

## UNITED STATES OBLIGATIONS UNDER STATUS OF FORCES AGREEMENTS: A NEW METHOD OF EXTRADITION?

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### I. INTRODUCTION — AN OVERVIEW OF EXTRADITION

*The laws of the United States . . . receive every fugitive and no authority has been given to our Executives to deliver them up.*

Thomas Jefferson<sup>1</sup>

The first extradition case in the young American Republic nearly resulted in a censure of President John Adams for directing a Federal Judge to permit British naval personnel to take custody of an alleged murderer who claimed to be an American citizen pressed into British service.<sup>2</sup> Several congressmen felt that the matter should have been presented to the court for a determination of whether the accused was guilty and, in any event, the case should have been tried in an American court.<sup>3</sup> Then Representative John Marshall helped defeat the notion for censure by a speech characterized as "one of the most consummate juridical arguments . . . ever pronounced in the halls of legislation."<sup>4</sup> He demonstrated that the offense had been committed in a location subject to British jurisdiction, that a solemn treaty required that the individual be surrendered to Great Britain when there was sufficient evidence of

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<sup>1</sup> I. J. MOORE, *EXTRADITION AND INTERSTATE RENDITION* 23 (1891).

<sup>2</sup> 10 ANNALS OF CONG. 532-33, 541-78 (1800) [1789-1824]. See *United States v. Robins* (sic), 27 F. Cas. 825 (No. 16175) (D.C.S.C. 1799). The case involved one Jonathan Robbins alias Thomas Nash. He purportedly admitted being an Irishman before being hung in chains. *Id.* at 842.

<sup>3</sup> B. ZIEGLER, *THE INTERNATIONAL LAW OF JOHN MARSHALL* 319-20 (1939) [hereinafter cited as B. ZIEGLER].

<sup>4</sup> Story, *Life, Character and Services of Chief Justice Marshall*, in 3 J. DILLIO, *JOHN MARSHALL* 357 (1903).

his criminality, and that President Adams had no choice but to surrender the individual to the British once he had determined that the evidence was sufficient and the treaty required the surrender.<sup>5</sup>

The controversy surrounding the surrender of the sailor and his subsequent execution by the British following a court-martial may have contributed to President Adams' defeat in the 1800 election.<sup>6</sup> At any rate, the issue of extradition lay dormant for more than a generation after the Jay Treaty provision requiring extradition of murderers and forgers expired in 1807. No further extradition arrangements were made by the United States until the Webster-Ashburton Treaty of 1842,<sup>7</sup> which led to a series of extradition treaties with other nations. At about this same time Congress enacted a statute, that survives today with little modification, entrusting the courts with the initial responsibility of acting upon extradition requests from abroad by determining whether sufficient evidence exists to warrant the trial of the alleged fugitive, and whether the treaty requires the extradition upon a positive answer to the first issue.<sup>8</sup>

Extradition is an emotional subject where two conflicting passions may affect the legal result. When one considers the desirability of insuring that felons should be subjected to trial to determine innocence or guilt and appropriate punishment, there is no better place for the trial than where the offense occurred as the witnesses can be easily assembled. On the other hand, if one feels that his own system of courts is far superior and fairer than any other and has a distrust of foreign methods, then the alleged criminal should not be surrendered. Older writers in international law felt that all states were obligated either to deliver up those fugitives who had left the location where the offense was committed to the sovereign over that territory,<sup>9</sup> or to proceed against

<sup>5</sup> B. ZIEGLER, *supra* note 3, at 320-23.

<sup>6</sup> See *United States ex rel. Martinez-Angosto v. Mason*, 344 F.2d 673, 684 (2d Cir. 1965).

<sup>7</sup> The Treaty of Amity, Commerce and Navigation with Great Britain (Jay Treaty), Nov. 19, 1794, [1795] 8 Stat. 116, T.S. No. 105, contained in Article XXVII a provision for the mutual delivery up to justice of fugitives charged with murder and forgery. This article expired in accord with the Treaty's terms on October 28, 1807, and the lack of friendly relations between the United States and Great Britain at the time prevented any steps to renew it. R. RAFUSE, *THE EXTRADITION OF NATIONALS* 15 (1939) [hereinafter cited as RAFUSE]. Although subsequent years brought negotiations with Great Britain, Mexico and Spain looking toward extradition treaties, none were successful until the Treaty with Great Britain as to Boundaries, the Slave Trade and Giving Up of Criminals (Webster-Ashburton Treaty), Aug. 9, 1842, [1842] 8 Stat. 572, T.S. No. 119. This treaty was followed in 1843 by extradition arrangements with France and similar treaties with several other states in the next decade. 1 J. MOORE, *supra* note 1, at 83-100. See also 1 SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 15-16 (1971) [hereinafter cited as SHEARER].

<sup>8</sup> Act of Aug. 12, 1848, ch. 168, 9 Stat. 302 (now 10 U.S.C. §§ 3184, 3186, 3188, 3190 (1970)).

<sup>9</sup> H. GROTIUS, *THE LAW OF WAR AND PEACE* 527 (1646 ed. J. Scott transl. 1925).

the criminal in their own courts.<sup>10</sup> However, it is settled practice today that there is no requirement to extradite individual criminals in the absence of extradition treaties between the state desiring to try or punish the individual and the state where the accused happens to be.<sup>11</sup>

Civil law countries have generally been able to resolve the emotional conflicts generated by extradition by willingly extraditing aliens and providing for punishment of nationals in their own courts.<sup>12</sup> Common law nations, where jurisdiction is commonly limited to the location of the offense,<sup>13</sup> frequently provide among themselves for extradition of all persons, but enter into treaties providing only limited requirements of extradition of nationals with civil law countries.<sup>14</sup>

The United States, whether it would be constitutionally permissible or not,<sup>15</sup> has not adopted any criminal code which would generally provide for the punishment of its own citizens for ordinary crimes committed abroad.<sup>16</sup> The major exception to this is the Uniform Code of

<sup>10</sup> *Id.*; E. DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 137 (1st ed. J. Scott transl. 1916).

<sup>11</sup> SHEARER, *supra* note 7, at 23-24.

<sup>12</sup> *Id.* at 102-10.

<sup>13</sup> *See, e.g.*, U.S. CONST. art. III, § 2, cl. 3.

<sup>14</sup> SHEARER, *supra* note 7, at 21, 68-72. The United States on January 1, 1972 had effective extradition treaties with the following countries which contained no reference to the nationality of the fugitive: Italy, Mar. 23, 1868, [1868] 15 Stat. 629, T.S. No. 174; Ecuador, June 28, 1872, [1873] 18 Stat. 199, T.S. No. 79; United Kingdom, Dec. 22, 1931, [1932] 47 Stat. 2122, T.S. No. 849; Union of South Africa, Dec. 8, 1947, [1951] 2 U.S.T. 884, T.I.A.S. No. 2243; Israel, Dec. 10, 1962, [1963] 14 U.S.T. 1707, T.I.A.S. No. 5476. Included under the Extradition Treaty with the United Kingdom, or previous ones with that nation also making no exemption for nationals or citizens, are the following countries: Australia, Barbados, Botswana, Burma, Canada, Ceylon, Cyprus, Fiji, Gambia, Ghana, Guyana, India, Ireland, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Malta, Mauritius, Nauru, Nigeria, Pakistan, Sierra Leone, Singapore, Swaziland, Tanzania, Tonga, Trinidad and Tobago, and Zambia. U.S. DEP'T OF STATE, *TREATIES IN FORCE* (1972). New Zealand was previously covered by treaties with the United Kingdom, U.S. DEP'T OF STATE, *TREATIES IN FORCE* 165 (1970), but a recent treaty has superceded such obligations. Under the New Extradition Treaty with New Zealand, Jan. 12, 1970, [1970] 22 U.S.T. 1, T.I.A.S. No. 7035, extradition of nationals is discretionary with the executive authorities of the state requested to deliver the fugitive. *See* note 22 *infra*.

Under the doctrine of *Charlton v. Kelly*, 229 U.S. 447 (1913), extradition treaties containing no mention of the nationality of the fugitive compel the United States to surrender American citizens if all the other requirements of the treaty are satisfied.

<sup>15</sup> If criminal conduct by American citizens abroad were considered an offense against the law of nations, Congress could define and provide for the punishment thereof. U.S. CONST. art. I, § 8, cl. 10. *See Blackmer v. United States*, 284 U.S. 421, 436-37 (1932); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285-86 (1952). *Cf. American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-57 (1909).

<sup>16</sup> 45 AM. JUR.2D, *Int'l Law* § 82 (1969). Many federal statutes provide for the punishment of certain common law felonies such as murder, rape and robbery committed within the special maritime and territorial jurisdiction of the United States. *See, e.g.*, 18 U.S.C. §§ 2031-32, 2111 (1970). *But see id.* at § 953. Congress has recently been considering legislation that would provide

Military Justice,<sup>17</sup> which applies in all places, but is effectively limited to persons on active duty in the Armed Forces.<sup>18</sup>

In order to avoid creating an absolute immunity for its citizens who commit crimes overseas, the United States has been generally willing to extradite its own citizens on a reciprocal basis with other states.<sup>19</sup> Civil law countries have normally refused, either on the basis of internal law or their own constitutions, to enter into treaties that compel the extradition of their own citizens.<sup>20</sup>

When confronted with a treaty provision that is fairly common providing that "neither party shall be required to deliver up its own subjects," the Supreme Court found that there was no authority for the United States to surrender fugitive American citizens to France.<sup>21</sup> Since

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for the punishment of civilians accompanying American armed forces overseas in federal courts within the United States. See NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: DRAFT OF A NEW FEDERAL CRIMINAL CODE xxxi, 19 (1970). See also Agata, *Extraterritorial Jurisdiction: Section 208*, in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 69-76 (1970). The proposed new code would cover in part the immunities from United States criminal proceedings generated by the Supreme Court decisions cited in note 18 *infra*. See Mills, *O'Callahan Overseas, A Reconsideration of Military Jurisdiction Over Servicemen's Non-Service Related Crimes Committed Abroad*, 41 FORDHAM L. REV. 325, 359 n.238, 363-67 (1972). An old British view of jurisdiction over offenses committed overseas can be found in W. HALL, *FOREIGN JURISDICTION OF THE BRITISH CROWN* 12-14 (1894).

<sup>17</sup> 10 U.S.C. §§ 801-940 (1970).

<sup>18</sup> Art. 5, U.C.M.J., 10 U.S.C. § 805 (1970); *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *Kinselle v. Kruger*, 361 U.S. 234 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970). The Supreme Court cases held unconstitutional the Congressional grant of limited authority for the exercise of court-martial jurisdiction over discharged servicemen (Art. 3(a), U.C.M.J., 10 U.S.C. § 803(a) (1970)), and civilian employees and other persons accompanying the Armed Forces outside the United States (Art. 2 (11), U.C.M.J., 10 U.S.C. § 802 (11) (1970)). The Court of Military Appeals in the *Averette* case decided that a provision of the Code (Art. 2 (10), U.C.M.J., 10 U.S.C. § 802 (10) (1970)) purporting to grant jurisdiction over civilians accompanying the armed forces overseas in wartime was not operative in an undeclared war such as Vietnam.

<sup>19</sup> SHEARER, *supra* note 7, at 110. See, e.g., *Extradition Treaty with Bavaria*, Preamble, Sep. 12, 1853, [1854] 10 Stat. 1022, T.S. No. 17.

<sup>20</sup> See, e.g., GRUNDGESETZ, art. 16(2) (1949) (W. Ger.). At least one writer from a civil law country considers that non-extradition of nationals is almost a principle of international law. S. LAZAREFF, *STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW* 232, 266 (1971) [hereinafter cited as LAZAREFF]. See also Text of Negotiating History of NATO Status of Forces Supplementary Agreement with Germany 1087, 1098 (1963) (computer generated text prepared by the Air Force Accounting and Finance Center).

<sup>21</sup> *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936). The clause which exempts nationals of the requested state from any obligation of extradition had been interpreted in Great Britain to permit discretionary extradition. See *RAFUSE*, *supra* note 7, at 56-73. The clause, or one very similar thereto, appears in the United States extradition treaties with the following countries in effect on 1 January 1972: Albania, Mar. 1, 1933, [1935] 49 Stat. 3313, T.S. No. 902; Austria, Jan. 31, 1930, [1930] 46 Stat. 2779, T.S. No. 822; Belgium, Oct. 26, 1901, [1902] 32 Stat. 1894, T.S. No. 409; Bolivia, Apr. 21, 1900, [1901] 32 Stat. 1857, T.S. No. 399; Bulgaria, Mar. 19, 1924, [1924] 43 Stat. 1886, T.S. No. 687; Chile, Apr. 17, 1900, [1902] 32 Stat. 1850, T.S. No. 407;

that time the United States has generally tended to have a clause in extradition treaties that permits both parties to deliver fugitive citizens whenever they decide in their own discretion to do so.<sup>22</sup> The validity of such a permissive clause that leaves the delivery up to the discretion of an executive rather than a judicial official has not been directly tested

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Colombia, May 7, 1888, [1891] 26 Stat. 1534, T.S. No. 58; Congo (Brazzaville), Jan. 6, 1909, [1911] 37 Stat. 1526, T.S. No. 361; Costa Rica, Nov. 10, 1922, [1923] 43 Stat. 1621, T.S. No. 668; Cuba, Apr. 6, 1904, [1905] 33 Stat. 2265, T.S. No. 440; Czechoslovakia, July 2, 1925, [1926] 44 Stat. 2367, T.S. No. 734; Dominican Republic, June 19, 1909, [1910] 36 Stat. 2468, T.S. No. 550; Egypt, Aug. 11, 1874, [1875] 19 Stat. 572, T.S. No. 270; El Salvador, Apr. 18, 1911, [1911] 37 Stat. 1516, T.S. No. 560; Estonia, Nov. 8, 1923, [1924] 43 Stat. 1849, T.S. No. 703; Finland, Aug. 1, 1924, [1925] 44 Stat. 2002, T.S. No. 710; Germany, July 12, 1930, [1931] 47 Stat. 1862, T.S. No. 836; Greece, May 6, 1931, [1932] 47 Stat. 2185, T.S. No. 855; Haiti, Aug. 9, 1904, [1905] 34 Stat. 2858, T.S. No. 447; Honduras, Jan. 15, 1909, [1912] 37 Stat. 1616, T.S. No. 569; Hungary, July 3, 1856, [1856] 11 Stat. 691, T.S. No. 9; Iceland, Jan. 6, 1902, [1906] 32 Stat. 1906, T.S. No. 405; Indonesia, June 2, 1887, [1889] 26 Stat. 1481, T.S. No. 256; Iraq, June 7, 1934, [1936] 49 Stat. 3380, T.S. No. 907; Latvia, Oct. 16, 1923, [1924] 43 Stat. 1738, T.S. No. 677; Liechtenstein, May 20, 1936, [1937] 50 Stat. 1337, T.S. No. 915; Lithuania, Apr. 9, 1924, [1924] 43 Stat. 1835, T.S. No. 699; Luxembourg, Oct. 28, 1883, [1884] 23 Stat. 808, T.S. No. 196; Monaco, Feb. 15, 1939, [1940] 54 Stat. 1780, T.S. No. 959; Netherlands, June 2, 1887, [1889] 26 Stat. 1481, T.S. No. 256; Norway, June 7, 1893, [1893] 28 Stat. 1187, T.S. No. 262; Panama, May 25, 1904, [1905] 34 Stat. 2851, T.S. No. 445; Paraguay, Mar. 26, 1913, [1914] 38 Stat. 1754, T.S. No. 584; Peru, Nov. 28, 1899, [1901] 31 Stat. 1921, T.S. No. 288; Poland, Nov. 22, 1927, [1929] 46 Stat. 2282, T.S. No. 789; Portugal, May 7, 1908, [1908] 35 Stat. 2071, T.S. No. 512; Romania, July 23, 1924, [1925] 44 Stat. 2020, T.S. No. 713; San Marino, Jan. 10, 1906, [1908] 35 Stat. 1971, T.S. No. 495; Switzerland, May 14, 1900, [1901] 31 Stat. 1928, T.S. No. 354; Thailand, Dec. 30, 1922, [1924] 43 Stat. 1749, T.S. No. 681; Turkey, Aug. 6, 1923, [1934] 49 Stat. 2692, T.S. No. 872; Venezuela, Jan. 19, 21, 1922, [1924] 43 Stat. 1698, T.S. No. 675; Yugoslavia, Oct. 25, 1901, [1902] 32 Stat. 1890, T.S. No. 406; U.S. DEP'T OF STATE, TREATIES IN FORCE (1972). The Extradition Treaty with France which was the subject of the *Valentine* case was modified in 1971 to authorize discretionary surrender of the requested state's nationals. Extradition Treaty with France, Feb. 12, 1970, [1971] 22 U.S.T. 407, T.I.A.S. No. 7136.

<sup>22</sup> The extradition treaties with the following countries coming into effect after the November 9, 1936 Supreme Court decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), contain provisions permitting extradition of the requested state's nationals when that state's appropriate authorities deem it proper: Liberia, Nov. 1, 1937, [1939] 54 Stat. 1733, T.S. No. 955; Sweden, Oct. 24, 1961, [1963] 14 U.S.T. 1845, T.I.A.S. No. 5496; Brazil, Jan. 16, 1961, [1964] 15 U.S.T. 2093, T.I.A.S. No. 5691; New Zealand, Jan. 12, 1970, [1970] 22 U.S.T. 1, T.I.A.S. No. 7035; France, Feb. 12, 1970, [1971] 22 U.S.T. 407, T.I.A.S. No. 7075; Spain, May 19, 1970, [1971] 22 U.S.T. 737, T.I.A.S. No. 7136; Argentina, Jan. 21, 1972, [1972] 23 U.S.T. 3501, T.I.A.S. No. 7510. The only presently effective United States extradition treaty which precludes surrender of nationals and which was signed after the *Valentine* decision is the Extradition Treaty with Monaco, Feb. 15, 1939, [1940] 54 Stat. 1780, T.S. No. 959. The Extradition Treaty with Liechtenstein, May 20, 1936, [1937] 50 Stat. 1337, T.S. 915, became effective after the *Valentine* holding but was signed prior thereto.

Older United States extradition treaties permitting discretionary surrender of nationals and in effect on January 1, 1972 were with the following countries: Japan, Apr. 29, 1886, [1886] 24 Stat. 1015, T.S. No. 191; Mexico, Feb. 22, 1899, [1899] 31 Stat. 1818, T.S. No. 242; Argentina, Sep. 26, 1896, [1900] 31 Stat. 1883, T.S. No. 6; Guatemala, Feb. 27, 1903, [1903] 33 Stat. 2147, T.S. No. 425; Nicaragua, Mar. 1, 1905, [1907] 35 Stat. 1869, T.S. No. 462; Uruguay, Mar. 11, 1905, [1908] 35 Stat. 2028, T.S. No. 501. U.S. DEP'T OF STATE, TREATIES IN FORCE (1972).

by the Supreme Court. The leading case relied on treaties containing such a discretionary clause to justify its interpretation that the Extradition Treaty with France created neither a mandatory nor a permissive obligation to extradite citizens.<sup>23</sup> The Court has not actually been averse to extradition of American citizens and upheld extradition of citizens even when the accused established that the other party to the treaty was refusing to comply with its obligations to extradite its own nationals.<sup>24</sup>

One understandable reason for a reluctance to extradite nationals is the feeling that a citizen deserves to be tried by judges and peers of his own nationality, especially when he has managed to return to the territory where only his own native country can legitimately exercise power over him. Thus, one could claim that he should not be subjected to courts of another nation where prejudice against him may exist solely because he is a foreigner and the court proceedings are likely to be unintelligible to him.<sup>25</sup> The Senate of the United States showed a certain distrust of foreign proceedings in the early 1950's during the approval of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA).<sup>26</sup> Several senators felt that American servicemen should be tried only by courts-martial for offenses committed abroad in order to insure that their constitutional rights as Americans would be preserved.<sup>27</sup> There was much discussion concerning the lack of any requirement in some courts for proof beyond a reasonable doubt and the danger of communist judges in France and Italy.<sup>28</sup> While the opponents of NATO SOFA were unsuccessful in defeating ratification or adding a reservation to the treaty that would have refused to recognize any foreign country's right to try American servicemen, the Senate's advice and consent did contain a statement that requires military commanders to seek diplomatic intervention in any case tried by foreign authorities where the accused might be denied the constitutional rights he would enjoy in the United States.<sup>29</sup>

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<sup>23</sup> *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 12-18 (1936).

<sup>24</sup> *Charlton v. Kelly*, 229 U.S. 447 (1913); *see Neely v. Henkel*, 180 U.S. 109, 123 (1901).

<sup>25</sup> *RAFUSE*, *supra* note 7, at 145-47.

<sup>26</sup> *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces*, June 19, 1951, [1953] 4 U.S.T. 1792, T.I.A.S. No. 2846 [hereinafter cited as NATO SOFA]. The NATO SOFA now has the following parties: Belgium, Canada, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom and the United States. U.S. DEP'T OF STATE, TREATIES IN FORCE 290 (1971). *See* 99 CONG. REC. 4659-74 (1953).

<sup>27</sup> *See, e.g.*, 99 CONG. REC. 4659-74 (1953).

<sup>28</sup> *Id.* at 4668, 8733, 8741.

<sup>29</sup> *Id.* at 8730. The final text of the Senate Resolution is found at 4 U.S.T. 1828-29 [1953-52].

While NATO SOFA was being ratified, there was no mention in the Senate that extradition was involved.<sup>30</sup> The treaty was designed, at least in that part concerning criminal jurisdiction, to settle the conflicting claims between the criminal authorities of the state where American and other foreign forces were stationed (the receiving state) and the military authorities of the foreign state (the sending state).<sup>31</sup> Since both the domestic and military authorities could claim a legitimate basis under their own law for subjecting a serviceman and some related civilian personnel to their own courts operating in the receiving state, a system of priorities of the right to exercise that claimed jurisdiction was devised.<sup>32</sup> It was almost taken for granted that the accused individual would remain within the receiving state's territory.

Extradition, however, contemplates something different than just a determination of which of two sovereigns operating within the same territory may exercise its criminal powers. The Supreme Court's classic definition of extradition is formulated as:

the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and *within the territorial jurisdiction of the other*, which, being competent to try and to punish him, *demand the surrender*.<sup>33</sup>

More recently, American writers have de-emphasized the underscored portions of that definition and concentrated more on the process of surrender:

Extradition is the process by which persons charged with or convicted of crimes against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment.<sup>34</sup>

Thus, American extradition contemplates the physical transfer of an individual from the territory of one state to that of another. The process involved in SOFAs, at least where the accused remains within the receiving state from the time of the offense until the end of punishment, does not involve any transfer between territories of different states. Neverthe-

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<sup>30</sup> No mention of extradition is contained in the Senate debate, *id.* at 4320, 4659-74, 8724-82, 8835-38.

<sup>31</sup> LAZAREFF, *supra* note 20, at 128.

<sup>32</sup> J. SNEE & K. PYE, STATUS OF FORCES AGREEMENTS; CRIMINAL JURISDICTION (1957) [hereinafter cited as J. SNEE & K. PYE].

<sup>33</sup> *Terlinden v. Ames*, 184 U.S. 270, 289 (1902) (emphasis added).

<sup>34</sup> 6 M. WHITEMAN, DIGEST OF INT'L LAW 727 (1968) [hereinafter cited as M. WHITEMAN]; See also IV G. HACKWORTH, DIGEST OF INT'L LAW 1 (1942): "Extradition is that process by which fugitives from the justice of one state who seek asylum in another state are delivered up by the latter to the former."

less, one writer has termed the SOFA arrangement as a "formal variant of extradition,"<sup>35</sup> and one NATO country has used its internal extradition law prohibiting surrender of nationals, to justify a refusal to surrender to American forces a soldier who had deserted the Army while stationed in the country of his own nationality.<sup>36</sup>

During the 1970's, three reported federal court decisions have articulated the right and duty of the United States Armed Forces to effectuate *alleged* American obligations contained in the NATO and other SOFAs to return servicemen to the receiving state after the soldiers and airmen involved had left the receiving state during the exercise of criminal jurisdiction over them by foreign authorities.<sup>37</sup> In reaching these decisions permitting the armed forces to deliver the serviceman from the United States to the receiving state's authorities for trial or punishment, the courts have relied more heavily upon the international obligations of the United States rather than any inherent right of the armed service involved to assign its personnel wherever it considered appropriate.<sup>38</sup> While the courts hesitated to denominate the proposed action of the military authorities as extradition,<sup>39</sup> two of the cases referred extensively to important extradition cases to justify the process.<sup>40</sup>

The obligations found by the courts may be equally applicable to certain civilian personnel connected with American military communities overseas. Thus American military or other designated authorities could arguably be required to return civilians encompassed by SOFAs to a receiving state if such a civilian is alleged to have committed an offense subject to the receiving state's jurisdiction but has managed to depart the receiving state before the exercise of jurisdiction is completed.

The purpose of this paper is to examine critically the international

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<sup>35</sup> A. Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, XL BRIT. Y.B. INT'L LAW 77, 80 (1964).

