THE USE OF FORCE OVERSEAS: AN ANALYTICAL FRAMEWORK

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I. INTRODUCTION AND APPROACH**

Few situations are more laden with legal pitfalls than the use of force by U.S. security personnel overseas. This article briefly describes the legal parameters of such activities and offers suggestions for the base level practitioner. The discussion will be general in nature since individual agreements and practices established to govern the presence of U.S. forces in specific countries, as well as host nation laws, vary dramatically. This article will not tell the reader what is permissible on a particular base; rather, it is designed to assist judge advocates in the process of determining what operating constraints exist. Preplanning focused on the individual circumstances of each installation is an absolute necessity.

The term "force" is used here to imply physical force and includes activities ranging from the defense of property and attempts to detain an individual to the use of deadly force. For the judge advocate deciding whether a particular use of force is appropriate, the determinative question concerns whom that force is to be used against. There are three categories to consider: U.S. servicemembers, host nation citizens, and U.S. civilians. Though force may be employed in all three categories, the justification and scope of that use varies. Using inappropriate or excessive force given the circumstances can have disastrous results. Such use may very well be considered an affront to host nation sovereignty and result in an international incident. The staff judge advocate must ensure procedures are in place and training is sufficient to preclude situations of this nature from developing.

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** *This article was written from the perspective of an Air Force judge advocate practicing overseas. Though the "real-world" examples are drawn from situations at Air Force bases, those examples and the framework for analysis proposed are equally relevant on an Army, Navy, or Marine Corps facility. Additionally, this article is designed for installation judge advocates handling situations not involving armed hostilities. Therefore, situations such as those arising during* Operation Just Cause *in Panama are not addressed by this analysis.*

II. USING FORCE AGAINST U.S. MILITARY PERSONNEL

The authority of U.S. security personnel to use force overseas is strongest when that force is directed against our own personnel. The authority for this use is found in virtually all major status of forces agreements (SOFA's) and derives from the recognition by the signatories of U.S. criminal jurisdiction over individuals subject to military law.[1] Given the sovereign status under international law of all host nations, these provisions effectively constitute a limited surrender of jurisdiction to the United States.

This surrender of jurisdiction envisions the use of force by U.S. personnel. Though SOFA's do not generally address the use of force itself against military personnel, such use is legally implied under international law based on the grant of jurisdiction to another sovereign in the territory of the host nation. Indeed, jurisdiction, when exercised in a foreign country, would be meaningless without the authority to effectuate custody or impose punishment. That the ability to use force results from the grant of jurisdiction is also evident from a reading of the specific provisions granting jurisdiction in light of the entire SOFA. For example, relevant provisions of most agreements require the host nation to turn custody of U.S. military personnel over to U.S. authorities in cases in which the United States has either primary or exclusive jurisdiction.[2] Clearly, custody contemplates the use of force if only to maintain that custody. Similarly, most agreements do not allow execution of a death sentence if the domestic law of the host nation does not authorize such a punishment, thus approving by negative implication the use of force to carry out other forms of punishment.[3]

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1. *See, e.g.*, NATO Status of Forces Agreement (SOFA), June 19, 1951, art. VII, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67 [hereinafter NATO SOFA]; Japan Status of Forces Agreement, Jan. 19, 1960, Japan-United States, art. XVII, 11 U.S.T.S. 1652, T.I.A.S. 4510 [hereinafter Japan SOFA]; Korea Status of Forces Agreement, July 9, 1966, Korea-United States, art. XXII, 17 U.S.T. 1677, T.I.A.S. 6127 [hereinafter Korea SOFA]; Agreement Implementing Article IV of the Panama Canal Treaty, Sep. 7, 1977, Panama-United States, art. VI, T.I.A.S. 10032 [hereinafter Panama Agreement]; and the Philippines Basing Agreement, Mar. 14, 1947, Philippines-United States, art. XIII, 61 Stat. 4019, T.I.A.S. 1775 [hereinafter Philippines Basing Agreement]. Texts of the above agreements, as well as other important international agreements affecting military activities, can be found in AFP 110-20, July 27, 1981 as amended.
2. *See, e.g.*, NATO SOFA, *supra* note 1, at art. VII, para. 5(a); Japan SOFA, *supra* note 1, at art. XVII, para 5(a); Korea SOFA, *supra* note 1, at art. XXII, para. 5(a); Panama Agreement, *supra* note 1, at art. VI, para. 5(a); Agreement on Criminal Jurisdiction Amending the Philippines Basing Agreement, Aug. 10, 1965, Philippines-United States, art. XIII, para. 5(a), 16 U.S.T. 1090, T.I.A.S. 5851 [hereinafter Philippines Crim. Jur. Agreement].
3. *See, e.g.*, NATO SOFA, *supra* note 1, at art. VII, para. 7(a); Japan SOFA, *supra* note 1, at art. XVII, para. 7(a); Korea SOFA, *supra* note 1, at art. XXII, para. 7(a); and Philippines Crim. Jur. Agreement, *supra* note 2, at art. XIII, para. 7(a). The Panama Agreement flatly forbids the carrying out of a death sentence instead of tying its permissibility to local law. Additionally, the agreement forbids the Panamanians from executing U.S. personnel for any reason. Panama Agreement, *supra* note 1, at art. VI, para. 8.

