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# The United States Status of Forces Agreement with the Republic of China: Some Criminal Case Studies

by *Hungdah Chiu*\*

## I. INTRODUCTION

The presence of United States (US) forces in China can be traced back to the late nineteenth century when, under the 1901 Peking Protocol<sup>1</sup> the US and other powers were granted the right to station their troops in Peking and at various points between Peking and the seaport of Taku. The purpose of these installations was to protect US legations and maintain their access to the sea.<sup>2</sup> Members of the US forces at that time, like many foreigners under the extraterritorial regime established under the so-called unequal treaties,<sup>3</sup> were not subject to Chinese jurisdiction.<sup>4</sup>

During the Second World War, the US and the Republic of China (ROC) became allies and US forces entered China to assist the Chinese resistance

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1. Final Protocol for the Settlement of the Disturbances of 1900 (1901), *reprinted in* 1 *TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-1919*, at 278-320 (J.A. MacMurray ed. 1973) [hereinafter cited as Peking Protocol].

2. Peking Protocol, *supra* note 1, arts. 7 & 9.

3. See Chiu, *Comparison of the Nationalist and Communist Chinese Position on the Problem of Unequal Treaties in CHINA'S PRACTICE OF INTERNATIONAL LAW* 239, 243 (J.A. Cohen ed. 1974); 2 *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 1116 (J.A. Cohen and H. Chiu eds. 1974) [hereinafter cited as *PEOPLE'S CHINA*]; C.L. HSIA, *STUDIES IN CHINESE DIPLOMATIC HISTORY* (1925); W.L. TUNG, *CHINA AND THE FOREIGN POWERS: THE IMPACT OF AND REACTION TO UNEQUAL TREATIES* (1970). See also G.W. KEETON, *THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA* (1928) [hereinafter cited as *KEETON*]. For a discussion of the development of the unequal treaties concept in international law, see Comment, *An Examination of the Treaties Governing the Far Eastern Sino-Soviet Border in Light of the Unequal Treaties Doctrine*, 2 *B.C. INT'L & COMP. L. REV.* 445, 449 (1979).

4. For the history of extraterritoriality in China, see generally R. FISHEL, *THE END OF EXTRATERRITORIALITY IN CHINA* (1952); KEETON, *supra* note 3.

against Japanese aggression.<sup>5</sup> Under traditional international law, armed forces admitted on foreign territory enjoy a limited, but not an absolute, immunity from the territorial jurisdiction of the host country.<sup>6</sup> The scope of that immunity, however, is controversial.<sup>7</sup> In order to clarify the status of US forces in China, the two countries entered into an agreement, in the form of an exchange of notes, on May 21, 1943, concerning jurisdiction over criminal offenses committed in China by members of US forces.<sup>8</sup> According to the Agreement, "the service courts and authorities of [the US] military and naval forces shall . . . exercise exclusive jurisdiction over criminal offenses which may be committed in China by members of such forces."<sup>9</sup> Because of the Chinese sensitivity to the unequal treaty problem,<sup>10</sup> the Agreement was drafted in reciprocal form by providing that the US "will be ready to make like arrangements to ensure to such Chinese forces as may be stationed in territory under United States jurisdiction a position corresponding to that of the United States forces in China."<sup>11</sup> The Agreement was to terminate six months after the end of the war.<sup>12</sup> Although Japan surrendered on September 2, 1945, technically the state of war continued until the San Francisco Japanese Peace Treaty<sup>13</sup> entered into force on April 28, 1952, which formally brought the war to an end. Six months later, the Agreement formally expired.

Although the Agreement was in force until 1952, all US forces withdrew from China in late 1949, following the collapse of the Nationalist forces in the Chinese civil war.<sup>14</sup> On December 8, 1949, the Republic of China (ROC)

5. See J. FAIRBANK, *THE UNITED STATES AND CHINA* 306 (3rd ed. 1972) [hereinafter cited as *THE U.S. AND CHINA*].

6. See 1 L. OPPENHEIM, *INTERNATIONAL LAW* 847-849 (8th ed. Lauterpacht ed. 1955).

7. S. LAZEREFF, *STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW* 11 (1971) [hereinafter cited as *STATUS OF MILITARY FORCES*]. See Baxter, *Jurisdiction Over Visiting Forces and the Development of International Law*, *AM. SOC'Y INT'L L.* 58 *PROC.* 174 (1958); Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction* 27 *BRIT. Y. B. INT'L L.* 186 (1950).

8. Agreement Respecting Jurisdiction Over Criminal Offenses Committed By Armed Forces, May 21, 1943, 57 Stat. 1248, E.A.S. No. 360 [hereinafter cited as 1943 Agreement]. To implement the Agreement, the Republic of China promulgated "An Act to Govern Criminal Cases Concerning Members of U.S. Armed Forces in the Republic of China" on October 1, 1943. See C. C. Yen, *TSAI-HUA-MEI-CHIH FA-LU TI-WEI* 8-9. See CHING-CHANG YEN, *TSAI-HUA MEI-CHUN CHIH FA-LU TI-WEI* (The Legal Status of the United States Armed Forces in the Republic of China) 164 (1975) [hereinafter cited as *LEGAL STATUS OF US FORCES*].

9. 1943 Agreement, *supra* note 8.

10. See generally TSENG Y.H., *THE TERMINATION OF UNEQUAL TREATIES IN INTERNATIONAL LAW* (1933).

11. *JURISDICTION OVER ARMED FORCES BY THE UNITED STATES AND CHINA* 484, 485 Documents on American Foreign Relations (Goodrich ed. 1944).

12. *Id.*

13. Multilateral Treaty of Peace with Japan, Sept. 8, 1951 [1951] 3 U.S.T. 3169, T.I.A.S. No. 2490.

14. The People's Republic of China (PRC) was proclaimed on October 1, 1949, although the mainland was not under complete Communist control until May 1950. See *THE U.S. AND CHINA*, *supra* note 5, at 327.

government moved to Taiwan,<sup>15</sup> but the US ceased to provide military advice and aid to that government and adopted a hands-off policy toward China.<sup>16</sup>

The outbreak of the Korean War on June 25, 1950<sup>17</sup> caused the US to change its China policy again.<sup>18</sup> Military advice and aid to the ROC government were resumed in late 1950,<sup>19</sup> and a small military advisory group, later known as the Military Assistance Advisory Group (MAAG), was also sent to Taiwan.<sup>20</sup> To govern the status of these personnel, notes were exchanged on January 30 and February 3, 1951<sup>21</sup> between the US and the ROC, which provided that "such personnel, including personnel temporarily assigned, will, in their relations with the Chinese government, operate as a part of the United States Embassy, under the direction and control of the Chief of the United States Diplomatic Mission."<sup>22</sup> In other words, members of the MAAG were treated as diplomats and therefore enjoyed diplomatic immunity.<sup>23</sup>

For the first few years after the conclusion of the above agreement, there were few disputes concerning the status of MAAG members in Taiwan, since their number was small and the force primarily consisted of officers.<sup>24</sup> With the increased US involvement in the defense of Taiwan, the number of MAAG members also steadily increased. In 1954 approximately 1,000 MAAG personnel were stationed on Taiwan.<sup>25</sup> By 1957, the figure had become 1,887, and the total number of US nationals and their dependents who were immune from Chinese criminal jurisdiction was approximately

15. POLITICAL HANDBOOK OF THE WORLD 112 (A.S. Banks ed. 1978).

16. See T. TZOU, AMERICAN FAILURE IN CHINA 527-28, 559-60 (1963). After the outbreak of the Korean War, the U.S. then provided some indirect assistance to the ROC by imposing a trade embargo and economic sanctions upon the PRC. See Lee & McCobb, *United States Trade on China, 1949-1970: Legal Status and Future Prospects*, 4 N.Y.U.J. INT'L L. & POL. 1 (1971); Cohen, *Chinese Law and Sino-American Trade*, in CHINA TRADE PROSPECTS AND U.S. POLICY (A. Eckstein ed. 1971).

17. *North Korean Forces Invade South Korea*, 23 DEP'T STATE BULL. 3 (1950).