<sup>36</sup> LAZAREFF, *supra* note 20, at 78.

<sup>37</sup> *United States ex rel. Stone v. Robinson*, 309 F. Supp. 1261 (W.D. Pa. 1970), *aff'd*, 431 F.2d 548 (3d Cir. 1970); *Williams v. Rogers*, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972). These cases are discussed in detail in Chapter IV *infra*.

<sup>38</sup> *United States ex rel. Stone v. Robinson*, 309 F. Supp. 1261, 1268-69 (W.D. Pa. 1970); *Williams v. Rogers*, 449 F.2d 513, 521 (8th Cir. 1971); *Holmes v. Laird*, 459 F.2d 1211, 1219-20 n.58 (D.C. Cir. 1972).

<sup>39</sup> "Sergeant Williams is not being unlawfully extradited." *Williams v. Rogers*, 449 F.2d 513, 522 (8th Cir. 1971).

<sup>40</sup> *Id.* at 520-21, referring to *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936); *Holmes v. Laird*, 459 F.2d 1211, 1218-19, 1221 (D.C. Cir. 1972), referring to *Neely v. Henkel*, 180 U.S. 109 (1901) and *Charlton v. Kelly*, 229 U.S. 447 (1913).



obligation of the United States to return to various receiving states such personnel encompassed by a SOFA, whether civilian or military, who have somehow managed to depart the receiving state before its criminal process has been completed. After first examining the terms of the SOFAs relevant to such a requirement and the views of various commentators, the recent cases will be reviewed.

## II. STATUS OF FORCES AGREEMENT AND THE OBLIGATION TO COOPERATE IN THE EXERCISE OF CRIMINAL JURISDICTION

The Cold War following World War II generated collective defense arrangements, such as NATO, which envisioned the lengthy stationing of a country's armed forces on the territory of an allied state, not as victorious occupants but as components of multinational forces in peaceful cooperation with the sovereign government of the allied foreign state.<sup>41</sup> The forces thus stationed not unnaturally acquired the same civilian accoutrements common to installations in their home states; i.e., civilian employees and the families of both the servicemen and such employees. The presence of the resultant large foreign military communities on a scale not previously experienced required some accommodation between the states providing the forces and those providing the stationing sites in order to cope with the legal problems of the individual serviceman and his civilian compatriots. Not the least of these problems was the resolution of the conflicting claims to jurisdiction over criminal offenses allegedly committed by the military or civilian members of the communities when both the receiving state and the military forces of the sending state could claim a basis under applicable law to prosecute and punish the same act or omission.<sup>42</sup> The problems were generally resolved for most of the NATO countries by the SOFA negotiated in 1951 with a formula of a priority of rights in exercising jurisdiction that was thereafter adopted in several other situations outside of the NATO structure.<sup>43</sup>

### A. *Jurisdictional Scheme of the SOFAs*

While the NATO SOFA deals with several legal problems, such as claims,<sup>44</sup> driving and motor vehicle licenses,<sup>45</sup> and custom and tax ex-

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<sup>41</sup> See LAZAREFF, *supra* note 20, at 1.

<sup>42</sup> See generally *id.* at 1-3; G. STAMBUK, *AMERICAN MILITARY FORCES ABROAD* 3-13 (1963) [hereinafter cited as G. STAMBUK]; Stranger, *Criminal Jurisdiction Over Visiting Armed Forces*, 52 INT'L L. STUDIES, xi, 154-56 (1957-58) [hereinafter cited as Stranger].

<sup>43</sup> Snee, *NATO Agreement on Status: Travaux Préparatoires*, 54 INT'L L. STUDIES 1, 4 (1961) [hereinafter cited as Snee].

<sup>44</sup> NATO SOFA, art. VIII.

<sup>45</sup> *Id.* at arts. IV, XI.

emptions,<sup>46</sup> its most heralded accomplishment is the subjection of the conflicting claims of the right to exercise criminal jurisdiction, to priorities based upon the effects of the offense and the status of the individual allegedly committing it.<sup>47</sup> Whenever an offense is committed by a serviceman or civilian employee, subject to the criminal or disciplinary jurisdiction of the military law of the sending state, either in the performance of official duty or directed solely against the security, property or person of the sending state or a member of its military community, the military authorities of the sending state have the primary right to exercise the criminal process within the receiving state. In the case of all other offenses punishable by the laws of both the receiving and sending states, the authorities of the receiving state have the primary right to exercise their jurisdiction. Both the military and local authorities are required to notify the other whenever their state determines not to exercise its primary right to exercise jurisdiction and to give sympathetic consideration to waiving its primary right in any case when the authorities of the other state request it to do so.<sup>48</sup>

This scheme of jurisdictional priorities was ultimately approved by the United States Senate despite considerable opposition by some Senators to giving up an alleged claim under traditional international law to immunity for servicemen stationed in a foreign country.<sup>49</sup> The advice and consent of the Senate, however, was accompanied by a resolution indicating that the jurisdiction provisions did not constitute a precedent for future agreements.<sup>50</sup> Notwithstanding the resolution, since 1951 the United States has concluded sixteen executive agreements with twelve nations covering the status of its forces and civilians connected with those forces stationed overseas<sup>51</sup> where the NATO scheme of a priority

<sup>46</sup> *Id.* at arts. XI-XIV. See generally R. ELLERT, NATO FAIR TRIAL SAFEGUARDS 2 (1963).

<sup>47</sup> NATO SOFA, art. VII. See LAZAREFF, *supra* note 20, at 444-45; G. DRAPER, CIVILIANS AND THE NATO STATUS OF FORCES AGREEMENT 182 (1966); J. SNEE & K. PYE, *supra* note 32, at 8-9.

<sup>48</sup> NATO SOFA, art. VII. The full text of Article VII is found in Appendix A.

<sup>49</sup> See, e.g., 99 CONG. REC. 8735-48 (1953). Two articles by an Army judge advocate were relied on heavily by opponents to the SOFA's criminal jurisdiction provisions. King, *Jurisdiction Over Friendly Foreign Armed Forces*, 36 AM. J. INT'L L. 539 (1942); King, *Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces*, 40 AM. J. INT'L L. 257 (1946). The articles are reprinted at 99 CONG. REC. 4659 and 8748 (1953). But see the memorandum presented by Attorney General Brownell to the Senate. *Int'l Law and the Status of Forces Agreement*, *id.* at 8762 (1953).

<sup>50</sup> 99 CONG. REC. 8730 (1953). For the final form of the Sense of the Senate Resolution accompanying the advice and consent to NATO SOFA, see 4 U.S.T. 1828-29 [1953-52].

<sup>51</sup> Annex to the Agreement of May 5, 1951 with Iceland on the Status of United States Personnel and Property, May 8, 1951, [1951] 2 U.S.T. 1533, T.I.A.S. No. 2295 [hereinafter cited as Icelandic SOFA]; Amendment of Article XVII of the Administrative Agreement under Article III of the Security Treaty with Japan, Sept. 29, 1953, [1953] 4 U.S.T. 1846, T.I.A.S. No. 2848 [hereinafter

cited as Former Japanese SOFA]; Agreement under Article IV of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510 [hereinafter cited as Japanese SOFA]; Defense Agreement on Use of Facilities in Agreed Areas in Libya, Sept. 9, 1954, [1954] 5 U.S.T. 2449, T.I.A.S. No. 3107 [hereinafter cited as Libyan SOFA] (no longer in force, U.S. DEP'T OF STATE, TREATIES IN FORCE 158 (1974)); Agreement with Nicaragua for the Establishment of a LORAN Transmitting Station, Sept. 5, 1958, [1958] 9 U.S.T. 1206, T.I.A.S. No. 4106 [hereinafter cited as Nicaraguan SOFA] (applicable only to uniformed Coast Guard personnel); Agreement with Pakistan Concerning Establishment of Communications Unit, July 18, 1959, [1959] 10 U.S.T. 1366, T.I.A.S. No. 4281 [hereinafter cited as Pakistani SOFA] (expired July 17, 1969, U.S. DEP'T OF STATE, TREATIES IN FORCE 171 (1969)); Agreement with United Kingdom Concerning United States Defence Areas in the Federation of the West Indies, Feb. 10, 1961, [1961] 12 U.S.T. 408, T.I.A.S. No. 4734 [hereinafter cited as West Indies SOFA]; Agreement with United Kingdom for the Establishment in the Bahama Islands of an Atlantic Undersea Test and Evaluation Center, Oct. 11, 1963, [1963] 14 U.S.T. 1431, T.I.A.S. No. 5441 [hereinafter cited as Bahaman SOFA]; Agreement with United Kingdom On Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, [1966] 18 U.S.T. 28, T.I.A.S. No. 6196 [hereinafter cited as Indian Ocean SOFA]; Agreement with United Kingdom on Tracking Stations: Facility on the Island of Mahe (Seychelles), Dec. 30, 1966, [1966] 18 U.S.T. 43, T.I.A.S. No. 6197 [hereinafter cited as Seychelles SOFA]; Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, [1963] 14 U.S.T. 506, T.I.A.S. No. 5349 [hereinafter cited as Australian SOFA]; Agreement Concerning Military Bases in the Philippines: Criminal Jurisdiction Arrangements, Aug. 19, 1965, [1965] 16 U.S.T. 1090, T.I.A.S. No. 5851 [hereinafter cited as Philippine SOFA]. This agreement replaced Article XIII of Agreement with the Philippines Concerning Military Bases, Mar. 14, 1947, [1947] 61 Stat. 4019, T.I.A.S. No. 1775 [hereinafter cited as Philippine Bases Agreement], which covered the same legal areas as NATO SOFA but has a different scheme of delineating criminal jurisdiction. *Id.* at art. XIII, para. 1, 4, 6. See J. DODD, CRIMINAL JURISDICTION UNDER THE UNITED STATES-PHILIPPINE MILITARY BASES AGREEMENT 37-49 (1968) [hereinafter cited as J. DODD]; Agreement on the Status of United States Armed Forces in the Republic of China, Aug. 31, 1965, [1966] 71 U.S.T. 373, T.I.A.S. No. 5986 [hereinafter cited as Chinese SOFA]; Agreement Under Article IV of the Mutual Defense Treaty Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, [1967] 17 U.S.T. 1677, T.I.A.S. No. 6127 [hereinafter cited as Korean SOFA]; Defense Agreement on Use of Military Facilities in Spain, Sept. 25, 1970, [1970] 21 U.S.T. 2259, T.I.A.S. No. 6977 [hereinafter cited as Spanish SOFA]. There is also a very brief agreement covering only uniformed personnel and civilian employees, which varies considerably from the previously mentioned SOFAs, but will be considered hereafter because of its custodial provisions and some resemblance to NATO SOFA. Agreement with New Zealand on Operations in Antarctica, Dec. 24, 1958, [1958] 9 U.S.T. 1502, T.I.A.S. No. 4151 [hereinafter cited as New Zealand SOFA].

There are four additional executive agreements delineating jurisdictional rights that might be categorized as SOFAs rather than military agreements bestowing immunity on personnel. These are not considered later in this paper because of dissimilarity to NATO SOFA. Agreement with United Kingdom concerning the Bahamas Long Range Proving Ground, July 21, 1950, [1950] 1 U.S.T. 545, T.I.A.S. No. 2099; Agreement with United Kingdom Concerning Establishment of Additional Sites in Saint Lucia, June 25, 1956, [1956] 7 U.S.T. 1939, T.I.A.S. No. 3595; Agreement with United Kingdom Concerning Establishment of Additional Sites on Ascension Island, June 25, 1956, [1956] 7 U.S.T. 1999, T.I.A.S. No. 3603; Agreement with Bahrain on Deployment of the United States Middle East Force, Dec. 23, 1971, [1971] 22 U.S.T. 2184, T.I.A.S. No. 7263.

One recent writer indicates that the United States has SOFAs of the NATO type with Brazil and Ethiopia. Mills, *O'Callahan Oversea: A Reconsideration of Military Jurisdiction Over Servicemen's Non-Service Related Crimes Committed Abroad*, 41 *FORDHAM L. REV.* 325, 337n.86 (1972). The Military Assistance Agreement with Brazil, Mar. 15, 1952, art. VI, [1953] 4 U.S.T. 170, 178, T.I.A.S. No. 2776, in effect bestows diplomatic immunity to military personnel of Brazil and the United States. The Agreement Concerning the Utilization of Defense Installations within

of the right to exercise jurisdiction has been followed with only minor variations.<sup>52</sup>

### B. *Arrest and Custody of Servicemen and Civilians*

The problems involved in the resolution of disputes over which authorities have the primary right to exercise criminal jurisdiction, or in

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Ethiopia, May 22, 1953, art. XVII, [1953] 5 U.S.T. 749, 756-58, T.I.A.S. No. 2964, provides all United States personnel connected with the installations (including dependents) immunity from Ethiopian criminal jurisdiction. Accordingly, these two agreements are not considered to be SOFAs as the term is used in this paper. *See generally* G. STAMBUK, *supra* note 42, at 51-73; Metzger and McMahon, *The Return of United States Servicemen for Offenses Committed Overseas*, 22 CASE W. RES. L. REV. 617, 632-37 (1971) [hereinafter cited as Metzger and McMahon].

<sup>52</sup> Only the Japanese SOFAs follow the NATO SOFA in limiting the primary right of the United States military authorities to exercise jurisdiction over servicemen and civilian employees alone. Former Japanese SOFA, para. 3(a); Japanese SOFA, art. XVII, para. 3(a). Nearly all the other SOFAs extend the primary right to the United States under the same circumstances over dependents. *See, e.g.*, Icelandic SOFA, art. 2, para. 4(a); Pakistani SOFA, Annex B, para. 3(a); West Indies SOFA, art. IX, para. 3(a); Philippine SOFA, Annex, para. 3(b). This extension of primary jurisdiction is largely theoretical in view of the lack of military jurisdiction over civilians in peacetime. *See cases cited note 18 supra*. The Japanese and other SOFAs also extend jurisdiction to the United States over any American servicemen present in the territory concerned, a privilege not expressly granted in the NATO SOFA which covers only members of an armed force present in the receiving state "in connexion (sic) with their official duties." NATO SOFA, art. I, para. 1(a). *See LAZAREFF, supra* note 20, at 266. Japanese SOFA, art. I (a). *See, e.g.*, Korean SOFA, art. I(a) (except servicemen attached to the American Embassy or the Military Advisory Group); Philippine SOFA, Agreed Official Minutes, para. 1 (only those persons subject to the military law of the United States regularly assigned to the Philippines or present in the Philippines in connection with the presence there of the U.S. bases).

The Libyan SOFA, art. XX, para. (1), in effect immunizes both military and civilian personnel, including dependents, from Libyan jurisdiction in the categories of offenses where the United States would have primary jurisdiction under NATO SOFA, art. VII, para. 3(a). In addition immunity exists for the serviceman and his civilian compatriots for offenses "committed solely within the agreed areas." Libyan SOFA, art. XX, para. 1(c). In all other cases Libyan courts "shall exercise jurisdiction unless . . . Libya waives its right to exercise jurisdiction." *Id.* at para. 1. In the expired Pakistani SOFA, Annex B, para. 3 (a)(iii), the United States has the primary right to exercise jurisdiction over offenses committed in the agreed areas.

The provisions on jurisdiction in the New Zealand SOFA, Memorandum of Understanding, para. 4(a) are unique:

If United States personnel are alleged to have committed acts which are offences against New Zealand law, the following provisions shall apply:

- (i) The New Zealand authorities, recognizing the problems arising from concurrent jurisdiction in criminal matters over such personnel in New Zealand territory, will consider alleged offences affecting only United States personnel or property, or committed in the performance of official duty, as a matter for the United States authorities.
- (ii) Moreover, the New Zealand authorities will not ordinarily be concerned to institute proceedings in New Zealand courts in respect of alleged minor offences which do not fall within the categories referred to in (i) above.

making a determination that the alleged offense was committed in the performance of official duty are beyond the scope of this paper and have been fully discussed elsewhere.<sup>53</sup> When a decision is made that the authorities of the receiving state will exercise jurisdiction, there remains a problem in insuring that the accused individual is available for the receiving state's officials and courts to effectively pursue their criminal processes.

### 1. *Arrest and Custody Provisions of the SOFAs*

The negotiators of NATO SOFA provided for the actual handling of personnel accused of offenses in relatively brief terms compared to the detailed provisions that would appear in later SOFAs where the United States was the only party which had armed forces, civilian components, and dependents of members falling in those categories<sup>54</sup> whose rights and obligations were defined by the agreements.

Under paragraph 5 of Article VII of NATO SOFA, the authorities of both the receiving and sending states are obliged to "assist each other in the arrest" of military and civilian personnel connected with the armed services "in the territory of the receiving state and in handing them over to the authority which is to exercise jurisdiction."<sup>55</sup> Whenever a uniformed serviceman or a civilian employed by the sending state's armed forces<sup>56</sup> "is in the hands of the sending State," that state is

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<sup>53</sup> See LAZAREFF, *supra* note 20, at 128-208; J. SNEE & K. PYE, *supra* note 32, at 24-33, 41-91; Stanger, *supra* note 42, at 185-245. See also J. DODD, *supra* note 51, at 40-43.

<sup>54</sup> The categories of personnel whose status is defined in the SOFAs are essentially the same but the denomination differs somewhat from SOFA to SOFA and results in inclusion or exclusion of particular individuals. Generally, American servicemen present in the receiving state are encompassed by the SOFAs although they may be required to be present because of official duty. See note 52 *supra*. Civilian personnel who are employed by the military forces or organizations form a second category and are normally termed "members of the civilian component." See NATO SOFA, art. I, para. 1(b). In NATO countries, except Iceland, the civilian employees may be nationals of any NATO country except the receiving state. *Id.* In some other countries they must be American nationals or citizens. See, e.g., Korean SOFA, art. 1(b); Spanish SOFA, *Definitions*, para. 2(a)(2). Dependents of both military personnel and civilian employees covered by the agreement are generally included in SOFA's coverage regardless of the nationality they may have. NATO SOFA, art. I, para. 1(c) (spouse or child depending on the member for support); Australian SOFA, art. 1 (spouse or other relative depending upon the member for support). But see Icelandic SOFA, art. 1, which excludes any Icelandic national from the coverage of the SOFA. See generally J. SNEE & K. PYE, *supra* note 32, at 11-20.

<sup>55</sup> NATO SOFA, art. VII, para. 5(a).

<sup>56</sup> Serviceman, member of the Armed Forces, civilian employee, civilian employed by the Armed Forces and like terms are used in the text of this paper rather than the precise language of each particular SOFA, the text of which should be consulted to determine precisely who is covered. See note 54 *supra*.

entitled to retain custody of the individual "until he is charged by the receiving State."<sup>57</sup>

The provisions of the NATO SOFA with respect to requiring cooperation between the sending state's military authorities and local authorities in arresting and handing over individuals to the state which will exercise jurisdiction are followed almost uniformly in all the subsequent SOFAs to which the United States is a party.<sup>58</sup> All of the current agreements indicate that the cooperation in the arrest will occur in the territory of the country involved.<sup>59</sup> Some limit the cooperation to the extent permitted by any law applicable to the authorities so cooperating.<sup>60</sup> The clause requiring the handing over of arrested personnel does not appear in the Spanish SOFA but other provisions therein seemingly cover any gap created by this omission.<sup>61</sup>

The right of the United States, or sending state, to obtain or retain custody over offenders who are part of the overseas military community finds extensive variations in the later SOFAs. While the NATO and Japanese SOFAs limit the right of the sending state to have custody of military personnel and civilian employees already in its custody, and only until such an accused is charged,<sup>62</sup> the primary provisions of the other agreements extend this right to dependents subject to military law and in many cases beyond the time of charging or indictment.<sup>63</sup> Even

<sup>57</sup> NATO SOFA, art. VII, para. 5(c).

<sup>58</sup> *Id.* at para. 5(a). See, e.g., Korean SOFA, art. XXII, para. 5 (a). But see Chinese SOFA, art. XIV, para. 5(a), which indicates that the handing over is to be to the authorities entitled to custody.

<sup>59</sup> Japanese SOFA, art. XVII, para. 5(a); Nicaraguan SOFA, art. IX, para. 4(a); West Indies SOFA, art. IX, para. 5(a); Bahamian SOFA, art. VI, para. 5(a); Indian Ocean SOFA, Annex II, para. 1(e)(i); Seychelles SOFA, para. 10(e)(i); Australian SOFA, art. 8, para. 5(a); Philippine SOFA, para. 5(a); Chinese SOFA, art. XIV, para. 5(a); Korean SOFA, art. XXII, para. 5(a); Spanish SOFA, art. XVIII, para. 1. The Icelandic SOFA, art. 2, para. 6(a) does not limit cooperation in the arrest to Icelandic territory. Neither does either of the effectively expired SOFAs. Pakistani SOFA, Annex B, para. 5(a); Libyan SOFA, art. XX, para. 3. The New Zealand SOFA, *Memorandum of Understandings*, para. 4(c) states "the United States authorities . . . will take whatever steps are necessary to punish personnel who have committed acts which are offences against [New Zealand] laws."

<sup>60</sup> West Indies SOFA, art. IX, para. 5(a); Bahamian SOFA, art. VI, para. 5(a); Indian Ocean SOFA, Annex II, para. 1(e)(i); Seychelles SOFA, para. 10(e)(i); Chinese SOFA, art. XIV, para. 5(a) (within the limits of their authority); Spanish SOFA, art. XVIII, para. 1 (within the limits of their respective legal powers).

<sup>61</sup> Spanish SOFA, art. XVIII. See Appendix B.

<sup>62</sup> NATO SOFA, art. VII, para. 5(c); Former Japanese SOFA, para. 5 (c); Japanese SOFA, art. XIV, para. 5(c). See J. SNEE & K. PYE, *supra* note 32, at 92-93.

<sup>63</sup> Icelandic SOFA, art. 2, para. 6(c) (until charging); Libyan SOFA, art. XX, para. 4 (on the United States authorities' undertaking to present him to the Libyan courts for investigatory proceedings and trial when required); Nicaraguan SOFA, art. IX, para. 4(c) (pending completion of judicial proceedings); Pakistani SOFA, Annex B, para. 5(c) (same as Nicaraguan SOFA); Australian SOFA, art. 8, para. 5(c) (until he is charged); Chinese SOFA, art. XIV, para. 5(c) (pending

with Japan, an Agreed Minute to the SOFA envisions that dependents as well as servicemen and civilian employees may be released to United States custody by Japanese officials until indictment or request for the return of such custody.<sup>64</sup> The Korean, Chinese and Spanish SOFAs all contemplate that the United States may retain or obtain the custody of military and civilian personnel until the completion of all appellate proceedings.<sup>65</sup> Some actually require the receiving state to entrust the individual to United States' military authorities without any specific request<sup>66</sup> and the Philippine SOFA requires the officer so obtaining custody to certify the receipt of the accused, his availability for investigation and trial, and that he will be produced before the competent court when required.<sup>67</sup> The Korean SOFA similarly requires the United States authorities to make any individual, over whom it is exercising custody, promptly available to Korean authorities for trial and investigation.<sup>68</sup>

The recent Spanish SOFA varies the language of the custody provisions extensively in comparison to other SOFAs. The United States is entitled to the custody of all persons covered by the SOFA who are "legally subject to detention by the military authorities of the United States" until their "surrender is requested . . . for the execution of sentence."<sup>69</sup> To the extent permitted by United States military law, the American authorities are to give "full consideration to decisions of the competent Spanish authorities regarding conditions of custody." The same officials are to "guarantee" the "immediate appearance" of any

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conclusion of all judicial proceedings); Korean SOFA, art. XXII, para. 5(c) (same as Chinese SOFA); Spanish SOFA, art. XVIII, para. 3 (until the conclusion of all judicial proceedings and, when appropriate, until his surrender is requested by the competent Spanish authorities).

The SOFAs with the United Kingdom specify a right of United States custody until the individual is charged, but apparently also contemplate that the United States may have custody pending completion of judicial proceedings by providing that in such cases the United States shall make the accused immediately available for investigation or trial proceedings. West Indies SOFA, art. IX, para. 5(c); Bahamian SOFA, art. VI, para. 5(c); Indian Ocean SOFA, Annex II, para. 1(e)(iii); Seychelles SOFA, para. 10(e)(iii). *See also* New Zealand SOFA, *Memorandum of Understandings*, para. 4(c).

<sup>64</sup> Former Japanese SOFA, Agreed Official Minutes, Re paragraph 5, para. 1; Japanese SOFA; Agreed Official Minutes, Article XVII, Re paragraph 5, para. 1.

<sup>65</sup> Korean SOFA, art. XXII, para. 5(c); Chinese SOFA, art. XIV, para. 5(c); Spanish SOFA, art. XVIII, para. 3 (if the person is "legally subject to detention by the military authorities of the United States").

<sup>66</sup> Chinese SOFA, art. XIV, para. 5(c).

<sup>67</sup> Philippine SOFA, Agreed Official Minutes, para. 5. This provision was contained in the main text of the Philippine Bases Agreement, art. XVII, para. 5.