Of course, the grant of jurisdiction by a host nation and the resulting right to use force to effectuate the grant is not without limit. The primary limitation concerns where that right is to be exercised. The agreements tend to limit such activities to the areas used by the United States under agreement with the host nation. For example, the SOFA with Japan states that "regularly constituted military units or formations of the United States armed forces shall have the right to police any facilities or areas which they use" pursuant to the agreement.[4] Any authority to conduct law enforcement activities outside the confines of the military installation is dependent on arrangements with host nation authorities. Absent such an arrangement, the arrest of a military member off-base would technically violate international law. In some cases, this issue is resolved formally by agreement between the host nation and the United States. For example, the German-U.S. Supplemental Agreement to the NATO SOFA gives U.S. military police the right to patrol off-base in public places and to take such measures as are necessary to maintain order and discipline among U.S. forces.[5] In other countries, relatively informal agreements may exist to provide the legal foundation for off-base activities. These arrangements generally require U.S. officials to notify local authorities in advance of any planned off-base activities. Of course, such arrangements should only be established after prior coordination with the major command and either the designated commanding officer or the U.S. country representative.[6]

III. USING FORCE AGAINST HOST NATION CITIZENS

The most restricted area of U.S. enforcement activity concerns citizens or residents of the host nation. No jurisdictional basis for such

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4. Japan SOFA, *supra* note 1, at art. XVII, para. 10(a). *See also* NATO SOFA, *supra* note 1, at art. VII, para. 10; Korean SOFA, *supra* note 1, at art. XXII, para. 10; and Philippines Crim. Jur. Agreement, *supra* note 2, at art. XIII, para. 10.

5. German-United States Supplementary Agreement to the NATO SOFA, Aug. 3, 1959, Germany-United States, art. 28, 1 U.S.T. 531, T.I.A.S. 5351 [hereinafter German Sup. Agreement]. In the Philippines, military police can be used off-base only subject to arrangements with the authorities of the Republic of the Philippines and in liaison with those authorities and insofar as such employment is necessary to maintain discipline and order among the members of the U.S. armed forces. Philippines Crim. Jur. Agreement, *supra* note 2, at art. XIII, para. 10(b). *See also* Japan SOFA, *supra* note 1, at art. XVII, para. 10(b) and Korea SOFA, *supra* note 1, ar art. XXII, para. 10(b). In Panama, U.S. enforcement operations outside the base may be required. Article XXI of the Panama Agreement provides:

> When the order and discipline referred to in this paragraph should be breached by members of the Forces outside the defense sites, and the authorities of the Republic of Panama, for reasons of language differences or other circumstances, consider it convenient, they may request the presence of personnel of the police of the United States Forces to cooperate in the reestablishment of order and discipline, and, in such cases, the United States Forces *shall be obligated to send them* (emphasis added).

Panama Agreement, *supra* note 1, at art. XXI, para. (3).

6. *See* AR 27-50/SECNAVINST 5820.4F/AFR 110-12, Dec. 1, 1984, for a listing of these individuals responsible for foreign criminal jurisdiction.

activities exists. Nor is there any authority to use force against such individuals off-base.[7] Indeed, such jurisdiction is often expressly reserved by the host nation.[8] On-base, the primary source of authority for the use of force against host nation citizens is found in those same provisions giving the United States the right to police facilities or areas used by the United States. These provisions contemplate the use of force against any offender, regardless of nationality. For example, the NATO SOFA provides that military police of the U.S. force may take all appropriate measures to ensure the maintenance of order and security on such premises.[9] Similar provisions exist in the SOFA's with Japan[10] and Korea,[11] the Philippines Basing Agreement,[12] and the Panama Agreement.[13] Based on these provisions, U.S. security forces may certainly act to protect U.S. property and lives and to maintain order on the military installation even when local nationals are involved.

