U.S. Status of Force Agreements With Asian Countries: Selected Studies

Charles L. Cochran and Hungdah Chiu

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Edited by CHARLES L. COCHRAN and HUNGDAH CHIU

CONTENTS

Introduction 1

Chapter I Jurisdiction Over American Military Personnel Under the U.S.-Philippine Status of Forces Agreement (Charles L. Cochran) 5
   I. Historical Background 5
   II. Independence and the First SOFA 9
   III. New Relationship in the 1965 SOFA 16
   IV. The 1979 Philippine Bases Agreement 28
   V. Conclusion 30

Chapter II Status of Forces Agreement, Due Process and Fair Trial: The Japanese Experience (Homer S. Pointer) 31


Chapter IV The United States Status of Forces Agreement with the Republic of China: Some Criminal Case Studies (Hungda Chiu)* 63
   I. Introduction 63
   II. Criminal Justice and Procedure Under the Republic of China Legal System 68
   III. The Reynolds Case of 1957 74
   IV. The Wilson Case of 1966 76
   V. The Starks and Eaton Case 79
   VI. Other Cases 84
   VII. Concluding Observations 85

Appendix A Ernest W. Bruch vs. Cliford Alexander, July 6, 1977 89
Appendix B  Exercise of Criminal Jurisdiction by Foreign Tribunals Over United States Personnel (1977-1978)  113

Selected Bibliography (Hungtah Chiu and Charles L. Cochran)  138

Treaties/Agreements Cited  140

Table of Cases Cited  140

Index  143

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INTRODUCTION

U.S. STATUS OF FORCE AGREEMENTS WITH ASIAN COUNTRIES: SELECTED STUDIES

EDITED BY CHARLES L. COCHRAN AND HUNGDAH CHIU

Introduction

Since the second world war large numbers of United States military personnel have been stationed for mutual defense purposes in the territory of other nations. The Uniform Code of Military Justice (UCMJ) applies to all military personnel of the United States overseas, with the consequence that an offense by a serviceman may come within the jurisdiction of the United States as well as the country where the offense occurred. Significantly different systems of law may operate within a sovereign state concerning military personnel.

Law, of course, reflects the culture, socio-economic conditions, and the political system in which it arises. Several Asian states examined in this work suggest legal systems that reflect their similarities and diversities with each other as well as with the United States.

The United States military authorities, not unreasonably, would prefer to exercise as much control over their own personnel, including criminal jurisdiction, as possible. And the civil authorities of every state, with even greater justification, insist on their undoubted right to exercise criminal jurisdiction within their own territory. In such a situation, both the sending and the host state have certain overlapping interests. Both want the sending state to have sufficient authority over its personnel to maintain the military discipline essential for the accomplishment of its mission. And in any joint undertaking, such as defense, both must be perceived as being equal partners in order to encourage mutual respect and avoid antagonisms that result from subtle suggestions of superior and inferior roles played by the participants in the enterprise. If allowed to continue unattended, these antagonisms can undermine the mutual defense effort. No state can be expected to waive its right and duty to protect its citizens or property.

The relationship between the visiting force and the host state is usually governed by a Status of Forces Agreement (SOFA) which tend to be Executive Agreements rather than treaties. The
North Atlantic Treaty Organization's (NATO) SOFA is the standard by which all other agreements are measured in the United States. However several agreements have rather different provisions. For example, the United States — Japanese agreement is modeled directly on the NATO-SOFA while the United States agreements with the Philippines, the Republic of Korea and the Republic of China have several significant variations.

In almost every case examined in this work, foreign jurisdiction is concurrent with military courts-martial. When the alternative to a trial before a military court is a trial before a foreign tribunal, the major issue is: "Who is to have primary jurisdiction?" Increasingly, these papers suggest, host states are asserting their right to exercise jurisdiction. A major source of friction between states involved in SOFA agreements is concern that military personnel will not be afforded a fair trial according to the sending state's legal standards, and a concern by the host state that the national dignity not be affronted by the sending state's military courts-martial handing down light sentences for criminal acts committed against the citizens of the host state.

In fact these papers uniformly suggest that the experience of the United States in Asia has been that trials of military personnel by the host state has generally been very fair and the sentences lighter than might have been expected through court martial convictions. The provisions of the SOFAs serve the function of guaranteeing that the international minimum standard of justice is applied.

Among the four SOFA agreements examined in this book, the one with the Republic of China will be terminated together with the termination of the 1954 Mutual Defense Treaty with that country on January 1, 1980. However, this does not mean that the analysis contained in the paper dealing with the Republic of China SOFA is now of academic interest only. As both Korea and Japan have been under strong Chinese cultural influence and shared many aspects of Chinese values, it is self-evident that a study of United States experience in applying SOFA in Taiwan may be quite helpful in studying SOFAs with both countries.

1. 6 UST 433; TIAS 3178; 248 UNTS 213.
The case of Bruch v. Alexander is included as Appendix A because it is an excellent illustration of the complexities of a case involving concurrent jurisdiction. The seemingly straightforward case involving an American airman stationed in Korea, ultimately raised questions about the protection of “due process” rights of the individual by the foreign jurisdiction. Finally a United States court became involved when the defendant returned home on emergency leave and asked for an injunction to prevent the military from sending him back to serve his sentence. Thus a United States court was passing judgment on the procedure of a foreign court which raises the Act of State issue.

Appendix B includes the most recent “Department of Defense Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals Over United States Personnel” for the period of 1 December 1977 — 30 November 1978. This data permits a comparison of the information from the Asian nations with each other and with the overall data from throughout the world.

Charles L. Cochran
Hungdah Chiu

October 21, 1979
CHAPTER I

JURISDICTION OVER AMERICAN MILITARY PERSONNEL UNDER THE U.S.-PHILIPPINE STATUS OF FORCES AGREEMENT

CHARLES L. COCHRAN

I. Historical Background

The current exercise of criminal jurisdiction over United States personnel in the Philippines has evolved from the unusual historical connection between these two nations. American military personnel have been in the Philippines almost without interruption since 1898, then the United States declared war against Spain. At that time, the Spanish colony of the Philippine Islands was already embroiled in revolutionary turmoil. The United States sought the collaboration of the Filipino rebels under General Emilio Aguinaldo, and arms were provided the rebels on the premise that their opposition to the Spanish enemy would aid the American war aims. The Spanish army in the Philippines was disorganized, effectively cut off from supplies or reinforcements from Spain, and quickly collapsed. On June 12, 1898, the independence of the first Philippine Republic was proclaimed. Commodore George Dewey and the American fleet, awaiting instructions from Washington, neither participated in nor interfered with the celebrations on shore.

The Treaty of Paris, ending hostilities between Spain and the United States, was signed on December 10, 1898. By its provisions, Spain was to cede sovereignty over the Philippines to the United States for $20 million. The cooperation between the rebels and the United States abruptly ceased, and by the time the exchange of ratifications took place on April 11, 1899, a full-scale insurrection against the new colonial power was in progress. The United States sent 120,000 troops to the Philippines to subdue the rebels it had previously aided. The pacification program took three years and was a costly effort in both lives and resources.¹ The

commander of the United States forces in the Philippines, Major General Merritt, established a military government which conformed to the principles of international law regarding military occupation. For a time, civil courts were suspended, and military courts tried civilians for criminal offenses. As the pacification program proceeded, civil courts were gradually allowed to resume their normal functions. However, the civil courts were not permitted to exercise jurisdiction over crimes committed by United States military personnel.

The period from 1900 through 1941 is known in Philippine history as the American Era. Two landmark cases during this time, dealt inconclusively with the troubling question of criminal jurisdiction. In Grafton v. United States, decided by the Supreme Court of the United States on appeal from the Philippine Supreme Court, it was held that there was concurrent jurisdiction in the Philippines over military personnel by both civil and military authorities. The Court determined that Grafton, a private in the army, could be tried by a general court-martial for a non-capital


2. The proclamation establishing the military government, dated August 14, 1898, is found in 24 Official Opinions of the Attorneys-General of the United States, 570, 573 (1903). See also Green Haywood Hackworth, Digest of International Law vol. VI, chapter XX, pp. 385–413 (Washington: Govt. Printing Office, 1943) (1961) for a statement of the law of military occupation applicable at that period and after.

3. Customary international law at this time frequently cited the dicta of Chief Justice John Marshall in the case of the Schooner Exchange v. McFadden, 11 U.S. [7 Cranch] 116 (1812), in which he stated: “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 dominion. . . . The grant of a free passage . . . 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” [at 139–140]. Subsequently, in Coleman v. Tennessee, 97 U.S. 509 (1878), the Supreme Court stated: “It is well settled that a foreign army permitted to march through friendly country, or to be stationed in it by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place.” (at 515). And in 1879, the Court stated in Dow v. Johnson, 100 U.S. 158, that “. . . a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and criminal jurisdiction.” (at 165).

4. 206 U.S. 333.
offense when the civil law declared the act to be a crime. Civilian violators of the law, whether the offense was committed on or off a military reservation, were not ordinarily subject to military criminal jurisdiction. In *Payomo v. Floyd*, a Filipino civilian residing on the Subic Naval Base was arrested by naval authorities for cutting timber on the installation without having obtained a permit. He was sentenced by base authorities for the violation, but in a petition for a writ of habeas corpus, the Philippine Supreme Court held that the United States Navy lacked the authority to make laws binding on the civilian population. The court recognized the necessity of the military to exercise control over the base, but held that this did not necessitate the "exercise of the functions of government over the civilian population of the reservation." The accused was ordered released for lack of jurisdiction by naval authorities. These cases did not resolve the troubling question of criminal jurisdiction.

Negotiations between the United States and the Philippines concerning jurisdiction over military bases began in earnest by the early 1930's. The Hare-Hawes-Cutting Act of 1933, which was passed over the veto of President Hoover, set forth the initial policy of the United States for the proposed Republic of the Philippines. Section 3 of the act stipulated that the United States would turn over "all the property and rights" of that country to the Commonwealth of the Philippine Islands "except such land or other property as has heretofore been designated by the President of the United States for military and other reservations of the Government of the United States. . . ."

5. *Id.* See also *United States v. Grafton*, 6 Phil. 55 (1906). Grafton was thus a case of concurrent jurisdiction. Whether jurisdiction would be exercised by military or civilian authorities was to be determined by which authority obtained jurisdiction first. After the passage by Congress of the First Organic Act of July 1, 1902, civilians were subject to civil law only when their offense was committed off the military installation.


7. *Id.* at 796.


9. 47 *Statutes at Large* 761 (1933).

10. *Id.* at 764.
stated that ten years after the commonwealth came into existence the President of the United States would by proclamation surrender all existing rights and sovereignty of the United States over the territory and people of the Philippines, except such land designated by the President of the United States for public purposes. Section 17 provided for the act to be approved by the Philippine legislature, but that body rejected it chiefly because its provisions would allow the United States to retain an unspecified amount of territory for military bases after independence.

The United States Congress made a second effort to provide an acceptable solution to the problem of the bases in the Tydings-McDuffie Act of 1934. This act provided, as did the first, that ten years after the commonwealth period began, the Philippines would be granted independence. The United States government would relinquish all military installations with the exception of naval and refueling stations, and the President of the United States was authorized to enter into negotiations with the government of the Philippine Islands within two years after the granting of independence to that nation to settle the remaining issues pertaining to the naval reservations and fueling stations. While technically the United States could retain jurisdiction over the naval bases and fueling bases if an agreement was not reached, the act signalled a willingness to compromise. It was accepted by the Philippine legislature and became the basis for mutual policy by the two powers involved.

From January 1941 through the early part of February 1945, the United States control over the Philippines was temporarily interrupted when Japan occupied most of the islands. To counteract Japanese propaganda in the Philippines concerning American colonialism, President Franklin Roosevelt issued a proclamation in which he gave a "solemn pledge" to the people of the Philippines that their freedom would be reclaimed and their independence established and preserved. The Japanese occupation of the Philippines was plagued by persistent guerrilla activities, and the new military rulers responded with large-scale and brutal retaliation against the civilian populace.

11. Id. at 768.
12. See Dodd, op. cit., p. 22.
13. 48 Statutes at Large 456 (1934), especially p. 463.
15. See Taccad, op. cit., p. 68. See also Yamashita v. Styler, 75 Phil. 563 (1945), and In re Yamashita, 327 U.S. 1 (1946).
II. Independence And The First SOFA

World War II clearly demonstrated, at least in that time period, that the Philippines were dependent upon the United States both economically and for military defense, and that the United States was dependent upon military bases in the western Pacific to protect its own interests. When President Harry S. Truman officially proclaimed the independence of the Republic of the Philippines on July 4, 1946, the new nation was anxious for economic support and military assistance, and its leaders were extremely cooperative when negotiations for military bases began with the United States, which was looked upon as a liberator. As a result, the United States received a rent-free lease on several bases for 99 years, through 2045.

Specific problems concerning the use of the bases were negotiated between the two governments, and the Military Bases Agreement was concluded in early March, 1947. The agreement was dealt with as a treaty by the Philippine Senate, which gave its consent to the document; in the United States it was treated as an executive agreement and therefore not submitted to the Senate.\(^{16}\)

By article XIII, paragraph 1 of the 1947 agreement, the Philippines granted the United States the right to exercise jurisdiction in the following situations:

- Any offense committed by any person within base except where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty) or the offense is against the security of the Philippines
- Any offense committed outside the bases by any member of the armed forces of the United States in which the offended party is also a member of the armed forces of the United States
- Any offense committed outside the bases by any member of the armed forces of the United States against the security of the United States.\(^{17}\)

The Philippines retained the right to exercise jurisdiction over "all other offenses committed outside the bases" by military

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17. U.S. TIAS 2846.
personnel of the United States. Stated simply, Philippine courts had no jurisdiction over offenses committed on the bases unless both the delinquent and the victim were Philippine citizens, or if the offense was against Philippine security. Conversely, American courts had no jurisdiction over offenses committed in the Philippines outside the military bases except when both the offender and the offended were members of the United States military, or if the offense was against the security of the United States.

The United States was also granted the right to exercise jurisdiction over its military personnel for violations of the law committed off base while the violator was engaged in the performance of official duty. Interestingly, the Philippine government was given the right to determine whether an offense committed off the base occurred while the individual was engaged in the performance of a specific military duty as defined in paragraph 4(b). The prosecuting attorney was obliged to notify the United States authorities exercising custody over the offender if the violation was found to have occurred during the performance of an official duty. The military authorities were then free to exercise jurisdiction. However, if the prosecuting attorney concluded that the offense had not occurred during the performance of official duty, the commanding officer only had the right of appeal to the Philippine Security of Justice to decide the question. The Secretary’s decision was final.

This was the one item in the agreement that granted more rights to the Philippines as a host state than the subsequent North Atlantic Treaty Organization Status of Forces Agreement (hereinafter cited as NATO-SOFA)19 granted to its host states. It has been suggested that although the NATO-SOFA is silent on the point, the negotiators assumed that the military authorities of the sending state would make the determination.18

18. Snee, Joseph M., and Pye, Kenneth A. Status of Forces Agreements and Criminal Jurisdiction (Dobbs Ferry: Oceana Publications, 1957) pp. 51–54. It is important to note that by the end of the Second World War few states were willing to accept the line of reasoning that had evolved from Marshall’s dicta in Schooner Exchange to the broader statements in Coleman v. Tennessee and Dow v. Johnson. Barton, writing in the British Yearbook of International Law, pointed out the three cases could not legitimately be cited as independent authority on immunity from criminal jurisdiction from the host state, because the question of immunity from criminal proceedings was not in issue in either case. [27 British Y.B. International Law 218, (1950)]. He pointed out that Marshall had limited his comments specifically to troops in passage only. In Kinsella v. Krueger (351 U.S. 470 (1956)) the Court in dicta stated that international law provides that “each
Although the Korean conflict temporarily increased the sensitivity of the Philippine government to the issue of security and the need for mutual security arrangements with the United States, the period after 1947 was one of growing nationalism and concern that the Philippines were not being treated as equal partners. When criminal jurisdiction problems began to arise between the United States military forces stationed in the Philippines and that government, they served as a focal point for discontent.

The NATO-SOFA, signed in June of 1951 and entered into force for the United States in August of 1953, provided the basis for unfavorable comparisons concerning criminal jurisdiction provisions in the Military Bases Agreement of 1947. Paragraph 9, Article VII of the NATO-SOFA provides for concurrent jurisdiction when the offense is a violation of the laws of both the sending and the receiving state. Which country has the "primary right" to exercise jurisdiction is determined by the type of offense and the circumstances in which the offense was committed. For example, the authorities of the sending state have the primary right to exercise jurisdiction over offenses solely against the property or security of the sending state or of a member of that state and for offenses committed in the line of duty. Otherwise, the receiving state has the primary right to exercise jurisdiction. The authorities of the state having the primary right to exercise jurisdiction shall also give "sympathetic consideration" to requests of the other state for a waiver of its right when the other state considers it to be of importance. Finally, the NATO SOFA requires that the state having the primary right must notify the other state as soon as practicable if it decides not to exercise jurisdiction.

This stands in sharp contrast to the agreement between the United States and the Philippines, in which jurisdiction was dictated by the place where the infraction occurred. In fact, the agreement allowed the United States to exercise jurisdiction over Philippine citizens when the offense was committed on the base, unless the offense was committed against another Philippine citizen or threatened Philippine national security. Since the sending state's exercise of jurisdiction in a host state is dependent upon a waiver of the receiving state's authority, usually evidenced in an international agreement, it would appear that this was an unusually, and perhaps unintentionally, broad waiver of sovereign authority by the host state. Not only could the sending state try its own citizens for crimes committed on the base, it could also
try the citizens of the receiving state if their crimes occurred on a sending state's military reservation.

In further contrast to the NATO-SOFA, the United States military authorities had jurisdiction to try military personnel for crimes committed on the base even though the victim was a citizen of the Philippines, and even when the offense was unrelated to any act or omission in the performance of official duty. The NATO-SOFA provides for the primary right of jurisdiction by the receiving state in those cases. The NATO SOFA also places an obligation upon the receiving and sending states to assist each other in the investigation of offenses and in the collection and production of evidence. The U.S.-Philippine agreement does not require such mutual assistance, but calls instead for mutual cooperation with respect to preserving order and discipline among United States military personnel.

The NATO-SOFA became the model for subsequent SOFA agreements with other countries. The U.S.-Japan SOFA following World War II included most of the more liberal features from the NATO model, and this fact was particularly galling to the Philippine government. It was pointed out that Japan, which had been a mutual enemy during the Second World War, was treated on par with many states, while the Philippines, an ally during the war, was not treated as well. Agitation to revise the Military Bases Agreement became more pronounced when the NATO-SOFA and the Japanese agreement became effective in 1953.

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nation has jurisdiction of the offenses committed within its own territory,” citing Schooner Exchange as authority. Subsequently, in Smallwood v. Clifford, [286 F. Supp. 97 (D.D.C. 1968) docketed No. 22053, D.C. Cir.], it was held: “It should be stated at the outset that under the applicable principles of international law, Korea should have exclusive jurisdiction to punish offenses committed within its territory, unless it expressly or impliedly consents to surrender its jurisdiction.”

19. Article VII, para. 5, 6.

20. Actually there have been three agreements with Japan. The Treaty of Peace with Japan (U.S. TIAS 2490), the Security treaty between the U.S. and Japan (U.S. TIAS 2491), and the administrative agreement under article III of the Security Treaty (U.S. TIAS 2492). Article XVII provided that the U.S. would have exclusive jurisdiction over all offenses committed in Japan by U.S. military personnel. On October 29, 1953, the protocol to amend article XVII of the administrative agreement went into effect. The protocol was similar to the terms of article VII of the NATO SOFA. The Treaty of Mutual Cooperation and Security between the U.S. and Japan (U.S. TIAS 4509) terminated the earlier security treaty. Article XVII is identical to the earlier protocol, however.

21. The desire to change the agreement in regard to jurisdiction problems over military personnel tended to be submerged within other issues that the government of the Philippines wanted to resolve. These included enforcement on the military
Formal negotiations between the two nations got underway in July 1956, on the tenth anniversary of Philippine independence. During these negotiations, the Philippine delegation attempted to obtain an agreement on problems of criminal jurisdiction similar to the NATO SOFA. The Philippine negotiators suggested that United States military authorities should have jurisdiction when the offender and the offended party were both members of the United States military or a dependent, and when the offense was either against the security of the United States or arising out of an act or omission done in the performance of official duty. Jurisdiction would be determined not by where the offense occurred, as it was under the existing agreement, but instead by the type of offense. The Philippines delegation asserted that sovereignty suggests that the sending state's exercise of jurisdiction is dependent upon an international agreement, without which the sending state has no authority, and that the Philippine government should waive its jurisdiction over crimes committed on the bases only in those cases involving Americans only. In opposition to this, American negotiators, who were largely drawn from the military, argued that since the bases employed approximately 15,000 Filipinos in a variety of capacities, large numbers of American military personnel would be subject to the jurisdiction of Philippine courts for offenses committed on the bases against Filipinos. The Americans feared that this could result in a demoralization of base military personnel. 22 Ultimately, the different views put forward by the two sides resulted in a collapse of the negotiations.

The sporadic raising of the issue of jurisdiction after 1956 did not result in any significant action by the two governments to

22. The number of employees on the bases varies considerably, of course. During the Vietnam conflict the number rose to approximately 40,000 Filipino employees. While the bases employ approximately 18,000 at the present time, total U.S. Government employment of Filipinos is approximately 32,000. For the view that the exercise of Philippine jurisdiction over U.S. military personnel would result in a lowering of morale, see The New York Times, September 4, 1956, p. 10. However, the commanding officer of the Navy in the Philippines stated that the exercise of jurisdiction by Philippine authorities over U.S. personnel improved the discipline and morale of the troops. He suggested that the threat of imprisonment in a Philippine jail contributed to good discipline. See U.S. Senate, Subcommittee of the Committee on Armed Services, Hearings, Operation of Article VII, NATO Status of Forces Treaty, 84th Congress, 2d Session, 1956.
resolve the issue. Irritation flared into the open following the fatal shooting by Airman 1st Class Larry Dean Cole of 16-year-old Rogelio Balagtas in 1964. Cole was assigned to guard duty at Clark Air Force Base. A gunnery range used for target practice by both the Philippine Air Force and the United States Air Force was among the restricted areas on the base, but civilians regularly gathered scrap metal and empty casings from it as a source of income. Cole was off duty on the afternoon of November 25, 1964, when he went out to hunt birds with a .22 caliber rifle. He claimed that upon seeing four Filipino youths on the gunnery range, he fired a warning shot in their general direction. He insisted that he did not fire with the intention of wounding or killing anyone. The youths fled through the brush. Airman Cole stated that he fired a few more warning shots and then continued hunting. The body of Rogelio Balagtas was found later that same evening close to a river in the area. An autopsy revealed that he died as the result of a gunshot wound in the head, and ballistics tests on the slug confirmed that the projectile had been fired from Cole’s personally owned rifle.

Authorities at Clark told local police of the incident, but the local press was not immediately informed. When some 45 days after the event the local press discovered that Cole was not on duty when the killing took place, but instead was on a personal hunting expedition, the occurrence received banner headlines and charges were made that the military authorities hoped the killing would escape public notice. Robert Trumbull reported in the New York Times that the Philippine press created the image of “trigger-happy” sentries “wantonly killing Filipinos.”

The circumstances of the fatal shooting were reminiscent of the case of Specialist Third Class William Girard, who caused the death of a Japanese woman in 1957. Both incidents occurred on military reservations and in areas where restrictions against trespass were rather laxly enforced. Girard was tried by a Japanese court which had concurrent jurisdiction with the United States. Because the victim of the offense was a Japanese citizen, Japan was able to exercise jurisdiction even though the victim was in a restricted area on a military reservation. But in Cole’s

24. Id., p. 3.
case, the 1947 agreement provided that the U.S. military authorities had criminal jurisdiction on the base.

Philippine reaction was strong. Demonstrations occurred in front of the U.S. Embassy. Protestors demanded that President Diosdado Macapagal insist on revisions of the agreement that would give the Philippines primary jurisdiction over all offenses committed by Americans outside the bases and inside the bases when a Filipino national was involved. The demonstrators carried 32 coffins symbolizing 32 Filipinos who had been shot and killed by American and Filipino security guards at Clark Air Force Base and Subic Bay Naval Station between 1952 and 1965. It was argued that particularly since Cole was off duty he should have been tried by a Philippine court.

There appears to have been concern by military authorities that leftist sympathizers could take advantage of the incident to the detriment of United States' interest. Official Philippine observers were invited to the general court martial of Airman Cole. The defendant was found guilty of unpremeditated murder, sentenced to three years confinement with hard labor, and demoted to private. At the end of his sentence he was to be given a dishonorable discharge. However, Major General Sam Maddox subsequently altered the sentence from a dishonorable discharge to a "bad conduct discharge." Several Philippine senators charged that the decision to alter the terms of the sentence meant that Americans were taking the Philippines for granted.

Public indignation over the Cole incident and other cases that were widely reported in the press was a major impetus to a serious resumption of talks to find a solution acceptable to both states concerning criminal jurisdiction. Accordingly, United States Ambassador William McCormick Blair and Philippine Foreign Secretary Mendez issued a joint statement in early February indicating they would try to negotiate a new agreement to broaden Philippine jurisdiction, especially over crimes committed by off-duty servicemen and some categories of offenses committed on bases. They indicated that they hoped an agreement would include provisions enabling either country to waive jurisdiction in cases of particular importance to one country or the other. The negotiations would, in effect, use the NATO-SOFA as a guideline for criminal jurisdiction questions.

27. Cited in Dodd, op. cit., p. 78.
III. New Relationship In The 1965 SOFA

On August 10, 1965, a new executive agreement amending the agreement of March 14, 1947 was signed.29 (Unlike the 1947 agreement, which was dealt with as a treaty by the Philippine Senate, this was not submitted to the Senate of either nation.) It was hailed as the beginning of a new era in relations between the United States and the Philippines. Criminal jurisdiction provisions in the revision were similar to those found in article VII of the NATO SOFA, and it appeared to satisfy the Philippine government’s desire that the United States government deal with it on the same basis it deals with other nations with which it has such agreements. The initial euphoria was rather short lived, however, for within a few years the Philippine government was to argue that their gains in jurisdiction over United States Military and civilian personnel were insufficient.

Article XIII of the Philippines Military Bases Agreement contains the criminal jurisdiction provisions. Paragraph 1(a) recognizes that the authorities of the host state have jurisdiction over the military personnel of the United States, the civilian component, and their dependents “with respect to offenses committed within the Republic of the Philippines and punishable by law of the Republic of the Philippines.” It further states in paragraph 1(b) that the military authorities of the United States shall have the right to exercise within the Republic of the Philippines all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States.30 Several U.S. Supreme Court decisions, in the last two decades, have held that civilians are not subject to court martial jurisdiction in times of peace. Therefore the agreed official minutes states in the second paragraph that:

The term “persons subject to the military law of the United States” does not apply to members of the civilian component


30. The wording of the article suggests acceptance of Kinsella v. Krueger and Smallwood v. Clifford in that it states that the U.S. shall have the right to exercise criminal jurisdiction within the Republic of the Philippines over persons subject to the military law of the United States. The agreement does not “recognize the existence of U.S. jurisdiction.” Hence, without the agreement, a U.S. court-martial could not exercise authority in the host country without infringing on the latter’s rights.
or dependents, with respect to whom there is no effective military jurisdiction at the time this arrangement enters into force.

It also states that if a change in military jurisdiction results from internal changes in United States law, the sending state will inform the government of the Philippines through diplomatic channels.

Paragraph 2 deals with cases of exclusive jurisdiction. The military authorities of the United States have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States concerning offenses relating to United States security, but not in violation of the law of the Republic of the Philippines. Conversely, the authorities of the Philippines have the right to exercise exclusive jurisdiction over all violations of the law relating to the security of the Republic of the Philippines, punishable by its law but not by the law of the United States. Subparagraphs identify the crimes of treason, sabotage, espionage, and violations of any law relating to official secrets of the state as being included in these types of offenses. These provisions are, for all practical purposes, identical to the provisions of article VII, paragraph 2, of the NATO SOFA and to provisions found in the SOFA between the United States and Japan. What is significantly different, however, is that paragraph 6 of the official minutes states that in time of war "... the United States shall have the right to exercise exclusive jurisdiction over any offenses which may be committed in the Philippines." The minutes do not make clear if this would apply if, for example, the United States was involved in a United Nations police action in a declared war in Europe or the Middle East not involving the Far East.

Except for the specifically mentioned cases of exclusive jurisdiction mentioned in paragraph 2, the right to exercise jurisdiction is concurrent under the agreement. As in the NATO SOFA, both parties agree to notify the other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction. The requirement of notification of the disposition of cases encourages each state to prosecute flagrant offenses to avoid irritating the other state and arousing hostile public reaction.

31. See note 20 above.
32. NATO SOFA, article VII, para. 6 (b). U.S. Philippine agreement, article XIII, Para. 6 (b).
(This can be a major problem in the Philippines, as cases discussed later will illustrate.)

Paragraph 3 of article XIII deals with criminal offenses in violation of the laws of both nations and is very similar to the corresponding provisions of the NATO and Japan-United States SOFAs. The Republic of the Philippines retains the primary right to exercise jurisdiction except that the United States military authorities shall have the primary right to exercise jurisdiction over all persons subject to the military law of the United States in relation to offenses solely against the property or security of the United States, or offenses solely against the person or property of a member of the United States armed forces or civilian component or of a dependent; and offenses arising out of any act or omission done in the performance of official duty.

