

# APPLICATION OF U.S. STATUS OF FORCES AGREEMENTS TO ARTICLE 98 OF THE ROME STATUTE

## INTRODUCTION

The International Criminal Court (ICC) represents the culmination of decades of work toward an independent standing international court capable of prosecuting and trying the most heinous of all international criminals.<sup>1</sup> The Rome Statute of the International Criminal Court (Rome Statute or Statute),<sup>2</sup> created out of the legacy of Nuremberg,<sup>3</sup> Tokyo,<sup>4</sup> the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>5</sup> and

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1. See Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE, Jan.-Mar. 1999, at 1 (discussing the origins, organization of the Preparatory Committee on the Establishment of an International Criminal Court and other events leading up to the creation of the Rome Statute of the International Criminal Court); see Leila Nadya Sadat, *The Evolution of the ICC: From the Hague to Rome and Back Again*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, NATIONAL SECURITY AND INTERNATIONAL LAW 31-49 (Sarah B. Sewall & Carl Kaysen eds., 2000) [hereinafter THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT].

2. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998) [hereinafter Rome Statute].

3. Charter of the International Military Tribunal, August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. Prior to the defeat of German in World War II, the allied powers of the United States, the United Kingdom, and Russia pledged to punish war criminals. This pledge manifested itself in a signed joint determination to hold Germans individually responsible for crimes committed by them during the course of the war. Following the war, on August 8, 1945, these three powers with the addition of France signed the London Agreement, providing for the establishment of an ad hoc Military Tribunal to prosecute and punish the major war criminals of the European Axis. This agreement contained the charter of the International Military Tribunal. Nineteen other nations subscribed to the principles of the Charter, and a common indictment for twenty-three nations was presented at Nuremberg.

Under the Charter, the Tribunal asserted jurisdiction over individuals who committed Crimes Against Peace, War Crimes, and Crimes Against Humanity. Official position or the orders of a superior would not be considered proper defenses. For a full description of the Tribunal see WHITNEY R. HARRIS, *TYRANNY ON TRIAL* (1999).

4. Charter of the International Military Tribunal for the Far East, art. I, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevens 20 (amended Apr. 26, 1946, 4 Bevens 27). Unlike the multinational cooperation creating the charter for Nuremberg, the Tokyo Charter was an executive decree of General Douglas MacArthur, Supreme Commander of the allied powers in Japan acting under orders from the United States Joint Chiefs of Staff. The other allied powers were consulted only after the Charter had been issued and because the Nuremberg Charter had already been negotiated few changes were made to the revised Tokyo Charter. Under the Charter, the Tribunal held jurisdiction over crimes against peace, war crimes and crimes against humanity. Official position or the orders of a superior would not be considered proper defenses.

For a full description of the Tribunal, see Richard H. Minear, *Victors Justice, The Tokyo War Crimes Trial* (1971) and Tim Maga, *Judgment at Tokyo, The Japanese War Crimes Trials* (2001).

5. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993), S.C. Res. 1166,

the International Criminal Tribunal for Rwanda (ICTR),<sup>6</sup> governs and authorizes the establishment of the ICC. During a month-long process in 1998,<sup>7</sup> representatives of 160 countries, assisted by more than 250 nongovernmental agencies,<sup>8</sup> negotiated the Statute.<sup>9</sup> One hundred and thirty-nine states signed the Statute and as of November 19, 2002, eighty-four states have ratified it.<sup>10</sup> The Rome Statute came into effect<sup>11</sup> on April 11, 2002<sup>12</sup> and entered into force<sup>13</sup> on July 1, 2002.<sup>14</sup>

Although the United States supports the ideals embodied in the Rome Statute, it is determined to obtain an exemption from the Court's jurisdiction for members of its armed forces and officials.<sup>15</sup> During the closing hours of the Rome Conference, delegates overwhelmingly voted down U.S. amendments to the Statute to secure this exemption.<sup>16</sup> The United States feels vulnerable to political attack through the Court because of its military deployment across the globe and its international role as peacekeeper.<sup>17</sup> Accordingly, U.S. policymakers<sup>18</sup> and the Department of

Un.N. SCOR, 3878th mtg., U.N. Doc. S/RES/1166 (1998), S.C. Res. 1329, U.N. SCOR, 4240th mtg., U.N. Doc. S/RES/1329 (2000).

6. S.C. Res. 955, U.N. SCOR, 3453d mtg. (1994).

7. *Id.* at 383.

8. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J., 381, 383 (2000).

9. This process occurred during the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court," also known as the Rome Conference (Rome Conference).

10. See Rome Statute of the International Criminal Court, at <http://www.un.org/law/icc/index.html> (Dec. 3, 2002).

11. The Statute provides for its entry into force sixty days after sixty states have ratified or acceded to it. When the sixtieth instrument of ratification was deposited with the Secretary General on April 11, 2002, the Statute came into effect.

12. Barbara Crossette, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. TIMES, Apr. 12, 2002, at A1.

13. "Entry into Force" is the point in time when a treaty becomes binding between the parties that have ratified or acceded to it. JAMES R. FOX, *DICTIONARY OF INTERNATIONAL LAW* (1992). "Entry into Force" is defined in Article 126 of the Statute.

14. See Tom Hundley, *It's U.S. vs. World on Global Tribunal; Bush Firm on War Crimes Court*, CHI. TRIB., July 3, 2002, at 1.

15. See Sarah B. Sewall et al., *The United States and the International Criminal Court: An Overview*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 2.

16. See M. Cherif Bassiouni, *Historical Survey: 1919-1998*, in STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 1, 26 n.135 (M. Cherif Bassiouni ed., 1998). In the words of a reporter covering the conference, "As delegates clapped, cheered, hugged and took snapshots to commemorate the moment, dejected members of the United States delegation sat stonily in their seats." Alessandra Stanley, *U.S. Dissents, but Accord Is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A3.

17. See Sewall et al., *supra* note 15, at 35.

Concerns about Americans being tried by the ICC flowed from an underlying fear that the Court could become politicized, used by hostile nations as a vehicle for challenging U.S. foreign policy.