This apparently broad grant of authority is, nevertheless, limited by practical, political, and legal considerations, which are most apparent in situations involving joint-use facilities. Many installations throughout the world are "mixed" camps on which there are both joint- and exclusive-use areas. As to U.S. exclusive-use areas, the order and security provisions of SOFA's clearly give the United States the right to take such actions as are necessary to prevent disturbances and other threats to security. Furthermore, no supplemental agreement is necessary to implement this authority; nor is consultation technically required prior to U.S. action. Judge advocates should be aware, however, that joint agreements or U.S. directives further defining this authority often do exist.[14] Some of those agreements may be classified, particularly when involving sensitive areas such as weapons storage locations. Though agreements of this nature are too numerous and particularized to catalogue here, the judge advocate must be thoroughly familiar with them to ensure their installation security plans comply with local provisions.

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7. The one exception is an individual who is both a citizen of the host nation and a member of the U.S. armed forces. Jurisdiction over such individuals may be exercised by the U.S. military. *See, e.g.*, NATO SOFA, *supra* note 1, at art. VII, para. 4; Japan SOFA, *supra* note 1, at art. XVII, para. 4; Korea SOFA, *supra* note 1, at art. XXII, para. 4; and Philippines Crim. Jur. Agreement, *supra* note 2, at art. XIII, para. 4.
8. *See, e.g.*, NATO SOFA, *supra* note 1, at art. VII, para. 4; Japan SOFA, *supra* note 1, at art. XVII, para. 4; Korea SOFA, *supra* note 1, at art. XXII, para. 4; Panama Agreement, *supra* note 1, at art. VI, para. (3); Philippines Crim. Jur. Agreement, *supra* note 2, at art. XIII, para. 4.
9. NATO SOFA, *supra* note 1, at art. VII, para. 10(a).
10. Japan SOFA, *supra* note 1, at art. XVII, para. 10(a).
11. Korea SOFA, *supra* note 1, at art. XXII, para. 10(a).
12. Philippines Crim. Jur. Agreement, *supra* note 2, at art. XIII, para. 10(a).
13. Panama Agreement, *supra* note 1, at art. XXI, para. (3).
14. *See, e.g.*, the U.S.-Turkish Agreement for Cooperation on Defense and Economy (DECA), Mar. 29, 1980, Turkey-United States, T.I.A.S. 9901 [hereinafter DECA], as well as its numerous supplementary agreements. At the time this article was written, the DECA was being renegotiated.

Joint-use areas are much more troubling. Though the United States must necessarily have the authority to patrol such areas to maintain order and security, U.S. security forces should, to the extent consistent with security of the installation, be extremely circumspect in using force against host nation citizens. The problem posed by joint-use facilities is primarily one of political sensitivities. Enforcement activities against host nationals may be distorted by opponents of the American presence to manipulate public opinion. Judge advocates must be sensitive to the extent to which host nations jealously guard their sovereignty.

Judge advocates must not only consider the issue of when can force be used against host nationals, but also that of how much force is appropriate. Basing agreements state that the United States can use "appropriate" measures to maintain order and security.[15] The spirit of the SOFA's and related agreements is that the United States alone determines appropriateness when acting against U.S. military personnel. When acting against local nationals, however, U.S. enforcement personnel should consider not only their own regulatory constraints, but local law on the use of force as well. In Spain, for example, it is extremely difficult to assert the defense of self-defense. Judge advocates must, in particular, have a firm grasp of the local laws addressing the use of force likely to produce death or serious bodily injury. The United States may be expressly obligated to respect the laws of the host nation.[16] Though the term "respect" does not create an obligation to "comply" with local laws, U.S. practices should, to the extent consistent with security concerns, generally follow the local legal guidelines. Finally, even when local laws are silent on particular issues, certain uses of force may offend local customs and result in unnecessary political tensions. The use of a firearm in Great Britain, or a military working dog in Turkey for example, is likely to draw unwelcome attention to the U.S. presence in those countries, regardless of the technical legality under local law of that use. As with exclusive-use areas, judge advocates also need to be aware that supplemental agreements or U.S. directives, some of which may be classified, may further define the scope of activity in joint-use areas.

Despite the legal and political constraints outlined above, valid justifications for the use of force against host nation citizens may be found in local law itself. In virtually all countries, appropriate force may be used in self-defense, defense of others, and defense of property. To the extent that U.S. personnel are obligated to respect local law, they are also entitled to its safeguards and permitted to act within its limits. Thus, a U.S. security

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15. *See* discussion, *supra*, at 5.

