**Westphalian Sovereignty and Military Bases**

The existence of military bases or foreign troop presence in a country on a long-term basis is an anomaly in international law and contravenes the principle of state sovereignty. Unlike embassies, diplomatic missions and envoys, all of which have long histories and are enshrined in international law, these military bases bases are not codified in law and are instead created on an ad-hoc basis between countries.

After the peace of Westphalia, permanent representatives of states were increasingly used in the facilitation of relations between countries. Though the established respect for messengers and envoys was widely accepted, it was only formally enshrined in the Vienna Convention on Diplomatic Relations in 1961 and has since been signed by most of the states in the world.[1] The grounds of an embassy is considered off limits, even in the case of an emergency such as a fire, until permission is given by the head of the mission.[2] Military bases on the other hand are not codified in any convention or international agreement, they are instead established on bi-lateral or multi-lateral agreements and treaties between countries or through organizations such as NATO.

The purpose of this paper is to understand why military bases and the presence of foreign forces in other countries have not been codified in international law the way that diplomatic missions have and what that means in regards to the principle of sovereignty. It will be argued that in line with Krasner's view of sovereignty as organized hypocrisy, military bases cannot be codified in international law lest that would bring down the edifice of the principle of sovereignty down all together.

## Status of Forces Agreements

In the past, there were two paradigms treating the issue of the presence of foreign troops in a specific country, 'law of the flag' and 'territorial sovereignty'. Law of the flag stipulates that if a country grants access to another country's forces to pass through its territory, then the sending country has jurisdiction. On the other hand 'territorial sovereignty' asserts that without an official agreement between the sending and receiving countries, then jurisdiction lies with the receiving country. [3]

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[1] Denza, Eileen, "Introduction to the Vienna Conventions on Diplomatic Relations", accessed on 3/April/2014 from the website of the United Nations Audiovisual Library of International Law, http://legal.un.org/avl/ha/vcdr/vcdr.html

[2] Syal, Rajeev. "Can police enter an embassy? A guide." Guardian 16 August 2012, n. pag. Web. 3 Apr. 2014. <http://www.theguardian.com/media/2012/aug/16/julian-assange-ecuador>.

[3] Gher, Jaime M. "Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons To Be Learned from the United States-Japan Agreement." University of San Francisco law Review. 37.Fall 2002. Henceforth: Gher.

With the end of World War II, the Allies, and in particular the US, found themselves occupying defeated countries which required long term military presence in order to re-build those countries. Also, with the rise of the Cold War, the US along with Western Europe committed to an alliance that entailed the long-term presence of foreign forces in other countries. This conflict between political necessity and the principle of sovereignty was reconciled through the establishment of agreements that would regulate the interaction of these different countries and the presence of foreign forces. These agreements came to be known as Status of Forces Agreements (SOFA). The first of these was the NATO SOFA, on which all other SOFAs have been modeled. As of the beginning of this century, the US had 105 SOFA with 101 different countries[4] and had a total of 860 military installations in over 40 countries.[5]

These SOFAs contain agreements relating to criminal and civil jurisdiction between the two contracting states, as well as taxes, obligations of the parties towards each other and the procurement of supplies and employees to support the existence of a base.[6] SOFAs also determine which country has jurisdiction in criminal cases that occur within the host countries borders. Jurisdiction is granted according to which country's laws has been violated, if US law has been violated, then the US maintains its jurisdiction, but if the host county's laws were violated, then the host country maintains Jurisdiction. The caveat in this arrangement, as has been shown by Eichelman, is that if a soldier happens to violate the host country's laws, then the US can still maintain jurisdiction because such a violation of the host's laws are also a violation of the US's Uniform Code of Military Justice. In these conditions, a concurrent jurisdiction occurs, which grants primary jurisdiction to the host country except if the case occurs while the suspect was 'on official duty', and the US has the sole authority to determine if the suspect was on official duty or not. Indeed, the US Army Regulation 27-50 calls on officials to maximize jurisdiction as much as is allowed by the SOFA agreement.[7] Eichelman further identifies13, 128 cases with concurrent jurisdictions worldwide, reported by the Advocate General of the Army in 1990, from these cases, the US received a waiver of foreign jurisdiction for 11,751 cases, or 89%.[8]

An example of this kind of concurrent jurisdiction incident was in 2002, when two South Korean girls were crushed to death by a US armored vehicle that was participating in exercises 18 miles from the 38th parallel. At first the US was not going to prosecute the soldiers responsible, but after massive demonstrations by

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[4] Eichelman, 23
[5] Scoville, 2
[6] Eichelman, Mark E. "International Criminal Jurisdiction Issues for the United States Military." Army Lawyer. August (2000): 23. Henceforth: 'Eichelman.'
[7] Gher, 234.
[8] Eichelman, 23-24.

thousands of South Koreans, the US charged both soldiers with negligent homicide and tried them in a military tribunal. As has been shown earlier, the US has primary jurisdiction over cases where the suspects are on official duty. For the first time since the South Korean SOFA was signed 36 years earlier, the Korean Ministry of Justice, requested that the US forgo its jurisdiction over this case. The US refused, claiming that there was no precedent for that.[9] Both soldiers were acquitted of any wrong doing in what was considered by many to have been a sham trial. [10]