<sup>68</sup> Korean SOFA, art. XXII, para. 5(c). A similar provision is contained in all SOFAs where the right of the United States to custody extends beyond the time of charging. *See, e.g.,* Pakistani SOFA, Annex B, para. 5(c); Chinese SOFA, art. XIV, para. 5(c). *See* Appendix B.

<sup>69</sup> Spanish SOFA, art. XVIII, para. 3.

such accused "in any proceedings that may require his presence, and, in any case, his appearance at the trial."<sup>70</sup>

## 2. *Provisions of Agreements Supplementing NATO SOFA*

The United States has entered into four executive agreements with three nations that modify, *inter alia*, the custodial provisions of the multilateral NATO SOFA. A 1954 pact with the Netherlands gives the United States the responsibility for the custody of all individuals subject to its military law pending trial.<sup>71</sup> American authorities are to make such individuals "immediately available to Netherlands authorities upon their request for purposes of investigation and trial."<sup>72</sup> As in many SOFAs the United States authorities are also required to consider the requests of the Dutch authorities "as to the way in which custody should be carried out."<sup>73</sup>

In an agreement with the Greek Government, the United States authorities are to "take custody of the accused pending completion of trial proceedings," and to maintain the custody in Greece.<sup>74</sup> The personnel envisioned as accused include not only the uniformed servicemen and civilian employees serving in Greece, but also their dependents and those "who are temporarily present in Greece."<sup>75</sup> This last category would include military and civilian personnel connected with American armed forces visiting Greece in a leave status; such personnel are not encompassed in NATO SOFA unless their presence in the receiving state is "in connection with their official duties."<sup>76</sup>

The most important supplementary agreement to NATO SOFA for the United States, primarily because of the large number of American personnel affected,<sup>77</sup> is the agreement with the Federal Republic of Germany, adhered to by six other NATO countries.<sup>78</sup> Under this agreement,

<sup>70</sup> *Id.*

<sup>71</sup> Agreement Concerning Stationing of United States Armed Forces in the Netherlands, Aug. 13, 1954, Annex, para. 3, [1954] 6 U.S.T. 103, 106, T.I.A.S. No. 3174, 4 [hereinafter cited as Dutch Supplementary Agreement].

<sup>72</sup> *Id.* See Appendix B.

<sup>73</sup> *Id.*

<sup>74</sup> Agreement Concerning the Status of United States Forces in Greece, Sept. 7, 1956, art. III, para. 1, [1956] 7 U.S.T. 2555, 2558, T.I.A.S. No. 3649, 4 [hereinafter cited as Greek Supplementary Agreement].

<sup>75</sup> *Id.* at art. I, para. 2.

<sup>76</sup> NATO SOFA, art. I.

<sup>77</sup> In early 1970 Senator Percy stated that about 220,000 of 310,000 American servicemen in Europe were stationed in West Germany, and that the American military community in Europe also included 14,000 civilian personnel and 235,000 dependents. 116 CONG. REC. 4254 (1970).

<sup>78</sup> Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Foreign Forces Stationed in the Federal



West Germany waives its primary right to exercise jurisdiction in all cases that it would have such a right under NATO SOFA, subject only to a possibility of recalling the waiver within twenty-one days following the notification by the United States of the individual case involved.<sup>79</sup> Even if the waiver is recalled, the United States is entitled in nearly all cases<sup>80</sup> to obtain the custody of all servicemen, civilian employees and dependents whom the German authorities have arrested and to retain custody of most of those same personnel which American authorities arrest.<sup>81</sup> The custody is to remain with American authorities until the German authorities release or acquit the accused, or until the "commencement of the sentence,"<sup>82</sup> a term contemplating the exhaustion of the appellate system.<sup>83</sup> As in the Dutch agreement, American authorities are to consider requests regarding custody made by competent German authorities.<sup>84</sup> They are also to "make the arrested person available . . . for investigation and criminal proceedings and to take all appropriate measures to that end and to prevent any prejudice to the course of justice (Verdunkelungsgefahr)."<sup>85</sup>

In a separate bilateral agreement with the United States, the Federal Republic extended the coverage of most of both the NATO SOFA and the Supplementary Agreement to American servicemen and civilian employees stationed in Europe and North Africa and dependents who accompany them on leave in West Germany.<sup>86</sup>

### 3. *The Right of the United States to Custody*

From the foregoing provisions in the various SOFAs and supplementary agreements, the sending state, which would normally be the United States, has acquired explicit rights that should be recognized under

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Republic of Germany, Aug. 3, 1959, [1963] 14 U.S.T. 531, T.I.A.S. No. 5351 [hereinafter cited as German Supplementary Agreement]. Denmark initially participated in the negotiations but did not sign the agreement. Text of Negotiating History, *supra* note 20, at 1, 291. Current parties to the German Supplementary Agreement are Belgium, Canada, France, Federal Republic of Germany, the Netherlands, United Kingdom, and United States. U.S. DEP'T OF STATE, TREATIES IN FORCE 290 (1972).

<sup>79</sup> German Supplementary Agreement, art. 19.

<sup>80</sup> German authorities have the right to custody in the case of "offenses directed solely against the security of the Federal Republic." *Id.* at art. 22, para. 2(c).

<sup>81</sup> *Id.* at art. 22.

<sup>82</sup> *Id.* at para. 3.

<sup>83</sup> Text of Negotiating History, *supra* note 20, at 1003.

<sup>84</sup> German Supplementary Agreement, art. 22, para. 3.

<sup>85</sup> *Id.*

<sup>86</sup> Agreement with the Federal Republic of Germany on the Status of Persons on Leave, Aug. 3, 1959, [1963] 14 U.S.T. 689, 694, T.I.A.S. No. 5352, 6 [hereinafter cited as German Leave Agreement].

international law to have authorities of its armed forces exercise physical control over its military members and certain civilians connected with its military establishment during pretrial and often appellate proceedings of courts of another sovereign state. The custodial provisions in the executive agreements subsequent to NATO SOFA reveal a growing tendency to clarify and expand these rights both as to the length of time involved and the category of personnel to whom this right applies.<sup>87</sup> Somewhat surprisingly, the agreements expanded these custody rights for the United States as well as its jurisdictional priorities during the same time that the United States Supreme Court curtailed the right of the armed forces to exercise court-martial jurisdiction over civilian personnel.<sup>88</sup> In large part, the willingness of the receiving state to agree to more extensive American custody may have resulted from a realization that pretrial custody is separate from the exercise of criminal jurisdiction and the infliction of punishment,<sup>89</sup> as well as the insistence of the American negotiators, who were faced with a Senate resolution indicating that the provisions of NATO SOFA were only the minimal acceptable terms and should not be repeated in future arrangements.<sup>90</sup> As a practical matter, it is not unlikely that local foreign authorities were probably satisfied to be rid of the burden of the accused during pretrial proceedings.<sup>91</sup> The anxiety of persons awaiting trial reputedly creates more severe custodial problems and this would only be aggravated in the case of individuals not fluent in his custodians' own tongue.<sup>92</sup>

In some of the countries where American forces were stationed, local authorities at times permitted American military authorities to retain custody beyond the time when the actual right to custody of the accused terminated.<sup>93</sup> The regulations promulgated jointly by all three American Armed Services, which purport to implement the Senate Resolution that accompanied the ratification of the NATO SOFA, encouraged this trend by requiring overseas commanders not only to attempt to obtain waivers in every case possible, whether the accused is military or civilian, but also to seek to retain custody of accused military personnel as long as possible.<sup>94</sup>

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<sup>87</sup> See pp. 14-17 *supra*.

<sup>88</sup> See Supreme Court cases cited note 18 *supra*.

<sup>89</sup> Stanger, *supra* note 42, at 256.

<sup>90</sup> 99 CONG. REC. 8370 (1953).

<sup>91</sup> Stanger, *supra* note 42, at 253.

<sup>92</sup> See Approved Draft, ABA Project on Standards for Criminal Justice Relating to Pretrial Release 2-3 (1968).

<sup>93</sup> LAZAREFF, *supra* note 20, at 241; Stanger, *supra* note 42, at 253-56; Metzger and McMahon, *supra* note 51, at 636. See *United States ex rel. Stone v. Robinson*, 309 F. Supp. 1261, 1267 (W.D. Pa. 1970).

<sup>94</sup> Status of Forces Policies, Procedures, and Information, Air Force Reg. No. 110-12, Army

#### 4. *The Military View of the Right to Custody*

Despite the acquisition under the agreements of the right to exercise custody over both military and civilian personnel, the Armed Services have been reluctant to recognize the right thus gained as any authority under United States law for American military authorities actually to exercise such custody.<sup>95</sup> In overseas areas, it is customary Army practice for charges under the Uniform Code of Military Justice to be preferred against military personnel whenever the receiving state might exercise its right to exercise jurisdiction.<sup>96</sup> Such an event provides military authorities with a theoretically sufficient and independent ground to exercise pretrial restraint, since the Code requires that persons charged with an offense be ordered into arrest or confinement.<sup>97</sup> Another provision of the same article also requires that immediate steps be thereafter taken to bring the case to trial or to dismiss the charges.<sup>98</sup> This requirement is apparently not felt to be compulsory as long as the United States can not exercise its jurisdiction without violating the delineations of priority in the SOFAs. Since there is no basis for preference of charges against civilians, such as civilian employees overseas or dependents accompanying the servicemen,<sup>99</sup> the services have refused to exercise custody of such personnel<sup>100</sup> in spite of indications in some SOFAs that the custody of the accused civilian must be entrusted to military authorities.<sup>101</sup>

The position of the armed forces in refusing to consider the SOFA provisions as grounds for the military authorities to actually exercise custody has been recently questioned by one commentator. However, his position that the SOFAs provide ample basis and authority for pretrial confinement or other forms of custodial control of both civilian and military personnel while they are in the receiving state, without the necessity of preferring American charges, has not yet been adopted by the services.<sup>102</sup>

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Reg. No. 27-50, SECNAV Instruction 5820.4C, 28 June 1967, para. 4 [hereinafter cited as AR 27-50].

<sup>95</sup> *Id.* See Heath, *Status of Forces Agreements as a Basis for United States Custody of an Accused*, 49 MIL. L. REV. 45, 84-85 (1970) [hereinafter cited as Heath].

<sup>96</sup> Heath, *supra* note 95, at 87-88.

<sup>97</sup> 10 U.S.C. § 810 (1970).

<sup>98</sup> *Id.*

<sup>99</sup> See cases cited note 18 *supra*.

<sup>100</sup> See Heath, *supra* note 95, at 84-85.

<sup>101</sup> See, e.g., Pakistani SOFA, Annex B, para. 5(c); Chinese SOFA, art. XIV, para. 5(c); Dutch Supplementary Agreement, Annex, para. 5(c); Dutch Supplementary Agreement, Annex, para. 3; Greek Supplementary Agreement, art. III.

<sup>102</sup> Heath, *supra* note 95. See AR 27-50, para. 4.

As explained by the commentator disagreeing with the Army position, one rationale for denying that SOFAs permit military incarceration of personnel is the permissive nature of the SOFA provisions<sup>103</sup> in contrast to the mandatory terms of the Uniform Code of Military Justice that compel some form of custody for personnel accused of offenses thereunder.<sup>104</sup> It has also been posited that the SOFAs are not self-executing in their custodial provisions and some form of legislation by the United States would be necessary to permit the Armed Forces to implement such custody.<sup>105</sup> Another arguable reason for failing to exercise custody could be that, except for the basic NATO SOFA which permits custody of only servicemen and employees and only for the limited period prior to the charging of an accused,<sup>106</sup> there is no Congressional ratification of the SOFAs by a formal treaty method<sup>107</sup> or other means, such as an appropriation of funds to support such custody.<sup>108</sup> Congress has actually recognized the SOFAs to some degree by providing for the costs of local counsel for personnel subject to the Uniform Code of Military Justice who are being tried in foreign courts.<sup>109</sup> When this provision was first enacted, the civilians whose status was defined in the SOFAs were generally subject to the Code, or thought to be so.<sup>110</sup>

The effect of the military attitude toward custody of personnel not actually in an Armed Service has been to deny civilian personnel overseas the benefit of American custody, as foreign authorities are forced to exercise their custodial powers if restraint is deemed necessary.<sup>111</sup> This may result in more severe treatment for a civilian forced to stay in foreign pretrial confinement since the SOFAs ordinarily permit the military authorities of the United States to determine what form cus-

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<sup>103</sup> Heath, *supra* note 95, at 87-88.

<sup>104</sup> 10 U.S.C. § 810 (1970).

<sup>105</sup> Heath, *supra* note 93, at 77.

<sup>106</sup> NATO SOFA, art. VII, para. 5(c).

<sup>107</sup> U.S. CONST., art. II, § 2, cl. 2. The recent action of the United States in restoring full Japanese sovereignty to the Ryukyu Islands (Okinawa) may possibly be interpreted as ratification of the Japanese SOFA. The treaty provides that all treaties applicable to Japan under the Defense Treaty of 1960 apply to Okinawa and one article specifically mentions the Japanese SOFA. Agreement with Japan Concerning the Ryukyu Islands and the Daito Island, June 17, 1971, arts. II, III, [1972] 23 U.S.T. 447, T.I.A.S. No. 7314, 5.

<sup>108</sup> Heath, *supra* note 95, at 64-71.

<sup>109</sup> 10 U.S.C. § 1037 (1970).

<sup>110</sup> *Id.* This provision was originally enacted in 1956 before the decisions cited in note 18 *supra* had invalidated the portions of the Uniform Code of Military Justice purporting to grant court-martial jurisdiction over civilians accompanying the armed forces overseas. Act of July 24, 1956, ch. 589, 70 Stat. 630, 10 U.S.C. § 802 (11-12) (1970).

<sup>111</sup> Heath, *supra* note 95, at 87-88.

tody should take.<sup>112</sup> Military personnel are thus subjected to pretrial confinement or other forms of custody under the fiction that their deprivation of liberty is justified by charges which can not be tried without the violation by the United States of the SOFA involved.

### C. *Termination of the Sending State's Custody*

Although the custodial provisions in the various agreements make expressly clear that the sending state has a right superior to that of the receiving state to have its military authorities retain physical control over most members of the overseas military communities during all or part of the pretrial and appellate processes of foreign courts, there are no explicit provisions requiring the sending state to surrender the accused at the termination of this period.<sup>113</sup> There are, however, in most of the SOFAs subsequent to NATO SOFA and in the supplementary agreements provisions requiring the sending state's military authorities to make accused personnel available for investigative proceedings and trials.<sup>114</sup>

The lack of any clear provision indicating that such custody of an accused as the military authorities may possess and exercise must be transferred to the receiving state for imposition of punishment or following charging or trial, should not justify a sending state's refusal to surrender the accused after its right to custody has expired. The provisions in most agreements requiring the United States as a sending state to assist the receiving state in handing the accused over to the state which is to exercise jurisdiction<sup>115</sup> would not seem to expire or terminate when the receiving state actually exercises that jurisdiction or acquires the accused temporarily for investigation or trial.

Both with the agreements indicating that the handing over is to be to the state exercising jurisdiction and with those where the handing over is to be to the state entitled to custody,<sup>116</sup> the end of the sending state's right to custody naturally infers that the individual should be surrendered to the receiving state's authorities to permit the exercise of juris-

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<sup>112</sup> While NATO SOFA, art. VII, para. 5(c), is silent on the form that custody should take, most SOFAs allow the United States or the sending state to determine the manner in which custody will be exercised after considering any special desires of local authorities. *See, e.g.,* Korean SOFA, art. XXII, para. 5 (c); German Supplementary Agreement, art. 22, para. 3. *See* Appendix B.

<sup>113</sup> A broad reading of the custody provisions would probably infer that custody must be transferred to the receiving state at the termination of the right of the sending state or the United States to continue such custody. *See Metzger and McMahon, supra* note 51, at 637.

<sup>114</sup> *See* note 68 *supra*.

<sup>115</sup> *See* p. 14 *supra*.

<sup>116</sup> Chinese SOFA, art. XXII, para. 5(c). *See* Philippine SOFA, Agreed Official Minutes, para. 5.

diction to be completed by such methods as infliction of adjudged punishment. Denying the sending state the right to impose punishment duly adjudged on a person within its territory after it has pursued its criminal processes would render the criminal jurisdiction provisions meaningless, abrogating their spirit if not any of their precise terms. Certainly where the sending state has custody of an accused within the territory of the receiving state, the superior sovereignty of the local state should compel the military authorities to submit to the receiving state's desire when those authorities no longer have a legitimate claim to custody of the individual by virtue of any international agreement.

The validity of this implied obligation to surrender an accused after the sending state's right to custody expires was quite abruptly upheld by the Supreme Court in the case of *Wilson v. Girard*<sup>117</sup> involving a soldier in Japan. Girard was accused of shooting a Japanese woman at a firing range while he was performing guard duties. The certificate of Girard's commander indicating that the offense occurred in the performance of official duties and was thus one over which American authorities had the primary right to exercise jurisdiction was disputed by Japanese authorities. Lengthy negotiations resulted in United States representatives agreeing to waive their primary right.<sup>118</sup> In a petition for habeas corpus commenced in the District of Columbia, Girard obtained an injunction prohibiting officials in the Defense Department from surrendering him to Japanese authorities for trial. The federal district judge determined that the United States could not constitutionally deprive an accused of trial by court-martial for an offense covered by the Uniform Code.<sup>119</sup> In an appeal bypassing the court of appeals, the Supreme Court reversed. Holding that under traditional international law Japan has "exclusive jurisdiction to punish all offenses against its laws committed within its borders"<sup>120</sup> and that its surrender of such jurisdiction for official duty offenses was conditioned by a clause requiring the United States to give sympathetic consideration to Japanese requests for waiver, the Court perceived no Constitutional or statutory barrier to the application of the waiver to Girard's situation.<sup>121</sup> The *per curiam* opin-

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<sup>117</sup> 354 U.S. 524 (1957), *rev'g* *Girard v. Wilson*, 152 F. Supp. 21 (D.D.C. 1957). The writ for habeas corpus was filed for Girard in the District Court on June 6, 1957; the District Court announced its decision on June 18 and the Supreme Court its *per curiam* opinion on July 11, 1957. See Baldwin, *Foreign Jurisdiction and the American Soldier*, 1958 Wis. L. REV. 52, 65 [hereinafter cited as Baldwin].

<sup>118</sup> *Girard v. Wilson*, 152 F. Supp. 21, 23 (D.D.C. 1957).

<sup>119</sup> *Id.* at 27.

<sup>120</sup> *Wilson v. Girard*, 354 U.S. 524, 529 (1957).

<sup>121</sup> *Id.* at 530.

ion did not hold that the Japanese SOFA compelled surrender of Girard to Japan, but the Court must have determined that such a surrender was permitted by its dissolution of the lower court's injunction prohibiting a delivery of Girard to Japanese authorities.<sup>122</sup>

The implicit approval in the *Girard* case of surrender to receiving states conformed with the holding of two previous lower court cases refusing any relief to servicemen overseas about to be delivered to foreign authorities.<sup>123</sup> No subsequent cases have successfully attacked any proposed or already effected surrender of servicemen to foreign authorities pursuant to this implied obligation of any SOFA, where the surrender was to take place and the individual was in the foreign country.<sup>124</sup>

Thus the normal application of SOFA provisions, where the individual commits the offense overseas and remains in the receiving state from the time of offense until the completion of any adjudged punishment, presents few problems. The sending state in exercising custody is equivalent to an agent of the criminal authorities of the receiving state,<sup>125</sup> possessing the right and sometimes the obligation of maintaining pretrial and appellate custody in the manner it deems appropriate,<sup>126</sup> and relinquishing the accused to the receiving state authorities if and when that state's courts convict the accused and his surrender is requested to serve any adjudged punishment.

While the *Girard* holding in the Supreme Court contained language limiting its application to the particular circumstances involved in the waiver of jurisdiction by the United States and the subsequent necessity to deliver the accused to Japanese authorities, the case has been broadly interpreted as judicial approval of the SOFAs in all respects.<sup>127</sup> Whether or not this expanded reading is justified, the surrender of individuals in the custody of the United States within the territory of a receiving state to local officials does seem legally unimpeachable, if not based upon a SOFA, upon the principle recognized by the Supreme Court of the

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<sup>122</sup> *Id.*

<sup>123</sup> *Cozart v. Wilson*, 236 F.2d 732 (D.C. Cir. 1956), *vacated as moot*, 352 U.S. 884 (1956); *May v. Wilson*, 153 F. Supp. 688 (D.D.C. 1956). *Cf.* *United States ex. rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1955), *cert. denied* 348 U.S. 952 (1955).

<sup>124</sup> *Smallwood v. Clifford*, 286 F. Supp. 97 (D.D.C. 1968), *vacated as moot*, No. 22053 (D.C. Cir. May 14, 1969); *Blount v. Laird*, Memorandum Order, Civil Action No. 2715-70 (D.C. Cir. Oct. 29, 1971).

<sup>125</sup> PROCEEDINGS: FIRST SUMMER CONFERENCE ON INT'L LAW, CORNELL LAW SCHOOL 92 (1957) [hereinafter cited as PROCEEDINGS].

<sup>126</sup> Chinese SOFA, art. XIV, para. 5(c); German Supplementary Agreement, art. 22. *See* Text of Negotiating History, *supra* note 20, at 463.

<sup>127</sup> *See* Note, 71 HARV. L. REV. 136, 140-41 (1957-58). *See also* Metzger and McMahon, *supra* note 51, at 644; *but see id.* at 625 n.38.

sovereignty of the receiving state and its general right to punish offenders within its borders for offenses therein committed.<sup>128</sup>

### III. SENDING STATE'S OBLIGATION TO RETURN FUGITIVES

While the operation of criminal jurisdiction provisions of the SOFAs may proceed smoothly enough in a routine case where the accused military member or civilian subjected to the criminal processes of the receiving state remains within the territory of that state from the time of the commission of the offense through the trial and imposition of any adjudged punishment, there remains the constant possibility of his departure. In this respect the individual is not unlike any criminal seeking to avoid the consequences of his crime by fleeing the jurisdiction which desires to subject him to its criminal powers. In the case of a serviceman or civilian connected with a military community, the departure may actually be facilitated by military movements or aircraft flights to which the local resident or ordinary alien would have less likelihood of access. Regardless of the form of custody exercised over an accused and whether it is exercised by foreign military authorities or local officials, an accused could escape at any time prior to the end of his prison sentence.<sup>129</sup> Conceivably he could flee or passively accept a reassignment from the sending state before his complicity in the offense is discovered and effective steps taken to insure his presence.<sup>130</sup> Finally, as has occasionally occurred, military authorities responsible for exercising custody may fail to take the proper steps to insure that an accused kept under a loose restrictive custody remains assigned to a unit in the receiving state permitting him to depart on a normal reassignment or for discharge back in the sending state.<sup>131</sup>

None of these possible events has much, if any, relevance to the

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<sup>128</sup> *Wilson v. Girard*, 354 U.S. 524, 529 (1957).

<sup>129</sup> See, e.g., *United States ex. rel. Stone v. Robinson*, 309 F. Supp. 1261 (W.D. Pa. 1970); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972). These two cases are described in Chapter IV *infra*.

<sup>130</sup> See, e.g., J. DODD, *supra* note 51, at 59, describing the departure of a naval enlisted man from the Philippines where the local arresting authorities had apparently released him without formally turning him over to United States naval authorities. Before the trial the man was returned to the United States and discharged.

<sup>131</sup> See, e.g., *Williams v. Rogers*, 449 F.2d 513 (8th Cir. 1971). This case is described in Chapter IV *infra*. See also J. DODD, *supra* note 51, at 58-59, describing the case of George E. Roe, a naval seaman who was formally released to American authorities but permitted to return to the United States for discharge because of a failure to stop his orders; PROCEEDINGS, *supra* note 125, at 96, where a former Judge Advocate General of the United States Army indicated in 1957 that either a soldier or an airman had been inadvertently returned to the United States and was thereafter taken back to France after a high level decision.



criminality of the individual although the act of departure may be an offense in itself and the statute of limitations may be affected. While it may have been logical and prudent for drafters of the SOFAs to take specific notice of these possible events and to provide for remedial action for their occurrence, there are no explicit provisions in the SOFAs or supplementary agreements covering this area.<sup>132</sup>

#### A. *Applicability of Extradition Treaties*

The most common method of dealing with individuals who flee a country to avoid prosecution or punishment is, of course, extradition. The individual whose status is or was defined by a SOFA would not, by virtue of that status, appear to be exempt from the coverage of such treaties.<sup>133</sup> If he leaves the receiving state and is found in any other state having an extradition treaty with the receiving state, that other state should be able to extradite the accused to the receiving state unless the alleged offense is exempt from extradition, as are most political offenses,<sup>134</sup> or because of other factors such as the accused's possession of the nationality of the state requested to make the extradition.<sup>135</sup>

Extradition, however, is a somewhat cumbersome procedure,<sup>136</sup> which normally involves judicial hearings<sup>137</sup> and the necessary delay involved in obtaining adequate evidence.<sup>138</sup> In the United States the approval of the Secretary of State must be obtained after the judicial proceedings<sup>139</sup> and still further delay can be effected through habeas corpus proceedings, other collateral remedies, and appeals from such cases.<sup>140</sup> The presently effective United States extradition treaties are

<sup>132</sup> None of the SOFAs or supplementary agreements have any explicit words indicating that an individual in any circumstances must be returned from a sending state, or any other location, to the receiving state if he leaves such state during the processing of his case. The purpose of this Chapter is to determine whether other provisions can be read so as to imply or infer that the sending state has a duty to return such individuals.