16. *See, e.g.*, NATO SOFA, *supra* note 1, at art. II and, for a slightly different variant, the Korea SOFA, *supra* note 1, at art. VII. Note that the NATO SOFA imposes a duty on the sending state to take measures effectuating respect, whereas the Korea SOFA does not. *Id. See also* Japan SOFA, *supra* note 1, at art. XVI and the Panama Agreement, *supra* note 1, at art. XXI, para. (3). Interestingly, the U.S. has explicitly agreed not to grant asylum to anyone fleeing the "lawful jurisdiction of the Philippines." Agreed Official Minutes to the Philippines Crim. Jur. Agreement, *supra* note 2, at para. 7.

policeman could act to defend a local national to the same extent as could a local citizen. That authority is akin to the power of the local private citizen, however, not that of local law enforcement officials. Judge advocates should ensure military police[17] training and operating procedures emphasize this latitude and that, in the event force must be used against host nation citizens, this justification is not overlooked.

To avoid problems, planning and cooperation with local officials, as well as careful review of military police procedures and training, are essential. It is often possible to formulate prior agreements with host officials on the scope of U.S. authority. At the national level, for example, the German Supplemental Agreement grants the United States authority to take Germans into custody if: (1) caught *flagrante delicto* and their identity cannot be determined or there is reason to believe they may flee or (2) upon request by German authorities.[18] Additionally, certain fugitives may be arrested in the event German authorities cannot respond in a timely fashion.[19] In Turkey, joint defensive measures are authorized by bilateral agreement.[20] Other countries have similar arrangements with U.S. forces.

Elsewhere, local understandings have proven helpful. The key is planning and the development of set procedures for coordination of efforts. The coordination at Florennes Air Base, Belgium, to address the many anti-cruise missile protests there, is an excellent example. Outside the perimeter, Belgian national police controlled demonstrators. Inside the perimeter, Belgian Air Police provided general security with U.S. security policemen guarding critical exclusive-use facilities. As a result, during the era of cruise missile deployment to that installation, American enforcement measures never became a political issue. A similar procedure is employed at U.S. bases in Great Britain.

Another creative example of local agreements with the host nation occurred at Ramstein Air Base several years ago. Under German host-guest statutes, only a host could refuse entry to a property. With regard to Ramstein, the United States was deemed a host and, thus, if Germans were to be ejected from the installation, it generally had to be at the direction of U.S. officials. For political reasons, however, Ramstein officials were concerned about doing so during their open-house. To resolve the issue, the Air Force negotiated an agreement with local officials to turn over its authority as host to the German police. This meant that all ejections would be at the demand of the German police and a sensitive political situation was effectively defused. Furthermore, the procedure was so successful that it was adopted by Air Force installations throughout the German state of Rheinland Phalz. These experiences demonstrate that joint installation

17. The term "military police" is used generically to refer to military law enforcement officials.
18. German Sup. Agreement, *supra* note 5, at art. 20, para. 1.
19. *Id.* at para. 2.
20. DECA, *supra* note 14.

security plans and procedures can often avoid the pitfalls associated with the American presence in a foreign nation.

Beyond the sphere of responsibility issues, everyday procedures can be established to forestall potential problems involving local nationals. A joint security patrol is an excellent idea because it may obviate U.S. action except at the direct request of a local enforcement official. Additionally, it is helpful to station a member of the host nation security force at installation entrances controlled by U.S. personnel. Language capability is also essential. At Incirlik Air Base, Turkey, for example, a local national interpreter is on duty at the law enforcement desk twenty-four hours a day. To the extent this is not possible, shifts should be arranged to ensure a military policeman fluent in the host language is available around-the-clock and language training should be made part of the local military security police training program. Reliable means of communication with local officials on- and off-base, must also be in place.[21]

IV. USING FORCE AGAINST U.S. CIVILIANS

U.S. civilians, including DOD employees and military dependents, are in a unique situation because their express status under the SOFA's and related agreements is inconsistent with U.S. case law. The NATO, Japan, and Korea SOFA's, as well as the Panama and Philippines Agreements, all speak in terms of the U.S. military as having jurisdiction over certain offenses committed by members of the civilian component or dependents.[22] In *Reid v. Covert*, however, the Supreme Court held that the military did not

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21. Indeed, certain agreements explicitly address the issue of on-base cooperation with local law enforcement officials. *See, e.g.*, Panama Agreement, *supra* note 1, at art. XXI, para. (3).

