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The Law of the Flag, the Law of Extradition, the NATO Status of Forces Agreement, and Their Application to Members of the United States Army National Guard

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THE LAW OF THE FLAG, THE LAW OF EXTRADITION, THE NATO STATUS OF FORCES AGREEMENT, AND THEIR APPLICATION TO MEMBERS OF THE UNITED STATES ARMY NATIONAL GUARD

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I. INTRODUCTION

With the advent of Project Capstone[1] in 1980, the United

1. Project Capstone was developed by the Army Forces Command (FORSCOM) as a comprehensive training program in order to optimally align Active Army and Reserve Component units to meet European wartime requirements and to satisfy the post-mobilization needs of continental United States military

States Army adopted a master European war plan which committed virtually every Army National Guard and Army Reserve unit to a large-scale field army for use in the European Theater of Operations. The plan was designed to combat a hypothetical offensive by tank-heavy Warsaw Pact forces through the centuries-old Fulda Gap invasion route[2] in the central region of the Federal Republic of Germany, or through the relatively vulnerable North German Plain. Project Capstone requires assignment of individual hometown units of the National Guard and Reserve to specific locations in the European Theater, enumeration of specific responsibilities and missions for accomplishment immediately after arrival, and assignment of specific dates for deployment overseas.[3] Some guardsmen and reservists would depart as early as two days after mobilization (M-2), but others might deploy much later depending on the availability of air and sea transport. In an effort to assist units to develop plans to accomplish wartime missions as rapidly as possible, an increasing number of two and three-man planning "cells" from National Guard units throughout the United States are currently visiting the European Theater of Operations as a part of their customary two-week annual training.[4]

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support activities, to encourage peacetime planning and training coordination among all wartime-aligned units, to provide a better rationale for force planning, to permit units deploying early in an emergency to be better manned and equipped, and to simplify mobilization stationing for both deploying and non-deploying units. UNITED STATES ARMY COMMANDERS CALL, Jan.-Feb. 1980, at 180.

2. The central region of the Federal Republic of Germany (West Germany) is marked by broad, flat valleys surrounded by steep, hilly terrain which is impassable to tanks. Natural "corridors" exist through the hilly terrain which have been used by invaders going east or west since the days of the Roman Empire. One of the most prominent of these natural "corridors" stretches westward from the German Democratic Republic (East Germany) to the heart of the Federal Republic of Germany through a gap in the hills near the town of Fulda.

3. The deployment date for each unit is expressed as a specific number of days after the President has declared mobilization.

4. The author is a Lieutenant Colonel in the United States Army Corps of Engineers, currently assigned as Operations Officer, 194th Engineer Brigade, Tennessee Army National Guard. While serving as Director of War Planning for the Brigade during a recent tour of duty in the European Theater, he conferred extensively on the subject of this paper with Judge Advocate General staff officers of the Third Air Force in the United Kingdom and United States Army units stationed in the Federal Republic of Germany, including the 412th Engineer Command, the 21st Support Command, Seventh United States Army, and Headquarters United States Army-Europe.

Actions by Warsaw Pact troops in Poland and Afghanistan increase the likelihood that United States contingency war planning will continue in the years ahead. The introduction of military personnel who will be in the European Theater of Operations for only a few weeks poses several legal problems which will be the subject of this Note. The human factor inherent in any discussion of the law relating to military personnel creates excellent opportunities for case studies. After a brief examination of the law of extradition, the law of the status of forces, and the effect of these bodies of law on the unique federal-state status of members of the Army National Guard, the provisions of the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA)[5] will be applied to the hypothetical case of a captain of a home town Guard unit who has committed a crime in a NATO signatory nation but who returns to the United States prior to the discovery of the crime. This hypothetical case undoubtedly will be reflected in real world case studies as increasing numbers of Guardsmen deploy for two week tours in Europe. The legal dilemma thus posed provides three possible courses of action:

(1) The United States Army can try the captain for homicide under the court-martial provisions of the Uniform Code of Military Justice.[6] The major problem with this option is the significant question as to whether, given these facts, the United States or the NATO signatory nation has jurisdiction over the crime.

(2) The United States and the NATO signatory nation can deal with the case under the NATO SOFA. The major difficulty with this option is that if NATO SOFA required the United States Army to return the accused for trial in the NATO signatory nation, the Army would have no power to do this because it would no longer have Title Ten federal in personam jurisdiction since the guardsman has already reverted back to Title Thirty-Two status.

(3) The United States and the NATO signatory nation in the spirit of international comity and under the United States-United Kingdom Extradition Treaty,[7] can treat the matter as a case of

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

6. Uniform Code of Military Justice, 10 U.S.C. § 816 (1976).

7. Treaty of Extradition, Oct. 21, 1976, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter cited as Treaty of Extradition].

extradition of a civilian. The stumbling block to this option is that many nations traditionally will not extradite their own citizens to stand trial in a foreign land.

Before applying the law to this hypothetical case, this Note will examine general international law regarding members of a "visiting force,"[8] the status of visiting forces in the absence of any agreements, former relevant international agreements, the NATO SOFA, and the United States-United Kingdom Extradition Treaty.

II. HISTORICAL BACKGROUND OF THE STATUS OF FORCES

Until the seventeenth century, both military law and international law were regarded as the embodiment of a greater common law of Europe which originated in the civil law of the Roman Empire.[9] For centuries Roman law was the only law taught in European universities.[10] Universally known and respected, Roman law dominated international political and commercial situations which were not appropriately subject to local law such as the common law of England. Thus, the Law Merchant, maritime law, and the law of international relations were controlled by the Roman civil law. Civil law jurists also dominated the development of British military law until the end of the English Civil War.[11] The Elizabethans accorded great esteem to ancient Rome in all things military, and the military law of ancient Rome was felt to be more than adequate for turning modern Europeans into disciplined and effective soldiers.[12] Thus, both international law and

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8. A "visiting force" is a foreign military force present in a nation at its invitation. The visiting force is usually the military force of an ally.

9. *See generally* Carnahan, *International Law in the United States Court of Military Appeals*, 3 B.C. INT'L & COMP. L. REV. 311, 312 (1980).

10. *See* B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 46-48 (1962); R. SCHLESINGER, COMPARATIVE LAW 247-49 (4th ed. 1980).

11. *See* F. WIENER, CIVILIANS UNDER MILITARY JUSTICE 165-67 (1967).

12. *See* H. WEBB, ELIZABETHAN MILITARY SCIENCE 25-26 (1965); C. BRAND, ROMAN MILITARY LAW 143-44, 183 (1968). John Adams expressed similar sentiments while serving as a member of a committee of the Continental Congress seeking to revise the articles of war:

> There was extant one System of Articles of War, which had carried two Empires to the head of Mankind, the Roman and the British: for the British Articles of War were only a literal translation of the Roman: it would be in vain for us to seek . . . for a more complete system of military discipline . . . .

3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 409-10 (L. Butterfield ed. 1961),

military law are rooted in the common stock of the Roman civil law.

Today, of course, Roman law is not the only source of authority for either United States military law or the law of nations. As stated in the Statute of the International Court of Justice, the primary sources of modern international law are:

> (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (2) international custom, as evidence of a general practice accepted as law;
> (3) the general principles of law recognized by civilized nations . . . .[13]

Conventions and treaties are part of the "supreme law of the land" under the Constitution,[14] and the United States Court of Military Appeals, which is a civilian "supreme court" for the military justice system, has expressly acknowledged that treaties are part of the law which it will apply.[15]

A. *Two Divergent Theories of Jurisdiction: The Law of the Flag v. Territorial Sovereignty*

Territorial jurisdiction[16] is one of the basic attributes of sovereignty in public international law. Classically, the territorial juris-

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quoted in Crump, *A History of the Structure of Military Justice in the United States,* 1775-1920 (pt. 1) A.F. L. REV., Winter 1974, at 41, 44; *see* Carnahan, *supra* note 9, at 312-13.

13. Statute of the International Court of Justice, *done* June 26, 1945, art. 38, 59 Stat. 1055, 1060, T.I.A.S. No. 993.

14. Autry v. Hyde, 19 C.M.A. 433, 436, 42 C.M.R. 35, 38 (1970).

15. *Id.* The Court of Military Appeals has, for example, held that treaties and international agreements give to the United States military commanders powers which they might not otherwise possess. *See, e.g.,* United States v. Manos, 17 C.M.A. 10, 37 C.M.R. 274 (1967); *cf.* United States v. Chasles, 9 C.M.A. 424, 26 C.M.R. 204 (1958) (international agreement supports the charge that a "regulation" was violated by the accused). *See generally* Alley, *The Overseas Commander's Power to Regulate the Private Life,* 37 MIL. L. REV. 115-20 (1967).

16. S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 7 (1971). Territorial jurisdiction refers to the jurisdiction of a state over individuals living in its territory, over things which are in this territory, and over facts which occur there. Rousseau, *Regime Actuel de Publications des Traites en France,* DROIT INTERNATIONAL PUBLIC 250 (1953), *quoted in* S. LAZAREFF, *supra* at 7.

diction of a host nation is exclusive and complete.[17] This exclusivity creates two consequences: the exclusive right to exercise all activities in a state, and the explicit exclusion of any other state's jurisdiction within the host nation's territory. On the other hand, the principle of territorial jurisdiction may also be defined as a continuum ranging from full territorial sovereignty in situations in which the host nation's law is the only law, to limited territorial jurisdiction in situations in which some degree of foreign sovereign immunity is granted to the visiting military force. Peaceful military occupation similar to the NATO model was practically unknown until the end of the eighteenth century. War occupation, or *occupatio bellica,* is an occupation of an enemy territory during hostilities, which confers upon the occupying state extensive powers. The sovereignty of the occupied state, however, survives. In the late eighteenth century a variant of peaceful occupation developed. Under this theory the occupied state retained not only the title but also the right to exercise its sovereignty. For example, because the Prussian territories were not continguous, Prussian forces had to pass through foreign territories to travel from one garrison to another. As a result, agreements to regulate the conditions of passage and the status of forces were created. In most of these early cases, however, very small contingents were present for only a brief duration and only under exceptional circumstances. NATO has altered the legal situation regarding the passage of troops because modern occupations last for considerable lengths of time, occupying forces have become increasingly important, and acceptance of permanent international tension is far different from past attitudes.[18]

The admission of a foreign force into a host nation during peacetime is subject to the agreement of the territorial sovereign, which normally defines the rights and obligations of the foreign force. If no formal agreement exists the courts must fill the gap. The concept of territorial sovereignty commands the conclusion that if the specific legal position of the foreign force has not been

17. S. LAZAREFF, *supra* note 16, at 7. Terminology in this area of the law revolves around protection of the interests of "sending" and "receiving" states, as well as the status of a "visiting force." To briefly summarize, the United States is a "sending" state when it deploys a "visiting force" consisting of Army personnel to the United Kingdom; the United Kingdom would then be characterized as a "receiving" state or "host nation."