U.S. negotiators sought an exception for the prosecution of Americans . . . U.S. leaders imply that

Defense<sup>19</sup> oppose the Court in its present form and continue to negotiate and search for exemptions.<sup>20</sup>

During the negotiation of the Rome Statute, the U.S. delegation to the U.N. Preparatory Commission for the ICC (PrepCom)<sup>21</sup> attempted to address these concerns<sup>22</sup> and shield U.S. military personnel from the Court's jurisdiction. While the fear about use of the ICC for politically motivated attacks<sup>23</sup> represents a legitimate concern for the world's lone superpower,<sup>24</sup> these concerns were incorporated into the negotiation process and safeguards were placed into the Rome Statute and the Rules of Evidence and Procedure<sup>25</sup> to protect U.S. interests. As stated by

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because the United States is exceptional in international affairs today—assuming a unique responsibility for promoting international security—it deserves some exemption from the rules applied to other states . . . .

*Id.*

See also Chimene Keitner, *Crafting the International Criminal Court: Trials and Tribulation in Article 98(2)*, 6 UCLA J. INT'L L. & FOREIGN AFF. 215, 238 (2001); Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFF. NOV.-DEC. 1998, at 20.

18. See Wedgwood, *supra* note 17, at 20 (noting that "Senator Jesse Helms (Republican-N.C.) has declared war on the ICC for not giving '100 percent protection' from prosecution to American GI's.").

19. "Because the Statute as drafted did not guarantee that the United States would have exclusive—or at least primary—jurisdiction to try alleged war crimes committed by American Servicemembers, the United States—under strong pressure from the Department of Defense—declined to sign the treaty." Robinson O. Everett, *American Servicemembers and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 137.

20. For descriptions of the American governmental position on the ICC, see Sadat & Carden, *supra* note 8, at 447; see generally Sewall et al., *supra* note 15, at 1-31; Keitner, *supra* note 17, at 232. See also David Stoelting et al., *The United States and the International Criminal Court*, 35 INT'L LAW. 614 (2001).

21. For a discussion of the The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court see, David J. Scheffer, *Staying the Course With the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 68 (2002).

22. David Scheffer observed:

On the larger issue of overall protection for the U.S. military, however, we finally had to face the facts that we were barking up the wrong tree and our military services were not being well-served with loosing arguments. I spent many years seeking full immunity for our military forces and their civilian leadership in negotiations that quite frankly sometimes seemed the theater of the absurd.

Ambassador David J. Scheffer, *A Negotiators Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 8 (2001).

23. See Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 68 (Winter 2001).

24. "The U.S. military has reason to be wary of an ICC. The concept of allowing a civilian court to evaluate what essentially may be professional military judgments runs contrary to the core of the U.S. military system." William L. Nash, *The ICC and the Deployment of U.S. Armed Forces*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 156. For a greater discussion on a military perspective of universal jurisdiction and the ICC, see Major L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156 (2001).

25. United Nations Preparatory Commission for the International Criminal Court, *Report of the Preparatory Commission for the International Court, Finalized Draft Text of the Rules of Procedure*

Ambassador David Scheffer,<sup>26</sup> “[S]hort of one hundred percent protection, for which there is no plausible multilateral formula, we successfully negotiated into the treaty regime an impressive body of safeguards that critics continue to overlook in their zeal to trash the treaty.”<sup>27</sup> Among these safeguards<sup>28</sup> is Article 98 of the Rome Statute, which makes international treaty obligations superior to requests or orders from the Court for surrender or delivery of a suspect.<sup>29</sup>

This Recent Development will compare protections given under Article 98 of the Rome Statute with current U.S. and multinational Status of Forces Agreements (SOFAs).<sup>30</sup> Part I discusses the structure and purpose of Article 98. Part II discusses the historical development and use of SOFAs, particularly the NATO SOFA. Part III offers a legal analysis that explores the use of SOFAs protection against ICC jurisdiction. Part IV applies this analysis to the U.N. SOFA. Part V examines recent arguments and attempts by Congress and the Bush Administration to gain additional ICC exemptions that go beyond the protections provided for in SOFAs. I conclude that SOFAs are potentially useful tools for states attempting to obtain jurisdiction over U.S. military personnel suspected of committing a crime that would initially fall under the ICC jurisdiction. However, SOFAs in their current form do not provide total protection for states trying to use them as a comprehensive prohibition against ICC prosecution.

## I. ARTICLE 98

A major achievement of the U.S. delegation to PrepCom was the successful negotiation of Article 98 of the Rome Statute entitled, *Cooperation With Respect to Waiver of Immunity and Consent to Surrender*.<sup>31</sup> Article 98(2) states:

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*and Evidence*, PCNICC/2000/1/Add.1 (2000), available at <http://www.un.org/law/icc/prepcomm/docs.htm>.

26. David John Scheffer is the former Ambassador-at-Large for War Crimes Issues. He was nominated by former President William J. Clinton to serve as the head of the U.S. delegation to United Nations negotiations for the establishment of a permanent International Criminal Court. For a more expansive definition of his position, see Scheffer, *supra* note 22, at 1-2 n.1-2.

27. *Id.* at 9.

28. *Id.* at 17.

29. See Rome Statute, *supra* note 2, art. 98.

30. The Status of Forces Agreement (SOFA) is a legal arrangement established between the United States and a host nation which establishes uniform rules for handling legal matters involving U.S. military personnel serving overseas.

31. See Rome Statute, *supra* note 2, art. 98(2).

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>32</sup>

Thus, Article 98(2) prevents the Court from requesting the surrender of a suspect when such surrender would conflict with other international agreements. Examples of these types of agreements include SOFAs and extradition treaties.<sup>33</sup>

The drafters of Article 98 intended to increase multilateral support for the ICC by resolving the dilemma arising from a conflict between a state's international obligations to other states and its duty to respect orders and requests from the Court.<sup>34</sup> Article 98 places international treaty obligations in a position superior to requests or orders from the Court for surrender or delivery of a suspect. As a result, states can intentionally create international obligations that compete or conflict with the Court's request for surrender for the sole purpose of avoiding its jurisdiction. Effectively, Article 98 supports current treaties and allows for the negotiation of future treaties or international agreements that would secure a state's jurisdiction over its citizens to supercede ICC jurisdiction.<sup>35</sup> Thus, it protects the power of states to independently negotiate international treaties concerning jurisdiction over certain criminal suspects.

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32. *Id.*

33. For a description of the application of Article 98 and SOFAs, see Keitner, *supra* note 17. While I do not agree with the conclusions of Keitner concerning the "common sense reading" of Article 98, her analysis on the application of Article 98 is useful.

