

AN EXPLORATION IN INTERNATIONAL COMPARATIVE LEGAL GEOGRAPHY:
MILITARY STATUS OF FORCES AGREEMENTS (SOFAs), SEXUAL VIOLENCE, AND
JURISDICTION

BY

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Nicole Patricia Reiz

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degree of Doctor of Philosophy.

Co-Chairperson Shannon O'Lear, PhD

Co-Chairperson Stephen Egbert, PhD

Chris Brown, PhD

Terry Slocum, PhD

Mariya Omelicheva, PhD

Date Defended: November 14, 2016

The Dissertation Committee for Nicole Patricia Reiz
Certifies that this is the approved version of the following dissertation:

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Co-Chairperson Shannon O’Lear, PhD

Co-Chairperson Stephen Egbert, PhD

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Abstract

Laws and legal practices have long shaped physical space, demarcated acceptable bodies and behaviors in place(s), and determined our rights, privileges, protections, and movements. Often, when we speak of “Law,” we speak of it philosophically asking abstract conceptual questions like “What is law?”, or, we approach law through normative questions regarding the relationship between morality and law. These questions, while important, have a tendency to homogenize or simplify law; however, by looking at legal interpretation and legal practices we can begin to understand the material impacts, the uneven legal geographies created by jurisdictional allocation and rules, and the heterogeneity of legal experiences. Utilizing a critical legal geography framework, I examine the contingencies and constraints of spatial justice in cases of rape and sexual assault of civilians by military personnel housed extraterritorially outside of direct conflict areas. The continued presence of foreign military personnel housed extraterritorially in times of peace is a relatively new phenomenon beginning in the middle of the 20th century and most often justified through a discourse of security. The long-term stationing of foreign forces requires legal instruments outlining and defining the rights, privileges, and immunities of these forces while in the territory of the host state. Crucially, these legal agreements, or Status of Forces Agreements (SOFAs), outline the jurisdictional allocation of criminal offenses committed by foreign forces while in a host state. To explore the material and spatial aspects of the different ways in which jurisdictional allocation is structured I utilized an exploratory, non-linear case study approach of three SOFAs: the UN SOFA in Haiti 2011-2014, the Japan-US SOFA in Okinawa 1945-2016, and the NATO SOFA specially in regard to US troops stationed in Germany, Italy, and the UK from 1990-2016. Each of the three cases was examined through a critical legal geography framework with attention paid to forms of social power and the impact of such forces on the achievement of justice for survivors of sexual assault crimes. As each case differed considerably historically,

socially, and spatially, different forms of analysis were used within each case as deemed appropriate, including chronotope analysis and informational interviews with legal practitioners to fully explore the ways in which spatial justice is achieved or constrained for sexual assault and rape survivors.

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Chapter 1: Introduction

Introduction

“We live in a time of porous legality or legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is, by interlegality.” – Boaventura de Sousa Santos

In our current era, increasing technological advancements in communication and transportation have provided the means whereby goods, capital, actors and ideas move across landscapes faster than ever before. Contraction of the relative distances between places due to these advances in essence make places seem closer than they were in previous eras. The consequence(s) of this “time-space compression,” to borrow a concept from David Harvey (1999), and processes of globalization are thought to manifest in two main ways. First, as a *consequence* of globalization there is the notion that all places in the world are becoming increasingly alike both economically and globally. This idea is a scaling up from the national to the global of the old idea of “modernization” (Agnew 2001). From this perspective of globalization and time-space compression, “common global norms about conduct...and cultural practices are spreading everywhere” (Agnew 2001, p. 133). Agnew warns us, though, that we must be skeptical of hyperbolic claims that this compression and the processes of globalization mean the “end of geography” or the “death of distance” as time presumably wipes out space as a meaningful dimension of human experience. He observes that the mechanisms and processes of globalization and modernization are not uniform across space, nor must these mechanisms culminate in creating global uniformity of norms, culture, or economics.

Literature about globalization and time-space compression is overwhelmingly written in regard to technological advancement, the spread of neoliberal norms and ideas, and the

increasing spread of capitalism in the ever-growing global economy. I argue that these ideas are also useful in looking at the relationship between actors and law. Actors' movements across legal spaces and their interactions with the physical, mental, and lived dimensions of the legal have become increasingly complex. New legal spaces have been created due to rapid movements of bodies and goods across the globe. Multinational companies span multiple scales and are subject to new laws in these global spaces. How are people affected as they move through new and different legal spaces? How are the spaces affected by people moving through them, in the production and reproduction of the various physical, mental and lived dimensions of these spaces?

We must understand laws as products of history, time, and culture, as laws are a major mechanism that groups and societies have used to solidify norms in space and place. In this way, laws are shaped by the spaces in which they have authority and conversely shape the spaces in which they exist. As noted by legal anthropologist Franz Benda-Beckmann and legal geographer Nicholas Blomley: "Law is a crucial way in constructing, organizing, and legitimizing spaces, places and boundaries" (Benda-Beckmann 2009, p. 3), furthermore, law is crucial because it not only serves to produce space but is also shaped by a socio-spatial context (Blomley 1994, p. 5). If we are to follow this view of law, then we must assume that processes such as globalization are changing or creating new spaces, thus altering some socio-spatial contexts as well as the laws governing or existing within those spaces. Evidence of changes in law arising from processes of globalization and increased attention to international issues can be seen in the creation of international and regional courts (International Criminal Court, European Human Rights Court), regional constitutions, treaties and treaty bodies, and other supra-national legal bodies. The interdisciplinary project of legal geography has focused on the intersection of law, space and

power towards gaining a more nuanced understanding of how space and law are mutually constitutive and both are heavily influenced and shaped by various forms of power (political, ideological, military, and economic). To this end, the study at hand raises some overarching questions both regarding the study at hand and to wider questions of those investigating the law at the international scale:

How can legal geography begin to assess international law?

-What questions should we be asking as legal geographers about international comparative law, overlapping legal spaces and jurisdictions and how these complex legal landscapes apply to individuals?

-What analytical tools¹ can legal geography bring to add to scholarship on international law/legal theory?

The current legal and critical legal geography literature is overwhelmingly focused on common law and urban settings, though recent works are moving in the direction of broadening the legal systems and spatial scales under study (Kedar 2003, Borgen 2007, Collis 2009, Cotula 2012, Schmitt 2013, Williams 2016). By addressing these questions subsequent scholarship can build upon the present study and contribute toward establishing a more robust literature of critical legal geography in the international and comparative areas of law.

The ever-expanding and changing nature of the international arena has produced a need for more structured international and regional legal bodies to govern the activities of various entities and active parties including transnational corporations, peacekeeping operations, state-to-state interactions, and military forces stationed long-term on extraterritorial bases or missions. The creation of these new legal spaces and thus new legal obligations and constraints also creates new legal norms and rules within these spaces. The legal norms at various legal and spatial

¹ By analytical tools, I mean what tools can geographers specifically bring to investigations on the workings of international law and jurisdiction. This could include critical analysis through scalar interactions, the social construction of borders and borderlands, or a framework of placemaking and social interaction.

scales (local, national, regional, international) differ, and thus overlap and conflict as actors move within and throughout these legal spaces. For example, norms and laws within a nation-state regarding the definition of rape (e.g., non-consensual sexual intercourse, or any non-consensual sexual penetration) and *who* can be raped (e.g. females only, unmarried females and adolescents) may not necessarily be the same as international legal definitions of what rape is and who is protected. More specifically, statutes regarding rape within International Humanitarian Law (IHL), which covers the protection of civilians in times of conflict, are ungendered, that is, these statutes provide legal recourse for both female AND male victims of rape (Eriksson 2011). Many national rape laws, however, are gendered and only provide legal protection and recourse for female victims of rape (McGlynn and Munro 2010).

As social actors move in and out of these legal spaces and situations, the laws governing rape and the actors involved may change. This change occurs because laws governing the treatment of sexual violence and rape tend to be context specific. If a rape takes place between a civilian and a soldier within an internationally recognized conflict, it may be subject to international humanitarian law or international human rights law. If the same rape occurs between a civilian and a soldier outside of an international conflict context, it may be subject to domestic law if both parties are citizens of the same nation-state. If, however, the soldier is part of a foreign military force and the victim is a civilian of the host country, the rape may be subject to the rules of the Status of Forces Agreement (SOFA). Part of a larger comprehensive security agreement between a host country and a foreign stationed military force, a SOFA establishes the rights and privileges of foreign personnel in the host state. Thus the applicable law and recourse for violations of it, vary for cases of rape between these foreign personnel and civilians of the host state.