18. *See generally id.* at 7-8.

defined, the act of admitting a foreign force cannot by itself be interpreted as granting exorbitant rights within the host nation. Therefore, except for the internal disciplinary power armies inherently exercise over their employees, a foreign force is subject to the laws of the receiving state. There are two divergent views regarding this conflicting jurisdiction. Under the "law of the flag" theory[19] the visiting force enjoys extensive jurisdictional powers. This is often referred to as foreign sovereign immunity. On the other hand, under the theory of territorial sovereignty the sending state and the receiving state would share the jurisdictional power. There is no known example of visiting forces completely subject to the receiving state's laws, but the degree of legal autonomy enjoyed by visiting forces varies.[20]

B. *The Law of the Flag: Background*

It is undisputed that members of a visiting force are subject to their own national military discipline. A United States soldier who disobeys an order commits the same offense whether he is in the United States or abroad. He is punished according to the rules of United States military discipline[21] using an internal procedure which is of no interest to the receiving state and which does not interfere with the sovereignty of that state. Only in exceptional cases do the courts of a receiving state become involved in such matters.[22] But the situation is more complex if the offense

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19. Under the law of the flag, or foreign sovereign immunity, a soldier serving in a foreign land is a representative of his sovereign. He is answerable, therefore, only to the law of the flag under which he marches.

20. S. LAZAREFF, *supra* note 16, at 8-9.

21. Uniform Code of Military Justice, 10 U.S.C.A. § 802 (Supp. 1981). The Uniform Code of Military Justice is applicable to all members of a regular component of the armed forces, *i.e.*, the Army, Navy, Marines, Air Force, and Coast Guard (when operating as a service of the Navy in time of war). 10 U.S.C.A. § 802(3) (Supp. 1981).

22. Barton, *Foreign Armed Forces: Qualified Jurisdictional Immunity*, [1954] BRIT. Y.B. INT'L L. 341. *See also* S. LAZAREFF, *supra* note 16, at 9 n.7. Barton posits the case of a Swiss soldier assigned to a Swiss detachment in United Kingdom territory. This soldier disobeys an order. He is arrested, tried by the Swiss in the United Kingdom, punished and detained. Although he is still in the United Kingdom, he resides in barracks put at the disposal of the Swiss Army. If this solider asks for a writ of habeas corpus from a British court it is likely that he will obtain satisfaction since his detention cannot be justified under the law of the United Kingdom. The situation would be different if a treaty recognizing the competence of the Swiss Army to deal with military of-

in question is an offense against the law of the receiving state. In these cases there is a real conflict between the territorial jurisdiction and the jurisdiction of the flag. Earlier United States and United Kingdom writers and cases exhibited more support for the law of the flag theory while most post-World War II legal authorities in these nations have advocated a concept of restricted territorial sovereignty under which jurisdiction is divided between the courts of the sending and the receiving states.[23]

The arguments favoring the law of the flag are summarized as follows:

> Strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign organized military force which, with the consent of the territorial sovereign, enters its domain. Members of the force who there commit offenses are dealt with by the military or other authorities of the State to whose service they belong, unless the offenders are voluntarily given up.[24]

A German writer, Oppenheim, explained:

> Whenever armed forces are on foreign territory in the service of their home State, they are considered extraterritorial and remain, therefore, under its jurisdiction. A crime committed on foreign territority 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.[25]

But he qualified his statement:

> 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 . . . .[26]

A French writer explained:

> The overriding principle in this field is as follows: any force operating on foreign soil is in no way subject to the territorial sovereign and exercises an exclusive right of jurisdiction over its mem-

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fenses in the United Kingdom were in force. *Id.*

23. S. LAZAREFF, *supra* note 16, at 11.
24. C. HYDE, INTERNATIONAL LAW 24 (1951).
25. L. OPPENHEIM, 1 INTERNATIONAL LAW § 445 (4th ed. 1948).
26. *Id.*

> bers. On this point, the writers, the laws, and the practice are agreed, whether in a case of *occupatio bellica,* or of conventional occupation resulting from a treaty, or, as in the present case, when forces are present to cooperate with the local forces.[27]

The *Casablanca Deserters,*[28] a famous early European case, is frequently cited for the proposition that a force on foreign soil is not subject to the jurisdiction of the territorial sovereign.[29] In 1908 Casablanca, a Moroccan city, was occupied and garrisoned by the French military forces. Six French Foreign Legion deserters, three of whom were German nationals, attempted to board a German ship anchored in the harbor, while guided by and under the protection of the Chancellor of the German Consulate. The deserters were recognized by a French soldier on duty and a struggle ensued during their arrest. The two governments decided to refer the case to arbitration, and Germany agreed that her Consul had been wrong in extending his protection to the non-German nationals. The problem before the court was the legality of the protections afforded the three German nationals.[30]

The Permanent Court of the Hague held:

> The difficulty of this case lay in that two particular situations, both exorbitant and both related to the concept usually known as "extra territoriality," were in conflict. Each of the Parties was claiming exclusive jurisdiction over the deserters. Germany was invoking the "Capitulations Regime" applying in Morocco . . . . France was invoking, in order to claim exclusive jurisdiction over the deserters, the rights belonging to an occupation force over the members of that force.[31]

In enunciating the law of the flag, the Court noted that Casa-

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27. S. LAZAREFF, *supra* note 16, at 126 (quoting and translating A. CHALUFOUR, LE STATUT JURIDIQUE DES FORCES ALIEES PENDANT LA GUERRE 1914-1918 (1927) (thesis, Les Presses Modernes, Paris) [hereinafter cited as A. CHALUFOUR].

28. The Casablanca Deserters (Perm. Ct. Arb. 1909), *reprinted in* REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 36-39 (1909) [hereinafter cited as The Casablanca Deserters]. *See generally* Gidel, REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 326 (1910); Gidel, *The Casablanca Deserters,* II RECUEIL DE JURISPRUDENCE DALLOZ 177 (1911); Pillet, IV RECUEIL SIREY 1 (1911).

29. King, *Further Developments Concerning Jurisdiction Over Friendly Armed Forces,* 40 AM. J. INT'L L. 257 (1946).

30. The Casablanca Deserters, *supra* note 28.

31. Gidel, *The Casablanca Deserters,* II RECUEIL DE JURISPRUDENCE DALLOZ 177 (1911).

blanca was militarily occupied and garrisoned by French military forces, that France was not at war but had intervened internationally for the protection of French and foreign residents in Morocco, and that an occupation force as a rule exercises an exclusive right of jurisdiction over all persons belonging to the force in spite of the Capitulations Regime. The Court carefully worded its decision, however, because as the phrase "as a rule" indicates, an occupation force does not *always* have jurisdiction over all persons in the force. This difference between always having jurisdiction and almost always having jurisdiction has given opposing scholars a basis for their arguments.

The leading United States decision involving the law of the flag was rendered by the Supreme Court in *The Schooner Exchange v. McFadden.*[32] In October 1810 the schooner *Exchange,* owned by two United States citizens, left Baltimore for Spain. Although France and the United States were not at war, a French man-of-war seized the schooner which was assigned to the French fleet and renamed *Balaou Five.* Thereafter, a storm compelled it to seek safe harbor at Philadelphia for repairs. The United States owners filed a libel in the United States district court asserting their ownership and seeking a decree restoring possession of the schooner. The United States attorney then filed a suggestion that the schooner was an armed French public vessel which had been forced out of necessity to enter the port. The district court dismissed the libel on the grounds that a friendly armed public vessel was not under the jurisdiction of a United States court, but the circuit court reversed. When the Supreme Court reinstated the dismissal, Chief Justice John Marshall enunciated the principle of the law of the flag: although the jurisdiction of a nation within its own territory is susceptible only of self-imposed limitations, exceptions to this exclusive jurisdiction exist and are traceable to the express or implied consent of the territorial sovereign.[33] After noting the immunity accorded a foreign sovereign,[34] Chief Justice Marshall said that a sovereign is also understood to have ceded a portion of his territorial jurisdiction in situations in which the state allows the troops of a foreign nation to pass through its territory.

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32. 11 U.S. (7 Cranch) 116 (1812).
33. *Id.* at 135-36.
34. *Id.* at 138.

> In such a case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it, would certainly be considered as violating his faith . . . . The grant of free passage, therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.[35]

Chief Justice Marshall found no requirement that a right of passage be granted to foreign armed warships, because "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace."[36] For law of the flag partisans, this statement implied that friendly forces on foreign soil would be immune from the jurisdiction of the foreign nation.[37] But many writers argue that such an interpretation of Chief Justice Marshall's dictum is incorrect.[38] The purpose of the libel, according to these sources, was to gain jurisdiction over the force (the ship), not the members of the force (the crew). This has been pointed out by the Court of New South Wales (Australia):

> [W]hat the learned judge had in mind was exercise of a jurisdiction which would prevent the troops from acting as a force . . . not exercise of jurisdiction over individual soldiers in respect of liabilities incurred or wrongs done, perhaps out of all connection with their military duties.[39]

Another argument against a broad interpretation of Marshall's words is that the waiver of jurisdiction over troops during their passage applied only to offenses against the army's regulations and that the territorial sovereign reserved the right to exercise its sovereignty when an offense was committed against its own laws. But more important is the consideration that Chief Justice Marshall's remarks only applied to troops "during their passage," a comparatively short period of time and certainly not analogous to the long-term stationing of United States forces on the soil of NATO allies.

Eight years after *The Schooner Exchange* decision, similar

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35. *Id.* at 139-40.
36. *Id.* at 141.
37. S. LAZAREFF, *supra* note 16, at 15.
38. *See, e.g.*, Wright v. Cantrell, 44 N.S.W. 45, 49 (1943) (opinion of Jordan, C.J.).
39. *Id.*

facts confronted a British court in *The Prins Fredrik*.[40] The Advocate of the Admiralty argued that public property belonging to a foreign sovereign and destined for public use was exempt from the jurisdiction of British courts under the doctrine of foreign sovereign immunity. His argument, which expanded the law of the flag, was successful. In 1880, Lord Brett in the Court of Appeals case *The Parlement Belge*[41] relied on these earlier holdings to find a Belgian mail packet immune from the jurisdiction of the courts of the United Kingdom. The zenith of United States law of the flag cases was *Berizzi Bros. v. The Steamship Pesaro*.[42] Justice Van Devanter in *Berizzi* affirmed the foreign sovereign immunity doctrine by finding that *The Pesaro*, a government-owned merchant vessel, was used for a public purpose. The Court stated, "We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."[43]

Subsequent United States cases have maintained the *Exchange* doctrine in situations involving the passage of troops. In *Tucker v. Alexandroff*[44] the Court stated, "[I]f foreign troops are permitted to enter or cross our territory, they are still subject to the control of their own officers and exempt from local jurisdiction."[45] The Supreme Court of Panama also has held that passing foreign troops are exempt from local jurisdiction.[46] Again, it must be emphasized that this Panamanian decision applied the law of the flag to crossing forces, not stationed forces. Even authorities who support the law of the flag do not propound unqualified foreign

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40. 165 Eng. Rep. 1543 (1820).

41. [1879-80] 5 P.D. 197.