18. O.E. CLUBB, TWENTIETH CENTURY CHINA 338 (1964).

19. THE U.S. AND CHINA, *supra* note 5, at 320.

20. On United States Military Assistance Advisory Groups, see generally STATUS OF MILITARY FORCES, *supra* note 7, at 49-52 (1971); Tao, *The Sino-American Status of Forces Agreement: Criminal Jurisdiction over American Soldiers on Nationalist Chinese Territory*, 51 B.U. L. REV. 1, 6 (1971) [hereinafter cited as *SOFA Criminal Jurisdiction*].

21. Mutual Defense Assistance Agreement, Jan. 30, 1951, United States — Republic of China, [1951] 2 U.S.T. 1499 T.I.A.S. No. 2293 [hereinafter cited as 1951 Mutual Defense Agreement], reproduced in MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF CHINA, TREATIES BETWEEN THE REPUBLIC OF CHINA AND FOREIGN STATES 794 (1958).

22. *Id.*

23. 1951 Mutual Defense Agreement, *supra* note 21, ¶ 3. This interpretation is confirmed by a statement delivered by the Chinese Minister of Justice at the Legislative Yuan in 1957. See 19 LI-FA-YUAN KUNG-PAO (Gazette of the legislative Yuan) 103 (1957).

24. See *Mei-chun ku-wen-t'uan ch'eng-li-shih-nien* (Ten years of the United States Military Assistance Advisory Group), *Chung-yang jih-pao* (Central Daily News), June 1, 1951, at 1, cited in *SOFA Criminal Jurisdiction*, *supra* note 20, at 6, fn. 37.

25. *Chung-yang jih-pao*, May 1, 1961, at 2.

3,000.<sup>26</sup> The MAAG personnel included not only officers, but enlisted personnel as well.<sup>27</sup>

On December 2, 1954, a Treaty of Mutual Defense was concluded between the ROC and the US,<sup>28</sup> which entered into force on March 3, 1955. Article VII of the Treaty provides: "The Government of the Republic of China grants, and the Government of the United States of America accepts, the right to dispose such United States land, air and sea forces in and about Taiwan and the Pescadores as may be required for their defense, as determined by mutual agreement." Under the provisions of this article, US military forces, other than MAAG members, were permitted to enter Taiwan,<sup>29</sup> but until 1965 there was no agreement to govern their legal status there. In fact, however, these personnel enjoyed complete immunity from Chinese jurisdiction. Although the basis of their immunity is not clear, it is possible that the ROC treated them as part of the MAAG, thereby enabling them to enjoy complete immunity.<sup>30</sup>

With the increased number of MAAG personnel and US forces in the ROC, it was inevitable that some American soldiers would commit offenses against the Chinese. When a serious crime against a Chinese was committed by a member of the MAAG or US forces, the Chinese public was frustrated by the fact that Chinese courts could not exercise jurisdiction. The Chinese, therefore, repeatedly urged their government to conclude a status of forces agreement,<sup>31</sup> like those that exist among the NATO countries,<sup>32</sup> with the US to establish Chinese jurisdiction over members of US forces. The Reynolds case of 1957,<sup>33</sup> which precipitated the outbreak of an anti-American riot and the sacking of the US Embassy,<sup>34</sup> was an expression of such frustration by the Chinese public. It was not until 1965 that the Agreement between the Republic of China and the United States of America on the Status of United States Armed Forces in the Republic of China<sup>35</sup> (hereinafter referred to as

26. See *SOFA Criminal Jurisdiction*, *supra* note 20, at 6.

27. *Id.*

28. Mutual Defense Treaty between the United States and the Republic of China, Dec. 2, 1954, United States — Republic of China, [1955] 6 U.S.T. 433, T.I.A.S. No. 3178 [hereinafter cited as 1954 Mutual Defense Treaty].

29. *Id.* art. IV.

30. *SOFA Criminal Jurisdiction*, *supra* note 20, at 6-7.

31. *Id.* at 11-12.

32. See Re, *The NATO Status of Forces Agreement and International Law*, 50 N.W. L. REV. 349 (1955); Schwenk, *Comparative Study of the Law on Criminal Procedure in NATO Countries under the NATO Status of Forces Agreement*, 35 N.C. L. REV. 358 (1957). See also STATUS OF MILITARY FORCES, *supra* note 7, at 63.

33. See § III *infra*.

34. See Lien-ho pao (United Daily News), May 25, 1957, at 3, cited in *SOFA Criminal Jurisdiction*, *supra* note 20, at 9.

35. Agreement on the Status of United States Armed Forces in the Republic of China, April 12, 1966, United States — Republic of China, [1965] 17 U.S.T. 373, T.I.A.S. No. 3178 [hereinafter cited as SOFA-ROC].

SOFA-ROC) was concluded. However, it should be noted that the MAAG personnel continued to enjoy immunity from Chinese jurisdiction under the 1951 Agreement.<sup>36</sup>

On December 15, 1978, President Carter announced that the United States would recognize the People's Republic of China on January 1, 1979 and simultaneously terminate diplomatic relations with the Republic of China.<sup>37</sup> The President also stated that the United States would terminate the 1954 Mutual Defense Treaty with the Republic of China in accordance with the provisions of the Treaty.<sup>38</sup> On April 30, 1979, all United States military personnel left Taiwan, thus ending 29 years of United States military presence on the Island since the outbreak of the Korean War in 1950. According to Article 20 of the SOFA-ROC, this "Agreement shall remain in force" while the 1954 Mutual Defense Treaty "remains in force." Thus, it was terminated together with the Mutual Defense Treaty on January 1, 1980.

The United States presently maintains significant military installations in other Asian nations in which Chinese cultural influence has been reflected in attitudes similar to those analyzed in this article. Therefore, an examination of the SOFA-ROC may serve to elucidate certain aspects of the United States' status of forces agreements with Japan and the Republic of Korea.<sup>40</sup>

## II. CRIMINAL JUSTICE AND PROCEDURE UNDER THE REPUBLIC OF CHINA LEGAL SYSTEM

The Republic of China is a civil law country.<sup>41</sup> Both its civil code and procedure and its criminal code and procedure are essentially modelled on the

36. See generally, *SOFA Criminal Jurisdiction*, *supra* note 20.

37. See *Taiwan — The Mutual Defense Treaty* 79 DEP'T STATE BULL. 25-26 (1979).

38. *I.e.*, upon one-year notice, with the removal of all United States Military personnel from Taiwan within four months. See *U.S. Statement*, 18 INT'L LEGAL MAT'LS 273 (1979). In *Goldwater v. Carter*, 48 L.W. 2778, \_\_\_\_\_ F. Supp. \_\_\_\_\_ (D.C.D.C. Oct. 17, 1979), District Court Judge Oliver Gasch held that the President of the United States did not have the power to terminate the Mutual Defense Treaty without the approval of two-thirds of the Senate or the majority of both houses of Congress. However, the District of Columbia Circuit Court of Appeals reversed. *Goldwater v. Carter*, 48 L.W. 2388, \_\_\_\_\_ F.2d \_\_\_\_\_ (D.C. Cir., Nov. 30, 1979). The U.S. Supreme Court affirmed. *Goldwater v. Carter*, 48 L.W. 1093, \_\_\_\_\_ U.S. \_\_\_\_\_ (Dec. 13, 1979).

39. A complete history of the negotiation and establishment of the SOFA-ROC is beyond the scope of this article. For a more complete summary, see *SOFA Criminal Jurisdiction*, *supra* note 20, at 6-15.

40. For a comparative study of the SOFA-ROC and the U.S. Status of Forces Agreement with Japan, the Republic of Korea, and the Philippines, see *U.S. STATUS OF FORCE AGREEMENTS WITH ASIAN COUNTRIES: SELECTED STUDIES* (C.L. Cochran and H. Chiu eds. 1979).

41. See generally Ma, *General Features of the Law and Legal System of the Republic of China*, in *TRADE AND INVESTMENT IN TAIWAN: THE LEGAL AND ECONOMIC ENVIRONMENT IN THE REPUBLIC OF CHINA 1* (R. Cosway, H.H.P. Ma, & W.L. Shattuck eds. 1973) [hereinafter cited as *ROC LEGAL SYSTEM*]. See also Tao, *Reform of the Criminal Process in Nationalist China*, 19 AM. J. COMP. L. 747 (1971).