What this discussion highlights, is that not only does the context change the law and legal spaces rapes occur within, but that the nature of the actors may change as they move through space and thus alter what laws apply as well. Whether as a tourist, a peacekeeper, or a soldier, the legal conditions that are placed upon social actors change spatially and temporally. Furthermore, these situations and legal spaces are not always clearly defined and neatly bounded. Oftentimes multiple laws and legal structures pertain to an actor simultaneously from multiple spatial scales. These intersections of legal norms are what Boaventura de Sousa Santos (1983) has termed “interlegality”. Interlegality can manifest in countless situations depending on the context, the legal structures/cultures involved, the actor(s), time, and place. It is this intersection, these moments of interlegalities, that constitutes the focus of this study. Examining spatial variations of phenomena and the potential causes for these variations is the focus of many studies within the political geography literature. Similarly, my intention is to study the spatial variations and applications of SOFAs as they pertain to cases of rape of civilians by military personnel. Taking this a step further, not only is my intent to study the spatial variations of these agreements, but also how the construction of these agreements creates numerous legal environments under which actors interact, and thus creates variable legal consequences and experiences of security for these actors. As noted in the recent collected work *The Expanding Spaces of Law* (2014) by legal anthropologists Keebet and Franz von Benda-Beckmann, legal pluralism is notably absent from the critical legal geography framework. They contend, and I heartily agree with this contention, that “attentiveness to plural legal constellations, especially to nonstate legal formations and to contradictory and coexisting notions of space, will force legal geographers to adopt a more nuanced perspective of the law-space-power nexus” (p. 20). For instance, the recent attention given to “border studies” in geography is a perfect avenue through

which geographers can engage with law, space, and temporality. A recent study by Brigitta Hauser-Schaublin and Sven Missling on borderland regimes in Cambodia demonstrates how fruitful these endeavors can be. Examining a contested strip of land that includes ancient temples between Cambodia and Thailand, Hauser-Schaublin and Missling provide a detailed analysis of how this borderland was subjected to “changing, temporarily overlaying, spatially overlapping regimes that were organized in a legally hierarchical order in such a way that some orders temporarily suspended others” (2014, p. 80). Most importantly, from a geographic perspective, was the identification of the effects of such spatial practices and the various constructions of meaning of this shifting border in that “sometimes these boundaries were invisible and could be crossed without any consequences; sometimes the crossing required special permits or was prohibited and trespassing implied being killed” (2014, p. 80). For those geographers studying borderland regimes and borders more generally, a more concerted effort towards including a nuanced discussion of law would likely open up further areas of discussion in the literature and may provide a better analysis of the spatial aspects of borders and the effects of their creation and maintenance.

With this movement toward a more nuanced discussion of the “law-space-power nexus” in mind, central to this study are the questions of: How and why are actors within the same space bounded by various laws, and what consequences do these variable and porous legal spaces have for similar situations? Furthermore, how can we better understand the relationship between temporality, place making, and experiences of (in)justice through the practice of jurisdiction?

With the number and variety of legal structures and rape laws, there are numerous ways in which the study of the interlegal situations of rape law could be undertaken. I have chosen to examine cases of documented rape and the subsequent legal actions within three different status

of forces agreements (SOFAs): the United Nations Status of Forces Agreement with Haiti following the 2008 earthquake governing the UN Peacekeeping operation (MINUSTAH), the United States Status of Forces Agreement with Japan, but specifically in reference to crimes committed in Okinawa from 1945-Present, and the North Atlantic Treaty Organization (NATO) SOFA that governs all NATO military personnel – specifically this case examines rapes by US NATO personnel in Italy of both Italian and non-Italian citizens. There are a number of justifications for examining rape within SOFAs rather than other domestic and international cases (International Criminal Tribunal of Rwanda (ICTR) or International Criminal Tribunal of Yugoslavia (ICTY), for example). Since the diversity (type of legal system, systems of punishment, reform movements) and variability (definition of rape, who may be legally a victim of rape, age of consent) of rape laws across space and scale is considerable, it can be difficult to adequately compare cases of rape in a meaningful way if the subset of laws is not wholly comprehensive. An assessment of this nature would involve well over 180 laws under a variety of legal systems (civil law, common law, theocratic law, mixed legal systems, and plural legal systems). Unfortunately, adequately addressing all of the complexities that a full assessment would entail would be outside of the constraints of the present study. Restricting the study to a small number of key SOFA cases allows me to still address key elements of the influence of different types of legal systems in aspects of justice and security without necessitating a comprehensive analysis of the variety of legal systems.

Utilizing critical legal geography as a lens highlights the complexity of these cases and the impediments to justice and the variable experiences of security. As noted by prominent legal geographer David Delaney “[l]egal geographers take us into the workshops where space, law and (in)justice are the means of the co-production of each other. They show us, often in granular

detail, how unjust geographies are made and potentially unmade” (2015, p. 2). It is my intention that through the close study and comparison of three different cases, where a Status of Forces Agreement is in place, we may come closer to unmaking, or finding ways to unmake, some of the very unjust geographies shaped by legal practices under SOFA agreements in these cases of sexual violence.

Purpose and Research Questions

Purpose of Study

This work aims to examine the legal geographies of status of forces agreements (SOFAs), specifically regarding cases of rape and sexual violence of civilians by military personnel. This necessitates an inquiry into how SOFAs, international law, and rape have been treated, or not treated, by geographers and those engaged with the interdisciplinary project of legal geography. Geographer Alexandre Kedar (Braverman et al. 2014) and legal scholar William Twining (2009) have both lamented the lack of comparative and international legal work within the interdisciplinary project of legal geography. Legal geographer Irus Braverman has also commented on this gap, noting “legal geography scholarship has provided a partial account as it has confined itself to the investigation of specific jurisdictions, mostly within the confines of the nation-state or, on occasion, the level of international law.” (Braverman et al. 2014, p. 16). In addition to the rather limited focus of legal geography scholarship on issues in the urban, common-law landscape, calls for more nuanced, comparative work at additional spatial scales with a particular focus on the influence of temporality have been made by legal anthropologists Keebet and Franz von Benda-Beckmann (2014) and criminology and legal scholar Mariana Valverde (2014, 2015). The need for a wider scope within the literature is clear. As I have noted,

given the lack of engagement with the topic of sexual violence in the discipline of geography as a whole, and a lack of international and comparative work within legal geography, my intention is to facilitate a discussion drawing on both subjects. Thus, the objective is to explore how rape has been addressed across a number of cases involving three different SOFAs, involving multiple and simultaneous spatial scales and within different legal structures. In the process, I intend to re-engage the discipline of geography with the topic of rape and expand on the role of power and temporality within legal geography. Beyond these goals, this study will begin to address gaps within the legal geography literature regarding security and injustice, jurisdiction, comparative law and legal pluralism and address spatial heterogeneity and scalar complexities of rape law that are often overlooked and understudied.

Research Questions

The overarching goal of this study is to examine various manifestations of the law-space-power nexus, particularly regarding cases of rape by military personnel against civilians under status of forces agreements. In each case I will address the following research questions to accomplish this goal:

- How are legal spaces formed by these bi-lateral and multi-lateral SOFAs?
- How is power, in its various forms (political, military, ideological, economic), involved in the occurrence and judicial outcome(s) of these crimes?
- How does the relationship between power and the space shape the jurisdictional aspects of these cases?
- How can we understand the effects that the legal structures and practices under the three SOFAs in this study have on individuals at different scalar dimensions?
- How do the formations of these spaces under these laws and agreements protect or harm social actors and precipitate in variable experiences of security?
- How can these cases illuminate or help us interrogate conflicting understandings and experiences of security at the local/human scale versus security at the state, regional, or international scale?

These questions are carefully crafted toward meeting the following four goals:

- 1) To examine how the intersection of law, space, and power manifests in various ways across place, cultures, and temporalities in regard to rape and sexual violence under three different Status of Forces Agreements.
- 2) Critically examine jurisdiction as a factor in the construction of space, its use as a technology and its ability to illuminate the “how” of governance.
- 3) To examine these cases through the lens of critical legal geographies, highlighting the ways in which power, authority, and law interact in creating spatialities of injustice and investigating the contingencies and constraints of spatial justice.
- 4) Finally, through the lens of critical legal geography this study seeks to illustrate the dynamic relationships between proximate and distant legal spaces created by these SOFAs with the objective of breaking down the traditional boundaries between the local/global, familial/state, and personal/political objects of study resulting in a more nuanced understanding of the varied experiences of security within the following case studies (Pain and Staeheli, 2014).