Problems have arisen concerning the application of primary jurisdiction by the United States in instances where an offense (typically assault and battery) has been committed by a member of the United States military against his wife (a dependent) who may also be a citizen of the Philippines. Even though the offense may be committed off the base in the Philippines and against a citizen of the Philippines, the United States has primary jurisdiction. Military law is not designed to handle marital problems, and the military authorities tend to be lenient in such cases. This antagonizes the local population, and because of the large number of marriages between members of the military and Philippine citizens there has been pressure for the United States to waive its primary right of jurisdiction in these cases. In recent efforts to revise the 1965 agreement, The Philippine government has insisted that an exception should be made to United States primary jurisdiction if or when the dependent is also a citizen of the Philippines.

United States military authorities, according to paragraph 4, do not have the right “... to exercise jurisdiction over persons who are nationals of or ordinarily residents in the Republic of the Philippines, unless they are members of the United States armed

33. NATO SOFA, article VII, para. 2, and Protocol to Amend Article XVII of the Administrative agreement, October 29, 1953, article XVII, para. 3.1.

34. This appears to be an anomalous situation, unforeseen by the negotiators when the agreement was drawn up. The Republic of the Philippines is also exceptional because of the special relation by which Filipinos may join the U.S. military. There have been many cases in which the U.S. military authorities have primary jurisdiction over a citizen of the Philippines who is also a member of the U.S. military and who also commits an offense off the base but in the line of duty.
forces.” Thus, Filipino employees and civilian Negrito guards at United States military bases in the Philippines are subject to the jurisdiction of the laws of the Republic of the Philippines for prosecution for criminal offenses even if the violations occur on the military base.35

A major problem has developed in the agreement concerning the primary right of the military authorities of the United States to exercise jurisdiction over military personnel for “offenses arising out of any act or omission done in the performance of official duty.” The official minutes defined official duty as:

... any duty or service required or authorized to be done by statute, regulation, the order of a superior or military usage. Official duty is not meant to include all acts by an individual during the period while he is on duty, but is meant to apply only to acts which are required or authorized to be done as a function of that duty which the individual is performing.

Nonetheless, problems have arisen over the interpretation and implementation of these provisions. Two cases illustrate the difficulties.

On July 26, 1968, a U. S. Marine guard, Corporal Kenneth A. Smith, shot and killed a Filipino who had stolen a bicycle and was fleeing on it through the gate of the naval base at Sangley Point, just south of Manila. The Filipino, employed as a bootblack on the base, failed to halt on command of the guard.36 Ambassador G. Mennen Williams immediately expressed his regret to the

35. The Negrito Guard Agency supplies many civilian guards for the U.S. military in the Philippines. Negritos are the native inhabitants of the Philippines who tend to be somewhat smaller and darker than Filipinos of ancestry originating outside the islands. There is considerable discrimination against Negritos in the Philippines and the antagonism has resulted in their being thought of as performing well as guards. In the Philippines, pilferage is generally accepted in the culture and is a major problem at Clark and Subic Bay. Negritos, it is thought, are therefore less likely to let Filipinos remove property; whereas Filipino guards would be more likely to look the other way. At least six Negrito guards had been slain by armed thieves on the bases by 1965 (see Robert Trumbull, New York Times, January 31, 1965, sec. IV p. 10.) Negrito guards have in turn shot and killed thieves in a number of cases. See New York Times, January 26, 1965, p. 1. Sources who asked not to be identified have told this writer that Philippine officials believe U.S. military authorities do not cooperate fully with local authorities, as required by the agreement (para. 6), in the investigation of offenses alleged by Negrito guards against other citizens of the Philippines when the offense occurs on the base.

Philippine government over the incident and said that the United States Navy would cooperate fully with the Philippine authorities in determining the facts of the case, as provided for in the agreement. Naval authorities indicated that they would permit Philippine officials to interrogate Corporal Smith. A few days after the incident, about 100 youths from the Nation’s Youth Group, a nationalist organization, held a demonstration and broke into the U.S. Embassy compound.

Philippine officials charged that the marine corporal was guilty of murder and suggested that he should be turned over to Philippine authorities to stand trial. The U.S. Navy did not comply with this request, but instead awarded $3,750 in compensation to the mother of the youth and announced the sentry would be tried by a court martial. During the court martial proceedings, Corporal Smith claimed that he was acting in accordance with his orders when he fired at the youth. He argued that he shot at the fleeing man’s legs as he had been instructed to do, but the young man ducked under a rail just as he fired and was fatally wounded. The court martial acquitted the marine guard in January and he was immediately transferred to Camp Pendleton, California, outside the jurisdiction of the Philippines.

A *New York Times* editorial stated that the verdict of the court martial seemed inescapable in a technical sense, but went on to suggest that it did point up an urgent need for revising the military procedures that permit such a loose use of firearms. It proposed that less lethal ways to protect American overseas bases from pilferage were a diplomatic and humanitarian necessity. Philippine Foreign Secretary Carlos P. Romulo expressed shock at the decision, saying “The bootblack is only one of many Filipinos who have lost their lives needlessly inside a military base and whose killers have gone scot-free.” He added that it would be in the mutual interests of both nations to remedy the situation by mutual agreement.

Although the death of an individual stealing a bicycle is an appropriate target for criticism, the military is concerned that a U.S. court-martial try a guard who believes he is acting legitimately in the performance of an official duty. The military believes it is imperative that a sentry guarding highly classified areas or materials does not hesitate because of concern that his

37. *Id.* See also article XIII, para. 6.
action may not be "in the performance of official duty." In seeking a revision of the 1965 agreement, the Philippine government has insisted that "offenses arising out of any act or omission done in the performance of official duty" be more explicitly defined. The United States would prefer to leave it rather undefined. In the Smith case, for example, the general act of the sentry in guarding the gate was in the performance of an official duty, but it could also be argued that the specific act of firing on a suspect fleeing on a bicycle was "excessive use of force" in those circumstances, and therefore an offense not protected by the "performance of official duty" clause. The act was perhaps lawful but done in an unlawful way.

The Agreed Minute Number 3 provides that in instances where it is necessary to determine whether an alleged offense arose out of an act or omission done in the performance of official duty,

... a certificate issued by or on behalf of the commanding officer of the alleged offender or offenders, on advice of the Staff Legal Officer or Staff Judge Advocate, will be delivered promptly to the city or provincial fiscal (prosecuting attorney) concerned, and this certificate will be honored by the Philippine authorities.

If the local prosecuting attorney questions the certificate, it will be discussed between officials of the government of the Republic of the Philippines and the diplomatic mission of the United States if the request is received by the U.S. mission within ten days from receipt of the certificate by the provincial fiscal. Since the 1947 agreement gave the Philippine authorities the ultimate power to determine whether an offense occurred in the performance of official duty, the 1965 agreement significantly strengthens the power of the sending state.

Philippine authorities have taken the position that in the event of a dispute as to whether an action was in the performance of official duty, a revised agreement should allow this to be determined by a Philippine court, because in the final analysis it is a judicial question. The Philippine government has argued

40. Article VIII, paragraph 8 of the NATO SOFA provides for an arbitrator from the receiving state to make the determination in the event of a disagreement as to whether the offense was in the performance of an official duty. The Agreement Between the U.S. and Spain on the Use of Military Facilities in Spain of January 31, 1976, allows a "Joint Committee for Politico-Military Administra-
that any other interpretation would allow U.S. law to be superior to Philippine law within its own jurisdiction. If, according to Philippine law, Corporal Smith's action was an offense because it constituted "excessive use of force," but a U.S. court martial found it to be an act arising out of the performance of an official duty and therefore not a violation, the resulting acquittal, they suggest, implies that the U.S. claims the right to authorize acts in the host state. The Supreme Court in *Wilson v. Girard* explicitly stated that "Under international law, a friendly foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless it expressly or impliedly consents to surrender its jurisdiction to the visiting sovereign." The Philippine government has claimed that it did not surrender that jurisdiction in the 1965 agreement.

Another case that touched off anti-U.S. demonstrations and received severe press criticism occurred in 1969. Gunner's Mate 3d Class Michael Mooney was hunting with a service pistol in the jungle near the rifle range on the Subic Bay base when, according to his explanation, he fired at what he believed to be a wild boar in the bush. The shot resulted in the death of a Filipino laborer, Glicerio Amor. Mooney was off duty at the time and there was a Navy prohibition on the use of a service pistol for hunting.

The Philippine government had primary jurisdiction in the case but waived it at the request of the U.S. military authorities. Mooney showed, during his court martial proceedings for negligent homicide, that he had helped Amor get a job on the base as a laborer. This apparently had an impact on the board, which believed that he would not have intentionally acted maliciously toward someone he had befriended. Mooney was acquitted, transferred back to the United States and discharged.

tive Affairs" to make the final determination in the event of a dispute U.S. TIAS 8361. Actually, in the case under discussion, a duty certificate was issued. The agreement provides that a duty certificate will be honored by the Philippine authorities but that it may be made the subject of diplomatic discussions if the Philippine authorities disagree with the certificate. However, the Philippine Secretary of Justice adopted the surprising position that the 1965 amendments did not apply since they had not been ratified by the Philippine Senate. He stated that it was his view that the 1947 agreement was in force. Therefore the United States had jurisdiction because in the 1947 agreement, jurisdiction over on base offenses was vested in the United States. The U.S. government held that from an international law point of view, the 1965 amendments are valid. The Philippine government, with the one exception, has held that the 1965 agreement is binding.

An official Philippine observer found the court martial to be fair and impartial, but took exception to the acquittal, believing there was sufficient evidence for a conviction for negligent homicide. The Philippine government delivered a protest to the United States government expressing its "distinct disappointment" over the acquittal. The U.S. rejected a request that Mooney be returned for trial by a local court, noting that it would be a case of double jeopardy. Also, there was no legal way to require his return to the Philippines in the absence of an extradition treaty between the two countries. President Marcos directed the Foreign Ministry to seek discussions with the U.S. on the revision of the military bases agreement. He called for a review of all treaties and agreements with the U.S. in view of the "apparent miscarriage of justice" in the acquittal of Mooney. Demands by Marcos to give his government greater jurisdiction over Americans who commit crimes against Filipinos on the bases became a theme during his reelection campaign of 1970. The State Department indicated at that time that it was prepared to discuss a new agreement with the Philippine government covering American military bases.

Another example, but with a different outcome, concerned the case of Sergeant Bernard Williams, who was charged in Angeles city with forcible abduction and attempted rape. The Philippine authorities had primary jurisdiction and indicated that they intended to exercise it. Paragraph 5(a) requires the assistance of the authorities of both states in the arrest of members of the U.S. armed forces in the Republic of the Philippines in handing them over to the authority which is to exercise jurisdiction. Paragraph 5(c) provides that an accused member of the U.S. military over whom the Republic of the Philippines is to exercise jurisdiction shall, if he is in the hands of the United States, remain in their custody until he is charged by the Republic of the Philippines.

43. See Factor v. Laubenheimer, 290 U.S. 276, at 287 (1933), where the Court stated, "The principles of international law recognize no right to extradition apart from treaty." See also, Hackworth, op cit., 13-16. Whiteman, Digest, v. 6, p. 727.
45. The actual wording is, "The custody of an accused member . . . 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." The major humanitarian reason for this provision is to permit the individual, if he is to be confined, to be able to communicate with others who speak the same language. Also, customs differ with cultures, and the conditions of confinement may differ significantly. Usually U.S. custody is permitted through the trial. In prison, the man is visited once a month.
this instance, Williams was in the custody of United States officials. In an apparent error, the serviceman was reassigned to a post in North Dakota at the normal rotation procedure rather than being held on the base as required by the treaty. When this was discovered, the Air Force informed the Philippine government that it was returning Sergeant Williams to face trial in a criminal court there. A formal U.S. diplomatic note said the action was being taken to “correct an administrative error,” by which Williams had been “inadvertently” reassigned to duty in the U.S.

The efforts to return Williams were temporarily delayed because of Williams’ attempt to obtain relief from U.S. federal courts.⁴⁶ The federal court ultimately rejected Williams’ contentions that transfer under the agreement with the Philippines constitutes unlawful extradition, that he would get a defective trial before Philippine courts, and that he was entitled to a probable cause hearing before being released to Philippine authorities. While Williams was fighting his transfer in U.S. courts, Judge Cifenino Gaddi of Angeles found the commander of Clark Air Force Base, Colonel Averill Holman, and a member of his staff, Lt. Col. Raymond Hodges, guilty of contempt for failing to produce Williams, and ordered fines and imprisonment for both officers until the defendant was surrendered.⁴⁷ Both officers had left the Philippines for new assignments a short time before the contempt citations were handed down, and the actions of the judge can only be viewed as frivolous. Williams ultimately was returned and stood trial before a local court.

Although the U.S. military authorities ordinarily may be expected to maximize jurisdiction to the greatest extent possible on the bases, there are occasions when it has been found useful to invite local authorities on the base as a means of increasing military authority. One such instance, which did not result in formal legal proceedings, was reported in the New York Times in October of 1972. Philippine constabulary troops entered Subic Bay Naval Station and arrested an American civilian lawyer, Douglas

by American military representatives, who check on his health. At the trial, the U.S. government pays a local lawyer for the serviceman’s defense. Several inspectors who have visited foreign prisons have reported that Americans are treated especially well. South Korea and Japan are reported to have separate facilities for American military personnel which are better than those for their own countrymen. See in this regard, Homer E. Moyer, Jr. Justice and the Military, published in Conjunction with the Military Law Reporter, no. 1–626.

Sorenson, who had been at the law center of the base working on cases of American sailors. Mr. Sorenson and two other employees of the National Lawyers Guild, which provided civilian counsel to servicemen, generally in antiwar or free-speech cases, were alleged by the Philippine authorities to be "subversive."

The U.S. Embassy said that the 1965 agreement allowed the host nation to make certain arrests on the base. The next day, however, the official spokesman for Ferdinand Marcos stated that the arrests of the American civilians had been carried out "on information received from the commander of the base."48 Neither the U.S. Embassy nor Rear Admiral John Dick, the base commander, would comment on this statement, except to indicate that under the agreement the base may not be used to provide shelter for violators of Philippine law. The New York Times indicated that the cause of their arrest appears to have been a six-page mimeographed news sheet reported to have been prepared for circulation among sailors at Subic. In any event, the Philippine government announced that those arrested in connection with the possession of allegedly subversive documents faced possible summary deportation if they did not leave voluntarily. It was stated that there was enough information to charge the Americans with "activities inimical to national security." A subsequent story in the New York Times said that a JAG officer on active duty in the Philippines at the time confirmed Sorenson's view that the ouster was pressured by the Navy.49

The Sorenson case demonstrates that civilians do not have as many protections as military personnel in states with which the U.S. has a SOFA treaty. It also suggests what is generally unspoken but widely acknowledged, that in many respects martial law under Marcos is preferred by the U.S. military because it provides a more stable and organized environment in which to operate than the less organized pre-martial-law political system.

Whenever a member of the United States military is prosecuted under the jurisdiction of the Republic of the Philippines, that person is entitled under paragraph 9 of the agreement to the standard list of protections found in the NATO SOFA.50 In

48. Id. October 21, 1972. See also the October 20 and October 26 issues of the Times for additional references to the episode.
49. Id. November 17, 1972. Military personnel have a right to a civilian attorney, but with the departure of Mr. Sorenson there were no longer American civilian attorneys available to enlisted men at Subic Bay.
50. Article XIII, paragraph 9 of the Philippine agreement reads: Whenever a member of the United States armed forces or civilian component or a dependent is
addition to the rights afforded to accused servicemen, which amount at least to an "international minimum standard of justice," the Philippine agreement goes beyond the provisions of the NATO SOFA in that it gives the accused an unqualified right to have an official U.S. trial observer present during the trial. The trial observer, normally a military lawyer or a local attorney hired by the military, files a report with the U.S. authorities concerning the observance of the rights of the accused and the general impartiality of the trial. Although there are evidently no cases in which an observer was not permitted in a NATO country, the guarantee of this right is stronger in the Philippine — U.S. agreement. Subparagraph (g) of the NATO SOFA provides that the accused shall be entitled "... to communicate with a representative of the government of the sending state and, when the rules of the court permit, to have such a representative present at his trial." The Philippine agreement entitles the individual "... to communicate with a representative of the government of the United States; and to have a representative of the United States government present during the trial, which will be public except when the court decrease [sic] otherwise in accordance with Philippine law.

It should be noted that the only SOFA in existence which qualifies as a treaty is the basic NATO agreement. All of the others are executive agreements. The U.S. Senate, in ratifying the NATO SOFA, included a "Resolution of Ratification" expressing the sense of the Senate that certain procedures should be followed regarding trials of American military personnel in foreign courts.

prosecuted under the jurisdiction of the Republic of the Philippines 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 favor, if they are within the jurisdiction of the Republic of the Philippines;
(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in the Republic of the Philippines;
(f) if he considers it necessary, to have the services of a competent interpreter;
(g) to communicate with a representative of the Government of the United States; and
(h) to have a representative of the United States Government present during the trial, which will be public except when the court decrease [sic] otherwise in accordance with Philippine law.
The Senate was concerned that the U.S. be allowed to retain custody of a serviceman accused of committing a crime until he was charged or ready to begin his sentence. This NATO formula is found in the Philippine agreement in paragraph 5:

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.\textsuperscript{51}

Problems are raised if the position is taken that the only legal basis for confinement in a U.S. facility is to be found in the Uniform Code of Military Justice (UCMJ), which provides in article 10 that when "any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong or which he is accused and to try him or to dismiss the charges and release him." The potential for a denial of due process is increased when the authorities of a receiving state delay bringing a case to trial for an unjustifiable length of time or prevent defense counsel from interviewing material witnesses when they are nationals of the receiving state. The only basis for the United States to maintain custody over the accused, if it is not found in the UCMJ, is in the self-executing nature of the agreement itself. The agreement may not abridge the individual's constitutional rights, however, and some have argued that maintaining custody for a prolonged period by U.S. authorities in a foreign state while proceedings are pending amounts to a denial of due process by the sending state, even though the custody does not necessarily mean confinement or imprisonment, but merely that the individual cannot be transferred out of the country until completion of the judicial proceedings and sentencing.\textsuperscript{52} Yet the only alternative to the U.S. maintaining custody would be to turn the accused over to the local authorities for confinement. The problem is a serious one; some U.S. personnel have been placed in a hold status after their normal enlistments are up for a period in excess of a year while charges are pending.

\textsuperscript{51} See also NATO SOFA, article VII, para. 5(c).  
IV. The 1979 Philippine Bases Agreement

Negotiations between the Republic of the Philippines and the United States to revise the base agreements, including the criminal jurisdiction provisions, began in 1970 although the current agreement does not expire until 1991. In April, 1976, formal discussions began on the following questions, among others: the number and size of military facilities, command and control of the installations, criminal jurisdiction, the scope of the United States defense commitment to the Philippines, and the amount of compensation to be paid by the United States. A Philippine reassessment of its international position following the Vietnam conflict and the apparent success of both Spain and Turkey in obtaining new base agreements with the United States involving significantly increased assistance levels were clearly factors being considered by the Philippine negotiators. There was also the feeling that the United States dependence on the bases in the Philippines is greater than ever since the loss of access to bases in Thailand and Vietnam.53

The United States agreed to the negotiations although it would have preferred to retain the status quo, under which the United States had few constraints over its use of facilities and relatively low costs. A complete assessment of all the factors involved in the negotiations is beyond the scope of this paper. However, it is important to bear in mind the magnitude of the United States presence in the Philippines. There are over 40,000 U.S. citizens in the Philippines, and the U.S. government employs approximately 32,000 Filipinos there. The United States has the largest private investment in the Philippines and is its second largest trading partner, after Japan. While there is a reservoir of good will for the United States in the Philippines, there is also considerable resentment over its pervasive influence. With the American withdrawal from Vietnam, President Marcos began to have doubts concerning the commitment of the U.S. to the defense of the Philippines. The Philippines have formal ties with the People's Republic of China, the Soviet Union and Cuba, and strong nationalist sentiment in the Philippines requires that the government take a hard line on the issue of the American bases.

The Philippine government is very sensitive about the image of their country as a client of the United States. President Marcos

has carefully studied the texts of the U.S. agreement with Spain, under which the bases there are commanded by Spanish officers and fly the Spanish flag. Although the original 99-year lease on the bases was renegotiated to last only until 1991, it was still virtually rent free. Former Secretary of State Henry Kissinger tried to conclude a pact by which the United States would grant the Philippines $1 billion in economic and military aid over five years, but before the announcement of the pact could be made President Marcos indicated that he wanted more. Marcos indicated that “Progress in negotiations must now wait upon the assumption of office of a new American administration.”

Finally, on January 7, 1979, Carlos Romulo, Minister for Foreign Affairs, sent a message to the United States confirming the positive results of the negotiations. The new base accords which are technically amendments to the agreements that run to 1991 included several key points. As in the agreement with Spain and Turkey, the agreement affirms Philippine sovereignty over the bases and noted that the Philippine flag would be flown in a position of supremacy on all bases. In addition each base shall be under the command of a Philippine base commander.

The Philippine government assured the United States in the agreement that the latter shall enjoy “unhampered military operations involving its forces in the Philippines.” This is interpreted to mean that the bases may be used as a base of operations against an enemy of the United States with no Philippine veto.

Interestingly, the basis for criminal jurisdiction over United States military personnel was left unchanged. However, the Philippine government, under the new agreement, has assumed “responsibility for perimeter security at the bases.” This should greatly reduce contacts between Filipino civilians and American military personnel on official duty involving security. The United States specifically agreed to retain accused personnel in the Philippines for “a reasonable time, and to prevent their inadvertent departure” to provide time for discussions between the two governments relating to the question of jurisdiction in official duty cases. The wording will permit military officials to insist upon speedier trials as undue delay in host government decisions

54. *New York Times*, December 18, 1976, and December 5, sec. IV, p. 3. Also generally, Senate Staff Report, *op. cit.*, note 53.
55. Text of letter to Carlos Romulo, Minister for Foreign Affairs, Manila from United States negotiators.
or actions could be argued to be "unreasonable". Otherwise the bases for criminal jurisdiction remains exactly the same as under the earlier agreements.

Finally, the agreement pledges efforts to obtain $500 million in military and economic aid from Congress for the Philippines over a five year period. This sum is only half of the amount offered by Kissinger. Another clause indicates that there will be a thorough review of the base arrangements every five years, which will probably be the basis for determining aid levels for the next five year period.

V. Conclusion

The United States-Philippine Status of Forces Agreement reflects an evolutionary power relationship between these two states. Almost complete jurisdiction over U.S. military personnel, provided by the 1947 agreement has been significantly reduced by the 1965 agreement.

Article XIII, it was hoped, would further alleviate the irritants that plagued United States-Philippine relations. However the Philippine government has expressed growing dissatisfaction with jurisdictional provisions and has pressed for a renegotiation of the agreement. The United States is not anxious to further reduce its jurisdiction over its personnel, of course, and proceeded slowly with the negotiations.

The new agreement does appear to be an improvement for both parties. Since the Philippine government now has responsibility for perimeter security, it should reduce friction between civilians and military personnel acting as guards in official capacity. The American military will thus have a lower profile. The U.S. military may nonetheless still be responsible for security in areas of the base to be utilized by the military. So "essential" security is retained. Other areas of the bases may be used jointly by the U.S. and Philippine military for training purposes. The flying of the Philippine flag in a position of supremacy should also help to reduce anti-American sentiment.

57. See note 54 above.
CHAPTER II

STATUS OF FORCES AGREEMENT, DUE PROCESS
AND FAIR TRIAL: THE
JAPANESE EXPERIENCE*

HOMER S. POINTER

Subsequent to the conclusion of the occupation of Japan after World War II, United States forces in that country were governed by Article XVII of a 1952 administrative agreement,¹ executed in implementation of Article III of a 1952 security treaty.² Under the terms of the administrative agreement, the United States had the primary right to exercise criminal jurisdiction over all offenses committed by American military personnel. However, the administrative agreement also contained a pledge to revise its criminal jurisdiction provisions to emulate those of the North Atlantic Treaty Organization Status of Forces Agreement³ (NATO SOFA) when the latter agreement came into effect for the United States. Accordingly, on September 29, 1953, Japan and the United States signed a “Protocol to Amend Article XVII of the Administrative Agreement Under Article III of the Security Treaty Between The United States of America and Japan.”⁴ This 1953 protocol made the criminal jurisdiction provisions applicable to Japan nearly identical to those of the NATO SOFA. Later, the 1952 security treaty was superseded by a “Treaty of Mutual Cooperation and Security,” signed on January 19, 1960.⁵ Article VI of that treaty

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of the Naval Academy, the Judge Advocate General; the Department of the Navy, or any other governmental agency.
1. 3 UST 3341, TIAS No. 2492.
2. 3 UST 2491, TIAS No. 2491.
3. Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces; signed June 19, 1951; effective August 23, 1953; 4 UST 1792, TIAS No. 2846, 199 UNTS 67.
4. Signed September 29, 1953; effective October 29, 1953; 4 UST 1846, TIAS No. 2848.
provided that the use of facilities and areas in Japan by American naval, land and air forces would be governed by a separate agreement replacing the 1952 administrative agreement and its amendments, including the 1953 protocol. On the same date, the United States and Japan concluded an "Agreement Under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan." It is under this agreement that United States forces in Japan, including Okinawa, presently operate.

Before discussing the specific provisions of the SOFA between the United States & Japan, an overview of the treatment of the criminal jurisdiction question in the U.S. Congress is necessary to a complete understanding of the agreement's provisions. An examination of the NATO SOFA's ratification proceedings is particularly illuminating, since the U.S.-Japan SOFA was modelled on it.

When the NATO SOFA came before the Senate Foreign Relations Committee, the legal adviser to the Department of State testified that without an express agreement military forces abroad are automatically subject to the jurisdiction of the receiving state. The Department of Justice prepared and presented a memorandum of law which made the point that international law does not provide friendly foreign forces with immunity from the criminal jurisdiction of the receiving state. In opposition to this, Senator John Bricker introduced a resolution to delete the NATO SOFA's criminal jurisdiction provisions. He accused the State Department of misinterpreting customary international law, infringing on the power to make rules for the government of the land and naval forces, depriving American service members of their constitutional rights, and surrendering established United States rights.

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8. 6 Digest of International Law 389 (Whiteman ed. 1968). The Department of Justice Memorandum was submitted for the record on July 14, 1953; see 99 Cong. Rec., pp. 8762-8769. It was revised and reprinted in Schwartz, International Law and the NATO Status of Forces Agreement, 53 Colum. L. Rev. 1091 (1953).
without obtaining a *quid pro quo*.9 (Others besides Senator Bricker have interpreted customary international law as providing immunity from criminal jurisdiction of the receiving state to a friendly foreign force invited into the receiving state without conditions.10 *Dicta* in Chief Justice Marshall’s landmark opinion in *The Schooner Exchange v. M’Faddon*11 has often been cited in support of such a proposition.)

Nevertheless, the Senate did ratify the NATO SOFA,12 with certain reservations.13 It was “the sense of the Senate” that whenever an American service member was tried under the treaty by the authorities of a receiving state, the commanding officer of the United States forces in that state would examine its law with particular reference to the procedural safeguards of the United States Constitution. If under all the circumstances of the case there were a perceived danger of inadequate protection or denial of the constitutional rights the service member would enjoy in the United States, the commanding officer should request that the authorities of the receiving state waive jurisdiction over the case. If his request for waiver were refused, the commanding officer was to request the Department of State to press the waiver request

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11. U.S. (7 Cranch) 116 (1812). This case was a libel in admiralty filed in federal district court against the Exchange after the ship had entered the port of Philadelphia due to bad weather. The libellants alleged that the ship had been commissioned as a French man-of-war after being seized on the high seas by agents of the Emperor Napoleon. The district court dismissed the libel, holding that an armed vessel of a friendly sovereign nation is not subject to the jurisdiction of United States courts, with regard to the question of title to that vessel. The Supreme Court of the United States *affirmed*, indicating the issue was an important and delicate one of whether an American citizen can assert in an American court title to an armed national vessel found in American waters. Chief Justice Marshall wrote, “The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.” (11 U.S. at 136). In dicta, however, Marshall set out three classes of cases in which a sovereign state is understood to waive or cede a part of that exclusive territorial jurisdiction. The third of those three cases is where it “allows the troops of a foreign prince to pass through his dominion.” (11 U.S. at 139).

12. Article II, §2, of the U.S. Constitution authorizes the President to make treaties, “with advice and consent of the Senate . . .”

through diplomatic channels. Finally, the Senate intended that a U.S. representative appointed by the chief of the diplomatic mission to the receiving state (with advice of the senior military representative) would attend the trial of any service member by authorities of the receiving state to monitor compliance with the provisions of the SOFA.