French, German and Swiss legal systems.<sup>42</sup> Nonetheless, the ROC laws retain certain traditional Chinese legal values and principles.<sup>43</sup>

The ROC has a three-level judiciary.<sup>44</sup> On the national level, there is the Supreme Court, which is the court of last resort.<sup>45</sup> However, the Supreme Court does not interpret the constitution; such interpretation is performed only by the Council of Grand Justice,<sup>46</sup> the constitutional court. The Supreme Court, the Council of Grand Justice and other courts are under the administrative umbrella of the Judicial Yuan. On the provincial level, there is the High Court,<sup>47</sup> which is a court of appeal. The High Court may have one or more branches,<sup>48</sup> depending upon the volume of litigation before it. On the local level, there is the District Court,<sup>49</sup> a court of first instance. Attached to each level of courts is a Public Prosecutor's office.<sup>50</sup> The procurators investigate and prosecute criminal offenses on behalf of the state. In addition to regular courts, there is an Administrative Court<sup>51</sup> in charge of citizens' complaints against unlawful administrative measures carried out by the government.

ROC criminal procedure does not include provisions for jury trial;<sup>52</sup> the judges decide issues of fact and of law. Similar to other civil law systems, there are no strict rules of evidence.<sup>53</sup> However, the jurisprudence of the Supreme Court has developed some case law on the subject.<sup>54</sup> Facts tried at the District

42. See generally J. CARBONNIER, *DROIT CIVIL* (1969).

43. Leng, *Chinese Law in SOVEREIGNTY WITHIN THE LAW* 242, 250 (A. Larson & C.W. Jenks eds. 1965) [hereinafter cited as *SOVEREIGNTY WITHIN THE LAW*].

44. See Law of Organization of the Court Ch. 1, art. 2, (1932) (Rep. of China) [Law of Organization], reprinted in 2 *A COMPILATION OF THE LAWS OF THE REPUBLIC OF CHINA* 3 (1974) [hereinafter cited as *COMPILATION OF ROC LAWS*].

45. *Id.* ch. IV, arts. 21-25, reprinted in 2 *COMPILATION OF ROC LAWS*, *supra* note 44, at 8-9.

46. Constitution of the Republic of China, art. 79 (1947), translated in 3 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 1 (A. Blaustein & G. Flanz eds. 1971), reprinted in 1 *COMPILATION OF ROC LAWS*, *supra* note 44, at 3.

47. Law of Organization, ch. III, arts. 16-20, reprinted in 2 *COMPILATION OF ROC LAWS*, *supra* note 44, at 6-7.

48. *Id.* ch. III, art. 10, reprinted in 2 *COMPILATION OF ROC LAWS*, *supra* note 44, at 5.

49. *Id.* ch. II, arts. 9-15, reprinted in 2 *COMPILATION OF ROC LAWS*, *supra* note 44, at 5-6.

50. *Id.* ch. VI, arts. 33-43, reprinted in 2 *COMPILATION OF ROC LAWS*, *supra* note 44, at 10-16.

51. *SOVEREIGNTY WITHIN THE LAW*, *supra* note 43, at 252.

52. See generally *CRIMINAL CODE* [CRIM. CODE] (Rep. of China) (1935) reprinted in 2 *COMPILATION OF ROC LAWS*, *supra* note 44, at 181-281.

53. *Id.* But see *CODE OF CIVIL PROCEDURE* [CODE OF CIV. PROC.], ch. I, § 3 (Rep. of China) (1935), reprinted in 1 *COMPILATION OF ROC LAWS*, *supra* note 44, at 640-63.

54. There are only 66 articles (arts. 154-219) concerning evidence among 512 articles of the *CODE OF CRIMINAL PROCEDURE* [CODE OF CRIM. PROC.] (Rep. of China) (1935), reprinted in 2 *COMPILATION OF ROC LAWS*, *supra* note 44, at 333. Among the 66 articles, only one relates to the admissibility of evidence:

"Article 155. 1. A Court is free to determine the probative force of the evidence. 2.

Evidence given by an incompetent witness, having not been lawfully investigated, obviously contrary to reason or inconsistent with established facts shall not form the basis of a decision."

*Id.* art. 155, reprinted in 2 *COMPILATION OF ROC LAWS*, *supra* note 44, at 373. However, between

Court level may be reopened at the High Court trial. The Code of Criminal Procedure has an article on the presumption of innocence,<sup>55</sup> but there is no prohibition against self-incrimination. Similarly, confession obtained under free will may be used as evidence against the accused.<sup>56</sup> A warrant authorizing an arrest or search may be issued by a procurator<sup>57</sup> in the course of an investigation or by a judge<sup>58</sup> in the course of a trial. There is no prohibition against using illegally obtained evidence at trial with the exception of confessions by the defendant.<sup>59</sup> A policeman who undertakes an illegal search for criminal evidence does so at his own risk. If his search produces no criminal evidence, he is subject to disciplinary action<sup>60</sup> by his superior or private action by the victim.<sup>61</sup> Investigation by a procurator is not public<sup>62</sup> and an accused usually consults his lawyer only after the procurator has finished his investigation.<sup>63</sup> The accused has no right to demand cross-examination or confrontation of a witness; permission for cross-examination is granted at the discretion of the trial judge.<sup>64</sup>

1928 and 1973, the Supreme Court selected 50 representative cases as precedents relating to the interpretation of this article. See TSUI-KAO FA-YUAN PAN-LI YAO-CHIH 1927-1974 (Synopsis of Supreme Court Precedents, 1927-1974) at 644-650 (1976).

55. CODE OF CRIM. PROC. art. 156 *reprinted in* 2 COMPILATION OF ROC LAWS, *supra* note 44, at 373 provides: "Confession of an accused not extracted by violence, threat, inducement, fraud, unlawful detention or other improper devices and consistent with facts may be admitted in evidence." *Id.*

56. *Id.* ch. IX, art. 100.

57. *Id.* ch. XI, art. 128 § III. See generally Part. II, ch. I, § 1; arts. 207, 230.

58. *Id.* ch. XI, art. 128, § III.

59. See note 56 *supra*.

60. The Chinese Police Law, art. 10 (1953) (Rep. of China), *reprinted in* TSUI-HSIN SHI-YUNG CHUNG-YANG FA-KUEI HUI-PIEN (Latest Practical Collection of Laws and Decrees of the Central Government) 655 (Yeh C.-c. ed. 1973) [hereinafter cited as Yeh], provides: "If an order issued or an action taken by a police is illegal or improper, the people may appeal to administrative remedy." *Id.* The Chinese Constitution, art. 24, (1947), *reprinted in* 1 COMPILATION OF ROC LAWS, *supra* note 44, at 7, provides: "Any public functionary who, in violation of law, infringes upon the freedom or right of any person shall, in addition to being subject to disciplinary measures in accordance with law, be held responsible under criminal and civil law. . . ." *Id.*

CRIM. CODE, art. 306, *reprinted in* 2 COMPILATION OF ROC LAWS, *supra* note 44, at 267, provides: "1. A person who without reason breaks and enters a dwelling house. . . . belonging to another shall be punished with imprisonment for not more than one year, detention, or a fine of not more than 300 yuan."

Art. 307 provides: "A person who searches the person, dwelling house. . . . of another contrary to law or order shall be punished with imprisonment for not more than two years, detention, or a fine of not more than 300 yuan." *Id.*

The CIVIL CODE [CIV. CODE], art. 195 (Rep. of China) (1929), *reprinted in* 1 COMPILATION OF ROC LAWS, *supra* note 44, at 99, provides: "In case of injury to the body, health, reputation or liberty of another, the injured party may claim a reasonable compensation in money for such damage as is not a purely pecuniary loss."

61. CIV. CODE, art. 195, *reprinted in* 1 COMPILATION OF ROC LAWS, *supra* note 44, at 99.

62. CODE OF CRIM. PROC. Pt. II, ch. I, § 1, art. 45, *reprinted in* 2 COMPILATION OF ROC LAWS, *supra* note 44, at 95.

63. *Id.* art. 27, ¶ 1, provides: "An accused may employ an advocate at any time after the initiation of a prosecution." 2 COMPILATION OF ROC LAWS, *supra* note 44, at 340-341.