42. 271 U.S. 562 (1926).

43. *Id.* at 574. *See generally* Note, *Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law From The Schooner Exchange to the State Immunity Act of 1978*, 13 VAND. J. TRANSNAT'L L. 761, 768-76 (1980) [hereinafter cited as *Reciprocal Influence*].

44. 183 U.S. 424 (1901).

45. *Id.* at 433.

46. Republic of Panama v. Schwartzfiger, *reprinted in* 21 AM. J. INT'L L. 182 (1927).

> It is a principle of international law that an armed force of one state, when crossing the territory of another friendly country with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign but to that of the officers and superior authorities of its own command.

Id. at 184-85.

sovereign immunity for forces stationed on foreign soil.[47]

C. *Territorial Sovereignty: Background*

A receiving state possesses a general and unrestricted right of jurisdiction over the members of a visiting force if the principle of territorial sovereignty is given its fullest application. As a corollary, there is a complete denial of jurisdiction to the powers commanding the visiting force so that the leaders of the visiting force cease effective command. This theory has never been entertained seriously. A member of a visiting force represents his state of origin, and many contemporary writers now agree that the territorial sovereign must give special consideration to the application of the theory of territorial sovereignty[48] in cases involving the representation of the foreign state by its agents.

Many characteristics distinguish territorial sovereignty over a visiting force from sovereign immunity for the visiting force. Simply stated, under territorial sovereignty the visiting soldier is answerable only to the sovereign through whose land he marches. On the other hand, a system of sovereign immunity for a visiting force would hold the same soldier answerable only to the sovereign under whose flag he marches. These two sovereigns represent either end of a continuum. The growth of the concept of restricted sovereign immunity began with a 1938 House of Lords decision, *Compania Naviera Vascongado v. Steamship Christiana.*[49] Although the court held that a Spanish merchant ship, requisitioned by and in the possession of the Spanish government, was immune from a suit by the former owners, Lord Maughan expressed serious reservations concerning the analysis in *The Parlement Belge* and *The Schooner Exchange.*[50] This doubt took root and came to fruition in *Republic of Mexico v. Hoffman,*[51] in which a ship owned by the Mexican government but not in its possession or in public service was subjected to an *in rem* lien in a California district court. After determining that Mexican ownership was not sufficient without the requisite public use, the Supreme Court affirmed the decision to deny immunity. In *Ex Parte*

47. S. LAZAREFF, *supra* note 16, at 17.
48. *Id.* at 18.
49. [1938] A.C. 485.
50. *Id.* at 518-23.
51. 324 U.S. 30, 41 (1945).

Republic of Peru,[52] the Court identified courses of action that a foreign sovereign might follow to claim immunity. It could appear in court and raise the immunity issue, or it could request that the Department of State authorize the court to recognize the immunity of the foreign sovereign. This option was later reinforced by the famous "Tate Letter"[53] in which the Department of State's Acting Legal Advisor, Jack B. Tate, informed the Acting Attorney General, Philip B. Perlman, that he advocated the restrictive theory of immunity under which only certain acts of a foreign sovereign would be immune.[54] While the State Department would no longer recognize immunity for private acts, it would continue to authorize immunity for public acts.[55] Confusion occurred, however, during attempts to distinguish between the public and the private acts which would trigger immunity.

The issue of whether visiting forces are immune from local jurisdiction was confronted in *United States v. Sinigar*.[56] Sinigar, a United States Army private stationed in Canada, was called to testify before a Canadian coroner's inquest. He refused and was jailed for contempt. Thereafter, he was tried by a United States Army courtmartial for conduct bringing discredit upon the armed forces. The Court of Military Appeals held that "concurrent jurisdiction"[57] existed since customary international law did not prevent both sovereigns from bringing charges against Sinigar. In *United States v. Robertson*,[58] a merchant seaman serving aboard a United States Department of Commerce vessel carrying armed forces cargo killed a fellow seaman in a Yokohama waterfront brawl. On appeal, Robertson contested the Navy courtmartial's jurisdiction by arguing that while the administrative agreement between Japan and the United States granted the latter exclusive jurisidiction over members of the civilian component, he was not a part of that civilian component. The Court of Military Appeals

52. 318 U.S. 578 (1943).

53. 26 DEP'T STATE BULL. 984-85 (1952). In this letter, Jack B. Tate reviewed the trend among other nations toward use of the restrictive theory of territorial sovereign immunity, as opposed to the classical or virtually absolute theory of foreign sovereign immunity. *Id.*

54. *Id.*

55. *See generally Reciprocal Influence, supra* note 43, at 793.

56. 6 C.M.A. 330, 20 C.M.R. 46 (1955).

57. 6 C.M.A. at 336-37, 20 C.M.R. at 52-53.

58. 5 C.M.A. 806, 19 C.M.R. 102 (1955).

agreed with Robertson,[59] but nevertheless found him properly subject to United States military jurisdiction since his status as a civilian accompanying the force gave rise to concurrent United States and Japanese jurisdiction.[60] *United States v. Cadenhead*[61] also involved the question of concurrent jurisdiction, but the Court of Military Appeals held that "American military personnel stationed in Japan on a permanent basis may be tried by Japan for offenses committed within its territory and punishable by its laws."[62]

The Court's decisions on the status of visiting forces under customary international law then may be summarized as follows:

> (1) Foreign military courts are permitted to exercise jurisdiction over members of the force in the territory of another State.
> (2) Taken together, *Robertson, Sinigar,* and *Cadenhead* establish that the local authorities may also exercise jurisdiction over members of the foreign force, at least for offenses committed off-duty and outside of camp.
> (3) Foreign military courts may treat civilians accompanying their force as members of that force, so long as those civilians are not nationals of the State where the trial is held.[63]

In 1965 the American Law Institute adopted the restrictive approach to territorial sovereign immunity in proceedings arising out of commercial activities.[64] Meanwhile, in the United Kingdom, the decision in *The Philippine Admiral Owners v. Wallem Shipping Ltd.,*[65] in which the Privy Council accepted jurisdiction over a Philippine Government vessel used solely for trading purposes, initiated a process which eventually led to the legislative adoption of the restrictive doctrine of sovereign immunity. On appeal Lord Cross pronounced the unanimous opinion of the Privy Council that the precedents favoring the absolute doctrine of sovereign immunity were based on erroneous interpretations of *The Parlement Belge.*[66]

The enactment of the Foreign Sovereign Immunities Act of

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59. 5 C.M.A. at 814-18, 19 C.M.R. at 111-14.
60. 5 C.M.A. at 818-20, 19 C.M.R. at 114-16.
61. 14 C.M.A. 271, 34 C.M.R. 51 (1963).
62. 14 C.M.A. at 272-73, 34 C.M.R. at 52-53.
63. Carnahan, *supra* note 9, at 336.
64. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 69 (1965).
65. [1977] A.C. 373.
66. *Id.* at 394.

1976 (FSIA)[67] in the United States was an attempt to clarify the distinction between public and private acts. Facially, the FSIA drew the distinction. In reality, however, it left many aspects of the distinction open for future court interpretations. Similarly, the British enacted the State Immunity Act of 1978 (State Act),[68] which was viewed by some scholars as an improvement over the United States Act.[69] Both acts begin with the premise that foreign sovereigns are entitled to immunity but both carefully limit that immunity through several enumerated exceptions. The FSIA and the State Act indicate that neither the sovereign host nor the sovereign commander will have exclusive jurisdictional control on questions involving members of a visiting force on the soil of a foreign ally. Restrictive territorial sovereignty prevailed over both the law of the flag and absolute sovereign immunity.

III. FORMER AGREEMENTS

Agreements on the status of visiting forces have undergone a steady evolution since the law of the flag lost currency after the First World War. As the move toward concurrent jurisdiction proceeded, questions parallel to the question caused by ambiguities in acts such as the FSIA and the State Act developed regarding which sovereign controlled in any given situation. Despite concurrent jurisdiction, however, the United States consistently sought the exclusive right to jurisdiction over its forces.[70]

The nations which negotiated status of forces agreements during the First World War[71] did not separate jurisdictional power from the military disciplinary power which was an essential part of the military organization structure. As early as 1914, the Belgian and French governments had entered into an agreement[72] establishing the general competence of military jurisdiction over the members of each force, or against those who could prejudice each force. This emphasis on the right of a military force to claim ju-

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67. 28 U.S.C. §§ 1330, 1602-1611 (1976).

68. C. 33. *See generally* Statement of the Solicitor General, 949 PARL. DEB., H.C. (5th ser.) 412 (1978).

69. Delaume, *The State Immunity Act of the United Kingdom*, 74 AM. J. INT'L L. 185, 198-99 (1979).

70. S. LAZAREFF, *supra* note 16, at 19.

71. *Id.*

72. S. LAZAREFF, *supra* note 16, at 20 (quoting and translating A. CHALUFOUR, *supra* note 27, at 48).

risdiction involved neither a consideration of the territory in which the offense was committed nor of the nationality of the offender.[73] The fact that the jurisdictional criterion was the damaging act rather than the nationality of the offender implies that the basis of this agreement was more akin to territorial sovereignty than to the law of the flag. In 1915, an agreement between France and the United Kingdom[74] recognized the exclusive jurisdiction of the tribunals over their respective forces, regardless of either the rights of the territorial sovereign of the place in which the act was committed or of the nationality of the accused.[75] General Pershing's agreement with the French stressed the law of the flag by providing that each nation would possess exclusive criminal jurisiction over all personnel subject to its military law. During the war, however, the United Kingdom continued to request that its right to exercise control as a territorial sovereign be respected, while the United States continued to seek exclusive rights of jurisdiction over all United States military personnel regardless of the nature of the offense or the right of the territorial sovereign of the place in which it was committed. In fact, the point was made moot by the agreements entered into at the end of the war. Two conclusions are apparent from the First World War agreements. First, the law of the flag generally was not applied since the rule of territorial sovereignty was upheld, and even the agreements ostensibly utilizing the law of the flag were quite flexible in their application.[76] Second, each Allied army ruled a well-determined zone from which most civilians had been evacuated so that jurisdictional disputes only arose outside these zones of de facto sovereignty. These disputes generally involved personnel on leaves of absence. Thus the First World War did not establish the preeminence of the law of the flag.[77]

The Second World War presented an entirely different situation. Instead of the well-determined zones of operation which had characterized previous army operations, most of the Allied Forces were scattered throughout the United Kingdom during the period prior to the Normandy invasion. These forces mingled with the population and traveled on the public roads, raising an entirely

73. *Id.*
74. *Id.*
75. *Id.*
76. S. LAZAREFF, *supra* note 16, at 22.
77. *Id.* at 21.

new set of legal issues regarding the status of forces. These new questions began the evolution of jurisdictional rules which has culminated with the current NATO stationing arrangements. Although the Allied Forces Act[78] gave jurisdiction to the Allied military courts solely for questions of discipline and administration of the forces and reserved concurrent jurisdiction for offenses punishable under the laws of both the sending and receiving states, Parliament acceded to United States requests that the law of the flag receive certain preferences. The United States of America (Visiting Forces) Act of 1942 provided that "[S]ubject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America."[79] The Visiting Forces Act did not, however, mark the universal acceptance of the law of the flag as the preeminent jurisdictional rule. In the United Kingdom only the United States forces were enjoying complete immunity from United Kingdom jurisdiction, while the other Allied Forces stationed in the United Kingdom enjoyed only the restricted and concurrent jurisdiction provided by the Allied Forces Act.