22. The NATO SOFA, for example, provides that "[t]he military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State." *Supra* note 1, at art. VII, para. 1(a). Indeed, the agreement specifically mentions members of the "civilian component" in discussing primary jurisdiction and transfer of custody. *Id.* at art. VII, para. 3a and para. 5. Similar provisions exist in the Japan SOFA (art. XVII), Korea SOFA (art. XXII), and Panama Agreement (art. VI). *Supra* note 1.

The purported basis for military jurisdiction over civilian components is article 2 of the UCMJ. That article sets forth two relevant jurisdictional provisions. It provides that persons subject to the UCMJ include:

> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands;
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> (12) . . . Persons within an area leased by or otherwise reserved or acquired for use of the United States which is under control of the Secretary concerned and which is outside the . . . .

Uniform Code of Military Justice, 10 U.S.C. 802 (1983 & Supp. 1989).

have criminal jurisdiction over these civilians despite the existence of international agreements purportedly granting that power.[23]

Nevertheless, as with host nation citizens, the absence of criminal jurisdiction does not preclude the authority to use force. In the first place, the agreements grant the United States the right to maintain order and control on U.S. facilities. The special political problems posed by joint-use facilities and local nationals are less relevant here because these problems were primarily related to infringements, imagined or otherwise, on sovereignty. These concerns, although still valid, are minimized with regard to U.S. citizens due to the purported grants of jurisdiction in the SOFA's and related agreements. Though U.S. domestic law appears not to recognize such jurisdiction, the agreements indicate that the host nation understands the U.S. military has a legitimate interest in the activities of those U.S. citizens who are in the country due to its presence. Consequently, the host nation is less likely to be concerned with actions taken against members of the civilian component and dependents than it would be with regard to the same actions against its own citizens.

Though the use of force against U.S. citizens is politically more palatable, the U.S. military has no greater legal right to use force against U.S. civilians than it does against local nationals. A common misperception is that U.S. statutes with extraterritorial effect provide a separate justification for enforcement actions against U.S. citizens. In fact, they do not. Extraterritorial statutes, such as the Internal Security Act of 1950[24] or those covered under the special maritime and territorial jurisdiction laws,[25] do grant the United States the power to try certain offenses committed overseas. Nevertheless, the power to try offenses does not create the power to arrest outside U.S. territory absent a grant of that authority by the host nation. That grant exists with regard to offenses committed by military personnel in the host country. Arguably, the SOFA and related agreements attempted to do the same with civilians and dependents, but the Supreme Court declared that grant invalid. Finally, even in those cases where the host nation permits the United States to take custody of an individual pursuant to an extradition treaty or agreement, the U.S. Marshals Service, not the military, is the proper authority to do so. The result is that, when dealing

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23. Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802 *et seq.* (1983 & Supp. 1989). 354 U.S. 1 (1957). *Reid* was heard, based on a grant of petition for rehearing of two prior cases involving dependent wives who had murdered their husbands (one in England, the other in Japan). In both cases, art. 2(11) of the UCMJ was cited as the basis for jurisdiction. In a 6-to-2 decision, the Court held that military dependents overseas could not be tried for capital offenses at a court-martial. The majority split is important to note. Justices Frankfurter and Harlan relied on the fact that the cases involved a capital offense. A broader view was taken by Chief Justice Warren and Justices Black, Douglas, and Brennan. They did not limit their restriction to capital cases and held, instead, that any trial of civilians violated the Constitution. Rejecting a "necessary and proper" argument, the majority based its opinion in great part on the constitutional right to trial by jury.
24. 50 U.S.C. 797 (1951).
25. 18 U.S.C. 7 (1969 & Supp. 1989).

with U.S. civilians, the military must resort to precisely the same justifications it uses when employing force against host nation citizens—the right to maintain order and security and local law. Similarly, it may use no greater force than authorized in situations involving local nationals.

V. SUMMARY

This article has not attempted to provide specific guidelines to judge advocates facing any particular situation. Instead, it is designed to help judge advocates understand the analysis they must employ in deciding what procedures are appropriate in a use-of-force situation. In-depth planning for likely use of force scenarios is essential and must be coordinated not only with agencies on-base likely to be affected, but also with higher headquarters. This author once found himself at the office in the wee hours of the morning trying to find legal justification for an incident involving a local national. The host nation attorney was nowhere to be found, the English translations of local law that existed were nineteen-years old, and the single letter providing guidance from higher headquarters was outdated. Obviously, advance planning, as well as a review of existing procedures, is an investment that can yield enormous returns.