<sup>133</sup> See, e.g., Extradition Treaty with Japan, *supra* note 22, at art. II.

<sup>134</sup> See generally M. GARCIA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* 73-94 (1956).

<sup>135</sup> See generally RAFUSE, *supra* note 7; SHEARER, *supra* note 7, at 93-131.

<sup>136</sup> Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 28 (1968). *Contra*, Comment, *Toward the Elimination of the Legal Non-Person from International Extradition*, 18 U.C.L.A. L. REV. 410, 426 (1970).

<sup>137</sup> 18 U.S.C. § 3184 (1970).

<sup>138</sup> *Id.* at §§ 3188, 3190.

<sup>139</sup> *Id.* at § 3186.

<sup>140</sup> *Wacker v. Bisson*, 370 F.2d 552 (5th Cir. 1967), *cert. denied*, 387 U.S. 936 (1967). An earlier appeal in this case of an extradition to Canada for securities offenses had resulted in *Wacker* being permitted to seek a declaratory judgment invalidating the proposed extradition after two unsuccessful habeas corpus attempts. *Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965). The original extradition proceedings had begun in April, 1963, four years before the Supreme Court acted on the last appeal. *Id.* at 604, 387 U.S. 936 (1967).

limited to specifically enumerated offenses and do not cover the whole range of possible criminal conduct as do the SOFAs.<sup>141</sup> Usually most of the common law felonies such as murder, rape and robbery are included.<sup>142</sup>

A more difficult obstacle to the use of extradition treaties to return an individual to the receiving state from the United States is the failure of many such treaties to permit, under the interpretation of the Supreme Court, extradition of American citizens.<sup>143</sup> In the case of countries with which the United States has both a SOFA relationship and an extradition treaty, Americans can not be extradited to Belgium, the Federal Republic of Germany, Greece, Iceland, Luxembourg, the Netherlands, Norway, Portugal and Turkey.<sup>144</sup> There are no presently effective extradition treaties with China, Denmark, the Philippines or South Korea.<sup>145</sup> With the aforementioned countries, if one assumes that most American servicemen and civilians accompanying them abroad are Americans, extradition is presently unavailable. Extradition of such individuals is permissible in the case of France, Japan, New Zealand, Nicaragua and Spain.<sup>146</sup> Extradition of American citizens is mandatory in the absence

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<sup>141</sup> See generally treaties listed notes 14, 21 and 22 *supra*; SHEARER, *supra* note 7, at 133-37. The United States is a party to the Convention on Extradition (Inter-American), Dec. 26, 1933, [1935] 49 Stat. 3111, T.S. No. 882, to which eleven Latin American countries are also a party. In the Convention, extradition is to take place if the act constitutes a crime punishable under the laws of both the demanding and surrendering state by imprisonment for more than one year. *Id.* at art. 2. Because the Convention does not apply between any two of the signatories when they have a bilateral extradition treaty and the United States does have such treaties with all other parties, the Convention has no practical effect in the United States. U.S. DEP'T OF STATE, TREATIES IN FORCE 314 (1973).

<sup>142</sup> See, e.g., Extradition Treaty with Japan, *supra* note 22, at art. VI. This treaty was modified by a later Extradition Treaty with Japan, May 17, 1906, [1906] 34 Stat. 2951, T.S. No. 454, to include simple larceny when the crime is punishable in both Japan and the United States by imprisonment for one year or more. Also included was an actual conviction with at least one year imprisonment as a sentence.

<sup>143</sup> *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936). See generally RAFUSE, *supra* note 7, at 32-55.

<sup>144</sup> See note 21 *supra*. At the time of NATO SOFA's negotiations, the United States had in effect the Extradition Treaty with Denmark, Jan. 6, 1902 [1903] 32 Stat. 1906, T.S. No. 405, which also contained the clause interpreted to bar surrender of nationals. Denmark and the United States terminated that treaty effective June 18, 1968. 7 J. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 38 (1971). A new extradition treaty with Denmark has been signed but is still pending submission to and approval by the Senate. Dep't State Press Release No. 1726, 67 DEP'T STATE BULL. 130 (1972).

<sup>145</sup> U.S. DEP'T OF STATE, TREATIES IN FORCE (1973). With respect to Denmark, see note 144 *supra*.

<sup>146</sup> See note 22 *supra*. Prior to 1970 New Zealand was covered by previous treaties with the United Kingdom and thus extradition would have been mandatory absent some disqualifying factor other than the nationality of the fugitive. See note 14 *supra*.

of some other ground for exemption in the case of Australia, Canada, Great Britain and Italy.<sup>147</sup>

It is thus apparent that extradition may be totally ineffective in a large number of cases where an individual encompassed by a SOFA manages to leave the receiving state before his alleged crime is adequately disposed of by that state. Some of the cases may be resolved by the exercise of American jurisdiction (if any exists) since the SOFAs do not prohibit such outside the receiving state.<sup>148</sup> The difficulty of obtaining witnesses may, however, make this possibility practically ineffective. Since the United States follows the principle that individuals will not be surrendered to a foreign state absent a treaty obligation to do so or an authorizing statute,<sup>149</sup> and there is no statute presently permitting extradition to any SOFA country,<sup>150</sup> any requirement to return the fugitive individual<sup>151</sup> to the receiving state must be found, if at all, in the SOFA.

#### B. *Use of the SOFAs to Return Any Fugitive*

If the SOFAs and the supplementary agreements had as a primary purpose the suppression of crime, the normal stated desire of an extradition treaty,<sup>152</sup> it would be logical to infer that the states contracting the SOFAs intended that all parties thereto should be bound to take every step possible to insure that alleged criminals be brought before the court having either the primary or exclusive right to try the individual under the terms of the particular agreement. This result would be in line with the normal practice of interpreting treaties and other international agreements liberally to accomplish the intended results of the states party thereto.<sup>153</sup> Laudable as may be the goal of insuring that criminals be brought to justice, none of the SOFAs to which the United States is a party contain any statement that indicate the agreements were designed to accomplish that end. Instead the plain terms of most SOFAs appear to be directed to defining the legal status within the receiving state of the foreign military force and individuals connected with or a

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<sup>147</sup> See note 14 *supra*.

<sup>148</sup> See, e.g., NATO SOFA art. VII, para. 8; Chinese SOFA, art. XIV, para. 8.

<sup>149</sup> *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).

<sup>150</sup> 18 U.S.C. § 3185 (1970) authorizes extradition to countries occupied or controlled by the United States.

<sup>151</sup> The word fugitive is used in this paper to describe any individual leaving the territorial jurisdiction of the alleged offense, whether or not the departure is with specific intent to avoid trial or punishment by the local authorities.

<sup>152</sup> See, e.g., Extradition Treaty with Argentina, *supra* note 22, at Preamble.

<sup>153</sup> *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936).

part of the force.<sup>154</sup> Many provisions of the SOFAs and the negotiating histories available indicate that the rights and obligations created thereunder were intended to be limited in geographical scope to the area within the boundaries of the receiving state.

### 1. *Territorial Indicia in the Language of the SOFAs*

Many of the SOFAs and supplementary agreements contain introductory or preambulatory language similar to that of NATO SOFA indicating that the states involved desired "to define the status of [foreign military] forces *while in the territory of another Party*."<sup>155</sup> This initial limitation gains reinforcement in the definitions of the personnel whose status is being defined. In most SOFAs, military personnel are covered by the SOFA only when in the receiving state, often in an official duty capacity related to defense relationships between the sending and receiving state.<sup>156</sup> Civilian personnel are similarly defined in several SOFAs<sup>157</sup> and provisions excluding civilian personnel possessing the nationality of the receiving state are common.<sup>158</sup>

The territorial aspects are also found in the portions of the SOFAs dealing with the exercise of criminal jurisdiction itself. Initially most SOFAs recognize the right of the sending state's military forces to exercise criminal powers within the receiving state.<sup>159</sup> Prohibitions against the exercise of sending state jurisdiction over a civilian national of the receiving state are found.<sup>160</sup> The principle of double jeopardy is contained in all the SOFAs and is ordinarily restricted to the territory of the receiving state or "the same territory" where the authorities of one state have exercised jurisdiction pursuant to the SOFA.<sup>161</sup>

Perhaps the most compelling provision militating against any infer-

<sup>154</sup> See, e.g., NATO SOFA, Preamble; Chinese SOFA, Preamble.

<sup>155</sup> NATO SOFA, Preamble. See also, e.g., Australian SOFA, Preamble.

<sup>156</sup> See, e.g., NATO SOFA, art. 1(a); Icelandic SOFA, art. 1; Japanese SOFA, art. I(a); Pakistani SOFA, para. 11; But see West Indies SOFA, art. I.

<sup>157</sup> See, e.g., NATO SOFA, art. I(b); Korean SOFA, art. I(b). But see Spanish SOFA, Definition, para. 2(a)(2).

<sup>158</sup> See, e.g., NATO SOFA, art. I(b); Korean SOFA, art. I(b); New Zealand SOFA, *Memorandum of Understandings*, para. 11.

<sup>159</sup> See, e.g., NATO SOFA, art. VII, para. 1(a); Nicaraguan SOFA, art. IX, para. 1(a); Australian SOFA, art. 8, para. 1(a); Philippine SOFA, para. 1(d).

<sup>160</sup> See, e.g., Icelandic SOFA, art. 2, para. 1(a); Indian Ocean SOFA, Annex II, para. 1(d).

<sup>161</sup> See, e.g., NATO SOFA, art. VII, para. 8; Nicaraguan SOFA, art. IX, para. 6; Korean SOFA, art. XXII, para. 8. But see Icelandic SOFA, art. 2, para. 8, where the clause prohibits only Icelandic authorities from trying an individual after the United States authorities have tried him for the same offense; New Zealand SOFA, *Memorandum of Understandings*, para. 4(d) which indicates that "the principle of not trying an accused twice for the same offense (sic) will be followed." Both of these latter provisions contain no explicit territorial limits.

ence that a sending state should be required to return any fugitive who departs the receiving state is the common clause indicating that the sending and receiving states' authorities shall assist each other in the arrest of servicemen and civilians "*in the territory of the receiving state.*" Of the presently effective SOFAs, only the Icelandic and relatively unimportant New Zealand agreement omit this territorial phrase.<sup>162</sup>

On the face of the SOFAs themselves, therefore, a strong argument is available that they do not create any viable obligations outside the territory of the receiving state. It is reasonable to infer that the drafters of the SOFA did not intend to create any new obligation to arrest individuals outside a receiving state. Not only is the requirement to assist in the arrest limited to the receiving state, but the individual who would be the subject of the arrest would have left the receiving state and probably thereby have lost his status as a person defined by the SOFA.<sup>163</sup> Considering the relative ease with which the SOFAs could have included a provision such as the following:

If any accused member of the force or civilian component or dependent leaves the territory of the receiving State before trial and the imposition of punishment, if appropriate, in a case where the receiving State has the primary or exclusive right to exercise jurisdiction, the appropriate authorities of the sending State will return the individual to the receiving State . . .

It seems reasonable to conclude that the territorial limitations of the SOFAs exclude any interpretation that a sending state must return fugitives who once possessed a status encompassed by the SOFA.

There are two considerations, however, that can point to a contrary conclusion. The provisions of later SOFAs indicating that the United States may retain custody beyond the time of charging by the receiving state may compel an obligation to produce the individual at a later time. This is discussed more fully in Part C of this Chapter. A second consideration is the other portion of the arrest clause in most SOFAs which indicates that the sending and receiving states' authorities shall assist each other in handing over the accused to the authorities entitled to

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<sup>162</sup> NATO SOFA, art. VII, para. 5(a); Icelandic SOFA, art. 2, para. 6(a); New Zealand SOFA, *Memorandum of Understandings*, para. 4(c). *See also, e.g.*, Japanese SOFA, art. XVII, para. 5(a) (in the territory of Japan). *See generally* Appendix B.

<sup>163</sup> *See, e.g.*, NATO SOFA, art. I(a)-(c); Australian SOFA, art. I. *Cf.* German Supplementary Agreement, art. 2, para. 2 (b), where dependents remaining in the Federal Republic after the death or departure of the serviceman or civilian employee upon whom they depend retain their status for ninety days. *See generally* LAZAREFF, *supra* note 7, at 262-63.

exercise jurisdiction.<sup>164</sup> The territorial limitation commonly found in the arrest clause does not appear to modify this requirement. Moreover it could be suggested that the receiving state's local authorities could hardly be expected to assist in any arrest outside of their own territory since they would not be enforcement agents in the sending state.<sup>165</sup> Thus an argument may be advanced that the sending state should hand over any individual regardless of his location and status. His status as a member of the force, civilian component, or dependent presumably would revive when the sending state returns him to the receiving state.<sup>166</sup> This construction is somewhat strained and it would seem much more logical to interpret the word "them" in the phrase "in handing them over" as referring to those individuals arrested in the receiving state.<sup>167</sup> Even this interpretation could, however, extend the obligations of the sending state beyond the geographical limits by a contention that anyone once arrested in the receiving state and later assuming a fugitive status in the sending state should be handed over to the authorities of the receiving state.<sup>168</sup> A more limited reading to include only those continuing constant status as a member of the force's military community would seem to be more consistent with the general tenor of the limited geographical scope of the SOFAs. The phrasing, however, is ambiguous enough to warrant inquiry into the negotiating histories that are available.<sup>169</sup>

## 2. *NATO SOFA Negotiations*

The negotiating history of the basic NATO SOFA reveals that the agreement derived from a combination of two documents. Several of the negotiating parties had reached a prior agreement which may be termed the Brussels Powers SOFA.<sup>170</sup> Several of the European parties to NATO

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<sup>164</sup> See, e.g., NATO SOFA, art. VII, para. 5(a); West Indies SOFA, art. IX, para. 5(a).

<sup>165</sup> Arguably any assistance rendered by authorities of the receiving state, such as fingerprint or sketch identification, sent from receiving state to a sending state could constitute assistance in the arrest. The determination between Iceland and the United States in the Icelandic SOFA, art. 2, para. 6(a) not to limit cooperation to Icelandic territory could be construed as indicating such cooperation was envisioned.

<sup>166</sup> See, e.g., NATO SOFA, art. I(a)-(c).

<sup>167</sup> NATO SOFA, art. VII, para. 5(a). See generally Appendices A and B for the wording of the arrest and custody provisions of all the SOFAs considered herein.

<sup>168</sup> This argument is particularly strong in the case of the individual handed over to the receiving state for custody. See pp. 41-49 *infra*.

<sup>169</sup> The available negotiating histories are those for NATO SOFA and the German Supplementary Agreement. Snee, *supra* note 43; Text of Negotiating History, *supra* note 20. Metzger and McMahon, *supra* note 51, at 634.

<sup>170</sup> Agreement Relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers, Dec. 21, 1949. The Agreement can be found at Snee, *supra* note 43, at 331. Belgium, France, Luxembourg, the Netherlands, and the United Kingdom were parties signatory but the

suggested that this document be used as the basis for negotiations.<sup>171</sup> The United States, which was not a party to that agreement, submitted a draft which paralleled the Brussels Powers SOFA but changed many definitions and expanded the scope of personnel to include civilians.<sup>172</sup> In almost all respects, the Brussels Powers SOFA contained the same territorial limitations that emerged in the NATO SOFA;<sup>173</sup> the United States draft, while indicating a territorial scope in the preamble, contained no such limitation in the provisions dealing with either the arrest or handing over of individuals accused of offenses in the receiving state.<sup>174</sup> The negotiating history fails to reveal why the final document contained the limitations in the arrest provisions, but the selection of the more limited version would support the inference that the drafters intended to create no obligations for the sending state outside of a receiving state.<sup>175</sup>

Extradition was mentioned once during the negotiating discussions by the Belgian delegate in connection with the formulation of the double jeopardy provision of Article VII.<sup>176</sup> As first proposed, that provision would have contained no limits and a trial by one party would have precluded a second trial for the same offense by the other party involved.<sup>177</sup> The Belgian delegate objected that such a rule would result in individuals being able to escape punishment altogether. He visualized a

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agreement never went into effect because of the emergence of NATO. LAZAREFF, *supra* note 20, at 45.

<sup>171</sup> Snee, *supra* note 43, at 55.

<sup>172</sup> *Id.* The original draft proposed by the United States is at *id.* at 345.

<sup>173</sup> In the Brussels Powers SOFA, the "members of a foreign force" were defined as those "travelling or resident in the execution of their duties under the Brussels Treaty in the territory of a Contracting Party other than the 'sending State'." *Id.* at 331. In the arrest provision it was provided: "Where the authorities of the 'receiving State' consider that, in respect of an offence committed in the 'receiving State' by a 'member of a foreign force', the necessities of the investigation, trial and execution of the sentence require the imprisonment of the offender, the authorities of the 'foreign force' will assist in making the arrest, if the offender can be found and arrested in the territory of the 'receiving State'." *Id.* at 334.

<sup>174</sup> "... [D]esiring to establish mutual privileges and immunities for personnel, who are subject to military law, of one member nation on duty in the territory of another member nation." *Id.* at 345; "The authorities of the receiving and sending States will assist each other in the arrest and handing over of offenders . . ." *Id.* at 349.

<sup>175</sup> Metzger and McMahon, *supra* note 51, at 633. The definitions of personnel to be encompassed by the SOFA proposed by the United States were also broader in territory than that in the Brussels Powers SOFA as indicated in note 173 *supra*: "... military personnel of the sending State, and civilian personnel subject to military law of the sending State maintained by a Contracting Party on duty in the territory of another Contracting Party . . ." Snee, *supra* note 43, at 345-46. This definition may easily be read to include personnel not physically in the receiving state but merely assigned to a position therein.

<sup>176</sup> Snee, *supra* note 43, at 104.

<sup>177</sup> *Id.*

Belgian delinquent escaping France after a French trial pursuant to the SOFA. Such a person, he indicated, would avoid punishment because of Belgium's constitutional prohibition against the extradition of its nationals.<sup>178</sup> None of the delegates suggested that they intended to require Belgium to violate her Constitution; instead the double jeopardy provision was modified to include only the territory where the trial occurred, leaving Belgium free to prosecute its fugitive citizen in her own courts.<sup>179</sup>

The territorial language of the NATO SOFA is arguably strengthened by the bilateral arrangement made between the United States and Iceland for the status of American forces and property in that nation which has no armed forces.<sup>180</sup> Iceland was a full participant in the negotiations and signed but never ratified the NATO SOFA. The executive agreement reached with Iceland became effective before the end of the negotiations and was revealed to all negotiators.<sup>181</sup> This agreement constitutes the second American SOFA in the sense that it delineated priorities in the exercise of concurrent jurisdiction offenses.<sup>182</sup> The SOFA provisions are contained in an annex to an earlier agreement concerning defense arrangements in furtherance of NATO by the United States in Iceland. Neither the basic agreement nor the annex contains a preamble indicating that the provisions are to be limited in geographical terms.<sup>183</sup> Most significantly the arrest and handing over provisions do not contain the territorial phrase found within the comparable NATO SOFA provisions.<sup>184</sup> The definition of the personnel covered by this Icelandic SOFA, however, is couched in language requiring the person to be "in the territory of Iceland" for the SOFA to be applicable.<sup>185</sup> The Icelandic

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 105. In a subsequent discussion of the double jeopardy provision after it had been modified, the Netherlands delegate commented "that one case not provided for in this paragraph was when, for instance, an American soldier injured a Belgian in transit through his country on his way, say to Holland. If the American force held a court-martial in Holland, the soldier, although he could not be tried by the Netherlands authorities, could be tried by the Belgians, if they got hold of him." The other delegates recognized the problem but indicated that they hoped it would rarely occur since trial would normally occur where the offense was committed and the witnesses were located. *Id.* at 112. This discussion would seem to indicate that none of the delegates felt that United States authorities would have been obliged to return the errant soldier to Belgium either to try him there or to surrender him to local authorities. See pp. 35-36 *infra*.

<sup>180</sup> Snee, *supra* note 43, at 57.

<sup>181</sup> *Id.* at 210.

<sup>182</sup> The first was the Philippines Bases Agreement. See note 51 *supra*.

<sup>183</sup> Defense Agreement with Iceland, May 5, 1951, [1951] 2 U.S.T. 1195, T.I.A.S. No. 2266; Icelandic SOFA.

<sup>184</sup> Icelandic SOFA, art. 2, para. 6(a).

<sup>185</sup> *Id.* at art. 1.



representative, while signing the NATO SOFA indicated that any other NATO country stationing forces in Iceland could have extended to it the same terms as the United States had in its agreement and that Iceland considered this sufficient since it could never be a sending state.<sup>186</sup> Whether Iceland felt that the bilateral SOFA with America was more protective of its interests is at best speculative, but it seems indisputable that the agreement could be more easily interpreted than NATO SOFA to require the returning to Iceland fugitive servicemen or civilians who allegedly commit offenses in Iceland while in a status covered by that SOFA.<sup>187</sup>

The examination of the negotiating history of NATO SOFA and the text itself, as well as the contemporaneous Icelandic SOFA, fail to reveal that the framers contemplated any requirement that sending states would be obligated to bring any of its personnel into the receiving state in order to permit the authorities of that state to exercise their right of jurisdiction.

Since such action would closely resemble extradition, no matter how labelled, it is useful to consider the likely reaction of the negotiating states had a specific proposal been suggested to require return of fugitives. It has been suggested that many of the negotiators would have disputed any indication that the inclusion of the limiting territorial language meant that the United States or any sending state had no duty to arrest and hand over its servicemen who were no longer in the receiving state.<sup>188</sup> This argument seems somewhat tenuous in view of the Belgian delegate's comments discussed above and the failure of the other negotiators to object to his comments about the Belgian rule barring extradition of nationals.<sup>189</sup> Of the twelve parties in the negotiations, eight had at the time extradition treaties with the United States that completely exempted extradition of nationals.<sup>190</sup> A ninth party, Italy, had an extradition treaty with the United States that completely omitted mention of the nationality of the fugitive. Italy had for a long time interpreted this treaty to permit it to refuse to extradite its nationals based upon its internal law disfavoring such extradition even while the United States interpreted the treaty to compel delivery of United

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<sup>186</sup> LAZAREFF, *supra* note 20, at 422-23.

<sup>187</sup> This author is of the opinion that the Icelandic SOFA does compel the United States to deliver fugitives who committed a crime while possessing a status covered by the Icelandic SOFA. There do not appear to be any cases involving such a fugitive.

<sup>188</sup> Metzger and McMahon, *supra* note 51, at 634.

<sup>189</sup> See p. 32 *supra*.

<sup>190</sup> These countries were Belgium, Denmark, France, Iceland, Luxembourg, the Netherlands, Norway and Portugal. See notes 21, 144 *supra*.

States citizens.<sup>191</sup> Since it can be assumed that most of the members of a sending state's military forces and civilian components will be nationals of the sending state,<sup>192</sup> it would seem more logical to infer that the majority of the delegates would have opposed any obligation that would have effectively altered its normal extradition relationships. It would appear that the delegates' general silence about the problem of fugitives, together with the desire expressed in the Preamble, means that NATO SOFA is not designed to cope with the fugitive situation.

This conclusion that NATO SOFA does not require sending states to return personnel to the receiving state to aid in its exercise of jurisdiction is not inconsistent with the tenor expressed throughout Article VII, where cooperation and consideration of the other state's wishes are emphasized.<sup>193</sup> If one accepts the proposition that the primary reason for setting up the priorities in the exercise of jurisdiction was to resolve conflicting claims over the right to try an individual for the same act or omission when both authorities could claim legitimate power over the individual concerned, the problem disappears when the individual leaves the territory where the simultaneous claims exist. At that time, either party should be able to employ any legitimate means to restore the individual to its power and exercise its jurisdiction. If the individual flees to a third state, extradition may be attempted by either state.<sup>194</sup> Deportation is a possibility if the fugitive is not a national or citizen of the third state.<sup>195</sup> If the individual returns to the sending state, then that state is free to extradite the individual or to exercise jurisdiction over the offense involved; if the offense is not subject to prosecution in the sending state<sup>196</sup> prosecution for the flight involved may be a possibility.<sup>197</sup> The problems of the fugitive criminal are difficult, but an assertion that

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<sup>191</sup> *Charlton v. Kelly*, 229 U.S. 447 (1913). The Italian government agreed in 1946 to extradite its own nationals to the United States. 6 M. WHITEMAN, *supra* note 34, at 866, 872-73.

<sup>192</sup> See Text of Negotiating History, *supra* note 20, at 304.

<sup>193</sup> NATO SOFA, art. VII, paras. 3(c), 5(a) and (b), 6, and 10(b).