In 1943 a United States delegation in Ottawa sought to obtain exclusive jurisdiction over United States personnel stationed in Canada. An advisory opinion by the Supreme Court of Canada prompted the Canadian Parliament to grant the United States request and confer exclusive jurisdiction.[80] Secured by a detailed agreement, the law of the flag thus received support, as it did in similar United States agreements with Australia,[81] Belgium,[82] China,[83] Egypt,[84] India,[85] and New Zealand.[86] Also instructive was

78. 3 & 4 Geo. 6, c. 5 (1940).

79. 5 & 6 Geo. 6, c. 31, § 1 (1942).

80. Exchange of notes of Dec. 27, 1943, Feb. 10 & Mar. 9, 1944, *cited in House Comm. on Foreign Affairs, Hearings Before the Committee on Foreign Affairs*, H.R. REP. No. 309, 84th Cong., 1st Sess. 144 (1955-56).

81. Unilateral Declaration by the Australian Authorities, AUSTL. STAT. R. No. 241 (Mar. 27, 1942); *see* COMMONWEALTH GAZETTE, May 27, 1942.

82. Agreement on Jurisdiction Over Criminal Offenses Committed by Armed Forces in the Belgian Congo, Aug. 4, 1943, United States-Belgium, 51 Stat. 1215, E.A.S. No. 395.

83. Agreement on Jurisdiction over Criminal Offenses Committed by Armed Forces, May 21, 1943, United States-China, 57 Stat. 1248, E.A.S. No. 360.

84. Agreement on Criminal Offenses Committed by Armed Forces, Mar. 2, 1943, United States-Egypt, 57 Stat. 1197, E.A.S. No. 356.

85. Agreement on Jurisdiction over Criminal Offenses Committed by Armed

the legal status accorded the Allied Forces at the time of the 1944 Normandy invasion. The French Provisional Government authorized the Allied military authorities to exercise an exclusive right of jurisdiction over their forces, with the settlement of damage claims to be reserved for the Allied Reparations Commission.[87] The urgency of the situation justified these exceptional procedures. Rather than drawing any firm conclusions as to the jurisdictional principles expressed in the agreements (the law of the flag or territorial sovereignty), the significance of power to enforce the provisions of this agreement must be emphasized. The more powerful states generally obtained a broader right of jurisdiction than did the less powerful states.

The end of World War II did not eliminate the jurisdictional questions raised by the stationing of forces outside their state of origin. The occupation of Germany and Austria made it necessary to set up a line of communications reaching from the ports of France to the United States garrisons beyond the German frontier. In order to facilitate the transit of, and logistical support for, personnel, additional garrisons were established along the communications line. Two categories of United States personnel thus existed in France—personnel who were in transit and permanently stationed personnel. While most of the bilateral agreements with France have not been published,[88] one significant document expressing the intent of the parties was published in the Agreement of November 6, 1950.[89] This document stated the principle of territorial sovereignty and gave jurisdiction to French courts to try United States military personnel, although United States authorities normally asked for a waiver of French jurisdiction if the offense had been committed in the performance of official United States military duties. The Minister of Justice, however, would decide on each waiver, thus strengthening the principle of territorial sovereignty. In practice, the French also waived jurisdiction when the victim was a member of the United

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Forces, Sept. 29, 1942, United States-India, 58 Stat. 1199, E.A.S. No. 392.

86. Agreement on Military Forces, Mar. 31, 1942, United States-New Zealand, 56 Stat. 1896, E.A.S. No. 305.

87. Exchange of notes of Dec. 11, 1942 and Mar. 23, 1943; *see* COMMONWEALTH GAZETTE, Apr. 8, 1943.

88. S. LAZAREFF, *supra* note 16, at 34. Most of these agreements remain secret.

89. *Id.* at 29, *See generally* F. POGNE, THE UNITED STATES ARMY IN WORLD WAR II—THE SUPREME COMMAND (1948) (the official Department of the Army).

States forces or when the offense was punishable under United States law and not under French law. Although it was technically impossible for a French citizen to take the United States to court for a tort claim, a procedure was devised to allow such claims to be submitted to United States claims officers and passed to the Chief of the French Liaison Office for a recommendation based on French law. Satisfaction of these claims usually depended upon the French authorities' recommendations.[90] Although the system worked remarkably well, it raised complaints that the French citizens were denied their "day in court."[91]

The bilateral agreements that have been signed between the United States and over fifty foreign governments fall into three categories. In the first category are the few agreements that grant to the sending state an exclusive right of jursidiction over a member of the force. These include agreements with Korea,[92] Denmark (only for matters involving Greenland),[93] and Japan.[94] The second category includes the few agreements which distribute the right of jurisdiction between the sending state and the receiving state on the basis of the place in which the offense was committed. Examples include agreements between the United States and Saudi Arabia,[95] the Bahamas,[96] and the Dominican Republic.[97] The great bulk of all agreements between the United States and foreign nations falls into a third category. These agreements generally consist of a system of concurrent jurisdiction superimposed on a system in which jurisdiction is based upon the nature of the

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90. Lavauzelle, *L'Organisation Militaire Atlantique,* Edition Methodique No. 110-11, Droit International, BULLETIN OFFICIEL DE MINISTERE DE LA GUERRE (1956).

91. S. LAZAREFF, *supra* note 16, at 35-37.

92. Agreement on Jurisdiction over Offenses by United States Forces in Korea, July 12, 1950, United States-Korea, 5 U.S.T. 1408, T.I.A.S. No. 3012. The invasion of South Korea began on June 25, 1950.

93. Agreement on the Defense of Greenland, Apr. 27, 1951, United States-Denmark, 2 U.S.T. 1485, T.I.A.S. No. 2292.

94. Agreement on Article III of the Security Treaty, Feb. 28, 1952, United States-Japan, 3 U.S.T. 3341, T.I.A.S. No. 2492.

95. Agreement on the Airbase at Dhahran, June 18, 1951, United States-Saudi Arabia, 2 U.S.T. 1466, T.I.A.S. No. 2290, *extended on* Apr. 2, 1957, 8 U.S.T. 403, T.I.A.S. No. 3790.

96. Agreement on the Bahamas Long Range Proving Ground, July 21, 1950, United States-United Kingdom, 1 U.S.T. 545, T.I.A.S. No. 2099.

97. Agreement on the Long Range Proving Ground for Guided Missiles, Nov. 26, 1951, United States-Dominican Republic, 3 U.S.T. 2569, T.I.A.S. No. 2425.

offense. The principle of concurrent jurisdiction reconciles the disparate concepts of territorial sovereignty and the immunity of a foreign sovereign. Two categories of offenses give rise to concurrent jurisdiction. First are the offenses against the law of the sending state, its property, or a member of the same force to which the offender belongs. Second, there are all other offenses. Authorities of the receiving state usually will prosecute offenses falling in the first category only if special considerations require them to do so. In the second category of cases, the receiving state normally will preserve its priority of jurisdiction but will entertain a request for waiver from the sending state. These principles were exemplified in the Agreement on the Status of Members of the Armed Forces of the Signatory Powers of the Treaty of Brussels, which was signed at London, December 21, 1949, but never put in force.[98]

All of these agreements regarding the status of forces stationed in a foreign country are supported by certain customary practices. Even such ardent supporters of the law of the flag as the United States Department of State, there is agreement that the admittance of a foreign force into a territory is always dependent on the approval of the territorial sovereign. In addition, Chief Justice Marshall's formulations in *The Schooner Exchange,* involving the disciplinary power of the force, are still valid. Nevertheless, drawing a distinction between infringement of the law of the receiving state and disciplinary offenses often creates a problem since some acts are offenses against both. It is apparent, though, that most civil and criminal offenses will be subject to the jurisdiction of the territorial sovereign. The principal exception is the offense committed while in the performance of official duty.

The desires and requirements of both the sending and the receiving states must be carefully considered in any jurisdictional system; often this requires that both states have some measure of jurisdiction at the same time. While the jurisdiction of one is usually subordinate to that of the other, this concurrent jurisdiction calls for a structure in which both sides are clearly aware of their respective rights and responsibilities, thereby minimizing disagreements and conflicts.

Most agreements today are based on the initial assumption that the territorial sovereign has unique rights with certain enumer-

98. S. LAZAREFF, *supra* note 16, at 45-47.

ated exceptions. These exceptions can only be justified by agreements clearly determining respective jurisdictional rights. Thus agreements regarding shared jurisdiction may be classified into six categories:

> (1) Agreements in which jurisdiction is based on the nature of the offense. This system is advantageous to both the nation sending the forces and the host nation because punishments are based on national preferences and norms.
> (2) Agreements in which territorial jurisdiction governs unless otherwise stipulated. This concept, exemplified in the Brussels Agreement, gives the receiving state the option of waiving its jurisdiction in situations in which special circumstances prompt the sending state to claim jurisdiction.
> (3) Agreements in which the sending state has jurisdiction unless otherwise stipulated. The sending state can grant or refuse requests to waive jursidiction, but this procedure obviously impairs territorial sovereignty.
> (4) Agreements in which jurisdiction depends on the location in which the offense was committed. This concept is seldom used because it disregards territorial sovereignty.
> (5) Agreements in which jurisdiction is dependent upon whether the offense was committed in times of peace or war. This concept usually results in the sending state receiving more extensive rights in time of war.
> (6) Agreements in which the force is assimilated with diplomatic personnel. This is the procedure normally followed when United States Marine personnel are assigned to United States embassies abroad. Such assimilation can be conceivable only when the strength of the stationed force is quite small and it fulfills its duties under the control of an embassy or a Military Advisory Assistance Group (MAAG), such as is often found in nations allied to the United States.

All of these competing theories indicate that there was no single established and undisputed doctrine defining the status of forces abroad when the North Atlantic Treaty became operative. As previously discussed, by the operative date of the North Atlantic Treaty court decisions in the United States and the United Kingdom had swung back to a preference for territorial sovereignty based on the "common" international law. In 1953 the only support for the law of the flag and the immunity of foreign sovereigns from jurisdiction was found in specific written agreements among

the various allies. The parties to the North Atlantic Treaty therefore had the burden of formulating formal positions regarding the status of national forces on foreign soil.[99]

IV. The NATO Status of Forces Agreement (NATO SOFA)

A. *Negotiations*

The initial decision confronting the North Atlantic Treaty parties was whether to use bilateral or multilateral agreements to effectuate common goals. Adoption of a series of bilateral agreements had the advantage of promoting a certain amount of specificity since each agreement could be drafted to address certain preexisting geographical political conditions. Such a move would not have been acceptable to the receiving states, however, since a bilateral agreement does not constitute a satisfactory justification "for the presence of foreign forces which are neither conquerors nor guests."[100] This psychological aspect of the problem was of paramount concern since the population of many potential receiving states viewed

> [t]he American soldier [as] a constant model of the national weakness; his presence itself reminds nations jealous of their independence that they are no longer in a position to defend themselves by their own means . . . . Ordinarily, the American soldier has more money than the native and spends it in a way which irritates the local population . . . . [T]he American servicemen arrive carrying with them their accent, their electric refrigerators, their up-to-date cars, their high pay and their own style of life.[101]

A multilateral agreement, on the other hand, would signify equal treatment for all of the allies. Indeed, within the framework of an alliance the presence of foreign forces loses the connotation of an "occupation" and becomes a feature of the federal type of organization in which the receiving state is an equal partner. Under the aegis of a multilateral agreement, common legal and administrative principles would guide all NATO states. Significantly, five of

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99. *Id.* at 57-59.

