Jurisdictional Wrangling: US Military Troops Overseas and the Death Penalty

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The current deployments of military forces to Iraq and Afghanistan have caught the attention of the American public, but many Americans forget that large numbers of their fellow citizens are also stationed elsewhere around the world, serving in uniform. These servicemembers had been stationed overseas before Operation IRAQI FREEDOM began, and they will remain there long after that conflict has ended. These men and women face special circumstances: they are US citizens, subject to the laws of the United States and the US military. But at the same time, they are living in another country and are also subject to the laws and jurisdiction of their host country. For the most part, negotiated legal agreements decide which country will prosecute them in the event of criminal misconduct, and prosecutions are handled routinely in most cases.

But if a servicemember is accused of a crime which could be punished by the death penalty in the United States, the host country often becomes concerned. This is especially true in Europe, where a number of treaties ban the imposition of the death penalty in all circumstances. In these cases, European countries try to assert their own jurisdiction over the accused so as to prevent a possible death sentence for him or her, even when such action conflicts with a bilateral treaty signed with the US. Such situations force European countries to choose between conflicting international treaty obligations: one which abolishes the death penalty and another which directs them to hand over criminal defendants to the US military. This Development discusses the issues that arise from such conflicting treaty obligations in the case of US servicemembers stationed abroad and proposes solutions consistent with international law and the current status of diplomatic relations between the US and European states.

I. STATUS OF FORCES AGREEMENTS

Prior to World War II, the permanent overseas deployment of US military troops was rare. But the dawning of the Cold War and America’s containment

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Doctrine led to permanent stationing of large numbers of US servicemembers in foreign countries. This basing policy continued after the end of the Cold War, and as of June 2003, the US had approximately 365,000 military personnel stationed overseas.\(^1\) The US has attempted to clarify the legal status of these forward-deployed troops through the use of Status of Forces Agreements ("SOFAs").\(^2\) SOFAs are legally binding international agreements that address a variety of issues, ranging from criminal and civil jurisdiction to taxes and driving licenses.

Early international law held that a friendly state which was invited to send its troops into another state's territory maintained jurisdiction over its own forces. Today, customary international law takes the opposite view and holds that jurisdiction lies with the state where the crime occurs.\(^3\) When a foreign national enters the borders of another state, he subjects himself to the laws of the host state. SOFAs constitute a treaty exception to this customary view. In the absence of a SOFA, therefore, a state would have exclusive jurisdiction over foreign troops stationed within its borders.\(^4\)

Perhaps the most important such agreement is the NATO SOFA, which is both multilateral and reciprocal.\(^5\) By contrast, virtually all of the bilateral SOFAs to which the US is a party are non-reciprocal, meaning that they apply to US troops in the "receiving" (host) country but not to that state's troops when they are stationed in the US.\(^6\) The NATO SOFA serves as the draft for many bilateral SOFAs today.\(^7\) Article VII of the NATO SOFA addresses criminal jurisdiction, and most SOFAs currently in effect mirror its provisions.

There are two categories of jurisdiction in SOFA criminal cases: exclusive and concurrent. The US retains exclusive criminal jurisdiction over offenses which are criminalized under US laws but not in the receiving state.\(^8\) For example, desertion is a crime under the Uniform Code of Military Justice ("UCMJ") but is not criminalized in many receiving countries. The converse is also true: if an

\(^1\) Included in this number is the approximately 145,000 troops serving in Iraq. See Kris Osborn, **U.S. Seeks More Help from Coalition Members**, CNN Headline News (June 10, 2003), available online at <http://www.cnn.com/2003/US/06/10/hln.terror.coalition.assistance> (visited Oct 10, 2003).


\(^5\) Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, 4 UST 1792 (1953) (hereinafter NATO SOFA).


\(^7\) Lepper, 37 AF L Rev at 172 (cited in note 4).

\(^8\) NATO SOFA art VII § 2(a) (cited in note 5).
offense is not a crime in the US but is a punishable crime in the receiving state, then the receiving state has exclusive jurisdiction over the offense. This situation rarely arises however, because most civil offenses under the laws of the receiving country also violate the general articles of the UCMJ. Determining jurisdiction is more complicated when an offense is punishable both in the US and in the receiving state. These are cases of concurrent jurisdiction, and SOFAs allocate primary and secondary jurisdiction between the two countries. Ordinarily, the receiving state has primary concurrent jurisdiction, and the United States has secondary concurrent jurisdiction. This allocation of jurisdiction is consistent with customary international law, as described earlier. There are two main exceptions to this rule. If the crime harms a US citizen or US property, then the US has primary jurisdiction (the “inter se” exception). The US also has primary jurisdiction if the offense is committed by a servicemember in the course of performing an official duty (the “official duty” exception). Furthermore, the state with secondary jurisdiction can request that the primary state waive its jurisdiction and allow the secondary state to prosecute the offense. The state with primary jurisdiction is directed to give “sympathetic consideration” to such waiver requests. These requests are made most frequently when the offense is especially egregious or politically significant.