<sup>194</sup> See the first Extradition Treaty with Argentina cited in note 22 *supra*, at art. 3. This provision permits extradition of an offender for a crime committed outside the requesting state's territorial jurisdiction if the state requested to permit the extradition would have jurisdiction in similar circumstances. However, older treaties tend to limit extradition to offenses committed within the territorial jurisdiction of the requesting state and have been interpreted by the State Department as so limited when the language is not specific. 6 M. WHITEMAN, *supra* note 34, at 890-97.

<sup>195</sup> See 8 U.S.C. §§ 1182 (a)(9), 1251 (a)(1) (1970).

<sup>196</sup> See notes 15, 16 *supra*.

<sup>197</sup> See, e.g., 18 U.S.C. § 1073 (1970). This section makes it criminal to move in interstate or foreign commerce to avoid prosecution "under the law of the place from which [the alleged criminal] flees." This would logically include a fugitive from abroad but the venue provision in the same section limits prosecution to the Federal Judicial District where the original crime was committed.

NATO SOFA is a partial remedy for the situation does not seem to be borne out either by the language or the negotiating history.

### 3. *Negotiation of German Supplementary Agreement*

In the fourth year following the signatory date of NATO SOFA, negotiations began on the multilateral Supplementary Agreement for West Germany.<sup>198</sup> The document that emerged in 1959 and went into effect in 1963 is more than four times the length of the basic NATO SOFA.<sup>199</sup> The very first article indicates that the rights and obligations of the forces of the sending states are to be modified as provided in the agreement "in the territory of the Federal Republic of Germany."<sup>200</sup> This initial territorial indication is reinforced throughout the agreement and in the negotiating history.<sup>201</sup> In discussing a provision relating to the right of a German representative to have access to an accused individual being held in custody by the authorities of a sending state, a request by the Danish representative that a provision be inserted to indicate that the right would exist only in Germany was rejected by all the other delegations as superfluous since it "would only confirm the general principles relating to the territorial scope of the supplementary arrangements."<sup>202</sup>

One provision in the Supplementary Agreement does create an obligation transcending German boundaries. Whenever a sending state exercises jurisdiction over an offense committed against German interests by a person covered by the NATO SOFA and Supplementary Agreement, the arraignment and trial are to occur in Germany unless the applicable law requires the trial to be held elsewhere, in cases of military exigency<sup>203</sup> or in the interests of justice.<sup>204</sup> Thus a sending state would in a normal case have to return any individual to West Germany in order to prosecute him. Quite realistically the intent of this article is susceptible to negation by a policy of determining that the interests of

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<sup>198</sup> Text of Negotiating History, *supra* note 20, at 2.

<sup>199</sup> German Supplementary Agreement. In *The Status of NATO Forces in the Federal Republic of Germany*, a pamphlet produced by United States Army Europe in 1963, the English text of NATO SOFA occupies 16 pages; the Supplementary Agreement, together with its Protocol of Signature occupies 68.

<sup>200</sup> German Supplementary Agreement, art. 1.

<sup>201</sup> See, e.g., *id.* at art. 5.

<sup>202</sup> Text of Negotiating History, *supra* note 20, at 443.

<sup>203</sup> German Supplementary Agreement, art. 26, para. 1(b). During the negotiations, the sending states declared that the exception for military necessity was designed to cover cases where troops entered Germany temporarily for maneuvers. Text of Negotiating History, *supra* note 20, at 459; German Supplementary Agreement, Protocol of Signature, Re art. 26, para. 1(b).

<sup>204</sup> German Supplementary Agreement, art. 26, para. 1.

justice dictate trying individuals outside the Federal Republic, even though German authorities are to be notified in every such case and be given an opportunity to express their views on the proposed situs of trial.<sup>205</sup> It would appear, however, that good faith compliance with the article would compel some obligation on the sending state outside Germany's borders and would extend the territorial scope of the agreement despite the negotiators' statements to the contrary.

More significant than the inclusion of this article covering cases to be tried by sending state authorities is the lack of any comparable provision dealing with cases to be tried by German authorities. The negotiation history published nowhere discusses the problem of the fugitive.<sup>206</sup> One unpublished commentator, who claimed to have attended "numerous sessions of the negotiating committees"<sup>207</sup> during the drafting of the agreement, points out that there are no provisions in any of the SOFAs specifically providing for the return of personnel.<sup>208</sup> He indicates that SOFAs are not designed to have any application outside of the receiving state<sup>209</sup> and that in the case of a fugitive "the only remedy available to foreign authorities is a formal extradition proceedings (sic) if such a treaty or statute exists."<sup>210</sup> While the commentator was referring to the SOFAs in effect in 1960 when he wrote, his close connection with the negotiations indicate that the drafters of the German Supplementary Agreement did not attempt to deal with the fugitive from German court proceedings.<sup>211</sup>

Extradition did receive considerable attention in the negotiations although in a context separate from the fugitive from West Germany.<sup>212</sup> The discussions finally resulted in the following protocol to the agreement concerning Article VII of the NATO SOFA:

[T]he Federal Republic does not consider it to be within its competence to decide on requests for extradition of members of a force, of a civilian component or dependents.

(b) The sending States will not act upon requests for extradition of

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<sup>205</sup> *Id.* at para. 1(b). The same article permits a German representative to attend any trial by the sending state outside the Federal Republic unless his presence is incompatible with the court's rules or the security of the sending state. *Id.* at para. 2.

<sup>206</sup> Text of Negotiating History, *supra* note 20.

<sup>207</sup> H. Watson, Criminal Jurisdiction in Germany Under the New Supplementary Agreement; A Step Forward?, Foreword, May 1960 (Unpublished Thesis in The Judge Advocate General's School, U.S. Army Library).

<sup>208</sup> *Id.* at 74.

<sup>209</sup> *Id.* at 75.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at Foreword.

<sup>212</sup> Text of Negotiating History, *supra* note 20, at 1098-1138.

Germans who are present in the Federal territory as members of a force or as dependents.<sup>213</sup>

This provision resulted from the expressed concern of a Belgian delegate about Belgian personnel in Germany. He did not want German authorities to apprehend Belgians and extradite them to a third country because they were present in Germany as a result of orders or accompanying the Belgian force.<sup>214</sup> Several other delegations expressed similar concern about their personnel who might be involuntarily present in the Federal Republic.<sup>215</sup> The American representative indicated that apparently no case involving the problem had arisen under any SOFA but that the large American contingent in Germany warranted specific attention and provisions.<sup>216</sup> The West German delegate, although concerned about giving up a right that other NATO states might have to extradite sending state personnel,<sup>217</sup> was anxious to avoid the circumvention of the German Constitution by a sending state in delivering a German member of a sending state's force or dependent to another state.<sup>218</sup> The agreement emerging from the discussions seems to accommodate all the parties' concerns, although difficulties might be raised when a German member of a sending state's force is reassigned to another location where extradition proceedings might be applicable.<sup>219</sup>

In view of the failure of the negotiators to deal specifically with the case of a fugitive from German justice, the tenor of the discussions about extradition, and the constitutional bar to the extradition of German nationals,<sup>220</sup> it seems logical to conclude that the Supplementary Agreement was not intended to create any new obligation to deliver fugitives to the German court processes, at least as long as the individual was not first subjected to custody in the hands of the receiving state, a problem discussed in Part C, below. To conclude that the German negotiators wanted to impose on the sending states an obligation tantamount to mandatory extradition of its nationals when the German Constitution would preclude application of the same sort of obligation to

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<sup>213</sup> German Supplementary Agreement, Protocol of Signature, Re art. VII, para. 2.

<sup>214</sup> Text of Negotiating History, *supra* note 20, at 557, 1087.

<sup>215</sup> *Id.* at 1118.

<sup>216</sup> *Id.* at 1117-18.

<sup>217</sup> *Id.* at 1118, 1138.

<sup>218</sup> *Id.* at 1099-1100. The concern would naturally be only about servicemen or dependents since by definition civilian employees encompassed by the SOFA and supplementary agreement could not be Germans. NATO SOFA, art. I(b).

<sup>219</sup> But see German Supplementary Agreement, Protocol of Signature, Re art. I, para. 3, which provides that the sending states will refrain from sending to West Germany as members of their forces persons who are solely Germans.

<sup>220</sup> GRUNDGESETZ, art. 16(2) (1949) (W. Ger.).

Germany, without a clear indication in either the terms of the agreement or the negotiations, is unreasonable. Although West Germany had started to regain acceptability, the Governments of Belgium, France, and the Netherlands, all accepting generally the principle that nationals are immune from extradition, would most likely have rejected any proposal that required extradition of their nationals to their former enemy.<sup>221</sup>

#### 4. *Other Considerations*

Based on the foregoing discussion, it appears very difficult to interpret the SOFAs in general as compelling the sending state to aid the receiving state involved by returning personnel to that state to permit the effective exercise of its primary right of jurisdiction. As each SOFA is examined individually, the territorial considerations may be stronger or weaker than those contained in the NATO SOFA. The almost total lack of such provisions in the Icelandic SOFA may support an inference that return of an individual is mandatory.<sup>222</sup> The failure of any of the agreements subsequent to NATO SOFA to contain any substantial revision of the terms of arrest and handing over obligations seem to militate against interpreting any such agreement as creating an obligation that does not exist in NATO SOFA.<sup>223</sup>

One early writer in commenting upon the *Girard* case<sup>224</sup> and the waiver of jurisdiction by the United States indicated that the power of a sending state to waive its jurisdiction must inherently contain the power to deliver the individual to the sending state.<sup>225</sup> He posited that the requirement to give a request for waiver sympathetic consideration does not depend upon the location of the accused.<sup>226</sup> This assumption is questionable if the waiver, as provided in the SOFA, is applicable only

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<sup>221</sup> See p. 3 *supra*. See also Jeschek, *Int'l Criminal Law: Its Object and Recent Developments*, M. BASSOUNI AND V. NANAA, 1 INT'L CRIMINAL LAW 49, 58 (1973) [hereinafter cited as Jeschek].

<sup>222</sup> See pp. 32-33 *supra*.

<sup>223</sup> See 1 OPPENHEIM, INTERNATIONAL LAW 954 (8th ed. Lauterpacht 1955). The lack of most of the territorial indications in the Libyan and Pakistani SOFAs supports an inference that return of any fugitive under those agreements was intended. By using the rationale employed in *Valentine v. United States ex rel. Neidecker*, 229 U.S. 5 (1936), one could conclude that the inclusion of limiting territorial terms in SOFAs negotiated after these two (1954 and 1959) should be construed as indicating that both rights and obligations of the United States are restricted. Similarly, NATO SOFA's limited terms in comparison not only with the Icelandic SOFA, but also the Philippine Bases Agreement, would indicate that obligations should be restricted to the territory of the receiving state. See pp. 46-47 *infra*.

<sup>224</sup> *Wilson v. Girard*, 354 U.S. 524 (1957).

<sup>225</sup> Baldwin, *supra* note 117, at 87.

<sup>226</sup> *Id.* at 88.

to an individual having a defined status. The status is arguably lost in departure from the receiving state. The writer somewhat weakened the tenor of his proposition in suggesting that it applied only to personnel subject to the authority of the sending state's military officials.<sup>227</sup> He also indicated that the exercise of such a power or obligation should be contingent upon the receiving state's officials corresponding duty to act promptly, and to restrain from insisting upon treating minor offenses as compelling a return to the receiving state.<sup>228</sup>

As partial support for his proposition, Professor Baldwin indicated that requiring the sending state to rely on extradition treaties would not seem consonant with the intention of the SOFAs. "It would usually mean that crime would go unpunished."<sup>229</sup> Unfortunately the "intention" of the SOFAs is a vague term that is susceptible of many interpretations. The expressed intention is ordinarily to define status within the receiving state.<sup>230</sup> Suppression of crime is secondary, if contained at all. It would not appear to be inconsistent with a SOFA to use an extradition treaty to enable the receiving state to regain effective control over any individual once covered by a SOFA. Extradition is the ordinary method to perfect the jurisdictional defect existing when a person is not present.<sup>231</sup> Resort to extradition by the receiving state would likely be the only way to insure punishment if the accused individual fled to a state where neither the sending nor the receiving state has any authority to exercise jurisdictional power.<sup>232</sup> Thus, the complaint that crime would go unpunished reflects the reluctance of states to execute complete extradition arrangements. Apparently, the SOFAs are not designed to correct this deficiency. If the accused returns to the sending state, that state would have the right to proceed criminally against the individual under international law and, from a moral viewpoint, probably should do so.<sup>233</sup>

A more recent article has presented the theory that, notwithstanding the geographical tenors of the SOFAs, an implicit obligation to deliver a serviceman to the receiving state should be recognized in cases where an accused managed to leave the receiving state before his participation in an offense is discovered, or before he has been arrested and placed

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<sup>227</sup> *Id.* at 89-91.

<sup>228</sup> *Id.* at 90-91.

<sup>229</sup> *Id.* at 89.

<sup>230</sup> See, e.g., NATO SOFA, Preamble.

<sup>231</sup> Jeschek, *supra* note 221, at 56. See pp. 7-8 *supra*.

<sup>232</sup> See note 194 *supra*.

<sup>233</sup> See pp. 2-3 *supra*.

in custody.<sup>234</sup> Failure to recognize such an obligation where public interest in or outrage over the offense has been aroused would create "obvious repercussions"<sup>235</sup> and draw the viability of the SOFA arrangements into question. Apparently, the authors foresee the probable repercussions to be a reluctance to save any jurisdiction on the part of the receiving state, constant interference with military custody decisions by local officials, and the possibility of a renunciation of the SOFAs.<sup>236</sup>

It seems ironic that the same sort of situation that creates the right of a defendant in a state criminal proceeding in the United States to obtain a change of venue to avoid an atmosphere of mob justice or trial by press<sup>237</sup> should be advanced as a reason to turn an American serviceman over to foreign courts that may be unfair because of those very circumstances. It is unquestionable that the American military community may benefit from such action; such willing cooperation will encourage better relations between the local civilian criminal authorities and American commanders and their subordinates. The difficulty with these considerations is that they are more political and diplomatic than legal. Such considerations call for making the obligations explicit rather than forming a rationale to buttress an otherwise questionable duty.

Political issues and diplomatic considerations go into the formulation of extradition treaties. The handling of such cases by extradition ordinarily permits impartial judicial participation and review in the process to insure that there is a legal basis for the intended prosecution<sup>238</sup> or that the offense involved is not so political in nature that asylum rather than delivery for the offender should ensue.<sup>239</sup> Extradition practice and treaties have evolved a rule that the state obtaining extradition can not generally prosecute or retain the offender for an offense other than the one supporting the extradition request nor can the state re-extradite the offender to a third state without permission from the state granting extradition.<sup>240</sup> The SOFAs do not appear to have such rules built into their operation.<sup>241</sup> Indeed, offenses of a political nature are specifically mentioned in the areas of both exclusive and concurrent jurisdiction.<sup>242</sup> Individuals of the sending state's military community are required to

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<sup>234</sup> Metzger and McMahon, *supra* note 51, at 635.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Shephard v. Maxwell, 384 U.S. 333 (1966).

<sup>238</sup> 18 U.S.C. § 3184 (1970).

<sup>239</sup> 6 M. WHITEMAN, *supra* note 34, at 799-858.

<sup>240</sup> *Id.* at 1095-1107.

<sup>241</sup> See, e.g., NATO SOFA, art. VII.

<sup>242</sup> *Id.* at paras. 2(c), 3(a)(i).



refrain from political activities in the receiving state by a common provision in the SOFAs.<sup>243</sup> All these matters are subject to careful consideration by the courts and the Secretary of State in extradition cases.<sup>244</sup> It would seem preferable to accord individuals who are in a foreign country, sometimes involuntarily as a result of orders or a natural desire to accompany the family breadwinner, the same considerations if they somehow manage to escape the grasp of a state more involved in its own politics than in doing justice. Certainly the true criminal should be surrendered, and the American extradition process is designed to reach that very end. A SOFA requirement to deliver automatically any alleged offender or convict subjects the individual involved to unequal treatment.<sup>245</sup>

For the reasons discussed, it would seem to follow that the SOFAs are not susceptible to a construction automatically engendering an obligation to deliver fugitives. There are, however, in most United States SOFAs and Supplementary Agreements following the NATO SOFA detailed custody provisions that arguably require delivery of offenders, if not at all times, at specific times to permit the receiving state to exercise its jurisdiction effectively. These will now be considered in more detail.

### C. *The Right of Custody as an Obligation to Return*

#### 1. *General Considerations*

In contrast to the relatively short period envisioned for the sending state's right to retain custody under limited circumstances in the basic NATO SOFA,<sup>246</sup> many later agreements expand in scope and time the right of the United States to obtain and retain custody of personnel forming part of its overseas military community.<sup>247</sup> In exercising this right to custody, American authorities are ordinarily required to consider the wishes of local authorities in determining the form custody should take.<sup>248</sup> Under nearly all the expanded provisions, the United

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<sup>243</sup> See, e.g., NATO SOFA, art. II; Icelandic SOFA, art. 2, para. 1(b).

<sup>244</sup> 18 U.S.C. §§ 3184, 3186 (1970). See 6 M. WHITEMAN, *supra* note 34, at 1026-30.

<sup>245</sup> U.S. CONST., amend. XIV, § 1, cl. 4. This clause is applicable by its terms only to action by states subordinate to the United States Government and does not apply to federal action. *Simpson v. United States*, 342 F.2d 643 (7th Cir. 1965). But see *Ballard v. Laird*, 350 F. Supp. 167 (S.D. Cal. 1972); *Korematsu v. United States*, 323 U.S. 214, 234-35 (1944) (J. Murphy dissenting). In the last case Justice Murphy suggested that equal protection was included in the due process of the Fifth Amendment.

<sup>246</sup> NATO SOFA, art. VII, para. 5(c).

<sup>247</sup> See pp. 13-17 *supra*.

<sup>248</sup> See, e.g., German Supplementary Agreement, art. 22, para. 3.

States is to make the accused member of the force or civilian component or dependent in its custody available for trial or investigative proceedings.<sup>249</sup> Two of the SOFAs and the German Supplementary Agreement require United States authorities to "take all reasonable steps to that end" (i.e., making the individual available for trial) and "to prevent any prejudice to the course of justice."<sup>250</sup> Protocols are common requiring the United States to hold the individual in the vicinity of the local sending state's authorities which are exercising jurisdiction if the military force is actually present in that area.<sup>251</sup>

On their face these provisions would seemingly compel the United States to produce any individual over whom the American military authorities have taken custody pursuant to the relevant agreement. There are, however, two ambiguities in the terms of most such provisions. The phrasing ordinarily is such that the United States is obliged to produce an individual possessing the status defined by the SOFA.<sup>252</sup> The individual who manages to evade the custody of American military authorities and depart from the sending state's territory would apparently lose that status in the process. Since most SOFAs require the military member to be in the territory of the receiving state to be eligible for the benefits or rights accorded under the SOFA,<sup>253</sup> it may be posited that the sending state has no obligation to produce an individual who

<sup>249</sup> See, e.g., *id.*; Korean SOFA, art. XXII, para. 5(c). See also Text of Negotiating History, *supra* note 20, at 1087, where the French delegate, in proposing the article which eventually emerged as the one granting the sending states the right to custody of most accused personnel, indicated that the forces had sufficient administrative and disciplinary power to insure that an accused member of the force or civilian component or a dependent would appear before his judges for investigation, trial or after his sentence had become final.

<sup>250</sup> Chinese SOFA, Agreed Minutes to Article XIV, Re para. 5(c), para. 3; Korean SOFA, art. XXII, para. 5(c); German Supplementary Agreement, art. 22, para. 3. The phrase involved first appeared in the German Supplementary Agreement and is accompanied in both the English and French text by the German word *Verdunkelungsgefahr*. See text at note 85 *supra*. Thus in the supplementary agreement, the German interpretation would be helpful and presumably control. An old German dictionary translates the word as "prejudice to the course of justice," as does the English text. CASSEL'S NEW GERMAN DICTIONARY 654 (1939). *Gefahr* is a common German noun meaning danger or fraud, *id.* at 226; *Verdunkelung* is a common noun meaning black-out or darkening, *id.* at 654, but has a legal connotation of collusion. ADLER, ELSEVIER'S DICTIONARY OF CRIMINAL SCIENCE 198-99 (1960). THE TEXT OF THE NEGOTIATING HISTORY, *supra* note 20, fails to aid in the interpretation. It is thus unclear whether this phrase should be interpreted to demand that the United States should do everything possible in any location to insure an accused's presence at trial or investigation if such accused has come into American custody, or merely to refrain from any action that would aid or abet an accused in avoiding German justice.

<sup>251</sup> German Supplementary Agreement, Protocol of Signature, Re art. 22; Chinese SOFA, Agreed Official Minutes to Article XIV, Re para. 5(c), para. 4.

<sup>252</sup> See, e.g., Korean SOFA, art. XXII, art. 5(c); Philippine SOFA, Agreed Official Minutes, para. 5. But see Japanese SOFA, Agreed Minutes, Article XVII, Re para. 5, para. 1.

<sup>253</sup> See, e.g., Chinese SOFA, art. I, para. 1(a).

has lost his status. A contrary argument that such status may be terminated only when done in accordance with ordinary military procedures is possible, but is weakened in the case of SOFAs where that status can be acquired without any official military sanction.<sup>254</sup>

A second difficulty with the custodial provisions is their phrasing to require the production of an individual only for investigation or trial. The mention of these two specific events could be construed to exclude a perhaps more important occasion, the time when the right to custody by the United States has expired and the receiving state desires the accused individual himself to impose the adjudged punishment. In rebuttal to such a contention it may be argued that such a construction would clearly violate the obvious intent of the framers to accompany the right of custody with the obligation to produce.<sup>255</sup> The individual who manages to get in such a situation, however, beside relying on the principle of *expressio unius est exclusio alterius*,<sup>256</sup> may argue that his presence is not really required since the outstanding judgment of the receiving state court will survive for some period and that that state may proceed in any other legitimate manner to obtain his custody if he should happen into a location that the sending state may extend its power to by such methods as extradition.

Nevertheless, the acquisition of custody by the sending state does present a viable basis for implying an obligation to return an individual who intentionally or passively slips out of that custody when exercised in the receiving state.<sup>257</sup> The authors of the article which concluded that an implicit obligation to return even those servicemen over whom no such custody has been effected, find a stronger basis for implying the obligation when custody has been perfected.<sup>258</sup> Under such circumstances, the failure of the United States to return the fugitive is considered a clear breach of its custodial responsibility.<sup>259</sup> As has already been indicated, the United States can hardly be a guarantor of an accused's presence if he should manage to reach a third state in which neither the receiving nor sending state could assert a right to obtain his custody.<sup>260</sup> The obligation of the United States in such a situation must be limited to locations where the United States has a legitimate right to assert its power over the individual.

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<sup>254</sup> See, e.g., *id.*; Greek Supplementary Agreement, art. I, para. 2.

<sup>255</sup> Metzger and McMahon, *supra* note 51 at 636-37.

<sup>256</sup> 1 OPPENHEIM, INTERNATIONAL LAW 954 (8th ed. 1955).

<sup>257</sup> Metzger and McMahon, *supra* note 51, at 636-38.

<sup>258</sup> *Id.* at 638.

<sup>259</sup> *Id.*

<sup>260</sup> See p. 39 *supra*.

It must be realized that the speedy return of an individual who was in American custody will mollify the immediate problems of the military authorities at the scene of the alleged offense. Failure to return promptly an accused to local justice, where local authorities feel that the United States is obligated to do so,<sup>261</sup> will decrease the likelihood of a friendly relationship with such officials and even national authorities. The waiver of primary rights to exercise jurisdiction by the receiving state will probably decline and controversy about cases involving the official duty status may increase. Local authorities may increase their surveillance of the type of custody actually exercised by American authorities and requests for the waiver of primary American jurisdiction may rise. Local anger about the incident, especially if it involves moral overtones, may increase prejudice against Americans not only in the court system but in ordinary intercourse with the local community. Thus failure to return the individual who gets away will have an adverse impact on community relations and the American servicemen and civilians who remain in the area. Whether such considerations warrant prompt action, the possibility of such seems somewhat diminished by the recent cases involving attempts to prevent return of servicemen, two of which lasted more than a year before the Supreme Court denied certiorari.<sup>262</sup>

## 2. *Two Special Cases: Spain and the Philippines*

The custodial provisions of the Spanish SOFA, the most recently concluded executive agreement,<sup>263</sup> contain the strongest language supporting a United States obligation to return a fugitive. Not only are the definitions in that SOFA contingent upon the official assignment of the individual serviceman or employee to Spain rather than his presence therein,<sup>264</sup> but also the "United States military authorities shall *guarantee* [the accused's] immediate appearance . . . in any proceedings that may require his presence and, in any case, his appearance at the trial." Regardless of difficulties inherent in the possible escape of an individual in American custody to a third state,<sup>265</sup> a valid interna-

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<sup>261</sup> Metzger and McMahon, *supra* note 51, at 638.

<sup>262</sup> Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972). Sergeant Williams commenced his action in April 1970; the petition for a writ of certiorari was denied in February 1972. Privates Holmes and Tucker in the latter case began their suit in July 1971; certiorari was denied in September 1972 but a related habeas corpus action remained pending until late January 1973. See note 352 *infra*.