The Department of Defense responded to the reservations of the Senate resolution by adopting a policy “to protect, to the maximum extent possible, the rights of United States personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.”14 In implementing that policy the Navy, Army, and Air Force have directed that “the same procedures for safeguarding the interests of U.S. personnel subject to foreign jurisdiction will be applied, insofar as practicable, in all overseas areas.”15 Joint regulations provide for the designated commanding officer to prepare a country law study of the laws and procedures of the country of his responsibility, and update it as necessary to remain current. The commanding officer is responsible for comparing the procedural safeguards of his country with those considered necessary to a fair trial in state courts in the United States. Safeguards deemed particularly important include specific and definite standards of guilt with the government bearing the burden of proof; protection against ex post facto laws and bills of attainder; right to counsel and an interpreter; a speedy and public trial by an impartial tribunal; confrontation with accusing witnesses and compulsory process to favorable ones; and protection against self-incrimination, use of unlawfully obtained evidence, double jeopardy, and cruel and unusual punishment.16 Most importantly, the Defense Department has directed that waivers of foreign criminal jurisdiction be obtained as frequently as possible. In those cases in which receiving states decline to waive jurisdiction, a United States trial observer is to be present at every stage of the proceedings.

Judicial treatment of the question of jurisdiction of a host country over friendly foreign forces is also important to an understanding of the U.S.-Japan SOFA. In cases decided in 1957, the Supreme Court of the United States rejected the M'Faddon dicta and denied the existence of any customary rule of

16. Id., appendix C.
international law that a foreign force invited into a receiving state without conditions is by implication immune from the receiving state's jurisdiction.\textsuperscript{17} First, \textit{Kinsella v. Krueger}, the Court stated that "under the principles of international law each nation has jurisdiction of the offenses committed within its own territory."\textsuperscript{18} Then, in \textit{Wilson v. Girard}, a case dealing specifically with the 1953 protocol with Japan, the Court reiterated that, "A sovereign nation has exclusive jurisdiction to punish offenses against its law committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." The Court went on to say that it found no provision of the Constitution, or legislation subsequent to the 1952 security treaty, which prohibited carrying out that provision of the protocol which authorized waiver of jurisdiction by the United States. Determination of the wisdom of such a provision was left by the Court to the Executive in negotiating it and to the Congress in ratifying it.\textsuperscript{19, 20}

Article XVII of the current U.S.-Japan SOFA provides for criminal jurisdiction of offenses, committed by United States service members in Japan.\textsuperscript{21, 22} Paragraph 1 provides that American military authorities shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the laws of the United States. Similarly, Japan has jurisdiction over SOFA personnel with respect to offenses committed within the territory of Japan and made punishable by Japanese law. Thus, in regard to the usual criminal offense the United States and Japan share concurrent jurisdiction. Paragraph 2 of Article XVII provides that the United States shall have the right to exercise exclusive jurisdiction over persons subject to U.S. military law with respect to offenses punishable by American but not Japanese law, and that Japan shall have the right to

\textsuperscript{17} Heath, \textit{Status of Forces Agreements as a Basis for United States Custody of an Accused}, 49 Mil. L. Rev. 45, 49-55 (1970).
\textsuperscript{18} 351 U.S. 470, 479 (1956), rev’d on other grounds, 354 U.S. 1 (1957).
\textsuperscript{19} 354 U.S. 524, 529 (1957).
\textsuperscript{20} \textit{Girard}, 354 U.S. 524, 529, 530.
\textsuperscript{19} The terms of the 1953 protocol and the 1960 SOFA are very similar. What differences there are between them are immaterial to a determination of their constitutionality.
\textsuperscript{21} 11 UST 1652, TIAS No. 4510.
\textsuperscript{22} Though article XVII of the SOFA addresses the subject of jurisdiction over "members of the United States armed forces, the civilian component, and their dependents," this paper is concerned essentially only with jurisdiction over military service members.
exercise exclusive jurisdiction over SOFA personnel with respect to offenses punishable by Japanese but not American law.

Paragraph 3 may well be the most important provision of Article XVII, for it sets out the general rules for determining which state has the primary right to exercise its jurisdiction in those cases where jurisdiction is concurrent. United States military authorities have the primary right to exercise jurisdiction over SOFA personnel in relation to offenses solely against the security or property of the United States, or against the person or property of other SOFA personnel, and offenses arising out of any act or omission done in the performance of official duty. Japanese authorities have the primary right to exercise jurisdiction over any other offense. Paragraph 3 also provides for waiver of the primary right to exercise jurisdiction by so notifying the authorities of the other state "as soon as practicable." It further stipulates that the authorities of the state having the primary right to exercise jurisdiction shall give "sympathetic consideration" to a request of 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."

The provisions of Paragraph 3 are embodied in the procedures of "Agreed View 40." When written notification has been made to either United States or Japanese authorities by authorities of the other state of an alleged offense by an individual over whom Japan has the primary right to exercise jurisdiction, the Japanese Ministry of Justice shall advise the legal office of the headquarters in Japan of the branch of service of which the individual is a member whether it will exercise jurisdiction by bringing an indictment in the case. If notice is received that Japan will not bring an indictment, or if no notice is received by the legal office within a specified period of time, the United States may exercise jurisdiction. The period of time within which such notice shall be given by Japan varies according to the seriousness of the offense. For offenses punishable under Japanese law by confinement of less than six months, and for a specified list of minor offenses, the period is ten days after the date of the original notification of an

23. The SOFA between the United States and Japan became effective in 1960. At that time the 1953 protocol was incorporated into the SOFA, and its Agreed Official Minutes were made a part of the Agreed Minutes to the 1960 SOFA. The Joint Committee has not yet updated the Agreed Views to reflect implementation of the SOFA, and their text still refers to the 1953 protocol. U.S. Forces Japan Pam 125-1 of January 1, 1976.
alleged offense; for offenses punishable under Japanese law by confinement for more than six months, the period is twenty days after the date of the original notice of the alleged offense. If the Ministry of Justice so desires, it can extend those periods of time by five and ten days, respectively, during which time the United States will not exercise its jurisdiction.24

A similar provision allows Japan to exercise jurisdiction over offenses against the state or nationals of Japan arising out of official duty. Following notification by Japan of such an offense, the commanding officer of the alleged offender notifies the chief procurator25 of the district in which the alleged offense occurred whether the United States will exercise jurisdiction. If the procurator does not receive such notice within ten days after the date of the notice of the original alleged offense, Japan may exercise its jurisdiction.26

Agreed View 40 also provides for an affirmative request for waiver of the primary right to exercise jurisdiction in cases where waiver is considered to be of particular importance by the other state. In cases where Japan has given notice of intent to exercise jurisdiction, the United States has ten days to request waiver by the Ministry of Justice. Japan then has ten days to respond to the waiver request, during which time trial will not proceed. However, the United States is not precluded during this period from accomplishing all of the pretrial procedures required by military law to bring the case to trial by court-martial.27 Similarly, in cases where the United States has the primary right to exercise jurisdiction and Japan considers waiver to be of particular

24. During the author's tenure in Japan as staff judge advocate at Commander, Fleet Activities, Okinawa, April 1974 through October 1975, it was standard procedure to observe these extended periods without exercising jurisdiction as if the Ministry of Justice had given notice of its desire for the extension. This was considered a quid pro quo for the fact that Japanese failure to give notice of exercise of jurisdiction was construed as a waiver. In practical experience, failure to give notice at least within the extended period of time was a rare occurrence.

25. The chief procurator in Japan is analogous to the U.S. Attorney. He is an official of the national Ministry of Justice, and the chief prosecutor within a given district.

26. Inasmuch as the policy of the U.S. is to maximize U.S. jurisdiction to the greatest extent permitted by the applicable agreements, such cases are rare. See SecNavInst 5820.4D, September 5, 1974, paragraph 1-4(a).

27. For an appreciation of the potential importance of such a provision in the face of military speedy trial requirements, see United States v. Henderson, 1 Military Justice Reporter 421 (1976).
importance, the Ministry of Justice may request waiver from the cognizant legal office. The United States then has ten days in which to respond, during which time trial will not proceed.

Paragraph 5 of Article XVII provides that the United States and Japan shall assist each other in arresting offending SOFA personnel and handing them over to the state which is to exercise jurisdiction. When Japanese authorities arrest SOFA personnel, they are to promptly notify the military authorities of the United States. Paragraph 5(c) provides that the custody of SOFA personnel in the hands of the United States shall remain with the United States until they are charged by Japan. Given the proposition that under customary international law the receiving state has exclusive jurisdiction over criminal offenses committed within its territory by friendly foreign forces, it should follow that the receiving state could retain custody of an alleged offender if it so desired.28 Accordingly, such a provision in the SOFA must be considered a limitation on Japanese jurisdiction (and sovereignty) in favor of American jurisdiction. This circumstance would clearly be in pursuance of Senate, Department of Defense and service policy. Furthermore, it has been the practice in Japan to allow the United States to retain custody of a service member after trial and pending appeal until the case has either been decided by the Japanese Supreme Court or neither party seeks further appeal.29

Paragraph 6 provides for mutual assistance in carrying out all necessary investigations of alleged offenses, including the seizure, collection and production of evidence. Further, each state will notify the other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction. Paragraph 7 provides that the United States will not execute a death sentence in Japan if Japanese legislation does not provide for capital punishment in a similar case. There is also provision for Japanese assistance in carrying out a sentence of imprisonment pronounced by military authorities of the United States. Paragraph 8 provides that where an accused has been tried under the provisions of Article XVII by either state and has been acquitted, or has been convicted and is serving or has served his sentence, or has been


29. Heath, supra n.17, at 47. Also see Hearings Before a Subcommittee of the Committee on Armed Services, United States Senate in the Case of William S. Girard, 85th Cong., 1st Sess., at 28 (1957).

This is consistent with the author's experience in dealing with Japanese authorities in 1974 & 1975 for custody over American service members.
pardoned, he may not be tried again for the same offense within the territory of Japan by the other state. This protection is essentially one against double jeopardy, and theoretically could be broader in scope than that afforded a service member based in the U.S. who under similar circumstances could constitutionally be tried by both state and military authorities.

Paragraph 9 entitles the SOFA service member prosecuted under Japanese jurisdiction to certain specific rights: a prompt and speedy trial; notification prior to trial of the specific charge against him; confrontation with prosecution witnesses; compulsory process for obtaining favorable witnesses (if they are within the jurisdiction of Japan); legal counsel of his own choice, or free or assisted legal representation under the conditions then prevailing in Japan; a competent interpreter; communication with a U.S. representative; and the presence of U.S. representative at trial.30

In some respects, the SOFA may enlarge the fundamental protections available to the service member rather than restrict or deny them. Federal law provides for payment by the United States of a service member's counsel fees, court costs, bail and other expenses (not including fines) incident to representation before foreign tribunals;31 a service member tried by U.S. court-martial and represented by civilian counsel must pay his own counsel fees.32 Further, unlike the SOFA, there is no provision for bail under the Uniform Code of Military Justice33 for an accused service member awaiting trial by court-martial. Conspicuously absent from the SOFA, however, is the traditional Anglo-American right to trial by jury. The jury system in criminal cases introduced to Japan in 1928 no longer exists; popular preference for trial by professional judges resulted in its suspension in 1943, and it has not been revived.34

If in the absence of a SOFA the receiving state has criminal jurisdiction over friendly foreign forces, and if it is the policy of

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30. In addition, SOFA personnel are guaranteed the following of the constitution of Japan: protection against arrest or detention without adequate cause, the right to be informed of the charge, immediate privilege of counsel, public trial by an impartial tribunal, opportunity to examine all witnesses, and protection against self-incrimination and cruel punishments. Agreed Minute to article XVII, SOFA.

31. 10 U.S.C. §1037.


the United States to maximize U.S. jurisdiction to the extent permitted by the applicable agreement, those provisions of any SOFA which diminish receiving state jurisdiction and increase sending state jurisdiction become of major importance. One such provision in the Japanese SOFA is paragraph (a)(ii) of Article XVII, which vests in the United States the primary right to exercise jurisdiction in all cases arising out of any act or omission done in the performance of official duty, regardless of the injury or damage to Japanese nationals or their property resulting from the offense. The determination that a particular offense arose out of official duty is effectively a determination of which state will exercise jurisdiction. So two crucial questions arise: what constitutes official duty, and who determines official duty on a case-by-case basis.

Like its NATO model, neither the Japanese SOFA nor its Agreed Minute attempt to define official duty. The Agreed Minute regarding paragraph 3(a)(ii) does provide that where a service member is charged with an offense, his commanding officer’s certificate that the alleged offense, if committed by him, arose out of his official duty shall in any judicial proceeding be sufficient of the fact, “unless the contrary is proved.”\(^{35}\) In assessing the NATO experience with a similar provision at least one commentator perceives the United States as taking the position that the official duty certificate issued by the commanding officer is conclusive on the issue.\(^{36}\) Receiving states view such a principle as restricting their jurisdiction beyond the terms of the agreement, and threatening the integrity of their legal systems. The result has been a series of controversies over the certificate’s validity, rather than a joint effort to define the phrase, “arising out of” official duty.

This is one area in which the Japanese SOFA is probably superior to its NATO counterpart. Article XXV establishes a “Joint Committee” of a representative from each state as a means of consultation between the United States and Japan on all matters requiring mutual consultation regarding implementation

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35. 11 UST 1652, pp. 1752-1753, TIAS No. 4510. The SOFA and its Agreed Minute also fail to establish any standards or guidelines as to what constitutes sufficient “contrary proof.”

36. Stambuk, supra n.9, at 85.
of the SOFA. For example, when there is disagreement or doubt as to the official duty status of a service member at the time of the commission of an alleged offense, the Joint Committee considers the facts of the case in an attempt to reach a mutually satisfactory result. If the Joint Committee cannot resolve the issue, the respective governments can pursue further consideration of the matter through appropriate diplomatic channels.

Even if machinery exists for resolution of questions of official duty status, there remains the question of the standards to be applied in determining official duty. The *Wilson v. Girard* case provides some clue as to what constitutes official duty under the Japanese SOFA. On January 30, 1957, Specialist Third Class William S. Girard was participating in a small unit exercise at Camp Weir, Japan, where Japanese civilians had also gathered to collect expended brass cartridges. During a break in the exercise, while Japanese police were being sought to remove the civilians, Girard was assigned to guard a machine gun. The facts are in dispute as to whether or not Girard enticed a Japanese woman to approach the machine gun to gather brass, but it is clear that he had placed an expended 30-caliber cartridge case on a grenade launcher on his rifle. When the woman ran after a warning shot had been fired, Girard's second round hit her in the back, severing an artery, and she bled to death.

The United States took the position that at the time of the shooting Girard was acting in performance of his official duties within the meaning of the 1953 protocol, and therefore the United States had the primary right to try him. Japan contended that he was acting beyond the scope of his official duties, therefore Japan had the primary right to try him. After lengthy negotiations, the United States agreed to waive whatever jurisdiction it might have and turn Girard over to Japanese authorities for trial, and he was subsequently indicted for causing death by wounding. Girard sought a writ of habeas corpus in the United States District Court for the District of Columbia, which denied the writ but enjoined his delivery to the Japanese. After granting certiorari, the Supreme Court affirmed denial of the writ and reversed the declaratory relief enjoining his delivery to Japanese authorities. Appendix A to the Court's opinion is the affidavit of Robert Dechert, General Counsel of the Department of Defense, which states, "Official duty is not meant to include all acts by personnel while they are on duty, but only those acts which are required to be done as a function of the duties which they are performing. Thus, a substantial departure from the acts a person is required to
perform in a particular duty usually will indicate an act outside of his ‘official duty.’”

Thus, the criteria is not whether the service member was on duty at the time of the alleged offense. Rather, a clear connection between the act or omission which constitutes the alleged offense and the performance of an official duty is required. Despite such guidelines for a determination of official duty, and a Joint Committee to resolve disputes, the potential for conflict persists. In Okinawa Prefecture in the summer of 1974, a case remarkably similar to Girard arose at the Ie Shima bombing range. An Air Force security policeman assigned to prevent Japanese civilians from entering the range to gather brass or cut grass for fodder shot a civilian with a flare pistol, breaking his arm. Local Air Force authorities initially informed the chief prosecutor that the shooting was beyond the scope of official duties and that they would deliver the airman to Japanese authorities for trial. The local press demanded immediate and severe punishment. However, Headquarters, Fifth Air Force, issued an official duty certificate and notified the Ministry of Justice that the United States would exercise jurisdiction in accordance with paragraph 3(a)(ii). After lengthy negotiations by the Joint Committee, the matter was finally resolved at the diplomatic level in favor of American jurisdiction. Press reaction in Okinawa was vociferous in its opposition when the Ministry of Justice announced the decision almost a year later. Although a spokesman from the Japanese prosecutor’s office expressed his confidence that a court-martial would soon pronounce an appropriately severe sentence, Air Force authorities announced that the security policeman would be disciplined at an Article 15 proceeding instead.

A fair examination of the quality of the due process of law afforded a service member under any SOFA requires some

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37. 354 U.S. 524, at 542. It should be noted that in Girard the Supreme Court did not hold that the alleged offense arose out of the performance of official duties. The decision merely upheld the constitutionality of the provision of the protocol under which the U.S. waived jurisdiction and agreed to deliver him for trial by Japan.

38. Naval forces in Japan are advised, “Being ‘on duty’ at the time of the incident is not the criteria. An Official Duty Certificate may be issued only in those instances where the incident arose out of those acts or omissions which are related to the performance of official duty.” Commander, Naval Forces Japan Instruction 5820.16A of 10 May 1976, 7–1.

39. Article 15, UCMJ, 10 U.S.C. § 815, provides for administrative disposition of minor offenses. Under military law it is not a judicial proceeding, nor are its limited punishments tantamount to a finding of guilty.
consideration of the cultural differences between the sending and receiving states. In the case of the NATO SOFA, the cultural differences between member European states may be negligible. With regards to the United States and Japan, however, there are major cultural differences which are manifested in the Japanese legal system and therefore deserving of attention. For some 250 years prior to the mid-nineteenth century, Japan was under the feudal system of the Tokugawa Shogunate, which ruled through subordinate local lords, while the Emperor was only a nominal monarch. There was no judiciary, as distinguished from the administrative institutions of the local lords or the Shogun. Then in 1868 the Meiji Restoration created a constitutional monarchy by which the Emperor replaced the ruling Shogun. Though the Imperial Japanese Constitution of 1889 purported to follow the principle of separation of powers, the Emperor and the Cabinet had as much rule-making authority as the Diet. The courts were supervised by the Minister of Justice, a Cabinet member, though judges were somewhat independent from him in the exercise of their judicial power. Administrative and military courts limited the ordinary courts to settling private disputes and trying criminal offenders.40

Japanese law during this period was derived from codes, not courts, and the binding power of precedents was very limited. Most Japanese codes were German in orientation. Not only was the German code a good compromise between factions favoring English or French legal systems, but it was considered the most progressive of the late nineteenth century codes in point of view of legal theory. Like Japan, a unified Germany had recently entered the world community, and its recent successes and authoritarian tradition appealed to the Meiji elite.41, 42

American occupation after 1945 weakened the primary influence of German law, and brought about numerous revisions in Japanese codes, especially civil and commercial codes. The Constitution of 1946 created a constitutional democracy and made drastic changes in the political and legal structure of the country. The doctrine of separation of powers reached maturity, and the Diet became the sole law-making body in the government. The

judicial power was vested in a Supreme Court and in such inferior courts as were established by law. Under this still-existing system, Japanese judges are independent, bound only by law and the Constitution. They cannot be removed from office unless judicially declared mentally or physically incompetent to perform their duties, and they are immune from disciplinary actions by any executive organ or agency. The Supreme Court has sole power to make rules of practice and procedure, and governs matters relating to attorneys, internal discipline of the courts and judicial administration.43

The Supreme Court of Japan is composed of fifteen justices, including a chief justice. Except in the case of impeachment of the Commissioner of the National Personnel Authority, it has only appellate jurisdiction. In criminal cases the grounds for appeal are limited to constitutional questions or conflicts with precedents of the Supreme Court or the High Courts, although the Supreme Court may hear a case involving an important question of law on petition of certiorari. As a rule, appeals are taken from the judgments of the High Courts. The Supreme Court may sit in a division of five justices, or en banc.44

In 1947 the Supreme Court established a Legal Training and Research Institute ("Shihokenshusho"), the legal profession’s sole educational institution.45 Admission is by very competitive national examination, and in recent years virtually every new lawyer, judge and procurator has trained there.46

There are eight High Courts in eight large cities47 with territorial jurisdiction over eight parts of Japan, and some have branches.48 Generally, the High Courts take appeals from judgments of the District or Family Courts, and from Summary Courts in criminal cases.49

44. Ibid., p. 5.
45. Ibid., p. 6.
46. In 1965 there was one lawyer (bengoshi) for every 13,846 Japanese. In 1970, 507 of 20,160 applicants were admitted. Stevens, supra n.42, at 679-80.
47. Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo and Takamatsu.
48. For example, the Fukuoka high court has a branch in Naha, Okinawa. A service member convicted in district or family court in Okinawa can appeal to the Naha branch of the Fukuoka high court without the necessity of going to the mainland of Japan.
The District Court is the primary trial court and the court of general jurisdiction. It may consist of a single judge, or three judges in the case of a serious offense. Family Courts were created in 1949 to handle conflicts within the family and related domestic affairs of legal significance. In addition, all criminal cases in which the alleged offender is under twenty years of age must first be brought to the Family Court for investigation and hearing. If the offense is a serious one, or other circumstances warrant, the case may then be turned over to the procurator for criminal prosecution in the District Court. The Family Court consists of a single judge, but he has extensive use of investigators and probation officers.\(^5^0\)

The Summary Courts have jurisdiction over minor offenses, and may summarily impose fines up to 50,000 yen solely on the basis of documentary evidence. In traffic offenses, fines up to 50,000 yen can be imposed upon hearing the statement of the accused in open court. Punishment is limited to fines or short-term confinement. If a longer period of imprisonment is considered appropriate, or if the accused demands an ordinary trial, the Summary Court must transfer the case to the District Court.\(^5^1\)

Despite the influence of the German civil code and American law, and the imitative nature of Japanese Constitution and statutes, there yet exists what has been called the “Japanese legal consciousness,”\(^5^2\) a combination of native attitudes, traditions and social norms that make the Japanese process unique. Relationships in Japan, even economic ones, are considered to be basically social rather than legal. For example, contracts depend more on what the parties feel subjectively their relationship is or should be rather than upon the objective wording of their contract.\(^5^3\) Similarly, even though the Constitution of 1946 contains many of the fundamental rights known to American law (e.g., due process, fair and speedy trial, right to counsel and to remain silent), there remain some vestiges of the system existing during the Meiji era, such as the importance of confessions as a source of evidence, which the police endeavor to obtain during investigations.\(^5^4\) Indeed, given the Japanese regard for personal

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50. Ibid., pp. 7–8.
51. Ibid., pp. 8–9.
honor and the principle that remorse is the first step toward rehabilitation, the criminal who pleads guilty may normally expect a somewhat lighter sentence than the one who might expect to rely on technicalities to secure an acquittal. And though the absence of a jury trial is difficult for many Americans to understand, the overwhelming majority of trial observers would attest to the fundamental fairness of the typical Japanese trial.

If there are substantive changes in the due process rights afforded American SOFA personnel, they may well come from Japanese criminal reform rather than from any modifications in the SOFA. For example, one recent proposal has been to lower the age limitation on Family Court jurisdiction from 20 to 18 years. There has also been some criticism of the informality of Family Court proceedings, but its judges and attorneys oppose destroying the “benevolent spirit” of the present juvenile law.  

In recent years, waivers of jurisdiction by Japanese authorities have far exceeded the numbers of trials of American service members in Japanese courts, though waiver rates have varied from year to year. For example, from December 1, 1968, through November 30, 1969, Japanese authorities waived jurisdiction in 1,710 of 2,079 cases, an 82-percent rate. For the same period in 1969 and 1970, the waiver rate was 87 percent (2,892 of 3,306 cases); in 1974–75 it was 58 percent (529 of 913 cases); and in 1975–76 the Japanese waived jurisdiction in 67 percent of the cases that arose.

In 1969, during the annual hearings of a subcommittee of the U.S. Armed Services Committee to review the operation of Article VII of the NATO-SOFA and of criminal jurisdiction agreements with other countries. Senator Murphy asked why service members do not have the “advantages” of being tried in American rather than foreign courts. Senator Ervin pointed out that a SOFA was an effort to balance the interests of our military against the sovereignty of foreign countries . . . .” Our experience in Japan

55. Ibid., p. 288.
indicates that the U.S.-Japan SOFA has achieved this balance remarkably well. The question of jurisdiction over American service members has been satisfactorily determined in general, and machinery has been set in place to resolve specific disagreements. From the point of view of international law and political relations, the Japanese-American SOFA substantially guarantees both Japanese sovereignty and American concerns for discipline within the bounds of due process of law.
CHAPTER III

STATUS OF FORCES AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES: PROBLEMS OF DUE PROCESS AND FAIR TRIAL OF U.S. MILITARY PERSONNEL

Soon Sung Cho

It was not until February 9, 1967, after 17 years of torturous negotiations, that the United States and the Republic of Korea (ROK) concluded a status of forces agreement (SOFA). The U.S. had already signed such agreements with the NATO nations, Japan, the Philippines, and Nationalist China, recognizing the right of those countries to exercise some measure of criminal jurisdiction over Americans stationed within their borders. But because the ROK lacked a tradition of guaranteeing Western judicial rights, the U.S. was reluctant to allow its military personnel to be subjected to Korean justice. For their part, the Koreans viewed the U.S. resistance to negotiate a SOFA as an affront to their sovereignty and national pride. The bitter experience of Western colonialism in Asia was still a recent memory.

The first U.S. servicemen landed on the Korean peninsula on September 9, 1945, as liberators in the aftermath of Japanese occupation during World War II. For the next three years, Korea was governed by the American military occupation force, and the need for a SOFA did not emerge until the proclamation of the ROK as an independent nation on August 15, 1948. On August 24, 1948, an interim agreement was concluded between the president of the new republic and the commanding general of the U.S. Army in Korea, Lt. General John R. Hodges, that gave the U.S. military exclusive jurisdiction over its personnel and their dependents. This agreement soon lost much of its importance, however, since by September 19, 1949, all U.S. forces were withdrawn from Korea.

with the exception of a small military advisory group, numbering only 470 at the outbreak of hostilities between North and South Korea in June of 1950. Its status was outlined in a separate agreement signed in January of that year.

The influx of large numbers of U.S. servicemen into Korea as the conflict escalated in 1950 again raised questions of jurisdiction. An exchange of notes between the ROK’s Ministry of Foreign Affairs and the U.S. Embassy in Taegon led to what became known as the Taegon agreement, confirming the power of the United States to exercise exclusive jurisdiction over U.S. forces in Korea because of the prevailing wartime conditions. The agreement also stipulated that Korean nationals arrested by U.S. authorities for offenses committed against American military personnel or their dependents would be delivered to ROK civil authorities “as speedily as practical.” This meant that U.S. military courts would not try Korean nationals unless requested by the ROK government because of the nonexistence of local courts. The Taegon agreement was to remain in effect until the SOFA of February, 1967.

The U.S. role in the Korean conflict represented the largest conventional military action since World War II, involving a commitment of nearly a quarter of a million soldiers. Without this intervention, the ROK would have been overwhelmed by the communist forces of North Korea, which by September of 1950, only ten weeks after the war began, occupied all of South Korea except for a narrow stretch of the Pusan perimeter. It is understandable, then, that the ROK was willing to grant the U.S. exclusive jurisdiction over its troops in exchange for their support. It was not until hostilities ceased in July, 1953, that the ROK began to press for the conclusion of a formal SOFA.

The mutual defense treaty signed by the U.S. and the ROK in October of 1953 authorized the negotiation and conclusion of subsequent agreements regarding the disposition of U.S. troops.

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In December, 1954, the ROK proposed a provisional agreement for customs and duties for U.S. servicemen as part of a SOFA. Five months later, the ROK sent a draft proposal for a SOFA to the U.S. Embassy, and twice in the next two years the Korean government sent memorandums to the U.S. urging the commencement of negotiations for an agreement. The U.S. attitude toward negotiations remained lukewarm, however; the reason given for this reluctance was that the ROK was technically still in a state of war because a peace treaty had not been concluded between the United Nations and North Korea. Although Undersecretary of State Christian Herter, following a visit to the ROK in September, 1957, urged a speedy conclusion of a new agreement, it was not until September of 1958 that the U.S. ambassador to the ROK indicated for the first time that the U.S. government was ready to begin negotiations, and shortly thereafter the ROK's proposal to begin negotiations in June of 1959 on the facilities and areas under the control of the U.S. Army in Korea was accepted.

The U.S. stance toward negotiating a new agreement became more positive when the government of Syngman Rhee was toppled by a violent student revolution in April, 1960. The students demanded the return of democracy and the restoration of the dignity of their nation as truly independent in name and practice. They criticized the mendicant mentality of the Rhee government and its inability to punish U.S. servicemen who committed serious crimes against Korean citizens. Fearing that the anger of the students might be transferred into a strong anti-American movement in the ROK, the U.S. agreed to negotiate a comprehensive SOFA, and on April 10, 1961, Ambassador Walter P. McConarghy and Prime Minister Chang Myun issued a joint communiqué to that effect. The first conference to negotiate the new agreement was convened on April 17, 1961, but the negotiation process was interrupted by the military coup d'etat of May 16, 1961.6

After the coup, both sides met again in September, 1962, and decided that a SOFA should be concluded only after the establishment of a new civilian government in the ROK. In the meantime, meetings continued to be held to work out technical aspects of the new agreement. When Secretary of State Dean Rusk

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visited Korea in January, 1964, he restated the U.S. intention of concluding a SOFA at the earliest possible date; Rusk reaffirmed this in a joint communiqué issued during the visit of ROK President Park and Foreign Minister Tong-Won Lee to Washington, D.C. in March, 1965. All the major differences in areas such as criminal jurisdiction, claims, and labor conditions were resolved during Park's visit, and technical negotiations accelerated afterward. On July 8, 1966, the contents of the agreement were finalized.7 One factor in the successful conclusion of the agreement was the commitment of ROK troops to aid the American side in the Vietnam conflict.

