WHO REALLY SHOULD HAVE EXERCISED JURISDICTION OVER THE MILITARY PILOTS IMPLICATED IN THE 1998 ITALY GONDOLA ACCIDENT?

KIMBERLY C. PRIEST-HAMILTON*

INTRODUCTION

ON FEBRUARY 3, 1998, a U.S. Marine Corps EA-6B Prowler flew up the Val di Fiemme toward Cavalese on a low-level training mission from the nearby Aviano Air Base.¹ As a result of flying well below altitude restrictions, the jet severed the cables supporting an Italian ski gondola.² Tragically, all twenty passengers of the gondola dropped approximately 400 feet to their death.³

Prosecutors alleged that Captain Richard Ashby, the pilot of the Prowler, and Captain Joseph Schweitzer, the navigator ("the crew-members"), were flying too low and too fast at the time of the accident, possibly showing off or "flat-lining."⁴ Furthermore, Italy's Air Force Chief General Mario Aspino declared that the Prowler was flying 3300 feet below the designated altitude floor (specified in the flight plan that was filed at Aviano) and four miles off course.⁵ While U.S. Ambassador Thomas Foglietta recently conceded that the Prowler clearly was "flying

---

* Kimberly C. Priest-Hamilton graduated with honors from Southern Methodist University School of Law in May of 2000. After serving one year as law clerk to the Honorable Barbara M. G. Lynn, Judge, United States District Court, she will practice commercial litigation at Carrington, Coleman, Sloman & Blumenthal.


⁴ See id.

⁵ See Nordland & Masland, supra note 2, at 41.
below the minimum approved altitude," the crew-members denied flying recklessly. Moreover, they asserted that they were unaware of the gondola cable strung 370 feet above the ground. Nevertheless, both the United States military court and the Italian court charged the crew-members with twenty counts of involuntary manslaughter and twenty counts of negligent homicide.

On July 13, 1998, Italian Judge Carlo Ancona dismissed the twenty counts of manslaughter charges against the crew-members, as well as the twenty counts of negligent homicide charges, ruling that Italy lacked jurisdiction to hear the case under the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces ("NATO SOFA"). Hence, the crew-members were to be prosecuted in a United States military court on twenty counts of involuntary manslaughter and twenty counts of negligent homicide, as well as other minor charges such as dereliction of duty and destruction of military and civilian property.

Recently, a U.S. court-martial acquitted Ashby of both involuntary manslaughter and homicide. Moreover, the court found that Ashby acted without negligence in flying the Prowler into the gondola cable. As a result of Ashby’s acquittal, man-
slaughter charges against Schweitzer were dismissed.\textsuperscript{13} Thereafter, the crew-members were found guilty of obstruction of justice and conspiracy for destroying a videotape of the flight.\textsuperscript{14}

Thus far, Congress has set aside $20 million for property damages caused by the gondola incident.\textsuperscript{15} Moreover, ten of the twenty families of the victims have filed wrongful death claims under NATO, seeking damages ranging from $812,000.00 to $5.4 million.\textsuperscript{16}

In advocating for jurisdiction over the claims in the present case, the United States argued that “the jet was flying under the auspices of the alliance when the incident occurred” and thus, the United States had primary criminal jurisdiction under NATO SOFA.\textsuperscript{17} On the other hand, the Italian prosecutor argued that because the Prowler violated the mandated flight patterns, the flight was not a United States mission, and therefore, Italy had primary jurisdiction under NATO SOFA.\textsuperscript{18}

This Article provides an in depth exploration of these arguments and will ultimately conclude which court should have exercised criminal and/or civil jurisdiction. Part I begins with a discussion of the historical background of jurisdiction and international law, the predominant theories in the area, and several Supreme Court decisions regarding the status of forces under international law. Part II analyzes Article VII of NATO SOFA, specifically focusing on issues of “foreign criminal jurisdiction” and “waiver.” In addition, this section offers an analysis of the foreign criminal jurisdiction law under NATO SOFA applied to the facts of the case at hand, as well as a conclusion as to whether a United States military court properly had jurisdiction to try the crew-members involved in the Italian gondola incident. The latter section of Part II briefly summarizes foreign civil jurisdiction law under NATO SOFA, and predicts how the civil claims asserted by the victims’ survivors will proceed. Part III offers a brief insight into the necessity that the United States maintain positive relations with Italy. Finally, Part IV concludes

\begin{footnotes}
\footnote{\textsuperscript{13} See Associated Press, \textit{Navigator Pleads Guilty to Obstruction, Conspiracy Charges}, \textit{Florida Today}, March 30, 1999, at 07A.}
\footnote{\textsuperscript{15} See \textit{On Trial}, \textit{People Magazine}, February 8, 1999, at 151.}
\footnote{\textsuperscript{16} See \textit{id}.}
\footnote{\textsuperscript{17} Simpson, \textit{supra} note 9.}
\footnote{\textsuperscript{18} See \textit{id}. Additionally, Italian Prosecutor Francantonio Granero challenged the constitutionality of NATO SOFA. See \textit{id}.}
\end{footnotes}
with the jurisdiction issues that NATO SOFA raises as well as a look at the policy arguments behind each issue.

I. HISTORICAL BACKGROUND OF FOREIGN CRIMINAL JURISDICTION AND THE MILITARY

A. THEORIES AND CASE LAW REGARDING FOREIGN CRIMINAL JURISDICTION

Two theories regarding international jurisdiction existed before NATO SOFA was adopted: the law of the flag and territorial sovereignty. The law of the flag principle stands for the proposition that a military force “operating on foreign soil is in no way subject to the territorial sovereign and exercises an exclusive right of jurisdiction over its members.” The fundamental assumption behind this principle is that because the military force of a sending state is a representative of the sovereign, it is exclusively subject to the “law of the flag.” Historically, the law of the flag principle has been utilized by influential nations. For example, the United States (arguably the only remaining superpower) has asserted this theory as governing its military in foreign countries for approximately 188 years.

This principle was first officially recognized in the United States by Supreme Court dicta in *Schooner Exchange v. McFadden*, decided in 1812. In the *Schooner* opinion, Chief Justice Marshall stated that a receiving state gives up its territorial jurisdiction when a foreign military force passes through its territory. Chief Justice Marshall’s opinion assumed that the need for military discipline was an essential component of the military doctrine. In other words, if the military did not have the ability to discipline its own, the commander would lose control of his

---

22 See LAZAREFF, supra note 20, at 13.
23 11 U.S. 116 (1812). This famous case involved an action brought by Americans who claimed to be the owners of the Schooner “Exchange,” a vessel that was seized by the French and made into a ship of war. See id. at 117-19.
24 See id. Chief Justice Marshall stated in dicta, “The grant of a free passage [through a foreign country], therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which his army may require.” Id. at 140.
force. The *Schooner* opinion, however, was limited to a military force "passing through" a foreign country as opposed to one stationed there.

Sixty years later, in *Coleman v. Tennessee*, the Supreme Court expanded the holding of *Schooner*. The Court held that a sending state maintained exclusive jurisdiction over its force stationed in the receiving state, as well as over its force passing through the receiving state. Thus, for the first time, it was held that a force passing through the receiving state and a force permanently stationed in the receiving state were to be treated the same.

Finally, in 1902, the Supreme Court issued its last opinion regarding the status of forces before implementing NATO SOFA. In *Tucker v. Alexandroff*, the Court reaffirmed the holdings of *Schooner* and *Coleman* by specifically recognizing the importance of each state maintaining military discipline over its own troops.