64. *Id.* art. 184, ¶ 2, provides: "If it is necessary in order to determine the truth, witnesses

After a judgment is rendered, either the accused<sup>65</sup> or the procurator<sup>66</sup> may file an appeal. In special circumstances, if a procurator believes that the court rendered an excessively severe sentence, he may also file an appeal to the higher court to request a reduction of sentencing.<sup>67</sup>

Because the ROC is a civil law country, the doctrine of the binding quality of judicial precedent (*stare decisis*)<sup>68</sup> is not technically recognized. However, the Supreme Court synopses of precedents are frequently relied upon in lower court judgments or in the arguments of the parties.<sup>69</sup> The Supreme Court has a Precedents Compilation Committee to select representative cases of different categories rendered by its various divisions.<sup>70</sup> Once a case is selected as a precedent, its synopsis is prepared by the judge(s) of the division that originally wrote the judgment and published.<sup>71</sup> Upon publication, the case synopsis becomes a precedent and has the force of the law.<sup>72</sup> When an earlier precedent should be revised or reversed, the President of the Supreme Court can request that the President of the Judicial Yuan convene a meeting of the judges of the Supreme Court to discuss the matter and make necessary changes.<sup>73</sup>

Because Chinese criminal procedure differs from that of the US in several important respects, during the negotiating of the SOFA-ROC, the US insisted on the inclusion of specific procedural safeguards that correspond to those accorded in the US. As a result of prolonged negotiations, a US defendant under the SOFA-ROC has the following special protection in a Chinese criminal trial:<sup>74</sup>

- (1) The right to "a prompt and speedy trial."<sup>75</sup> This protection is redun-

may be ordered to confront each other or the accused, and such a confrontation between witnesses may also be ordered at the request of the accused." 2 COMPILATION OF ROC LAWS, *supra* note 44, at 379.

65. *Id.* pt. III, ch. I, art. 344, ¶ 1. 2 COMPILATION OF ROC LAWS, *supra* note 44, at 419.

66. *Id.* art. 344, ¶ 2.

67. *Id.* art. 344, ¶ 3, provides: "A procurator may also appeal for the benefit of an accused." *Id.*

68. See ROC LEGAL SYSTEM, *supra* note 41, at 16.

69. Similarly, Japanese courts have accorded deference to prior case law. See L. W. BEER & H. TOMATSU, A GUIDE TO THE STUDY OF JAPANESE LAW 29 (1978).

70. There are five divisions relating to criminal cases in the Supreme Court. See [1978] CHINA YEARBOOK 109 (1978).

71. The official summary and publication are subject to the final approval of the President of the Supreme Court.

72. See ROC LEGAL SYSTEM, *supra* note 41, at 16.

73. See Rules Governing the Judicial Yuan Meeting on Changing Precedents (September 15, 1952), cited in 5 Yeh, *supra* note 60, at 6757. The meeting is chaired by the President of Judicial Yuan and the quorum is the two-third majority of the total judges of the Supreme Court. The decision of the meeting shall be made by the two-third majority of the judges present. See Articles 4 and 5 of the Rules.

74. For an excellent summary of "due process" under the ROC Constitution, the Code of Criminal Procedure and SOFA-ROC, see W. Y. F. Ning, *Due Process and the Sino-American Status of Forces Agreement*, 17 AM. J. COMP. L. 94-115 (1969).

75. SOFA-ROC, *supra* note 35, art. 14, ¶3(a), [1965] 17 U.S.T. 373, 387.

dant, as Chinese courts are generally more efficient than US courts in handling both civil and criminal cases.

(2) The right of the accused to be informed, before trial, of the specific charge or charges made against him.<sup>76</sup> This protection is also redundant, since it is guaranteed by the ROC Code of Criminal Procedure.<sup>77</sup> However, the agreed minutes regarding this paragraph interpret this right to mean that the accused "shall not be arrested or detained without being at once informed of the charges against him."<sup>78</sup> This goes beyond the protection of the ROC Code of Criminal Procedure which, in Articles 76 and 101, permits the detention or arrest of a suspect if one of the following circumstances exists:

- (a) He has no fixed domicile or residence;
- (b) He has absconded or there exist facts sufficient to justify an apprehension that he may abscond;
- (c) There exist facts sufficient to justify an apprehension that he may destroy, forge, or alter evidence, or conspire with a co-offender or witness;
- (d) He has committed an offense punishable by death, life imprisonment, or imprisonment for not less than five years.<sup>79</sup>

(3) The right to be confronted with the witness against him, including a full opportunity to examine all witnesses whose testimony is presented at the trial.<sup>80</sup> This protection exceeds that provided by the ROC Code of Criminal Procedure. Under Article 184, paragraph 2 of the Code, the trial judge shall decide whether it is necessary for the accused to confront a witness. While the accused may request the trial judge to allow him to confront a witness, his request is subject to the ruling of the trial judge.<sup>81</sup> Moreover, under Article 169 of the Code, if "a presiding judge foresees that a witness . . . will not freely state what he knows in the presence of the accused, he may order the accused to leave the court."

(4) The accused shall be entitled "to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the Republic of China."<sup>82</sup> While the ROC Code of Criminal Procedure provides in Article 178 that a legally summoned witness who fails to appear may be arrested and

76. *Id.* ¶9(b), [1965] 17 U.S.T. 373, 389.

77. CODE OF CRIM. PROC., art. 264, *reprinted in 2 COMPILATION OF ROC LAWS, supra* note 44, at 400.

78. SOFA-ROC, *supra* note 35, Agreed Minutes to art. 14 Re ¶9(b), [1965] 17 U.S.T. 373, 394.

79. CODE OF CRIM. PROC., art. 76, *reprinted in 2 COMPILATION OF ROC LAWS, supra* note 44, at 353.

80. SOFA-ROC, *supra* note 35, Agreed Minutes to art. 14 Re ¶9(c), [1965] 17 U.S.T. 373, 389.

81. CODE OF CRIM. PROC., art. 184, ¶2, *reprinted in 2 COMPILATION OF ROC LAWS, supra* note 44, at 379.

82. SOFA-ROC, *supra* note 35, art. 14, ¶9(d), [1965] 17 U.S.T. 373, 389.

forced to appear, this procedure is at the discretion of the procurator, trial judge or presiding judge. The accused may request the court to summon a witness, but his request is subject to the approval of the court or the procurator's office.<sup>83</sup>

(5) The right to have legal representation, including the right to have present and consult with legal counsel at any preliminary investigations, examinations or hearings, at which the accused is present, as well as through all stages of trial and appeal.<sup>84</sup> The ROC Code of Criminal Procedure provides in Article 27, that "an accused may employ an advocate [lawyer] at anytime after the initiation of a prosecution."<sup>85</sup> While it is not unusual for an accused to employ a lawyer during the investigation period, the lawyer apparently cannot examine the record and exhibits or make copies or photographs from the files concerning the accused before the initiation of a prosecution.

(6) "The accused shall not be compelled to incriminate himself."<sup>86</sup> There is no such protection under the ROC Code of Criminal Procedure.

(7) "No appeal will be taken by the prosecution from a judgment of acquittal nor may an appeal be taken by the prosecution from any judgment which the accused does not appeal except upon grounds of errors of law."<sup>87</sup> There is no such protection under the ROC Code of Criminal Procedure.

In addition to above-stated changes in the ROC Code of Criminal Procedure under the SOFA-ROC, the SOFA-ROC also provides that an accused member of the US armed forces in Taiwan shall be held in the custody of the US authorities throughout the entire pre-trial and trial process.<sup>88</sup> The Agreement further states that the US government "shall have the right to have a representative present, with whom the accused may communicate, at any preliminary investigations, examination, or hearings at which the accused is present, as well as at all stages of trial and appeal."<sup>89</sup>

In the course of negotiating the Agreement the US negotiators made no demand to change substantive ROC criminal law. Most of the demands for changes pertained to criminal procedure.<sup>90</sup> As a matter of fact, the ROC criminal law generally is less severe than its American counterpart.<sup>91</sup>

83. CODE OF CRIM. PROC., art. 178, *reprinted in 2 COMPILATION OF ROC LAWS, supra* note 44, at 377.

84. SOFA-ROC, *supra* note 35, Agreed Minutes to art. 14 Re ¶9(e), [1965] 17 U.S.T. 373, 394.

85. CODE OF CRIM. PROC., art. 27, ¶1, *reprinted in 2 COMPILATION OF ROC LAWS, supra* note 44, at 340-41.

86. SOFA-ROC, *supra* note 35, Agreed Minutes to art. 14 Re ¶9, [1965] 17 U.S.T. 373, 394.

87. *Id.*

88. *Id.* art. 14, ¶5(c), [1965] 17 U.S.T. 373, 392-393.