These questions and ultimate goals as articulated here necessitate a discussion of the research context in which this study is situated. Following a discussion of the research context, a stand-alone chapter has been dedicated to a brief history of the treatment of rape in law from ancient Hebrew law to the present, though this history is not exhaustive. Changing perceptions and treatments of rape, including the definition of rape and via the creation of new rape laws and prohibitions within recent international criminal tribunals (ICTY, ICTR), have significant impacts on international and binational agreements over crimes committed by military personnel during active conflicts and under SOFAs in non-conflict arenas. With the research and historical contexts clearly defined, three case studies are examined, each in a separate chapter. These cases are examinations of instances of rape and sexual assault by military personnel under three different SOFA agreements: a UN SOFA for a peacekeeping mission in Haiti following the 2010 earthquake, the United States- Japan SOFA specifically involving cases of rape and sexual assault on the island of Okinawa, and the NATO SOFA, specifically involving cases of rape and sexual assault by NATO military personnel of civilians in Italy.

Unfortunately, there was an abundance of case studies I could have chosen to analyze for this study. Rapes and sexual assaults by military personnel under the jurisdiction of SOFA agreements are not unusual. In the past year alone (2014-2015), news stories regarding French UN peacekeepers sexually exploiting children in the Central African Republic made international headlines (Amnesty International, 2015), while Human Rights Watch released numerous reports regarding rapes, sexual assaults and exploitation by African Union soldiers in Somalia under the African Mission to Somalia (AMISOM) (HRW, 2014). The three cases in this study were chosen purposefully to represent the spectrum of jurisdictional allocation typically found within Status of Forces Agreements. Each of these cases share three elements in common: 1 - they involve the rape or sexual assault of civilians of a host nation by military personnel of a visiting force, 2 - the legal apparatus governing the privileges and immunities of the visiting forces in each case is a status of forces agreement (SOFA), and 3- all three cases are outside of active conflicts. How they differ is at the crux of the issue in this study: the adjudication of jurisdiction over the visiting forces.

This study begins with the examination of the case of MINUSTAH (*Mission des Nations Unies pour la Stabilisation en Haiti*) the UN mission to Haiti. A multi-lateral, non-reciprocal, agreement involving personnel from over 26 countries, the military personnel are governed by a United Nations Status of Forces Agreement (SOFA) where jurisdiction over visiting forces is wholly retained by the sending state, or the state of origin of the military personnel. Thus, there is no jurisdictional authority of these crimes by the host state of Haiti, even though the survivors of these crimes are Haitian citizens who were attacked within the sovereign space of Haiti. It is non-reciprocal in that the SOFA only applies to visiting UN peacekeeping military personnel

stationed in Haiti, it does not apply to Haitian military personnel who might be stationed in one of the UN troop contributing countries.

The second case involves cases of rape and sexual assault of civilians by US military personnel stationed on the Japanese island of Okinawa. The US military has maintained a substantial presence on the island since 1945, though the type of authority the US military holds on the island and the jurisdictional allocation and powers held by the US military have evolved over time. Currently US troops are under the authority of the bilateral, non-reciprocal, US-Japan Security Treaty of 1960 and corresponding Status of Forces Agreement. Jurisdiction over crimes committed by US military personnel is housed under a somewhat complex jurisdictional arrangement. For serious crimes, such as rape, murder, and other forms of physical assault, the US military and Japan hold concurrent jurisdiction. That is, both authorities hold jurisdictional authority over the crime of rape and sexual assault between a member of the US military and a civilian. In this case, Japan holds primary rights to the case, and the US military holds secondary rights, though the US military has the right to appeal for a waiver of primary jurisdiction, which Japan can refuse. Again, this agreement is non-reciprocal in that the arrangement as outlined is only for US military personnel stationed with Japanese sovereign territory and does not apply to any Japanese military personnel that may be stationed in the United States.

The third case within this study involves the multilateral and reciprocal Status of Forces Agreement of the North Atlantic Treaty Organization (NATO SOFA) and cases of rape by NATO military personnel, specifically American military personnel, of civilians in Italy. Criminal jurisdiction as delineated by Article VII of the NATO SOFA is also concurrent, much like the US-Japan SOFA agreement, with both the sending state and the host state holding jurisdictional authority. Article VII prescribes who holds primary and secondary rights of

jurisdiction based on the type of crime committed by the offender. Under Article VII, crimes of rape and sexual assault accord the host state primary jurisdiction and the sending state secondary rights to jurisdictional authority. Once again, though the host state may have primary rights to these cases, the sending state does have the ability and right to submit a request for waiver of jurisdiction, and the host state, under the guidelines of the NATO SOFA, must give it sympathetic consideration (Pagano, 1992). As noted previously, unlike the first two cases, the NATO SOFA is a reciprocal agreement, thus the jurisdictional guidelines, as outlined by Article VII, are applicable to troops of any NATO member state who are stationed in another NATO member state.

The focus of this study will consistently remain on a critical analysis of the techniques of law: that is the practices of jurisdiction both within each individual case study and between all three case studies, highlighting the indeterminate aspect of jurisdiction and how this is related to the variable experiences of security of both perpetrators and survivors of these crimes. The practices of law, especially as linked to the techniques of jurisdiction², are directly related to level of justice or injustice experienced by the survivors of these crimes. Furthermore, I critically analyze just how these techniques are implicated in the variable experiences of security by individuals within these situations. As the logic underlying the justification for long-term stationing of visiting forces in host states is often that of achieving or maintaining security, just whose security is at stake?

² Techniques of jurisdiction here follows the a particular Deleuzian discussion on the ‘subject of rights’ and refers to those techniques that are instrumental in fashioning a ‘legal person.’ This can mean, in this case, who can be raped, who can rape, and what legal authority determines the characteristics of a particular survivor, perpetrator, and incident. See Mussawir’s discussion of Deleuze, jurisprudence and the tradition of technical legal thought in *Jursidcition in Deleuze: The Expression and Reprerentation of Law* (2011).

The objective here is to demonstrate the complexity of the legal geography surrounding rape in cases involving multiple social actors and spatial scales. Though a thorough quantitative analysis of the number of crimes, the jurisdictional allocation of each offense, and the rulings of each case would be ideal in underpinning the critical analysis of these case studies, a quantitative study of these particular cases is almost impossible. As noted by Kirk and Francis (2000) in their examination of crimes of sexual violence under three different visiting forces agreements of the US military in East Asia, “complete data on the number of violent acts committed by US military men against women and children in host communities are not available for several reasons” and “official statistics in host countries are often incomplete” where “in some cases records are kept in such a way that violence against women is not noted as a separate category” (p. 247). Additionally, this study intends to expand upon the assertion that legal spaces are not neatly bounded and clearly defined hierarchical structures. Furthermore, this apparent fluidity or indeterminism in the legal spaces, laws, and applications of sentences for these crimes stands in direct opposition to the very real and concrete experience of the act of rape itself. In the process of examining these cases, the effects and impacts that the type of legal system, power, time and space have on rape law and the prosecutions of these crimes will be examined and discussed.

Methods of Case Selection

Cases were found and selected using the following method. Within the specified time period of each study, cases were identified in the Okinawa and NATO cases through a careful search of US military courts-martials records. Once cases within the study area and time period were identified, further information on the case beyond that given in the courts-martial brief was found through a systematic search of news coverage of said cases as well as the identification of

any appeals documentation or other scholarly works that referenced a specific case. Historical cases that occurred before the regular publication of courts-martials by the US military were largely found in historical scholarly works on post-World War II Okinawa under US military occupation. In the UN-Haiti case study, these cases were identified through news coverage and by deduction through the UN Conduct and Disciplinary Unit records and the Sexual Exploitation and Abuse publications.

Chapter 2: Research Context

Introduction

“...behind all law is someone’s story; someone whose blood, if you read closely, leaks through the lines. Text does not beget text; life does. The question...is whose experience grounds that law.” – Catherine Mackinnon

The experience of sexual violence by groups and individuals in military contexts has received an increasing amount of attention by scholars within the last 20 years. Though the use and occurrence of rape, sexual- and gender-based violence (SGBV) has been documented throughout history and cultures (Burke 2007), recently there has been a shift from documenting and discussing these events in a historical context towards an increasing effort to theorize about the occurrence of rape and SGBV in militarized situations, the experiences of security, and the legal approaches and assemblages within which these events are situated. Scholars from a number of disciplines (anthropology, political science, sociology, women’s studies, law, criminal justice, and history) utilize a wide variety of theoretical and methodological tools in examining rape and other forms of sexual violence in militarized situations; however, many of these studies focused on SGBV within active conflict situations (civil and interstate wars, insurgencies, uprisings, coups, etc.) (Askin 1997, Bourke 2000, Skjelsbaek 2001, Wood 2006, Baaz and Stern 2013) rather than my current study, which is situated within rape and sexual violence in militarized settings outside of active conflicts.