Contrary to the law of the flag principle, the territorial sovereignty theory gives the receiving state a general right of jurisdiction over members of a military force on the premise that it would be unacceptable to prohibit a sovereign state from punishing an offense committed on its territory. This concept originated from the theory that a state has supreme jurisdictional interest over anything that happens on its territory. Hence, the receiving state will not allow the sending state to ex-

---

25 See Archibald King, *Jurisdiction over Friendly Foreign Armed Forces*, 36 Am. J. Int'l. L. 539 (1942). If military authority had no ability to punish its own, "forces would cease to be an army and would become a mob." Id.

26 See *Schooner*, 11 U.S. 116 (1812). Note that the *Schooner* decision does not directly address the modern situation at hand where members of a military force are sent to a foreign country for a certain length of time, on a friendly basis. It simply addresses the issue of a military force "passing through" a foreign country. Nevertheless, it has been used to support the law of the flag principle pertaining to a military force stationed in a foreign country for a certain period of time. See Lazaroff, *supra* note 20, at 14-17.

27 97 U.S. 509 (1879).

28 See id. at 515. "It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from civil and criminal jurisdiction of the place." Id.


30 See id. at 433. "[I]f foreign troops are permitted to enter, or cross our territory, they are still subject to the control of their officers and exempt from local jurisdiction." Id.

31 See Lazaroff, *supra* note 20, at 17.

exercise its jurisdiction within the receiving state’s territory.\textsuperscript{33} It is widely accepted today, that in the absence of a treaty (such as NATO SOFA), jurisdiction over foreign forces lies exclusively with the receiving state.\textsuperscript{34}

In conclusion, the United States Supreme Court has consistently held that a sending state may retain jurisdiction over its military force stationed in foreign jurisdictions. Because the United States has an enormously strong international presence, stationing more military troops in foreign countries than any other country in the world, it favors the law of the flag principle. But it is important to note that not all countries adhere to this principle; hence, the United States’ concern for its military forces stationed in foreign countries has intensified.\textsuperscript{35}

\section*{B. International Jurisdiction During World War I}

During World War I, the law of the flag principle predominated.\textsuperscript{36} The rationale was that jurisdictional power was inseparable from disciplinary power, which was an essential part of the military organization.\textsuperscript{37} During World War I, the United States (along with a majority of the Allies) argued for exclusive jurisdiction over its military forces stationed in France.\textsuperscript{38} Contrary to the territorial principle, which France traditionally adhered to, France permitted the United States (and other Allies) to retain exclusive jurisdiction, primarily because France was in a weak bargaining position and needed the Allies' military presence in its country.\textsuperscript{39}

Although the law of the flag was the predominant theory at that time, the United Kingdom demanded that forces in its country recognize the principle of territorial sovereignty.\textsuperscript{40}

\textsuperscript{33} See id. While territorial sovereignty exists in theory, it has never been exclusively adopted by any country. See LAZAROFF, supra note 20, at 17. However, most countries today rely on territorial sovereignty in arguing for concurrent jurisdiction over foreign military stationed in their territory. Id.


\textsuperscript{35} See 99 CONG. REC. 9080 (daily ed. July 14, 1953).

\textsuperscript{36} See LAZAREFF, supra note 20, at 19.

\textsuperscript{37} See id.


\textsuperscript{39} See id. This can be seen as an early example of the dominant role that a country’s relative bargaining power plays in determining who has jurisdiction over its military forces.

\textsuperscript{40} See Pagano, supra note 19, at 195.
Although the United States insisted on exclusive jurisdiction over its military force in Great Britain; Great Britain refused to recognize the law of the flag principle.\textsuperscript{41} Even with extensive negotiations, the two countries failed to reach a resolution before the end of World War I.\textsuperscript{42}

C. INTERNATIONAL JURISDICTION DURING WORLD WAR II

The situation was quite different during World War II, when allied forces were scattered throughout the United Kingdom, mixing freely with the local population.\textsuperscript{43} As a result, Great Britain adopted the Allied Forces Act in 1940. This Act granted the Allied Military Courts jurisdiction over such issues as “questions of discipline and administration regarding the member of the forces.”\textsuperscript{44} Violent crimes such as rape and murder, however, were subject to the exclusive jurisdiction of the British courts.\textsuperscript{45}

In 1942, the U.S. forces arrived in Great Britain and immediately attempted to obtain an exclusive right of jurisdiction over its forces.\textsuperscript{46} Because of Great Britain’s need for U.S. forces at that time, the British Government conceded to the United States, permitting it to retain jurisdiction over U.S. military forces stationed in Great Britain by enacting the United States of America Visiting Forces Act.\textsuperscript{47} This Act constituted a “very considerable departure . . . from the traditional system and practice of the United Kingdom” and was only a temporary arrangement due to the necessities of war.\textsuperscript{48} Nevertheless, the United

\textsuperscript{41} See id.

\textsuperscript{42} See id. at 195-96. Note that during World War I, both the United States and the United Kingdom were dominant super powers; hence, the intense tug-of-war between the principles of law of the flag and territorial sovereignty.

\textsuperscript{43} See LAZAREFF, supra note 20, at 24. The forces stationed in the United Kingdom were “mixed with the population, using public roads, consuming locally purchased as well as imported goods; their presence was raising completely new legal problems.” Id.

\textsuperscript{44} Allied Forces Act, 1940, 34 Geo. 6, ch. 5.

\textsuperscript{45} See id.

\textsuperscript{46} See LAZAREFF, supra note 20, at 24.

\textsuperscript{47} See Visiting Forces Act, 1942, 56 Geo. 6, ch. 315. The Visiting Forces Act states, “[s]ubject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America.” Id.

\textsuperscript{48} LAZAREFF, supra note 20, at 25 (quoting Hearings 6, p. 403). See also G.P. Barton, Foreign Armed Forces: Immunity From Criminal Jurisdiction, 27 BRIT. Y.B. INT’L. L. 186, 199 (1950). Despite Great Britain’s intention that the Visiting Forces Act be temporary, it served as a model for later agreements entered into between the United States and Great Britain (including NATO SOFA).
States was the only country permitted to obtain exclusive jurisdiction over its forces in the United Kingdom.49 Similar to France in World War I, Great Britain was in a weak bargaining position because of its need for U.S military forces in its country. The United States thus emerged again as the “jurisdictional winner” by retaining jurisdiction over its military force stationed in Great Britain.50

In summary, three points arise out of the study of how foreign countries historically dealt with the issue of jurisdiction and its application to their military forces stationed abroad during World Wars I and II. First, a nation’s preference for the law of the flag principle or territorial sovereignty as its jurisdictional policy has relied on whether that nation is “primarily a military force exporter or importer.”51 Because the United States traditionally acted as a military force exporter, it espoused the law of the flag principle (compared to Italy, who primarily acted as a military importer, and thus, espoused the principle of territorial sovereignty). Second, because of the unique situations encountered during World Wars I and II, countries were willing to “temporarily adopt the opposite [jurisdictional] position” to suit their needs regarding the requirement for certain military forces.52 Finally, the jurisdictional consensus reached in any status of forces agreement largely reflects the relative bargaining power of each party to the agreement at the time the agreement is made.53 “Whenever both States are not politically and economically equal, the more powerful state will obtain a broader right of jurisdiction, even in peacetime.”54 Therefore, the more powerful the nation, the more bargaining power it will have to retain its preferred jurisdictional principle.