100. Flory, *Les Bases Militaires a L'Etranger*, Annuaire Francais de Droit International 3, 5 (1955) (translation by this author).

101. Whitton, *L'Exercice de la Competence Penale a l'Egard des Forces Americaines a l'Etranger*, Revue Generale de Droit International Public 6 (1959).

the signatory states of the original North Atlantic Treaty[102] were already parties to the multilateral agreement on the status of forces under the Brussels Treaty.[103]

B. *Criminal Jurisdiction*

Article VII of the NATO SOFA deals with the allocation of criminal jurisdiction and is the most controversial article of the agreement. The exercise of criminal jurisdiction is an essential attribute of territorial sovereignty, but the law of the flag would accord criminal jurisdiction to the sending state. The differing legal systems and legal traditions within the nations of the Alliance complicated a choice between these competing jurisdictional theories. For example, the right of trial by jury is not a fundamental basis of the legal systems of each of the NATO members.[104] The other major problem in choosing a basis for jurisdiction was the wide variation in punishments for any given offense prescribed by each of the signatory nations.[105] As a result of these variations, positions on the jurisdiction question ranged from those who felt that any waiver of jurisdiction constituted an infringement on territorial sovereignty to those at the other end of the spectrum who felt it was wrong to subject military personnel contributing to a foreign state's defense to the jurisdiction of the foreign courts.[106]

The *Girard* case,[107] which dealt with a similar issue involving the Japanese Protocol,[108] caused an international controversy

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102. These were Belgium, France, Luxembourg, the United Kingdom and The Netherlands. *See* S. LAZAREFF, *supra* note 16, at 64 & n.3.

103. *See generally id.* at 63-64.

104. *Id.* at 128.

105. *See generally id.* at 128-29.

> We have happily come a long way from the days of Colonel Minuti. The colonel, a Venetian officer attached to the diplomatic mission in Turkey in 1749, wounded a Janissire (Turkish infantry soldier member of sultan's guard) as a result of a fight provoked by an insult from the latter. The colonel was handed over by Venice to the Turkish authorities who immediately proceeded to decapitate him. Today, verbal violence has replaced this procedure of summary justice.

Id. at 129.

106. Many United States Senators, for example, disagreed on this point. *See* Baldwin, *Foreign Jurisdiction and the American Soldier: The Adventures of Girard,* 1958 WIS. L. REV. 52, 58.

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

108. Protocol to Amend Article XVII of the Administrative Agreement

which not only threatened the very existence of the United States-Japan Alliance, but also became a major point of disagreement in the United States Senate debate on the NATO SOFA.[109] Pursuant to the Security Treaty of 1952 between Japan and the United States, certain offenses were designated as falling within the exclusive jurisdiction of one country, while in other instances both exercised concurrent jurisiction although one nation would have the primary right to exercise jurisdiction.[110] Army Specialist Girard was charged with the wrongful death of a Japanese woman on a firing range, and the United States decided to waive its right to primary jurisdiction in deference to Japanese authorities. At trial, Girard contended that delivering him to the Japanese Government violated his constitutional rights since he killed the woman while performing an official duty. In direct contrast to the "law of the flag" rationale in *The Schooner Exchange,* the *Girard* court explained that a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders by members of a visiting force, unless it expressly or impliedly consents to surrender its jurisdiction.[111]

The question before the Senate during the 1953 debates[112] was whether, in the absence of a treaty provision similar to the provision found in *Girard,* a receiving state should have jurisdiction to try United States soldiers. Senator Bricker, a firm supporter of the law of the flag, proposed a reservation to the NATO SOFA which, if adopted, would have deprived the receiving state of all criminal jurisdiction over offenses committed within its territory regardless of the nature of the offense.[113] Senator Bricker felt this extreme move necessary in order to guarantee that Constitutional rights of United States citizens would not be "bargained away" in a treaty. The United States Supreme Court later espoused a similar position in *Reid v. Covert.*[114]

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under Article III of the Security Treaty between the United States and Japan, Sept. 29, 1953, 4 U.S.T. 1846, T.I.A.S. No. 2848.

109. *See generally* Baldwin, *supra* note 106.

110. M. WHITEMAN, 6 DIGEST OF INTERNATIONAL LAW 746 (1968). There was also a provision allowing waiver of this primary right to assert jurisdiction in cases of particular importance to the other nation. *Id.*

111. 354 U.S. at 529.

112. 99 CONG. REC. 4659 (1953).

113. *See* Heath, *Status of Forces Agreements as a Basis for United States Custody of an Accused,* 49 MIL. L. REV. 45, 49 (1970).

114. 354 U.S. 1 (1957). In *Reid* the Supreme Court held that "[n]o agree-

After full debate[115] the Senate rejected the proposed reservation by a vote of 53 to 27.[116] The NATO SOFA has thus formed a model for all later negotiations concerning local jurisdiction over United States forces.[117]

Article VII of the NATO SOFA recognizes that the sending state and the receiving state have concurrent jurisdiction over the visiting force, and lays down the basic rules for the exercise of this jurisdiction.[118] If an act is an offense solely under the laws of *one* of the two states involved, paragraph two of article VII speci-

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ment with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution . . . ." *Id.* at 16. *Reid* was viewed as a particularly significant decision in military circles since it involved an executive agreement between the United States and the United Kingdom which permitted United States military courts to exercise exclusive jurisdiction over offenses committed in the United Kingdom by United States servicemen or their dependents. Agreement on Jurisdiction over Criminal Offenses by Armed Forces, July 27, 1942, United States-United Kingdom, 57 Stat. 1193, E.A.S. No. 355. The United States Government argued that the Uniform Code of Military Justice, 10 U.S.C.A. § 802(11) (West Supp. 1981), insofar as it provided for the military trial of dependents accompanying the armed forces, could be sustained as legislation necessary and proper to carry out United States obligations under the executive agreement. The Supreme Court replied that "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." 354 U.S. at 6. Citing the supremacy clause of the United States Constitution, the Court commented that "[t]here is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. *Id.* at 16.

115. 99 CONG. REC. 4659 (1953).

116. *Id.* at 8782.

117. *See* Coker, *The Status of Visiting Military Forces in Europe: NATO SOFA, a Comparison*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 115 (M. Bassiouni & V. Nanda eds. 1973); Jordan, *Creation of Customary International Law by Way of Treaty*, 9 A.F. JAG L. REV. 38 (1967).

118. Paragraph 1 of article VII of the NATO SOFA provides that:

> 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 offenses committed within the territory of the receiving State and punishable by the law of that State.

NATO SOFA, *supra* note 6, 4 U.S.T. at 1798.

fies that the state whose law has been violated would exercise exclusive jurisdiction.[119] Difficulties arise in situations in which an act is punishable both by the law of the sending state and the receiving state, and paragraph three resolves these problems by creating a system of priorities between the sending and receiving states for the right to exercise jurisdiction.[120] The receiving state, however, has the primary right to exercise this jurisdiction in most cases. The sending state gains the primary right to exercise jurisdiction only if the offense "arises out of" the performance of

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119. Paragraph 2 of article VII of the NATO SOFA provides that:

(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.

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

(i) treason against the State;

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

Id.

120. Paragraph 3 of article VII of the NATO SOFA provides that:

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

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

Id. at 1800.

official duties or is committed against another member of the visiting force, its civilian component, or a dependent.[121] An equally important provision promises that each state will give "sympathetic consideration" to a request from the other for a waiver of its primary right of jurisdiction. The concept of sympathetic consideration is so widely accepted that some authorities feel that it reflects customary international law.[122]

Paragraph five calls for the sending and receiving states to assist each other in the arrest of members of the force in the territory of the receiving state.[123] This is of primary importance to the subject matter of this Note because "[i]t is well established that a suspect or offender belonging to a force . . . does not enjoy any right of asylum and that the military installations of the sending State enjoy no extraterritorial privileges."[124] It is significant that the United States, which is the largest sending state under the NATO SOFA, has adopted a rather broad policy of cooperation. Although the language of the NATO SOFA calls only for assistance in the arrest of members of the force *in the territory* of the receiving state, the United States has gone further and has long had a policy of also returning to the custody of the receiving state accused personnel who had left the territory of the receiving state prior to the date when the receiving state began arrest attempts.

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121. Hansen v. Hobbs, 22 C.M.A. 181, 46 C.M.R. 181 (1973), suggests that the sending state's determination that an offense arose out of the accused's official duty may be subject to review in the receiving state's courts. 22 C.M.A. at 182, 46 C.M.R. at 182.

122. *See generally* Carnahan, *supra* note 9, at 336; Wijewardane, *Criminal Justice over Visiting Forces with Special Reference to International Forces*, [1965-66] 41 BRIT. Y.B. INT'L L. 122, 146.

123. Paragraph 5 of article VII of the NATO SOFA provides that:

> (a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.
>
> (b) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.
>
> (c) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.

NATO SOFA, *supra* note 6, 4 U.S.T. at 1800.

124. S. LAZAREFF, *supra* note 16, at 238.

Cases arising under the provisions of the NATO SOFA and non-NATO SOFA case law indicate that the United States broad policy of cooperation, even absent the mandate of the NATO SOFA, will prompt the United States to return military personnel who have committed offenses abroad to the receiving nation. The leading case under the NATO SOFA is *Holmes v. Laird*,[125] a case involving the arrest of a United States soldier stationed in the Federal Republic of Germany on charges of attempted rape. Trial in the district court (Landgerricht) culminated in conviction and a sentence to imprisonment for three years. The conviction became final after an appeal to the Federal Supreme Court (Bundesgerichtshof) was denied, and it became the United States Army's responsibility to turn Holmes over to the Federal Republic. Holmes had absented himself without leave, however, and returned to the United States where he surrendered himself to Army officials and filed a complaint based on deprivations of rights allegedly secured to him by the NATO SOFA and by the due process clause of the United States Constitution. Holmes asked for an injunction restraining the Army from surrendering him to the Federal Republic of Germany. The district court had held that even if Holmes' allegations regarding the lack of due process were proven, it was beyond the power of the judiciary to order corrective action.[126] In affirming the district court, the court of appeals said that matters "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[127] The court of appeals, citing *Wilson v. Girard* and *Reid v. Covert*,[128] reasoned that the locus of the crime in the Federal Republic of Germany entitled that nation to exclusive jurisdiction. Holmes' citizenship in the United States did not give him immunity to commit crimes in Germany, nor did it entitle him to a trial in any other mode than that allowed by the country whose law he violated. Holmes was returned to the Federal Republic of Germany to serve his sentence.