Other studies examine the relationship and evolution between SGBV and domestic and international civilian law (Bourke 2011, Eriksson 2011, Eboe-Osuji 2012, Henry 2014) though generally from a historical, legal, or feminist perspective and few, if any, focus on the impact of the practice of jurisdiction. A related body of literature examines SGBV within military law and

culture (Burke 2004, Hayes 2006, Rosen 2007, Browne 2007, Murnane 2007, Hollywood 2007, Hillman 2009) though often these studies are focused on intramilitary sexual violence, rather than sexual violence between military personnel and civilians in extraterritorial settings, as in this study. Other bodies of literature and scholars focus on the concept of security and its relation to governance, gender, geopolitics, scale, and militarism (Krahmann 2003, Shepherd 2007, Dalby 2010, Burgess 2010), though only recently have these studies included law and jurisdiction (Benda-Beckmann et al. 2009, Sassen 2006, Shepherd 2015; Valverde 2008, 2009, 2014, 2015). And recently, the interdisciplinary project of legal and critical legal geography has gained momentum, exploring the nexus of law, space, and power (Blomley 1990, Blomley and Bakan 1992, Braverman et al. 2014) though few studies have focused on the practice of law and jurisdiction (Ford 1992, Martin et al. 2010) and there are currently no studies within legal and critical legal geography that focus on rape or sexual, gender-based violence (SGBV).

It is at the confluence of these various bodies of literature that this study is located. Though often the term ‘nexus’ is used to demonstrate the connection and exploration of multiple subjects, I specifically use ‘confluence’ as I believe it is more appropriate to demonstrate this study as an active, and fluid, joining together of multiple literatures - where analytical tools from a variety of distinct disciplines are employed together, simultaneously, to fully appreciate and investigate the complex working of jurisdiction in these cases and the relationships of jurisdictional practices to multiple scales of security and experiences of security not only by the survivors of sexual violence and rape but also of the perpetrators of these crimes. To place this current research in context and demonstrate how this work moves some existing literature forward (critical legal geography) while simultaneously building upon other efforts at merging two areas of literature (critical geography and jurisdiction, critical security studies and law), this

chapter explores the critical legal geography literature, demonstrates where this study sits within critical legal geography and relates this study and critical legal geography to the supporting literatures of jurisdiction and legal practice, critical security studies (css), and sexual- and gender-based violence (SGBV) in conflict and the military.

Each of the three cases presented in this study (Haiti and UN Peacekeepers, Okinawa and the US Military, and Italy and NATO) draws upon these bodies of literature, though not equally nor uniformly. While each of the cases involves the rape or sexual assault of civilians by military or security personnel who are governed by a corresponding Status of Forces Agreement between the visiting forces and the host state, the history, relationship, actors, laws, and jurisdictions differ considerably in each case as do the relative power relationships between the host state and the sending state. Thus, while each of these literatures does play a role in examining each of the three cases within this study, the prominence of the respective bodies of literature will differ considerably in relation to the factors at play within the particular case study. For example, in Haiti, sending states maintain exclusive jurisdiction over their personnel who are deployed as peacekeepers. As such, crimes committed by these individuals are solely under the control of the sending state's laws, courts and justice mechanisms. On the other hand, in Okinawa, US military personnel exist within a concurrent jurisdictional arrangement where certain crimes, including rape and sexual assault of Okinawan civilians, are governed by both the Okinawan authorities under Japanese criminal law (as the primary holder of jurisdiction with first rights to the case) and with the US Military as secondary rights holders to the case if Okinawan authorities decide not to pursue the case or if they are persuaded to forfeit their rights to primary jurisdiction. While this section provides the research context for the conceptual and analytical tools employed throughout the entire study, each individual case study within the

larger work includes a case specific research context section, which provides the historical background and legal context pertinent to that specific case.

Legal Geography and Critical Legal Geography

Law is always somewhere. The world around us, our homes, our cities, all of our lived spaces and social spaces are bound up with a multitude of legal meanings. This intersection of law and space has produced the subdiscipline of legal geography. Scholars recognized a link between geography and law as early as the 1920s (Kedar 2003, p. 405). However, a coherent and directed effort towards examining the intersection of, and relationship between, geography and law emerged only within the last thirty years. The work of Nicholas Blomley, Gordon Clark, and Joel Bakan can be seen as marking the start of legal geography, though there are a handful of considerable works from the 1980s (see de Sousa Santos 1987 and Economides et al. 1986). These early works recognized that the interpretive turn in the social sciences, geography included, could be useful in moving beyond “law and geography” towards understanding the mutually constitutive relationship of law and geography and fully appreciating relationships among space, law and power (Bakan and Blomley 1992; Blomley 1993, 1994; Chouinard, 1994).

The field of legal geography continued to grow and diversify through the 1990s and 2000s. Special issues of journals were dedicated to legal geography, including *Historical Geography*'s theme issue on “Geography, Law and Legal Geographies” in 2000.

Simultaneously, other scholarly work that could be considered legal geography was emerging in other subdisciplines. Work in political geography and urban geography examined relationships among spaces of citizenship, racism, and law (Ford 1994, Fyfe 1995). Political geographers have long been considering relationships among neoliberalism, globalization, and the

construction of space, meaning, and identity – all of which are themes of interest for legal geography. However, very little of the literature has recognized the role of law explicitly (Delaney, 2014). For instance, Newman and Paasi's (1998) article, "Fences and Neighbors in the Postmodern World: Boundary Narratives in Political Geography," calls our attention to ways in which boundaries and territory play a role in constructing and shaping sociospatial identities. Boundaries, according to the authors, are instrumental in creating and solidifying socialization narratives, creating the categories of 'Us' and the 'Other.' Despite interesting legal implications, their work does not examine legal dimensions of these kinds of border issues directly. Similar to arguments made by Newman and Paasi, Richard Ford's (1999) article, "Law's Territory: A History of Jurisdiction," outlines how identity is created and maintained through a legal discourse of territorial jurisdiction. Much of the early work in legal geography was brought together in *The Legal Geography Reader*, edited by prominent legal geographers Nicholas Blomley, David Delaney, and Richard T. Ford. This collection of articles demonstrates the depth and breadth of legal geography within political, human, and cultural geography, with articles on public space, racism, property, the formation of states, environmental regulation, and globalization. A key theme throughout the collection, and one that this study aims to build upon, is the socially constructed and contested material and discursive aspects of legal space(s).

Whereas legal geography is concerned with studying spatial representations in laws and legal practices, e.g., discerning between private vs. public spaces, making decisions about spatial equity, creating spaces of exclusion by establishing environmental protection zones, etc. (see the Law and Geography 2002 contributions), critical legal geography (Bakan and Blomley 1992) questions the assumptions and power dynamics of uneven spaces of representation and justice emerging from particular laws. Like other critical endeavors such as feminist geography, post-

colonial geography, and critical cartography, critical legal geography aims to tear away our abstract view of law and rather than see law as an objective, static, and neutral tool of implementing order and justice, through a critical legal geography lens we can see the practices of law as messy, subjective, and constantly evolving within the geopolitical surroundings and influences of time and space. Much as Donna Haraway (1988) draws our attention to the ‘god trick’ of claims to an objective ‘view from nowhere’ of Western science, critical legal geography draws our attention to the taken-for-granted spaces, norms and inequalities naturalized and legitimized by law highlighting the ability of law and legal decisions to “shape, demarcate, and mould human geographies and social space” (Kedar 2003, p. 407).

Much of the recent work in legal geography takes a critical stance. The subject matter is diverse, ranging from studies regarding the legalization and commodification of outer space which demonstrates how international law does not simply govern space but also creates space (Collins 2009), to the spatial architecture of rights such as the legal maneuvers allowing torturers under the Bush administration to be domestically and internationally exempt from law (D’Arcus 2014). Throughout this work is a critical examination of how law is used to legitimate political and social inequality. It seeks to demonstrate how legal institutions, documents, conventions, and practices reinforce hierarchical social relationships and legitimize practices that marginalize, silence and harm (Kedar 2003). As noted by Hutchinson (1991) and reiterated by Blomley and Bakan (1992), “the rule of law is a mask that lends to existing social structures the appearance of legitimacy and inevitability; it transforms contingency of social history into a fixed set of structural arrangements and ideological commitments (Hutchinson 1991, p. 183; Blomley and Bakan 1992, p. 667).