<sup>263</sup> The Spanish SOFA was signed September 25, 1970.

<sup>264</sup> Spanish SOFA, Definitions, para. 2.

<sup>265</sup> See note 194 and p. 39 *supra*.

tional obligation would seemingly exist when the individual is subject to military authority.<sup>266</sup>

Two factors external to the Spanish SOFA support the apparently broader geographical scope of that agreement in comparison to other SOFAs. The United States and Spain concluded a new extradition treaty about four months prior to the implementation of the Spanish SOFA.<sup>267</sup> This treaty, which was approved by the Senate, contained the provision common to most recent extradition treaties of the United States permitting the Executive Authority of the United States to extradite American nationals.<sup>268</sup> Although the treaty was not ratified until after the effective date of the SOFA, the cooperative spirit between the two countries in expressed intentions concerning the suppression of crime would pervade their diplomatic relationship.<sup>269</sup>

The Spanish SOFA replaced a working agreement denominated Procedural Agreement Number 16, which was signed by representatives of and for the Spanish High Command and the Department of Defense.<sup>270</sup> The increased stature of the new agreement was accompanied by the stronger language indicating the guarantee.<sup>271</sup> Even under the old arrangement, the Federal Courts of the United States in two unreported cases declined to interfere with the return of American servicemen to Spain, in one case from New Jersey where discharge of the airman involved was almost completed,<sup>272</sup> and in the other where the Army returned a soldier from the Federal Republic of Germany.<sup>273</sup> The for-

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<sup>266</sup> The Spanish SOFA, art. XVIII, para. 3, permits the United States to acquire custody of any person "who is legally subject to the detention of the military authorities of the United States."

<sup>267</sup> Extradition Treaty with Spain, *supra* note 22, which was signed May 19, 1970. The Spanish SOFA was signed September 25, 1970.

<sup>268</sup> See note 22 *supra*.

<sup>269</sup> Extradition Treaty with Spain, *supra* note 22, at Preamble.

<sup>270</sup> Procedural Agreement No. 16 to the 26 September 1953 Agreements, Sept. 4, 1955. Under this agreement, a mixed Commission on Jurisdiction was established. Generally the United States had the right to exercise jurisdiction over all offenses subject to punishment through the Uniform Code of Military Justice. An elaborate procedure was provided for the waiver of American jurisdiction upon request of local authorities. The Agreement gave the United States the right to custody and provided that "United States authorities shall accept the responsibility of assuring the presence of the offender at the appointed time of trial."

<sup>271</sup> Spanish SOFA, art. XVIII, para. 3.

<sup>272</sup> *Buskers v. Seamans*, Civil No. 1208-70 (D.N.J. Sept. 17, 1970), *stay denied*, No. 19,270 (3d Cir. Sept. 18, 1970), *stay denied*, Memorandum Order (U.S. Sept. 19, 1970) (Blackmun, Cir. J). This case is described in Metzger and McMahon, *supra* note 51, at 620.

<sup>273</sup> *Server v. Laird*, Civil No. 1583-71 (D.D.C. Aug. 6, 1971), *stay denied*, No. — (D.C. Cir. Nov. 29, 1971), *stay denied*, Memorandum Order (U.S. Nov. 30, 1971) (Burger C.J. and Blackmun, Cir. J). Server escaped from American custody in January, 1970 at Rota, Spain just prior to being released to Spanish authorities for service of sentence following a conviction for possession of drugs. After a sojourn in Switzerland, he surrendered to military authorities in the United States

mer case was accomplished prior to the signing of the SOFA, but the latter occurred thereafter.<sup>274</sup>

Under these circumstances, it appears that the obligation to return an individual to Spain should be recognized as valid in international law, even if further arguments are possible under American domestic law.<sup>275</sup>

Like the Spanish SOFA, the newest one,<sup>276</sup> the Philippine agreement, the oldest one,<sup>277</sup> contains some unique custody provisions. Under the main provisions of the 1947 Philippine Bases Agreements and the Agreed Official Minutes of the present SOFA, Philippine authorities are to entrust "without delay to the commanding officer of the nearest base" the custody of any serviceman, civilian employee or dependent over whom the Philippine courts will exercise jurisdiction.<sup>278</sup> This officer is to provide a certificate that the accused "will be produced before [the competent] court when required by it."<sup>279</sup> Because of the categorization of personnel, the same defect in the loss of status may exist if the accused manages to leave the Philippines.<sup>280</sup> The lack of a specific requirement to surrender for the service of a sentence, as described above, may be a problem in this SOFA also.<sup>281</sup> The duty under the SOFA to provide a receipt containing a promise to make the individual available, however, arguably would create a stronger commitment on the part of the United States. Although the certificate is to be produced by an individual,<sup>282</sup> his position as the commanding officer doing an act re-

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and was taken to Germany for a court-martial involving military offenses. In July 1971, the Secretary of the Army ordered his return to Spain, which generated the cited action.

<sup>274</sup> The Spanish SOFA was signed September 25, 1970.

<sup>275</sup> See p. 66 *infra*.

<sup>276</sup> See note 51 *supra*.

<sup>277</sup> The Philippines Bases Agreement is the oldest SOFA as that term is used herein. The present Philippine SOFA, concluded in 1965, was an amendment of the criminal jurisdiction provisions only to conform more closely to the NATO SOFA scheme.

<sup>278</sup> Philippine Bases Agreement, art. XIII, para. 5; Philippine SOFA, Agreed Official Minutes, para. 5.

<sup>279</sup> *Id.*

<sup>280</sup> The Philippine Bases Agreement did not contain any clear definition of the personnel involved. The Philippine SOFA, Agreed Official Minutes, para. 1, indicates that primary United States jurisdiction will extend only to those persons subject to the military law of the United States regularly assigned to the Philippines or present in the Philippines in connection with the presence there of the United States bases. The main provisions of the SOFA adopt NATO SOFA terminology (e.g., members of the United States armed forces or civilian component) without defining the personnel to be covered. It could be asserted that such terminology inherently carries the limited territorial scope of NATO SOFA. The use of the word "stationed", although limited to the question of priority of jurisdiction, could indicate the reverse, i.e., that no territorial limitations were envisioned.

<sup>281</sup> Philippine SOFA, Agreed Official Minutes, para. 5. See p. 43 *supra*.

<sup>282</sup> Philippine SOFA, Agreed Official Minutes, para. 5.

quired by the agreement seems to be an act of the United States.<sup>283</sup>

There is a factor external to the Bases Agreement that might warrant a stronger inference of an American obligation to return a fugitive who returns to the United States after his custody has been entrusted to a base commander. When the Base Agreement was signed, the Philippines had been independent for less than a year. Prior to that time, the Philippines had been a territory and for all practical purposes a forty-ninth state of the United States for extradition.<sup>284</sup> Alleged or convicted criminals in either the United States or the Philippines were subject to handling under interstate extradition, a process considerably simpler than international extradition.<sup>285</sup> Although no extradition treaty with the Philippines was effected after its independence, the drafters of such a treaty may not have contemplated the same difficulties with extradition that were raised in the NATO SOFA negotiations.<sup>286</sup> The negotiators could have assumed that a fugitive would be included in the terminology. Even if the problem had not been discussed, it would be reasonable to argue that the negotiators would have intended to include them within the terms of the agreement. While this method of interpreting international agreements is somewhat tenuous,<sup>287</sup> it seems more rational than attempting to infer the same agreement among several nations whose extradition relationships would be considerably modified.

Accordingly, among the SOFAs to which the United States is currently a party, a strong case may be presented that individuals whose custody is given to American military authorities must be returned from the United States to either the Philippines or Spain.<sup>288</sup>

<sup>283</sup> Badong, *Philippine Jurisdiction Over the George E. Roe Case*, 32 PHILIPPINE L. J. 403, 407 (1957); Castro, *U.S. Jurisdiction Over Armed Forces in the Philippines*, 7 FAR EASTERN L. REV. 626, 649 (1960). But see Aguilar, *Criminal Jurisdiction Under the Revised Bases Agreement*, 41 PHILIPPINE L. J. 729, 746-49 (1966) [hereinafter cited as Aguilar]. One Philippine judge considers that the obligation is personal to the commander and formed sufficient basis to hold the Commander of Clark Air Force Base and the individual signing the custody receipt in contempt. *The Holman Contempt Order*, 45 PHILIPPINE L.J. 387 (1970). The commander was ordered to pay a fine of 1000 pesos and to be confined until he produced a Bernard Williams. See *Williams v. Rogers*, 449 F.2d 513 (8th Cir. 1971), described at pp. 52-55 *infra*. The fine and imprisonment were apparently never executed because of the intervention of the Philippine Foreign Secretary. Memorandum for Respondent, 36-39, *United States of America v. Gaddi*, G.R. No. L-33793 (Philippines Sup. Ct. filed Nov. 22, 1971).

<sup>284</sup> Act of Feb. 9, 1903, ch. 529, 32 Stat. 806; Act of Feb. 6, 1905, ch. 454, 33 Stat. 698. See 18 U.S.C. §§ 662(b), 666 (1940).

<sup>285</sup> U.S. CONST., art. IV, § 2, cl. 2; 18 U.S.C. §§ 3182-83 (1970).

<sup>286</sup> Negotiations on the Philippine Bases Agreement commenced before Philippine independence. Aguilar, *supra* note 283, at 729.

<sup>287</sup> LORD MCNAIR, *THE LAW OF TREATIES* 431 (1961); M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 186-87 (1967).

<sup>288</sup> See pp. 44-47 *supra*.

### 3. *The Return of Civilians*

The commentators mentioned in this part have found reasons to imply an obligation to return only active duty servicemen. It has been assumed without question that military authorities do not have any legitimate power to affect the liberty of such individuals, at least in the United States.<sup>289</sup> If one assumes, however, that the SOFAs somehow imbue such authorities with the right and obligation to return errant servicemen, it is an easy step to apply the same arguments to the fugitive civilian. The civilian employees of the military force and their dependents enjoy many, if not all, benefits that the serviceman receives under the SOFA as a result of their status.<sup>290</sup> The procedural rights applicable to a trial in the receiving state's courts apply equally to the civilian.<sup>291</sup> For all practical purposes, the serviceman's civilian companions remain in the receiving state the same length of time as he does and are considered by the local population as an integral part of the American military community. In the later agreements, the military authorities have at least the right and, in some cases, the obligation to exercise custody over the civilians.<sup>292</sup> In such cases the refusal to exercise the custody required by the agreement would hardly form a basis for justifying a refusal to return an individual who escapes because such custody was not actually exercised.<sup>293</sup> When it is considered that the escaping civilian may well completely avoid prosecution or punishment for the offense involved because of the failure of American law to make crimes committed by its nationals abroad generally punishable in United States courts,<sup>294</sup> there is a stronger reason to infer an obligation to return the civilian than the military man who can be prosecuted under the Uniform Code of Military Justice.

### 4. *Inequity of Obligation Resulting from Custody*

Besides the problems already discussed in deriving from the exercise of custody an obligation for the United States to return individuals where such custody fails to hold the individual in the receiving state, there is a basic inequity in such a position. Imagine a very serious

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<sup>289</sup> Baldwin, *supra* note 117, at 90-91; Metzger and McMahon, *supra* note 51, at 624. *See also* PROCEEDINGS, *supra* note 125, at 96.

<sup>290</sup> *See, e.g.*, NATO SOFA, art. XI, para. 2(a).

<sup>291</sup> *Id.* at art. VII, para. 9.

<sup>292</sup> *See, e.g.*, Philippine SOFA, Agreed Official Minutes, para. 5; Chinese SOFA, art. XIV, para. 5(c).

<sup>293</sup> 1 OPPENHEIM, INTERNATIONAL LAW 923 (8th ed. Lauterpacht, 1955).

<sup>294</sup> *See* notes 15-16 *supra*.



offender in the hands of the receiving state after an initial arrest and prior to being handed over to American authorities for custody, or during trial proceedings, or while serving a legitimately adjudged long prison sentence. If during such time the felon escapes from local authorities and leaves the receiving state, then he would not have to be returned to the receiving state. A relatively minor offender released by local police officials for an offense such as public drunkenness who complies with apparently valid orders reassigning him to the United States would have to be returned for his trial unless the receiving state agreed to waive their right to have American authorities produce such a person.

It is true that such extreme examples of minor offenses would probably not result in much complaint from receiving states and the United States would be able to dispense with any requirement to return minor offenders where the cost of return would far exceed the worth of prosecution. However, similarly serious offenders might be treated unequally, not on the basis of the gravity of the offense, but on the fortuitousness of being in the custody of a foreign official rather than an American or by cleverly concealing identity long enough to leave the receiving state. Such a possibility is fundamentally unfair even if legally rational. To avoid such a result, which the negotiators of any SOFA would have been extremely unlikely to intend, it would seem preferable to construe the custodial provisions only to require duties within the receiving state, if at all possible.

It might be complained that such a construction would be bad faith on the part of American officials, who would be in a position to subvert local court procedure by exercising custody so ineffectively that any accused can avoid local justice. It is submitted that the ordinary commander deserves more credit than such an argument suggests. Most SOFAs require that the views of the local authorities be given consideration in the determination of the form custody is to take. Such views are not binding<sup>295</sup> but must be accorded good faith. The individual accused fleeing the receiving state is contributing to proof against himself and the current trend of developing extradition treaties that may permit his return<sup>296</sup> to countries where extradition is not presently possible may eventually redound against him. The present obligation of the United States can reasonably be interpreted to require that custody be exercised in good faith. Ordinarily the local commander will be able to make a

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<sup>295</sup> See, e.g., Spanish SOFA, art. XVIII, para. 3.

<sup>296</sup> See note 22 *supra*. Extradition treaties are not considered void as *ex post facto* if applied to offenses committed before the treaty becomes effective. 6 M. WHITEMAN, *supra* note 34, at 753-57. See, e.g., the first cited Extradition Treaty with Argentina, *supra* note 22, at art. 22.

considered judgment that will keep the individual available to local authorities when required.

#### IV. THE RETURN OF SERVICEMEN IN THE COURTS

##### A. *The Cases*

While the foregoing discussion has centered on the sending state's obligation, as much as it can be found in the SOFAs themselves, to return fugitive individuals to the receiving state, only indirect reference has been made to actual cases reaching the United States courts. While there were no reported instances of servicemen or civilians contesting military officials' attempts to return them to the receiving state during the first decade and a half following the effective date of the NATO SOFA, the 1970s have produced three generally reported federal court efforts by four servicemen to block their impending return overseas, where the obvious if not admitted reason for the proposed military action was to surrender the individual to authorities of another nation to permit it effectively to exercise its criminal jurisdiction in accordance with a SOFA.

##### 1. *United States ex. rel. Stone v. Robinson*<sup>297</sup>

In the first reported case, an airman fled Japan following his conviction for robbery and attempted rape. Stone was an airman stationed in Vietnam who committed the alleged offenses during a rest and recuperation leave in Japan in March 1968. Japanese authorities duly notified the Air Force of their intention to exercise Japan's primary jurisdiction and Stone was eventually sentenced to six years imprisonment on September 8, 1968, one day after his enlistment would normally have expired. A month earlier he had signed a document extending his enlistment for two months. This process was repeated several times to extend his enlistment beyond September 1969. The extensions permitted the United States to retain Stone in Air Force custody and gave him the benefit of trial and appellate counsel at United States expense. During the whole processing of Stone's case in the Japanese appellate system, the Air Force kept him in a loose custody, restricting him to an Air Base.<sup>298</sup> Although the Japanese Supreme Court affirmed his conviction on August 29, 1969, the Japanese authorities apparently took no imme-

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<sup>297</sup> 309 F. Supp. 1261 (W.D. Pa. 1970), *aff'd* 431 F.2d 548 (3d Cir. 1970).

<sup>298</sup> Stone spent from October 19 to December 7, 1968 in military confinement as a result of a court-martial for offenses connected with the unauthorized absence during which he committed the offenses tried by the Japanese Court. *United States ex rel. Stone v. Robinson*, 431 F.2d 548, 549 (3d Cir. 1970).

diate steps to obtain his custody for service of the sentence and Stone fled Japan by commercial aircraft on September 12, two weeks later.

Stone was soon apprehended by military police in Pennsylvania and committed to a county jail. He then commenced a habeas corpus proceeding alleging that his extensions in the Air Force were void because of coercion by military officials, as well as some technical irregularities in their execution.<sup>299</sup> District Judge Rosenberg of the Western District of Pennsylvania first found the extensions to be voluntary.<sup>300</sup>

The judge then proceeded to discuss the obligations of the Air Force to return Stone to Japan. He indicated that in accepting the protection and aid of counsel by the extensions, Stone had incurred "the responsibility or duty to see that the obligations of the United States Government as they concerned him were as well respected under all the circumstances."<sup>301</sup> Finding that the United States was obligated to turn Stone over to Japanese authorities upon indictment for the offenses resulting in the conviction, the judge found that custody could be redelegated to the United States.<sup>302</sup> Finding that the United States had an obligation to retain such custody and that Stone himself "had an obligation to make himself available when wanted by the Government of Japan,"<sup>303</sup> the court reasoned that Stone could not breach either of the obligations by leaving Japan. When he did so, the United States Government was compelled "to arrest and seize him, wherever it could find him, and return him."<sup>304</sup> The court then stated:

Stone came voluntarily to Japan. He voluntarily accepted the hospitality and benefits of that Government, and responsibility placed upon him, while in that country, of complying with its law as regarded his own conduct toward the citizens of Japan and the liability for such penalty as was imposed by that country's law for any breach thereof

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<sup>299</sup> *United States ex rel. Stone v. Robinson*, 309 F. Supp. 1261, 1262 (W.D. Pa. 1970).

<sup>300</sup> *Id.* at 1265.

<sup>301</sup> *Id.* at 1265-66. It is unclear to this author why the Government of the United States pressed an argument that the United States Air Force was obliged under the SOFA to return Airman Stone to Japan. Under the Extradition Treaty with Japan, *supra* note 22, at arts. II, VII, Stone was subject to extradition for the robbery conviction. Two possibilities are apparent. The habeas corpus petition commenced quickly after Stone's apprehension and the government may have felt that the Air Force could justify custody on the Japanese SOFA as well as Stone's absence; secondly, the extradition procedure might have presented problems since the related conviction for attempted rape would not be subject to extradition, *id.* at art. II, and Japan would theoretically have had to pay the costs of the extradition, *id.* at art. VIII; 18 U.S.C. § 3195 (1970). See *United States ex rel. Stone v. Robinson*, 309 F. Supp. 1261, 1262 (W.D. Pa. 1970).

<sup>302</sup> *United States ex rel. Stone v. Robinson*, 309 F. Supp. 1261, 1267 (W.D. Pa. 1970).

<sup>303</sup> *Id.* at 1268.

<sup>304</sup> *Id.*

by him. He had an obligation to the Government of Japan and he cannot here disclaim it, anymore than can the United States repudiate its treaty obligations.<sup>305</sup>

The court concluded by holding that in some cases involving military custody for the purpose of removing an individual to a "far distant land", "interference with the functions and obligations of the executive branch of the Government" might be warranted, but Stone's circumstances did not warrant habeas corpus.<sup>306</sup>

Appellate review by the Third Circuit consisted primarily of consideration of the validity of the extensions; finding ample basis for the District Court's determination that the extensions were valid, the appellate court affirmed the validity of the Air Force custody of the petitioner.<sup>307</sup> On a petition for rehearing, the full Third Circuit rejected Stone's contention that the validity of the Japanese conviction should have also been considered by the panel and implied that the issue had been fully and properly resolved by the District Court.<sup>308</sup>

The appellate panel was fully cognizant that the Air Force intended to turn Stone over to Japanese authorities,<sup>309</sup> but did not consider the validity of the proposed action, confining itself to the question of whether the appellant was properly still in the Air Force.<sup>310</sup> The court therefore did not deal squarely with the question of the obligation of the United States, through the Air Force, to consummate an action amounting to extradition. In turning down Stone's request for review of the Japanese conviction, the court indicated that the appellant was misconstruing the nature of habeas corpus relief and that Air Force custody was legal.<sup>311</sup> The later litigants apparently realized that habeas corpus would be unsuccessful and attacked the problem more directly by seeking injunctions against any transfer of the serviceman back to the receiving state.

## 2. *Williams v. Rogers*<sup>312</sup>

The next case involved an Air Force sergeant who was arraigned before a Philippine court for forcible abduction and attempted rape in August 1969. Pursuant to the minutes accompanying the Philippine

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<sup>305</sup> *Id.* at 1269.

<sup>306</sup> *Id.*

<sup>307</sup> *United States ex rel. Stone v. Robinson*, 431 F.2d 548 (3d Cir. 1970).

<sup>308</sup> *Id.* at 553.

<sup>309</sup> *Id.* at 549.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 553.

<sup>312</sup> 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

SOFA, Williams was entrusted to the custody of the Commanding Officer of Clark Air Force Base. This was accomplished by his physical release to a lieutenant colonel in the base's Legal Office, with the officer issuing a certificate that Williams "will be held ready to appear before a duly constituted investigation or competent court of the Philippines at such times and places as required."<sup>313</sup> Several pretrial sessions ensued with Williams present, but before the actual trial, he received and complied with change of station orders to Minot Air Force Base in North Dakota. The orders were issued only because of a failure by Air Force officials to place an administrative hold on Williams based upon the pending Philippine charges. When Williams' departure was discovered, the Philippine Government protested strongly through diplomatic channels. Under Department of Defense direction, apparently with State Department concurrence, the Air Force sought to correct its mistake by issuing new orders transferring Williams back to Clark Air Base in the Philippines.<sup>314</sup> Williams' response was a complaint in the District Court for North Dakota seeking to enjoin the transfer as "illegal and contrary to existing Air Force Regulations" and depriving "him of certain constitutional rights in that such action would be tantamount to an extradition to the Philippines . . . in the absence of an extradition treaty."<sup>315</sup> After issuing a routine temporary restraining order, the court granted Williams a preliminary injunction and hinted that it would deal with the constitutional issues involved in the proposed transfer after a full hearing.<sup>316</sup> However, after the elapse of the one year period required by Air Force regulations between changes of station, the District Court granted the Government's motion for summary judgment and ruled that Williams was eligible for immediate transfer to the Philippines without discussing the propriety of the transfer as an extradition to the Philippines.<sup>317</sup> Apparently the Court followed the implications of *Orloff v. Willoughby*<sup>318</sup> which indicates that military discretion over duty assignments is complete and beyond judicial review except for determination of whether the individual is properly in a military service.<sup>319</sup>

Williams received, however, a much more thorough if no more suc-

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<sup>313</sup> Williams v. Rogers, 449 F.2d 513, 516 (8th Cir. 1971).

<sup>314</sup> *Id.* at 519.

<sup>315</sup> Williams v. Rogers (sic), Civil No. 1027, Memorandum and Order Granting Preliminary Injunction, 2-3 (D.N.D. May 22, 1970).

<sup>316</sup> *Id.* at 5.

<sup>317</sup> Williams v. Rogers, 449 F.2d 513, 516 n.3 (8th Cir. 1971).

<sup>318</sup> 345 U.S. 83 (1953).

<sup>319</sup> *Id.* at 94. See also Cortright v. Resor, 447 F.2d 244, 246 (2d Cir. 1971).

cessful consideration of his contentions from the Eighth Circuit. Taking at face value Williams' claim that his transfer to the Philippines was dictated by diplomatic rather than military considerations or discretion,<sup>320</sup> the Court of Appeals noted that the matters "seemingly transcend the heart and penumbra of *Orloff*."<sup>321</sup> The Court then considered the history of Article XIII of the Bases Agreement with the Philippines and found it "a valid and appropriate exercise of legislative and executive authority."<sup>322</sup> The Bases Agreement was authorized by a joint resolution of Congress and "entrusted the President with broad powers to withhold, acquire and retain military bases as he deemed necessary for the mutual protection of [the United States] and the Philippines."<sup>323</sup> The Court of Appeals then considered the *Valentine* case and held it applicable as requiring some authority in law or treaty to provide a basis for "surrender of fugitives by this country to another."<sup>324</sup> The Court concluded, however, that the Bases Agreement, as modified by the criminal jurisdiction provisions furnished both authority and compulsion for "the prompt return of Sergeant Williams to the Philippines."<sup>325</sup> Since the President had power to negotiate the arrangements involved in the SOFA, it was "not impermissible to find that he has the correlative power to enforce the obligations of our servicemen undertaken pursuant thereto."<sup>326</sup>

Unfortunately the Court of Appeals did not explain what language in the agreement required or authorized the United States to return fugitive servicemen. The Court did not consider, nor did Williams apparently contend, that any obligations were limited to Philippine territory.<sup>327</sup> The Court did, however, recite four policy reasons supporting the power to return Williams:

- (a) The obvious interest of the military in securing the custody of those of its personnel who are charged with the commission of crimes by Philippine authorities pending their trial;
- (b) The impact and adverse effect that an open and well-publicized breach of the solemn obligations imposed on commanding officers by the custodial provisions of Article XIII has upon the reputation and integrity of American Servicemen stationed in the Philippines and upon the military

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<sup>320</sup> *Williams v. Rogers*, 449 F.2d 513, 519-20 (8th Cir. 1971).