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125. 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972).

126. *Id.* at 1215.

127. *Id.* (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)).

128. Wilson v. Girard, 354 U.S. 524, 529 (1957); Reid v. Covert, 354 U.S. 1, 15 n.29, 48-49 (1957).

Williams v. Rogers[129] is a leading non-NATO case in which an airman stationed at Clark Air Base in the Philippines awaiting trial for the forcible abduction and attempted rape of an unmarried female Philippine national was inadvertently transferred to the United States. This transfer directly violated paragraph five of article XIII of the Military Bases in the Philippines Agreement.[130] Citing due process violations similar to those alleged in the *Holmes* case, Sergeant Williams sought to enjoin the Secretary of the Air Force from transferring him back to the Philippines.[131] The district court ruled the airman eligible for immediate transfer. On appeal, the court ruled that the Military Bases in the Philippines Agreement, authorized by a joint resolution of the Congress, gave the President broad powers to acquire military bases and to negotiate necessary jurisdictional arrangements implicit in the use of such bases.[132] It was in the interest of the United States for Sergeant Williams to remain on Clark Air Base pending the final disposition of the Philippine proceedings against him and that benefit produced a concomitant obligation to report to the Philippine authorities when required to do so.[133] The court found that since the case did not involve criminal charges under United States law in the courts of the United States, guarantees embodied in the United States Constitution did not apply. After the Supreme Court denied certiorari,[134] Sergeant Williams was returned to the Philippines.

A second important non-NATO case was brought the following year in the United States District Court for the Eastern District of Wisconsin. *Stark v. Seamans*[135] involved an airman charged with serious drug offenses in Taichung City, Taiwan, who sought an order enjoining the Secretary of the Air Force from transferring him to Chinese custody and compelling the Secretary to

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129. 449 F.2d 513 (8th Cir.), *cert. denied,* 405 U.S. 926 (1971).

130. Mar. 14, 1947, United States-Philippines, 61 Stat. 4019, Criminal Jurisdiction Arrangements Exchange of Notes, Aug. 10, 1965, United States-Philippines, art. XIII, 16 U.S.T. 1090, T.I.A.S. No. 5851. This agreement allowed the United States to retain custody of military personnel accused of committing a crime in the Philippines pending final judgment, but required that the United States produce such persons for Philippine punishment after final judgment.

131. 449 F.2d 513, 516 (8th Cir.), *cert. denied,* 405 U.S. 926 (1971).

132. *Id.* at 521.

133. *Id.* at 522.

134. 405 U.S. 926 (1971).

135. 339 F. Supp. 1200 (E.D. Wis. 1972).

transport him to the continental United States. The court held that since the defendant's alleged misconduct did not arise in the performance of his official duties, and since the Status of Forces Agreement gave the Republic of China exclusive criminal jurisdiction in this type of case, the United States was obliged to surrender him to the Chinese authorities. Under the precedents of *The Schooner Exchange* and *Wilson v. Girard,* the grant of exclusive jurisdiction to the Republic of China in the Republic of China-United States Status of Forces Agreement was a lawful act of the executive branch.[136] Starks was surrendered immediately, to stand trial in a Chinese court.

It is readily apparent from the case law that service members will be returned to the justice of the receiving state in situations in which the United States armed forces have jurisdiction under the Uniform Code of Military Justice over service members who are accused of criminal acts against local nationals in foreign lands where they are stationed under status of forces agreements which occur outside the performance of official duties. This is true even if the service members have subsequently been transferred or have absented themselves to the continental United States.[137]

C. *Due Process Rights of an Accused*

All developed legal systems recognize that a person should not

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136. *Id.* at 1201.

137. In addition to researching the case law in this area, the author has extensively discussed this issue with Judge Advocate General Officers at Headquarters United States Air Force, Washington, D.C.; Department of International Law Studies, United States Army War College, Carlisle Barracks, Pa.; International Law Division, United States Army Judge Advocate General School, Charlottesville, Va.; 412th Engineer Command, Karlsruhe, Federal Republic of Germany; Third United States Air Force, RAF Mildenhall Air Force Base, United Kingdom, 21st Support Command, Kaiserslautern, Federal Republic of Germany; and Headquarters United States Army-Europe and Seventh United States Army, Heidelberg, Federal Republic of Germany. After thorough discussions of the NATO SOFA and other status of forces agreements, none of these Judge Advocate General Officers were of the opinion that a service member who had been transferred out of the receiving state would be immune from an immediate transfer back to the receiving state to answer criminal charges under the laws of the receiving state. This is limited, of course, to situations in which the service member is still subject to the in personam jurisdiction of the United States military forces.

be placed in jeopardy twice for the same offense.[138] Nevertheless, customary international law does not prohibit two or more nations from punishing an individual for the same offense if each has prescriptive jurisdiction over the offense and enforcement jurisdiction over the accused.[139] In order to form a protective barrier against most forms of double jeopardy, the NATO SOFA provides that an accused may not be tried by both the sending and the receiving states unless the crime involved a violation of the disciplinary rules of the force.[140]

Due process is also assured in other provisions of the NATO SOFA. The NATO SOFA and many of the other status of forces agreements to which the United States is party also enumerate procedural rights to which an accused "shall be entitled."[141] This implies that the NATO SOFA *creates* rights for individual persons, but the Court of Military Appeals in *United States v.*

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138. *See* Oehler, *Recognition of Foreign Penal Judgments and Their Enforcement*, 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 261 (M. Bassiouni & V. Nanda eds. 1973).

139. *Id.*; *cf.* United States v. Richardson, 580 F.2d 946 (9th Cir. 1978).

140. Paragraph 8 of article VII of the NATO SOFA provides in part:

> Where an accused has been tried in accordance with the provision of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the same territory by the authorities of another Contracting Party.

NATO SOFA, *supra* note 6, 4 U.S.T. at 1802.

141. Paragraph 9 of article VII of the NATO SOFA provides that:

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

Id.

Carter[142] announced that the NATO SOFA "confers no *individual* rights and most assuredly seeks only to preserve those protections presently existing."[143] The court then listed the procedural rights contained in paragraph nine, article VII of the NATO SOFA as being "preserved" rather than "created" rights.[144] During the initial negotiations the other NATO powers had acquiesced in United States proposals that specific rights be guaranteed to members of visiting forces, since all parties realized that the United States would be the principal sending state under the SOFA. For this reason, the "due process" portion of the SOFA seeks to "preserve specifically *United States* due process rights, as those rights were understood in 1949."[145]

V. Three Possible Courses of Action in the Hypothetical Case

A hypothetical case involving a member of the Army National Guard accused of homicide while serving on a short tour of duty in the United Kingdom was discussed earlier in this Note, along with three possible courses of action for military authorities. As a guardsman, the captain is on "Title Thirty-Two state status"[146] while in his home state. As a result of his "state status," until he is transferred to Title Ten federal status[147] he is not subject to

142. 16 C.M.A. 277, 36 C.M.R. 433 (1966).

143. 16 C.M.A. at 281, 36 C.M.R. at 437.

144. 16 C.M.A. at 282, 36 C.M.R. at 438.

145. Snee, *NATO Agreements on Status: Travaux Preparatoires* 54 U.S. Naval War College International Studies 165 (1961). *See generally* Carnahan, *supra* note 9, at 347-49.

146. The training and pay status of the Army National Guard is authorized by 32 U.S.C.A. § 502 (Supp. 1981). This training normally consists of twelve weekend assemblies at a hometown National Guard Armory and fifteen days of annual training at a nearby military reservation. Guard units train with active Army doctrine, equipment, and pay under a state organization headed by the state Adjutant General and with the assistance of active Army advisor personnel. Although it is a Reserve component of the United States Army, a Guard unit is wholly a state organization and is available to the governor for use in civil emergencies until it is "federalized."

147. Uniform Code of Military Justice, 10 U.S.C. §§ 801-935 (1976). Section 802 of the Uniform Code of Military Justice states that the Code applies to members of a regular component of the armed forces and to members of a reserve component while they are on inactive duty training and authorized by written orders voluntarily accepted.

the Uniform Code of Military Justice,[148] the orders of the United States Army, or to the orders of the President. While on "state status" he is legally a member of a state, as opposed to federal, force. His commander-in-chief is the governor of his home state. While the guardsman is on his regular active federal training, however, he is subject to the Uniform Code of Military Justice and his commander-in-chief is the President of the United States.

Assume that the National Guard captain has been transferred to Title Ten federal status for his regular two weeks of annual training. He has been sent to the United Kingdom as a part of a three-man war planning cell. While in Liverpool, he becomes involved in an altercation with an English national who later disappears. The captain completes his two-week tour of duty, returns to his home town, and reverts to "state status." It is only at this point that British police authorities learn that the national was killed in the altercation and locate two witnesses who agree to testify that they saw the captain commit the murder.

A. *Applicability of the UCMJ in the Hypothetical Case*

Each of the courses of action available to military authorities requires an analysis of the prerequisites that must exist before that course can be pursued. The first option is to bring the captain to trial for murder under the Uniform Code of Military Justice (UCMJ).[149] Before deciding whether the UCMJ applies, a court must first consider whether the United States or the United Kingdom has jurisdiction over such an offense since the UCMJ would be applicable only if the United States had jurisdiction. In the United Kingdom, treaties are not the "law of the land" and do not become operative in domestic law until implemented by passage of an act of Parliament. The NATO SOFA was implemented by the Visiting Forces Act, 1952.[150] The operative section

148. Transfer of the National Guard into the active Army for periods of federal service is authorized by 10 U.S.C.A. § 672 (Supp. 1981). This may occur when an entire unit is called into federal service by the President in time of national emergency. If a single guardsman is called to a tour of duty outside the continental United States, he is customarily called into federal service under Title Ten so that virtually all military personnel abroad serve under a similar legal status. Guardsmen become subject to the Uniform Code of Military Justice when they are on federal duty with the active Army under written orders voluntarily accepted by them. 10 U.S.C.A. § 802(3) (Supp. 1981).

149. Uniform Code of Military Justice, 10 U.S.C.A. § 918 (Supp. 1981).

150. 15 & 16 Geo. 6 & 1 Eliz. 2, c. 67.

of the Visiting Forces Act is quite similar to paragraph three, article VII of the NATO SOFA.[151] Under both formulations, the only likely situation in which the United States would have exclusive jurisdiction would occur when the murdered man was also a member of the United States force serving in the United Kingdom. Only in this situation would a court reach the issue of the applicability of the Uniform Code of Military Justice.