A criticism that can be made against legal geography and critical legal geography is that the project and the body of literature that claims this providence is characterized by theoretical pluralism, covers a wide array of topics, and taken as a whole “does not seem to have a common methodology, few distinguishing concepts, and no ‘debates’ through which differing positions might be refined” (Delaney 2015, p. 1). As David Delaney further states “I sometimes wonder what renders it sufficiently coherent such that ‘progress’ could be attributed to it” (Delaney 2015, p. 1). The perceived lack of coherence in CLG can likely be traced to its origins, as it did not grow out of or in response to a specific school of thought. Unlike other critical studies which developed in response to the perceived shortcomings of more traditional bodies of literature (e.g. critical security studies from traditional security studies), legal geography and critical legal geography instead grew more out concern for the co-opting and misuse of geographic tools and concepts by other disciplines examining law during the spatial turn in the 1980s and 1990s and also a concern over the lack of attention to law and legal spaces by geographers, especially in urban geography.

Much of the early legal and critical legal geography literature is focused more on the urban and is largely situated within areas governed by common law legal traditions (generally speaking, Canada, the United Kingdom, and the United States). More recently, this focus has expanded beyond the urban to smaller scales (the home, zoos) and larger scales (international law and outer space) (Braverman 2014, Pearson 2013). And it should be noted that some of the best scholarship of the spatiality of law is not housed with critical legal geography but in critical legal anthropology, specifically the work of Keebet and Franz von Benda-Beckmann and their work on legal pluralism and governance (Benda-Beckmann 2009, 2013). As they have noted:

“The issue of legal responsibility and liability is particularly pressing with regard to issues of violence perpetrated by governing bodies. We have now entered into a

new era in which the current developments in the pluralization of governance effectively imply a retreat of the state from its liability to prevent undue violence and reveal the Janus-like nature of governance” (2009, p. 14).

Though I take these criticisms seriously, I remain committed to critical legal geography as the main lens for this project. I am drawing from the wide array of literature, with its theoretical pluralism and methodological incoherence, to identify a conceptual space from which to question the legitimizing power of law. I aim to uncover ways in which law perpetuates social injustice and marginalization. Further, I aim to expose law as indeterminate by challenging the ways in which conventional spatial and legal imaginaries “invisibilize injustices, obscure their contingencies and causes, uncouple injustice from responsibility, and legitimize injustices or render them as mere misfortunes, if not deserved fates” (Delaney 2015, p. 2). Such an approach allows us to see rape as an assemblage of violence (Springer 2011) where various discourses of militarized security, a wide array of cultural and legal notions of rape, and the circumstances of an act of rape are all interwoven materially, spatially, temporally, and discursively.

Sexual Violence and Militarism

“Combat and rape, the public and private forms of organized social violence, are primarily experiences of adolescent and early adult life. The United States Army enlists young men at seventeen; the average age of the Vietnam combat soldier was nineteen. In many other countries, boys are conscripted for military service while barely in their teens. Similarly, the period of highest risk for rape is in late adolescence. Half of all victims are aged twenty or younger at the time they are raped; three-quarters are between the ages of thirteen and twenty-six. The period of greatest psychological vulnerability is also in reality the period of greatest traumatic exposure, for both young men and young women. Rape and combat might thus be considered complementary social rites of initiation into the coercive violence at the foundation of adult society. They are the paradigmatic forms of trauma for women and men.”

– Judith Lewis Herman “Trauma and Recovery”

Once a taboo subject and considered exclusively a private matter, rape and sexual violence have become increasingly visible in headlines across the world. In India, massive anti-

rape protests occurred throughout the first few months of 2013 in response to the brutal gang-rape of a 23-year old female physiotherapy student on a public bus. Protests again erupted in India in April of the same year over the rape of a 5-year old girl (BBCa 2013, BBCb 2013). Angered by the inaction of police, protesters took to the streets seeking greater protection against rape, increased police action in reported cases of rape, and overall reform of the existing rape legislation in India. In the United States, documentary filmmakers Kirby Dick and Amy Ziering released “The Invisible War” in 2013. The documentary brought to light the thousands of sexual assaults and rapes that occur in the US military every year. The widespread release and attention that followed its release prompted Congress to ask questions of the military command structure regarding sexual violence within its ranks. On the international front, the United Nations (UN) continued to address sexual violence in conflict. On June 24th, 2013 the United Nations Security Council (UNSC) unanimously passed Resolution 2106, reaffirming previous Resolutions regarding sexual violence in conflict as well as strengthening existing measures currently in place (UNSC 2013). Resolution 2106 marked the sixth resolution passed by the UNSC regarding Women, Peace and Security and the fourth resolution focused on conflict-related sexual violence (Puri 2013).

The three examples described in the preceding paragraph demonstrate the dominant spatial scales (local, national and international) where rape is typically viewed or “placed.” The examples also make a second point: rape is not of one type or variety, but many. Rape, in its various forms includes, but is not limited to: domestic rape by a partner, stranger rape, date rape, rape by a superior (military and occupationally), rape in conflict (by other civilians), and rape as a tactic of war and genocide (by soldiers and at the command of superiors) (Enloe 2000). The variety of ways in which we understand or classify rape translates into a variety of laws at the

local, national and international scale concerning rape in its various forms and under a variety of contexts. As noted above, a brief overview of news coverage regarding rape shows a tendency to view rape, its occurrence, and the solutions to it (generally legal reform) as existing at three main spatial scales: the local, national and international.

The scalar level that is often chosen for a specific case or type of rape is determined by the context of the rape. For example, a small number of the perpetrators of the systematic rapes of Bosnian Muslim women by Serbian forces during the war in 1994, were tried at the international level in the International Criminal Tribunal for the former Yugoslavia (ICTY). On the other hand, a highly publicized incident of rape involving two teenagers in Maryville, Missouri where the 17-year old grandson of a prominent local politician was accused of having sex with a 14-year old freshman girl who was too drunk to consent and who was subsequently raped by two other boys, aged 13 and 15, in January of 2012, though under national attention, nevertheless was supposed to be tried at the local court level where jurisdiction resides. The male perpetrator later pled guilty to misdemeanor child endangerment amid a great deal of controversy regarding the local prosecutor's decision that there was insufficient evidence to bring a charge of sexual assault (Morris and Arnett 2014). The difference between the cases is context. The systematic use of rape, set within an internationally recognized zone of conflict, placed these act of rapes as war crimes and thus subject to international criminal law and tried at the international legal level and scale. The case between the two teenagers in Missouri, outside of any conflict area, and considered a local matter between two individuals, was adjudicated at the local legal level and scale. Though the acts, unwanted sexual penetration of one individual by another, at face value were the same, the context and situation surrounding the rape, determined the

category of the offense (war crime, domestic assault) and the scalar level at which the cases were located.

The scholarly literature covering the vast scales, types, and laws regarding sexual and gender-based violence as briefly addressed in the preceding paragraphs is extensive and diverse. While a thorough and detailed overview of this full body of literature is outside the scope of this current study, I focus here on the literature regarding rape and sexual- and gender-based violence (hereafter termed SGBV) specifically related to militarism. Militarism, in this context, is distinct from the military. As discussed by Tyner (2010) following Chalmers Johnson, military refers to “all those activities, qualities and institutions required by a state to fight a war in its defense” (p. 6). Though the cases within this study involve military personnel who are engaging in activities under the justification of security, the cases in this study do not fall under the context of war but from extraterritorially housed personnel in times of peace. As such, these instances of violence between military personnel and local civilians are more so related to militarism which is defined by Rachel Woodward as “the shaping of civilian space and social relations by military objectives, rationales and structures, either as part of the deliberate extension of military influence into civilian spheres of life and prioritizing of military institutions, or as a byproduct of those processes” (Woodward 2005, as quoted by Tyner 2010, p. 8). Examined by scholars from a variety of disciplines, including history, gender studies, political science, and law, the majority of studies that interrogate the relationship between SGBV and militarism are situated within the realm of active conflict situations or war. Many studies within this area of scholarship are empirical quantitative studies or comparative case studies seeking to define causal mechanisms of SGBV in war and conflict (Green 2006, Wood 2006, Bastick et. al 2007, Butler et. al 2007, Farr 2009, Wood 2009, Mroz 2011, Nordas and Cohen 2012, Cohen 2013, Cohen and Nordas

2014). These studies, as noted by Davis and True (2015) generally “offer two significant explanations of the onset and prevalence of sexual violence in conflict situations” (p. 497): one, SGBV is directly caused by the presence of armed conflict or two, that “sexual violence is an instrumental strategy deployed against civilians for the purpose of war gain or plunder” (p. 497). Though united under a common focus in investigating causal mechanisms of SGBV in conflict, many of these studies diverge on important points: those that argue SGBV in conflict is largely driven by opportunity (Butler et al. 2007, Cohen 2013) and studies that view it as directly related and driven by strategic considerations as a weapon of war (Card 1996, Farr 2009, Brown 2011).