The SOFA is an agreement under the National Defense Treaty between the ROK and the United States8 and is to remain in force as long as the treaty lasts.9 It may be revised by mutual consent at any time. The scope of its 31 articles, and the subsequently agreed-upon minutes clarifying each article, focuses on major aspects regarding the facilities, areas, and status of the U.S. military in Korea; issues addressed include security measures for military facilities and areas, cost and maintenance, utilities and services, entry and exit, customs and duties, taxation, local procurements, labor conditions, foreign exchange controls and accounting and claims procedures. Of chief interest here is article XXII, which concerns criminal jurisdiction.

Problems of criminal jurisdiction had often been sources of conflict in ROK-U.S. relations, and Article XXII was easily the most controversial issue in the negotiations process. It follows the patterns of the NATO SOFA and the SOFA between the United States and Japan.10 Through this article, the military authorities of the United States have the right to exercise all criminal and disciplinary jurisdiction conferred on them by the law of the United States over members of the American armed forces, civilian components, and their dependents within the ROK. On the other hand, the authorities of ROK have jurisdiction over U.S.

7. Ibid. See also Bopmu Bu (The Ministry of Justice), Hanmi Kyosop Hoei Rok (The Records of Korea — U.S. Negotiation), (Seoul, 1972). This is the record on the detailed minutes on claims issue.
8. From the point of view of the United States, the SOFA with the ROK is an executive agreement because it was concluded without the advice and consent of the Senate. However, for the ROK the agreement is, in effect, a treaty because it was ratified by the Korean legislature according to article 56 of the ROK constitution.
9. See Article 31 of the U.S.-ROK SOFA.
military personnel and their dependents for offenses committed within Korea and punishable under the laws of Korea. In cases where the right to exercise jurisdiction is concurrent, the American military authorities have the primary right to exercise jurisdiction over U.S. personnel and their dependents in offenses committed solely against the property or security of the United States or against the person or property of another member of the U.S. military or a dependent, and over offenses arising out of the performance of official duty. In the case of any other offense, the ROK authorities have the primary right to exercise jurisdiction. The United States military authorities do not have the right to exercise jurisdiction over ROK nationals or residents in the ROK unless they are members of U.S. military. In addition, it has been stipulated that the authorities of either state possessing the primary right of jurisdiction shall give sympathetic consideration to a request from the authorities of the other state for a waiver of jurisdiction in cases where the other party considers it to be of particular importance. In short, article XXII reflects the system of original and concurrent jurisdiction incorporated in the NATO SOFA.11

The article also provides certain criminal procedural safeguards to be observed in any ROK trial involving U.S. service-members. For example, paragraph 9 explicitly states that a U.S. citizen prosecuted under ROK jurisdiction shall be entitled:

(a) to a prompt and speedy trial;
(b) to be informed, in advance of trial, of the specific charges made against him;
(c) to be confronted with the witness against him;
(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of ROK;
(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Korea;
(f) if he considers it necessary, to have the services of a competent interpreter; and

to communicate with a representative of the American government and to have such a representative present at his trial.

These provisions safeguard the constitutional rights of American servicemembers and guarantee fair trials when they are tried under ROK jurisdiction.

In the first year after the agreement was implemented, the ROK authorities waived their jurisdiction in the vast majority of cases involving U.S. military personnel. According to the report of the ROK's Ministry of Justice, 1,710 crimes involving 2,029 offending U.S. service members were committed. Nine hundred cases of accidental injury and homicide in the performance of official duty, 565 cases of violent assault, 14 cases of rape, 8 cases of arson and 21 cases of custom law violation were included. The ROK exercised jurisdiction in only 9 of these cases, involving 17 U.S. service members.

The first criminal case involving U.S. military personnel under the SOFA was brought into an ROK court on March 17, 1967. A U.S. airman, Staff Sargeant Billy J. Cox, allegedly had committed arson on February 20 by setting fire to a small house near Osan Air Base after discovering that his Korean girlfriend was not at home. He was also charged with having beaten a taxi driver on his way back to the base. In a Seoul district Court Sargeant Cox was found not guilty of the arson charge due to lack of evidence, and was fined only for the assault on the taxi driver. Later that year, Lt. John D. Rock was accused by Korean authorities of an attempt to sell three diamond rings on the blackmarket; he received a jail sentence and was placed on probation. Another Korean court charged an American civilian with wounding a Korean girl when a pistol accidentally discharged. The civilian was sentenced to a six-month prison term. On December 21, 1967, the Seoul district court found two American soldiers guilty of raping a Korean girl. Private William N. Page was sentenced to $2$ to $3$ years in prison and Specialist 4th class Raymond Velasquez was given a $1rac{1}{2}$ to $2$ year sentence. This was the first case in which an ROK court handed down prison sentences to American servicemen. Most observers, both in

Korea and the United States, regarded the sentences as "moderate and reasonable." To handle American offenders, several detention rooms were prepared in the prisons of Seoul, Suwon, and Taegu. These rooms were especially remodeled to meet the standards of third-class American hotels.

For the period from 1967-1978, the Ministry of Justice reported that 27,911 U.S. servicemen committed a total of 23,723 crimes. ROK authorities could have exercised primary jurisdiction over 21,372 of these cases, involving 25,396 offenders, while the United States could have exercised primary jurisdiction over only 350, involving 362 people. However, ROK authorities waived their right to exercise jurisdiction in 21,195 of the above cases, and chose to exercise primary jurisdiction over only 177. This is 0.83 percent of the total cases and 1 percent of the involved individuals.

While Korea has waived 99.2 percent of its cases under primary jurisdiction, other countries with similar SOFAs have waived approximately 80 percent of their cases. For example, in 1964 the rate of waiver in NATO countries was 83.5 percent in France, 80 percent in Germany, 76 percent in Greece, 57.7 percent in Italy, and 15.2 percent in Turkey.

When all NATO SOFA members are considered, an average of 68.1 percent of the cases involving the exercise of primary jurisdiction were waived by the receiving countries in 1964. In Asia during the same period, Japan waived jurisdiction in 80.9 percent of its cases, and the Philippines waiver rate was 78.8 percent.

The timidity of the ROK government in the exercise of primary jurisdiction over American servicemen may be explained by the fact that the national interest of Korea strongly dictated keeping the U.S. military presence in Korea at all costs. The ROK did not want to unduly antagonize American public opinion by trying a large number of American servicemen in Korean courts. Furthermore, since 1968 the United States government has expressed its wish to withdraw U.S. forces from Korea, and this threat has certainly had a great impact on the Korean attitude toward the waiver of primary jurisdiction. It now appears that the ROK government wanted to exercise primary jurisdiction only in a few serious and exemplary cases so that it could pacify the

17. *Oe Mu Bu*, pp. 78–79.
Korean public and demonstrate to the U.S. that it still reserved the right to exercise primary jurisdiction for violations of Korean laws. Thus, Korea has exercised primary jurisdiction in only about fifteen cases annually since the inception of the SOFA.

One problem that arose after the SOFA was implemented had to do with notice of jurisdiction. It had been agreed by a separate understanding that if the state having the primary right decided not to exercise its jurisdiction, it should notify the authorities of the other state within 15 days after the occurrence of the case. The ROK government felt that 15 days was too short a period to decide whether to waive jurisdiction or not, especially considering the fact that other nations with which the U.S. had a SOFA were given 21 days to make similar decisions. It was felt that the ROK was placed in a disadvantageous position vis-a-vis other U.S. allies.

Another problem was that the ROK government felt that the United States and the military authorities unduly questioned the qualifications of Korean judges and court procedure by insisting that public trials should be conducted by an impartial tribunal composed exclusively of "judges who completed their probationary period." Such a restrictive condition has not been included in any other SOFAs the U.S. has signed. Furthermore, it was agreed that any statement of the accused taken in the absence of an American governmental representative shall be inadmissible as evidence in court and that such a representative shall be entitled to be present at all preliminary investigations, examinations, pre-trial hearings, the trial itself, and subsequent proceedings in which the accused is present. Korea felt that the statement of the accused taken with the presence of his attorney, whether the attorney was a U.S. governmental representative or not, should be admissible as evidence.

A third area of concern was the feeling of many Koreans that accused American service members were overprotected by the SOFA. They certainly received more protection than they would be entitled to in the United States. For example, it was agreed that in any case prosecuted by the Korean authorities under article XXII, an appeal would not be made by the prosecution from either

18. Ibid., p. 216.
19. Pak Ju-In, "Han-Mi Gundae Chiui Hyopjong e kwan hayo" (on the ROK-USA Status of Forces Agreement) in Kom Ch'al, Vol. 1, 1968, p. 70. Kom Ch'al is the quarterly published by the Prosecution General's Office of the ROK.
20. Ibid.
a judgment of not guilty or an acquittal. In addition, an appeal may not be made by the prosecution from any judgment which the accused does not appeal except upon the grounds of errors of law.21 Thus, the discretion of whether or not to exercise an appeal may be unduly limited for an ROK prosecutor. Further, the accused shall not be required to stand trial if he or she is physically or mentally unfit to do so and participate in the defense.22 There is an inherent danger of misusing this requirement by the accused in order to delay the trial.

Lastly, the definition in the SOFA of the term “official duty” is so vague that it has left room for controversy between the parties. The agreement states that official duty is “to apply only to acts which are required to be done as functions of those duties which the individuals are performing.” The U.S. authorities have the primary right to exercise jurisdiction over the American servicemen and their dependents “in relation to offenses arising out of any acts or omissions done in the performance of official duty.” But the agreement is not clear as to when an offense arises out of an act or omission done in the performance of official duty and who has the right to make this determination.23 If the American authorities make this determination they will, in all likelihood, apply their own national criteria.

Similarly, if Korean authorities determine whether or not an offense was committed in the performance of official duty, they will probably apply Korean criteria. The concept of official duty varies from State to State, and it is practically impossible to arrive at a common but precise definition of the “performance of official duty.” Therefore the Koreans consider the need for additional clarification of the concept of “performance of official duty” to be extremely important.24

Several serious challenges have been mounted against the provisions of the SOFA by U.S. servicemen affected by the agreement. Perhaps the most serious one was brought by Specialist Fourth Class H. H. Smallwood, Jr., in June, 1968. On February 29, 1968, he was arrested by American military authorities in Korea after having been implicated in the murder of a Korean prostitute. After an initial pre-trial investigation in

22. Ibid., p. 220.
23. Ibid., p. 70. See also Snee & Pye, op. cit., p. 46-50.
accordance with article XXXII of the Uniform Code of Military Justice, the charges were dismissed for lack of evidence, even though Smallwood had been identified in a line-up by two eyewitnesses who claimed he was the victim’s companion at the approximate time of her death. Dissatisfied with this mild American action, and under the pressure of the adverse Korean public opinion as expressed in the Korean mass media, the Korean Ministry of Justice, on March 11, 1968, notified the commander of the U.S. Army in Korea that the ROK would exercise its primary right of jurisdiction over Smallwood on the charges of murder and arson. On April 25 of the same year he was indicted by the Seoul district prosecutor.²⁵ Pending trial in the Korean Court, Smallwood initiated habeas corpus proceedings in the U.S. District Court for the District of Columbia and asserted that the U.S. military did not have legitimate authority to release him to the Korean authorities for trial by a Korean court. His arguments were centered on two major points: first, the SOFA of 1966 with the ROK was not approved by the United States Government in a constitutionally accepted manner; and second the fair trial guarantees in the SOFA were insufficient in law and practice to protect the petitioner against violations of Fourteenth Amendment due-process rights.²⁶

For the first point of contention, the court declared that ratification of the SOFA by the United States was “clearly unnecessary” since Senate approval could not affect a grant of jurisdiction by the ROK. It further stated that under well-accepted international law Korea should have exclusive jurisdiction to punish offenses committed within its territory unless it either explicitly or implicitly consented to surrender its jurisdiction. The SOFA simply constituted a unilateral waiver by the ROK of its criminal jurisdiction in certain cases. Therefore, when a crime falls outside the area covered by this limited waiver, primary jurisdiction is maintained by the nation within which the crime occurred.

For the second point of contention, that the nature of the Korean system of criminal justice is inherently violative of the Fourteenth Amendment requirement of due process, the court asked by what authority the United States may dictate to a


“sovereign nation the procedure to be followed by that nation in the exercise of its primary jurisdiction over alleged violations of its criminal laws.”27 It stated that under international law the United States is without authority to infringe upon that jurisdiction.

The court proceeded to dismiss the case. Meanwhile, Smallwood was found guilty of murder and arson and sentenced to 15 years in prison, but he was acquitted on January 13, 1969, by a Korean Appeals Court on the grounds of insufficient evidence to support the charges. The question remained, however, whether an American service member’s right to a fair trial could be protected when the individual was subjected to a different legal system which did not recognize the concept of hearsay, forbade consultation between the defendant and his attorney during trial, and placed the burden of proof on the defendant. Even though the American court declared these allegations “unsubstantiated” in the Smallwood case, a U.S. Defense Department study on the Korean legal system concluded that American servicemen “were not likely to get a fair trial” in a Korean court because of the weakness of South Korean law and practice.28

Another case in which it was argued that the accused did not receive a fair trial in a Korean court was brought by Ernest W. Bruch, a medical corpsman assigned to Korea.29 He was charged with having killed a Korean policeman by striking him on the head and kicking him in the chest. On May 31, 1973, the Korean government notified American military authorities that the ROK would exercise criminal jurisdiction over Bruch. On July 23, 1973, the ROK indicted him and he was subsequently found guilty of the charges by a Korean court. Meanwhile, Bruch had left Korea on emergency leave for his home in Kansas, and there he brought his case before the United States District Court. He argued that perjured testimony of ROK officials was used to convict him, and consequently he had been deprived of his constitutional rights of due process as a United States citizen. He also argued that the United States Army deprived him of his constitutional rights by delivering him to the ROK authorities when it was known he would not be accorded due process and by not complying with many Army regulations that safeguarded those rights. Bruch

27. Ibid., p. 101.
asked for a determination that he was entitled to an honorable discharge from the U.S. Army with all the prerequisites pertaining to his services. The U.S. Army countered Bruch's allegations by contending that the "plaintiff was validly charged, tried, convicted and sentenced by a Korean civilian court pursuant to the Status of Forces Agreement between the United States of America and the Republic of Korea." The Army argued that resolution of several of Bruch's factual contentions would require the District Court to review, de novo, the Korean criminal proceedings, and that the court was without jurisdiction to conduct such a review. It was further argued that the relief sought by Bruch was barred by the doctrine of sovereign immunity, because it would require action by the Army that would result in a breach by the U.S. Government of obligations mandated by its defense treaty with Korea. Lastly, the Army claimed that actions of the military authorities were discretionary, neither arbitrary or capricious, and in no way violative of Bruch's constitutional rights.

The court decided that the fundamental test of justice had not been met and that a fair trial had not been provided to the plaintiff Bruch, because the judgment of the Korean court was based on perjured testimony and was contrary to the great weight of the evidence. This was "a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution." The court further concluded that the failure of the American military authorities to request the Department of State to press a request of waiver of jurisdiction through diplomatic channels was arbitrary and capricious under the facts and circumstances. The court concluded that Bruch was entitled to an honorable discharge to be issued to him by the Army as of June 2, 1973, with all perquisites and benefits.

Both the Smallwood and Bruch cases raised serious doubts about the ability of Korean courts to afford fair trials for American servicemembers. It has long been a central feature of the Anglo-American legal system that the serious sanctions available in criminal procedures cannot be invoked against an accused person arbitrarily. As early as the fourteenth century, English courts provided that an individual may not be imprisoned or put to death except by "due process of law." As the late Supreme Court Justice Felix Frankfurter observed, "The history of liberty has largely been the history of the observance of procedural safeguards." Unfortunately, Korea does not have a long-established democratic tradition. As in other Asian nations,
the political tradition of Korea has long been “government by man” rather than “government by law.” 30 Under the tradition of “ Asiatic despotism,” people were arrested arbitrarily and jailed without a trial. Government agencies frequently violated the privacy of the individual through unreasonable searches and seizures of property or person. These traditions still linger on despite the fact that the present ROK constitution and laws of criminal procedure explicitly prohibit them. Under these circumstances the protection of American serviceman’s right to fair trial will become difficult to obtain if the law is not followed closely in practice.

Recently, Korean courts have become very conscientious about observing the procedural aspects of criminal justice. For example, a U.S. serviceman, Jack Abercrombie, was accused of killing a Korean girl and found guilty both in the Seoul district and appellate courts. However, the Korean Supreme Court ordered a retrial of the case by the lower court because of improper use of evidence. Abercrombie was found not guilty at his second trial. 31

Under the mandate of the U.S. Senate resolution during the ratification process of the NATO SOFA, it was required that studies of the legal system of SOFA countries be prepared and a comparison made with the procedural safeguards for fair trial in the U.S. courts. Such a study of the ROK legal system was completed in May, 1971, by the judge advocate for the commander of the U.S. Army in Korea, and a supplement to that study was prepared after the new Yushin constitution was adopted in Korea on December 27, 1972. A major conclusion reached in these studies is that a fair trial may be accorded the American servicemen under Korean law and that the Korean criminal procedural codes met the standards of the Western democratic nations. 32 The problem now is the implementation of these laws; it will take a long time for Korea to build a democratic tradition. However, a fair trial can be obtained in a Korean court as long as the Korean and American authorities judiciously observe the safeguards of the SOFA. It is generally agreed, in fact, that U.S. servicemen tend to receive much more lenient sentences in a Korean court than they would in an American court. Nonetheless, the question

of proper implementation of the SOFA remains, and the
guarantee of a fair trial for U.S. servicemembers in Korea will
continue to be a focus of attention in the years to come.
CHAPTER IV
THE UNITED STATES STATUS OF FORCES AGREEMENT WITH THE REPUBLIC OF CHINA: SOME CRIMINAL CASE STUDIES*

HUNGDAH CHIU

I. Introduction

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

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2. Peking Protocol, supra note 1, Articles 7 & 9.


4. For the history of extraterritoriality in China, see generally R. Fishel, The End of Extraterritoriality in China (1952); The Development of Extraterritoriality, supra note 3.
During the Second World War, the US and the Republic of China (ROC) became allies and US forces entered China to assist the Chinese resistance against Japanese aggression.\(^5\) Under traditional international law, armed forces admitted on foreign territory enjoy a limited, but not an absolute, immunity from the territorial jurisdiction of the host country.\(^6\) The scope of that immunity, however, is controversial.\(^7\) In order to clarify the status of US forces in China, the two countries entered into an agreement, in the form of an exchange of notes, on May 21, 1943, concerning jurisdiction over criminal offenses committed in China by members of US forces.\(^8\) According to the Agreement, "the service courts and authorities of [the US] military and naval forces shall . . . exercise exclusive jurisdiction over criminal offenses which may be committed in China by members of such forces."\(^9\) Because of the Chinese sensitivity to the unequal treaty problem,\(^10\) the Agreement was drafted in reciprocal form by providing that the US "will be ready to make like arrangements to ensure to such Chinese forces as may be stationed in territory under United States jurisdiction a position corresponding to that of the United States forces in China."\(^11\) The Agreement was to terminate six months after the end of the war.\(^12\) Although Japan surrendered on September 2, 1945, technically the state of war continued until the entry into force of the San Francisco Japanese

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9. Id.
10. See generally, Tseng Y.H., The Termination of Unequal Treaties in International Law (1933).
11. Jurisdiction Over Armed Forces by the United States and China, Documents on American Foreign Relations 484, 485 (Goodrich ed. 1944).
12. Id.
Peace Treaty on April 28, 1952, which formally brought the war to an end. Six months later, the Agreement formally expired.

Although the Agreement was in force until 1952, all US forces withdrew from China in late 1949, following the collapse of the Nationalist forces in the Chinese civil war. On December 8, 1949, the Republic of China (ROC) government moved to Taiwan, but the US ceased to provide military advice and aid to that government and adopted a hands-off policy toward China.

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

14. The People's Republic of China was proclaimed on October 1, 1949, although the mainland was not under complete Communist control until May 1950. See The U.S. and China, supra note 5 at 327.
17. 23 Dept. of State Bull 3 (1950).
19. The U.S. and China, supra note 5 at 320.
22. Id.
23. ¶3, Mutual Defense Agreement, supra note 21. This interpretation is confirmed by a statement delivered by the Chinese Minister of Justice at the
For the first few years after the conclusion of the above agreement, there were few disputes concerning the status of MAAG members in Twiwan, since their number was small and the force consisted primarily of officers. With the increased US involvement in the defense of Taiwan, the number of MAAG members also steadily increased. In 1954 approximately 1,000 MAAG personnel were stationed on Taiwan. By 1957, the figure had become 1887, and the total number of US nationals and their dependents who were immune from Chinese jurisdiction was approximately 3000. The MAAG personnel included not only officers, but also enlisted personnel.

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

With the increased number of MAAG personnel and US forces in the ROC, it was inevitable that certain American soldiers would commit offenses against the Chinese. When a serious crime against a Chinese was committed by a member of the MAAG or US forces, the Chinese public was frustrated by the fact that Chinese courts could not exercise jurisdiction. The Chinese,

Legislative Yuan in 1957. See 19 Li-fa-yuan Kung-pao (Gazette of the legislative Yuan) 103 (1957).
26. See SOFA Criminal Jurisdiction, supra note 20, at 6.
27. Id.
30. SOFA Criminal Jurisdiction, supra note 20 at 6-7.
therefore, repeatedly urged their government to conclude a status of forces agreement,31 like those that exist among the NATO countries,32 with the US to establish Chinese jurisdiction over members of US forces. The Reynolds case of 195733, which precipitated the outbreak of an anti-American riot and the sacking of the US Embassy,34 was an expression of such frustration by the Chinese public. It was not until 1965 that the Agreement between the Republic of China and the United States of America on the Status of United States Armed Forces in the Republic of China35 (hereinafter referred to as SOFA-ROC) was concluded. However, it should be noted that the MAAG personnel continued to enjoy immunity from Chinese jurisdiction under the 1951 Agreement.36

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

In this article the author will provide a brief introduction to the problems involved in the accommodation of the United States’

31. *Id.* at 11-12.
33. See § III, *infra*.
38. *I.e.*, upon one-year notice, with the removal of all United States Military personnel from Taiwan within four months. See Notice of Termination delivered by the United States to the Republic of China on December 23, 1978, Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 1979, 231 (1979).
and the Republic of China's legal systems in the process of negotiating the SOFA-ROC. Following this discussion, several criminal cases tried in Chinese and US military courts under the SOFA-ROC will be examined. The article will conclude with some observations regarding the effect of the divergent United States and Chinese attitudes on the operation of the SOFA-ROC.

The recent termination of the 1954 Mutual Defense Treaty and the SOFA-ROC and the subsequent removal of U.S. military personnel from Taiwan provides an excellent opportunity to re-examine the exercise of criminal jurisdiction during the fourteen-year history of the SOFA-ROC. The United States presently maintains significant military installations in other Asian nations in which Chinese cultural influence has been reflected in attitudes similar to those analyzed in this article. Therefore, an examination of the SOFA-ROC may serve to elucidate certain aspects of the United States' status of forces agreements with Japan and the Republic of Korea.

II. Criminal Justice And Procedure Under
The Republic Of China Legal System

The Republic of China is a civil law country. Both its civil code and procedure and its criminal code and procedure are essentially modelled on the French, German and Swiss legal systems. Nonetheless, the ROC laws retain certain traditional Chinese legal values and principles.

The ROC has a three-level judiciary. On the national level, there is the Supreme Court, which is the court of last resort.

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

40. For a comparative study of the SOFA-ROC and the U.S. Status of Forces Agreement with Japan, the Republic of Korea, and the Philippines, see Chapters 1 to 3 of this book.


42. See generally, J. Carbonnier, Droit Civil (1969).


45. Id. Ch. IV, arts, 21-25.
However, the Supreme Court does not interpret the constitution; such interpretation is performed only by the Council of Grand Justice,\textsuperscript{46} the constitutional court. Both the Supreme Court, the Council of Grand Justice and other courts are under the administrative umbrella of the Judicial Yuan. On the provincial level, there is the High Court,\textsuperscript{47} which is a court of appeal. The High Court may have one or more branches,\textsuperscript{48} depending upon the volume of litigation before it. On the local level, there is the District Court,\textsuperscript{49} a court of first instance. Attached to each level of courts is a Public Procurator's office.\textsuperscript{50} The procurators investigate and prosecute criminal offenses on behalf of the state. In addition to regular courts, there is an Administrative Court\textsuperscript{51} in charge of citizens' complaints against unlawful administrative measures carried out by the government.

ROC criminal procedure does not include provisions for jury trial;\textsuperscript{52} the judges decide both facts and law. Similar to other civil law systems, there are no strict rules of evidence.\textsuperscript{53} However, the jurisprudence of the Supreme Court has developed some case law on the subject.\textsuperscript{54} Facts tried at the District Court level may be reopened at the High Court trial. The Code of Criminal Procedure has an article on the presumption of innocence,\textsuperscript{55} but there is no

\textsuperscript{47} Law of Organization, supra note 44, ch. III arts, 16-20.
\textsuperscript{48} Id., ch. III art. 10.
\textsuperscript{49} Id., ch. II, art. 9-15.
\textsuperscript{50} Id., ch. VI, arts. 33-43.
\textsuperscript{51} Sovereignty Within the Law, supra note 43, at 252.
\textsuperscript{52} See Generally, Criminal Code, promulgated Jan. 1, 1935 [hereinafter cited as Criminal Code].
\textsuperscript{53} Id. But see the Code of Civil Procedure Pt. II, ch. I, § 3 (arts. 277-376).
\textsuperscript{54} There are altogether only 66 articles (Articles 154-219) concerning evidence among 512 articles of Chinese Code of Criminal Procedure. Among the 66 articles, only one relates to the admissibility of evidence:

"Article 155. 1. A Court is free to determine the probative force of the evidence.
2. Evidence given by an incompetent witness, having not been lawfully investigated, obviously contrary to reason or inconsistent with established facts shall not form the basis of a decision."

However, between 1928 and 1973, the Supreme Court selected 50 representative cases as precedents relating to the interpretation of this article. See Tsui-kao fa-yuan pan-li yao-chih 1927-1974 (Synopses of Supreme Court Precedents, 1927-1974), 644-650 (1976).

\textsuperscript{55} Article 156 of the Code of Criminal Procedure [hereinafter cited as Code of Criminal Procedure] provides: "Confession of an accused not extracted by violence, threat, inducement, fraud, unlawful detention or other improper devices and consistent with facts may be admitted in evidence."
prohibition against self-incrimination. Similarly, confession obtained under free will may be used as evidence against the accused.\textsuperscript{56} A warrant authorizing an arrest or search may be issued by a procurator\textsuperscript{57} in the course of an investigation or by a judge\textsuperscript{58} in the course of a trial. There is no prohibition against using illegally obtained evidence at trial with the exception of confessions by the defendant.\textsuperscript{59} A policeman who undertakes an illegal search for criminal evidence does so at his own risk. If his search produces no criminal evidence, he is subject to disciplinary action\textsuperscript{60} by his superior or the victim may bring an action against him.\textsuperscript{61} Investigation by a procurator is not public\textsuperscript{62} and an accused usually consults his lawyer only after the procurator has finished his investigation.\textsuperscript{63} The accused has no right to demand cross-examination or confrontation of a witness; permission for cross-examination is granted at the discretion of the trial judge.\textsuperscript{64}

\footnotesize{56. Code of Criminal Procedure, ch. IX art. 100.}
\footnotesize{58. Code of Criminal Procedure, ch. XI, art. 128, ¶ III.}
\footnotesize{59. See note 56, supra.}
\footnotesize{60. Article 10 of the Chinese Police Law, promulgated June 15, 1953, provides: “If an order issued or an action taken by a police is illegal or improper, the people may appeal to administrative remedy,” Tsui-hsin shi-yung chung-yang fa-kuei hui-pien (Latest Practical Collection of Laws and Decrees of the Central Government) 655 (Yeh C. c. ed. 1973). Article 24 of the Chinese Constitution, entered into force on December 25, 1947, provides: “Any public functionary who, in violation of law, infringes upon the freedom or right of any person shall, in addition to being subject to disciplinary measures in accordance with law, be held responsible under criminal and civil law. . . .” Article 306 of the Chinese Criminal Code provides: “1. A. Person who without reason breaks and enters a dwelling house. . . . belonging to another shall be punished with imprisonment for not more than one year, detention, or a fine of not more than 300 yuan [U.S. $25.00].” Article 307 provides: A person who searches the person, dwelling house. . . . of another contrary to law or order shall be punished with imprisonment for not more than two years, detention, or a fine of not more than 300 yuan.” Article 195 of the Chinese Civil Code provides: “In case of injury to the body, health, reputation or liberty of another, the injured party may claim a reasonable compensation in money for such damage as is not a purely pecuniary loss.”}
\footnotesize{61. Id.}
\footnotesize{63. Art. 27, ¶ 1, of the Code of Criminal Procedure provides: “An accused may employ an advocate at any time after the initiation of a prosecution.”}
\footnotesize{64. Art. 184, ¶ 2 of the Chinese Code of Criminal Procedure provides: “If it is necessary in order to determine the truth, witnesses may be ordered to confront each other or the accused, and such a confrontation between witnesses may also be ordered at the request of the accused.”}
After a judgment is rendered, either the accused or the procurator may file an appeal. In special circumstances, if a procurator believes that the court rendered an excessively severe sentence, he may also appeal to the higher court to request a reduction of sentencing.