II. THE EUROPEAN PERSPECTIVE

All European NATO states have ratified the Sixth Protocol to the European Convention which abolishes the death penalty. The European Convention ("the Convention") is a Council of Europe treaty that promotes adherence to the human rights outlined in the Universal Declaration of Human Rights. Article I of the Convention states that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The Sixth Protocol is an optional addition to

9 Id § 2(b).
10 Id § 3.
11 Lepper, 37 AF L Rev at 174–76 (cited in note 4).
15 Id at 224.
the Convention that entered into force in 1985 and abolished the death penalty in signatory states.\textsuperscript{16}

A new Protocol to the Convention has further strengthened Europe’s resolution against the death penalty. Protocol 13 became effective when ten states ratified it, which occurred on January 7, 2003. It then entered into force in those states immediately. This Protocol bans the death penalty in all circumstances, closing a gap left by the Sixth Protocol for acts committed in times of war or imminent danger of war.

While Protocol 13 covers only a few additional cases, it sends a strong message about Europe’s position on the death penalty. The Council of Europe’s Committee of Ministers’ Press Release states: “The adoption [of Protocol 13] is a strong political signal that the death penalty is unacceptable in all circumstances.”\textsuperscript{17} While only seventeen states have ratified the Protocol to date, forty-one states have signed it in the single year since its inception.\textsuperscript{18} More ratifications can be expected.

When a US servicemember is charged with a capital crime in a country that is a signatory to either Protocol, that country is faced with conflicting treaty obligations: follow the Protocols and prevent imposition of a possible death sentence, or follow the SOFA and surrender jurisdiction to the US. This dilemma attains greater political significance as opposition to the death penalty grows in Europe. European governments are unanimously opposed to the death penalty, and popular opposition to capital punishment has been increasing in Europe for many years.\textsuperscript{19} The European Union has adopted a firm anti-capital punishment stance, and abolition of the death penalty is required for any state seeking entry into the EU. The EU also opposes the death penalty in other countries; it sponsors international resolutions opposing the death penalty and writes letters to US officials urging them to commute the death sentences of Americans currently on death row.\textsuperscript{20}


\textsuperscript{19} See, for example, Europe Outraged over Graham Execution, available online at <http://www.cbsnews.com/stories/2000/06/21/national/main207908.shtml> (visited Oct 5, 2003).

European opposition to capital punishment is now affecting the administration of justice within the US military, as “several European receiving states have become increasingly reluctant to allow the United States to exercise any jurisdiction at all over capital offenses.” European receiving states are asserting that cases with the potential to result in a death sentence are of “particular importance” and are reluctant to waive their primary jurisdiction in an increasing number of cases. The NATO SOFA itself only says that an execution of a foreign servicemember may not be carried out in a receiving state if that state does not permit capital punishment, but this is insufficient for many European countries: they do not want to support the death penalty at all, even by relinquishing custody of the accused servicemember so that the prosecution and sentencing can be carried out in another country.

III. AN EXAMPLE CASE

The case of Staff Sergeant Charles D. Short illustrates the potential jurisdictional problems that arise from the tension between countries’ conflicting treaty obligations. Short was a US Air Force member stationed in the Netherlands in 1988. While in the Netherlands, Short murdered and dismembered his wife, a Turkish national. Dutch police arrested Short, and he confessed to the murder while in their custody. The US had primary concurrent jurisdiction in the case for two reasons. First, the victim had a stronger connection to the US than to the Netherlands, as she was not a Dutch national and she was married to a US citizen. Second, the Netherlands had signed a supplemental agreement to the NATO SOFA which gives the US primary jurisdiction over its servicemembers, even when the victim of a crime committed by a US servicemember is Dutch.

Short could have been charged with capital murder under the UCMJ. As a signatory to the Sixth Protocol, the Dutch government refused to relinquish custody of Short and risk subjecting him to the death penalty. A civil court in the Hague determined that while the NATO SOFA did give primary jurisdiction to the US, the court would not surrender Short unless the US guaranteed not to seek the death penalty. The Commander in Chief of the US Air Force in Europe refused to issue such a guarantee.

A Dutch appellate court reversed the decision on the grounds that the NATO SOFA assigned primary jurisdiction to the US and therefore the

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23 More details on the Short case can be found in id.
24 Parkerson and Lepper, 85 Am J Intl L at 700 (cited in note 21).
Netherlands had neither criminal nor civil jurisdiction over Short. If the Netherlands did not have jurisdiction, then the Sixth Protocol did not apply, and the Dutch government was free to extradite Short in accordance with the SOFA. The appellate decision thus found a way to construe the SOFA and the Sixth Protocol as consistent with one another.25

While the appellate decision was pending, however, Short was convicted of manslaughter by a Dutch criminal court and sentenced to six years imprisonment.26 The civil appellate decision meant that the criminal conviction had to be reversed. Had the appellate court not found a way around the Sixth Protocol, Short might have escaped criminal punishment altogether, as the Netherlands had no jurisdiction to prosecute (according to the appellate decision), and the US did not have custody of Short.