Other studies change the focus from the causal mechanisms within conflict, and why SGBV may or may not be prevalent in a given conflict or war, towards a focus on the perpetrators of SGBV – examining *why* military personnel, and other actors in conflict (rebel militia members, insurgents, etc.) choose to perpetrate SGBV, in their own words through in-depth interviews (Baaz and Stern 2009, 2012, 2013). In these studies, rather than identifying causal mechanisms, the focus is instead on improving protection and justice measures for potential and existing survivors of SGBV, and creating potential avenues for prevention (Baaz and Stern 2012, Skjelsbaek 2012). The authors of these studies remain acutely aware of the gendered aspects of war and conflict and maintain that a focus on the gendered cultural dynamics that existed before the genesis of a particular conflict is key to understanding the occurrence of SGBV within the conflict (Cooke and Wollecotte 1993, Kronsell and Svedberg 2011, Baaz and Stern 2013, Blanchard 2014, Davis and True 2015). The divergence within this literature is between those who seek to maintain women at the center of analysis with the intent of building better protection measures for women through tougher laws and policies, and those scholars and practitioners who instead put the perpetrators at the center of analysis, seeking to understand the

rationale of perpetrators of SGBV with the intent of working to change the conditions that promote the rationalization of SGBV by perpetrators. The former is largely located in standpoint feminist research within the discipline of international relations (IR) with a focus towards implementing protective measures for potential victims like UN resolutions 1325. The latter literature shifts this focus from protection of victims to prevention by identifying and focusing on the rationale of the perpetrators, examining the previously existing gendered aspects within a given culture, and seeking preventative measures, with a directed effort at critiquing resolutions and policies that assume that women and children are always the objects to be protected, rather than all civilians (Skjaelsbeck 2012).

Moving from these literatures of analyzing SGBV within conflicts and potential preventative or protective measures for potential and existing survivors is another body of literature that investigates the mechanisms of justice through punishment of perpetrators. While the former studies are concerned with why SGBV happens and how to potentially decrease the occurrence of such, the latter studies examine how survivors can obtain justice, and why that justice often proves to be so elusive. As one would expect, the majority of these studies come from legal scholars and social scientists concerned with legal practices (Morris 1996, Askin 1997, McHenry 2002, Bourke 2011, Grey 2014). Generally, these studies are either concerned with improving existing legal mechanisms (Holt 1991, Ajzenstadt and Steinberg 2001, Daly and Bouhours 2010, Spohn and Horney 2013), building new mechanisms of justice for survivors of SGBV, investigating cultural and institutional impediments to the effectiveness of these legal mechanisms (e.g. stigmatization, victim-blaming, retributive violence) (Mackinnon 1993, Farwell 2004), or examining the aspects of military enculturation that seem to promote SGBV (Morris 1996). Though preventative and protective measures for potential and existing survivors

of SGBV is certainly a personal concern, the current study is more firmly situated with the latter body of literature. Of particular concern throughout the case studies is how the practices of jurisdiction under SOFAs by sending states versus host states often leads to a lack of justice for the survivors of these crimes. However, unlike these studies of wartime rape and legal mechanisms, this current work is concerned with women outside of active conflict zones, generally those living close to extraterritorial military bases or in areas of long-term peacekeeping operations.

With the increased participation of women in the armed forces, especially in the United States military, and the increased visibility of survivors of sexual assault, the literature on sexual violence in the armed forces has dramatically increased over the last ten or so years. Works by the prominent feminist scholar Cynthia Enloe were some of the first in-depth studies of the relationship between women and militarism, specifically addressing the effect that military bases have on women's bodies (1988, 1989, 2000, 2014). Enloe's work has often focused on the undervaluation of women's labor in and around military bases and gendered politics within the national and international political arenas. Arguably, some of Enloe's most important contributions to our understanding of the link between militarism, military bases, and the lives of women has been examining the gendered, racialized, and historical role of US military bases in various contexts including marriages between US military personnel and local women (around extraterritorial bases), racial issues between black US GIs and local white women in Britain in WWII, and investigating how the rights of military wives and ex-wives play a prominent role in analysis as does security for women soldiers at military bases. Finally, and the most pertinent to this study is Enloe's analysis and her attention paid to women in prostitution around military bases, and the international gendered politics of national security including historical analyses of

British practices toward women living near military bases and the Japanese use of “comfort women” in the Asia-Pacific region in WWII (2014). Though Enloe does address the issue of SOFAs in relation to their ability to jeopardize the legitimacy of local governments and the need to investigate the everyday gendered relations of the base, she does not specifically address the jurisdictional practices themselves as a cause for insecurity (2014, p. 44-50). This study intends to move this work forward, acknowledging the very real issues of security for women (and men) who live on and near extraterritorial military bases as thoroughly discussed by Enloe, but includes the role that law and jurisdictional practices play in shaping insecurity for these local civilians.

Significantly, Enloe’s work serves as somewhat of a bridge between two prominent strains of literature regarding women and militarism. With the rise in coverage of sexual assault within the military through the recent documentary “The Invisible War” (2012) and various government reports, investigations, and pushes for legislation led by US Senator Kristen Gillibrand (D- N.Y.) (Shane 2015, Wong 2015), the access and proliferation of information on these crimes has led to a number of studies regarding sexual violence in the military. Often these studies are investigations into the causal relationships between military training and values and sexual and domestic violence (Morris 1996, Adelman 2003), empirical studies of the rates of sexual assault and rape among the various branches of the military and various “scandals” (Rosen 2007, Browne 2007, Hillman 2009), and critical work investigating the legal and cultural impediments that survivors of these crimes face within the military justice system (Murname 2007). While highlighting the continued need to improve legal mechanisms within the military to protect both women and men from sexual assault from their fellow service members and superiors as well as combating the military cultural practices that seemingly promote such

behavior (e.g. military songs and chants that include violent and sadistic sexual imagery and domination and the decoration of military equipment with pornographic imagery) (French 1992, Kelly 2000), these studies are often limited to *intramilitary* violence. That is, they are often focused on sexual violence experienced by military service personnel perpetrated by their fellow service members and superiors. In her most recent update of *Beaches, Bananas, and Bases* (2014), Enloe addresses this gap stating,

“Two related questions frequently have gone unexplored during the debate over what to do to effectively prevent and prosecute sexual violence inside the American military. First, what, if any are the causal linkages between, on the one hand, sexual violence perpetrated by US military men on women inside the military and, on the other, against civilian women living around US military bases at home and abroad? Second, how exactly do diverse men inside the military absorb the masculinized idea that women are property to be used by men in ways that allegedly confirm their own manhood and simultaneously preserve the masculinized atmosphere in certain institutionalized spaces?... The two questions are related – failure to ask and try to answer has meant that American military women rarely have tried to make common cause with women in other countries who have endured abuse as a consequence of US soldiers being based abroad. Most often, sexual violence inside the military has been treated merely as a domestic issue. In reality, it has been a dynamic of international politics.” (Enloe 2014, p. 69).