<sup>321</sup> *Id.* at 520.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 521.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Williams v. Rogers* (sic), Complaint, Civil No. 1027 (D.N.D., filed Apr. 8, 1970).

mission and the purposes of our bases there; (c) Our conviction that custodial provisions of the kind involved here can have present and future meaning and significance only if Armed Forces supervisory personnel are deemed to possess the power to correct administrative errors of the type that occurred here. (d) Our feeling that the benefit to Sergeant Williams in being permitted to remain on base and in American custody pending the final disposition of the Philippine proceedings against him produced a concomitant obligation to report and appear when required to do so and to remain responsive to the curative orders of superior officers if, as here, a mistake should occur through inadvertance and oversight.<sup>328</sup>

Considering these factors, together with the following:

It is undisputed that he enjoyed the right and privilege of remaining with his detachment during the Philippine court proceedings; he concedes that he was orally informed . . . that he was to be placed on "Administrative Hold"; and he does not dispute the defense (sic) contention that he executed, on October 17, 1969, a written acknowledgment to the effect that he was to appear in the Court of First Instance on January 16, 1970, the next hearing date in the trial proceedings.<sup>329</sup>

The Eight Circuit concluded that "Sergeant Williams is not being unlawfully extradited and that he is obligated to promptly (sic) return to the Philippines as ordered."<sup>330</sup>

The Court of Appeals also found unwarranted any contention that the trial in the Philippines might be unfair or politically motivated.<sup>331</sup> It also determined that Sergeant Williams was not entitled to the probable cause hearing of the type normally conducted in extradition proceedings because the SOFA with the Philippines "neither imposes nor contemplates such a requirement."<sup>332</sup> This conclusion is somewhat difficult to accept if the Court viewed the SOFA as authorizing extradition, since the extradition statute applies whenever there exists an extradition treaty. The Philippine SOFA is not a treaty but the statute could arguably apply to any international agreement. At any rate, such a hearing would not have been expressly contrary to the terms of the SOFA and would have avoided the problem of an Executive Agreement inconsistent with an Act of Congress.<sup>333</sup> Nevertheless, the appeal was unsuccessful as was an attempt to obtain a writ of certiorari from the Su-

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<sup>328</sup> *Williams v. Rogers*, 449 F.2d 513, 521-22 (8th Cir. 1971).

<sup>329</sup> *Id.* at 522.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 522-23.

<sup>333</sup> See pp. 66-67 *infra*.

preme Court.<sup>334</sup> Sergeant Williams may have had the ultimate success, however, when the Philippine proceedings resulted in his acquittal.<sup>335</sup>

### 3. *Holmes v. Laird*<sup>336</sup>

The most recently reported case involved two soldiers stationed in West Germany. In July 1970, Privates Holmes and Tucker were arrested on attempted rape and related charges. The two soldiers claimed that investigation by military authorities resulted in a determination that there was insufficient evidence to warrant prosecution.<sup>337</sup> Nevertheless the German authorities recalled their general waiver of the primary right to exercise jurisdiction in accordance with the Supplementary Agreement. Trial in December 1970 resulted in conviction and a sentence of three years imprisonment for both accused. While appellate proceedings lasting until July 1971 were underway, the accused were kept under a loose restriction at the unit to which they were assigned. Shortly before the *Bundesgerichtshof*, the German Supreme Court, affirmed the accused's convictions and sentences, both were permitted to take a leave from their Army station upon condition that they remain in the Federal Republic. They nevertheless broke this limitation and somehow returned to the United States, surrendering to Army officials at the office of Congresswoman Shirley Chisholm. They were thereafter placed in a military confinement facility but immediately initiated a suit to enjoin the American military from transferring them to West Germany, primarily because of claimed deficiencies in their German trial relating to rights guaranteed them by the Status of Forces Agreement, international law and the United States Constitution.<sup>338</sup>

The District Court held that the United States had a valid and binding obligation to return the accused to Germany for service of their sentence; that any claim of defects in the West German trial arising from the guarantees listed in the Status of Forces Agreement was beyond the power of the court to correct; such claims were a proper matter to be handled by the executive branch of the Government through diplomatic channels. Accordingly the Government obtained its requested motion for summary judgment without any inquiry into the validity of assertions that the convictions had been obtained contrary to SOFA guaran-

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<sup>334</sup> *Williams v. Rogers*, 405 U.S. 926 (1972).

<sup>335</sup> Interview with Will H. Carroll, civilian attorney with the International Law Division, Office of the Judge Advocate General, United States Air Force in Washington, D. C. on March 1, 1973.

<sup>336</sup> 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972).

<sup>337</sup> *Holmes v. Laird*, 459 F.2d 1211, 1214 (D.C. Cir. 1972).

<sup>338</sup> *Id.*



teed rights of speedy trial and confrontation of the witness(es).<sup>339</sup>

In the appellants' brief to the District of Columbia Court of Appeals, Holmes and Tucker conceded the validity of the NATO Status of Forces Agreement and the German Supplementary Agreement<sup>340</sup> but claimed a right to prove their assertions relating to the unfairness of the German trial and thereby justify relief from any United States obligation to return them to Germany.<sup>341</sup> The appellants also added a contention that the agreements were no longer applicable to them because they were no longer in the territory of another Contracting Party.<sup>342</sup>

As did Williams from the Eighth Circuit, Holmes and Tucker received thorough but unsuccessful consideration from the District of Columbia Circuit. The Court noted that the Constitution could not be applied to the German trial.<sup>343</sup> It agreed with the District Court that even assuming that the appellants were denied rights listed in the SOFA, American courts were not empowered to review foreign criminal proceedings,<sup>344</sup> and that such deprivations did not relieve the United States of the obligation to surrender the accused once the convictions were final.<sup>345</sup> Additionally the Court noted that since another article of the NATO SOFA which appellants claimed gave them certain rights provided that "all differences between the Contracting Parties relating to the interpretation or application of the Agreement shall be settled by negotiation without recourse to any outside jurisdiction,"<sup>346</sup> the Court was foreclosed from considering the appellants' arguments. The Court then hinted some dissatisfaction at the Government's failure to deny specifically the appellants contentions but reiterated its holding that such matters were for executive discretion and not the courts.<sup>347</sup>

In a footnote the Court disposed of the argument that the appellants were beyond the territory where any American obligation to surrender them existed, by stating:

[A]ppellants were in West Germany as members of a 'force' at the time of the commission of the offenses with which they were charged. West German jurisdiction then attached, and neither *it* nor the correlative

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<sup>339</sup> Holmes v. Laird, Order, Civil Action No. 1159-71 (D.D.C. June 28, 1971).

<sup>340</sup> Brief for Appellants at 37, Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972).

<sup>341</sup> *Id.* at 68.

<sup>342</sup> *Id.* at 55-58.

<sup>343</sup> Holmes v. Laird, 459 F.2d 1211, 1218 (D.C. Cir. 1972).

<sup>344</sup> *Id.* at 1218-19.

<sup>345</sup> *Id.* at 1219-23.

<sup>346</sup> NATO SOFA, art. XVI.

<sup>347</sup> Holmes v. Laird, 459 F.2d 1211, 1223-25 (D.C. Cir. 1972).

American obligation to surrender was affected by appellants' subsequent unauthorized departure for the United States.<sup>348</sup>

In the same footnote the Court of Appeals disposed of a related argument that the return and surrender of the accused could be effected only pursuant to an extradition treaty by indicating that the NATO SOFA, "a treaty in every sense of the word," and the Supplementary Agreement permitted the "executive branch to invade one's personal liberty criminal proceedings."<sup>349</sup> The Court failed to indicate exactly what provision or provisions in the SOFA or the Supplementary Agreement created this obligation transcending West Germany's borders. The Court did recite the *Stone*, *Williams*, *Girard* and other cases as judicial approval of surrender "without any intimation that a problem of unlawful extradition" was involved.<sup>350</sup>

The petition of the accused for a writ of certiorari was denied by the Supreme Court in September 1972,<sup>351</sup> but the pendency of habeas corpus proceedings relating to the accused's pretrial confinement and military status delayed their departure for Germany until February 1973.<sup>352</sup>

### B. *Judicial Theories Supporting The Return*

At least three theories supporting the obligation of the United States to return fugitive personnel in order to surrender them to a receiving state are discernable in the above described cases.

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<sup>348</sup> *Id.* at 1219 n.59.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 1219-20 n.59.

<sup>351</sup> *Holmes v. Laird*, 409 U.S. 869 (1972).

<sup>352</sup> On December 23, 1971, Privates Holmes and Tucker filed petitions for habeas corpus in the District Court for the District of Columbia, alleging that their continued confinement in a military facility pending decision of the validity of their forced return to West Germany was illegal. Private Tucker also requested discharge from the United States Army because no charges were filed against him before his term of enlistment expired. The petitions were dismissed by District Judge J. Smith. *Tucker v. Froelke*, Order, Habeas Corpus No. 117-71 (D.D.C. Feb. 8, 1972); *Holmes v. Laird*, Order, Habeas Corpus No. 118-71 (D.D.C. Feb. 8, 1972). The appeals from these orders were dismissed on the motion of the appellants who indicated that they desired to be transferred to West Germany to begin service of their sentence, since they had no assurances that the time spent in a military stockade in Virginia would be credited to the German confinement period. *Tucker v. Froelke*, Order, No. 72-1194 (D.C. Cir. Jan. 29, 1973); *Holmes v. Laird*, Order, No. 72-1195 (D.C. Cir. Jan. 29, 1973). The appellate court had indicated five months earlier, *sua sponte*, that the appeals would be decided upon the briefs then filed and the record without oral argument. See *Holmes v. Laird*, Order, No. 72-1195 (D.C. Cir. Aug. 31, 1972).

Privates Holmes and Tucker had earlier been unsuccessful in obtaining release from military confinement in a petition for habeas corpus to the Court of Military Appeals. *Holmes v. Laird*, 21 U.S.C.M.A. 657, 44 C.M.R. 942 (1971).

### 1. *Personal Obligation of the Accused*

Both the *Stone* and *Williams* cases contain language indicating that partial justification for their return to Japan and the Philippines, respectively, derived from the receipt by the accused of certain benefits attributable to the SOFA involved. These benefits of freedom from the custody of the receiving state and of financial aid in retention of local counsel are deemed to obligate the accused personally to honor the jurisdiction of the receiving state by submitting to its power and almost to estop him from complaining of the effort of the armed service to help enforce this personal obligation.<sup>353</sup> The appellate government brief in the *Holmes* case suggested that the accused lacked clean hands in their unauthorized departure from Germany after receiving the benefit of American custody and financial aid and were therefore not entitled to any equitable injunctive relief.<sup>354</sup> Perhaps because of the appellants' assertion that some of the benefits of NATO SOFA's fair trial guarantees were in fact denied them,<sup>355</sup> the District of Columbia Circuit did not in any manner justify its decision on this rationale.

The theory that an accused has an obligation to return could be expanded to include the many benefits that any serviceman or civilian derives from a SOFA, not only in the event of a criminal trial but also in the customs and privileges areas. The many exemptions from customs on much imported personal property of servicemen and civilians, the easy and inexpensive acquisition of driving licenses and registration plates and freedom from local receiving state income taxation, are only some of the benefits that place the individual connected with an American military force operating under the umbrella of a SOFA in a privileged position compared to both the ordinary tourist or visitor, and indeed, the local resident.<sup>356</sup> With these greater privileges, it can be argued, should come a correlative greater obligation to submit to the local courts upon the allegation of commission of offenses.

The personal obligation of the members of the overseas military communities to obey the local law and to refrain from any action that would defeat the receiving state from exercising jurisdiction is arguably also found in a provision in all the SOFAs:

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<sup>353</sup> United States *ex rel.* *Stone v. Robinson*, 309 F. Supp. 1261, 1265, 1268 (W.D. Pa. 1970); *Williams v. Rogers*, 459 F.2d 513, 522 (8th Cir. 1971).

<sup>354</sup> Brief for Appellee at 31-34, *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972). *But see* Brief for Appellants at 65-67, *id.*

<sup>355</sup> *Holmes v. Laird*, 459 F.2d 1211, 1214 (D.C. Cir. 1972).

<sup>356</sup> E. ELLERT, NATO FAIR TRIAL SAFEGUARDS 2 (1963).

It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and in particular, from any political activity in the receiving State. It is also the duty of the sending State to take necessary measures to that end.<sup>357</sup>

Because of the military reluctance to exercise custodial control over civilian employees and dependents,<sup>358</sup> the civilians encompassed by the SOFAs may not receive the benefit, if it be such, of military custody during the exercise of the receiving state's jurisdiction. However, in cases where local authorities do not see fit to confine an accused civilian pending his trial and appeal, such an accused will probably continue to live in the military community and receive the various other benefits of the SOFA. Although a civilian accused may not receive the financial aid in a local criminal case in the manner received by the uniformed serviceman, the civilian is entitled to the same guarantees of speedy trial, confrontation of witnesses, compulsory process, an interpreter and the presence of an American Government representative at his trial.<sup>359</sup> Under regulations applicable to all overseas commanders, military authorities are required to discourage the exercise of local jurisdiction over civilians whenever the case can be appropriately disposed of through the use of various administrative powers of the commander, such as a denial of access to government facilities.<sup>360</sup> The commander must also initiate measures to invoke diplomatic intervention in any case where it appears that the civilian will not receive a fair trial.<sup>361</sup> Additionally, the civilian overseas is much more likely to be a voluntary recipient of SOFA benefits. Whereas the serviceman usually can not refuse his assignment to a foreign country, his family is not compelled to accompany him nor is the civilian employee forced to accept assignment outside the United States.<sup>362</sup>

Thus civilians covered by the SOFAs, although perhaps to a lesser degree, receive benefits quite similar to the uniformed serviceman and should be under a similar obligation to subject themselves to a receiving state's court. It would seem difficult for a court to nullify such an

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<sup>357</sup> NATO SOFA, art. II. *See also, e.g.*, Icelandic SOFA, art. 2, para. 1(b); Korean SOFA, art. VII; Spanish SOFA, art. XIV.

<sup>358</sup> *See pp. 19-21 supra.*

<sup>359</sup> *See, e.g.*, NATO SOFA, art. VII, para. 9; Pakistani SOFA, Annex B, para. 9; Seychelles SOFA, para. 10(i); Australian SOFA, art. 8, para. 9.

<sup>360</sup> AR 27-50, para. 4.

<sup>361</sup> *Id.*

<sup>362</sup> *See J. MACY, PUBLIC SERVICE 236 (1971).*

obligation for civilians, if indeed one exists for servicemen, merely because the benefits are of a slightly lesser quantity; their voluntary acceptance would seem to offset any such deficiency.

On a purely equitable basis, the inference of a United States right to enforce the individual's own obligation to submit to the lawful exercise of jurisdictional authority by the receiving state has great appeal. It emphasizes the moral obligations of the individual. American custody and financial aid were the benefits mentioned in the *Stone* and *Williams* cases. It is highly questionable, however, whether an accused in such a position has any right to insist on these benefits, which are somewhat gratuitous. Congressional appropriations may fail to provide for the cost of local counsel. United States custody, although encouraged by the applicable regulations, need not always be exercised.<sup>363</sup> With respect to the other rights listed in the fair trial portion of the SOFAs, the failure of the *Holmes* case to examine claimed violations leaves an accused apparently subject solely to the discretion of his military and civilian superiors to insure that such benefits are actually bestowed.<sup>364</sup>

The primary difficulty with the theory that the accused must submit himself to the receiving state's jurisdiction is its equitable nature. A moral obligation of an individual is usually irrelevant when constitutional issues are involved. The *Valentine* case principle that clear authority is needed to permit the United States to surrender an individual to a foreign government has constitutional foundations in the Fifth Amendment prohibition against deprivation of liberty without due process of law.<sup>365</sup> Even transfer of arrested individuals between districts in the Federal Court system invokes a process covered by Federal Rules derived from Congressional enactment.<sup>366</sup> Extradition among the states is authorized by the Constitution and governed in some detail by statute.<sup>367</sup> Similarly any transfer of individuals to a foreign country with a view toward criminal proceedings should be based on clear obligations and authority to effect such a transfer, not vague moral obligations of the person being surrendered.

## 2. *Continuing Jurisdiction of the Receiving State*

The *Holmes* case indicates that West German jurisdiction attached at the time of the offense and could not be defeated by the unauthorized

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<sup>363</sup> AR 27-50, para. 4.

<sup>364</sup> *Holmes v. Laird*, 459 F.2d 1211, 1265 (D.C. Cir. 1972).

<sup>365</sup> U.S. CONST., amend. V; *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).

<sup>366</sup> See FED. R. CRIM. P. 40.

<sup>367</sup> U.S. CONST., art. IV § 2, cl. 2; 18 U.S.C. §§ 3182-83 (1970).

departure of Holmes and Tucker.<sup>368</sup> In view of the Supplementary Agreement's provisions relating to a conditional waiver of jurisdiction over all offenses subject only to a recall after notification, the right to exercise such jurisdiction would probably attach only after the recall. Such a recall was, however, effected in the case.<sup>369</sup>

The Court of Appeals was presumably referring to the subject matter jurisdiction since effective German control of Holmes and Tucker ceased as long as the two accused were beyond the territorial jurisdiction of the court or German authorities. Thus the ultimate issue to be resolved was the existence of an American obligation to assist West Germany by restoring Holmes and Tucker to effective West German control. The Court of Appeals justified the return of the two to Germany by indicating that the obligation of the United States to surrender the accused was correlative with the attachment of jurisdiction and did survive the accused's apparently successful removal of their status as members of the force by departure from West Germany.<sup>370</sup> By referring to the attachment of jurisdiction, the Court appears to have ignored the main thrust of the appellants' assertion that their departure from West Germany terminated any American obligation under the SOFA and Supplementary Agreement and forced West Germany to rely on other appropriate means to regain control, such as extradition.<sup>371</sup> It appears that the *Holmes* reasoning skips a logical step in justifying the obligation to surrender upon the subject matter jurisdiction. The appellants could hardly deny that West Germany had inchoate territorial jurisdiction over the alleged offense. The issue was whether the United States was required to help in making such jurisdiction practically effective. The court was more sound in approving the surrender by virtue of the world-wide applicability of the obligation to surrender the accused,<sup>372</sup> although such a conclusion may have been questionable based upon the discussion in Part III above.

If, however, the District of Columbia Court of Appeals' reasoning is accepted, a receiving state's jurisdiction over civilians accompanying the forces would be equally viable. Thus the United States' obligation to arrest and surrender civilians should transcend the borders of the receiving state and subject such civilians to the same treatment received by Holmes and Tucker. The existence of such a power in United States

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<sup>368</sup> *Holmes v. Laird*, 459 F.2d 1211, 1219 n.59 (D.C. Cir. 1972).

<sup>369</sup> *Id.* at 1214; German Supplementary Agreement, art. 22, para. 3.

<sup>370</sup> *Holmes v. Laird*, 459 F.2d 1211, 1219 n.59 (D.C. Cir. 1972).

<sup>371</sup> Brief for Appellants at 55-57, *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972).

<sup>372</sup> *Holmes v. Laird*, 459 F.2d 1211, 1218 (D.C. Cir. 1972).

military authorities is open to question and may never be tested because of reluctance exercise it.<sup>373</sup> Such a power is inevitably related to the actual custody which the United States assumes only over the uniformed serviceman. While most of the SOFAs condition the custodial right on a request by the United States or the sending state,<sup>374</sup> some provisions almost compel the United States to accept custody of civilians.<sup>375</sup> If the agreements require such, the refusal of the United States to accept custody in the receiving state would hardly serve as justification for refusing to arrest the fugitive civilian and return him to the receiving state for trial or punishment.

### 3. *SOFAs as Extradition Treaties*

The *Holmes* case indicates that the NATO SOFA as supplemented by the German agreement is equivalent to an extradition treaty.<sup>376</sup> The Eighth Circuit in *Williams* hints at the same proposition in concluding that he was not being unlawfully extradited.<sup>377</sup> Labelling the agreements formally as extradition treaties was probably avoided since doing such would have invoked the applicability of the Codal provisions requiring an examination of the case by an extradition magistrate and the final determination by the Secretary of State as to the propriety of the proposed extradition.<sup>378</sup> Arguably, the intended action of the military authorities to expand United States effort to return the fugitive servicemen contrasts with normal extradition where the requesting country assumes custody of the fugitive in the United States, pays most of the extradition expenses and carries the fugitive back to the requesting state.<sup>379</sup>

There is no hint in the statutory provisions of the United States Code dealing with international extradition that Congress intended to limit the procedures solely to Senate approved and formally ratified treaties.<sup>380</sup> Some of the debates in the House of Representatives in 1848 indicate that a regularization of procedures whenever the United States

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<sup>373</sup> See p. 19 *supra*.

<sup>374</sup> See, e.g., Spanish SOFA, art. XVIII, para. 3.

<sup>375</sup> Philippine SOFA, Agreed Official Minutes, para. 5; Chinese SOFA, art. XIV, para 5(c); New Zealand SOFA, *Memorandum of Understandings*, para. 4(c). The Korean SOFA, art. XXII, para. 5(c) requires United States military authorities to retain custody of all personnel in their hands, but permits transfer to Korean authorities at any time. See also Japanese SOFA, Agreed Minutes, art. XVII, Re para. 5.

<sup>376</sup> *Holmes v. Laird*, 459 F.2d 1211, 1219 n.59 (D.C. Cir. 1972).

<sup>377</sup> *Williams v. Rogers*, 449 F.2d 513, 522 (8th Cir. 1971).

<sup>378</sup> 18 U.S.C. §§ 3184-86 (1970).

<sup>379</sup> *Id.* at §§ 3186, 3195.

<sup>380</sup> *Id.* at §§ 3181, 3184.

had an obligation to extradite was intended, so that responsible police officials could respond intelligently to extradition requests.<sup>381</sup>

If the SOFAs are treated as equivalent to extradition treaties, they should logically be as applicable to civilians, even including discharged servicemen, in compelling the United States to produce a fugitive who allegedly committed or was convicted of an offense subject to the receiving state's jurisdiction while that person was in a position encompassed within the SOFA's definitions. This would be true in any case unless the obligation to extradite is somehow contingent upon the assumption of custody by the United States. As indicated above, the Philippine, Chinese and arguably, the Japanese SOFAs do not depend on United States willingness to accept custody but require local authorities to hand over both servicemen and civilians.<sup>382</sup> It would seem inappropriate on an international law level to use a refusal to assume actual custody, which the United States is required to exercise by the agreement, to justify a denial of the obligations resulting from that required responsibility.<sup>383</sup>

The possibility of treating the SOFAs as extradition treaties was not fully explored by the cases. Without a fuller development of this theory in the courts or an attempt to use a SOFA as such before an extradition proceeding, it is at best speculative to assume that the cases stand for such a proposition.

## V. CONCLUSIONS

The limited goal of this paper has been to determine what, if any, obligations the United State has under SOFAs to return personnel who allegedly commit crimes while in a foreign state as part of an American military community. The varied nature of the relevant provisions give rise to considerations that result in dissimilar obligations from country to country. The earliest SOFA with the Philippines and the newest one with Spain arguably require the return of any individual over whom the United States military authorities have acquired custody pursuant to the agreement.<sup>384</sup> The lack of territorial limitations in the SOFAs with Iceland and Libya as well as the expired one with Pakistan provide substantial support for a conclusion that all personnel accused of crimes subject to those countries' primary right to exercise jurisdiction should be returned if they depart before punishment, regardless of whether the

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<sup>381</sup> 18 CONG. GLOBE 868 (1848).

<sup>382</sup> See note 375 *supra*.

<sup>383</sup> See 14 M. WHITEMAN, *supra* note 34, at 282-83 (1970).

<sup>384</sup> See pp. 44-47 *supra*.



particular individual has been subjected to American custody within the foreign nation.<sup>385</sup> A similar obligation exists with respect to offenders who have been released to American custody in Japan because of the definition of personnel involved in the custody provision itself.<sup>386</sup> In all the other countries considered, there are substantial obstacles to finding any inferred obligation to return fugitive personnel.<sup>387</sup>

To overcome the territorial limitations and the difficulties with the loss of status, it has been suggested that policy considerations supply the missing link.<sup>388</sup> Custody actually exercised by American military authorities has also been simultaneously advanced as implying an obligation to return.<sup>389</sup> It is submitted, however, that such political considerations lead in the opposite direction and should be resolved in advance rather than on an *ad hoc* basis in each case. Using the custody basis alone has a potential for extremely inequitable results.<sup>390</sup>

To the extent that the SOFAs are read to require return of only servicemen, they are creating problems of equal protection for all personnel who are similarly subject to the jurisdiction of the receiving state.<sup>391</sup> Freely returning servicemen may also work against the desirable goal of a rational extradition policy that should permit the extradition of any American citizen or national for any serious offense committed outside the United States.<sup>392</sup>

The decisions of the courts in the three cases discussed should be reconsidered. The holding of the district court in *Stone* was probably valid because of the particular terms of the Agreed Official Minutes in

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<sup>385</sup> See pp. 31-33 and p. 38 *supra*.