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

Because Chinese criminal procedure differs from that of the US in several important respects, during the negotiating of the SOFA-ROC, the US insisted on the inclusion of procedural safeguards. As a result of prolonged and tough bargaining, a US

67. Art. 344, ¶ 3 of the Code of Criminal Procedure provides: "A procurator may also appeal for the benefit of an accused."
68. See ROC Legal System, supra, note 41, at 16.
70. There are five divisions relating to criminal cases in the Supreme Court. See [1978] China Yearbook 109 (1978).
71. The official summary and publication are subject to the final approval of the President of the Supreme Court.
73. See Rules Governing the Judicial Yuan Meeting on Changing Precedents, promulgated September 15, 1952. Yeh C. -c. supra, note 60, Vol. 5, p. 6757. The meeting is chaired by the President of Judicial Yuan and the quorum is the two-third majority of the total judges of the Supreme Court. The decision of the meeting shall be made by the two-third majority of the judges present. See Articles 4 and 5 of the Rules.
defendant under the SOFA-ROC has the following special protection in a Chinese criminal trial: 74

(1) The right to a “prompt and speedy trial.” 75 This protection is redundant as Chinese courts are generally more efficient than US courts in handling both civil and criminal cases.

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

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

(3) The right to be confronted with the witness against him, including a full opportunity to examine all witnesses whose testimony is presented at the trial. 80 This protection goes beyond the ROC Code of Criminal Procedure. Under Article 184, paragraph 2 of the Code, the trial judge shall decide whether it is necessary for the accused to confront a witness. While the accused may request the trial judge to allow him to confront a witness, his

75. SOFA-ROC Art. 14, ¶ 3 (a), 17 U.S.T. 388.
76. Id., ¶ 6.
78. SOFA-ROC Agreed Minutes Re: ¶ 9(b), [1965] 17 UST 373, 394.
80. Agreed Minutes to the SOFA-ROC Re Art. 9(c), [1965] 17 UST 373, 389.
request is subject to the ruling of the trial judge. Moreover, under Article 169 of the Code, if "a presiding judge foresees that a witness . . . will not freely state what he knows in the presence of the accused, he may order the accused to leave the court."

(4) The accused shall be entitled "to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the Republic of China." While the ROC criminal procedure code provides in Article 178 that a legally summoned witness who fails to appear may be arrested and forced to appear, this procedure is at the discretion of the procurator, trial judge or presiding judge. The accused may request the court to summon a witness, but his request is subject to the approval of the court or the procurator's office.

(5) The right to have legal representation, including the right to have present and consult with legal counsel at any preliminary investigations, examinations or hearings, at which the accused is present, as well as through all stages of trial and appeal. The ROC Code of Criminal Procedure provides in Article 127, that "an accused may employ an advocate [lawyer] at anytime after the initiation of a prosecution." While it is not unusual for an accused to employ a lawyer during the investigation period, the lawyer apparently cannot examine the record and exhibits and make copies or photographs from the files concerning the accused before the initiation of a prosecution.

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

(7) "No appeal will be taken by the prosecution from a judgment of acquittal nor may an appeal be taken by the prosecution from any judgment which the accused does not appeal except upon grounds of errors of law." There is no such protection under the ROC criminal procedure code.

In addition to above-stated changes in the ROC Code of Criminal Procedure under the SOFA-ROC, the latter also provides that an accused member of the US armed forces in Taiwan shall

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82. SOFA-ROC Art. 14, ¶ 9(d), [1965] 17 UST 373, 389.
84. Agreed Minutes to the SOFA-ROC Re. Art. 14 ¶ 9(e), [1965] 17 UST 373, 394.
86. Agreed Minutes to the SOFA-ROC, Art. 14, ¶ 9, [1965] 17 UST 373, 394.
87. Id.
be held in the custody of the US authorities throughout the entire pre-trial and trial process. The Agreement further states that the US government "shall have the right to have a representative present, with whom the accused may communicate, at any preliminary investigations, examination, or hearings at which the accused is present, as well as at all stages of trial and appeal."

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

III. The Reynolds Case of 1957

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

As previously noted, the diplomatic status granted to MAAG personnel precluded the exercise of jurisdiction by the Republic of China. The US authorities decided to try Reynolds at Taipei by a

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88. SOFA-ROC Art. 14, § 5(c), [1965] 17 UST 373, 392-393.
89. Agreed Minutes to the SOFA-ROC Re Art. 14, § 9(g), [1965] 17 UST 373, 394.
90. See generally, SOFA-ROC Criminal Jurisdiction, supra note 20.
91. E.g., the maximum length for imprisonment for a definite period is limited to twenty years. See Article 33 of the ROC Criminal Code.
93. Id.
94. Under current international law, not all members of an embassy enjoy diplomatic immunity. See generally I. Brownlie, Principles of Public International Law [hereinafter cited as Brownlie] Ch. XVI, p. 333 (1973). Service personnel usually enjoy immunity only when they are in the course of performing their official duty. Article 37, Vienna Convention on Diplomatic Relations [hereinafter cited as Vienna Convention] 500 U.N.T.S. 95, in force April 24, 1964. In view of
US court-martial for voluntary manslaughter rather than murder. 95

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

There were several reasons for the Chinese perception that Reynolds’ acquittal was the result of an unjust trial. First, most Chinese did not understand that under US laws, Reynolds was not subject to re-trial. 98 Chinese commentators criticized the judgment as very unfair and urged a new trial. When they learned that the US Defense Department ruled out a new trial without adequate explanation, 99 the Chinese were very indignant. As explained previously, the Chinese legal system permits the procurator to appeal a finding of innocence and obtain a conviction at the appellate level. 100 For the Chinese public, the US refusal to retry Reynolds represented bad faith and indicated a disregard for the life of a Chinese national.

Second, under the traditional Chinese concept of justice, a person who kills another person should receive some punishment

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Reynolds’ low rank of sergeant in the U.S. Military Service, he should have been treated as equivalent to the U.S. Embassy service personnel. Thus, Reynolds should not have enjoyed diplomatic immunity in regard to a homicide which was in no way related to his official duty.

96. Id., at 9.
98. The Fifth Amendment of the United States Constitution provides that “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. Under Article 73 of the Uniform Code of Military Justice, 64 Stat. 108, only the accused can request a retrial, after receiving a sentence of death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, on grounds of newly discovered evidence or fraud on the court.
in order to restore the cosmic harmony upset by the unnatural death of a person. This is so regardless of the reason for the homicide. While the Chinese law has been completely modernized and homicide committed as a result of self-defense may be considered as a ground for reduction or exemption of punishment, the law also provides that the act of self-defense may not be excessive. In the Reynolds case, Chinese commentators asserted that the second shot fired by Reynolds was unnecessary. From the Chinese point of view, Reynolds should have been held responsible for excessive self-defense and should have at least received some minor punishment. Therefore, from the Chinese perspective of justice, Reynolds' acquittal was totally unjustified.

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

IV. The Wilson Case Of 1966

The Wilson case was the first trial of a U.S. serviceman by a Chinese court. John A. Wilson was a dental technician second class in the US Navy. He was assigned to Detachment 5, Headquarters Support Activity at Kaohsiung, Taiwan, Republic of China. On June 1, 1966, after drinking a bottle of beer and about seven-tenths of a bottle of whiskey, Wilson rode in a car driven by his wife at a speed of about 30 miles per hour. Dissatisfied with the slow speed, Wilson reached over with his left foot to press the accelerator. Wilson's wife became scared, stopped the car, and left. After taking over, Wilson drove the car at a speed of 80 miles per hour (the speed limit was 40 mph), immediately hitting a bicyclist and an elderly female pedestrian. The woman was thrown into the air by the impact and landed on the hood of the car. Nonetheless, Wilson continued to drive, dragging the woman for 600 feet until he hit another pedestrian. The woman died immediately. Wilson left the scene of the accident and returned home without reporting

101. See D. Bodde and C. Morris, Law in Imperial China 181-183 (1967) [hereinafter cited as Law in Imperial China].
102. Article 23 of the Chinese Criminal Code provides: "An act performed by a person in defense of his own rights or the rights of another against immediate unlawful infringement thereof is not punishable; provided, that if the act of defense was excessive, punishment may be reduced or remitted."
103. Id. See also Supreme Court decision [1955] Shang No. 4738.
104. SOFA-ROC Criminal Jurisdiction, supra note 20, at 7.
105. Decision No. 772 (Kao-hsiung Dist. Ct. 1066).
the incident. It was only after his wife reported the accident to US military police that Wilson informed the US authorities.106

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

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

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

106. SOFA-ROC Criminal Jurisdiction, supra note 20, at 23.
107. SOFA-ROC Art. 14, ¶ 1(b) [1965] 17 UST 373, 386.
108. SOFA-ROC Art. 14, ¶ 3(a), 3(b) [1965] 17 UST 373, 387.
109. Agreed Minutes to the SOFA-ROC Re Art. 14 ¶ 3(c) [1965] 17 UST 373, 390.
110. Id.
111. Id., at 391.
High Court confirmed the conviction but reduced the punishment to six months' imprisonment or a fine in lieu of imprisonment. The court advanced several reasons for the reduction in sentence:

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

The decision of the High Court was severely criticized by Chinese legal scholars. First, intoxication is generally not considered to be a ground for reduction of sentence. While the law is silent on this point, some scholars suggested that intoxication should serve to increase the punishment rather than reduce it. Second, the court's interpretation of "voluntary surrender" was also inconsistent with the Code provision and judicial precedent. Article 62 of the Criminal Code provides: "If a person voluntarily submits himself for trial for an offense not yet discovered, the punishment shall be reduced." Since the defend-

116. Interviews with Judge Li Chung-Sheng, of the Kaohsiung District Court, Judge Wen Wen-ho of the Hsung-tsu District Court, and Chief Judge Chao Che-chung of the Taiwan District Court, with Lung-sheng Tao, cited in SOFA-ROC Criminal Jurisdiction, supra note 20, at 24, fn. 133.
117. Article 89 of the Criminal Code provides: "1. A person who commits an offense while intoxicated may, after execution or remission of punishment, be ordered to enter a suitable place for compulsory cure. 2. The period for enforcing the measure prescribed in the preceding paragraph shall not exceed three months." One Supreme Court decision held that if a person became feebleminded because of drunkenness and then committed a crime, his punishment should not be reduced. Judgment of 28th Year (1939) Shang No. 3816.
The defendant's wife notified the US military authorities before Wilson surrendered, his surrender should not have been considered a "voluntary surrender" under Chinese law. Many legal scholars and lawyers in Taiwan felt that the court simply was being particularly lenient toward a foreigner who came to assist in the defense of Taiwan. These authorities asserted that the decision had no precedent in the law of the Republic of China. They also believed that if the defendant had been tried in the US and under US law, he would have received a much more severe punishment.

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

V. The Starks And Eaton Case

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

119. Information from interviews conducted by the author's former students in Taiwan during 1966 and 1967.
121. File No. 60th Year [1971], Su no. 58.
122. See Art. 10, ¶ 1 of the Statute for the Purge of Narcotics During the Period of Communist Rebellion; Art. 263 of the Criminal Code. See also, 70 Am. J. Int'l L. 145 (1976).
Under the Agreed Minutes Regarding Article 14, paragraph 3(c) of the SOFA-ROC, possession of narcotics is not included in the categories of offenses in which "major interests of Chinese administration of justice... may make imperative the exercise of Chinese jurisdiction." However, notes exchanged between the ROC and the US on the same day that the SOFA-ROC was signed included offenses of "illegal possession of or trade in narcotics, and attempts to commit such offenses or participation therein" within these categories. Therefore, the ROC authorities decided to recall the waiver and to have the case tried by the Taichung District Court. On February 6, 1971, the Court sentenced Starks and Eaton to two years' imprisonment for jointly possessing opium in violation of Article 10, paragraph 1 of the Statute for Purge of Narcotics During the Period of Communist Rebellion. The defendants appealed. On August 5, 1971, the Taichung Branch of the Taiwan High Court affirmed the decision of the District Court.

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

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

The defendants contended that the search was illegal because it had been conducted without the presence of American military authorities as required by article XVII (4), and without a search

warrant as required by the Chinese Code of Criminal Procedure.128 The court said:

If the authorities of the United States armed forces have been afforded the opportunity to be present by Chinese law enforcement personnel, the latter may conduct a search in accordance with the law. If sufficient facts exist to show that a person inside the premises is committing a crime, and the circumstances are urgent, a judicial policeman or a judicial police officer may search a dwelling house or other premises without a search warrant. This is provided in Article 131 of the Code of Criminal Procedure of the Republic of China.129 Cheng Lai-shiu, a witness, is a Chinese judicial policeman. When he was on duty, it was reported that Starks et al. were suspected of committing a crime. He obtained the illegally possessed narcotic items. It was obvious that someone inside the premises rented by Starks et al. was committing a crime. At the same time, Starks et al. threw out the criminal items to destroy evidence when they saw policemen approaching them. This was an urgent circumstance. Cheng Lai-shiu, who conducted the search, was not violating the law as he had no time to request a search warrant. Before Cheng Lai-shiu went on duty in this case, he notified the authorities of the US armed forces through the Foreign Affairs Police. The American authorities sent armed forces police to the scene. When Cheng Lai-shiu conducted the search, Bruoks and Balazs, two American armed forces policemen had sent Starks et al. to the base, but the AP's officer, James, was on the scene. This was testified to by Bruoks and Balazs and was shown in the file. As James was

128. Article 128, ¶ 1 of the Code of Criminal Procedure provides: "A search requires the use of a search warrant."

129. Article 131 of the Code of Criminal Procedure provides: "1. A Judicial policeman or judicial police officer may search a dwelling house or other premises without a search warrant under one of the following circumstances: . . . (3) If sufficient facts exist to show that a person inside the premises is committing a crime, and the circumstances are urgent. 2. Within twenty-four hours after making a search as specified in the preceding paragraph, the case shall be reported to a procurator of the court."

It should be noted that under Chinese law a search warrant is issued during the investigation period by a procurator. But when the case is at the trial stage, a search warrant is issued by a presiding or commissioned judge (Article 128, paragraph 3, of the Code of Criminal Procedure).
representing the authorities of the US armed forces, even though he did not provide any assistance or conduct the search, his presence did not affect Cheng Lai-shiu in the discharge of his duty. After the search, Cheng Lai-shiu reported to a procurator of Taichung District Court within 24 hours. His search did not violate the law at all.\textsuperscript{130}

The appellants also argued that the special criminal statute on narcotics should not be applied to them\textsuperscript{131} as this statute was not within the penumbra of the NATO-SOFA. The court said:

The Republic of China has priority jurisdiction in the case of illegal possession of narcotics in accordance with the special minutes of the meeting and Article XIV of the SOFA-ROC, so the special law was not excluded from use in SOFA-ROC cases. It is impossible to say that the Chinese court violated the SOFA-ROC by imposing punishment on Starks et al. in accordance with the current Chinese law.\textsuperscript{132}

According to the Agreed Minutes Regarding Article 14, the US can send an observer to be present throughout the entire pre-trial and trial process.\textsuperscript{133} After attending the proceedings at the District Court trial, the US observer raised questions concerning the fairness of the trial under the SOFA/ROC.\textsuperscript{134} The first point he raised concerned the absence of a key witness at the trial. Under Article 14, paragraph 9(c) and its agreed minutes, a defendant was entitled to confrontation of adverse witnesses. This right included a full opportunity to examine all witnesses whose testimony was presented at trial.\textsuperscript{135} One of the key witnesses against the

\textsuperscript{130} 70 Am. J. Int’l L. 145 (1976).
\textsuperscript{131} Under Article 263 of the Criminal Code, the punishment for possessing opium with intent to commit the offenses of selling, smoking, or manufacturing opium is detention (1 day to 4 months) or a fine of not more than 500 yuan (approximately U.S. $40.00). But under the special statute, possession of opium alone is subject to a minimum punishment of two years’ imprisonment.
\textsuperscript{132} See 70 Am. J. Int’l L. 147 (1976).
\textsuperscript{133} Agreed Minutes to the SOFA-ROC Re: Art. 14 ¶ 9(g) [1965] 17 UST 373, 394.
\textsuperscript{134} Trial Observer’s Report for the Trial of SGT. Jan R. Starks and Ab Labruce Eaton in Taichung District Court, Taichung, Taiwan, Republic of China [(no date, the date of trial was February 3, 1971)], submitted to U.S. Taiwan Defense Command. A copy may be obtained from the U.S. Department of Defense under the Freedom of Information Act.
\textsuperscript{135} Id.
defendants in this case was an individual who claimed to have seen someone throw something from the defendants’ house into the roof of a neighbor. This person was not present at trial. Therefore, the trial observer considered that the trial did not comply with the Agreement.

The observer’s view appeared to be a misunderstanding of the SOFA-ROC provisions. Since the defendants made no request for the presence of that witness at the trial, they waived their right under the SOFA-ROC and had no legitimate complaint. The SOFA-ROC does not predicate the validity of a trial upon the actual confrontation of a witness by the accused at the trial.\(^{136}\)

The second point raised by the US trial observer concerned the right of the defendants to cross-examine all witnesses against them. In the observer’s view, because the defendants’ lawyer made no attempt to cross-examine any of the witnesses, this right was virtually meaningless. However, the defendants were personally asked by the judge whether they wanted to ask any questions of the witnesses. Nevertheless, the US trial observer’s asserted that this opportunity was of little value without the effective assistance of counsel.

While the US trial observer’s statement may have been true, the SOFA-ROC only guarantees an accused the right to cross-examine the witnesses.\(^{137}\) The exercise of this right is entirely within the discretion of the accused. Failure to exercise the right of cross-examination is held to constitute a waiver of that right under ROC law.

The last point raised relates to evidentiary rules. The US observer considered that there was “an inadequate showing” of a nexus between the accused and the opium found. This view, however, was based on the Anglo-American evidentiary standards,\(^{138}\) and is not covered by the fair trial guarantees provided in the SOFA-ROC.

Another trial observer was sent to observe the High Court trial. In his opinion, all rights prescribed by the SOFA-ROC were observed by the High Court and the appeal was conducted in a fair and proper manner.\(^{139}\)

\(^{137}\) SOFA-ROC Agreed Minutes to the SOFA-ROC Re: Art. 14 ¶ 9(c), [1965] 17 UST 373, 394.
\(^{138}\) See McCormick, Evidence 433-441 (2d ed. 1972).
\(^{139}\) Trial observer’s Report for the Trial of SGT Jan R. Starks and Ab Labruce Eaton in Taiwan High Court, Taichung Branch, Taichung, Taiwan, Republic of
VI. Other Cases

(a) THE LUTZ CASE OF 1972

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

(b) THE BROWN CASE OF 1966

On June 26, 1966, United States Army Specialist Four Clem Brown dragged a thirteen-year-old Chinese girl to his car, drive to a quiet place and then raped her. The Chinese authorities recalled the waiver of jurisdiction, and the procurator prepared documents

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China [no date, the dates of trial were May 17 and July 29, 1971]), submitted to U.S. Taiwan Defense Command. A copy may be obtained from the U.S. Department of Defense in accordance with the Freedom of Information Act.

141. Id.
142. Id.
144. Id.
147. Information gathered by the author's former students through interviews with professors of law at Taiwan, ROC.
to prosecute Brown in accordance with Chinese law. However, before the formal prosecution was filed, the victim withdrew her complaint from the procurator’s office and the case was dismissed.\textsuperscript{149} Under the Chinese Criminal Code, prosecution for rape can be instituted only upon a complaint filed by the victim.\textsuperscript{150} The US military authorities considered the case a serious one and tried Brown by a general court martial. The defendant was sentenced to eighteen months’ confinement at hard labor, demoted to private, and forced to forfeit eighteen months’ pay.\textsuperscript{151}

(c) THE MIGUEL CASE OF 1966\textsuperscript{152}

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

The practice of the ROC government in handling rape cases is to recall the waiver of jurisdiction under the SOFA-ROC.\textsuperscript{153} However, the US offenders generally seem to be aware that prosecution of such cases depends on the victim’s filing a complaint.\textsuperscript{154} Such offenders usually have been able to make a monetary settlement with the victim in exchange for withdrawal of the complaint prior to formal prosecution.\textsuperscript{155}

\textbf{VII. Concluding Observations}

The difficulties which arose in the process of negotiating the criminal jurisdiction sections of the SOFA-ROC primarily resulted from the different philosophies of criminal justice and procedure in the US and the ROC. In the US, the emphasis is on the protection of the accused and the result is that some criminals

\textsuperscript{149} Id.
\textsuperscript{150} Criminal Code, Art. 236.
\textsuperscript{151} 38 CMR 460 (ABR 1966); Pet. den. 17 USCMA 653 (1966).
\textsuperscript{153} Legal Status of U.S. Forces, supra note 120 at 164.
\textsuperscript{154} Criminal Code Art. 236.
\textsuperscript{155} It should be noted that such a settlement of a rape case is not unusual even between Chinese citizens.
avoid conviction and punishment. In the ROC, on the other hand, the purpose of the criminal justice procedure is to find and punish the real criminal in order to maintain social order and to do justice to the victim. According to the Chinese point of view, it is unreasonable that an accused should be specially protected while the interests of maintaining public order and doing justice to the victim can be disregarded. The criminal justice system in the ROC, similar to that of most civil law countries, is an inquisitive one, \(^ {156} \) differing substantially from the Anglo-American adversary model. The Chinese judges play a very active role in the ROC criminal system. In contrast, lawyers fulfill a much more limited role.

While substantive Chinese criminal law was not at issue during the SOFA-ROC negotiations, one must realize that the criminal law of a country reflects certain traditional societal values. Where traditional values are not readily discernable in legal provisions, they may be reflected in judicial practice. Under traditional Chinese law and judicial practice, a person who kills another, regardless of reasons, must receive some punishment. \(^ {157} \)

The basic rationale for the necessity of punishment in any homicide relates to the Chinese cultural view of human relationships. When one person has killed another, the cosmic harmony is upset and something must be done to restore it. If equilibrium is not restored, the entire harmony of the society would be disturbed. Punishment of the killer is one method of restoring the cosmic harmony. Under traditional law, a person using foul language against another person and causing the latter to commit suicide would be responsible for the offense of homicide. \(^ {158} \)

To a certain degree, this attitude toward homicide still persists today. Thus, in a traffic accident case involving the death of a pedestrian, the driver must receive some punishment, \(^ {159} \) usually at least six months' imprisonment, regardless of the causes of the accident. In view of the foregoing, it is not surprising that the Chinese people were very indignant at the acquittal in the Reynolds case. \(^ {160} \) This indignation was further aggravated by the

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156. See generally, ROC Legal System, supra note 41.
157. Law in Imperial China, supra note 101 at 43.
158. Id., at 232.
159. Typically, at least six month's imprisonment.
160. See § III, supra.
fact that no compensation was made by the killer or the US authorities to the victim's family.¹⁶¹

After the SOFA-ROC entered into force in 1966,¹⁶² the Chinese side assumed jurisdiction over homicide cases where the victim was a Chinese. In every homicide case tried by Chinese courts, the US killers received some punishment. In the meantime, in most traffic accident cases, a settlement of compensation with the victim's family was usually made before the court passed final judgment. The imprisonment sentence rendered against an American in a traffic accident case usually could be replaced by payment of a fine. In general, the Chinese people appeared to accept such a disposition of traffic accident homicide cases committed by Americans, although the lack of actual imprisonment of Americans in such cases was not entirely satisfactory.

The Chinese courts treated American defendants quite leniently during the fourteen-year history of the SOFA-ROC. This is partially because the Chinese judges feel that US forces came to assist the defense of Taiwan against Communist aggression and thus deserved preferential treatment. Another reason is the traditionally cautious treatment of cases concerning aliens, in order to impress the aliens with the fairness of Chinese justice and avoid international disputes.

On the other hand, the Chinese courts have usually imposed especially severe punishment on Chinese who committed offenses against members of US forces. The reasons for doing so are similar to those stated above. Moreover, such offenses also affect the international reputation of the Republic of China and therefore it is thought that those offenders should receive a more severe punishment than ordinary offenders.

¹⁶¹ See generally, SOFA-ROC Criminal Jurisdiction, supra note 20, at 9.
¹⁶² SOFA-ROC entered into force on April 12, 1966.
Appendix A

ERNEST W. BRUCH,

vs.

CLIFFORD ALEXANDER, Secretary of the Army of the United States of America,

July 6, 1977
Case No. 74-125-C5)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT

This case involves the misfortunes of a 17-year-old boy induced to enlist in the United States Army, with the consent of his next of kin, by the flamboyant representations of the recruiting agency that great opportunities for personal improvement and advancement awaited him in the service.

Petitioner Bruch was taught basic medical care for ten weeks, then went to L.P.N. School. He was sent to a hospital at Fort Leonard Wood for six months and was from there shipped to South Korea. There he was assigned to serve at a missile base some distance from any center of population and became the only medical corpsman at that installation. This teenager engaged in a relationship with a young Korean female which was countenanced by his superiors. He carried on the liaison at a location in a village just outside the perimeter of the base. It was this activity on the part of the petitioner, apparently supported by American-made cigarettes, that brought about his situation. It was a serious crime under Korean law for a Korean to possess or use American
cigarettes. That the responsible officers at the base tolerated the existence of brothels which teenage soldiers were permitted, if not encouraged, to patronize, should not receive the approbation of this or any other court. Certainly, this case will not be one which will be mentioned by recruiters or held out as a recommendation to prospects for the military service.

The record indicates that this youngster was the only medical corpsman at the base and when the Korean policeman who had suffered a heart attack at a place a mile distant from the base was brought to the base for resuscitation, it became the lot of petitioner to administer aid. Petitioner gave the police officer mouth-to-mouth resuscitation. This failing, he undertook closed-heart massage, which method he had been taught but had not previously undertaken to use. Closed-heart massage is a violent, though frequently successful, treatment. In this case, some of the policeman’s ribs were broken, a frequent consequence of closed-heart massage. It was this condition that produced the charge that the policeman had died from “multiple internal injuries” from the assault upon him. This widely publicized story and the additional false charge that the policeman had suffered a severe blow on the head laid the foundation for the formal charges brought against the petitioner.

In spite of clear evidence to the contrary, petitioner was charged and found guilty of having struck the deceased on the head and with kicking him in the left chest region with his feet, causing him to die. Defense counsel suggest that the Court should realize and be aware of the fact that in Korea the civil law system prevails. The fair implication of this is that had the trial of petitioner taken place under the common law system, a different result would have been obtained. The common law system exists in only a few countries. It has existed in the United States of America for more than two hundred years without any widespread support for a change. The fact that this petitioner was tried under a system of which he had little, if any, understanding, and where a language was used that he didn’t comprehend scarcely justifies the findings made by the Korean court which are contrary to the facts in the case.

For a better understanding of the issues in the somewhat complicated case, pertinent portions of the Pretrial Order are set forth as follows:
3. **Nature of the Case.**

Count I is a claim by way of Habeas Corpus presently dismissed subject to pending motion to reconsider addressed to the Court. (This count was dismissed by the Court.)

Count II is a claim for injunctive and affirmative relief in the nature of mandamus.

Count III is a claim for declaratory judgment relief under the U.S. Constitution and for money damages.

4. **Plaintiff's Factual Contentions.**

Plaintiff is a citizen and resident of Kansas. He alleges the wrongful refusal of the military to discharge him on March 29, 1974, the termination date of his enlistment. He alleges that his continued restraint by Defendant is by reason of his prosecution by the Republic of Korea (ROK), to which jurisdiction he was delivered by the U.S. Army after the Army had made a full and independent investigation of the facts and circumstances surrounding the allegations of the ROK indictment, and determined or should have determined that the ROK charges were not true, and that the facts alleged by ROK could only be established by perjured testimony of officers of ROK, all in violation of Plaintiff's due process rights under the Constitution of the United States. Plaintiff alleges that he was tried in a ROK court and perjured testimony was used to convict him and he was sentenced to serve a commitment to a ROK prison, this under a treaty or agreement which deprives him of his constitutional rights as a United States citizen.

Plaintiff contends that by delivering him for trial to a foreign government after the investigation had concluded, and facts and circumstances developed therefrom deprived him of due process by the affirmative acts of the Defendant.

Plaintiff further alleges that the Defendant and his agents deprived Plaintiff of constitutional rights by delivering him to ROK authorities when said agents knew he would not be accorded due process, in that agents knew he would not be afforded an English translation of the dossier or ‘protocol’ considered by the ROK court; that he would not be represented in the investigative stage of the development of the ‘protocol’ which said agents knew was the significant
time when witnesses are confronted and said agents knew was a critical part of the trial in the sense of the application of justice to which he is entitled under U.S. Constitution, and when said agents knew that the 'trial' which could be 'observed' would consist of 'form' and not 'substance'; that the burden of proof would not, in fact, be upon the prosecution, but upon the Plaintiff. Plaintiff alleges further deprivation of his rights occurred in that Defendant and his agents failed and refused arbitrarily and capriciously to request a waiver of jurisdiction from ROK and failed and refused to request the Department of State to press such request through diplomatic channels.