34. Articles 12(1) and 12(2) of the Rome Statute subject the military forces of a State Party to the jurisdiction of the ICC. "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5." Rome Statute, *supra* note 2, art. 12. Military Forces of non-state parties would only become subject to the jurisdiction of the Court if they were involved in a situation referred to the Prosecutor by a state party, art. 13(a), or by the Security Council acting under Chapter VII of the United Nations Charter, art. 13(b), or when the Prosecutor has initiated an investigation, art. 31(c). In a situation where a non-state party's national has been referred to the court and an international treaty has been signed between the host state and the sending state, art. 98 creates a way for the sending state to obtain custody of the person in question without coming into conflict with a request from the ICC for jurisdiction. *Id.*

35. "When the U.S. delegation successfully negotiated the inclusion of Article 98(2) in the Rome Treaty we had in mind our own SOFAs and their applicability." Scheffer, *supra* note 22, at 17. Scheffer acknowledges the arguments concerning protection of U.S. servicemembers under Article 98 and SOFAs and states, "Perhaps more importantly, even as a non-party, under Article 98(2) we can negotiate agreements with other governments that would prevent any Americans being surrendered to the ICC from their respective jurisdictions without our consent. As a signatory state, we are now in a much stronger position to negotiate such freestanding agreements." *Id.* at 18.

This subordination of ICC jurisdiction to national courts and international treaties follows the central tenet of “complementarity” found throughout the Rome Statute. Although the term “complementarity” is never used in the Statute, the Preamble, Article 1, and Article 17 establish that the ICC shall exercise its jurisdiction in cases where national legal systems are non-existent, refuse to prosecute, or are unable to prosecute suspects.<sup>36</sup> Complementarity thus preserves the sovereign right of states to prosecute criminals within their jurisdiction without external interference,<sup>37</sup> while preserving a jurisdictional “safety net” through the ICC when no proper prosecutorial fora exist.<sup>38</sup> Throughout the Statute, PrepCom provided for complementarity in order to protect national sovereignty and provide a check on any overreaching power of the Court.<sup>39</sup>

Article 98’s requirement that the ICC defer to conflicting international agreements both weakens and strengthens the Court. Restrictions on the Court’s ability to request surrenders constrains its jurisdictional reach. Not only will the Court be subordinate to national legal systems through complementarity, but it will also be subordinate to conflicting international agreements that prevent the surrender of suspects.<sup>40</sup> Inherently, this restriction lessens the Court’s ability to obtain suspects for trial. It also limits the ability of an international court to try suspects who have committed such heinous crimes, that only a trial on the international level will satisfy victims’ pleas for justice.<sup>41</sup>

At the same time, Article 98’s deference to conflicting international agreements strengthens the Court’s legitimacy. Unlike the ICTY<sup>42</sup> and the

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36. For a description of the history and applicability of the complementarity principle, see Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001).

37. In discussing the negotiations of the Rome Statute Scheffer states,

We built into the Treaty procedures by which countries with strong legal systems can investigate and if merited, prosecute their own citizens and thus require the court to back off. The principle of complementarity, or primary deferral to national courts, is an extraordinary and somewhat complex protective mechanism that manifests itself in the Treaty and in the supplemental documents. Much of the complementarity regime originated with us and we prevailed in its adoption. Indeed, in some circumstances the Rome Treaty regime offers military personnel greater protection from foreign prosecution than do current law and practice.

Scheffer, *supra* note 22, at 12.

38. THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 73.

39. *Id.*

40. Rome Statute, *supra* note 2, art. 98(2).

41. See Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 51-60.

42. Res. 827, *supra* note 5; Res. 1166, *supra* note 4; Res. 1329, *supra* note 5.

ICTR,<sup>43</sup> which derive jurisdiction and legitimacy from the Security Council powers under Chapter VII of the U.N. Charter,<sup>44</sup> the ICC derives its legitimacy and authority from a treaty negotiated by sovereign and equal states.<sup>45</sup> The ICC's premised theory of universal jurisdiction "derives from the idea that when criminal activity rises to a certain level of harm, or sufficiently important interests of international society are threatened, all States may apply their laws to the act."<sup>46</sup> If a new treaty was imposed to require Court primacy over national legal systems and pre-existing treaty obligations, sovereignty rights would be violated,<sup>47</sup> resulting in weak support for the Court and the refusal of states to surrender suspects for trial. Complementarity, therefore, recognizes individual state sovereignty while at the same time preserving the ICC's global jurisdiction.

In sum, Article 98 facilitates negotiation and ratification of future international agreements and limits the Court's intrusion upon international relations. The inherent right of a state to negotiate international agreements that increase its ability to obtain criminal jurisdiction over its nationals may reduce some opposition to the Court.<sup>48</sup> Although negotiating these agreements will become more difficult as nations ratify the Statute, Article 98 serves as a legal and psychological confidence building measure for states wishing to preserve and exercise their right of first jurisdiction over their nationals and prevent their citizens from appearing before the ICC.

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43. Res. 955, *supra* note 6.

44. *Action with Respect to Threats to the Peace, or Acts of Aggression*, U.N. CHARTER, reprinted in 59 Stat. 1976 Y.B.U.N. 1043.

45. "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." See Rome Statute, *supra* note 2, pmbl.

46. Sadat & Carden, *supra* note 8, at 407.

47. Noting the extraordinary quasi-legislative process of the preparatory commission meetings for the ICC, Sadat and Carden state,

for one of the classic objections to the establishment of an international criminal court has been the absence of an international sovereign power. The delegates in Rome, perhaps well aware of this unease, were generally quite conservative in crafting the definitions of crimes, and for the most part adhered to existing treaties, or in the absence of treaties, fairly well-established principles of customary international law. But to the extent the Rome conference was in fact a quasi-legislative process by which the international community 'legislated' by a non-unanimous vote, the political legitimacy of the norms rests not on any classic theory of contract between absolute sovereigns (treaty-making) but on some other grounds. From this perspective, it cannot be denied that the adoption of the ICC statute represented an extraordinary moment for international law.

*Id.* at 389-90.

48. See Keitner, *supra* note 17, at 247.

## II. STATUS OF FORCES AGREEMENTS

In the decades following World War II, the U.S. military establishment's single-minded mission was to forcefully oppose the spread of communism.<sup>49</sup> The Cold War forced the United States to deploy its troops around the globe<sup>50</sup> in order to maintain a strong physical deterrence to the Soviet threat.<sup>51</sup> It was unclear how customary international law would deal with criminal jurisdiction over visiting forces,<sup>52</sup> especially the problem of concurrent jurisdiction over crimes committed by visiting forces on foreign territory.<sup>53</sup> In order to resolve these problems, SOFAs<sup>54</sup> were developed for the express purpose of defining the legal rights and responsibilities of military forces stationed on foreign soil.<sup>55</sup> SOFAs are international agreements between states that create obligations concerning the jurisdiction over foreign state's military or civilian citizen.