D. INTERNATIONAL JURISDICTION POST-WORLD WAR II

Because the end of World War II did not alleviate the necessity of retaining military forces in foreign countries, the jurisdic-

49 See Norman Bentwich, The United States of America Visiting Forces Act, 6 Mod. L. Rev. 68, 72 (1942).
50 This historical illustration serves as yet another example of the United States getting its way with foreign jurisdictions because of its super-power status.
51 Supervielle, supra note 38, at 9.
52 Id. This was illustrated in World War I with France and in World War II with Great Britain, when both countries permitted the United States to retain exclusive jurisdiction over its military force, even though France and Great Britain adhered to the territorial sovereignty principle. See id.
53 See id.
54 Id. at 9.
tional conflicts remained and the United States and other countries created several different types of jurisdictional agreements. A limited number of countries permitted the United States to retain exclusive jurisdiction over its military stationed in their countries. Other countries (primarily third-world countries), determined jurisdiction by geographical partition. In other words, these countries gave the United States exclusive jurisdiction over offenses committed by the U.S. military only where “members of the American Forces [had] the right to go and orders [had] been given accordingly.” Finally, the majority of countries gave the United States “concurrent jurisdiction” over its military forces. At that time, concurrent jurisdiction reconciled the concept of territorial sovereignty with the law of the flag principle, and hence, formed the basis for the Treaty of Brussels and later, NATO SOFA.

The Treaty of Brussels, signed March 17, 1948, represents the first agreement between European nations that contemplated Allied troops remaining in European countries for an indefinite period of time. Although representing a concurrent jurisdictional approach, the Treaty of Brussels recognized the principle of territorial sovereignty in Article 7:

It is the duty of ‘members of a foreign force’ to respect the laws in force in the ‘receiving State’ and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity.... Members of a ‘foreign force’ who commit an offence in the ‘receiving State’ against the laws in force in that State can be prosecuted in the courts of the ‘receiving State.’

On the other hand, the Treaty of Brussels further provided that if the offense committed in the receiving state also violated the sending state’s laws, the receiving state should consider “with the greatest sympathy” conferring jurisdiction to the sending state. Ultimately, the terms of the article determined jurisdiction based on both the amount of damage done to either state and the respective interests of both states.

---

55 These countries included Korea, Ethiopia, and Japan.  
56 See Lazareff, supra note 20, at 39-42.  
57 Id. at 40-42. This gave the United States exclusive jurisdiction because it was highly unlikely that an offense would be committed outside of these zones. However, even if an offense was committed outside of these zones, the American authorities would routinely intervene to obtain jurisdiction over the offense. See id.  
58 Treaty of Brussels, at art. 7, para. 1.  
59 Treaty of Brussels, at art. 7, para. 2.
In summary, under the Treaty of Brussels, the receiving state enjoyed the exclusive right of jurisdiction only when the offense violated its own laws, but not those of the sending state. Moreover, if the offense committed was punishable under both the sending and the receiving state's laws, concurrent jurisdiction existed. Article 7, paragraph 2 of the Treaty divided these offenses into two categories: (1) offenses against the law of the sending state or against its property, or against a member of the force to which the offender belonged; and (2) all other offenses. Regarding the first category, the receiving state had authority to prosecute only if it concluded that "special considerations require[d] them to do so." Offenses committed under the second category were subject to the exclusive jurisdiction of the receiving state. Hence, the Treaty of Brussels resurrected the territorial sovereignty principle and attempted to alleviate the law of the flag principle.

II. NATO SOFA
A. Introduction

On April 4, 1949, thirteen politically free and economically stable countries joined together to create the Agreement Between the Parties to the North Atlantic Treaty (hereinafter "NATO"). This Agreement resulted from an effort to create uniform political, economic, and military sanctions to defend against communist expansion and aggression. Subsequently, on June 19, 1951, NATO SOFA was signed. This Agreement asserted the duties, rights, and obligations of a visiting force stationed in a foreign state. While NATO SOFA laid out the rights and duties of signatories in many important areas, the heart of the Agreement concerned criminal jurisdiction over foreign military personnel, as asserted in Article VII. Within the crimi-

---

60 See Lazareff, supra note 20, at 47.
61 See Treaty of Brussels, at art. 7, para. 2.
62 Id. Thus, in this situation, it appears that the receiving state had priority jurisdiction, leaving the sending state with jurisdiction only when the receiving state waived its right to prosecute the offense. See id.
64 See Robert B. Ellert, NATO 'Fair Trial' Safeguards: Precursor to an International Bill of Procedural Rights 1 (1963). It has been stated that NATO "contemplated an unprecedented peacetime stationing of the forces of one party in the territory of another." Id.
65 See NATO SOFA, supra note 9.
66 See Ellert, supra note 64, at 2.
nal jurisdiction provisions, NATO SOFA attempted to address the issues pertaining to: (1) when a military force stationed in a foreign state committed an offense; (2) and when both the sending and the receiving state had concurrent jurisdiction. This formula apportioned the right to exercise jurisdiction on a reciprocal basis depending on the paramount interests of each state. In summary, the sending state received jurisdiction over offenses against the sending state’s property or its nationals committed by its force while performing official duties. On the other hand, the receiving state retained primary jurisdiction over offenses committed by a visiting force against the receiving state’s nationals, which were anticipated to cause resentment among the citizens of the receiving state (i.e. murder, rape).

Article VII is the most popular article of NATO SOFA and has attracted wide debate and comment since its inception. The article has been the subject of intense debate simply because of its subject matter—foreign criminal jurisdiction over military forces, which directly implicates the opposing principles of the law of the flag and territorial sovereignty. NATO SOFA states have historically favored one principle, depending on their role as a receiving state versus their role as a sending state. Moreover, other problems regarding the misunderstanding or misinterpretation of foreign law present themselves in Article VII. For example, the United States’ historical distrust of certain NATO SOFA countries (i.e. France and Italy) and their corresponding laws and imposable punishments clearly formed the basis for the negative reaction by U.S. Congressmen and public opinion to the Agreement during its introduction. Finally, nationalistic emotions tended to be greatly aroused by the subject of Article VII. In particular, strong United States sentiments emerged from the arguments put forth during the hearings on NATO SOFA. Some nationalists denounced Article VII because it subjected U.S. servicemen to the jurisdiction of the re-

67 See id. Specifically, Article VII deals with the allocation of criminal jurisdictional rights, the cooperation between states in criminal matters, and the authority of the military police. See Lazareff, supra note 20, at 128.
68 See Lazareff, supra note 20, at 128.
69 It is the premise of this Article that the United States has traditionally leaned in favor of the law of the flag principle because of its inherent national power and traditional role as a sending state.
70 See Lazareff, supra note 20, at 129.
71 See id.
This criticism was largely due to the fact that the United States had primarily been a sending state under NATO SOFA. Specifically, the forces of the United States stationed in foreign states outnumbered the 12,000 foreign troops stationed in the United States during 1955. On the other hand, some influential Americans voiced their support of NATO SOFA and were willing to hand over some criminal jurisdiction claims against U.S. servicemen to the receiving states (or at least give the appearance of handing over some criminal jurisdiction claims). In other words, the U.S. leaders that initially sup-

---

72 See Ellert, supra note 64, at 2. The following excerpt serves as an example of the vehement emotions exemplified by some Americans over the jurisdictional compromises made in NATO SOFA:

One hundred and seventy-nine years ago our country proclaimed the independence of the United States of America and all her citizens. Foreign potentates and the barratorious empires of Europe were put on notice that Americans would no longer tolerate the evil practices of laws over which they had no control. To protect our people from the wretched canons of remote kingdoms our ancestors fought and died in a war called the 'Revolution'. To protect our ships and sailors and soldiers from the humiliations imposed upon them by foreign monarchs our ancestors fought and died in a war called the 'War of 1812'. In both of these wars the men of the National Guard made the ultimate sacrifice.