Plaintiff further alleges that Defendant and his agents failed to provide Plaintiff with competent counsel in circumstances where he could in any real sense aid in his defense under all the circumstances known to agents and the Defendant. Plaintiff further alleges that Defendant and his agents were and are required by Federal law to protect to the maximum extent possible his rights in these circumstances, but that said agents have on numerous and diverse occasions failed and refused to comply with regulations of the Department of Defense and its policies intended to carry out the purpose of the Federal policy and to protect Plaintiff in that not by way of limitation but example Defendant and his agents have failed to follow said regulations and policies in at least the following ways:

(1) Defendant admits that he did not follow the exact procedure specified in AR 635-200, Section III, 2-11, and the Plaintiff alleges that Plaintiff executed an affidavit as a direct result of the failure to follow said regulations, and duress and coercion upon the Plaintiff, and Plaintiff alleges that said affidavit was not knowingly and voluntarily executed by reason of the violations of said regulations by Defendant's agents.

(2) . . . (that) during plaintiff's extending interrogation by the Korean Prosecutor . . . plaintiff's Korean attorney slept.

(3) Plaintiff further alleges that Defendant's agents failed and refused to comply with EA Regulation 27-2, 8.c., and USFK PD 7-19 in allowing Major David Dodge, M.D., to depart ROK for the U.S. without giving Plaintiff opportunity
to preserve testimony of ten (10) days written notice of the
intention of said individual to depart ROK before his
departure date.

(4) Plaintiff further alleges that Defendant and his
agents failed to comply with AR 27–50 in many ways
including an attempt to grant plaintiff the form of com-
pliance therewith while refusing to apply the substance of the
protections provided therein in arbitrarily and recklessly
failing to review in any depth the investigative information
in their hands, which, if they did not know they should have
known; in making decisions thereunder with reference to
suggesting in writing that a fair trial would be, and had
been, provided to the Plaintiff; and in failing to have timely
personal review by the commanding officer of proceedings, as
specifically required therein, thereby evidencing additionally
the concern for form and failure to provide substance to
Plaintiff by Defendant and his agents due to facts and
circumstances relating to this incident.

Plaintiff further alleges that Defendant has a non-
discretionary ministerial duty to discharge him with honor,
and that his orders under which he returned to this country
do not speak the truth as to his rightful status. He alleges
that Defendant assumes the right to deliver him to the ROK,
which Defendant will do unless restrained, and that he will
suffer irreparable damage by unjust incarceration in a
foreign jail by the complicity of Defendant and under
Defendant’s authority in violation of Plaintiff’s right,
privileges and immunities as a citizen. Plaintiff asks that
Defendant be permanently enjoined from returning him to
authorities of ROK and such other and additional mandatory
orders to Defendant as the Court determines proper in the
premises.

Plaintiff further alleges that Defendant and his agents
publish the Pacific Stars and Stripes newspaper and that
they did suffer said paper to publish false and inflammatory
statements regarding Plaintiff and the incident at issue
thereby aiding in the development of an atmosphere
injurious to Plaintiff in relation to diplomatic initiatives on
his behalf and affecting in an injurious way the judgments
and exercise of so called discretionary decisions of Defend-
ant’s agents.
Plaintiff further asks determination that he is entitled to an honorable discharge from the U.S. Army with all prerequisites pertaining to his service therein, and that the acts of Defendant were wrongful in refusing to grant his discharge since March 29, 1974. Plaintiff further asks the Court to determine that Defendant and his agents have wrongfully, outrageously and in reckless disregard of Plaintiff's rights, arbitrarily and capriciously failed to exercise Defendant's rights to the extent that Defendant is stopped from claiming jurisdiction over the person of the Plaintiff and from refusing to discharge Plaintiff.

4.1 Defendant's Factual Contentions. The Defendant contends that:

a. Plaintiff was and is properly a member of the United States Army during all times pertinent to this case by virtue of an enlistment extension agreement voluntarily entered into by him with Defendant or his authorized representatives.

b. Plaintiff was validly charged, tried, convicted and sentenced by a Korean civilian court pursuant to the extant status of Forces Agreement (SOFA) between the United States of America and the Republic of Korea.

c. Defendant's actions in connection with Plaintiff's surrender to Korean authorities for trial and the trial itself were in substantial conformance with his duties as set forth under the SOFA and applicable U.S. Army regulations. In addition, Defendant claims that his actions in this regard, as well as those of his subordinates, were discretionary and not arbitrary or capricious, nor in any way violative of Plaintiff's constitutional rights.

d. Resolution of certain of Plaintiff's factual contentions will require this Court to review, de novo, the Korean criminal proceedings, and Defendant contends that this Court is without jurisdiction to conduct such a de novo review. See Defendant's Motion for Summary Judgment (Docket 23).

e. The relief sought by Plaintiff is barred by the doctrine of sovereign immunity because it would require affirmative action by Defendant resulting in a breach by the
United States of America of its obligations mandated by its treaty with the Republic of Korea.

f. Since the date of the incident leading to the Korean trial (May 22, 1973) Plaintiff has received certain benefits from the United States Government, the acceptance of which constitutes Plaintiff's enlistment in the United States Army as a matter of law.

7. Issues of Fact.

a. What were the acts of Defendant and his agents and authorized representatives relating to Plaintiff that bear upon the Plaintiff's constitutional rights in this case.

b. What Government benefits have accrued to Plaintiff since May 22, 1973, and up to the date of trial.

c. Whether Plaintiff exhausted available administrative remedies in connection with his surrender by U.S. Army authorities for prosecution by Korean authorities.

d. Whether the Defendant or his authorized representatives have complied with the following regulations in connection with this case:
(1) AR 27-50
(2) AR 635-200, § III, ¶ 2-11
(3) EA Reg 27-2, ¶ 8.c and 9
(4) USFK Policy Directive 7-19

e. Whether Plaintiff's execution of the enlistment extension agreement was voluntarily made.

8. Issues of Law.

a. Has Defendant or his authorized representatives violated constitutional rights of Plaintiff.

b. Has Defendant or his authorized agents acted contrary to their own regulations with relation to Plaintiff.

c. Whether U.S. Army Regulation 635-200, § III, ¶ 2-11, confers any individual rights upon or grants any benefits to a member of the U.S. Army.
d. What prejudice, if any, attached to Plaintiff as the result of any failure by the Defendant to comply with U.S. Army regulations.


f. Whether the SOFA, standing alone, grants authority to Defendant to retain custody and control of Plaintiff beyond the period of his original enlistment.

g. Whether the U.S. Government must abrogate a treaty obligation to return Plaintiff to Korea if U.S. Army officials have failed to comply with any of the provisions of U.S. Army regulations involved in this case.

h. To what extent, if any, does this Court have jurisdiction to review, de novo, the Korean criminal proceedings involved in this case.

The Court has reviewed the record and files in the case, has considered the extensive and well-prepared briefs and arguments presented by counsel, the requests submitted for Findings and Conclusions; and after being fully advised in the premises, makes the following:

**FINDINGS OF FACT**

1. Petitioner Ernest W. Bruch, as a result of persuasive and extensive advertisement by the United States Army, enlisted in the United States Army on September 30, 1970, for a term of three years. At the time of his enlistment he was a resident and citizen of the State of Kansas and all preparatory paper work for his enlistment was completed in the State of Kansas. On April 1, 1971, he extended his enlistment to three years and six months. He was assigned to and reported to a station in the Republic of Korea on April 30, 1972. On November 20, 1972, he made written application which was accepted to remain in Korea for ten months beyond his original expiration date of his assignment to and including March 29, 1974.

2. From the date of his enlistment to the time of trial, Bruch performed as an excellent soldier. It is not denied that Bruch was trained as an emergency medical technician and a licensed practical nurse and served as a medical corpsman in his assignment in Korea and was so serving on May 22, 1973.
At the time of filing of the complaint herein Howard Callaway was the appointed Secretary of the Army, which post he had had at all times pertinent to this claim. Subsequently, he was replaced and the named defendant was substituted in the name of Martin Hoffman, subsequent Secretary of the Army. With the commencement of 1977, the named defendant has again been substituted to reflect the presently acting Secretary and appointed Secretary of the Army, Clifford Alexander, who ratifies by his appearance herein by counsel the acts and omissions of the agents of the United States complained of by the Petitioner Bruch.

In the Republic of Korea there is an official agency whose representatives are known as Korean Monopoly Police. Their fundamental responsibility is to enforce the prohibition against the sale or smoking of American cigarettes or other foreign cigarettes by Korean nationals unless a proper customs tax or other tax is paid to the government of Korea.

On May 16, 1973, two Korean Monopoly Police in civilian clothes came into the village which had been established immediately outside the military compound at which Bruch was stationed in the Republic of Korea. While in the village, a girlfriend of Bruch was smoking an American cigarette. She saw the Monopoly Police in civilian clothes approaching her and threw down the cigarette and smashed it under her heel. The Korean Monopoly Police slapped her around. As this was going on, Bruch came within view and he saw his girlfriend being slapped by an unidentified apparent Korean civilian. He became angry and grabbed one of the men and shook him a little, but as a result of the blandishments of his girlfriend and an older woman with whom she lived, he released the Korean Monopoly Policeman and had no further contact with them. Shortly thereafter other American soldiers ran the two Koreans out of the village and they made threats that they would return.

6. On May 22, 1973, at about 11:30 a.m., Bruch was in the mess hall when he received a telephone call from the gate guard to the effect that he was wanted at the gate. Bruch went to the gate and found that there was a message that there might be some trouble down at his girlfriend’s house. Bruch returned to the mess hall and sought out an acting sergeant of the MPs, Private Kuhar, telling him there might be some trouble at his girlfriend’s house and he was going down there. He asked Kuhar to come with him. They followed behind Bruch through the gate and the MPs saw Private Collettee who they knew had a girlfriend that lived in the vicinity of Bruch’s girlfriend and asked him if he wanted to come
along, stating that there might be some difficulty. Bruch, in the meantime, had stopped in at a pool hall and picked up a pool cue which was an accepted protective device in the civilian village and headed off in a hurry to his girlfriend’s house. When Bruch arrived at the girlfriend’s house she was not present and he talked to an old Mamson who told him she didn’t know where the girl was. Bruch was upset and puzzled by the circumstances and smacked the house with the pool cue, causing it to break and leaving a short piece of the end of the cue in his hand. As Bruch commenced to walk back up the main road to the compound he passed Kuhar, Protzeller and Colletee, who had just arrived. They turned and followed him toward the compound.

7. The Korean Monopoly Police made no claim that they were in the village for the purpose of investigating or apprehending any United States soldier. On the date of May 22, 1973, nine Korean Monopoly Police had come to the village for the express purpose of arresting petitioner’s girlfriend. As Bruch and the other soldiers proceeded up the roadway toward the compound through the village, they were surrounded by the nine Korean Monopoly Police who attempted to impede their progress. As a direct result, there was a shoving match between the Korean Monopoly Police and, by that time, five American soldiers.

8. Within a very short time of this altercation other American soldiers commenced to appear, and the Korean Monopoly Police left the vicinity, some of them running. No one gave chase to them.

9. One of the Korean Monopoly Police, a 47-year-old man by the name of Kim, ran with some of his colleagues up over a more than 400-foot hill and for a period of 15 to 20 minutes for a distance of about one and one-half to two kilometers. At that time Kim and his fellow Monopoly Police looked back and, seeing no one following them, sat down under a tree. Mr. Kim became ill and had a serious heart attack. Shortly thereafter, the Korean Monopoly Police flagged a United States jeep and the deceased, Mr. Kim, was brought to the compound where Bruch was the medical corpsman. Bruch gave mouth-to-mouth resuscitation and closed-chest heart massage for a period of fifteen to twenty minutes until the Medivac helicopter could arrive to take the injured man to the hospital.

The closed-chest heart massage is an accepted treatment for a person whose heartbeat has ceased. Petitioner had been instructed in its use but had never before actually administered it. The massage is violent and frequently results in breaking the ribs on
the left side of the rib cage. That result occurred during petitioner’s effort to revive the Korean officer. Petitioner did not intend by the recognized appropriate treatment to injure the Korean but only intended to restore his heartbeat. The broken ribs caused by the massage was the most serious charge against petitioner by the Korean authorities.

10. The next day, May 23, 1973, the original five soldiers identified as involved in the incident saw two lawyers at the Staff Judge Advocate’s Office at Yon Son Garrison, Seoul, Korea. The two lawyers were Major Charles Stockstill, appointed to represent them with reference to any military charges or investigations which might be made, and Captain Jablonski, representing the Status of Forces Division of the Staff Judge Advocate’s Office. Upon returning to their unit, Bruch and two others were ordered confined to the U.S. Army Stockade at Ascom, Korea, under orders of Brigadier General Haskins, the 39th Brigade Commander.

11. Beginning on May 24, 1973, reports of the incident purporting to set forth the facts were published in the Pacific Stars and Stripes, a newspaper published, authorized and paid for by the Department of Defense with the involvement of the Secretary of the Army. The policy established by the Department of Defense (Ex. D-1) requested that the news published shall be factual and objective, that good taste shall prevail in selection and handling of news and that morbid, sensational or alarming details not essential to factual reporting shall be avoided. But contrary to this established policy articles purporting to be news regarding the incident were published. Said reports stated that the Korean Monopoly Police were attempting to stop an alleged black-market exchange at the time of the incident. No evidence from anyone in any of the trials involved in this matter indicate that there is or ever was any substance to such a claim or statement. At about the same time, the English language newspapers published in Korea had articles published in them titled with such headlines as “GI’s Beat Government Official to Death.” Defendant’s Exhibit X discloses that the message traffic relating to Petitioner’s dilemma was set forth in a transmission from Korean Army Headquarters to Washington, D.C., in June 1973. Exhibit 17 published in the Stars and Stripes, recited that the autopsy showed that the Korean died of internal injuries and a severe blow to the head, in fact the message related that the Judge Advocate in Korea had been informed that the autopsy report had not been
completed and that no report known to the United States Military justified that comment.

12. The May 25, 1973, Japan Daily News reported in the headlines that “Seven GIs Kill Korean Official.” By June 3, the Pacific Stars and Stripes was reporting that they had been advised as a result of the autopsy that the man “died from multiple internal injuries and a severe blow to the head” and the same was reiterated on June 4, 1973 by the Pacific Stars and Stripes and on the sixth of June, 1973. On June 7, 1973, Pacific Stars and Stripes reported that Korea would exercise criminal jurisdiction and that the autopsy report revealed that the deceased had died of “multiple internal injuries and a severe blow to the head suffered during the assault.” The autopsy results specifically do not support the report that there was a blow to the head suffered by the decedent or that he died of multiple internal injuries and the agents publishing the Pacific Stars and Stripes knew or should have known that the report was inflammatory, prejudicial to the Plaintiff Bruch and was not true. The same was published with reckless disregard for the rights of Bruch and the others involved.

13. Pursuant to the message traffic staff communication from the designated Commanding Officer’s Office sent to Respondents’ Washington D.C., office, the incident giving rise to this action, “has received widespread publicity of an adverse nature in the Korean National news media and in the Pacific edition, ‘Stars and Stripes’ newspaper.” According to the message traffic sent under date of June 7, 1973, also distributed to the State Department, “June 7 Stars and Stripes story says an autopsy revealed the dead official died of injuries suffered in the assault. However, according to U.S.F.K. Judge Advocate the Autopsy report has not been completed.”

14. On May 24, 1975, Bruch and others were taken to the police station at An Yang, Korea. They were accompanied by a United States representative and their Korean attorney, who was then provided for them by the SOFA Division of the Staff Judge Advocate’s Office. The petitioner, on advice of counsel, refused to answer any questions. However, the five soldiers were at the police station for between two and three hours, during which time they were confronted by the witnesses against them — the Korean Monopoly Police and others purported to be witnesses to the incident.

15. On May 30, 1973, a line-up was held at the missile compound where Bruch was stationed. The three soldiers from the
stockade, including Bruch, attended the line-up. The Korean Monopoly Police involved in the incident went one by one through the line-up to identify the men who were involved in the incident. They first claimed that they had not seen the accused at the police station the week before but subsequently admitted they had. At the time and place, the Korean Monopoly Police at the line-up for the purpose of making identification did purposely try to subvert the line-up and the identifications there by trading information. As a result, the Korean Criminal Investigation Department (CID) and American CID reprimanded the Korean Monopoly Police and separated them so that they could not succeed in their effort to subvert the line-up and make a farce of it for their benefit.

16. On June 7, 1973, Bruch and another soldier by the name of Buchanan were released from the stockade to report to the Korean prosecutor's office in Seoul to submit to interrogation. During this extended interrogation of Bruch by the Korean prosecutor, Bruch's Korean attorney slept. On June 8, 1973, Bruch and others returned to the Korean prosecutor's office for further questioning.

17. On June 13, 1973, Bruch was released from the stockade and reassigned to duty at another compound within his battalion.

18. On June 18, 1973, Bruch reported to the Korean prosecutor's office with Captain Jablonski and was informed that he was to be arrested by the Korean Police and turned back over to American custody. No charges were brought against Bruch on said day at the time of arrest.

19. On June 20, 1973, an Article 32 Investigation Hearing was commenced, lasting for two days. The investigating officer's report was submitted under date of July 26, 1973, to the convening authority. In it, the investigating officer found "it is the conclusion of the investigating officer that the actual fighting was initiated by the Korean agent against Pfc. Collette, and that Sp4 Bruch and Pvt. Buchanan were drawn voluntarily into the action. It does not appear that Pfc. Kuhar, Pfc. Collette or Pfc. Proteller actively engaged in fighting the Korean agent."

20. At the Article 32 Investigation, under oath, Major D. L. Dodge, M.D., a pathologist, testified that he performed the autopsy on the Korean, that the man suffered very little trauma, and that he had no head trauma. Major Dodge testified that the conclusion of the autopsy is that the deceased suffered trauma due to the resuscitation attempt by reason of the closed-chest heart massage that Bruch attempted to use. The physician testified that the deceased died from a cardiac arrest secondary to an arrhythmia.
sustained due to physical shock and exertion. The pathologist testified that the decedent was not hit on the head whatsoever, and that he doubts that the man was beaten. He further testified that it would be impossible for this man to run if the chest damage was done prior to the running and that is the reason that he believes the damage to the chest was done during the resuscitation attempt after the man had died.

21. At the Article 32 Investigation, the houseboy, Kim Cong Ha repudiated the statement made to the Korean Police as being a true statement of his statement made to them.

22. At the Article 32 Investigation, the witness, Yi Sun A. testified that the words placed into her statement by the Korean National Police were not what she had told them.

23. On July 23, 1973, the Republic of Korea indicted Bruch and others. After June 22, 1973, Major Charles Stockstill, the defense counsel for any charges pending in the military, had completed his formal involvement until such time as charges might be brought against his clients including Bruch. However, after that time, Major Stockstill did specifically bring to the attention of the SOFA Criminal Division and particularly to Jon Yi Lee, Ki C. Lee and Captain Jablonski the information that exculpatory facts were established at the Article 32 Investigation. Stockstill urged that a clear injustice would result from any trial by the Koreans or by ceding jurisdiction to the Republic of Korea. He cited the flagrant inconsistencies of the claims and statements of the Republic of Korea officials, the autopsy reports and testimony of Major Dodge. The SOFA Criminal Division responded to Major Stockstill be indicating absolutely no interest in the claims of injustice. At that time, Major Stockstill and all of the lawyer representatives of the SOFA Criminal Division were conscious of the fact that there had been in modern history no case of a trial of a United States soldier by the Republic of Korea courts where the indicted person had not been found guilty at the first trial by the Seoul District Criminal Court.

Two apparent exceptions are reported by the Country Law Study. They prove the rule, not any exception. In reference to the defendant H. K. Smallwood who appears in the citations of Federal Cases in the American Reporters, in the case of Smallwood v. Clifford, the diplomatic efforts exerted on appeal after confirmation of the determination of guilty by the trial court in the intermediate appellate court took place in the Supreme Court where the Supreme Court of Korea found “reasonable doubt” as to the conviction of Smallwood. The second defendant
proving the rule not the exception was the case of *Abacrombie*
which the record shows was a case in which a soldier was alleged
to have killed a Korean female. On trial he was found guilty. At
the intermediate appellate court he was found guilty. The major
evidence, which was the accumulation of vomit over the body of
the deceased which had flecks of blood in it, was tested and
showed the blood to be type AB. Both the decedent and accused
had type O blood. This real evidence, having been rejected by both
the trial court and the intermediate court, was considered by the
Supreme Court of Korea after substantial urging and diplomatic
pressures by the U.S. Military to the extent that at the Supreme
Court level a new trial was granted and the District Court under
the urging and decision of the Supreme Court found Abacrombie
not guilty at his second trial.

24. AR 27-50, under the mandate of the Reservations as
agreed to by the Senate of the United States on July 15, 1953 (AR
27-50, Page 14), and the regulation pursuant to such reservations
(AR 27-50, Page 3, ¶ 3), requires the preparation of a study of the
law of the country under SOFA and a comparison thereof with the
procedural safeguards of a fair trial in the state court of the
United States. Such a Country Law Study was prepared under
date of May 1, 1971. The basis for the conclusions of that Country
Law Study was substantially changed with the change in the
Constitution of the Republic of Korea, which became effective on
December 27, 1972. A supplement to the Country Law Study was
prepared a year and one-half later by the Judge Advocate for the
commanding officer. The Country Law Study for Korea and
supplement purport to conclude that a fair trial may be accorded a
serviceman under Korean Law.

25. The Plaintiff, at his trial before the Korean Court, was
not provided with an English translation of the dossier or the
protocol which was used in evidence as the fundamental
prosecutor’s case against him.

The record before the Court establishes affirmatively that the
petitioner was not afforded an opportunity to hear or see much of
the evidence upon which the trial court and appellate court made
their decisions. The record establishes that even then testimony of
the petitioner himself was in the record and considered by the
Court without any means by which he could know the content of
the evidence. Bruch gave two extensive interviews and statements
to the prosecutor. The prosecutor summarized in Korean that
which he considered to be the statement of Bruch as a part of the
dossier. At the trial Bruch was asked whether he had told the
prosecutor the truth and he confirmed that he did. His statement as then presented to the court in the dossier became evidence which had never been translated. The contents of that statement were not known to the petitioner Bruch. Substantial other evidence before the court and considered by it was entered into the record in the same manner. Bruch does not know and the trial observer who purported to monitor and determine whether a fair trial was had does not know whether the autopsy and other documentary evidence was considered by the court. The trial observer observed the oral testimony and did not have access to the substantial part of the record of evidence upon which the court relied in making a decision and therefore cannot know the nature and extent of the evidence upon which the petitioner here was convicted.

26. According to the Country Law Study dated May 1, 1971 page 2, “Procedurally it is of particular note that in Codal Systems the preparation and development of a case occur primarily in the prosecutor’s office; the courtroom plays the final but less active role. This difference from Anglo-American procedures colors much of the discussion of fair-trial safeguards herein and requires that the administrators of the SOFA must be closely involved in each case from its inception.”

The witness Ki C. Lee testified that he did not maintain close involvement in the case from its inception, and that his sole responsibility was that as trial observer. Captain Jablonski, who was the military legal adviser, refused to testify to that or characterize his involvement as being closely involved in the case from its inception. The respondent and his agents failed to follow their own obligation as set forth in their Country Law Study.

27. According to the interim report of the trial observer for the hearing held on November 6, 1973, the defense attorney advised the court that he would call Dr. Dodge, the pathologist, as one of a number of witnesses at the next scheduled hearing on November 27, 1973. On November 27, 1973, the defense counsel withdrew the request to call Dr. Dodge for the reason that Dr. Dodge was out of the country prior to November 6, the date when the attorney first advised the court he wished to call him.

28. In February of 1974, Bruch met with Captain Jablonski of the SOFA Criminal Division, at which time the question was raised as to the termination date of Bruch’s enlistment. Jablonski told Bruch that he had two choices. He either signed an indefinite extension of his enlistment on the form provided in 635-200, § III, or upon the 29th of March, 1974, the American Army would call
up the Koreans and have them meet Bruch and his personal property at the gate and the U.S. Army would turn him over to ROK possession and terminate further legal counsel or other aid to Bruch.

29. Captain Jablonski unilaterally determined that Bruch was not entitled to the protections provided by AR 635-200, § III, implementing the policy of AR 27-50 and made no effort to fully comply with the provisions of that regulation. Subsequently and on a date not established on the instrument, Bruch did execute an affidavit in the form set forth by AR 635-200, § III, as a direct result of the failure of the agents and representatives of the respondent to fully advise him of his rights under the said Army regulation and by reason of the coercion and duress and misrepresentation inherent in the statements of Captain Jablonski to Bruch upon which Bruch relief to his detriment.

30. Pursuant to the Resolution of Ratification with Reservations agreed to by the United States Senate on July 15, 1953, § III, “If, . . . 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, the commanding officer shall request the authorities of the receiving state to waive the jurisdiction. . . .” As implementation of that Congressional state policy, AR 27-50 has been issued and the policy of the Department of Defense set forth therein is, “To protect, to the maximum extent possible, the rights of United States Personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.” In implementing that policy under Army Regulation 27-50, page 3, ¶ 4, the procedure provided is as follows:

“1. In cases where it appears probable that (1) release of jurisdiction over U.S. Military Personnel will not be obtained and (2) that the accused may not obtain a fair trial,” then the designated commanding officer is obligated “personally” to determine if such danger exists and to proceed through diplomatic channels and otherwise for the maximum protection possible to the U.S. Military Personnel.

31. The attorney for Bruch was not allowed to be present during the interrogation and development of the statements for the prosecutor’s dossier which was submitted to the panel of judges trying the case prior to the case as a basic part of the prosecution.

32. Pursuant to AR 27-50, it is the personal responsibility of the designated commanding officer to determine whether there was any failure to comply with procedural safeguards secured by
pertinent SOFA agreement and whether the accused received a fair trial under all the circumstances. According to paragraph 5.f, page 5, that responsibility may not be delegated. According to the affidavit of Major General Richard G. Stillwell, the appropriate designated commanding officer in Korea at that time, the only information which he reviewed in attempting to determine whether or not there was a fair trial was the trial observer's report. None of the substantial irregularities known to the other agents of the respondent were submitted to him nor, pursuant to the words of the affidavit, did he make any inquiry as to whether other facts would bear upon whether it was probable that Bruch might receive a fair trial. In addition, the affidavit reflects that General Stillwell was required by the regulation to review the trial observer report on January 18, 1974, but that he did not in fact review it until July 18, 1974, one month after this case was filed and that such delay is a prejudicial breach of the Rebuttal.

33. Pursuant to the memoranda made by Ki C. Lee, the trial observer of Bruch's trial, under dates of June 20, 1973 and March 26, 1974, it is clearly evidenced that the practice in the relationship of SOFA Criminal Division with the courts and prosecutors of the Republic of Korea involved barter of many things other than the merits and rights of the parties. In the March 1974 memoranda, Ki C. Lee describes that the delay of a trial of one U.S. soldier was attributable to the U.S. Government request for the return from the Republic of Korea of 18 air conditioners, and that but for the request the case would have been tried the preceding December. In the June 20, 1973 memoranda, Ki describes that in regard to the three soldiers against whom indictments were “suspended,” the act was attributed to being “helpful to Ki’s office” and not the merits.

34. The entire record evidences that respondent's agents anticipated and believed that if Bruch were indicted he would be found guilty, but in all likelihood they anticipated that he would be granted a suspended sentence by the court. Such general information and understanding was conveyed to Bruch by the SOFA Administrative Agent of the respondent.

35. The relations between respondent's agents and the ROK were essentially based upon expedience and failed to provide “maximum extent possible” protection to Bruch.

36. Under all the evidence it is established and the government is convinced that the “trial” provided to plaintiff Bruch under all of the circumstances established in the record was one in which Bruch was granted the semblance of the protections
of the form of fair trial, but one in which he was denied the substance of such safeguards and protections. The record reflects that the designated commanding officer and the court martial’s convening authority failed to seek or obtain for their consideration all of the facts and circumstances which were readily available to them which they are required by regulation to consider in order to determine in their judgment an informed opinion as to, first, the likelihood of a fair trial by the Republic of Korea, and, subsequently, whether a fair trial was provided under all of the circumstances. This failure to consider the facts and circumstances known to other of the respondent’s agents under their command represents a clear failure to provide to Bruch the protection which the regulations require. The record reflects that the nondelegable judgments, in the first instance of the court martial’s convening authority and subsequent to the trial, of the designated commanding officer were not and could not represent the required informed judgments because the significant facts and circumstances relating thereto were not considered by such officers and their action of failure to act under their discretion without the requisite facts and circumstances in their possession was arbitrary and capricious and denied to Bruch his statutory and regulatory protection implementing the due process rights of Bruch.

37. Bruch received his regular pay and allowances up to and including the end of May, 1974, at which time he left Korea on emergency leave for his home in Kansas, by reason of the death of his father. Thereafter, Bruch received no pay from the respondent or his agents, excepting only that the respondent continued mistakenly to pay two allotments until sometime in August of 1975, when said allotments were unilaterally terminated by the respondent’s agents. The amounts paid to Bruch by mistake were in the sum of $1,500.00, which should be repaid to the respondent by Bruch.