89. *Id.* Agreed Minutes to art. 14 Re ¶9(g), [1965] 17 U.S.T. 373, 394.

90. *See generally SOFA-ROC Criminal Jurisdiction, supra* note 20.

91. *E.g.*, the maximum length for imprisonment for a definite period is limited to twenty years. *See CRIM. CODE, art. 33 reprinted in 2 COMPILATION OF ROC LAWS, supra* note 44, at 189.

### III. THE REYNOLDS CASE OF 1957<sup>92</sup>

In the late evening of March 20, 1957, a Chinese citizen named Liu Tzu-jan was killed in front of the Yangming Mountain home of MAAG Master Sergeant Robert Reynolds. According to Reynolds, Liu was peeping on Mrs. Reynolds during her shower. When the defendant went outside with a pistol to order Liu away, Liu allegedly came toward him with a heavy stick in his hand. As Liu was about to hit Reynolds, the Sergeant fired the first shot into Liu's chest. Although seriously wounded, Liu attempted to flee. The second shot fired by Reynolds hit Liu in the back and killed him. The police, however, never found the heavy stick alleged by Reynolds to have been carried by Liu.<sup>93</sup>

As previously noted, the diplomatic status granted to MAAG personnel precluded the exercise of jurisdiction by the Republic of China.<sup>94</sup> The US authorities decided to try Reynolds at Taipei by a US court-martial for voluntary manslaughter rather than murder.<sup>95</sup>

During the trial, Reynolds consistently argued that he killed Liu in self-defense. The US military prosecutor pointed out that the second, fatal shot hit Liu in the back, and that the police were unable to find the "heavy stick" allegedly used by Liu in his attempted attack on Reynolds. On May 23, 1957, the court found the defendant not guilty on the ground of self-defense and Reynolds was immediately acquitted.<sup>96</sup> The next day an anti-American riot broke out in Taipei during which an angry mob sacked the US Embassy and the US Information Service headquarters in the ROC capital.<sup>97</sup>

There were two main reasons for the Chinese perception that Reynolds' acquittal was the result of an unjust trial. First, most Chinese did not understand that under US law, Reynolds was not subject to re-trial.<sup>98</sup> Chinese commen-

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92. The case is thoroughly analyzed in Tseng-foong Lin, *A Study of [the] Reynolds Case (1957) from the Viewpoint of International Law*, 4 CHENG CHI L. REV. 223-242 (1971). For a summary of the case, see *SOFA-ROC Criminal Jurisdiction*, *supra* note 20, at 7-10.

93. *Id.*

94. Presently, under international law, not all members of an embassy enjoy diplomatic immunity. See generally I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 333 (1973) [hereinafter cited as BROWNIE]. Service personnel usually enjoy immunity only when they are in the course of performing their official duty. Vienna Convention on Diplomatic Relations, April 24, 1964, art. 37, 500 U.N.T.S. 95, 112, 21 U.S.T. 77 [hereinafter cited as Vienna Convention]. In view of Reynolds' low rank of sergeant in the U.S. Military Service, he should have been treated as equivalent to the U.S. Embassy service personnel. Thus, Reynolds should not have enjoyed diplomatic immunity in regard to a homicide which was in no way related to his official duty.

95. *SOFA-ROC Criminal Jurisdiction*, *supra* note 20, at 8. See 10 U.S.C. § 817(a) (1975).

96. *Id.* at 9.

97. [1957-1958] CHINA YEARBOOK 202-204 (1958); Lien-ho pao (United Daily News), May 25, 1957, at 3.

98. The Fifth Amendment to the United States Constitution provides that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Under Article 73 of the Uniform Code of Military Justice, Pub. L. No. 506, 64 Stat. 108 (1950), only the accused can request a retrial, after receiving a sentence of death, dismissal,

tators criticized the judgment as very unfair and urged a new trial. When they learned that the US Defense Department ruled out a new trial without adequate explanation,<sup>99</sup> the Chinese were indignant. The Chinese legal system permits the procurator to appeal a finding of innocence and obtain a conviction at the appellate level.<sup>100</sup> For the Chinese public, the US refusal to retry Reynolds represented bad faith and indicated a disregard for the life of a Chinese national.

Second, under the traditional Chinese concept of justice, a person who kills another person should receive some punishment in order to restore the cosmic harmony upset by the unnatural death of a person.<sup>101</sup> This is so regardless of the reason for the homicide. While the Chinese law has been completely modernized and homicide committed as a result of self-defense may be considered as a ground for reduction or exemption of punishment,<sup>102</sup> the law also provides that the act of self-defense may not be excessive.<sup>103</sup> In the Reynolds case, Chinese commentators asserted that the second shot fired by Reynolds was unnecessary. From the Chinese point of view, it was clear that Reynolds exercised excessive self-defense and should have at least received some minor punishment. Therefore, from the Chinese perspective of justice, Reynolds' acquittal was totally unjustified.

One of the side effects of the Reynolds Case and the ensuing riot was that the Chinese government urged the US to speed up the negotiation of the SOFA-ROC which began in 1956.<sup>104</sup>

#### IV. THE WILSON CASE OF 1966<sup>105</sup>

The Wilson Case was the first trial of a US serviceman by a Chinese court. John A. Wilson was a dental technician second class in the US Navy. He was assigned to Detachment 5, Headquarters Support Activity at Kaohsiung, Taiwan, Republic of China. On June 1, 1966, after drinking a bottle of beer and about seven-tenths of a bottle of whiskey, Wilson rode in a car driven by his wife at a speed of about 30 miles per hour. Dissatisfied with the slow speed,

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dishonorable or bad-conduct discharge, or confinement for one year or more, on grounds of newly discovered evidence or fraud on the court. *Id.*

99. *Chung-hua jih-pao* (Chung-hua Daily News), May 26, 1957, at 1.

100. See CODE OF CRIM. PROC., Pt. III, ch. II, arts. 361-374, reprinted in 2 COMPILATION OF ROC LAWS, *supra* note 44, at 421-23.

101. See D. BODDE & C. MORRIS, LAW IN IMPERIAL CHINA 181-83 (1967) [hereinafter cited as LAW IN IMPERIAL CHINA].

102. The CRIM. CODE, art. 23, reprinted in 2 COMPILATION OF ROC LAWS, *supra* note 44, at 186, provides that: "An act performed by a person in defense of his own rights or the rights of another against immediate unlawful infringement thereof is not punishable; provided, that if the act of defense was excessive, punishment may be reduced or remitted." *Id.*

103. *Id.*

104. SOFA-ROC Criminal Jurisdiction, *supra* note 20, at 7.

105. Decision #772 (Kao-hsiung Dist. Ct. 1966).

Wilson reached over with his left foot to press the accelerator. Wilson's wife became scared, stopped the car, and left. After taking over, Wilson drove the car at a speed of 80 miles per hour (the speed limit was 40 mph), immediately hitting a bicyclist and an elderly female pedestrian. The woman was thrown into the air by the impact and landed on the hood of the car. Nonetheless, Wilson continued to drive, dragging the woman for 600 feet until he hit another pedestrian. The woman died immediately. Wilson left the scene of the accident and returned home without reporting the incident. It was only after his wife reported the accident to US military police that Wilson informed the US authorities.<sup>106</sup>

Under Article 14, paragraph 1(b) of the SOFA-ROC, "the authorities of the Republic of China shall have jurisdiction over the members of the United States armed forces or civilian component, and their dependents, with respect to offenses committed within the Agreement Area and punishable by the law of the Republic of China."<sup>107</sup> Article 14, paragraph 3(b) further provides that where the right to exercise jurisdiction is concurrent, the Republic of China shall have the primary right to exercise jurisdiction over all offenses, with the exception of those against the property or security of the US, against the property or persons of Americans coming under the Agreement, and against those arising out of any official acts.<sup>108</sup> However, under Agreed Minutes Regarding Article 14, paragraph 3(c), the Republic of China waived the primary rights granted to the Chinese authorities under this paragraph in favor of the US.<sup>109</sup> The ROC reserved the right to recall its waiver regarding cases in which "major interests of Chinese administration of justice . . . may make imperative the exercise of Chinese jurisdiction."<sup>110</sup> Examples of the latter include:

- (1) Security offenses against the Republic of China.
- (2) Offenses causing the death of a human being, robbery, and rape where the victim is Chinese.
- (3) Attempts to commit the above stated offenses or participation therein.<sup>111</sup>

Because the Wilson case involved the death of a Chinese national and aroused great indignation among the Chinese people, the Chinese authorities decided to recall the waiver and try the case before a Chinese court. The Kaohsiung District Court sentenced Wilson to twenty months' imprisonment for the crime of manslaughter.<sup>112</sup> On appeal, the Tainan Branch of the

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106. 40 Int'l L. Rep. 86 (1970); *SOFA-ROC Criminal Jurisdiction*, *supra* note 20, at 23.