In 1951, one hundred and seventy-five years after our people secured their independence and were protected by the Bill of Rights, our Department of State negotiated for the surrender of the birth rights of those who wear the uniform of the United States. On July 15, 1953, the Senate of the United States ratified a vicious treaty which defamed and disparaged the rights of freeborn men who happen to be in the service of this formerly sovereign country.

Yes, it is true that American soldiers and Guardsman abroad are subject to trial under foreign law and denied the constitutional protections for which many generations of militia men have gallantly laid down their lives. Yes, you G.I.'s and Guardsman are now subject to the injustices that are handed down by magistrates and juries in those foreign lands where the people write 'Yankee Go Home' on every wall and building. Yes, it is true that the kangaroo and Star Chamber court procedures; local police brutalities; and in some instances communist judges and juries are the rewards that our men in uniform earn by serving under the flag of the United States in Europe and Japan. Yes, it is indeed a sad travesty on Justice to deprive American troops overseas of the protection of the Government and Constitution for which they must give their very lives to defend.


74 For example, President Eisenhower stated in a letter:
ported the inception of NATO SOFA anticipated that the United States would maintain exclusive jurisdiction over its military forces stationed abroad.\(^{75}\)

In conclusion, the U.S. citizens who participated in drafting Article VII experienced intense emotional debate during the process. The United States historically played a dominant role as a sending state and thus, maintained control over its military forces stationed abroad. By becoming a member of NATO SOFA, the United States risked equalizing its advantageous foreign criminal jurisdiction position with other NATO SOFA countries. Nevertheless, despite that risk, the United States became a member of NATO SOFA, arguably not anticipating that its military forces abroad would ever really be subject to another country's criminal jurisdiction. Thus, it is likely that many of the problems encountered when using NATO SOFA today are present because of legal aspects which were supposedly overlooked (or simply ignored) because of emotional considerations during the drafting process.

**B. THE UNITED STATES AND NATO SOFA NEGOTIATIONS**

In drafting NATO SOFA, the drafting committee (hereinafter “the Working Group”) faced two draft proposals: the Brussels Agreement and the American counterproposal. As discussed earlier, the Brussels Agreement, for the most part, adopted the principle of territorial sovereignty.\(^{76}\) The American counterproposal, on the other hand, naturally espoused the law of the flag principle. According to U.S. Secretary of State Murphy, during the preliminary and semi-official negotiations, the United States made every effort to convince the Working Group to adopt its view that criminal jurisdiction should reside exclusively with the sending state.\(^{77}\) It was apparent to the Working Group that the

---

I can certainly appreciate the concern of those who fear that these agreements might subject American soldiers overseas to systems of criminal justice foreign to our own traditions. I do not share such fears, however, because of the many years experience I have had in command of American troops overseas. That experience convinces me that our friends abroad will continue to cooperate, as they have in the past, in turning over those charged with offenses against their laws to our own military courts for trial.

**LAzAREFF, supra note 20, at 130.**  
\(^{75}\) See **LAzAREFF, supra note 20, at 130-31.**  
\(^{76}\) See supra notes 58, 59, 61-62.  
\(^{77}\) See **LAzAREFF, supra note 20, at 130-32.**
United States would not waive its rights to exercise jurisdiction over foreign military personnel stationed in the United States.78

During the course of negotiations, the United States drafted a "compromise proposal," which, for the most part, comprises the text of present-day Article VII.79 The most significant "compromise" in this proposal was the understanding that criminal jurisdiction over an offense committed by a serviceman stationed in a foreign country would be concurrent with primary jurisdiction residing in the sending state.80 It is arguable, however, whether this was really a compromise at all on the part of the United States. The United States was concerned only with the ultimate result, that it retain criminal jurisdiction over acts committed by its military in foreign countries, and not with whether the jurisdiction it obtained was termed exclusive or concurrent.81 As discussed below, the U.S. military law is broadly interpreted for the purpose of encompassing the majority of offenses committed by its servicemen. Nevertheless, although some Americans opposed NATO SOFA, many commentators have argued that the Agreement represents a successful "compromise" between the NATO SOFA nations (with the United States ultimately getting its way).

C. Exclusive Jurisdiction

Paragraph 2 of Article VII authorizes exclusive criminal jurisdiction in two situations. In the first situation, when an offense is punishable by the sending state but not the receiving state, the sending state has exclusive criminal jurisdiction over its military personnel. In the second situation, when the offense is punishable by the receiving state but not the sending state, the receiving state has exclusive criminal jurisdiction.82 In other

78 See id. This was due to the conflicting federal-state relationship in the American Union and the fear that American states may try to assert their rights to exercise jurisdiction over foreign forces. See id. at 132.
79 See id.
80 See id.
81 See id. The Senate, in efforts to maintain criminal jurisdiction over its military stationed in foreign countries at all times, produced a regulation that stated "[c]onstant efforts [would] be made to establish relationships and methods of operation with host country authorities that [would] maximize U.S. jurisdiction to the extent permitted by applicable agreements." Army Reg. 27-50/SECNAVINST 5820.4G/Air Force Reg. 110-12 (Jan. 14, 1990), Status of Forces Policies, Procedures, and Information, para. 1-7(a).
82 See NATO SOFA, supra note 9, at art. VII, para. 2. The exclusive jurisdiction provision provides:
words, the state whose law is not violated does not have an inter-
est in or a right to exercise criminal jurisdiction over the offense.83

But, when an offense is committed that is punishable under
both the sending and the receiving states’ laws, exclusive jurisdic-
tion no longer applies; rather, a case of concurrent jurisdic-
tion subject to the provisions of Article VII, paragraph 3 evolves.
Although several problems of interpretation arise from Article
VII,84 the most problematic issue relating to this Article is one in
theory. The issue is as follows: when an offense is committed in
a receiving state, do not both the receiving and the sending
states have an interest in prosecuting that offense?85 The receiv-
ing state arguably has an interest in prosecuting all offenses that
occur within its territory. Conversely, the sending state has an
interest in prosecuting its own military force and an inherent
interest in protecting its military force’s constitutional rights.
Furthermore, most violations in the receiving state constitute vi-
olations in the sending state. Hence, in reality, a situation
where either the sending or the receiving state has exclusive ju-
risdiction is rare.

Most violations committed by U.S. military servicemen against
the laws of the receiving state are also deemed to be against the
sending state by means of Article 134 of the Uniform Code of
Military Justice (hereinafter “UCMJ”).86 Specifically, this catch-

---

2.a. The military authorities of the sending State shall have the
right to exercise exclusive jurisdiction over persons subject to the
military law of that State with respect to offences, including of-
fences relating to its security, punishable by the law of the sending
State, but not by the law of the receiving state.
2.b. The authorities of the receiving State shall have the right to
exercise exclusive jurisdiction over members of a force or civilian
component and their dependents with respect to offences, includ-
ing offences relating to the security of that State, punishable by its
law but not by the law of the sending State.
2.c. For the purpose of this paragraph and of paragraph 3 of this
Article a security offence against a State shall include:
- treason against the State;
- sabotage, espionage or violation of any law relating to official
  secrets of that State, or secrets relating to the national defense
  of that State.