**Unfair Agreements**

There have also been claims of racism in the writing up of SOFAs that is tilted against Asian countries in comparison to European ones. The NATO SOFA is one of the only SOFAs which is reciprocal in the sense of granting the host country similar rights if it's troops were present in the US. Other SOFA are not reciprocal in the sense "that they allow the United States to exercise jurisdiction over U.S. troops stationed on the territory of another state-party while, at the same time, denying that state-party similar powers with respect to its own personnel stationed in the United States."[11]

After the rape of a young girl in Japan, the US army refused to hand over the suspects to Japanese authorities because of fear that Japanese justice system would not provide the suspects with their constitutionally guaranteed rights. This does not seem to be an issue for European countries, which in most cases happen to have similar justice systems. Within the Japanese SOFA, there is a controversial section that allows the US to maintain custody of any accused member of the armed forces until they are charged by Japan. Many believe that this clause allows the US to hamper Japanese investigations into the criminal acts of members of its armed forces.[12]

South Korea is also often used as an example of the unfair treatment it received in the SOFA agreement. After the unofficial end of the Korean War, South Korea agreed to the stationing of US troops on its territory in order to discourage the north from attempting another invasion. Resulting from the weakness that South Korea

[9] Alex Lee, Yoon-ho. "Criminal Jurisdiction Under The U.S.- Korea Status Of Forces Agreement: Problems To Proposals." Journal of Transnational Law and Policy. 13:1. (2003): 215. Henceforth: 'Alex Lee'.

[10] French, Howard W., and Don Kirk. "American Policies and Presence Under Fire in South Korea." New York Times 8 Dec 2002, Archives n. pag. Web. 4 Apr. 2014. <http://www.nytimes.com/2002/11/28/world/bush-apologizes-to-koreans-for-killing-of-2-girls-by-gi-s.html>.

[11] Scoville, Ryan M. "A Sociological approach to the negotiation of Military Base Agreements." University of Miami International and Comparative Law Review. 14:1. (2006): 8. Henceforth: Scoville.

[12] Gher, 239.

suffered from as it was rebuilding the country, it was obliged to accept conditions "that were less than ideal and more stringent than the prevailing international norms, such as the NATO SOFA."[13] Though of course it can be argued that the US views its attaining extra rights in relation to the SOFA agreement with South Korea as compensation for underwriting that country's security.

**Violations of Westphalian Sovereignty according to Krazner's Concept of Contracting**

According to Krasner, there are four forms of sovereignty: Domestic, Interdependence, International Legal and Westphalian Sovereignty. For the purposes of this paper, we only need to consider the last two. Krasner defines International legal sovereignty as being "concerned with establishing the status of a political entity in the international system."[14] Westphalian sovereignty on the other hand is based on "territoriality and the exclusion of external actors from domestic authority structures."[15]

From what has been already shown above, it is clear that countries such as Japan and South Korea have been unable to "exclude external actors" when it comes to the maintenance of jurisdiction within their territories. This then is a clear violation of Westphalian sovereignty even though it is done through the agreements of the rulers of those countries. This process of voluntarily forgoing sovereignty is what Krasner has termed as "contracting" which is when rulers are able to maintain authority and legitimacy within their states with the assistance of external powers. The external power either provides material gain or military security, and in return the external power receives influence over the states actions. He also claims that states can inadvertently compromise their own sovereignty through invitation to other states. Either way, sovereignty is not a norm that is very respected.

An example that Krasner gives of contracting is the case of France and certain African states. Some rulers in Africa, such as those of Madagascar, participated in contractual agreements with France because these "rulers relied on the French military to keep them in office."[16] These agreements were in violation of the principles of Westphalian sovereignty, while still being consistent with the principles of international legal sovereignty. This example is very similar to the situation that countries such as South Korea finds itself in. South Korea was dependent on US military forces to maintain its border with North Korea and to

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[13] Alex lee, 221.
[14] Krasner, Stephen D. "Power, the State, and Sovereignty: Essays on international relations." New York London: Routledge, (2009), e-book. Chapter 8.
Ibid
[16] Krasner, Stephen D. "Sovereignty: Organized Hypocrisy" (Princeton: Princeton University Press, 1999): 200. Henceforth: Krasner (1999).

provide security. It was because of this dependence that South Korea agreed to a disadvantageous agreement such as the one that it signed with the US, an agreement that takes away from its sovereignty without reciprocating.[17]

## Conclusion

As Krasner has said, the principle of sovereignty is a popular and widely talked about norm, yet it is also extensively violated. South Korea and Japan are both countries that have contracted some form of agreement that violates the principle of Westphalian sovereignty while still maintaining their international legal sovereignty. This has been done because they either relied on the US to maintain their authority within their countries or because they relied on the US to provide them with security from external elements.

Either way, it seems that the reason that military bases and the presence of foreign troop within a country is not codified in international law is because such a presence provides the sending country with power over the receiving country and is as such a violation of sovereignty, a principle that is held in high esteem and established in the UN charter. This hints at what Krasner has talked about when he said "the Westphalian model is an example of organized hypocrisy; it has been enduring, but it has not necessarily been constraining."[18]

It seems that if military bases and the presence of foreign troops will be codified in international law, then by its very presence, it would negate the principle of sovereignty that is such an important element in international relations.

[17] Alex Lee, 220.
[18] Krasner (2009), Chapter 8.