Prior to World War II, customary international law recognized that "armed forces [were] organs of the state [that] maintain[ed] them and remain[ed] [so] when on the territory of another state."<sup>56</sup> In times of peace, when a state has agreed to the presence of visiting troops,<sup>57</sup> this theory remains true.

A similar approach is "law of the flag doctrine" as defined by Chief Justice Marshall's opinion in the U.S. Supreme Court decision, *Schooner Exchange v. McFaddon*.<sup>58</sup> The law of the flag doctrine asserts that a state consenting to the entry of foreign armed forces on its territory confers upon the sending state total immunity from local jurisdiction.<sup>59</sup> Marshall

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49. See Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, S.C. LAW., Aug. 2000, at 23. See also Steven G. Hemmert, *Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction*, 17 B.U. INT'L L.J. 215, 227 (1999); Horst Kraatz, *The NATO Status of Forces Agreement and the Supplementary Agreement*, ARMY LAW., Nov. 1990, at 3.

50. Arthur C. Bredemeyer, *International Agreements: A Primer for the Deploying Judge Advocate*, 42 A.F. L. REV. 101, 101 (1997).

51. JOHN WOODLIFFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW* 15 (1992).

52. See Eichelman, *supra* note 49, at 23.

53. See *THE HANDBOOK OF THE LAW OF VISITING FORCES* (Dieter Fleck ed., 2001) [hereinafter *LAW OF VISITING FORCES*]; SERGE LAZAREFF, *STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW* (1971).

54. See Bredemeyer, *supra* note 50, at 105 (Colonel Bredemeyer describes SOFA's as an international agreement for defining the status of military forces within the territorial boundaries of another country).

55. See WOODLIFFE, *supra* note 51, at 15.

56. *Id.* at 170.

57. *Id.*

58. *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

59. WOODLIFFE, *supra* note 51, at 170. Justice Marshall sets forth this proposition in *The Schooner Exchange*, 11 U.S. at 139-40.

declared that a French military vessel visiting a U.S. port during a time of peace did so under the implied promise that the vessel was exempt from U.S. jurisdiction and enjoyed sovereign immunity.<sup>60</sup> While this doctrine has been interpreted from dicta in this case, it is important to note that the holding only applies to the narrow context of troops in transit over the territory of a state. Therefore, it does not directly apply to the modern practice of permanently stationing forces in a foreign country.<sup>61</sup>

Juxtaposed to the law of the flag doctrine is the principle of territorial sovereignty or territorial supremacy. This principle establishes that a state has “exclusive competence to take legal and factual measures within a territory and prohibit foreign governments from exercising authority in the same area without consent.”<sup>62</sup> In *Wilson v. Girard*<sup>63</sup> the U.S. Supreme Court cited to *The Schooner Exchange v. McFadden* and held, “a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.” Based on the SOFA signed between the United States and Japan after World War II,<sup>64</sup> this decision demonstrated the amalgamation of the two theories into one theory of concurrent jurisdiction.

During the peacetime period after World War II, many nations, the United Kingdom in particular,<sup>65</sup> hosted foreign military forces.<sup>66</sup> Customary international law began to reflect the desire of nations to have

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A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

*Id.*

60. WOODLIFFE, *supra* note 51, at 191 n.13.

61. *See id.* at 170.

62. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW*, 75 (1997).

63. *Wilson v. Girard*, 354 U.S. 524, 529 (1957).

64. *See* Protocol to Amend Article XVII of the Administrative Agreement Under Article III of the Security Treaty, Sept. 29, 1953, U.S.-Japan, T.I.A.S. No. 2848, at 1846.

65. *See* LAZAREFF, *supra* note 53, at 30.

66. *Id.* at 23.

jurisdiction over the crimes committed by foreign forces<sup>67</sup> and the application of concurrent jurisdiction.<sup>68</sup>

With the demise of the Soviet Union, the U.S. military redefined its mission.<sup>69</sup> This new mission reduced the number of troops stationed abroad and used the remaining troops as forward units, deployed in emergencies.<sup>70</sup> The new “war on terrorism”<sup>71</sup> and anti-drug campaign in South America<sup>72</sup> will also see deployment of U.S. military forces to foreign countries acting as military trainers and taking part in military actions.

As the United States becomes more involved in limited peacekeeping and humanitarian missions abroad and the stationing of troops in foreign countries changes, it is important for the United States to maintain legal jurisdiction over its personnel.<sup>73</sup> Since the ICC will create another jurisdiction for potential legal action, defining the legal status of foreign-deployed forces will become increasingly important.

#### A. NATO SOFA

The desire to delineate the legal rights and responsibilities of military personnel while avoiding many of the jurisdictional problems associated with long-term overseas deployment on friendly-nation territory<sup>74</sup> was partially fulfilled in 1951 with the drafting of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (NATO SOFA).<sup>75</sup> In order to maximize American jurisdiction over these

67. *Id.* at 24.

68. “While the idea of concurrent jurisdiction, shared by the host nation and the sending state was not new, it appears to have reflected the new interdependency among nations which arose after World War II, along with the increasing nationalistic identification of many persons.” LAW OF VISITING FORCES, *supra* note 53, at 101.

69. President Bush declared at West Point:

Cold War doctrines of deterrence and containment must now be replaced by a strategy of prevention that enables us to take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.

Sam Tanenhaus, *Lest We Forget in the Face of Worse to Come*, WASH. POST, Sept. 15, 2002, at B1.

70. See Bredemeyer, *supra* note 50, at 101.

71. See Susan Schmidt & Thomas E. Ricks, *Pentagon Plans Shift in War on Terror; Special Operations Command's Role to Grow With Covert Approach*, WASH. POST, Sept. 18, 2002, at A1.

72. See Scott Wilson, *U.S. Seeks Court Immunity for Troops in Colombia*, WASH. POST, Aug. 15, 2002, at A22.

73. See Bredemeyer, *supra* note 50, at 102.

74. “Except where a deployment to another country is covered by the contemporary and conventional laws of armed conflict, the deploying military force cannot operate within the territorial boundaries of another country without some sort of legal authority.” *Id.* at 102.

75. Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792 [hereinafter Agreement].

troops, the U.S. Senate, in its declaration giving advice and consent to the ratification of the NATO SOFA,<sup>76</sup> adopted on July 15, 1953,<sup>77</sup> required a compulsory waiver request only when the alleged offender's commander believed "there is danger that the accused will not be protected because of the absence or denial of Constitutional rights he would enjoy in the United States."<sup>78</sup> From this mandate, the United States established a policy<sup>79</sup> to secure its own jurisdiction whenever possible in cases where the receiving state had the primary right of jurisdiction.<sup>80</sup> As of 1997, the United States instituted some form of formal SOFA with eighty-seven<sup>81</sup> countries and by August 2000, the United States arranged for 101 SOFAs with 105 foreign countries.<sup>82</sup>

The NATO SOFA<sup>83</sup> has been the template for subsequent SOFAs.<sup>84</sup> SOFAs with non-NATO countries contain similar provisions to the NATO SOFA.<sup>85</sup> The almost universal adoption of SOFAs and the recognition of concurrent jurisdiction as the international norm for peacetime jurisdiction over visiting forces demonstrate the desire of states to maintain their territorial sovereignty, yet permit sending states to retain jurisdiction over the actions of their forces.<sup>86</sup>

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76. *Id.*

77. See JOSEPH M. SNEE & A. KENNETH PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 17 (1957).

78. LAW OF VISITING FORCES, *supra* note 53, at 112.

79. "[T]he U.S.—the sending state with the largest number of military forces overseas—has consistently pursued policies calculated to reduce the scope of the receiving state's jurisdiction over U.S. service personnel to as narrow an area as possible. In this way, the U.S. seeks to transfer every offense into the category of concurrent jurisdiction . . ." WOODLIFFE, *supra* note 51, at 177.

80. See LAW OF VISITING FORCES, *supra* note 53, at 112.

81. Bredemeyer, *supra* note 50, at 102 n.27 (citing HQ USAF/JAI SOFA Report (2 June 1997)) (on file with author).

82. Citing statistics taken from Eichelman, *supra* note 49, at 23 n.4 (citing the International & Operational Law Division, Office of The Judge Advocate General, U.S. Air Force, International Negotiation of Agreement Handbook, tab 18 (2000)). I was refused access to this material and am unable to verify its contents.

83. See Agreement, *supra* note 75.

84. See for example:

The NATO SOFA represents a widely accepted approach to regulating the status of foreign forces. It provides a good compromise between the primacy of the law of the flag and the principle of territorial sovereignty. Although these rules are widely used for solving status issues even outside NATO, their conventional applicability is limited to stays in the territory of another party. Special status of forces agreements or arrangements were concluded by various states in many cases, e.g. between the United States and more than eighty states; between France and several African states; and between the United Kingdom and other states outside the NATO region (e.g. Cyprus, 1960; Belize, 1981; Brunei, 1984; and Kenya, 1985).

LAW OF VISITING FORCES, *supra* note 53, at 47.

85. Agreement, *supra* note 75.

86. "The principle of concurrent jurisdiction reconciles the exigencies of the territorial sovereignty with the respect of the immunity of jurisdiction of foreign States. The main characteristic

SOFAs govern the relationship between the sending state's military personnel and the receiving state's legal and governmental structures. While these agreements cover necessities such as communications, travel and transportation, taxes, and hiring local employees, their most important function is the apportionment of criminal jurisdiction between the sending and receiving nations.<sup>87</sup> This apportionment covers both exclusive and concurrent situations. In the absence of these agreements, modern international law presumes that receiving states retain peacetime criminal jurisdiction over foreign troops within their territory.<sup>88</sup>

Key to determining jurisdictional questions<sup>89</sup> is Article VII of the NATO SOFA,<sup>90</sup> which apportions criminal jurisdiction among sending nation law, receiving nation law, or both, depending on the nature of the offense and the identity of the victim.<sup>91</sup> When only the sending state's law is violated, the sending state has the power to exercise sole criminal jurisdiction.<sup>92</sup> When only the receiving nation's law is violated, the receiving nation has the power to exercise sole criminal jurisdiction.<sup>93</sup> When the laws of both states are violated, paragraph 2(a)<sup>94</sup> asserts that the sending state retains exclusive jurisdiction over persons subject to the military law of that state; under paragraph 2(b),<sup>95</sup> the receiving state has exclusive jurisdiction over civilian persons accompanying a military force with respect to offenses of the receiving state and law of the sending state. The U.S. Supreme Court has upheld this provision and has eliminated U.S. military jurisdiction over American dependants and civilians in peacetime.<sup>96</sup> Since exclusive jurisdiction of the receiving state concerns only civilians, the difficulty arises when determining jurisdiction over crimes committed by military personnel.<sup>97</sup>

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of this type of agreement is that it is concluded between States of comparable social and political maturity where the judicial organisation and the legal principles present similar guarantees." LAZAREFF, *supra* note 53, at 43.

87. *Id.* at 133.

88. "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Wilson v. Girard*, 354 U.S. at 529 (citing *The Schooner Exchange*, 11 U.S. at 136).

89. LAZAREFF, *supra* note 53, at 128.

90. Agreement, *supra* note 75.

91. See LAW OF VISITING FORCES, *supra* note 53, at 102.

92. Agreement, *supra* note 75, art. VII, 1(a).

93. *Id.* art VII, 1(b).

94. *Id.* art VII, 2(a).

95. *Id.* art. VII, 2(b).

96. See *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Krueger*, 354 U.S. 7 (1957); *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960).

97. See LAW OF VISITING FORCES, *supra* note 53, at 110.

When a crime violates the laws of both nations, the NATO SOFA provides for concurrent criminal jurisdiction.<sup>98</sup> When this occurs, the receiving state maintains primary jurisdiction, except for offenses committed solely against the property or security or member of the sending State force,<sup>99</sup> or for offenses arising out of any act or omission done by a sending state service member in the performance of official duty.<sup>100</sup> In all other cases, the receiving state has the primary right to exercise jurisdiction.<sup>101</sup> Simply put, when an actor commits an offense in the course of duty or affects solely the property or personnel of the sending state, that state has jurisdiction. In all other cases (i.e. when personnel are not acting in their official capacity or an offense that does not solely affect the property or personnel of his or her sending state) the receiving state has jurisdiction.<sup>102</sup> The controversy herein arises when defining what is an “offense” and what is considered “official duty.”<sup>103</sup>

In cases of concurrent jurisdiction, where the receiving state has primary jurisdiction, that state has the opportunity relinquish jurisdiction through a waiver request from the sending state.<sup>104</sup> While this SOFA section creates no legal responsibilities,<sup>105</sup> it formalizes a process<sup>106</sup> by which states can request jurisdiction when the primary right lies with the receiving state.<sup>107</sup> Consistent with the U.S. interest to obtain the broadest possible jurisdiction over U.S. military forces,<sup>108</sup> the United States has a formal policy to enter into bilateral, supplemental agreements to extend jurisdiction to the greatest number of cases.<sup>109</sup>

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98. Agreement, *supra* note 75, art. VII, 3.