Id.
83 See LAZAREFF, supra note 20, at 151.
84 See generally id. at 151-54.
85 See id. at 151.
86 See JOSEPH M. SNEE & KENNETH A. PYE, STATUS OF FORCES AGREEMENT: CRIMI-
NAL JURISDICTION 24-25 (1957). See also United States v. Bowman, 260 U.S. 94
all provision grants criminal jurisdiction over "all disorders and
neglects to the prejudice of good order and discipline in the
armed forces" and "all conduct of a nature to bring discredit
upon the armed forces." By interpreting Article 134 of the
UCMJ broadly, the United States has the ability to deny exclu-
sive jurisdiction to the receiving state for virtually any crime
committed by its military. One of the main policies behind the
expansion of Article 134 was to reduce the scope of foreign
criminal jurisdiction over U.S. forces. By expanding Article
134 to include all, or at least the majority of criminal offenses
committed by its military force in the receiving state, the United
States has been able to retain criminal jurisdiction (albeit con-
current jurisdiction) over its military stationed in foreign
countries.

The breadth of the UCMJ is significant because of the waiver
provision found in Article VII, paragraph 3 of NATO SOFA. This provision implies that no waiver of jurisdiction may be
sought from a receiving state with exclusive jurisdiction. But if
an offensive act is deemed a violation of UCMJ Article 134, as
well a violation of the receiving state’s laws, the sending state
may request a waiver of jurisdiction (because each state is then
said to have concurrent jurisdiction). Once a waiver has been
sought, the receiving state is required to give the waiver request
“sympathetic consideration.”

(1922) and United States v. Keaton, 41 C.M.R. 64, 66 (C.M.A. 1969) (proposing
that the United States does not prevent the exercise of extraterritorial criminal
jurisdiction).

Uniform Military Code of Justice, art. 134 [hereinafter UCMJ]. The test
used in determining whether an act committed by a U.S. military serviceman is a
violation of the UCMJ is: (1) whether the act is a disorder or neglect to the preju-
dice of good order; or (2) whether the act brings discredit upon the armed
forces. If the answer to either of these questions is “yes,” the act is considered a
violation of U.S. military law and, hence, is not subject to exclusive jurisdiction of
the receiving state. See id.

This coincides with what the Senate’s goals were prior to ratification, as they
were assured that most violations of foreign law would be punishable under the
UCMJ. See Hearings Before the Committee on Foreign Relations, United States Senate,
83rd Cong., 1st Sess. (1953) on the Status of the North Atlantic Treaty Organiza-
tion, Armed Forces and Military Headquarters.

See Rouse and Baldwin, The Exercise of Criminal Jurisdiction under the NATO

Historically, U.S. Representatives took the position that any violation of the
receiving state’s law was a per se violation of the UCMJ. However, their position
has been modified and they have held that not every violation of a foreign state
law is a violation of the UCMJ. See Snee & Pye, supra note 86.

See NATO SOFA, supra note 9, at art VII, para. 3 (c).
In analyzing whether the United States or Italy had proper criminal jurisdiction over the offense committed in the case at hand, the first question is whether the offense gave rise to exclusive jurisdiction on the part of the sending state or the receiving state. The U.S. military courts have held that a negligent offense committed by a military serviceman that causes personal injury to the victim does not automatically give rise to an offense under the UCMJ. On the other hand, the U.S. military courts have held that the first or second clause of UCMJ Article 134 governs if the negligent offense results in death. Thus in this case, where the alleged offenses charged against the U.S. military crew-members included claims of negligent homicide and involuntary manslaughter, and where the end-result of these charges was death, a violation of UCMJ Article 134 allegedly has occurred. Therefore, as properly concluded by Italian authorities, Italy did not have the right to exercise exclusive criminal jurisdiction over the claim of negligent homicide nor involuntary manslaughter against the crew-members. Conversely, the United States clearly did not have exclusive criminal jurisdiction over the offenses because claims of both negligent homicide and involuntary manslaughter are chargeable offenses under Italian law. Therefore, the case at hand was quite clearly one of concurrent jurisdiction.

D. Concurrent Jurisdiction

Where the offense committed in the receiving state is punishable under both the receiving and the sending state's laws, concurrent jurisdiction arises. Under these circumstances, both states theoretically possess a right to exercise criminal jurisdiction over the offender. The majority of jurisdictional conflicts under NATO SOFA arise under this provision because both states retain the right to exercise criminal jurisdiction over the offense (because each state's laws have been violated). Because of the necessity for military maintenance command and discipline, the sending state has an interest in prosecuting its own servicemen (as well as protecting its servicemen's constitutional rights). On the other hand, the receiving state has an interest in prosecuting offenses against its public order. In light of these overlapping considerations, NATO SOFA has attempted to allocate primary rights to exercise criminal jurisdiction between the

---

92 See United States v. Kirchner, 4 C.M.R. 69-70 (1952).
states. Specifically, according to Article VII, paragraph 3(a), in the instance of concurrent jurisdiction, the sending state has the primary right to exercise criminal jurisdiction in two instances: first, when the offense is committed solely against its personnel or property; and second, when the offense is committed in the performance of official duty. The receiving state has primary jurisdiction in all other concurrent jurisdiction cases. Because the definition of an offense committed against a state’s personnel or property is fairly straightforward (and further, not the subject of the case at hand), this Article will focus on one of the most controversial provisions of NATO SOFA: the issue of what constitutes an act or omission done in the performance of official duty.

1. Offenses Committed in the Performance of Official Duty

It is well established that the courts of a receiving state are not competent to try offenses committed by foreign servicemen in the performance of their official duty. When a military serviceman is performing official duties, he is carrying out instructions from his state and should not be brought before the courts of the receiving state. Nevertheless, although it is clear that a military serviceman may not be prosecuted in the receiving state for an offense committed in the performance of official duty, it is unclear what actually constitutes the performance of official duty.

94 See NATO SOFA, supra note 9, at art. VII, para. 3.

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

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

i. offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependant;
ii. offences arising out of any act or omission done in the performance of official duty.

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

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

95 See LAZAREFF, supra note 20, at 170.

96 See id.
duty. Two issues emerge in the interpretation of this concept. The first issue is: when does an offense arise out of an act or omission done in the performance of official duty (or the scope of official duty). The second issue is: who is given the right to define the scope of official duty.

a. Scope of Official Duty

The drafting committee was unable to agree on a definition of the scope of official duty, and to date, NATO SOFA is silent on the issue. While the working papers are not definitive, they do add more understanding to this concept. In the first draft of NATO SOFA, the sending state was given exclusive jurisdiction over "all acts done in the performance of official duty." Subsequently, the second and third drafts gave the sending state primary jurisdiction over those acts done in the performance of official duty. In all three of these drafts, an "official duty offense" was defined as "an offence arising out of an act done in the performance of official duty or pursuant to a lawful order issued by the military authorities" of the sending state. Inasmuch as the drafting committee was aware of the vagueness of the definition, they deferred action on the Agreement until this definition could be clarified.

During negotiations of the Agreement, Italy supported NATO SOFA's theory regarding offenses committed in the performance of official duty in principle; however, it wanted a more precise definition of what was meant by a member of an armed force "on duty." Specifically, the Italian Representative asserted that the wording should not only mean that the act was done in the performance of official duty, but that it was done within the limits of that official duty.