<sup>386</sup> Japanese SOFA, Agreed Minutes, art. XVII, Re Para. 5, para. 1.

<sup>387</sup> See Chapter III *supra*.

<sup>388</sup> Metzger and McMahon, *supra* note 51, at 635, 638. See also *Williams v. Rogers*, 349 F.2d 513, 521-22 (8th Cir. 1971).

<sup>389</sup> Metzger and McMahon, *supra* note 51, at 637-38.

<sup>390</sup> See p. 50 *supra*.

<sup>391</sup> See note 245 *supra*.

<sup>392</sup> See note 22 *supra*, indicating that all but one American extradition treaty signed since the decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936) has provided for discretionary surrender of American citizens or nationals. Besides the indicated recent treaties, other extradition treaties have been signed or substantially agreed to with the following countries: Denmark (see note 144 *supra*); West Germany, 65 DEP'T STATE BULL. 47 (No. 1672, July 12 1971); Canada, *id.* at 741 (No. 1969, Dec. 27, 1971); Australia, 66 *id.* at 456 (No. 1708, Mar. 20, 1972); United Kingdom, 67 *id.* at 56 (No. 1724, July 10, 1972); and Ireland, *id.* at 146 (No. 1727, July 31, 1972). If all these treaties are eventually ratified and the apparent activist trend in negotiating new extradition treaties continues with provision for mandatory or permissive extradition of American nationals, there will be diminished need for the use of SOFAs to accomplish the same result. A refusal to use the SOFAs could spur other countries to negotiate extradition treaties with the United States permitting extradition not only of servicemen and their civilian counterparts, but any American committing an offense abroad.

that SOFA.<sup>393</sup> The decision in the *Williams* case may have reached the correct result but the reasons advanced are tenuous. If there was no obligation to return Sergeant Williams, one should not have been constructed out of the political and diplomatic ramifications involved in the case.<sup>394</sup> The *Holmes* case is probably erroneous in finding an obligation to return the individuals based on the SOFA and the German Supplementary Agreement.<sup>395</sup>

In spite of this author's opinion, it seems clear that the trio of cases has created substantial precedent for the inference of an obligation to return personnel entrusted to American custody in all the SOFAs.<sup>396</sup> The denial of *certiorari* must be treated cautiously, however.<sup>397</sup> Only the *Holmes* case in the appellate court dealt directly with the problem of an obligation existing outside the receiving state, and the handling of the issue was dubious.<sup>398</sup>

This paper has not considered several related problems in this area that may be involved in any future cases. The SOFAs are predominantly a creature of executive agreement.<sup>399</sup> The process of returning even servicemen to fulfill obligations thereunder is so closely related to extradition that it should be considered as such. Since extradition is traditionally handled by the formal treaty method,<sup>400</sup> SOFAs should be submitted to the same process if they are to create the same obligations. What can and cannot be done through executive agreements has been the subject of considerable debate in legal circles and the creation of an obligation affecting individual liberty within the area where the Constitution clearly applies is arguably not a proper subject for such pacts.<sup>401</sup>

Even if such an obligation can be created without Senate participation, a large issue is raised procedurally. The extradition procedure in international cases has been firmly established by statute and practice.<sup>402</sup>

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<sup>393</sup> Actually it is unclear whether Stone was formally released to American authorities pursuant to the Japanese SOFA, Agreed Minutes, art. XVII, Re para. 5, para. 1. See *United States ex. rel. Stone v. Robinson*, 309 F. Supp. 1261, 1263 (W.D. Pa. 1970).

<sup>394</sup> See pp. 46-47 and pp. 54-55 *supra*.

<sup>395</sup> See pp. 41-49 *supra*.

<sup>396</sup> See Chapter IV *supra*.

<sup>397</sup> See *Agoston v. Pennsylvania*, 340 U.S. 844, 844-45 (1950) (J. Frankfurter Memorandum).

<sup>398</sup> See pp. 62-63 *supra*.

<sup>399</sup> Only NATO SOFA was formally submitted to the Senate for approval. Arguably the Japanese SOFA has also been consented to by the Senate at least for application in the Ryukyu Islands (Okinawa). See note 107 *supra*.

<sup>400</sup> All the extradition treaties cited in notes 14, 21 and 22 *supra* were submitted to the Senate and approved in the manner envisioned by the Constitution.

<sup>401</sup> See Borchard, *Treaties and Executive Agreements-A Reply*, 54 YALE L. J. 616, 631 (1945).

<sup>402</sup> See 6 M. WHITEMAN, *supra* note 34, at 737-1122.

The Congressional scheme envisions substantial participation by the courts. Although it is clear that the extradition hearing is not in itself a criminal proceeding, it does offer substantial due process.<sup>403</sup> The SOFAs, as noted by the Eighth Circuit, do not contemplate such a procedure.<sup>404</sup> A considerable argument may be advanced, however, that such a procedure would not be inconsistent with a SOFA to determine whether the individual is subject to the obligation claimed to exist by American officials.<sup>405</sup> It would seem fairer for the United States to commence such proceedings and prove their obligations in a manner that must be done in extradition proceedings rather than to force an accused in custody to resort to the courts on short notice before the military establishment efficiently and quickly returns him to the receiving state and the issue has become moot.

Finally a question may be raised, even if one assumes that the SOFAs and Supplementary Agreements create no obligation to return personnel, as to the power of the military services over their own personnel. Thus, as the Government contended in the *Holmes* case, the Army might be free to return an individual to a receiving state to dispose properly of military offenses committed either in the departure or prior thereto.<sup>406</sup> Even if such an action is considered a clear subterfuge, it might also be submitted that an order to return an individual to a receiving state or the use of physical force to accomplish that end, would serve a valid military purpose.<sup>407</sup> The welfare of all other personnel in the receiving state would be considerably enhanced by such action.

This paper, however, proposes no solutions to the above questions.

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<sup>403</sup> 18 U.S.C. § 3184 (1970).

<sup>404</sup> *Williams v. Rogers*, 449 F.2d 513, 522-23 (8th Cir. 1971).

<sup>405</sup> See p. 39 *supra*. See also Metzger and McMahon, *supra* note 51, at 629 n.59. Those authors disagree on whether a hearing of any sort must be accorded to persons returned pursuant to a SOFA. The suggestion by Captain McMahon that military judges be designated to hold hearings offers some merit but the authority would be based almost exclusively upon regulatory action of a Departmental Secretary since the statutory authority for decisions by military judges is generally considered limited to cases actually referred to trial by court-martial. 10 U.S.C. §§ 826, 839 (1970). If the SOFAs actually provide a basis for return of personnel to the foreign state, this author is inclined to agree with only to the right of access to Federal Courts to prevent the action. See *United States ex. rel. Martinez-Angosto*, 344 F.2d 673, 688 (2d Cir. 1965) (Friendly, J., concurring); *Sayne v. Shipley*, 418 F.2d 679, 686 (5th Cir. 1969).

<sup>406</sup> Brief for Appellee at 31 n.20, *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972).

<sup>407</sup> But see Metzger and McMahon, *supra* note 51, at 622-29, where the authors conclude that the United States armed forces probably do not have inherent authority to return servicemen to a foreign country for the purpose of surrendering the individual apart from any SOFA obligation. Cf. *United States v. Nixon*, 21 U.S.M.C.A. 480, 484, 45 C.M.R. 254, 258 (1972), where the highest military court indicated that a refusal to get into a jeep to proceed to pretrial confinement could not generate a basis for prosecution of a violation of an order. Instead, indicated the court, military authorities should have employed reasonable force to accomplish the pretrial confinement.

In considering those problems, however, it is submitted that there is no obligation under most of the SOFAs and Supplementary Agreements to return or to extradite any person to the receiving state involved. The fugitive problem should be resolved by traditional methods, such as extradition, by a determination that the United States or its military authorities have a power to return the individual independent of any SOFA, or by trying the accused in the United States for his offense.

## APPENDIX A

## ARTICLE VII, NATO SOFA

1. Subject to the Provisions of this Article,
  - (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;
  - (b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.
2.
  - (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
  - (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.
  - (c) For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include
    - (i) treason against the State;
    - (ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.
3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
  - (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
    - (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
    - (ii) offences arising out of any act or omission done in the performance of official duty.
  - (b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.
  - (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.
4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.
5.
  - (a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.
  - (b) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.
  - (c) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.
6. (a) The authorities of the receiving and sending States shall assist each other in the

carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

- (b) The authorities of the Contracting Parties shall notify one another of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.
- 7. (a) A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case.
- (b) The authorities of the receiving State shall give sympathetic consideration to a request from the authorities of the sending State for assistance in carrying out a sentence of imprisonment pronounced by the authorities of the sending State under the provision of this Article within the territory of the receiving State.
- 8. Where an accused has been tried in accordance with the provisions 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 offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.
- 9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—
  - (a) to a prompt and speedy trial;
  - (b) to be informed, in advance of trial of the specific charge or charges made against him;
  - (c) to be confronted with the witnesses against him;
  - (d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
  - (e) to have legal representation of his own for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
  - (f) if he considers it necessary, to have the services of a competent interpreter; and
  - (g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit to have such a representative present at this trial.
- 10. (a) Regularly constituted military units or formations of a force shall have the right to police any camps, establishments or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises.
- (b) Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.
- 11. Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment, property, records and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose.

## APPENDIX B

ARREST AND CUSTODY PROVISIONS OF STATUS OF  
FORCES AGREEMENTS OTHER THAN NATO SOFA

## 1. Icelandic SOFA, art. 2, para. 6:

- (a) The authorities of the United States and Iceland shall assist each other in the arrest of members of the United States forces and their dependents who commit offenses in Iceland and in handing them over to the authorities which are to exercise jurisdiction in accordance with the above provisions.

\* \* \* \*

- (c) The custody of an accused over whom Iceland is to exercise jurisdiction shall, if he is in the hands of the authorities of the United States, remain in the hands of such authorities until he is charged by Iceland.

## 2. Provisions in Japanese SOFA (similar provisions were contained in the Former Japanese SOFA):

## Article XVII, para. 5:

- (a) The military authorities of the United States and the authorities of Japan shall assist each other in the arrest of members of the United States armed forces, the civilian component, or their dependents in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

\* \* \* \*

- (c) The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of

## Agreed Minutes to the Japanese SOFA:

## Article XVII

## Re paragraph 5:

- (1) In case the Japanese authorities have arrested an offender who is a member of the United States armed forces, the civilian component, or a dependent subject to the military law of the United States with respect to a case over which Japan has the primary right to exercise jurisdiction, the Japanese authorities will, unless they deem that there is adequate cause and necessity to retain such offender, release him to the custody of the United States military authorities provided that he shall, on request, be made available to the Japanese authorities, if such be the condition of his release. The United States authorities shall, on request, transfer his custody to the Japanese authorities at the time he is indicted by the latter.
- (2) The United States military authorities shall promptly notify the Japanese authorities of the arrest of any member of the United States armed forces, the civilian component or a dependent in any case in which Japan has the primary right to exercise jurisdiction.
3. Libyan SOFA, art. XX:
- (3) The United States and Libyan authorities will assist each other in the arrest and handing over to the appropriate authority of members of the United States forces for trial in accordance with the above provisions, and the Libyan authorities will immediately notify the United States authorities if they arrest any member of the United States forces. The Libyan authorities will, if the United States authorities request the release on remand of an arrested member of the United States forces, release him from their custody on the United States authorities' undertaking to present him to the Libyan courts for investigatory proceedings and trial when required.
4. Nicaraguan SOFA, art. IX, para. (4):
- (a) The authorities of the United States of America and the authorities of Nicaragua shall assist each other in the arrest of members of the United States Coast Guard in the

territory of Nicaragua and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

\* \* \* \*

- (c) The custody of an accused member of the United States Coast Guard over whom Nicaragua is to exercise jurisdiction shall be the responsibility of the United States of America pending completion of judicial proceedings. The United States authorities will make such an accused immediately available to the authorities of Nicaragua, upon their request, for purposes of investigation and trial.

5. Pakistani SOFA, Annex B, para. 5:

- (a) The authorities of Pakistan and the United States shall assist each other in the arrest of members of the Unit and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

\* \* \* \*

- (c) The custody of an accused member of the Unit, over whom Pakistan is to exercise jurisdiction, shall remain with the United States. The United States assumes the responsibility for custody pending conclusion of judicial proceedings. The United States authorities will make any member of the Unit immediately available to Pakistan authorities upon their request for purposes of investigation and trial.

6. West Indies SOFA, art. IX, para. (5):

- (a) To the extent authorised by law, the authorities of the Territory and the military authorities of the United States shall assist each other in the service of process and in the arrest of members of the United States Forces in the Territory and in handing them over to the authorities which are to exercise jurisdiction in accordance with the provisions of this Article.

- (c) Unless otherwise agreed, the custody of an accused member of the United States Forces over whom the authorities of a Territory are to exercise jurisdiction shall, if he is in the hands of the United States authorities, remain with the United States authorities until he is charged. In cases where the United States may have the responsibility for custody pending the completion of judicial proceedings, the United States authorities shall, upon request, make such a person immediately available to the authorities of the Territory for purposes of investigation and trial and shall give full consideration to any special views of such authorities as to the way in which custody should be maintained.

Note: Almost identical provisions appear in Bahaman SOFA, art. VI, para. (5)(a) and (c), Indian Ocean SOFA, Annex II, para. 1(e)(i) and (iii), and Seychelles SOFA, para. (10)(e)(i) and (iii).

7. Australian SOFA, art. 8, para. (5):

- (a) The military authorities of the United States and the authorities of Australia shall assist each other in accordance with arrangements to be agreed to by them in the arrest of members of the United States Forces or of the civilian component or of dependants in Australia and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

\* \* \* \*

- (c) The custody of an accused member of the United States Forces or of the civilian component or of a dependent over whom Australia is to exercise jurisdiction shall, if he is in the hands of the United States authorities, remain with the United States to the extent authorized by United States law until he is charged by Australia.

8. Provisions in Philippine SOFA:

Paragraph 5:

- (a) The appropriate authorities of the Republic of the Philippines and the appropriate authorities of the United States shall assist each other in the arrest of members of the United States armed forces or civilian component and their dependents in the Republic of the Philippines and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

\* \* \* \*



- (c) The custody of an accused member of the United States armed forces or civilian component or dependent over whom the Republic of the Philippines is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by the Republic of the Philippines.
- b. **Agreed Official Minutes:**
  - 5. In all cases over which the Republic of the Philippines exercises jurisdiction, the custody of an accused member of the United States armed forces, civilian component, or dependent, pending investigation, trial and final judgment, shall be entrusted without delay to the commanding officer of the nearest base, who shall acknowledge in writing (a) that such accused has been delivered to him for custody pending investigation, trial and final judgment in a competent court of the Philippines and (b) that he will be made available to the Philippine authorities for investigation upon their request and (c) that he will be produced before said court when required by it. The commanding officer shall be furnished by the fiscal (prosecuting attorney) with a copy of the information against the accused upon the filing of the original in the competent court.
- 9. **Provisions of Chinese SOFA:**

**Article XIV, para. 5:**

  - (a) The appropriate authorities of the United States and the authorities of the Republic of China will undertake, within the limits of their authority, to assist each other in the arrest of members of the United States armed forces or civilian component, and their dependents, in the Agreement Area and in handing them over to the authority which is to have custody in accordance with the provisions of this Article.

\* \* \* \*

  - (c) The custody of an accused member of the United States armed forces or civilian component, or a dependent, shall be promptly entrusted to the military authorities of the United States pending conclusion of all judicial proceedings. The United States military authorities will make any member of the United States armed forces or civilian component or their dependents, over whom the Republic of China is to exercise jurisdiction immediately available to the authorities of the Republic of China upon their request for purpose of investigation and trial.

**Agreed Minutes to Article XIV:**

*Re paragraph 5(c)*

- 1.
  - (a) Where jurisdiction is exercised by the military authorities of the United States, custody of members of the armed forces or the civilian component, or dependents, shall rest with the military authorities of the United States.
  - (b) Where jurisdiction is exercised by the Chinese authorities, custody of members of the armed forces or the civilian component, or dependents, shall rest with the military authorities of the United States in accordance with paragraphs 2 and 3 of this agreed minute.
- 2.
  - (a) Where the arrest has been made by the Chinese authorities, the arrested person shall be handed over to the military authorities of the United States if such authorities so request.
  - (b) Where the arrest has been made by the military authorities of the United States or where the arrested person has been handed over to them under subparagraph (a) of this paragraph, they:
    - (i) may transfer custody to the Chinese authorities at any time; and
    - (ii) shall give sympathetic consideration to any request for the transfer of custody which may be made by the Chinese authorities in specific cases.
  - (c) In respect of offenses directed solely against the security of the Republic of China, custody shall rest with the Chinese authorities in accordance with such arrangements as may be made to that effect with the military authorities of the United States.
- 3. Where custody rests with the military authorities of the United States in accordance

with paragraph 2 of this agreed minute, it shall remain with such authorities until the conclusion of all judicial proceedings held in accordance with this Article. The military authorities of the United States shall make the arrested person available to the Chinese authorities for investigation and criminal proceedings and shall take all appropriate measures to that end and to prevent any prejudice to the course of justice. They shall take full account of any special request regarding custody made by the competent Chinese authorities.

4. The United States shall retain the right to keep in custody the arrested person either in a detention institution of its own or with its armed forces. In order to ensure smooth implementation of the obligations imposed by the second sentence of paragraph 3 of this agreed minute, the military authorities of the United States shall keep the arrested person, where possible, in the vicinity of the seat of the Chinese authority dealing with the case; this, however, shall not constitute an obligation on their part to keep the arrested person outside the area in use by the United States armed forces.
10. Korean SOFA, art. XXII, para. 5:
  - (a) The military authorities of the United States and the authorities of the Republic of Korea shall assist each other in the arrest of members of the United States armed forces, the civilian component, or their dependents in the territory of the Republic of Korea and in handing them over to the authority which is to have custody in accordance with the following provisions.

\* \* \* \*
  - (c) The custody of an accused member of the United States armed forces or civilian component, or of a dependent, over whom the Republic of Korea is to exercise jurisdiction shall, if he is in the hands of the military authorities of the United States, remain with the military authorities of the United States pending the conclusion of all judicial proceedings and until custody is requested by the authorities of the Republic of Korea. If he is in the hands of the Republic of Korea, he shall, on request, be handed over to the military authorities of the United States and remain in their custody pending completion of all judicial proceedings and until custody is requested by the authorities of the Republic of Korea. When an accused has been in the custody of the military authorities of the United States, the military authorities of the United States may transfer custody to the authorities of the Republic of Korea at any time, and shall give sympathetic consideration to any request for the transfer of custody which may be made by the authorities of the Republic of Korea in specific cases. The military authorities of the United States shall promptly make any such accused available to the authorities of the Republic of Korea upon their request for purposes of investigation and trial, and shall take all appropriate measures to that end and to prevent any prejudice to the course of justice. They shall take full account of any special request regarding custody made by the authorities of the Republic of Korea. The authorities of the Republic of Korea shall give sympathetic consideration to a request from the military authorities of the United States for assistance in maintaining custody of an accused member of the United States armed forces, the civilian component, or a dependent.
  - (d) In respect of offenses solely against the security of the Republic of Korea provided in paragraph 2(c), an accused shall be in the custody of the authorities of the Republic of Korea.
11. Spanish SOFA, art. XVIII:
  1. Within the limits of their respective legal powers, the military authorities of the United States and the authorities of Spain shall mutually assist each other in the arrest of members of the United States personnel in Spain who are in Spanish territory.
  2. The authorities of Spain shall immediately notify the military authorities of the United States of the arrest of any member of the United States personnel in Spain.
  3. The custody of a member of the United States personnel in Spain, who is legally

subject to detention by the military authorities of the United States and over whom Spanish jurisdiction is to be exercised, shall be the responsibility of the United States military authorities, at their request, until the conclusion of all judicial proceedings and, when appropriate, until his surrender is requested by the competent Spanish authorities for execution of the sentence. During such period of custody by the United States military authorities, those authorities, within the legal powers given them by the military law of the United States, shall give full consideration to the decisions of the competent Spanish authorities regarding conditions of custody. The United States military authorities shall guarantee his immediate appearance before the competent Spanish authorities in any proceedings that may require his presence and, in any case, his appearance at the trial.

12. New Zealand SOFA, *Memorandum of Understandings*.

para. 4:

(b) For their part, the United States authorities will take measures to ensure respect for the laws of New Zealand by United States personnel and will take whatever steps are necessary to punish personnel who have committed acts which are offences against those laws.

(c) United States personnel who have been arrested or apprehended, whether by the New Zealand authorities or by the United States authorities, will be retained in custody by the United States authorities, who shall produce the personnel concerned, upon request by the New Zealand authorities, for investigation, identification or trial.

13. Dutch Supplementary Agreement, Annex:

3. The Netherlands authorities recognizing that it is the primary responsibility of the United States authorities to maintain good order and discipline where persons subject to United States military law are concerned will, upon the request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, except where they determine that it is of particular importance that jurisdiction be exercised by the Netherlands authorities. The United States assumes the responsibility for custody pending trial. The United States authorities will make these people immediately available to Netherlands authorities upon their request for purposes of investigation and trial and will give full attention to any other specific wishes of the appropriate Netherlands authorities as to the way in which custody should be carried out.

14. Greek Supplementary Agreement, art. 3:

1. In any such cases where the Government of Greece may exercise criminal jurisdiction as provided for in Article II above, the United States authorities shall take custody of the accused pending completion of trial proceedings. Custody of the accused will be maintained in Greece. During the trial and pretrial proceedings the accused shall be entitled to have a representative of the United States Government present. The trial shall be public unless otherwise agreed.

15. Provisions of German Supplementary Agreement:

Article 22:

1. (a) Where jurisdiction is exercised by the authorities of a sending State, custody of members of the force, of the civilian component, or dependents shall rest with the authorities of that State.

(b) Where jurisdiction is exercised by the German authorities, custody of members of a force, of a civilian component, or dependents shall rest with the authorities of the sending State in accordance with paragraphs 2 and 3 of this Article.

2. (a) Where the arrest has been made by the German authorities, the arrested person shall be handed over to the authorities of the sending State concerned if such authorities so request.

(b) Where the arrest has been made by the authorities of a sending State, or where the arrested person has been handed over to them under sub-paragraph (a) of this paragraph, they

- (i) may transfer custody to the German authorities at any time;
  - (ii) shall give sympathetic consideration to any request for the transfer of custody which may be made by the German authorities in specific cases.
- (c) In respect of offences directed solely against the security of the Federal Republic, custody shall rest with the German authorities in accordance with such arrangements as may be made to that effect with the authorities of the sending State concerned.
- 3. Where custody rests with the authorities of a sending State in accordance with paragraph 2 of this Article it shall remain with these authorities until release or acquittal by the German authorities or until commencement of the sentence. The authorities of the sending State shall make the arrested person available to the German authorities for investigation and criminal proceedings (Ermittlungs- und Strafverfahren) and shall take all appropriate measures to that end and to prevent any prejudice to the course of justice (Verdunkelungsgefahr). They shall take full account of any special request regarding custody made by the competent German authorities.

#### Article 23:

Where a person is arrested in any case referred to in paragraph 1 of Article 21 of the present Agreement, a representative of the sending State concerned shall have access to that person. Where a person arrested in any case referred to in paragraph 2 of that Article is held in custody by the authorities of a force, a German representative shall have a corresponding right to the extent to which the sending State avails itself of the right of access afforded by the first sentence of this Article. The German authorities and the military authorities of the sending State shall conclude such arrangements as may be required for the implementation of this Article. A representative of the State which has custody may be present when the right of access is exercised.

#### Article 26:

- 1. Where a member of a force or of a civilian component or a dependent is arraigned before a court of a sending State for an offence committed in the Federal territory against German interests, the trial shall be held in that territory
  - (a) except where the law of the sending State requires otherwise, or
  - (b) except where, in cases of military exigency or in the interests of justice, the authorities of the sending State intend to hold the trial outside the Federal territory. In this event they shall afford the German authorities timely opportunity to comment on such intention and shall give due consideration to any comments the latter may make.
- 2. Where the trial is held outside the Federal territory, the authorities of the sending State shall inform the German authorities of the place and date of the trial. A German representative shall be entitled to be present at the trial, except where his presence is incompatible with the rules of the court of the sending State or with the security requirements of that State, which are not at the same time security requirements of the Federal Republic. The authorities of the sending State shall inform the German authorities of the judgment and of the final outcome of the proceedings.

#### Protocol of Signature, Part II:

##### (1) Re Article 22:

The sending States shall retain the right to keep in custody the arrested person either in a detention institution of their own or with their force. In order to ensure smooth implementation of the obligations imposed by the second sentence of paragraph 3 of Article 22, the authorities of the sending State shall keep the arrested person, where possible in the vicinity of the seat of the German authority dealing with the case; this, however, shall not constitute an obligation on their part to keep the arrested person outside the area of the force.

##### (2) Re Article 26, paragraph 1, sub-paragraph (6):

The term "military exigency" may also apply to cases in which the offence was committed by a person temporarily present in the Federal territory for the purpose of training exercises or manoeuvres.