Unfortunately, our hypothetical guardsman cannot be subjected to the Uniform Code of Military Justice because, as the facts of this case indicate, he returned to the United States and reverted to "Title Thirty-Two state status"[152] at the end of his two-week annual training tour of duty. He is no longer under the jurisdiction of the United States Army and the Uniform Code of Military Justice. As a member of a state body of a reserve component of the United States Army, he may only be ordered to inactive duty training or Title Ten federal status[153] "on written orders voluntarily accepted"[154] by him, or in time of national emergency when the President calls his entire unit into "Title Ten federal

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151. Subject to the provisions of this section, a person charged with an offense against United Kingdom law shall not be liable to be tried for that offense by a United Kingdom court if at the time when the offense is alleged to have been committed he was a member of a visiting force or a member of a civilian component of such a force and—

(a) the alleged offense, if committed by him, arose out of and in the course of his duty as a member of that force or component, as the case may be; or

(b) the alleged offense is an offense against the person, and the person or, if more than one, each of the persons in relation to whom it is alleged to have been committed had at the time thereof a relevant association whether with that force or with another force of the same country; or

(c) the alleged offense is an offense against property, and the whole of the property in relation to which it is alleged to have been committed (or, in a case where different parts of that property were differently owned, each part of the property) was at the time thereof the property either of the sending country or of an authority of that country or of a person having such an association as aforesaid:

Provided that this subsection shall not apply if at the time when the offense is alleged to have been committed the alleged offender was a person not subject to the jurisdiction of the service courts of the country in question in accordance with the last foregoing section.

Id. § 3.

152. 32 U.S.C.A. § 502 (Supp. 1981); *see* note 146 *supra.*

153. 10 U.S.C.A. § 802(3) (Supp. 1981); *see* note 148 *supra.*

154. *Id.*

status." A national emergency is not a part of the hypothetical problem, and it is inconceivable that the guardsman would voluntarily consent to being returned to federal service in order that he might answer to a court-martial for the crime of murder. So the first option of applying the Uniform Code of Military Justice is foreclosed as a possible course of action in the hypothetical situation.

B. *Applicability of the NATO SOFA to the Hypothetical Case*

The second option in our hypothetical case is for the Army to order the accused to return to the United Kingdom to stand trial in the courts of that nation, in accordance with the precedents in *Wilson v. Girard*,[155] *Reid v. Covert*,[156] *Holmes v. Laird*,[157] *Williams v. Rogers*,[158] and *Stark v. Seamans*.[159] If the murdered man was a citizen of the United Kingdom, then paragraph 3(b), article VII of the NATO SOFA grants the primary right to exercise jurisdiction to the United Kingdom. Additionally, under section three of the United Kingdom's Visiting Forces Act, United Kingdom courts would also have domestic authority for jurisdiction over the accused. Thus there is no doubt that these precedents absolutely obligate the United States Army to return the guardsman to stand trial in Liverpool before Her Majesty's court.

Unfortunately, the Army once again lacks the necessary in personam jurisdiction to return the guardsman to England because the accused is no longer under Title Ten federal status and is totally beyond the reach of United States military justice. Unless the guardsman voluntarily consents to being recalled to active duty, or unless a national emergency aries which requires the President to call the accused's entire National Guard unit into Title Ten federal status, the United States Army cannot fulfill its obligation to the United Kingdom under the NATO SOFA. Again, it is inconceivable that such an accused would voluntarily consent to being returned to federal service so that he might stand before the Queen's Court in Liverpool for the crime of murder. Thus the direct applicability of the NATO SOFA through

155. 354 U.S. 524 (1957).
156. 354 U.S. 1 (1957).
157. 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972).
158. 449 F.2d 513 (8th Cir.), *cert. denied*, 405 U.S. 926 (1971).
159. 339 F. Supp. 1200 (E.D. Wis. 1972).

the United States Army is foreclosed as a possibility.

C. *Applicability of the Extradition Treaty*

The third option in our hypothetical case involved action by the Government of the United States (as distinguished from the United States Army) under the terms of the United States—United Kingdom Extradition Treaty[160] to return the accused to British justice. This process would be totally separate from the military context of either the Uniform Code of Military Justice or the NATO SOFA. While the existence of the SOFA might create a general feeling of obligation on the part of United States officials to return the guardsman, since the SOFA would not apply the accused would be treated as any civilian whose extradition was requested by the United Kingdom.

Extradition occurs when "persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment."[161] It is an extremely technical process requiring precision and cooperation between two sovereign systems that often exhibit different fundamental legal theory and procedure. Extradition enables states to surrender fugitive criminals to one another without diminishing either party's sovereignty, without demeaning either party's institutions of criminal justice, and without violating the traditional rights of the accused fugitive. This is a difficult task, and the rejection of an extradition request with the concomitant failure of the extradition process may be perceived as an insult to the requesting state's judicial system.[162]

1. Extradition Principles

Extradition in the United States is solely the prerogative of the federal government[163] and not a power of the several states of the Union.[164] In an early landmark case, *United States v. Rau-*

160. Treaty of Extradition, *supra* note 7.

161. M. WHITEMAN, *supra* note 110, at 727.

162. *See* Blakesley, *Extradition Between France and the United States: An Exercise in Comparative and International Law,* 13 VAND. J. TRANSNAT'L L. 653, 655-56 (1980).

163. *See* United States v. Rauscher, 119 U.S. 407 (1886); U.S. CONST. art. I, § 10.

164. M. WHITEMAN, *supra* note 110, at 727.

scher,[165] the Supreme Court laid down the basic principles governing extradition:

> It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.[166]

And in *Factor v. Laubenheimer,*[167] the Court further defined the concept of extradition:

> [T]he principles of international law recognize no right to extradite apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.[168]

The Court went further in 1936 and held that not only is there no duty to extradite apart from a duty under a specific treaty, but there is also no authority in United States law to extradite short of an express legislative or treaty stipulation.[169]

> Applying, as we must, our law in determining the authority of the President, we are constrained to hold that his power, in the absence of a statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondent.[170]

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165. 119 U.S. 407 (1886).
166. *Id.*
167. 290 U.S. 276 (1933).
168. *Id.* at 287.
169. Blakesley, *supra* note 162, at 659.
170. Valentine v. United States, 299 U.S. 5, 18 (1936).

In the United States, treaties are the "law of the land," and implementing legislation is not necessary for extradition treaties, which are generally self-executing. A fugitive may be arrested under the terms of the agreement alone, even absent enabling legislation.[171] While statutes have been enacted relating to extradition, these laws do not authorize extradition apart from treaty. The operation of these statutes and the authority they confer are dependent on the existence of an extradition treaty with a foreign government.[172] In *Valentine v. United States*,[173] the Court said that the compelling reason for judicial refusal to grant extradition without treaty authority is the

> fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. . . . Legal authority does not exist, save as it is given by act of Congress or by the terms of a treaty . . . .[174]

A similar inability to grant extradition in the absence of a treaty exists in the United Kingdom. The United Kingdom's law authorizing extradition may be applied only "[w]here an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals."[175] Fortunately for the military authorities in the hypothetical case, the United States-United Kingdom Extradition Treaty[176] clearly charts the course of action necessary to extradite the guardsman.

The Department of State exerts powerful influence on judicial interpretations of the validity and application of treaty provisions since the courts often rely on executive expertise to resolve these issues. This reliance is a natural outgrowth of the executive power to conduct foreign affairs.[177] Where doubts exist as to the mean-

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171. 18 U.S.C.A. § 3181 (West Supp. 1980); *see* M. WHITEMAN, *supra* note 110, at 734.

172. In re Metzger, 46 U.S. (5 How.) 176, 188 (1847).

173. 299 U.S. 5 (1936).

174. *Id.* at 9.

175. Extradition Act of 1870, 33 & 34 Vict., c. 52, § 2.

176. Treaty of Extradition, *supra* note 7.

177. *See* Blakesley, *supra* note 162, at 661; L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959).

ing of certain provisions, a construction consistently applied by the Department of State is of great weight.[178]

Many extradition treaties contain a provision that neither of the contracting parties shall be bound to surrender its own citizens.[179] Even the Greek city states, the ancient Italian cities, and other great civilizations exempted their citizens from extradition.[180] In situations in which a treaty has thus limited extradition, the United States Supreme Court has held that the exemption of nationals creates an absolute bar to the extradition of United States citizens.[181] The policy preference of the United States Government is to extradite fugitives regardless of nationality.[182] There are four differing approaches used in its extradition treaties, however. The first, exemplified by the 1909 Extradition Treaty between the United States and France,[183] provides that the parties are not bound to extradite their nationals. This completely and absolutely bars extradition from the United States. The second approach, which was adopted by the 1970 Extradition Treaty between the United States and France,[184] does not involve an express obligation to extradite nationals. The President is expressly given discretionary authority to extradite nationals on a case-by-case basis. The third approach is exemplified by the United States-United Kingdom Extradition Treaty of 1931[185] which remains silent on the subject of extradition of nationals.

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178. Factor v. Laubenheimer, 290 U.S. 276, 295 (1933); Charleton v. Kelly, 229 U.S. 447, 468 (1913).

179. Of the 163 extradition treaties printed in the League of Nations Treaty Series and the first 550 volumes of the United Nations Treaty Series, 98 treaties relieve the requested state from extradition duty, 57 give the requested state a discretionary right to refuse to surrender its own nationals, and only 8 provide for extradition regardless of the nationality of the fugitive. I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 24, 96, app. II (1971).

180. *See* Blakesley, *supra* note 162, at 690.

181. Valentine v. United States, 299 U.S. 5, 9-10 (1936). The power to extradite must be specifically granted in the extradition treaty, and where there is no positive statement a negative phrase cannot be construed as a grant of power to the President. *Id.* at 10.

182. *See* Blakesley, *supra* note 162, at 692.

183. Treaty of Extradition, Jan. 6, 1909, United States-France, 37 Stat. 1526, T.S. No. 561.

184. Proclamation on Extradition, Feb. 12, 1970, United States-France, 22 U.S.T. 407, T.I.A.S. No. 7075.

185. *See, e.g.*, Extradition Treaty, Dec. 22, 1931, United States-United Kingdom, 47 Stat. 2122, T.S. No. 849.

The fourth, exemplified by the present United States-United Kingdom Extradition Treaty, expressly provides for extradition without regard to nationality.[186] Therefore, the United States is able to maintain its policy of extraditing its own nationals, while expecting the United Kingdom to reciprocate.

2. Terms of the Treaty

Article III of the current United States-United Kingdom Extradition Treaty[187] provides that extradition shall be granted for an offense listed in the schedule[188] annexed to the Treaty only if the offense is punishable[189] under the laws of both countries by imprisonment for more than one year or by death and constitutes a felony under the laws of the United States. In *Collins v. Loisel*[189.1] the Supreme Court had made it plain that "an offense is extraditable only if the acts charged are criminal by the laws of both countries,"[190] and crimes which the United States holds to be felonies such as murder, manslaughter, and maliciously wounding or inflicting grievous bodily harm, are the first three offenses listed on the schedule.