107. SOFA-ROC, *supra* note 35, art. 14, ¶1(b), [1965] 17 U.S.T. 373, 386.

108. *Id.* art. 14, ¶3(a), 3(b), [1965] 17 U.S.T. 373, 387.

109. *Id.* Agree-1 Minutes to art. 14 Re ¶3(c), [1965] 17 U.S.T. 373, 390.

110. *Id.*

111. *Id.* at 391.

112. Judgment of Sept. 10, 1966, File No. 55th year, Shu-772. [A copy of the judgment is in the author's possession]. See 61 AM. J. INT'L L. 816-17 (1967). See also *SOFA-ROC Criminal Jurisdiction*, *supra* note 20, at 23-24.

Taiwan High Court confirmed the conviction but reduced the punishment to six months' imprisonment or a fine in lieu of imprisonment.<sup>113</sup> The court advanced several reasons for the reduction in sentence:

- (1) Wilson's notification to US authorities of the accident, even after his wife had already done so, still constituted "voluntary surrender." Under Chinese law, this fact permitted a reduction of punishment.<sup>114</sup>
- (2) The defendant was driving under the influence of intoxicating liquor.
- (3) The defendant had demonstrated a repentant attitude at the trial.
- (4) The defendant had made a settlement compensating the family of the victim.<sup>115</sup>

The decision of the High Court was severely criticized by some Chinese judges.<sup>116</sup> First, intoxication is generally not considered to be a ground for reduction of sentence. While the law is silent on this point,<sup>117</sup> some scholars suggested that intoxication should serve to increase the punishment rather than reduce it.<sup>118</sup> Second, the court's interpretation of "voluntary surrender" was also inconsistent with the ROC Criminal Code provision and judicial precedent. Article 62 of the Criminal Code provides: "If a person voluntarily submits himself for trial for an offense not yet discovered, the punishment shall be reduced." Since the defendant's wife notified the US military authorities before Wilson surrendered, his surrender should not have been considered a "voluntary surrender" under Chinese law. Many legal scholars and lawyers in Taiwan felt that the court simply was being particularly lenient toward a foreigner who came to assist in the defense of Taiwan. These authorities asserted that the decision had no precedent in the law of the

113. Judgment of Dec. 5, 1966, File No. 55th Year, Shang-3454, Decision #174 (Tainan Branch Chamber, Taiwan High Ct. 1966).

114. See CRIM. CODE, art. 62, reprinted in 2 COMPILATION OF ROC LAWS, *supra* note 44, at 197.

115. Judgment of Dec. 5, 1966, File No. 55th Year, Shang-3454, Decision #174 (Tainan Branch Chamber, Taiwan High Ct. 1966).

116. Interviews with Judge Li Chung-Sheng, of the Kaohsiung District Court, Judge Wen Wen-ho of the Hsing-tsu District Court, and Chief Judge Chao Che-chung of the Tainan District Court, with Lung-sheng Tao, cited in *SOFA-ROC Criminal Jurisdiction*, *supra* note 20, at 24, n.133.

117. The CRIM. CODE, art. 89, reprinted in 2 COMPILATION OF ROC LAWS, *supra* note 44, at 186, provides: "1. A person who commits an offense while intoxicated may, after execution or remission of punishment, be ordered to enter a suitable place for compulsory cure. 2. The period for enforcing the measure prescribed in the preceding paragraph shall not exceed three months." *Id.* One Supreme Court decision held that if a person became feeble-minded because of drunkenness and then committed a crime, his punishment should not be reduced. Judgment of 28th Year (1939) Shang No. 3816.

118. *E.g.*, see Han C.-m., *Intoxication and Criminal Responsibility*, 6 FA-HSUEH TS'UNG-K'AN (Chinese Law Journal) 124-130 (1957); and Chou Ya-p'ing, 26 FA-HSUEH P'ING-LUN (Law Review) 9-13 (No. 7, July 1960).

Republic of China.<sup>119</sup> They also believed that if the defendant had been tried in the US and under US law, he would have received a much more severe punishment.

Similarly, in other traffic accident death cases involving US military servicemen, Chinese courts have tended to impose either two to six months' imprisonment or payment of a fine in lieu of serving the sentence.<sup>120</sup> The courts also have instructed defendants to execute a monetary settlement to compensate the victim's family.

#### V. THE STARKS AND EATON CASE<sup>121</sup>

Jan Renard Starks and LaBruce Eaton were enlisted men attached to the 6217th Combat Support Group, US Air Force, Ching Chuan Kang Air Base, Taichung County. On April 16, 1969, they rented a house in Taichung outside the military complex, in direct violation of US military regulations. At approximately 11:00 p.m. on May 1, 1969, a check of servicemen was conducted by the Chinese Foreign Affairs Police together with US military police. When Starks and Eaton saw these police officers approaching the house, one of them threw a cloth bag containing nearly nineteen grams of opium out of a second story window. Upon discovering the bag, a neighbor reported it to the Chinese police officer in charge of the search. The result of the Chinese investigation indicated that Starks and Eaton had been in possession of the opium and thus in violation of Chinese law.<sup>122</sup>

Under the Agreed Minutes Regarding Article 14, paragraph 3(c) of the SOFA-ROC, possession of narcotics is not included in the categories of offenses in which "major interests of Chinese administration of justice . . . may make imperative the exercise of Chinese jurisdiction."<sup>123</sup> However, notes exchanged between the ROC and the US on the same day that the SOFA-ROC was signed included offenses of illegal possession of or trade in narcotics, and attempts to commit such offenses. Therefore, the ROC authorities decided to recall the waiver and to have the case tried by the Taichung District Court. On February 6, 1971, the Court sentenced Starks and Eaton to two years' imprisonment for jointly possessing opium in violation of Article 10, paragraph 1

119. Information from interviews conducted by the author's former students in Taiwan during 1966 and 1967.

120. See LEGAL STATUS OF US FORCES, *supra* note 8, at 164.

121. File No. 60th Year [1971], Su. No. 58.

122. Statute for the Purge of Narcotics During the Period of Communist Rebellion, art. 10, § 1 (Rep. of China) (1955), reprinted in TSUI-HSIN LIU-FA CH'UAN-SHU (Latest complete Six Codes) 283 (1970); CRIM. CODE, art. 263, reprinted in 2 COMPILATION OF ROC LAWS, *supra* note 44, at 256. See also Evans, *Judicial Decisions*, 70 AM. J. INT'L L. 132, 145 (1976) [hereinafter cited as Evans].