99. *Id.* art. VII, 3(a)(i).

100. *Id.* art. VII, 3(a)(ii).

101. *Id.* art. VII, 3(b).

102. For a description of the intent of the negotiation of the NATO SOFA and the practical application of this section please see; SNEE & PYE, *supra* note 77, at 51.

103. For a discussion on the difficulties of resolving these questions, see generally WOODLIFFE, *supra* note 51, at 179.

104. Agreement, *supra* note 75, art. VII, 3(c). “The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities on the other state for a waiver of its right in cases where that other State considers such waivers to be of particular importance.” *Id.*

105. In discussing the provisions of some of these bilateral agreements employing administrative sanctions against states unwilling to comply with a request for a waiver, Fleck states, “realistically speaking, however, this statement is of limited viability, since it is questionable whether the prospect of U.S. administrative sanctions will suffice to convince host nation authorities to waive their (exclusive) jurisdiction in cases involving other than minor offences.” LAW OF VISITING FORCES, *supra* note 53, at 114.

106. See WOODLIFFE, *supra* note 51, at 182-83.

107. See LAW OF VISITING FORCES, *supra* note 53, at 117.

108. See LAZAREFF, *supra* note 53, at 194.

109. *Id.* at 194.

## III. ARTICLE 98 &amp; SOFAS

A SOFA gives the United States a moderate amount of protection for its military personnel under Article 98 of the Rome Statute. Under Article 98(2), a SOFA is an international obligation that requires a host state of military forces to obtain the cooperation of the sending state in order to surrender the suspect to the ICC. Therefore, if a U.S. service member, while performing his or her official duty, committed a crime that could be prosecuted under the Rome Statute and was covered by a SOFA, the United States would maintain jurisdiction over this crime and the receiving state would be obliged to hand the suspect over to the United States for prosecution. Thus, Article 98(2) would preclude this foreign court from proceeding with an ICC request for surrender, effectively preventing prosecution or investigation.<sup>110</sup>

Even in circumstances when primary jurisdiction is unclear, the NATO SOFA allows for diplomatic intervention to obtain custody. Article VII, 3(c) declares that, “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.”<sup>111</sup> This section reflects an earlier trend whereby most countries agree on an ad hoc basis to U.S. requests for jurisdiction in cases where it retains no legal claim.<sup>112</sup>

In recent years however, countries with claims against U.S. citizens have challenged this trend.<sup>113</sup> In 2001, at the request of the Japanese government, an American soldier was released to Japanese authorities to face charges of rape that occurred while he was stationed in Okinawa.<sup>114</sup> This represents one of many incidents that have occurred in Japan, creating a political firestorm for both the U.S. and Japanese

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110. Rome Statute, *supra* note 75, art. 17 & 18(2).

111. Agreement, *supra* note 75, art. VII, 3(c).

112. See LAW OF VISITING FORCES, *supra* note 53, at 112.

113. See John E. Parkerson, Jr. & Steven Lepper, *Jurisdiction—NATO Status of Forces Agreement—U.S. Servicemen Charged With Criminal Offenses Overseas—European Convention on Human Rights*, Short v. Kingdom of the Netherlands, Nos. 13.949, 13.950, *excerpted and translated* in 29 I.L.M. 1388 (1990); Andrew Pollack, *Rape Case in Japan Turns Harsh Light on U.S. Military*, N.Y. TIMES, Sept. 20, 1995, at A3; “Despite their willingness to give the United States even more jurisdiction than was originally contemplated under the SOFA, several European receiving states have become increasingly reluctant to allow the United States to exercise any jurisdiction at all over capital offenses.” High Court of the Netherlands, Mar. 30, 1990, in *International Decisions* (Keith Heghet & George Katala III eds.), 85 Am. J. Int’l L. 698, 699 (1991).

114. *Rape Sparks Demand for Review of U.S. Forces Accord*, MAINICHI DAILY NEWS, July 10, 2001, at 1, available at 2001 WL 6897928.

governments.<sup>115</sup> Another example is the case of *Netherlands v. Short*,<sup>116</sup> in which a U.S. soldier was retained in a Dutch court on charges of murder. Pursuant to the NATO SOFA, the Dutch court was reluctant to hand Short over to the United States because doing so might subject him to the death penalty. Such an action would violate the Dutch court's responsibilities under the European Convention on Human Rights.<sup>117</sup> Short was eventually released when U.S. authorities informed the Dutch government that the death penalty would not apply in his case.<sup>118</sup> Other examples include: resistance in South Korea to U.S. forces;<sup>119</sup> an incident in Italy where a U.S. Marine pilot, during maneuvers, killed twenty gondola passengers when he severed a cable car line at a ski resort;<sup>120</sup> and the refusal of the Philippines to renew their SOFA with the United States.<sup>121</sup> Two more examples of SOFA controversies involve the revision of the SOFA with Germany and the lack of a SOFA covering U.S. military forces currently stationed in Saudi Arabia.<sup>122</sup> These examples demonstrate the increased desire of countries to assert legal jurisdiction and prosecute crimes committed on their soil according to their own laws.

Pressure from the ICC and the international community further reduces the U.S. willingness to agree to jurisdictional requests. The NATO SOFA offers a reciprocal agreement among NATO allies in which parties receive relatively similar protections for troops stationed in member countries.<sup>123</sup> Therefore, this provides for an amicable agreement between nations to cooperate with requests for jurisdictional waivers. On the other hand, all

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115. See Adam B. Norman, *The Rape Controversy: Is a Revision of the Status of Forces Agreement with Japan Necessary?*, 6 IND. INT'L & COMP. L. REV. 717 (1996); Pollack, *supra* note 113; Edward W. Desmond, *Garrison Under Siege: Anger Over a Rape Case Involving American Troops Threatens to Undermine Security Ties with the U.S.*, TIME INT'L ED., Oct. 16, 1995.

116. 29 I.L.M. 1375 (1990).

117. *Id.*

118. Parkerson & Lepper, *supra* note 113; High Court of the Netherlands, *supra* note 113.

119. Chris Karns, *South Koreans Continue Protests Against U.S. Forces Stationed on Peninsula*, PACAF News, AIR FORCE NEWS, May 2, 2001, at <http://www2.hickam.af.mil/newsarchive/2001/2001106.htm>; Associated Press, *New Deal Lets South Korea Detain American Soldiers Suspected of Rape, Murder: Accord is Finally Reached After 11 Rounds of Talks Since 1995*, ST. LOUIS POST-DISPATCH, Dec. 29, 2000, at A9.