---

97 See id. at 173.
98 Id.
99 See id.
100 Id. (quoting DR (51) 15).
101 LAZAREFF, supra note 20, at 174 (citing MS (J)-R (51)2, par. 13).
102 See id. (citing MS (J)-R (51)14, par. 30). The Italian Representative used the example of a driver on official business to illustrate his point. He explained that if the driver deviated from the direct route for reasons of official business and the accident occurred during such deviation, the driver could reasonably claim that he was acting in the performance of official duty. But if the driver deviated from the direct route for personal reasons and the accident occurred during such deviation, the driver could not claim that he was acting in the performance of official duty. See id.
Applying this definition to the case at hand, if the crew-members were specifically flying the Prowler according to their authorities’ orders, then the crew-members would have been acting in the performance of official duty, and therefore, the United States would have primary jurisdiction over their alleged offenses. However, if the crew-members were acting outside of their authorities’ orders (i.e. flying lower than instructed, flying faster than instructed, flying off-course), then the crew-members could not claim that they were acting in the performance of official duty, and hence, Italy would have primary jurisdiction over the offense.¹⁰³

U.S. military authorities, on the other hand, have never attempted to expressly communicate their definition of an offense effected during the performance of official duty.¹⁰⁴ Instead, they have preferred to extend the coverage of this concept as far as possible, arguably using their power as the largest sending state to retain primary jurisdiction in most instances.¹⁰⁵

In summary, the two most common “definitions” asserted by NATO SOFA members in effort to define an offense committed while in the performance of official duty are those opposing explanations represented by Italy and the United States. First, as Italy asserts, an offense is committed in the performance of official duty if and only if it was committed within the limits of that official duty. Conversely, as the United States argues, virtually any offense committed by its military surrounding the duties of the United States military is committed in the performance of official duty. To date, because NATO SOFA has provided no guidelines that officially define the scope of official duty, each country is left to rely on its own definition. Thus, the obvious conflict arises when, in cases such as the one at hand, the sending state’s military force commits an offense in the receiving state, and the issue of concurrent jurisdiction arises. In this instance, it is necessary to understand the definition of “perform-

¹⁰³ This analysis is similar to the much legislated topic of “scope of employment” found in U.S. agency law. See infra note 126-28.
¹⁰⁴ See Snee & Pye, supra note 86, at 47.
¹⁰⁵ See id. United States military authorities have typically tended to interpret acts done in the performance of official duty similar to the concept of “scope of employment,” but broader. For example, several cases have held that an officer driving his car to work from home is acting within the performance of official duty. See id. Thus, it is interesting to note the difference in the way that the United States defines “scope of employment” for the military and “scope of employment” for the remainder of U.S. citizens. See infra note 126-28.
formance of official duty” to determine which country has primary jurisdiction.

b. Who Defines Scope of Official Duty

As concluded from the discussion above, because NATO SOFA provides no set definition of an offense committed in the performance of official duty, and because NATO SOFA countries have varying definitions of the phrase, it is necessary to know whether the sending state or the receiving state has authority to assert its interpretation in defining the scope of official duty. Each state has an interest in exercising criminal jurisdiction in this instance. Thus, common sense dictates that the sending state will define the scope of official duty in its broadest sense, while the receiving state will define the term in its narrowest sense. At the drafting convention, the United States insisted that the sending state’s military authorities had sole power to determine whether its military personnel were conducting official duty, and whether the offenses committed by them were committed in the performance of such official duties. Hence, it is clear from the drafting history that the Working Group contemplated the possibility that the military authorities from the sending state should determine whether an offense committed by a member of its force was committed while performing official duty.

Because NATO SOFA is silent on this issue, the sending state must obtain the acquiescence of the receiving state in order to exercise a right of primary jurisdiction. This is typically done by the sending state’s issuance of an “official duty certificate,” which is simply a request for the receiving state’s waiver of criminal jurisdiction and permission for the sending state’s exercise

107 See Lazareff, supra note 20, at 174-75 (citing MS-R (51)14, par. 31).
108 See Snee & Pye, supra note 85, at 51.
109 See id. Although not specifically stated in NATO SOFA itself, persons closely involved with the adoption of the Agreement have stated that one of the criterion for determining whether the sending or the receiving state has primary criminal jurisdiction is the “predominant test.” See John Woodlife, The Peace-time Use of Foreign Military Installations Under Modern International Law 178 (1992). Further, others have suggested that the decision as to which country will exercise primary jurisdiction is not really based on doctrine at all, but rather on “conceptions of good faith, reasonableness, and efficacy.” Mark R. Ruppert, Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How To Maximize And When To Say No, 40 A.F.L. REV. 1, 7 (1996) (citing G.I.A.D. Draper, Civilians and the NATO Status of Forces Agreement 14 (1966)).
Although many of the receiving states have made it clear that they would accept the determination of certain authorities of the United States military on this issue, and therefore accept an official duty certificate from them without question, recall that NATO SOFA requires only that the receiving state give the request "sympathetic consideration." Nevertheless, it has been suggested that the United States' policy of requesting waivers of foreign criminal jurisdiction in cases regarding its military force "has led to the result that American forces are in fact 'extraterritorial' (and de facto following law of the flag principles), rather than subject to foreign criminal jurisdiction (with certain exceptions)." Some reasons that have been asserted in explanation of the United States' success in securing waivers are: (1) the receiving state's growing confidence in the U.S. military justice system's prosecutors and courts; (2) better communication between the sending state and the receiving state regarding these matters; (3) a perception that the United States is harsher in its dealings with criminal offenses than local courts; and (4) the receiving state's desire to conserve judicial expense and law enforcement resources.

Specific to this case, Italy has generally recognized that the sending state has the authority to make the "official duty" determination. Thus, Italy has typically acquiesced to United States' decisions regarding primary jurisdiction. Moreover, in several cases, action by the Italian military courts has actually been suspended upon the United States' presentation of an offi-

---

110 See Major Steven J. Lepper, A Primer on Foreign Criminal Jurisdiction, 37 A.F.L. Rev. 169, 176 (1994). In some cases, the receiving state will accept the sending state's official duty definition. But in the other instances, the certificate creates a rebuttable presumption of official duty status. See id.

111 See Snee & Pye, supra note 85, at 51.

112 See NATO SOFA, supra note 9, at art. VII, para. 3(c).

113 See Ruppert, supra note 109, at 7 (citing George Stambuk, American Military Forces Abroad 52, 110-11 (1963)).

114 Davis, Waiver and Recall of Primary Concurrent Jurisdiction in Germany, The Army Law, May 1988, at 30 (citing United States Army, Europe & 7th Army, International Affairs Division, Recall Rate, Ten-Year Analysis: 1977-1986 (1986)).

115 See Lazareff, supra note 20, at 180.

116 See Snee & Pye, supra note 85, at 53. For example, the operating procedures of the U.S. military stationed in Italy specifically state that a waiver of primary Italian jurisdiction should be requested "when the commander believes the case has particular importance in maintaining proper standards of discipline." U.S. Sending State Office for Italy Instruction 5820.1B, Operating Procedures in Italy Under Article VII, NATO Status of Forces Agreement (Feb. 23, 1994).
cial duty certificate. Tension has existed amongst Italian prosecutors, however, whom have voiced their desire to prosecute certain offenses in their own jurisdiction. Therefore, it is not entirely settled in Italy that the determination of “official duty” is a question solely for the sending state to resolve.\textsuperscript{117}

E. CONCLUSION ON NATO SOFA CRIMINAL JURISDICTION

In applying the concurrent jurisdictional analysis of NATO SOFA to the present case, one realizes the problems created by the ambiguities previously discussed. If the United States, as the sending state, did in fact have the power to define the scope of official duty, clearly it would argue that the crew-members were acting in the performance of official duty in that they were performing a training flight mission when the offense occurred. Therefore, the offense would have been committed in the performance of official duty and hence, the United States would have primary jurisdiction. In contrast, if Italy, as the receiving state, was authorized to define the scope of official duty, it would argue that the crew-members were not performing an official duty because they were acting outside of their official duty by flying off course, as well as too low and too fast. Therefore, the crew-members’ performance would fall out of the scope of official duty. As a result, the crew-members’ offense would not have occurred in the performance of official duty, and Italy would be deemed to have primary jurisdiction.