Most extradition treaties exempt certain types of offenses even when these offenses otherwise would constitute extraditable offenses. While these exemptions do not apply to the instant hypo-

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186. *See, e.g.*, Treaty of Extradition, *supra* note 7. Article I provides that "each contracting Party undertakes to extradite to the other, in the circumstances and subject to the conditions specified in this Treaty, *any person* found in its territory who has been accused or convicted of any offense within Article III, committed within the jurisdiction of the other Party." *Id.*, 28 U.S.T. at 229 (emphasis added); Convention on Extradition, Dec. 10, 1962, United States-Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476.

187. *See* Treaty of Extradition, *supra* note 7, 28 U.S.T. at 229.

188. *Id.* at 235.

189. The principle of speciality requires that a fugitive returned to a requesting nation through extradition proceedings be tried only for the offense for which he was extradited. United States v. Rauscher, 119 U.S. 407 (1886). Before he may be tried for additional offenses committed before his extradition, he must be released from custody and allowed to leave the country. This principle is addressed in article XII of the Treaty of Extradition, which provides that before a person who is extradited may be prosecuted for a "new" offense committed before his extradition, he must be allowed to return to the territory of the requested party, or alternatively, he must have thirty days during which he is free to so return. Treaty of Extradition, *supra* note 7, 28 U.S.T. at 233.

189.1. 259 U.S. 309 (1921).

190. *Id.* at 311.

thetical, they may be instructive in cases involving a slight variation of the facts found in the hypothetical. Common exemptions include political, religious, fiscal, and military offenses, although it is often hard to precisely define these crimes. A good example of this definitional difficulty is encountered when examining the political offense. While most treaties grant an exemption when the act with which the accused is charged is a political offense, a distinction is usually[191] drawn between a "purely" political offense such as treason or sedition as opposed to a "relative" political offense such as murder committed in the course of a rebellion. For example, under a Norwegian law both purely political and relatively political offenses are excepted from extradition: "[e]xtradition may not be effected for any political offense, or for any ordinary offense committed in connection with a political offense and with intent to promote the purpose aimed at by such political offense."[192] In the United States, a Second Circuit decision has held that persons may not be extradited for political offenses.[193] The decision whether or not an offense is political is usually left to the government on which the demand for extradition is made, but in the absence of such a treaty provision the right to determine this question inheres in the government which has made the demand.[194] The political exemption is contained in article V[195] of the United States-United Kingdom Extradition Treaty. In addition, article V of this Treaty bars extradition in the interest of preventing double jeopardy. Even though a prohibition against the imposition of double jeopardy pervades the internal criminal justice systems of both the United Kingdom and the United States, in certain previous cases it was possible for a person to be punished in a foreign nation and then punished again after extradition. This was possible because, in both the United Kingdom and the United States, foreign judgments are not a bar to prosecution, although they may be considered by the local court.[196] In addition, United States jurisdiction is not lim-

191. M. WHITEMAN, *supra* note 110, at 800.

192. Law of June 13, 1908, § 3 (Norway), *Lov om Utlevering av Forbrydere, quoted in* M. WHITEMAN, *supra* note 110, at 800.

193. Ex rel. Giletti v. Commissioner of Immigration, 35 F.2d 687, 689 (2d Cir. 1929).

194. In re Ezeta, 62 F. 972 (N.D. Cal. 1894). *See also* M. WHITEMAN, *supra* note 110, at 859.

195. Treaty of Extradition, *supra* note 7, 28 U.S.T. at 230.

196. In People v. Papaccio, 140 Misc. 696, 251 N.Y.S. 717 (1939), the accused

ited to crimes committed within the sovereign territory of the United States.[197] Another important exemption in article V provides that extradition cannot be barred by a statute of limitations found in the law of the requesting or the requested state.[198] Most extradition treaties also contain this type of provision, but the extradition laws of the United States contain no provision with respect to a statute of limitations.[199] Therefore, if a treaty has no provision allowing extradition in situations in which the statute of limitations has run, such as the hypothetical case in which[200] the United States is the requested state, no limitation of United States law is applied in the case. A final section of article V provides that "[e]xtradition may be refused on any other ground which is specified by the law of the requested Party."[201] Since nothing in the fact pattern of the hypothetical indicates that there will be any difficulty involving a political offense, double jeopardy, or a statute of limitations, these matters should present no bar to the extradition of the National Guardsman.

3. Extradition Procedures

In accordance with article VII[202] of the Treaty, a request for extradition made by the United Kingdom would normally proceed through diplomatic channels. A British request for extradition of a fugitive located in the United States would initially be presented to the Department of State, and the Secretary would make a policy decision as to whether extradition would be in the best interest of the United States. The twin imperatives of international comity and justice would influence the decision to extradite the fugitive to the United Kingdom.[203] If the Secretary of State decides to proceed with the matter, he will issue a "preliminary mandate" to the Department of Justice certifying that the United Kingdom has made a formal request for the arrest of the

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was prosecuted although he had already been convicted by an Italian court for a crime committed in New York.

197. *See* Blakesley, *supra* note 162, at 695.

198. Treaty of Extradition, *supra* note 7, 28 U.S.T. at 203.

199. M. WHITEMAN, *supra* note 110, at 864.

200. *See* Caputo v. Kelly, 96 F.2d 787, 789 (2d Cir. 1938).

201. Treaty of Extradition, *supra* note 7, 28 U.S.T. at 230.

202. *Id.* at 231.

203. Letter to the author from Rex L. Young, Office of International Affairs, Criminal Division, United States Department of Justice (April 29, 1981) [hereinafter cited as Young Letter].

accused and requesting "any Justice . . ., Judge . . ., or . . . Commissioner"[204] to issue a warrant for the arrest of the accused. Through the efforts of the Department of Justice[205] a warrant is then issued by a court after a complaint made under oath has been filed along with the preliminary mandate. The alleged fugitive may then be arrested and detained pending his hearing.[206]

According to paragraph 2 of article VII of the Treaty, the original extradition request from the United Kingdom must include the identity of the accused, a statement of the facts of the offense, the text of the applicable law, the maximum punishment and statute of limitations, and a statement of the legal provisions which establish the extraditable character of the offense.[207] In addition, there must be a copy of such evidence as would justify trial if the offense had occured within the United States, evidence that the accused is indeed the person named in the warrant, and a copy of the British warrant for the arrest of the accused.[208] Finally, the request must be sealed with the official seal of the appropriate minister of the Government of the United Kingdom and certified by the United States Ambassador to the United Kingdom.[209] In the United States, the judicial assistance in the initial decision to extradite occurs at a public[210] hearing conducted by "any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction by any state . . . ."[211] It is the function of the extradition magistrate at the hearing to determine whether the requested state has presented a proper case for the accused's extradition. This hearing process involves:

> determining whether the person brought before him is the person who is named in the extradition request and its supporting documents, whether a valid treaty exists between the requesting State and the United States, whether the evidence presented either shows that the accused has been convicted in the requesting State

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204. M. WHITEMAN, *supra* note 110, at 916-17 (form for Preliminary Mandate).

205. Young Letter, *supra* note 203.

206. *Id.*

207. Treaty of Extradition, *supra* note 7, 28 U.S.T. at 231.

208. *Id.* ¶ 3.

209. *Id.* ¶ 5, 28 U.S.T. at 231-32.

210. 18 U.S.C. § 3189 (1976). These hearings are usually public.

211. *Id.* § 3184.

> of committing, or establishes probable cause, or reasonable ground, to believe that the accused committed, acts constituting an offense named in the treaty. It may also involve determination whether any of the prohibitions mentioned in the applicable treaty exists (e.g., national of the requested State, offense of a political character, or prosecution barred by lapse of time).[212]

The extradition magistrate need not find that the accused is in fact guilty of the crime with which he is charged; it is only necessary that the evidence[213] be heard and considered so that the magistrate may determine whether "he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty."[214] The extradition magistrate will commit the accused for surrender to the requesting state only if the evidence against the fugitive would have been sufficient to justify commitment of the accused for trial had the offense been committed in the United States. The Supreme Court has likened this process to one of

> those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.[215]

While habeas corpus proceedings permit some limited review of the decision of an extradition magistrate, there is no appeal to any court from such a decision whether that decision be to commit the accused for surrender or to refuse to do so.[216] Similarly, there is no provision for bail within the extradition laws of the United States.[217]

Once the extradition magistrate has decided to commit the accused for surrender to the requesting state, the process of surrender becomes an executive function exercised by the Secretary of

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212. M. WHITEMAN, *supra* note 110, at 944-45.

213. If there are witnesses whose testimony is material to the defense of the accused and he is without funds to pay them, they will be paid in the same manner as those subpoenaed on behalf of the United States. 18 U.S.C. § 3191 (1976).

214. Factor v. Laubenheimer, 290 U.S. 276, 291 n.3 (1933).

215. Benson v. McMahon, 127 U.S. 457, 463 (1887).

216. Collins v. Miller, 252 U.S. 364 (1920).

217. M. WHITEMAN, *supra* note 110, at 1035.

State.[218] The Executive is not required to surrender the accused merely because the extradition magistrate made a permissive judicial determination in favor of extradition. It is only after the Secretary of State issues a "warrant for surrender" that the United States marshall for the district in which the fugitive is held is authorized to deliver the fugitive to any duly authorized representative of the requesting government.[219]

Our hypothetical guardsman is present within the territorial jurisdiction of the United States Government. The facts of this case do not indicate that there is any chance he will benefit from an exemption. Certain procedural safeguards from the extradition rules protect the guardsman during the extradition hearing and later, should there be a habeas corpus hearing. Since the United States and the United Kingdom have an announced policy of extraditing fugitives regardless of nationality, the guardsman would be surrendered to the Government of the United Kingdom to stand trial for murder.

VI. CONCLUSION

Given the facts of the hypothetical case, the Secretary of State undoubtedly would feel a moral obligation, engendered by the spirit and intent of the NATO SOFA, to extradite a guardsman accused by the United Kingdom of murder. From the British point of view, the guardsman was a member of the NATO visiting force in the United Kingdom when the crime occurred, and the fact that two weeks later he was not subject to the in personam jurisdiction of the United States Army and the Uniform Code of Military Justice would be a distinction without substance.

The procedures specified under the United States-United Kingdom Extradition Treaty could and would be used as an effective means of returning such a fugitive to stand trial for the crime of murder. This Treaty negates the significance of the law of the flag embodied in the absolute or classical theory of foreign sovereign immunity prior to the twentieth century, rendering that law inapplicable in this case. Under the modern theory of restrictive sovereign immunity, the immunity of the sovereign would be recognized with regard to sovereign or official public acts (*jure imperii*) but not with respect to private acts (*jure gestionis*) such as an

218. 18 U.S.C. §§ 3185-3186 (1976).
219. M. WHITEMAN, *supra* note 110, at 1046.

alleged off-duty murder.[220] Restrictive sovereign immunity, coupled with territorial sovereignty, would be the operative principles in achieving justice in this hypothetical case involving the law of the flag, the law of extradition, the Uniform Code of Military Justice, and the NATO Status of Forces Agreement.

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220. *Id.* at 553.