In the end, the US decided not to seek the death penalty for Short, since mental health problems prevented him from meeting the UCMJ requirements for capital punishment. With the assurance that Short would not face the death penalty, the Dutch government agreed to surrender him to US officials.

Because of Short's mental health issues, the US was able to evade the Dutch demand for a guarantee not to seek capital punishment. But this roundabout solution may not be available in future cases. As the Short case illustrates, these situations can be extraordinarily delicate: the Dutch government sought a guarantee not just that Short would not be executed but that also the prosecutor would not seek the death penalty. In this case, had the two governments not been able to reach an agreement, Short would never have faced any consequences for the murder of his wife. He would have remained in limbo: Dutch officials would have custody of him but would be unable to prosecute, and US officials would be unable to assert jurisdiction to gain custody.

IV. DIFFICULT SOLUTIONS

The difficulties associated with prosecuting Short are likely to arise in future cases. As explained by two military attorneys, "[a]s a general rule, each peacetime offense for which the death penalty is authorized for U.S. military courts is a concurrent jurisdiction offense."27 Since each state has the authority to prosecute the offense, determining which state has primary jurisdiction will become more important. When the death penalty is at issue, the receiving state may have a strong interest in maintaining primary jurisdiction and the political stakes are automatically higher than in an ordinary extradition case.

25 Id.
Several possible “solutions” to this problem exist, none of which are wholly satisfactory. The US might negotiate supplemental agreements, either to individual SOFAs or to the NATO SOFA. These agreements face the same difficulties as all international agreements—agreement upon the language, negotiation of details, and the securing of legislative approval. Given the increasingly high profile of the death penalty as a domestic political issue, both in the US and in Europe, this process would require a delicate approach. The real problem, however, is what the agreements would say. The US is highly unlikely to develop any type of institutionalized exception to the death penalty for foreign policy reasons, including some that extend beyond the servicemembers question.\textsuperscript{28} Even though the death penalty is a contentious issue in US politics, it is still legal in this country and is in fact supported by a majority of Americans.\textsuperscript{29} Promising not to impose the death penalty on servicemembers who commit a crime abroad but are subject to US jurisdiction might be seen as acquiescing to the politics of the host nation and undermining the military’s own judicial system.

European countries are equally unlikely to sign an agreement that always assigns primary jurisdiction to the US in every case. The cause of the conflict is that Europe wants to prevent capital punishment, and abdicating all responsibility does not fit well with either the language or the spirit of the European Convention Protocols. The US, on the other hand, will almost certainly not assign primary jurisdiction to the host nation in all cases, for several reasons. The US tends to be uncomfortable subjecting its citizens to foreign criminal justice systems generally, and the military in particular prides itself on implementing its own disciplinary system.

In the case of US military servicemembers stationed abroad, future cases might follow the reasoning of the Dutch appellate court in the Short case and find that the SOFA and Protocol obligations are not inconsistent by reasoning that the Protocols do not apply to American servicemembers. But even then, other governments may, like the Netherlands, still require an assurance that the US will not seek a death sentence. While this worked in the Short case, the US would not accept such an assurance as a consistent policy, and there is no guarantee that other European courts will reach the same result as the Short case.

To address the form, if not the substance, of this concern, the US policy could be an unofficial one. These competing jurisdiction cases are rare. The US could respond to each jurisdictional challenge with an agreement not to seek a death sentence in that case but leave open the question of future cases. Such a

\textsuperscript{28} For example, US states continue to execute foreign citizens in highly contentious cases.

procedure would hopefully avoid causing a major diplomatic incident and yet reach a satisfactory compromise.

However, ad hoc policies such as this present their own problems. They may allow politicians on both sides of the dispute to use jurisdictional disputes as publicity platforms and place the accused servicemember in an uncomfortable limbo. As the Short case illustrated, a jurisdictional dispute might also result in no state having jurisdiction to impose criminal punishment at all. Nevertheless, such jurisdictional conflicts only arise in rare circumstances and therefore may be best handled on a case-by-case basis.

The political sensitivity of the issue is further inflamed by the current international climate. For example, in addition to disagreement with the US over the war in Iraq, European countries are refusing to extradite terrorist suspects to the US, in part because of US death penalty laws and in part because of concerns about military tribunals. While the case of a terrorist suspect is obviously different from that of a US soldier accused of a crime while serving overseas, it illustrates how contentious the issue of criminal jurisdiction is and sets a poor precedent for the handling of jurisdictional issues cases in the future.

No matter what the final policy choice of the US is, bilateral and multilateral jurisdictional issues with respect to US servicemembers stationed abroad will certainly not become any easier. Opposition to the death penalty is growing both in the US and abroad, and the US is growing increasingly distant from European viewpoints on many international issues. The growing divergence between the US and European perspectives on the death penalty and other matters only promises additional difficulties in an already complex area of international law.

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30 See, for example, Sam Dillon and Donald G. McNeil, Jr., A Nation Challenged: The Legal Front; Spain Sets Hurdle for Extraditions, NY Times A1 (Nov 24, 2001).