As determined from the procedural aspects of this case, the United States prevailed in its claim of primary jurisdiction over the crew-members’ offense. Although it cannot be factually stated that this decision was incorrect, one can glean from the historical content of this Article the underlying factor of the United States’ super power status that undoubtedly played a part in this jurisdictional decision. Is this result one that the

\textsuperscript{117} For example, from the time period of Dec. 1 1703 to Nov. 30, 1994, the “waiver rate” (the amount of waivers successfully obtained by the United States out of those applied for) in Italy was only 50.3%. Compare this to the fact that during this same time period, 5840 U.S. military members were subject to primary foreign jurisdiction and a waiver was obtained by the United States in 4492 of those cases (or 89%). In viewing the two statistics together, the predictability of Italy’s granting a waiver requested by the United States is not all that certain. DOD Report, Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals over United States Personnel (1 Dec. 1993–30 Nov. 1994) (prepared by the Department of the Army, Office of the Judge Advocate General, as DoD’s Executive Agent).
Working Group would have reached? Moreover, is this jurisdictional decision fair?

F. FOREIGN CIVIL JURISDICTION

Though it may be predicted with some certainty whether a member of the sending state's military force is to be prosecuted in a criminal proceeding, and if so, whether the sending or the receiving state will exercise foreign criminal jurisdiction, the task becomes even more predictable with regard to foreign civil jurisdiction. Article VIII, paragraph 5 of NATO SOFA contains the guidelines for third parties asserting civil claims against a member of the sending state's military force.\footnote{See NATO SOFA, supra note 9, at art. VIII, para. 5. Article VIII, paragraph 5 of the Agreement provides:}

5. Claims . . . arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:

a. Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.

b. The receiving State may settle any such claims, and payment of the amount agreed upon or determinated by adjudication shall be made by the receiving State in its currency.

c. Such payment, whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Contracting parties.

d. Every claim paid by the receiving State shall be communicated to the sending States concerned together with full particulars and a proposed distribution in conformity with subparagraphs e. (i), (ii) and (iii) below. In default of a reply within two months, the proposed distribution shall be regarded as accepted.

e. The cost incurred in satisfying claims pursuant to the preceding sub-paragraphs and para. 2 of this Article shall be distributed between the Contracting Parties, as follows:

i. Where one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 per cent; chargeable to the receiving State and 75 per cent, chargeable to the sending State . . . .

iv. Every half-year, a statement of the sums paid by the receiving State in the course of the half-yearly period in respect of every case regarding which the proposed distribution on a
noted, however, that these guidelines are not always explicitly followed.

On the international legal stage, the doctrine known as "sovereign immunity" may be relied upon by the sending state. This doctrine stands for the fact that all states are equal, and hence, no state can exercise jurisdiction over another state. Furthermore, as seen above, Article VII of NATO SOFA provides a waiver of foreign criminal jurisdiction for all offenses committed by a military service person while in the performance of official duty. Hence, because of the high number of military troops stationed in foreign countries (and therefore, the increased number of opportunities for foreign military persons to commit crimes), it was necessary to create a provision in NATO SOFA which addressed how the issue of civil liability would be handled when property of the receiving state or a third person was harmed by an act or omission on the part of a foreign military service person. Article VIII, paragraph 5 of NATO SOFA was intentionally written in broad terms in effort to provide a third party that was damaged by a sending state's military force on the territory of the receiving state the ability to settle his or her claim(s).

percentage basis has been accepted, shall be sent to the sending States concerned, together with a request for reimbursement. Such reimbursement shall be made within the shortest possible time, in the currency of the receiving State.

f. In cases where the application of the provisions of sub-paragraph b. and e. of this paragraph would cause a Contracting Party serious hardship, it may request the North Atlantic Council to arrange a settlement of a different nature.

g. A member of a force or a civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties.

Id.

119 See Supervielle, supra note 33, at 6.

120 See NATO SOFA, supra note 9, at art. VII.

121 See LAZAREFF, supra note 20, at 304. It is interesting to note here that paragraph 5 of Article VIII refers to any third parties other than the sending state or the receiving state. In other words, the third persons asserting a civil claim are not required to be of the same nationality as that of the receiving state. This is a very different concept in the field of international law. See id. at 305. In application to this case, the victims of the gondola accident were from several different countries; however, because the twenty deaths were caused by the United States military while stationed in Italy, the third parties who are bringing the civil claims will be treated as Italian citizens regardless of their nationality (by being able to settle their claim with the Italian government, who will likely, in turn, be partially reimbursed by the United States).
receiving state, not the victim himself, for the victim’s claim in two situations: (1) when damages were caused by a member of the sending state’s military force and were caused during the performance of official duty; and (2) in other instances that the sending state’s military force is legally responsible.\footnote{See NATO SOFA, \textit{supra} note 9, at art. VIII, para. 5}

It is clear from this Article that under no circumstances may a third party from the receiving state or the receiving state itself assert a civil claim against a military service person for damages arising from an act or omission while in the performance of official duty. Hence, it may be accurately stated that the members of a sending state’s military force are truly immune from civil prosecution for acts committed while in the performance of official duty.\footnote{"[P]rocedure of the substitution is the legal device allowing the compensation of the victims of a damage while maintaining the legal principle of the immunity of jurisdiction of foreign States." \textsc{Lazareff}, \textit{supra} note 20, at 321.} Conversely, although the sending state is immune from prosecution by a third party, as well as the receiving state, the sending state is liable to the receiving state for reimbursement of a settlement of a third party’s claim asserted because of an act or omission caused by the sending state’s military force in the performance of official duty. Thus, the pervasive question in determining whether the sending state is liable for third party claims is whether the harm committed was in fact caused by an act or omission by a sending state’s military service person while in the performance of official duty.

1. Performance of Official Duty

As illustrated in the prior analysis of criminal jurisdiction under Article VII of NATO SOFA, the definition of performance of official duty similarly remains undefined in Article VIII, paragraph 5 covering civil jurisdiction. As expected, because NATO SOFA provides no precise definition of the phrase, numerous conflicts arise in attempting to determine what constitutes an act conducted in the performance of official duty. The United States has generated a significant amount of legislation on the subject under both tort law and agency law (agency law appears to be more applicable to the case at hand).\footnote{See \textsc{Lazareff}, \textit{supra} note 20, at 307.}

Under agency law, assuming that an agency relationship exists between the crew-members and the military, the first question is whether the relationship is that of a “master-servant” relation-
ship. Because the military clearly has control over the crew-
members' actions, a master-servant relationship may be in-
ferred;\footnote{See Restatement (Second) of Agency § 220 (1984).} hence, the military is said to be liable for only the 
crew-members' actions that are committed while acting in the 
scope of employment.\footnote{There are a few exceptions to this rule, found in Restatement (Second) of 
Agency § 219 (1958).} Under the Restatement (Second) of 
Agency § 228:

(1) Conduct of a servant is within the scope of employment if, 
but only if:

(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and 
space limits;
(c) it is actuated, at least in part, by a purpose to serve the 
master, and
(d) if force is intentionally used by the servant against an-
other, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment 
if it is different in kind from that authorized, far beyond the au-
thorized time or space limits, or too little actuated by a purpose 
to serve the master.\footnote{Restatement (Second) of Agency § 228 (1958).}

Applying the Restatement, it may be argued that the crew-
members were acting within their scope of employment based 
on the fact that they were performing a routine flight that was 
substantially within the authorized time and space limits for pur-
poses, at least in part, to serve the military. On the other hand, 
it may be conversely argued that the crew-members were acting 
outside their scope of employment because, although they were 
flying a routine training exercise, the crew-members were flying 
outside of the authorized time and space limits (by flying too fast 
and too low). In summary, it may not be conclusively predicted 
whether, under United States law, the crew-members were act-
ing in the scope of their employment (or in the performance of 
their official duties). Therefore, the proper conclusion is diffi-
cult to predict when attempting to apply both the law of the 
United States and Italy.