38. The indictment (Exhibit P) discloses that Bruch was charged as follows:

“1. The accused Bruch hit Mr. Ahn Kwang-mok by his head, and the left elbow with the pull stick, and then kicked him by the left chest region with his right feet, while the accused Pvt. Willie B. Buchanan hit Mr. Pak, Young-soo, also the Monopoly Official, by his left elbow with the pull stick, and kicked three-four times on the upper part of the left thigh, flourished fist, inflicting injuries on Mr. Ahn, cuts on
head and left chest which needed 10 days medical treatment, and cuts on the femoral region, etc., to Mr. Pak, which also needed 10 days medical treatment.

“2. At the approximately same time, under the influence of about 10 U.S. soldiers who came later, the accused Bruch hit Mr. Kim, Sung-duck, the Suwon Monopoly Official, by his back side of neck with the pull stick, kicked him on the chest region two or three times, pulling him with his hands, while the accused Buchanan (sic) hit the said Kim by his back twice with the pull stick to break it, and then he continued to hit him by the neck region with a tree rim (sic) two or three times, and the accused Collette hit the said Kim by his back shoulder two or three times with a tree rim (sic) and beat him with closed fist several times, pushed him to fall on the road; the accused beat him several times, causing him to death due to shock from physical injuries.”

36. The judgment of conviction found Bruch guilty of the identical charge. The judgment reads in pertinent part as follows:

“(T)hat the accused, Bruch, hit Mr. An Kwang Uk in the head and the left elbow with the pool cue and then kicked him in the left chest region with his right foot, while the accused Pvt. Willie B. Buchanan hit Mr. Pak Yong Su, also a Monopoly Official, in his left elbow with the pool cue, and kicked him three to four times on the upper part of his left thigh. Thus they inflicted injuries in the head and the left chest of Mr. An which required 10 days medical treatment, and cuts on the femoral region, etc. of Mr. Pak which also required 10 days medical treatment; and

that at the approximately same time, encouraged by the appearance of about 10 U.S. soldiers at the scene, the accused Bruch hit Mr. Kim Sung-duck, a Suwon Monopoly official, in the back of the neck with the pool cue and kicked him in the chest two or three times while pulling him by the hands. The accused Buchanan hit the said Kim in his back twice with a pool cue and then continued to hit him in the neck region with a tree limb two or three times. The accused Collette hit the said Kim in his back shoulder two or three times with a tree limb, beat him with closed fist several times and pushed him so that he fell on the road. All three accused then beat Kim several times, causing him to die due to shock from physical injuries.”
40. The injuries attributed to beatings of Kim Sung-duck, a Suwon Monopoly official, were caused by Bruch's efforts to administer to Kim Sung after Kim was brought back to the compound, where Bruch undertook to administer closed heart massage to him in the manner Bruch had been taught after entering the Service. The findings of the Korean trial court that Bruch was guilty of beating Kim Sung in the manner described in the judgment of the court were based on perjured testimony or because the court ignored the physical facts disclosed by the autopsy performed on the deceased.

41. Plaintiff enlisted in the United States Army on September 20, 1970, and has never been discharged. As determined by this court in its orders of April 23, 1975, and April 14, 1976, Plaintiff, as a matter of law, is subject to the custody and control of the United States Army.

42. On May 25, 1973, Plaintiff's commanding officer preferred charges against him for violation of Article 126 (assault with a means likely to produce grievous bodily harm), and Article 116 (participation in a riot) of the Uniform Code of Military Justice, 10 U.S.C. § 926, 19 U.S.C. § 916 (Exhibit F).

43. On May 31, 1973, the Korean Ministry of Justice notified the Commander, United States Forces, that the Korean government had decided to exercise jurisdiction over complainant and several other soldiers (Exhibit I). This notification was made pursuant to the terms of the treaty between Korea and the United States, the Status of United States Armed Forces in Korea Agreement (SOFA), 17 U.S.T. 1677; T.I.A.S. 6127.

44. On June 18, 1973, pursuant to the provisions of SOFA, the United States officially requested that custody be retained by United States Authorities (Exhibit M).

45. On June 20, 1973, an American attorney, Mr. Ki C. Lee, Office of the Staff Judge Advocate, United States Forces, had discussions with the Seoul Prosecutor's Office which resulted in dismissal of the cases with respect to three of the soldiers involved (Exhibit O). Originally, the Korean Government had requested that Bruch and five others be surrendered to it for prosecution. After the negotiations with Korean authorities, three American soldiers were released and three, including Bruch, were turned over to Korean authorities for prosecution.

46. During the period between notice of the exercise of jurisdiction by the Korean Government and the indictment, United States military authorities continued an investigation of the charges preferred under the Uniform Code of Military Justice.
An appointed military officer conducted an Article 32 investigation (10 U.S.C. § 832), and submitted his formal report on July 21, 1973. He recommended trial by special court martial; he did not recommend that the charges against complainant be dismissed. He did recommend that the charge of assault of four persons be amended to assault of one person and that the charge of riot be amended to breach of peace (Exhibit Q).

47. Each Finding of Fact set forth in the foregoing Findings of Fact deemed to be a conclusion of Law is hereby found to be a Conclusion of Law.

From the foregoing facts are drawn the following:

CONCLUSIONS OF LAW


2. The respondent through his agents delivered plaintiff Bruch up for trial to the Republic of Korea upon the indictment of July 23, 1973 (No. 1), when said agents knew or should have known that Bruch would not be protected and granted the fair trial guarantees required to be afforded him under Army Regulations 27-50 and the reservations entered by the United States Senate in 1953, "because of the absence and denial of Constitutional Rights which Bruch would enjoy in the United States and when said agents of respondents knew that Bruch would be accorded the perfunctory appearance of a form of due process, but that he would be essentially denied the substance of due process.

3. That the failure of the respondent and his agents to request the Department of State to press a request of waiver of jurisdiction through diplomatic channels was arbitrary and capricious under the facts and circumstances then and there existing, and thus the acts of the respondent and his agents deprived the plaintiff Bruch of his rights as an American citizen and a member of the U.S. Army under AR 27-50.

4. The Trial observer provided to observe the trial conducted by the Republic of Korea failed to report the many facts which he knew or should have known, such as the repudiation of statements by witnesses; the result of the autopsy and report thereof of Major Dodge, the pathologist; the attempt to subvert the line-up by the Korean Monopoly Police witnesses and complainants; the results of the Article 32 Investigation and other properly consider whether the plaintiff Bruch might be deprived of a fair
FINDINGS OF FACT AND CONCLUSIONS OF LAW

trial as provided by Army Regulations of the United States Constitution.

5. The respondent and his agents refused on three occasions to comply with important Army Regulation requirements existing for Bruch's protection, first, in unilaterally determining that Bruch should not be afforded the full procedure provided by Army Regulations 635-200 § III, with regard to extending his enlistment; secondly, by failing to bring the matter to the attention of the designated commanding officer before trial when it appeared that Bruch might not receive a fair trial; and third, by the failure of the commanding general to personally timely review all the facts and circumstances, including the Trail Observer's Report, as provided in AR 27-50, to determine in his nondelegable authority that no danger existed that the trial was unjust.

6. The judgment of the Korean court was based on perjured testimony and was contrary to the great weight of the evidence as to the cause of Mr. Kim's death for which Bruch was found guilty.

7. When added to all of the other circumstances and facts surrounding the treatment of the plaintiff Bruch, it requires the Court in this case to conclude that the fundamental test of justice was not met and a fair trial was not provided to the plaintiff Bruch with the knowledge, acquiescence and involvement of the respondent and his agents, and that such denial of protection to Bruch by respondent and his agents was a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

8. The respondent and his agents by the effect of misrepresentation, duress and coercion, and in furtherance of denying plaintiff Bruch his fundamental rights as an American citizen, did cause the Affidavit of Extension of his Enlistment to be executed. The parties acted pursuant to an extension until June 1, 1973, at which time the respondent and his agents allowed the plaintiff Bruch out of their restraint.

9. The plaintiff Bruch is entitled to an Honorable Discharge to be issued to him by the respondent and his agents as of June 2, 1973, with all of the prerequisites pertinent thereto and his costs.

10. Each Conclusion of Law set forth in the foregoing Conclusions of Law deemed to be a Finding of Fact is hereby found to be a Finding of Fact.

Petitioner's counsel will promptly prepare, circulate and submit appropriate form of judgment consistent with the foregoing Findings and Conclusions.

Dated at Topeka, Kansas, this 6th day of July, 1977.

George Temple
Senior Judge, Assigned
Appendix B

EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS OVER UNITED STATES PERSONNEL

The Department of the Army acts as the executive agent within the Department of Defense in gathering statistical data on the "Exercise of Criminal Jurisdiction by Foreign Tribunals Over United States Personnel." The data contained in this Appendix is for the reporting period of 1 December 1977 — 30 November 1978.

The data presented here includes statistical data concerning the exercise of criminal jurisdiction over United States military personnel from all over the world as well as from Japan, the Republic of Korea, the Philippines, and Taiwan. The world wide data helps to put the statistics from each country into perspective.

Throughout the world the United States was able to obtain a waiver from primary foreign concurrent jurisdiction in 84.3 per cent of the cases. While the comparable figures from Japan was 37 per cent, Republic of Korea 99.2 per cent, and the Philippines only 1.3 per cent.

The most frequent offense both on a world wide basis, and for each country studied, are traffic offenses which amounted to 47,346 of 48,346 legal violations involving military personnel during the reporting period. The next most numerous offense is under the collective heading "disorderly conduct, drunkenness, breach of peace," followed by "offenses against economic control laws." This is also consistent with the nations examined in this work. Most cases of this type are routinely handled without difficulty. Most of these cases, as the charts indicate, result in nothing more than a fine or a reprimand. The serious crimes (including murder, rape, manslaughter, arson, larceny, burglary, and aggrivated assault) are, for obvious reasons, the cause for much greater tensions between the sending and receiving state.
## Exercise of Criminal Jurisdiction by Foreign Tribunals

### Over United States Personnel

#### Analysis

<table>
<thead>
<tr>
<th>Period: 1 December 1977 - 30 November 1978</th>
<th>Area: World</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Army</td>
</tr>
</tbody>
</table>

### Total Number of Cases Subject to Primary or Exclusive Jurisdiction

- **All:**
  - 61,220
  - 4,030
  - 14,086
  - 79,336

- **Military:**
  - 54,453
  - 3,854
  - 13,483
  - 71,790

- **Civilians & Dependents:**
  - 6,777
  - 176
  - 1,603
  - 8,556

### Number of Primary Foreign Concurrent Jurisdiction Cases Involving Military:

- **All:**
  - 16,261
    - 98.1%
  - 896
    - 30.9%
  - 1,770
    - 59.4%
  - 18,927
    - 84.3%

### Civilians and Dependents Released to the U.S. for Disposition:

- **All:**
  - 199
    - 2.9%
  - 42
    - 23.9%
  - 136
    - 8.5%
  - 377
    - 4.4%

### Final Dispositions of Cases by Local Authorities (May Include Cases Pending from Previous Reporting Period)

<table>
<thead>
<tr>
<th>Total Number</th>
<th>Charges Dropped</th>
<th>Acquittals</th>
<th>Convictions</th>
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<tr>
<td>All</td>
<td>43,672</td>
<td>2,856</td>
<td>11,369</td>
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<tr>
<td>Military</td>
<td>2,209</td>
<td>1,000</td>
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<tr>
<td>Civilians</td>
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<td>10,086</td>
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### Total Final Results of Trials (May Include Results of Trials & Appeals Pending from Previous Reporting Period)

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<th>Total Number</th>
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<td>All</td>
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<tr>
<td>Military</td>
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<tr>
<td></td>
<td>93</td>
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<tr>
<td></td>
<td>320</td>
</tr>
</tbody>
</table>

### Breakdown of Final Results

- **Number of Acquittals:**
  - 39
    - .1%

- **Number of Unsuspended Sentences to Confine or Fine:**
  - 108
    - 6.4%

- **Number of Suspended Sentences to Confine or Fine:**
  - 57
    - .1%

- **Number of Sentences to Fine, Reprimand, etc., Only:**
  - 41,312
    - 99.6%

### Notes:

- Murder, rape, manslaughter, arson, larceny and related offenses, burglary and related offenses, forgery and related offenses, and aggravated assault.
<table>
<thead>
<tr>
<th>TYPE OF OFFENSE</th>
<th>TOTAL CASES SUBJECT TO FOREIGN JURISDICTION ARISING DURING PERIOD</th>
<th>FINAL DISPOSITION OF CASES BY FOREIGN TRIBUNALS DURING PERIOD</th>
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<td>EXCLUSIVE FOREIGN JURISDICTION CASES</td>
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<tr>
<td>MURDER</td>
<td>MIL 7</td>
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<td>RAPE</td>
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<td>CIV 1</td>
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<td>MANSLAUGHTER AND NEGLECTFUL HOMICIDE</td>
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<td>CIV 8</td>
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<td>ARSON</td>
<td>MIL 2</td>
<td>CIV 32</td>
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<tr>
<td>ROBBERY, LARCENY &amp; RELATED OFFENSES</td>
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<td>CIV 145</td>
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<td>CIV 34</td>
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<td>FORGERY AND RELATED OFFENSES</td>
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<td>SIMPLE ASSAULT</td>
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<td>DRUG ABUSE</td>
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<td>DISORDERLY CONDUCT, DRUNKENNESS, BREACH OF PEACE, ETC.</td>
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<tr>
<td>Murder</td>
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<td>Rape</td>
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<td>Robbery</td>
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<td>Arson</td>
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<td>Aggravated Assault</td>
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<td>Drug Abuse</td>
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<td>Traffic Control</td>
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<td>Offenses Against Economic Control</td>
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<tr>
<td>Total</td>
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</tr>
</tbody>
</table>

*including drunken and reckless driving and fleeing scene of accident.*
### Exercise of Criminal Jurisdiction by Foreign Tribunals Over United States Personnel

#### Period: 1 December 1977 - 30 November 1978

#### Area: Japan

<table>
<thead>
<tr>
<th>Category</th>
<th>Army</th>
<th>Navy</th>
<th>Air Force</th>
<th>All Services</th>
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<tr>
<td><strong>Total Number of Cases Subject to Primary or Exclusive Foreign Jurisdiction</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All:</td>
<td>315</td>
<td>1,392</td>
<td>1,087</td>
<td>2,794</td>
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<tr>
<td>Military:</td>
<td>189</td>
<td>1,332</td>
<td>858</td>
<td>2,377</td>
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<td>Civilians &amp; Dependents:</td>
<td>126</td>
<td>60</td>
<td>231</td>
<td>417</td>
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<td><strong>Number of Primary Foreign Concurrent Jurisdiction Cases Involving Military:</strong></td>
<td>80</td>
<td>1,288</td>
<td>442</td>
<td>1,810</td>
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<tr>
<td><strong>Primary Foreign Concurrent Jurisdiction Cases as to Which a Waiver of Local Jurisdiction Was Obtained (Military Only):</strong></td>
<td>51 (63.8%)</td>
<td>484 (47.6%)</td>
<td>135 (30.5%)</td>
<td>670 (37.0%)</td>
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<tr>
<td>Civilians and Dependents Released to the U.S. for Disposition:</td>
<td>45 (35.7%)</td>
<td>36 (60.0%)</td>
<td>47 (20.3%)</td>
<td>128 (30.7%)</td>
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<td><strong>Final Dispositions of Cases by Local Authorities (May Include Cases Pending from Previous Reporting Period):</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Number:</td>
<td>222</td>
<td>779</td>
<td>863</td>
<td>1,864</td>
</tr>
<tr>
<td>Charges Dropped:</td>
<td>175</td>
<td>175</td>
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<tr>
<td>Acquittals:</td>
<td></td>
<td></td>
<td>863</td>
<td>1,668</td>
</tr>
<tr>
<td>Convictions:</td>
<td>221</td>
<td>604</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total Final Results of Trials (May Include Results of Trials &amp; Appeals Pending from Previous Reporting Period):</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Number:</td>
<td>221</td>
<td>604</td>
<td>863</td>
<td>1,668</td>
</tr>
<tr>
<td>Serious Cases*:</td>
<td>42 (7.0%)</td>
<td>1 (1.0%)</td>
<td>43 (2.5%)</td>
<td></td>
</tr>
<tr>
<td><strong>Breakdown of Final Results: Number of Acquittals: Number of Unsuspended Sentences to Confinement:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Acquittals:</td>
<td>24 (4.0%)</td>
<td>4 (.5%)</td>
<td></td>
<td>28 (1.7%)</td>
</tr>
<tr>
<td>Number of Suspended Sentences to Confinement:</td>
<td>2 (.9%)</td>
<td>68 (11.3%)</td>
<td>18 (2.1%)</td>
<td>88 (5.2%)</td>
</tr>
<tr>
<td>Number of Sentences to Fine, Reprimand, etc., Only:</td>
<td>219 (99.1%)</td>
<td>512 (84.0%)</td>
<td>841 (97.5%)</td>
<td>1,572 (93.1%)</td>
</tr>
</tbody>
</table>

*Murder, Rape, Manslaughter, Arson, Larceny and Related Offenses, Burglary and Related Offenses, Forgery and Related Offenses, and Aggravated Assault.*

**Japan**
### Exercise of Criminal Jurisdiction by Foreign Tribunals

#### Over United States Personnel

**Period:** 1 December 1977 - 30 November 1978

<table>
<thead>
<tr>
<th>Type of Offense</th>
<th>Total Cases Subject to Foreign Jurisdiction Arising During Period</th>
<th>Final Disposition of Cases by Foreign Tribunals During Period</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Exclusive Foreign Jurisdiction Cases</td>
<td>Column A: Cases Released to the U.S. for Disposition</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>-----------------</td>
<td>----------------------</td>
</tr>
<tr>
<td><strong>MURDER</strong></td>
<td>MIL 5</td>
<td>CIV 10</td>
</tr>
<tr>
<td><strong>RAPE</strong></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>MANSLAUGHTER AND NEGLIGENT HOMICIDE</strong></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>ARSON</strong></td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td><strong>ROBBERY, LARCENY &amp; RELATED OFFENSES</strong></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>BURGLARY AND RELATED OFFENSES</strong></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>FORGERY AND RELATED OFFENSES</strong></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>AGGRAVATED ASSAULT</strong></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>SIMPLE ASSAULT</strong></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>DRUG ABUSE</strong></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>OFFENSES AGAINST ECONOMIC CONTROL LAWS</strong></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>TRAFFIC OFFENSES</strong></td>
<td>109</td>
<td>54</td>
</tr>
<tr>
<td><strong>DISORDERLY CONDUCT, DRUNKENNESS, BREACH OF PEACE, ETC.</strong></td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>109</td>
<td>52</td>
</tr>
</tbody>
</table>

- **Column A** includes all cases involving U.S. personnel which were subject to the exclusive jurisdiction of the host state.
- **Column B** excludes cases subject to U.S. primary or exclusive jurisdiction and cases subject to exclusive jurisdiction of the host state.
- **Column C** includes all cases finally adjudicated, i.e., all appellate rights exhausted or expired, including cases pending trial or appeal at end of previous reporting period and finally adjudicated during current period.

**Final Disposition of Cases:**
- **Charges Dropped:**
- **Final Acquittal:**
- **Final Conviction:**

**Footnotes:**
1. Includes all cases involving U.S. personnel which were subject to the exclusive jurisdiction of the host state.
2. Excludes cases subject to U.S. primary or exclusive jurisdiction and cases subject to exclusive jurisdiction of the host state.
3. Includes all cases finally adjudicated, i.e., all appellate rights exhausted or expired, including cases pending trial or appeal at end of previous reporting period and finally adjudicated during current period.
4. Including drunken and reckless driving and fleeing scene of accident.
<table>
<thead>
<tr>
<th>TYPE OF OFFENSE</th>
<th>FINE, REPRIMAND, ETC., ONLY</th>
<th>MILITARY</th>
<th>CIVILIAN</th>
<th>DEPENDENT</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>CONFINEMENT SUSPENDED</td>
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<td>UNDER 13</td>
<td>UNDER 13</td>
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<td></td>
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<td>CIV</td>
<td>DEP</td>
<td>UNDER 3 YRS</td>
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<td></td>
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<tr>
<td>MURDER</td>
<td>135</td>
<td>33</td>
<td>4</td>
<td>21</td>
</tr>
<tr>
<td>RAPE</td>
<td>23</td>
<td>13</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>MANSLAUGHTER AND NEGLIGENT HOMICIDE</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>ARSON</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>ROBBERY, LARCENY &amp; RELATED OFFENSES</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>BURGLARY AND RELATED OFFENSES</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>FORGERY AND RELATED OFFENSES</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>AGGRAVATED ASSAULT</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>SIMPLE ASSAULT</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>DRUG ABUSE</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>OFFENSES AGAINST ECONOMIC CONTROL LAWS</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>TRAFFIC OFFENSES</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>DISORDERLY CONDUCT, DRUNKENNESS, BREACH OF PEACE, ETC</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>OTHER</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>135</td>
<td>41</td>
<td>33</td>
<td>2</td>
</tr>
</tbody>
</table>

*including drunken and reckless driving and fleeing scene of accident.
### Exercise of Criminal Jurisdiction by Foreign Tribunals

**Area:** Japan  
**Service:** Navy  
**Period:** 1 December 1977 - 30 November 1978

<table>
<thead>
<tr>
<th>Type of Offense</th>
<th>Total Cases Subject to Foreign Jurisdiction Arising During Period</th>
<th>Final Disposition of Cases by Foreign Tribunals During Period</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Exclusive Foreign Jurisdiction Cases</td>
<td>Column A: Cases Released to the U.S. for Disposition</td>
</tr>
<tr>
<td></td>
<td>MIL</td>
<td>CIV</td>
</tr>
<tr>
<td>Murder</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Rape</td>
<td>12</td>
<td>2</td>
</tr>
<tr>
<td>Manslaughter and Negligent Homicide</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Arson</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Robbery, Larceny &amp; Related Offenses</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Burglary and Related Offenses</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Forgeroy and Related Offenses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aggravated Assault</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Simple Assault</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drug Abuse</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Offenses Against Economic Control Laws</td>
<td>2</td>
<td></td>
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<tr>
<td>Traffic Offenses</td>
<td>42</td>
<td>24</td>
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<tr>
<td>Disorderly Conduct, Drunkenness, Breach of Peace, Etc.</td>
<td>3</td>
<td>1</td>
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<tr>
<td>Other</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>44</td>
<td>29</td>
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</tbody>
</table>

**Notes:**
- Includes all cases involving U.S. personnel which were subject to the exclusive jurisdiction of the host state.
- Excludes cases subject to U.S. primary or exclusive jurisdiction and cases subject to exclusive jurisdiction of the host state.
- For MIL, Columns A, MIL, LESS B, MIL, PLUS C, LESS D, FOR CIV OR DEP, Columns A, CIV OR A, DEP, LESS B, CIV OR B, DEP, respectively.
- Includes all cases finally adjudicated, i.e., all appeals rights exhausted or expired, including cases pending trial or appeal at end of previous reporting period and finally adjudicated during current period.
- Including drunken and reckless driving and fleeing scene of accident.

JAPAN
<table>
<thead>
<tr>
<th>TYPE OF OFFENSE</th>
<th>FINE, REPRIMAND, ETC., ONLY</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>MIL</td>
</tr>
<tr>
<td>MURDER</td>
<td></td>
</tr>
<tr>
<td>RAPE</td>
<td></td>
</tr>
<tr>
<td>MANSLAUGHTER AND NEGLIGENT HOMICIDE</td>
<td></td>
</tr>
<tr>
<td>ARSON</td>
<td>1</td>
</tr>
<tr>
<td>ROBBERY, LARCENY &amp; RELATED OFFENSES</td>
<td>8</td>
</tr>
<tr>
<td>BURGLARY AND RELATED OFFENSES</td>
<td></td>
</tr>
<tr>
<td>FORGERY AND RELATED OFFENSES</td>
<td></td>
</tr>
<tr>
<td>AGGRAVATED ASSAULT</td>
<td>3</td>
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<tr>
<td>SIMPLE ASSAULT</td>
<td>11</td>
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<tr>
<td>DRUG ABUSE</td>
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<tr>
<td>OFFENSES AGAINST ECONOMIC CONTROL LAWS</td>
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</tr>
<tr>
<td>TRAFFIC OFFENSES</td>
<td>423</td>
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<tr>
<td>DISORDERLY CONDUCT, DRUNKENNESS, BREACH OF PEACE, ETC.</td>
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<tr>
<td>OTHER</td>
<td>5</td>
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<tr>
<td>TOTAL</td>
<td>490</td>
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</tbody>
</table>

* Including drunken and reckless driving and fleeing scene of accident.
<table>
<thead>
<tr>
<th>Type Of Offense</th>
<th>Exclusive Foreign Jurisdiction Cases</th>
<th>Column A Cases Released To The U.S. For Disposition B</th>
<th>Primary Concurrent Jurisdiction Cases Involving Military C</th>
<th>Waiver Of Primary Foreign Jurisdiction Over Military Detained D</th>
<th>Total Cases Reserved By Foreign Jurisdiction During Period E</th>
<th>Total Disposition Of Cases By Foreign Tribunals During Period F</th>
<th>Charges Dropped G</th>
<th>Final Acquittal H</th>
<th>Final Conviction I</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td>Rape</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Manslaughter And Negligent Homicide</td>
<td></td>
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<td></td>
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<td></td>
<td></td>
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<tr>
<td>Arson</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robbery, Larceny &amp; Related Offenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burglary And Related Offenses</td>
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<td>1</td>
<td>5</td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>Forger And Related Offenses</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aggravated Assault</td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>Simple Assault</td>
<td>8</td>
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<td>6</td>
<td>3</td>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drug Abuse</td>
<td>7</td>
<td>6</td>
<td>129</td>
<td>94</td>
<td>35</td>
<td>1</td>
<td></td>
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<td>21</td>
</tr>
<tr>
<td>Offenses Against Economic Control Laws</td>
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<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
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<tr>
<td>Traffic Offenses</td>
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<td>92</td>
<td>5</td>
<td>6</td>
<td>21</td>
<td>608</td>
<td>53</td>
<td>85</td>
</tr>
<tr>
<td>Disorderly Conduct, Drunkenness, Breach Of Peace, Etc.</td>
<td>114</td>
<td>58</td>
<td>92</td>
<td>5</td>
<td>6</td>
<td>21</td>
<td>608</td>
<td>53</td>
<td>85</td>
</tr>
<tr>
<td>Other</td>
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<td>9</td>
<td>1</td>
<td>11</td>
<td>8</td>
<td>3</td>
<td>9</td>
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<td></td>
</tr>
<tr>
<td>Total</td>
<td>414</td>
<td>52</td>
<td>159</td>
<td>443</td>
<td>135</td>
<td>721</td>
<td>54</td>
<td>120</td>
<td>698</td>
</tr>
</tbody>
</table>

1/ Includes all cases involving U.S. personnel which were subject to the exclusive jurisdiction of the host state.
2/ Excludes cases subject to U.S. primary or exclusive jurisdiction and cases subject to exclusive jurisdiction of the host state.
3/ For MIL, columns A, MIL, less B, MIL plus C, LESS D, for CIV or DEP, columns A, CIV or DEP, respectively.
4/ Includes all cases finally adjudicated, i.e., all appellate rights exhausted or expired, including cases pending trial or appeal at end of previous reporting period and finally adjudicated during current period.
5/ Including drunken and reckless driving and fleeing scene of accident.
| TYPE OF OFFENSE                  | MIL | CIV | DEP | MIL | CIV | DEP | MIL | CIV | DEP | MIL | CIV | DEP |
|--------------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| FINE, REPRIMAND, ETC., ONLY    |     |     |     |     |     |     |     |     |     |     |     |     |
| CONFINEMENT SUSPENDED          |     |     |     |     |     |     |     |     |     |     |     |     |
| SENTENCES IMPOSED IN CASES REPORTED IN COLUMN "H" OF PRECEDING PAGE       |     |     |     |     |     |     |     |     |     |     |     |     |
| CONFINEMENT NOT SUSPENDED      |     |     |     |     |     |     |     |     |     |     |     |     |
| K                             |     |     |     |     |     |     |     |     |     |     |     |     |
| MILITARY                      |     |     |     |     |     |     |     |     |     |     |     |     |
| UNDER TO TO                  |     |     |     |     |     |     |     |     |     |     |     |     |
| 1 3                          |     |     |     |     |     |     |     |     |     |     |     |     |
| OVER 5 YEARS (ITEMIZE)        |     |     |     |     |     |     |     |     |     |     |     |     |
| CIVILIAN                      |     |     |     |     |     |     |     |     |     |     |     |     |
| UNDER TO OVER 5 YEARS (ITEMIZE) |     |     |     |     |     |     |     |     |     |     |     |     |
| DEPENDENT                     |     |     |     |     |     |     |     |     |     |     |     |     |
| UNDER TO OVER 5 YEARS (ITEMIZE) |     |     |     |     |     |     |     |     |     |     |     |     |
| MURDER                        |     |     |     |     |     |     |     |     |     |     |     |     |
| RAPE                          |     |     |     |     |     |     |     |     |     |     |     |     |
| MANSLAUGHTER AND NEGLIGENT HOMICIDE |     |     |     |     |     |     |     |     |     |     |     |     |
| ARSON                         |     |     |     |     |     |     |     |     |     |     |     |     |
| ROBBERY, LARCENY & RELATED OFFENSES |     |     |     |     |     |     |     |     |     |     |     |     |
| BURGLARY AND RELATED OFFENSES |     |     |     |     |     |     |     |     |     |     |     |     |
| FORGERY AND RELATED OFFENSES  |     |     |     |     |     |     |     |     |     |     |     |     |
| AGGRAVATED ASSAULT           |     |     |     |     |     |     |     |     |     |     |     |     |
| SIMPLE ASSAULT               |     |     |     |     |     |     |     |     |     |     |     |     |
| DRUG ABUSE                    |     |     |     |     |     |     |     |     |     |     |     |     |
| OFFENSES AGAINST ECONOMIC CONTROL LAWS | 11 | 1 | 16 |     |     |     |     |     |     |     |     |     |
| TRAFFIC OFFENSES              |     |     |     |     |     |     |     |     |     |     |     |     |
| DISORDERLY CONDUCT, DRUNKENNESS, BREACH OF PEACE, ETC. | 660 | 53 | 85 |     |     |     |     |     |     |     |     |     |
| OTHER                         |     |     |     |     |     |     |     |     |     |     |     |     |
| TOTAL                         | 677 | 54 | 110 | 17 | 1 | 4 |     |     |     |     |     |     |