120. W. Michael Reisman & Robert D. Sloane, *The Incident at Cavalese and Strategic Compensation*, 94 AM. J. INT'L L. 505.

121. Rafael A. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67 (1992).

122. Agreement on the Dahrn Air Base, June 18, 1951, U.S.-Saudi Arabia, 2 U.S.T. 1474, extended on Apr. 2, 1957, 3 U.S.T. 403. For a discussion of the structure of this agreement see, LAZAREFF, *supra* note 53.

123. "Considering that the forces of one Party may be sent, by arrangement, to serve in the territory of another Party." Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, pmbl.

NATO members except Turkey have ratified the Rome Statute<sup>124</sup> and have participated in a worldwide campaign to support the Court.<sup>125</sup> This support indicates a general inclination toward cooperating with the Court once it is functioning.<sup>126</sup> At the same time, countries may also see their reliance on U.S. military protection diminish.<sup>127</sup> They may no longer readily defer to U.S. requests for jurisdiction in light of internal political pressures and changes in external military threats.

The terrorist attacks of September 11, 2001, dramatically changed U.S. military strategy.<sup>128</sup> While foreign countries have recently allowed the United States to station troops on their soil as part of the U.S. war on terrorism,<sup>129</sup> it remains to be seen whether or not they will provide immunity against ICC jurisdiction in the form of SOFAs. The war on terrorism has also exposed a need for access to foreign bases,<sup>130</sup> thereby shifting some negotiating leverage in favor of the receiving country and away from the United States.

Although nations grant waivers on a case-by-case basis in accord with NATO and similar SOFAs, other SOFAs contain blanket waivers. SOFAs with Tonga and Philippines,<sup>131</sup> as well as the annex to the NATO SOFA with the Netherlands, provide that, at the request of the United States, these countries will waive their primary right to exercise jurisdiction. However, when they determine that the case in question is of particular importance, nations may revoke the waiver. For example, a situation that would warrant transfer of an accused to the ICC would probably constitute “particular importance” to the receiving state. The receiving state would then exercise its right not to waive and prevent the United States from garnering jurisdiction. Article 98 protections would then be inapplicable and the United States would resort to alternative means<sup>132</sup> of obtaining

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124. See Rome Statute, *supra* note 10.

125. Joshua Rozenberg, *Vision of Global Crime Court Sees Light of Day at Last*, DAILY TELEGRAPH (LONDON), Mar. 21, 2002, at 21.

126. “The early entry into force of the Statute is therefore desirable and the Union is committed to making every effort to achieve the required number of instruments of ratification, acceptance, approval or accession, as well as contributing to the full implementation of the Rome Statute.” The Counsel of the European Union Common Position of June 11, 2001 on the International Criminal Court, 2001/443/CFSP.

127. See generally WOODLIFFE, *supra* note 51.

128. See Schmidt & Ricks, *supra* note 71.

129. Vernon Loeb, *U.S. Gains a Foothold in Central Asia*, SEATTLE TIMES, Feb. 25, 2002, at A3.

130. *Prime Minister Signs SOFA Allowing for U.S. Troops to Be Stationed in Romania*, WORLD NEW CONNECTION, Nov. 1, 2001, available at 2001 WL 29879914.

131. Christine Herra, *What's in a Name*, PHILIPPINE DAILY INQUIRER, Feb. 15, 2002, at 1.

132. See Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1 (2000).

jurisdiction and preventing transfer of the accused to the ICC.

Except for offenses committed solely against the property, security, a member of the sending state force, or for “offenses arising out of any act or omission done in the performance of official duty,”<sup>133</sup> SOFAs do not provide total protection against foreign jurisdiction. There is a general willingness to give the requesting country a waiver, but these waivers are not mandatory. “Sympathetic consideration” and instances of “particular importance” do not provide a legal basis for obtaining these waivers and would not suffice as an Article 98 ironclad “obligation under an international agreement” from which a state would be “required” to surrender a person.<sup>134</sup> Without an international agreement containing mandatory language requiring a waiver or a right to primary jurisdiction, Article 98 could not be invoked by the United States to prevent the Court from requesting a transfer of a U.S. service member.

#### IV. UNITED NATIONS SOFA

On June 30, 2002, the United States vetoed a six-month extension of the U.N. peace-keeping mission in Bosnia.<sup>135</sup> Because the Bush Administration feared that the ICC would unfairly target American soldiers for prosecution, it requested blanket immunity for all American soldiers serving on U.N. peace-keeping missions.<sup>136</sup> This veto blocked a resolution supported by thirteen of the fifteen members of the Security Council. As a result, members of the Security Council acquiesced to the U.S. request and granted all peace-keepers participating in the Bosnia mission blanket protection from ICC prosecution.<sup>137</sup> Effectively, this exemption gives peace-keepers no more protection against ICC prosecution than they had before. In the end, the Security Council adopted a resolution extending the Bosnian peace-keeping mission,<sup>138</sup> but not before the United States questioned future U.N. peace-keeping missions.<sup>139</sup>

The Model Status of Forces Agreement for peace-keeping operations

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133. Agreement, *supra* note 75, art. VII, 3(a)(i) & (ii).

134. For additional situations where SOFAs are not applicable to gain jurisdiction, see generally Paust, *supra* note 132.

135. Colum Lynch, *Dispute Threatens U.N. Role in Bosnia: U.S. Wields Veto in Clash Over War Crimes Court*, WASH. POST, July 1, 2002, at A1.

136. See Christopher Marquis, *U.S. Makes Deals to Skirt World Court: Romania, Israel First to Agree to Not Extradite GIs*, CHI. TRIB., Aug. 7, 2002, at 3.