123. Evans, *supra*, at 145. SOFA-ROC, *supra* note 35, Agreed Minutes to art. 14 Re ¶3(c), [1965] 17 U.S.T. 373, 390.

of the Statute for Purge of Narcotics During the Period of Communist Rebellion. The defendants appealed. On August 5, 1971, the Taichung Branch of the Taiwan High Court affirmed the decision of the District Court.<sup>124</sup>

In the course of the trial before the High Court, the appellants argued, *inter alia*, that the search by the Chinese police officer violated Article XVII(4) of the SOFA-ROC. That article provides that:

The private residences, and property therein, of members of the United States armed forces or the civilian component, and their dependents, located outside the areas and facilities in use by the United States armed forces shall be subject to searches, seizures, or other inspections in accordance with Chapter XI, Part I of the Code of Criminal Procedure of the Republic of China provided that the authorities of the United States armed forces have been afforded the opportunity to be present and to provide assistance.<sup>125</sup>

The defendants contended that the search was illegal because it had been conducted without the presence of American military authorities as required by Article XVII(4), and without a search warrant as required by the Chinese Code of Criminal Procedure.<sup>126</sup> The court said:

If the authorities of the United States armed forces have been afforded the opportunity to be present by Chinese law enforcement personnel, the latter may conduct a search in accordance with the law. If sufficient facts exist to show that a person inside the premises is committing a crime, and the circumstances are urgent, a judicial policeman or a judicial police officer may search a dwelling house or other premises without a search warrant. This is provided in Article 131 of the Code of Criminal Procedure of the Republic of China.<sup>127</sup> [footnote supplied] Cheng Lai-shiu, a witness, is a Chinese judicial policeman. When he was on duty, it was reported that Starks et al were suspected of committing a crime. He obtained the illegally

124. File No. 60th Year [1971], Shang-su No. 293. See Evans, *supra* note 122, at 146.

125. SOFA-ROC, *supra* note 35, art. 17(4), [1965] 17 U.S.T. 373, 402.

126. CODE OF CRIM. PROC., art. 128, ¶1, reprinted in 2 COMPILATION OF ROC LAWS, *supra* note 44, at 366, provides: "A search requires the use of a search warrant."

127. *Id.* art. 131, reprinted in 2 COMPILATION OF ROC LAWS, *supra* note 44, at 367, provides: "1. A judicial policeman or judicial police officer may search a dwelling house or other premises without a search warrant under one of the following circumstances: . . . 3. If sufficient facts exist to show that a person inside the premises is committing a crime, and the circumstances are urgent. II. Within twenty-four hours after making a search as specified in the preceding paragraph, the case shall be reported to a procurator of the court." *Id.*

It should be noted that under Chinese law a search warrant is issued during the investigation period by a procurator. But when the case is at the trial stage, a search warrant is issued by a presiding or commissioned judge. *Id.*, art. 128, ¶3, reprinted in 2 COMPILATION OF ROC LAWS, *supra* note 44, at 366-67.

possessed narcotic items. It was obvious that someone inside the premises rented by Starks et al was committing a crime. At the same time, Starks et al threw out the criminal items to destroy evidence when they saw policemen approaching them. This was an urgent circumstance. Cheng Lai-shiu, who conducted the search, was not violating the law as he had no time to request a search warrant. Before Cheng Lai-shiu went on duty in this case, he notified the authorities of the US armed forces through the Foreign Affairs Police. The American authorities sent armed forces police to the scene. When Cheng Lai-shiu conducted the search, Brooks and Balazs, two American armed forces policemen had sent Starks et al to the base, but the AP's officer, James, was on the scene. This was testified to by Brooks and Balazs and was shown in the file. As James was representing the authorities of the US armed forces, even though he did not provide any assistance or conduct the search, his presence did not affect Cheng Lai-shiu in the discharge of his duty. After the search, Cheng Lai-shiu reported to a procurator of Taichung District Court within 24 hours. His search did not violate the law at all.<sup>128</sup>

The appellants also argued that the special criminal statute on narcotics should not be applied to them<sup>129</sup> as this statute was not within the penumbra of the SOFA-ROC. The court said:

The Republic of China has priority jurisdiction in the case of illegal possession of narcotics in accordance with the special minutes of the meeting and Article XIV of the SOFA-ROC, so the special law was not excluded from use in SOFA-ROC cases. It is impossible to say that the Chinese court violated the SOFA-ROC by imposing punishment on Starks et al in accordance with the current Chinese law.<sup>130</sup>

According to the Agreed Minutes Regarding Article 14, the US can send an observer to be present throughout the entire pre-trial and trial process.<sup>131</sup> After attending the proceedings at the District Court trial, the US observer raised questions concerning the fairness of the trial under the SOFA-ROC.<sup>132</sup>

128. Evans, *supra* note 123.

129. Under CRIM. CODE, art. 263, reprinted in 2 COMPILATION OF ROC LAWS, *supra* note 44, at 186, the punishment for possessing opium with intent to commit the offenses of selling, smoking, or manufacturing opium is detention [1 day to 4 months] or a fine of not more than 500 yuan. But under the special statute, possession of opium alone is subject to a minimum punishment of two years' imprisonment. *Id.*

130. See Evans, *supra* note 123.

131. SOFA-ROC, *supra* note 35, Agreed Minutes to art. 14 Re ¶9(g), [1965] 17 U.S.T. 373, 394.

132. Trial Observer's Report for the Trial of Sgt. Jan R. Starks and Ab Labruce Eaton in Taichung District Court, Taichung, Taiwan, Republic of China [no date, the date of trial was February 3, 1971], submitted to U.S. Taiwan Defense Command. A copy may be obtained from the U.S. Department of Defense under the Freedom of Information Act.

The first point he raised concerned the absence of a key witness at the trial. Under Article 14, paragraph 9(c) and its agreed minutes, a defendant was entitled to confrontation of adverse witnesses. This right included a full opportunity to examine all witnesses whose testimony was presented at trial.<sup>133</sup> One of the key witnesses against the defendants in this case was an individual who claimed to have seen someone throw something from the defendants' house onto the roof of a neighbor. This person was not present at trial. Therefore, the trial observer asserted that the trial did not comply with the SOFA-ROC.

The observer's view appeared to be a misunderstanding of the SOFA-ROC provisions. Since the defendants made no request for the presence of that witness at the trial, they waived their right under the SOFA-ROC and had no legitimate complaint. The SOFA-ROC does not predicate the validity of a trial upon the actual confrontation of a witness by the accused at the trial.<sup>134</sup>

The second point raised by the US trial observer concerned the right of the defendants to cross-examine all witnesses against them. In the observer's view, because the defendants' lawyer made no attempt to cross-examine any of the witnesses, this right was virtually meaningless. However, the defendants declined the judge's personal invitation to interrogate the witnesses. Nevertheless, the US trial observer asserted that this opportunity was of little value without the effective assistance of counsel.

While the US trial observer's statement may have been true, the SOFA-ROC only guarantees an accused the right to cross-examine the witnesses.<sup>135</sup> The exercise of this right is entirely within the discretion of the accused. Failure to exercise the right of cross-examination is held to constitute a waiver of that right under ROC law. The last point raised relates to evidentiary rules. The US observer considered that there was "an inadequate showing" of a nexus between the accused and the opium found. This view, however, was based on Anglo-American evidentiary standards,<sup>136</sup> and is not covered by the fair trial guarantees provided in the SOFA-ROC. Another trial observer was sent to observe the High Court trial. In his opinion, all rights prescribed by the SOFA-ROC were observed by the High Court and the appeal was conducted in a fair and proper manner.<sup>137</sup>

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133. See generally SOFA-ROC, *supra* note 35, art. 14, [1965] 17 U.S.T. 373, 386-95.

134. SOFA-ROC, *supra* note 35, Agreed Minutes to art. 16 Re ¶9(c), [1965] 17 U.S.T. 373, 394.

135. See *supra* note 80 and accompanying text.

136. See generally J. McCORMICK, EVIDENCE 783-93 (2 ed. 1976).

137. Trial Observer's Report for the Trial of SGT Jan. R. Starks and Ab Labruce Eaton in Taiwan High Court, Tai chung branch, Taichung, Taiwan, Republic of China, [no date, the trial dates were May 17 and July 29, 1971], submitted to the US Taiwan Defense Command. A copy may be obtained from the US Department of Defense under the Freedom of Information Act.