It is here that we see the crux of the divide in literature regarding women, militarism, and sexual violence: those studies that investigate intramilitary sexual violence on the one hand, and those that study sexual violence as experienced by women who live near military bases on the other. While the former literature often focuses on the conditions that perpetuate intramilitary sexual violence (military culture, issues within how the military legal system functions), the latter often focuses on notions of security, or more accurately *insecurity*, as experienced by local civilian women who live near military bases – where the continued presence and existence of the base is often justified in terms of increasing local or regional security. Often, the latter literature is located in the area of critical studies of security and feminist approaches to International

Relations, (not to be confused with Critical Security Studies or the Copenhagen School), and is diverse in the ontologies, epistemologies and methodologies utilized. Generally feminist approaches to International Relations are discussed as diversifying into three “strands”: liberal, radical, and post-modern/post-positivist. The methodologies employed in these studies range from positivist, empirical studies to work centered on discourse analysis, though all are united in challenging traditional, state-centric notions of security. Notable works within this literature include Valerie Hudson and Andrea den Boer’s (2004) *Bare Branches: the Security Implications of Asia’s Surplus Male Population*, which investigates the potential security issues of the unbalanced gender ratio that is currently affecting many Asian nations and the approaches used to address this issue (enlisting young surplus males in military campaigns and high risk building projects), Cynthia Enloe’s many works investigating the complex ways that women’s lives are affected and shaped by militarism, *Does Khaki Become You?* (1988), *Maneuvers: The International Politics of Militarizing Women’s Lives* (2001), and *Bananas, Beaches, and Bases* (1990, 2000, 2014), and the edited collection by Asha Hans and Betty Reardon, *The Gender Imperative: Human Security vs. State Security*, which calls for a radical rethinking of security, asserting the position that human security derives from the experience and expectation of well-being of persons, communities, and the planet that sustains them, and maintaining a position that the present, highly militarized global system of state security is incompatible with human security (2010, 2012).

My current work relates to much of the feminist work in International Relations, taking the experiences of security of individuals under Status of Forces Agreements as a central concern. With Cynthia Enloe’s consideration of the division between intramilitary sexual violence and sexual violence of civilians near military bases in mind, this current study does not

limit analysis to only civilian survivors of sexual violence by SOFA military personnel. As a study investigating these crimes through the lens of critical legal geography, the focus here is on the practices of jurisdiction and a continued effort to understand the complex interplay of space, law, and power under these agreements that shapes the experiences of security and justice (or injustice) not only by civilian survivors of sexual violence, but also the experiences of men and women within the military who are survivors of these crimes as well as the perpetrators of these crimes. Though we would like to be able to clearly place cases of rape neatly within bounded territories or jurisdictional spaces whereby the legal authority and laws are easily identifiable and the consequences and justice meted out are predictable and consistent, this is often not possible. In some cases, mainly domestic cases of rape, the matters of jurisdiction and authority are relatively straightforward. However, under conditions of internal and international conflict, peacekeeping operations, and SOFAs, jurisdictional and legal authority becomes less clear.

While the previously discussed examples of rape in various contexts are brief, they are examples of what this work intends to examine, and they begin to raise some interesting questions. What role does “when” (time), “who” and especially “where” (space/place) play into which law applies to a particular case of rape? How do rape laws differ across space and time? Most importantly, in examining these cases from a geographical perspective, the technical aspect of “how” space plays a role and is in turn shaped by law is evaluated, something lacking or undertheorized by other types of feminist and legal analysis. Thus, particular emphasis and focus is placed on the role of jurisdiction and governance in the cases examined throughout this study (Valverde, 2008). Furthermore, in what ways and form does power become involved in these cases, both in shaping space and law? This dynamic relationship between space, law, and power is complex and understudied. All three factors shape, and are shaped by, one another, and

the ways in which the forces intersect have varying effects on social actors. Additionally, if we are to take seriously efforts at adequately addressing the continued presence of these crimes both within the military and the communities surrounding military bases, we must begin to address the complex scalar relations as noted by Cynthia Enloe that although rape within the military is often treated as a domestic issue, it is connected to the sexual violence as experienced by civilians living near extraterritorial bases in the realm of regional and international politics (Enloe 2014, p. 69).

Critical Security Studies: Security Practices

This study is firmly oriented within the pluralistic field of critical security studies, specifically focused on a critical assessment of security *practices*. Often conceived of as an orientation rather than a precise theoretical label, critical security studies is often seen as challenging many of the assumptions, positions, and objects of study in traditional approaches to security (Peoples and Vaughan-Williams 2010). Broadly defined, traditional approaches or traditional security studies can be understood as shorthand for those writing from a critical security orientation in reference to state-centric “Realist, Liberal, Peace Studies, and Strategic Studies perspectives in the study of security that prioritise the state as the referent object of security, and focus primarily on military threats to the security of the state” (Peoples and Vaughan-Williams 2010, p. 4).

Challenging traditional, state-centric approaches to security where military threats and force are often the focus, constructivist and critical approaches to security work to broaden the field of analysis to issues in other sectors such as the environmental, political, economic, and societal spheres as well as to deepen theoretical approaches to security, moving away from the

state as the sole referent object of study (Peoples and Vaughan-Williams 2010, p. 4). Within these moves towards broadening the realms in which we study security and the deepening moves towards expanding the referent objects of study, or what is to be secured, a diverse set of approaches can be found within critical security studies. These approaches mirror the movements of critical scholarship in other academic disciplines, including geography, with feminist and gender approaches, postcolonial perspectives, poststructuralism, and international political sociology/ecology all included within the broader umbrella of critical security studies.

The main concern of the critical literature that emerged in the post-Cold War era was that the concept of security needed to be reconceptualized. The three main “schools” associated with addressing this reconceptualization include the Welsh School, often associated with the brand of Critical Security Studies (CSS, as opposed to the lower case and more general critical security studies, lower case: css) that reframed security in terms of human emancipation rather than purely in terms of military power (Booth 1997, Jones 1999); the Copenhagen School where the concept of ‘securitization’ was pioneered with a focus on discourses of security – in effect focused on the processes through which issues like the environment become security issues (Buzan et al. 1998, Buzan and Waever 2003, Buzan and Waever 2009) and the Paris School where a sociological approach to security developed, whereby everyday practices of security became the center of analysis (Bigo 2002, 2006). To be sure, there are limits to mapping the rise and diversification of critical security studies to these three so-called “Schools”, as noted by Columba Peoples and Nick Vaughan-Williams (2010), as others may find it more constructive to look at the literature through the various ‘turns’ or analytical frameworks, instead.

As I am most concerned with the variable experiences of security at the scale of the individual and the role of legal technologies, specifically jurisdiction, in shaping these

experiences as set within large-scale security projects, it is the literature regarding security *practices* that is the most pertinent in providing the context for this particular study. As noted by Olsson et al. (2015), while in past decade much of the literature has been concerned with discursive approaches to security as put forward by the Copenhagen School under the concept of ‘securitization,’ more recent critical scholarship has been “shifting away from security-as-discourse and to understanding security *practices*” (Olsson et. al 2015, p. 23). It is my opinion that both approaches are important, as jurisdiction is a technology and must be interrogated as a practice; however, as jurisdiction is often described as speaking for the law (Dorsett and McVeigh, 2012), we must also understand that jurisdiction is also a discourse, “a way of speaking and understanding the social world” (Ford 1999, p. 855).

The drive to study security practices has been largely taken up by scholars and theorists in the so-called “Paris School” - the most prominent of whom is Didier Bigo who approaches the relation between liberty and security through the poststructurally informed perspective of International Political Sociology (ISP) (Peoples and Vaughn-Williams 2010, p.69). Utilizing Bourdieuan concepts such as *habitus* (the framework of orientation) and the *field* (the social universe through which actors and structures relate to one another and interact), theorists in the Paris School note that security is constructed not as a discursive practice and through speech-acts as in the Copenhagen School but rather through a range of often routinized practices such as surveillance and border controls (McDonald 2008, p. 567). The application of the aforementioned Bourdieuan concepts to the new security relations in the expanding and globalizing war on terror has led to new views on the terrain of security. Recognizing the clear distinctions between the domains of internal state security (police forces) and external state security (military) have become increasingly fuzzy in the West (although, one may argue that

these distinctions have always been fuzzy in other areas of the world), Bigo and others in the Paris School advance the position that this deconstruction of the border between inside and outside has led “to the playing out of that binary in new and often unexpected ways”(Peoples and Vaughn-Williams 2010, p. 69).

For those in the Paris School and Didier Bigo, specifically, the expansion of securitizing moves beyond speech acts into practices such as surveillance, profiling and containing of foreigners, and border controls has given rise to the professional *field* of security relations involving security professionals, governmental and non-governmental institutions, private industry, police and military that has led to a notion that security practices are linked to processes of (in)securitization. That is, in our current climate where security is reduced to technologies of surveillance, extraction of information and harsh legislative actions, liberal regimes are creating an atmosphere whereby illiberal actions are seen as necessary and justified (Bigo 2006, Peoples and Vaughn-Williams 2010). These illiberal actions as tied to moves of security in effect create (in)security. As noted by Bigo, security in this system is about sacrifice: the security of x leads to the insecurity of y . In this view, security and insecurity are not a binary but are “fundamentally interrelated and interdependent” (Peoples and Vaughn-Williams 2010). This concept is vitally important to this study as it is exactly the examination of the insecurity as experienced by those living near extraterritorially based military personnel under the justification of increasing security that is of greatest concern. In acknowledging the interrelated nature of security and (in)security, we may be able to improve security practices so that experiences of insecurity are decreased, though likely we will never be able to fully eradicate processes of insecurity under our current regimes and practices (Hans and Reardon, 2010). However, as noted by Bigo, the “ultimate task of a more sociologically oriented critical security studies, then, is to address the

question: ‘Who is doing an (in)securitization move, under what conditions, towards whom, and with what consequence?’” (Bigo 2008, p. 124 as quoted in Peoples and Vaughn-Williams 2010, p. 70).