137. S.C. Res. 1422, U.N. SCOR, 4572d mtg., U.N. Doc. S/Res/1422 (2002).

138. S.C. Res. 1423, U.N. SCOR, 4573d mtg., U.N. Doc. S/Res/1423 (2002).

139. See *U.S. Warns Future Missions Affected With No Immunity*, HOUSTON CHRON., July 3, 2002, at 23.

adopted by the U.N. General Assembly (U.N. SOFA) provides broader sending-state criminal jurisdiction than the NATO SOFA.<sup>140</sup> The U.N. SOFA “is intended to serve as a basis for the drafting of individual agreements to be concluded between the United Nations and countries on whose territory peace-keeping operations are deployed.”<sup>141</sup> When the United Nations becomes involved in peace-keeping missions, it negotiates and signs this agreement with the receiving nation on whose territory peace-keeping operations are being deployed.<sup>142</sup>

The U.N. SOFA gives states providing peace-keeping forces exclusive jurisdiction over any criminal offense that may be committed by their personnel in the host territory.<sup>143</sup> Unlike the NATO SOFA, this provision is not limited or subject to exceptions. Maintaining criminal jurisdiction of participating states over their forces encourages U.N. members to contribute peace-keepers to a U.N. mission in a country where there exists an unstable or hostile government.<sup>144</sup> This basic and unconditional provision gives U.S. troops involved in any U.N. operation greater protection under Article 98 than waivers or assignments of jurisdiction found in other SOFAs.

United States forces participating in U.N. actions, therefore, receive greater protection from ICC prosecution than in other unilateral military actions.<sup>145</sup> This protection increases incentives for U.S. participation in U.N. missions rather than acting unilaterally or through NATO. Unlike the ICTY, which has jurisdiction over U.S. military actions in the former Yugoslavia,<sup>146</sup> the ICC would be prevented from proceeding with a request for surrender of a U.S. service member if the U.N. SOFA protected his or her activities. In effect, the ICC creates greater protections against surrender and prosecution during peace-keeping operations than current ad hoc tribunals. Peace-keepers will be free from ICC prosecution so long as their nation of origin investigates and properly prosecutes any potential crimes they may have committed.

140. Model Status of Forces Agreement for Peace-keeping Operations, Report of the Secretary General, U.N. Doc. A/45/594, Oct. 9, 1990.

141. *Id.* art. 1.

142. “The model is intended to serve as a basis for the drafting of individual agreements to be concluded between the United Nations and countries on whose territory peace-keeping operations are deployed.” *Id.* pmbl.

143. “Military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offenses which may be committed by them in the [host state].” *Id.* art. 6(47)(b).

144. See LAW OF VISITING FORCES, *supra* note 53, at 497.

145. See *id.* at 505.

146. See ICTY, *supra* note 5.

## V. OTHER AGREEMENTS

In several cases, the United States has obtained exclusive jurisdiction over military personnel from countries where it has been involved in humanitarian relief efforts or similar military interventions. These agreements have usually been negotiated with countries in dire need of U.S. assistance and are willing to sacrifice legal jurisdiction in order to obtain economic or military aid. Examples include: an agreement with Zaire in 1994, which temporarily gave U.S. military personnel the same status as administrative staff of the U.S. Embassy; and a letter signed with Haiti in 1994 giving members, including Americans, of a non-U.N. multinational force stationed in Haiti the same status as U.N. personnel. These agreements were not intended as long-term solutions for peacetime troops stationed there. They were devised for specific activities and limited in scope. Negotiated on a case by case basis, these agreements responded to the necessity for immediate U.S. military involvement.

Currently the United States is pursuing a policy of negotiating treaties with each ICC member state to grant immunity to U.S. military personnel.<sup>147</sup> While few nations have signed such agreements,<sup>148</sup> the Bush Administration is intent on continuing such a policy even in the face of bitter opposition by the European Union.<sup>149</sup> The political success of such a policy is questionable, but the signing of such agreements will help ensure that U.S. military personnel remain under U.S. jurisdictional control.

Extradition treaties also present obligations under international agreements which comport with Article 98 requirements. An extradition treaty negotiated in 1999 with the Republic of Korea contained provisions preventing the extradition of U.S. citizens to the ICC and vice versa. While this example may become part of a trend of ICC protections in these agreements, gaining full coverage under them remains difficult. Congressional findings determined that: there are approximately 3,000 open extradition cases worldwide at any time; the United States signed extradition treaties with approximately sixty percent of the world's nations; half of these treaties are out-of-date; and treaties enacted prior to the 1970s are ineffective because they do not reflect modern criminal

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147. Ben Barber, *EU Applicants Told Not to Give U.S. Immunity; World Court's Writ at Issue*, WASH. TIMES, Aug. 13, 2002, at A1.

148. See Paul Miller, *Europeans to Exempt U.S. from War Court*, N.Y. TIMES, Oct. 1, 2002, at A6.

149. See Barber, *supra* note 147.

justice issues.<sup>150</sup> The amendment also called upon the Secretary of State to develop a process of negotiating new treaties. If the United States initiates this process, ICC protectionist language could be included, but it is uncertain whether many nations that have ratified the Rome Statute would be amenable to such provisions, let alone in violation of the Rome Statute.<sup>151</sup>

## VI. CONCLUSION

In their current form, U.S. SOFAs alone provide insufficient protection against possible ICC jurisdiction over U.S. military personnel stationed abroad. Questions of concurrent jurisdiction and language allowing for refusal of U.S. requests for waivers in cases of “particular importance” provide escape hatches for countries wishing to hand persons over to the ICC. Waivers of jurisdiction are based upon traditions of diplomatic agreement and “sympathetic consideration” rather than on rules of law. If a state is determined to send the individual to the ICC, current SOFAs provide inadequate protection in cases where they do not unequivocally determine jurisdiction.

While SOFAs do not explicitly provide for transfer of individuals to other jurisdictions, they do not prohibit such transfers either. Simply stated, they give jurisdiction to states in circumstances defined in the agreement. They leave open the possibility that Article 98 could not apply and a receiving state that has obtained jurisdiction over an individual and decides not to try him or her in its national court system could transfer this person to the ICC. This state would be under no obligation to waive their right to jurisdiction or to not surrender the individual to the ICC.

Only by obtaining mandatory waivers of jurisdiction in every SOFA can the United States gain absolute jurisdictional control over its military personnel stationed abroad. Such a policy in the current climate of relative global safety and rising European and Chinese political power would most likely be futile. Few countries will be willing to concede their right to any jurisdiction over stationed U.S. military personnel in their territory. Others will be hesitant and unwilling to weaken dramatically the power and legitimacy of the ICC. While a worldwide campaign of obtaining SOFAs,

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150. See 147 CONG. REC. H.2225 (daily ed. May 16, 2001) (proposed amendment 14 offered by Congressman Hyde to the Foreign Relations Authorization Act, Fiscal Years 2002 and 2003).

151. See Miller, *supra* note 148.

extradition treaties, or similar agreements providing waivers against ICC surrender is possible, current legal regimes and the political climate make the success of such an undertaking difficult and politically unlikely.

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