## VI. OTHER CASES

A. *The Lutz Case of 1972*<sup>138</sup>

There were very few non-traffic-related homicide cases involving US servicemen in Taiwan. In 1972, US serviceman Lutz strangled a Chinese bar girl to death. The Chinese authorities recalled the waiver of jurisdiction and tried the case before the Taichung District Court. The Court sentenced Lutz to eighteen months' imprisonment on a charge of negligent killing (manslaughter).<sup>139</sup> Upon appeal, the Taichung Branch of the Taiwan High Court set aside the lower court's decision and found the accused guilty of ordinary homicide.<sup>140</sup> Homicide is punishable by ten years' imprisonment. However, the High Court reduced the sentence to five years on the grounds that Lutz came to Taiwan to assist the anti-communist war and the killing followed an affray in which the victim had used abusive language.<sup>141</sup> Lutz appealed to the Supreme Court, which ordered the High Court to retry the case. Upon retrial, the High Court found there was no legal basis for reduction of punishment and sentenced the defendant to ten years' imprisonment.<sup>142</sup> The sentence was affirmed by the Supreme Court.<sup>143</sup> Commentators in the ROC have considered this to be a fair judgment.<sup>144</sup>

B. *The Brown Case of 1966*<sup>145</sup>

On June 26, 1966, United States Army Specialist Fourth Class Clem Brown dragged a thirteen-year-old Chinese girl to his car, drove to a quiet place and then raped her. The Chinese authorities recalled the waiver of jurisdiction, and the procurator prepared to prosecute Brown in accordance with Chinese law. However, before the formal prosecution was filed, the victim withdrew her complaint from the procurator's office and the case was dismissed.<sup>146</sup> Under the Chinese Criminal Code, prosecution for rape can be instituted only upon a complaint filed by the victim.<sup>147</sup> The US military authorities considered the case a serious one and tried Brown by a general court-martial. The

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138. *Chung-kuo shih-pao* (China Times) April 24, 1972, at 3.

139. *Id.*

140. *Id.* July 13, 1973, at 3.

141. *Id.*

142. *Id.* Mar. 5, 1975, at 3.

143. *Lien-ho pao* (United Daily News), June 19, 1975, at 3.

144. Information gathered by the author's former students through interviews with professors of law at Taiwan ROC.

145. Unpublished Opinion (1968), a copy of which may be obtained from the author. The case is summarized in *LEGAL STATUS OF U.S. FORCES*, *supra* note 8, at 164-65.

146. *Id.*

147. *CRIM. CODE*, art. 236, *reprinted in 2 COMPILATION OF ROC LAWS*, *supra* note 44, at 393.

defendant was sentenced to eighteen months' confinement at hard labor, demoted to private, and forced to forfeit eighteen months' pay.<sup>148</sup>

### C. *The Miguel Case of 1966*<sup>149</sup>

On June 19, 1966, another US military serviceman, named Miguel, raped a Chinese woman. Before the Chinese procurator filed a prosecution before a Chinese court, the victim withdrew her complaint from the procurator's office and the case was dismissed. Nevertheless, the US military authorities decided to prosecute Miguel under US law. Miguel was found guilty and sentenced to dishonorable discharge from military service and ten years at hard labor.<sup>150</sup>

The practice of the ROC government in handling rape cases is to recall the waiver of jurisdiction under the SOFA-ROC. However, the US offenders generally seem to be aware that prosecution of such cases depends on the victim's filing a complaint.<sup>151</sup> Such offenders usually have been able to make a monetary settlement with the victim in exchange for withdrawal of the complaint prior to formal prosecution.<sup>152</sup>

## VII. CONCLUDING OBSERVATIONS

The difficulties which arose in the process of negotiating the criminal jurisdiction sections of the SOFA-ROC primarily resulted from the different philosophies of criminal justice and procedure in the US and the ROC. In the US, the emphasis is on the protection of the accused and the result is that some criminals avoid conviction and punishment. In the ROC, on the other hand, the purpose of the criminal justice system is to find and punish the real criminal in order to maintain social order and to do justice to the victim. According to the Chinese point of view, it is unreasonable that the interests of the accused receive special protection while the interests of maintaining public order and doing justice to the victim are disregarded. The criminal justice system in the ROC, similar to that of most civil law countries, is an inquisitive one.<sup>153</sup> The Chinese judicial system differs substantially from the Anglo-American adversary model. The Chinese judges play a very active role in the ROC criminal system. In contrast, American judges fulfill a much more limited role.

148. 38 C.M.R. 460 (A.B.R. 1966), *pet. denied*, 17 U.S.C.M.A. 653 (1966).

149. LEGAL STATUS OF U.S. FORCES, *supra* note 8, at 165.

150. *United States v. Miguel*, No. 19708 (AFBR 1967) at 165, *pet. denied*, 17 U.S.C.M.A. 643 (1966).

151. CRIM. CODE, art. 236, *reprinted in* 2 COMPILATION OF ROC LAWS, *supra* note 44, at 248.

152. It should be noted that such a settlement of a rape case is not unusual even between Chinese citizens. For examples of the traditional Chinese attitude toward rape cases, *see generally* LAW IN IMPERIAL CHINA, *supra* note 8, at 427-28, 500, 540.

153. *See generally* ROC LEGAL SYSTEM, *supra* note 41.

While substantive Chinese criminal law was not at issue during the SOFA-ROC negotiations, one must realize that the criminal law of a country reflects certain traditional societal values. Where traditional values are not readily discernable in legal provisions, they may be reflected in judicial practice. Under traditional Chinese law and judicial practice, a person who kills another, regardless of reasons, must receive some punishment.<sup>154</sup> The basic rationale for the necessity of punishment in any homicide relates to the Chinese cultural view of human relationships. When one person has killed another, the cosmic harmony is upset and something must be done to restore it. If equilibrium is not restored, the entire harmony of the society would be disturbed. Punishment of the killer is one method of restoring the cosmic harmony. Under traditional law, a person using foul language against another person and causing the latter to commit suicide would be responsible for the offense of homicide.<sup>155</sup>

To a certain degree, this attitude toward homicide still persists today. Thus, in a traffic accident case involving the death of a pedestrian, the driver must receive some punishment,<sup>156</sup> usually at least six months' imprisonment, regardless of the causes of the accident. In view of the foregoing, it is not surprising that the Chinese people were very indignant at the acquittal in the Reynolds Case.<sup>157</sup> This indignation was further aggravated by the fact that no compensation was made by the killer or the US authorities to the victim's family.

After the SOFA-ROC entered into force in 1966,<sup>158</sup> the Chinese side assumed jurisdiction over homicide cases where the victim was a Chinese. In every homicide case tried by Chinese courts, the US killers received some punishment. In most traffic accident cases, a settlement of compensation with the victim's family was usually made before the court passed final judgment. The imprisonment sentence rendered against an American in a traffic accident case usually could be replaced by the payment of a fine. The Chinese people generally appeared to accept such a disposition of traffic accident homicide cases committed by Americans, although the lack of actual imprisonment of Americans was subject to criticism. The Chinese courts treated American defendants quite leniently during the fourteen-year history of the SOFA-ROC. This is partially because the Chinese judges felt that US forces came to assist the defense of Taiwan against Communist aggression and thus deserved preferential treatment. Another reason is the traditionally cautious

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154. LAW IN IMPERIAL CHINA, *supra* note 101, at 43.

155. *Id.* at 232.

156. Typically, at least six month's imprisonment.

157. See § III *supra*.

158. The SOFA-ROC, *supra* note 35, [1965] 17 U.S.T. 373, entered into force on April 12, 1966. *Id.*

treatment of cases concerning aliens, in order to impress the aliens with the fairness of Chinese justice and avoid international disputes. In contrast, the Chinese courts have usually imposed especially severe punishment on Chinese who committed offenses against members of US forces. The reasons for doing so are similar to those stated above. Moreover, such offenses also affect the international reputation of the Republic of China and therefore it is thought that those offenders should receive a more severe punishment than ordinary offenders.

While the administration of justice in the ROC under the SOFA-ROC has not been totally satisfactory in all cases, it has provided a predictable framework within which US citizens have received the benefits of US criminal law while on the territory of another sovereign. The outcomes of the *Wilson Case*, the *Starks and Eaton Case*, the *Lutz Case*, the *Brown Case*, and the *Miguel Case* were received more favorably by the Chinese than the decision in the *Reynolds Case*. By providing an orderly approach and mechanism for the judicial resolution of crimes committed by US nationals on ROC territory in ROC courts with US legal safeguards, the SOFA-ROC was a valuable variation of traditional principles of jurisdiction under international law.