Article VIII, paragraph 5 specifically provides that both the 
sending and the receiving states are to come to an agreement 
on whether the specific act or omission of the military service 
person was in fact committed in the performance of official
duty. But, in the absence of agreement, the Article states that an arbitrator shall make the final determination.

Regarding the case at hand, note that pursuant to the previous discussion regarding foreign criminal jurisdiction, it is obvious that the United States would want to claim that the crew-members were performing in their official duty (i.e. flying the simulated mission) when the accident occurred so that Italy, as the receiving state, would be forced under Article VII to waive its rights to criminal prosecution. Thus, after the United States argued that the crew-members were performing official duties, it could not very likely go back and assert the position that the crew-members were not performing official duties in effort to waive liability for the civil claims raised by the victims' families. A legal argument could hypothetically be made by the United States that the crew-members were not acting in the performance of official duty when the accident occurred, and hence, the United States would not be required to reimburse the Italian government for the settlement of the third party claims. This argument, however, assuredly will not be asserted because of the claim previously made by the United States that the crew-members were in fact acting in the performance of official duty.

2. Proceeding of Settlement

Assuming it is decided that the crew-members were acting in the performance of official duty at the time of the accident, and therefore, that the United States will be substituted for the crew-members in terms of liability, the procedure for settlement is explicitly laid out in Article VIII, paragraph 5. In summary, a consultation between the sending state and the receiving state is required for reasons of courtesy. Furthermore, although Italy, as the receiving state, is required to conduct an investigation of the accident, the United States is granted the authority to conduct its own investigation if it so desires. From this investi-

128 See NATO SOFA, supra note 9, at art. VIII, para. 5.
129 See id.
130 Although not the subject of this Article, if it were found that the crew-members were not acting in the performance of official duty at the time of the accident, under Article VIII, paragraph 5, the crew-members would, in fact, be civilly liable to the third-party claimants.
131 See LAZAREFF, supra note 20, at 329.
132 See id. The United States, as the sending state, may also give its opinion upon completion of its own investigation to the Italian Claims Office in Italy, as the receiving state requests it.
After the third parties have been compensated, the only remaining legal relationship regarding the third-party claims is between the sending state and the receiving state. Upon the receiving state's compensation of the third-party claims, the sending state then becomes liable to the receiving state for reimbursement of a certain percentage of the dollar amount paid in satisfaction of the claims. In this case, because the United States was the only sending state involved, the United States is required to reimburse Italy for seventy-five percent of the dollar amount paid in satisfaction of the settlement.

III. UNITED STATES RELATIONS WITH ITALY

Italy is a significant economic power, as it has the world's fifth largest economy and is a member of the G-7 economic group. Thus, Italy is an important economic ally to the United States, as well as an important military ally. One of Italy's greatest contributions to NATO is its continued agreement to allow U.S. military troops to be stationed on its territory. In 1996, approximately 14,000 U.S. military personnel were permanently stationed in Italy at eighteen installations and five NATO headquarters. Note, however, that because of the high volume of U.S. military stationed in Italy, there are presently calls frequently made by Italian journalists and government officials for examination of current United States-Italy bilateral defense agreements. Nevertheless, Italy has continued to host the majority of United States military troops in its country that it has in the past. From this brief synopsis, one can glean the importance

---

133 It is clear from Article VIII, paragraph 5, "that the only legal relationship of the victim of a damage is with the receiving State and cannot be with the wrong-doer." Id. at 331.
134 See NATO SOFA, supra note 9, at art. VIII, para. 5, sec. (e)(1).
136 See Major Stephen K. Forjohn, USSSO For Italy-Working On The Set Of La Dolce Vita, DEC ARMY LAW. 14 (1997).
137 See id. at 17. Note that most U.S. military forces in Italy are stationed at Aviano Air Base, the location of the alleged offenses committed in the case at hand. This Air Base is significant because it currently hosts the only United States F-16 that is permanently stationed in Europe. See id. at n.32.
138 See id. at n.31 (citing as an example Maurizio Molinari, Italia e USA, Fine Della Diplomazia Segreta [Italy and USA, End of Secret Diplomacy], PANORAMA, Nov. 28, 1996, at 32).
of the United States maintaining good relations with Italy. Moreover, it is easy to imagine how the political aspects of a situation such as this come into play in interpreting NATO SOFA with the facts at hand.

IV. CONCLUSION

Although foreign jurisdiction issues between two countries are certainly lessened when a treaty is involved, some problems inevitably remain. The case at hand demonstrates a few of the conflicts that persist when one country stations its military troops in another country. As this Article suggests, jurisdictional issues are ultimately determined by the position, particularly the bargaining power, of the sending state and the receiving state. In the present, the question of whether Italy or the United States had the primary right to exercise criminal jurisdiction, as well as the question of whether the United States was liable for reimbursement to Italy for the third-party civil claims, both turn on one question: “Were the crew-members acting in the performance of official duty when the crash that killed twenty passengers occurred?” If the answer to this question is “no,” then Italy should have asserted primary criminal jurisdiction, and the United States would be released from the necessity of reimbursing Italy for all third-party claims resulting from the accident. Conversely, if the answer is “yes,” then the United States properly asserted primary criminal jurisdiction, and properly reimbursed Italy for all third-party claims arising from the accident.

As previously determined, this question is a question of fact, and thus, cannot be answered determinatively in this Article. But, because the United States has already asserted primary criminal jurisdiction over the incident (and Italy has agreed to this assertion), we are only left to wonder whether this conclusion was what the drafters of NATO SOFA would have reached? Arguably, the U.S. drafters would have come to the exact same conclusion, as it was their position that the United States, as a military exporter, should never be subject to the jurisdiction of another country. The drafters from Italy, on the other hand, would have very likely reached the opposite conclusion based on their definition of “performance of official duty.” They likely would have concluded that the crew-members were acting outside of their official duty because they were flying the Prowler too low and too fast; hence, Italy should have asserted primary jurisdiction.
It cannot be denied that the United States has historically used its position as a super-power in order to obtain the advantage of maintaining jurisdiction over its military troops that are stationed in foreign countries. The United States has done this in several different ways, including exerting its jurisdiction principle (law of the flag) over other countries when those countries are in a weak bargaining position, using political situations to its advantage (as seen in World War I & II), and creating new laws or expanding existing laws (e.g. Article 134 of the Uniform Code of Military Justice) in an effort to maintain a proper jurisdiction claim over all crimes that could possibly be committed by its military personnel while stationed in a foreign country. The tactics used by the United States may be viewed in two ways. On one hand, the United States may be viewed as a bully, who thinks that it does not have to play by the rules, even if the rules are distinctly put forth in a treaty, and will ultimately get its way. On the other hand, the United States may be viewed as a protector: a protector of the world, as well as a protector of its own citizens. Hence, it is necessary for the United States, as the largest military exporter in the world, to exercise tactics such as those listed above so that it may continue to contribute its military services in the same way it has in the past.
Articles