that it will forego capital punishment so that it may punish the offender appropriately.

D. *Some Closing Thoughts*

Some may say that asking the United States to compromise is tantamount to advocating its retreat in the face of a clear violation of international law. Rather than condoning clear violations of the NATO SOFA, this proposal merely suggests that rather than abrogating or forcing its allies to withdraw from the treaty as a result of cases like *Short*, the United States should accept the reality of the underlying European human rights concerns. Those concerns are only going to become stronger in the future, and only a practical solution will prevent opening the door to SOFA modifications in this and possibly other areas. The

349. This, of course, assumes that the receiving state even will exercise jurisdiction. Although the Netherlands initially prosecuted Short and sentenced him to six years imprisonment, its court of appeals reversed on the ground that it did not possess primary jurisdiction. *See supra* notes 23-24 and accompanying text.

United States dual goals of maintaining a strong NATO alliance and maintaining military discipline are served, not by clinging to a punishment option that has not been used in almost thirty years, but by recognizing the deep roots of the Netherlands position and by maximizing its jurisdiction in spite of them. Before giving its assurances that the death penalty either will not be given or will not be executed, the United States certainly should argue its position strenuously. By thus registering its objections, it preserves its view that even the request for these assurances violates the SOFA. Before the United States thinks that the Netherlands and like-minded receiving states will be persuaded by these arguments, however, it must always remember *Short.*

The Cold War has ended, and many in the United States have attributed this to the enduring strength of principles of human rights and democracy. Throughout history, when those principles change, they presumably should only get better. Whatever the United States government might officially say about cases like *Short,* it must recognize that Europe, by abolishing capital punishment, has advanced that one-way ratchet of human rights yet another notch. This Article merely recognizes that Europe probably will not retreat from its new position. With that in mind, the United States only options are to stand firm or to compromise. Although by standing firm, the United States arguably is defending principles of international law, only by compromising will it achieve the goals of unity and justice that NATO represents.