* Including drunken and reckless driving and fleeing scene of accident.
<table>
<thead>
<tr>
<th>Service</th>
<th>Total Number of Cases Subject to Primary Jurisdiction</th>
<th>Total Number of Cases Released to the U.S. for Disposition</th>
<th>Total Number of Trials &amp; Appeals Pending from Previous Reporting Period</th>
<th>Final Dispositions of Cases by Local Authorities Reporting Period</th>
<th>Breakdown of Final Results of Trials &amp; Appeals Pending from Previous Reporting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>NAVY</td>
<td>2,234</td>
<td>2,016</td>
<td>205</td>
<td>107</td>
<td>4 (4.15)</td>
</tr>
<tr>
<td>NAVAL AIR CREW</td>
<td>312</td>
<td>312</td>
<td>14</td>
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<td>300</td>
<td>300</td>
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<td>9</td>
<td>8 (8.85)</td>
</tr>
<tr>
<td>TOTAL NAVY</td>
<td>2,266</td>
<td>2,048</td>
<td>220</td>
<td>117</td>
<td>5 (4.35)</td>
</tr>
<tr>
<td>TOTAL FOREIGN CONCURRENT JURISDICTION CASES</td>
<td>2,035 (99.5%)</td>
<td>2,023 (99.5%)</td>
<td>205</td>
<td>107</td>
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<td>TOTAL CIVILIANS AND DEPENDENTS Released to the U.S. for Disposition</td>
<td>205</td>
<td>205</td>
<td>9</td>
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<td>8 (8.85)</td>
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</table>

*Number includes minor offenses, assaults, and aggravated assault.
**EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS**

**OVER UNITED STATES PERSONNEL**

**AREA: REPUBLIC OF KOREA**

**SERVICE: ARMY**

**PERIOD: 1 DECEMBER 1977 - 30 NOVEMBER 1978**

<table>
<thead>
<tr>
<th>TYPE OF OFFENSE</th>
<th>TOTAL CASES SUBJECT TO FOREIGN JURISDICTION ARISING DURING PERIOD</th>
<th>FINAL DISPOSITION OF CASES BY FOREIGN TRIBUNALS DURING PERIOD</th>
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<tbody>
<tr>
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<td>EXCLUSIVE FOREIGN JURISDICTION CASES</td>
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<tr>
<td>DRUG ABUSE</td>
<td>94</td>
<td>94</td>
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<tr>
<td>OFFENSES AGAINST ECONOMIC CONTROL LAWS</td>
<td>146</td>
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<td>TRAFFIC OFFENSES</td>
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<tr>
<td>TOTAL</td>
<td>103</td>
<td>85</td>
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Footnotes:
1. Includes all cases involving U.S. personnel which were subject to the exclusive jurisdiction of the host state.
2. Excludes cases subject to U.S. primary or exclusive jurisdiction and cases subject to exclusive jurisdiction of the host state.
4. Includes all cases finally adjudicated, i.e., all appellate rights exhausted or expired, including cases pending trial or appeal at end of previous reporting period and finally adjudicated during current period.
5. Including drunken and reckless driving and fleeing scene of accident.
<table>
<thead>
<tr>
<th>TYPE OF OFFENSE</th>
<th>FINE, REPRIMAND, ETC., ONLY</th>
<th>MILITARY</th>
<th>CIVILIAN</th>
<th>DEPENDENT</th>
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<td>1 UNDER 3 TO TO OVER 5 YEARS (ITEMIZE)</td>
<td>1 UNDER 3 TO TO OVER 5 YEARS (ITEMIZE)</td>
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* Including drunken and reckless driving and fleeing scene of accident.
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<tr>
<th>TYPE OF OFFENSE</th>
<th>TOTAL CASES SUBJECT TO FOREIGN JURISDICTION ARISING DURING PERIOD</th>
<th>FINAL DISPOSITION OF CASES BY FOREIGN TRIBUNALS DURING PERIOD</th>
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<td>COLUMN &quot;A&quot; CASES RELEASED TO THE U.S. FOR DISPOSITION B</td>
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<tr>
<td>RAPE</td>
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<tr>
<td>MANSLAUGHTER AND NEGLIGENT HOMICIDE</td>
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<td>1</td>
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<tr>
<td>ARSON</td>
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<td></td>
</tr>
<tr>
<td>ROBBERY, LARCENY &amp; RELATED OFFENSES</td>
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<td>BURGLARY AND RELATED OFFENSES</td>
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<td>FORGERY AND RELATED OFFENSES</td>
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1/ INCLUDES ALL CASES INVOLVING U.S. PERSONNEL WHICH WERE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE HOST STATE.
2/ EXCLUDES CASES SUBJECT TO U.S. PRIMARY OR EXCLUSIVE JURISDICTION AND CASES SUBJECT TO EXCLUSIVE JURISDICTION OF THE HOST STATE.
3/ FOR MIL, COLUMNS A, MIL LESS B, MIL PLUS C LESS D. FOR CIV OR DEP, COLUMNS A, CIV OR A, DEP LESS B, CIV OR B, DEP, RESPECTIVELY.
4/ INCLUDES ALL CASES FINALY ADJUDICATED, I.E., ALL APPELLATE RIGHTS EXHAUSTED OR EXPIRED, INCLUDING CASES PENDING TRIAL OR APPEAL AT END OF PREVIOUS REPORTING PERIOD AND FINALY ADJUDICATED DURING CURRENT PERIOD.
5/ INCLUDING DRUNKEN AND RECKLESS DRIVING AND FLEEING SCENE OF ACCIDENT.
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* Including drunken and reckless driving and fleeing scene of accident.
<table>
<thead>
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<th>TYPE OF OFFENSE</th>
<th>EXCLUSIVE FOREIGN JURISDICTION CASES A</th>
<th>COLUMN 'A' CASES RELEASED TO THE U.S. FOR DISPOSITION B</th>
<th>PRIMARY FOREIGN CONCURRENT CASES INVOLVING MILITARY C</th>
<th>WAIVER OF PRIMARY FOREIGN JURISDICTION OVER MILITARY OBTAINED D</th>
<th>TOTAL CASES SUBJECT TO FOREIGN JURISDICTION ARISING DURING PERIOD E</th>
<th>TOTAL CASES RESERVED BY FOREIGN JURISDICTION DURING PERIOD F</th>
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| INCLUDES ALL CASES INVOLVING U.S. PERSONNEL WHICH WERE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE HOST STATE |
| EXCLUDES CASES SUBJECT TO U.S. PRIMARY OR EXCLUSIVE JURISDICTION AND CASES SUBJECT TO EXCLUSIVE JURISDICTION OF THE HOST STATE |
| FOR MIL, COLUMN A, MIL, LESS B, MIL, PLUS C, LESS D, FOR CIV OR DEP, COLUMN A, CIV OR A, DEP, LESS B, CIV OR B, DEP, RESPECTIVELY |
| INCLUDES ALL CASES FINALLY ADJUDICATED, I.E., ALL APPEAL RIGHTS EXHAUSTED OR EXPIRED, INCLUDING CASES PENDING TRIAL OR APPEAL AT END OF PREVIOUS REPORTING PERIOD AND FINALLY ADJUDICATED DURING CURRENT PERIOD |
| INCLUDING DRUNKEN AND REckLESS DRIVING AND FLEEING SCENE OF ACCIDENT |
## Exercise of Criminal Jurisdiction by Foreign Tribunals

**Over United States Personnel (Continued)**

**Period:** 1 December 1977 - 30 November 1978  
**Area:** Korea, Republic of  
**Service:** Air Force

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*Including drunken and reckless driving and fleeing scene of accident.

Korea, Republic of
<table>
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<tr>
<th>PERIOD: 1 DECEMBER 1977 - 30 NOVEMBER 1978</th>
<th>AREA: PHILIPPINES</th>
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<tr>
<td>EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS OVER UNITED STATES PERSONNEL (ANALYSIS)</td>
<td></td>
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<tr>
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<td>TOTAL NUMBER OF CASES SUBJECT TO PRIMARY OR EXCLUSIVE FOREIGN JURISDICTION</td>
<td>705</td>
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<td>NUMBER OF PRIMARY FOREIGN CONCURRENT JURISDICTION CASES INVOLVING MILITARY:</td>
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<td>PRIMARY FOREIGN CONCURRENT JURISDICTION CASES AS TO WHICH A WAIVER OF LOCAL JURISDICTION WAS OBTAINED (MILITARY ONLY):</td>
<td>11 (2.1%)</td>
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<td>CIVILIANS AND DEPENDENTS RELEASED TO THE U.S. FOR DISPOSITION:</td>
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<tr>
<td>FINAL DISPOSITIONS OF CASES BY LOCAL AUTHORITIES (MAY INCLUDE CASES PENDING FROM PREVIOUS REPORTING PERIOD)</td>
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<td>ACQUITTALS:</td>
<td>13</td>
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<tr>
<td>CONVICTIONS:</td>
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<td>TOTAL FINAL RESULTS OF TRIALS (MAY INCLUDE RESULTS OF TRIALS &amp; APPEALS PENDING FROM PREVIOUS REPORTING PERIOD)</td>
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</tr>
<tr>
<td>TOTAL NUMBER:</td>
<td>20</td>
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<td>SERIOUS CASES:</td>
<td>4 (20.0%)</td>
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<td>BREAKDOWN OF FINAL RESULTS - NUMBER OF ACQUITTALS:</td>
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<tr>
<td>NUMBER OF UNSUSPENDED SENTENCES TO CONFINEMENT:</td>
<td>13 (65.0%)</td>
</tr>
<tr>
<td>NUMBER OF SUSPENDED SENTENCES TO CONFINEMENT:</td>
<td>2 (10.0%)</td>
</tr>
<tr>
<td>NUMBER OF SENTENCES TO FINE, REPRIMAND, ETC., ONLY:</td>
<td>5 (25.0%)</td>
</tr>
</tbody>
</table>

*Murder, rape, manslaughter, arson, larceny and related offenses, burglary and related offenses, forgery and related offenses, and aggravated assault.
### Exercise of Criminal Jurisdiction by Foreign Tribunals Over United States Personnel

#### Area: Philippines

**Period:** 1 December 1977 - 30 November 1978

**Service:** Navy

<table>
<thead>
<tr>
<th>Type of Offense</th>
<th>Total Cases Subject to Foreign Jurisdiction Arising During Period</th>
<th>Final Disposition of Cases by Foreign Tribunals During Period</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Exclusive Foreign Jurisdiction Cases</td>
<td>Column &quot;A&quot; Cases Released to the U.S. for Disposition</td>
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<tr>
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<td>MIL</td>
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</tr>
<tr>
<td>Murder</td>
<td></td>
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<tr>
<td>Rape</td>
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<td></td>
</tr>
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<td>Manslaughter and Negligent Homicide</td>
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</tr>
<tr>
<td>Arson</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robbery, Larceny &amp; Related Offenses</td>
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<td>50</td>
</tr>
<tr>
<td>Burglary and Related Offenses</td>
<td>11</td>
<td>11</td>
</tr>
<tr>
<td>Forgeroy and Related Offenses</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Aggravated Assault</td>
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<td></td>
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<tr>
<td>Simple Assault</td>
<td>1</td>
<td>4</td>
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<tr>
<td>Drug Abuse</td>
<td></td>
<td></td>
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<tr>
<td>Offenses Against Economic Control Laws</td>
<td>69</td>
<td>1</td>
</tr>
<tr>
<td>Traffic Offenses</td>
<td>60</td>
<td>3</td>
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<tr>
<td>Disorderly Conduct, Drunkenness, Breach of Peace, etc.</td>
<td>86</td>
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<tr>
<td>Other</td>
<td>32</td>
<td>11</td>
</tr>
<tr>
<td>Total</td>
<td>162</td>
<td>11</td>
</tr>
</tbody>
</table>

1/ Includes all cases involving U.S. personnel which were subject to the exclusive jurisdiction of the host state.

2/ Excludes cases subject to U.S. primary or exclusive jurisdiction and cases subject to exclusive jurisdiction of the host state.

3/ For MIL, Column "A" cases, less than MIL, plus less than MIL. For CIV or DEP, Columns A, CIV or DEP, less than CIV or DEP, respectively.

4/ Includes all cases finally adjudicated, i.e., all appellate rights exhausted or expired, including cases pending trial.

5/ Includes finally adjudicated during current period.

6/ Includes drunk and reckless driving and fleeing scene of accident.

PHILIPPINES
<table>
<thead>
<tr>
<th>TYPE OF OFFENSE</th>
<th>FINE, REPRIMAND, ETC., ONLY</th>
<th>CONFINEMENT NOT SUSPENDED</th>
<th>CONFINEMENT SUSPENDED</th>
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<tbody>
<tr>
<td></td>
<td>MIL</td>
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<tr>
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<tr>
<td>RAPE</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MANSLAUGHTER AND NEGLIGENT HOMICIDE</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>ARSON</td>
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<tr>
<td>ROBBERY, LARCENY &amp; RELATED OFFENSES</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>BURGLARY AND RELATED OFFENSES</td>
<td></td>
<td></td>
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<tr>
<td>FORGERY AND RELATED OFFENSES</td>
<td></td>
<td></td>
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<tr>
<td>AGGRAVATED ASSAULT</td>
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<td>SIMPLE ASSAULT</td>
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</tr>
<tr>
<td>DRUG ABUSE</td>
<td>1</td>
<td>2</td>
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<tr>
<td>OFFENSES AGAINST ECONOMIC CONTROL LAWS</td>
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<tr>
<td>TRAFFIC OFFENSES</td>
<td></td>
<td></td>
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<tr>
<td>DISORDERLY CONDUCT, DRUNKENESSION, BREACH OF PEACE, ETC.</td>
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<tr>
<td>OTHER</td>
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<tr>
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<td>5</td>
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* INCLUDING DRUNKEN AND RECKLESS DRIVING AND FLEEING SCENE OF ACCIDENT.
<table>
<thead>
<tr>
<th>TYPE OF OFFENSE</th>
<th>TOTAL CASES SUBJECT TO FOREIGN JURISDICTION ARISING DURING PERIOD</th>
<th>FINAL DISPOSITION OF CASES BY FOREIGN TRIBUNALS DURING PERIOD</th>
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<tbody>
<tr>
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<td>EXCLUSIVE FOREIGN JURISDICTION CASES</td>
<td>COLUMN A CASES RELEASED TO THE U.S. FOR DISPOSITION</td>
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<tr>
<td>----------------</td>
<td>----------------------------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>MURDER</td>
<td>1</td>
<td>2</td>
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<tr>
<td>RAPE</td>
<td>1</td>
<td>8</td>
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<tr>
<td>MANSLAUGHTER AND NEGLIGENT HOMICIDE</td>
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<td>7</td>
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<tr>
<td>ARSON</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>ROBBERY, LARCENY &amp; RELATED OFFENSES</td>
<td>1 13</td>
<td>37</td>
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<td>TRAFFIC OFFENSES</td>
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EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS OVER UNITED STATES PERSONNEL

AREA: PHILIPPINES
SERVICE: AIR FORCE
PERIOD: 1 DECEMBER 1977 - 30 NOVEMBER 1978

\* INCLUDES ALL CASES INVOLVING U.S. PERSONNEL WHICH WERE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE HOST STATE.
\* EXCLUDES CASES SUBJECT TO U.S. PRIMARY OR EXCLUSIVE JURISDICTION AND CASES SUBJECT TO EXCLUSIVE JURISDICTION OF THE HOST STATE.
\* INCLUDES ALL CASES FINALY ADJUDICATED, I.E., ALL APPELLATE RIGHTS EXHAUSTED OR EXPIRED, INCLUDING CASES PENDING TRIAL OR APPEAL AT END OF PREVIOUS REPORTING PERIOD AND FINALLY ADJUDICATED DURING CURRENT PERIOD.
\* INCLUDING DRUNKEN AND RECKLESS DRIVING AND FLEETING SCENE OF ACCIDENT.
<table>
<thead>
<tr>
<th>TYPE OF OFFENSE</th>
<th>FINE, REPRIMAND, ETC., ONLY</th>
<th>CONFINEMENT SUSPENDED</th>
<th>CONFINEMENT NOT SUSPENDED</th>
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<td></td>
<td>MIL</td>
<td>CIV</td>
</tr>
<tr>
<td>MURDER</td>
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<td>1</td>
<td></td>
</tr>
<tr>
<td>RAPE</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MANSLAUGHTER AND NEGLIGENT HOMICIDE</td>
<td></td>
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<tr>
<td>ARSON</td>
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<td>ROBBERY, LARCENY &amp; RELATED OFFENSES</td>
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<td></td>
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<td>BURGLARY AND RELATED OFFENSES</td>
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<tr>
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<tr>
<td>DRUG ABUSE</td>
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<tr>
<td>OFFENSES AGAINST ECONOMIC CONTROL LAWS</td>
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<td>TRAFFIC OFFENSES</td>
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* INCLUDING DRUNKEN AND RECKLESS DRIVING AND FLEEING SCENE OF ACCIDENT.
| EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS |
| OVER UNITED STATES PERSONNEL |
| (ANALYSIS) |
| PERIOD: 1 DECEMBER 1977 - 30 NOVEMBER 1978 |
| AREA: TAIWAN |

<table>
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<tr>
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<td>PRIMARY FOREIGN CONCURRENT JURISDICTION CASES AS TO WHICH A WAIVER OF LOCAL JURISDICTION WAS OBTAINED (MILITARY ONLY):</td>
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<tr>
<td>CIVILIANS AND DEPENDENTS RELEASED TO THE U.S. FOR DISPOSITION:</td>
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<td>FINAL DISPOSITIONS OF CASES BY LOCAL AUTHORITIES (MAY INCLUDE CASES PENDING FROM PREVIOUS REPORTING PERIOD)</td>
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<tr>
<td>TOTAL NUMBER:</td>
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<tr>
<td>CHARGES DROPPED:</td>
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<tr>
<td>ACQUITTALS:</td>
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<td></td>
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<tr>
<td>CONVICTIONS:</td>
<td></td>
<td></td>
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<tr>
<td>TOTAL FINAL RESULTS OF TRIALS (MAY INCLUDE RESULTS OF TRIALS &amp; APPEALS PENDING FROM PREVIOUS REPORTING PERIOD)</td>
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<tr>
<td>TOTAL NUMBER:</td>
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<tr>
<td>SERIOUS CASES*:</td>
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</table>

**BREAKDOWN OF FINAL RESULTS**

- NUMBER OF ACQUITTALS: 
- NUMBER OF UNSUSPENDED SENTENCES TO CONFINEMENT: 
- NUMBER OF SUSPENDED SENTENCES TO CONFINEMENT: 
- NUMBER OF SENTENCES TO FINE, REPRIMAND, ETC., ONLY: 

*MURDER, RAPE, MANSLAUGHTER, ARSON, LARCENY AND RELATED OFFENSES, BURGLARY AND RELATED OFFENSES, FORGERY AND RELATED OFFENSES, AND AGGRAVATED ASSAULT.*

TAIWAN
<table>
<thead>
<tr>
<th>TYPE OF OFFENSE</th>
<th>TOTAL CASES SUBJECT TO FOREIGN JURISDICTION ARISING DURING PERIOD</th>
<th>FINAL DISPOSITION OF CASES BY FOREIGN TRIBUNALS DURING PERIOD</th>
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</thead>
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<tr>
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<td>EXCLUSIVE FOREIGN JURISDICTION CASES 1/</td>
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<td>COLUMN 'A' CASES RELEASED TO THE U.S. FOR DISPOSITION 2/</td>
<td>FINAL ACQUITTAL G</td>
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<tr>
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<td>PRIMARY FOREIGN CONCURRENT JURISDICTION CASES INVOLVING MILITARY 3/</td>
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<tr>
<td></td>
<td>WAIVER OF PRIMARY FOREIGN JURISDICTION OVER MILITARY OBTAINED D</td>
<td>FINAL CONVICTION H</td>
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<td></td>
<td>TOTAL CASES RESERVED BY FOREIGN JURISDICTION DURING PERIOD 4/</td>
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<tr>
<td>MIL</td>
<td>CIV</td>
<td>DEP</td>
</tr>
<tr>
<td>------</td>
<td>-----</td>
<td>-----</td>
</tr>
<tr>
<td>MURDER</td>
<td></td>
<td></td>
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<tr>
<td>RAPE</td>
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<tr>
<td>MANSLAUGHTER AND NEGLIGENT HOMICIDE</td>
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<td>ARSON</td>
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<tr>
<td>ROBBERY, LARCENY &amp; RELATED OFFENSES</td>
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<td>OFFENSES AGAINST ECONOMIC CONTROL LAWS</td>
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<td>TRAFFIC OFFENSES 5/</td>
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<tr>
<td>TOTAL</td>
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</table>

1/ INCLUDES ALL CASES INVOLVING U.S. PERSONNEL WHICH WERE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE HOST STATE.
2/ EXCLUDES CASES SUBJECT TO U.S. PRIMARY OR EXCLUSIVE JURISDICTION AND CASES SUBJECT TO EXCLUSIVE JURISDICTION OF THE HOST STATE.
3/ FOR MIL, COLUMNS A, MIL LESS B, MIL PLUS C LESS D. FOR CIV OR DEP, COLUMNS A, CIV OR A, DEP LESS B, CIV OR B, DEP, RESPECTIVELY.
4/ INCLUDES ALL CASES FINALLY ADJUDICATED, I.E., ALL APPELLATE RIGHTS EXHAUSTED OR EXPIRED, INCLUDING CASES PENDING TRIAL OR APPEAL AT END OF PREVIOUS REPORTING PERIOD AND FINALLY ADJUDICATED DURING CURRENT PERIOD.
5/ INCLUDING DRUNKEN AND RECKLESS DRIVING AND FLEEING SCENE OF ACCIDENT.

TAIWAN
CONTEMPORARY ASIAN STUDIES SERIES

SELECTED BIBLIOGRAPHY

Compiled by
CHARLES L. COCHRAN AND HUNGDAH CHIU

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Moyer, Homer E., Jr., Justice and the Military. Published in conjunction with the Military Law Reporter, no. 1-626.


United States High Commissioner to the Phillippines, Third Annual Report of the United States High Commissioner to the Philippine Islands to the President
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ARTICLES


TREATIES/AGREEMENTS CITED


TABLE OF CASES CITED


INDEX

Abercrombie, Jack, 61
Act of State, 3
1952 Administrative Agreement, 31, 32
1953 Protocol, 31, 32
Administrative Court, 69 (see also Legal System of ROC)
Amor, Glicerio, 22, see Mooney
Arrest, 24-25, 38, 57, 72 (see also Procedural safeguards)
Balagtas, Rogelio, See Cole
Balazs, 87
Blair, William McCormick, 15
Bricker, John, 32-33
Brown, Clem, 84, 85
Bruch, Ernest W., 59, 60
Bruoks, 81
Camp Pendleton, 20
Camp Weir, 41
Carter, 67
Chang Myun, 51
Cheng Lai-shiu, 81, 82
Ching ChuanKang Air Base, 79
Clark Air Force Base, 14, 15, 24
Cole, Larry Dean, 14, 15
Conception of justice, ROC, 75-76, 86; Japan, 45-46; Korea, 60-61
Concurrent jurisdiction, 17, 35, 53, 77
Cox, Billy J., 54
Council of Grand Justice, 69 (see also Legal System of ROC)
Cuba 28,
Custody, pre-trial, 27, 38, 73-74 (see also Procedural safeguards)
Dechert, Robert, 41
Dewey, George, 5
Dick, John, 25
Double jeopardy, 23, 34, 39 (see also Procedural safeguards)
Duty, official, determination of, 10, 18, 19-22, 29, 40-42, 57
Eaton, LaBruce, 79
Emilio Aguinaldo, 5
Ervin, 46
Exclusive jurisdiction, 17, 35, 38, 49, 50, 58
Extradition treaty between United States and Philippines, lack of, 23
Frankfurter, Felix, 60
French, 68
Gaddi, Ciferno, 24
German, 43, 45, 68
Girard, William, 14, 41
Hare-Hawes-Cutting Act, 7-8
Herter, Christian, 51
Hodges, John R., 49
Hodges, Raymond, 24
Holman, Averill, 24
Hoover, 7
Imperial Japanese Constitution of 1889, 43
Japanese legal consciousness, 45
Japanese Occupation of Philippines, 8; of Korea, 49
Judicial Yuan, 69, 71
Kaohsiung, 76, 77
Kissinger, Henry, 29, 30
Legal System of Japan, 43-43; ROC 68-71, 86
Legal Training and Research Institute, 44
Liu Tze-jen, 74
Lutz, 84
Macapagal, Diosdado, 15
Maddox, Sam, 15
Manila, 19
Marcos, 23, 25, 28, 29
McConarthy, Walter P., 51
Meiji Restoration, 43
Mendez, 15
Merrit, 6
Miguel, 85
Military Assistance Advisory Group (MAAG), 65, 66, 67, 74
1947 Military Bases Agreement of Philippines and U.S., attempts to revise, 12, 16; 1965 amendment, 16-19, 1979 agreement, 28-30
Military government in Philippines, 6
Mooney, Michael, 22, 23
Murphy, 46
Mutual Defense Treaty of U.S. and Korea, 50
National Defense Treaty of U.S. and Korea, 52, 60
National Lawyers Guild, 25
Negritos, 19, 35n.
New York Times, 14, 20, 24, 25
Okinawa, 32, 42
Osan Air Base, 54
Page, William 54
Peking, 63
Peking Protocol, 63
People's Republic of China, 28
Pescadores, 66
Precedents Compilation Committee, 71
Primary right to jurisdiction, 2, 11, 12, 18, 19, 22, 23, 31, 35, 36, 37, 40, 41, 53, 55, 56, 57, 58, 59, 77
Procedural safeguards, 25-27, 33, 34, 39, 53-54, 56, 52, 71-74, 82-83
Pusan, 50
Reynolds, Robert, 74
Right to counsel, 34, 39, 45, 53, 73 (see also Procedural safeguards)
Right to trial by jury, 39, 46, 69 (see also Procedural safeguards)
Rock, John D., 54
Romulo, Carlos P., 20, 29
Roosevelt, Franklin, 8
Rusk, Dean, 51-52
San Francisco Japanese Peace Treaty, 64-65
Sangley Point, 19
Search, 70, 80-82 (see also Procedural safeguards)
1952 Security Treaty between Japan and U.S., 31
Senate Foreign Relations Committee, 32
Smallwood, H.H., 57, 59
Smith, Kenneth A., 19, 20, 22
Sorenson, Douglas, 24-25
Spanish-American War, 5; Treaty of Paris, 5
Starks, Ian Renard, 79
Status of Forces Agreement (SOFA) with United States, 1; ROC, 2, 49, 64, 67, 68, 71-73, 76, 77, 80, 82, 83, 85, 86, 87; Japan, 2, 12, 17, 18, 31, 35-40, 47, 49, 52, 55, 68;
Korea, 2, 49-50, 54, 56, 58, 60, 68; NATO, 2, 10, 11, 12, 15, 17, 18, 25, 26, 31, 32, 43, 46, 49, 52, 55, 61, 67; Philippines, 2, 49;
Spain, 28, 29; Turkey, 28, 29 (see also Military Bases Agreement of Philippines and U.S.)
Statute for Purge of Narcotics During the Period of Communist Rebellion, 80, 82
Subic Naval Base, 7, 15, 22, 24, 25
Suwon, 55
Swiss, 68
Syngman Rhee, 51
Taegu, 55
Taejon agreement, 50
Taichung County, 79
Taipei, 74, 75
Taku, 63
Thailand, 28
Tokugawa Shogunate, 43
Tong-Won Lee, 52
Treaty of Mutual Cooperation and Security, 31
Truman, Harry S., 9
Trumbull, Robert, 14
Tydings-McDuffie Act, 8
Uniform Code of Military Justice (UCMJ) 1, 27, 39, 58
U.S.S.R., 28
Velasquez, Raymond, 54
Vietnam, 28, 52
Waiver of jurisdiction, 11, 13, 15, 18, 22, 33, 34, 35, 37, 38, 41, 46, 54, 55, 58, 60, 77, 84, 85
Williams, Bernard, 23, 24
Williams, Mennen, 19
Wilson, John A., 76
Yangming Mountain, 74
Yushin Constitution, 61
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