With a focus on the relationship between security and insecurity and with the questions as posed by Bigo in mind, I want to turn to the recent literature focused primarily on security practices. With the recent shift in the critical security scholarship away from security-as-discourse towards understanding security practices, the objects of study and questions in this literature have shifted, in kind. Recent research now asks “how security is practiced, by whom, and to what effect, starting from a fixed concept of ‘security’ such as a speech act, policy-given or normative, or ‘human security’” (Loughlan et al. 2015 p. 23). Thus, the approaches within the literature concerned with security practices are somewhat varied both methodologically, under the so-called fixed concepts of security as noted previously, and in line with the central questions (how it is practiced vs. who practices it). Those scholars who are primarily concerned with the concept of human security, for instance, approach the study of security practices differently, with perhaps a focus on the a/effect of security practices on civilians utilizing a constructivist analytical framework (Newman 2001) from those who are most concerned with how security professionals practice security through prescriptive policies and bargaining from an International Relations perspective (Adler and Puliot, 2011). Additionally, there are scholars who still engage with securitization theory but with a focus on practice, calling for a re-engagement with the concept of “act” within speech acts in terms of security practices (Huysmans 2011) and exploring the normative dilemmas faced by security analysts, that is, avoiding becoming part of the problem – how to write or speak about security when that security knowledge risks the further securitization of a subject, bodies or phenomenon (Villmusen and Buger 2010).

The various approaches to security practices as discussed here utilize a variety of theoretical motifs including Bourdieu's concepts of the *field*, *habitus*, and the idea of 'social capital' where his work is often combined with Foucault's ideas and concepts around relationality and questions of relational power (Balzacq et al. 2010, Loughlan et al. 2015). Those utilizing Bourdieu in critical security studies include Didier Bigo, many in the 'Paris School,' as well as Anna Leader in the 'Copenhagen School' (Leander 2005, 2010). Alternatively, scholars concerned with security practices as seen through the lens of 'security assemblages,' have increasingly utilized the work of Bruno Latour and actor-network-theory. As noted by Loughlan et al. (2015), interest in Latour by IR scholars concerned with security practices can be linked to increasing attention to materiality in International Relations (p. 37). A thorough discussion of the various uses of Bourdieuan, Foucauldian, Latourian ideas and concepts, and Actor-Network-Theory in critical security studies is outside the bounds of this current study. For a more in-depth discussion of the various works employing these ideas and concepts, please see the edited volume *Critical Security Methods* (2015) by Claudia Aradau, Jef Huysmans, Andrew Neal, and Nadine Voelkner.

More germane to this study is that the shift in approach from investigating how something is securitized through discourse to the practices themselves brings the moving bodies, artefacts, and *technologies* of security to the foreground of analysis. As such, "the researcher must leave the comfortable ground consisting of analytical frames of reference and enter the empirical muddy waters where discourse, institutions, and materialities form complex, dynamic entanglements" (Loughlan et al. 2015, p. 23). This final section focuses on these technologies and how best to study security practices, as the technologies themselves as practiced have become the focal point of much of the security practice literature. Much of the recent literature

has been overwhelmingly concerned with the use of surveillance technology and border controls in the form of drones (Shaw 2013, Gregory, 2015, Wilcox 2015) satellite imagery (Dodge et al. 2009), longer retention periods of telecommunications data, biometric identifiers in visas and passports (Bigo 2006), and the growing databases on the movement of goods, people (migrants, asylum seekers, traveling citizens, cross-border commuting workers), and resources across borders (van der Ploeg, 2006). It has been noted that within the so-called 'practice turn' there has been a concomitant increase in the use of spatial language and metaphors (Loughlan et al. 2015, p. 23). It is not surprising that within the studies of these practices and technologies of securities we find a surge in the use of spatial language, metaphors and concepts such as topology, topography, geography, boundaries, mapping, networks and so on, as the security practices are often directed at securing defined spaces or territories from threats both within and without. As such, it has become apparent "that studying security in practice forces us to rethink the spatialities of security" (Loughlan et al. 2015, p. 23). While others have translated this rethinking of the spatialities of security towards an emerging interest in the methodology of mapping through the works of Bourdieu and Latour (Loughlan et al. 2015, p. 23), I instead focus on rethinking these spatialities in terms of jurisdictional practices. In my analysis of the case studies within this project, I demonstrate how jurisdiction, as a practice and a technology, influences the experience of security in variable ways upon the bodies of individuals in the spaces under Status of Forces Agreements, the following section provides the background and context of jurisdiction for this study.

Jurisdiction and the Practice of Law

Our legal institutions must recognize the situational uniqueness of our contemporary political-legal reality. This requires a paradigm shift in our thinking: a shift that both encompasses and enables a deeper and wider understanding of situational complexity, as experienced by individuals culturally and jurisdictionally tied to multiple communities. (Shachar 2001, p. 88)

Jurisdictional thinking...gives legal form to life and life to law. In the world of St. Augustine, it gives us the structure of our existence. In the idioms of European traditions of law we cannot move but for the work of jurisdiction. Our deaths, too, will be marked by questions of jurisdiction and care of law (or its lack). (Dorsett and McVeigh 2012, p. 1).

It is tempting to examine jurisdiction solely in terms of its material/spatial attributes, as if it were simply an object or a built structure. But jurisdiction is also a discourse, a way of speaking and understanding the social world. (Ford 1999, p.855)

It has been widely discussed that our world is a legal world. Our various understandings of the environment around us – where we belong, where we are allowed, what and who we are – are all shaped by a plurality of legal systems, laws, and customs. For over two millennia, laws dictating acceptable behavior, rights, and privileges have been documented. As early as 1750 BCE, the ancient Babylonian Code of Hammurabi – inscribed on a basalt stele -- outlined over 300 laws and legal decisions governing the daily life in ancient Babylonia (Dykes 1904). While the character of laws themselves has changed over time with shifting cultural norms, the expansion and contraction of religious authority, and the rise and fall of various systems of rule, what has not changed is that for a law to be effective, there must be an accepted authority to enforce the law. To have the authority or power to enforce a law is to have jurisdiction over the offense, the offender, and/or the subject matter in question. The nature and characteristics of jurisdiction have changed through time as well, and scholars have written extensively on the evolution of jurisdiction throughout human history under various legal orders (Ford 1999, Berman 2002, Helmholz and Baker 2004, Riles 2005, Tamanaha 2008, Dorsett and McVeigh

2012). The following section will focus on the recent literature that seeks to disrupt the taken for granted link between jurisdiction and territory. Rather, I promote and support the scholarship that seeks to demonstrate the performative aspects of jurisdiction and the very real material and spatial consequences of various governance practices through the vehicle of jurisdiction.

This study examines how jurisdiction is linked to the variety of the security experiences for those living under Status of Forces Agreements (SOFAs)- specifically by survivors of sexual assault. It is becoming increasingly accepted that rape is a clear violation of one's personal integrity and warrants a legal response. However, the nature of that legal response and the experience of the survivor in seeking justice are heavily influenced by what court or legal entity claims authority and jurisdiction over that specific case. Thus, we cannot fully understand the variety of the security experiences of survivors of these crimes without a thorough consideration of the role that jurisdiction plays in shaping the governance of these crimes. Geographers often call our attention to the constitutive relationship between individuals, society, and space – how we construct the world around us through the various meanings we ascribe to borders, natural features, communities, ourselves, and the Other. Despite the increased attention to the social construction of space through various theoretical and methodological lenses, the role of jurisdiction in our construction of space and place within geography and more specifically in legal geography is notably absent. Centering this analysis on jurisdiction, then, requires the following discussion of jurisdiction - what it is; how it has been approached in recent critical literature; how it has been related to time and space; and most importantly the recent call to push past theoretical examinations of jurisdiction to an increased engagement with the practices of jurisdiction, governance, and the impacts of jurisdictional practices and governance moves on individual experiences of security.

Jurisdiction: What is it?

Jurisdiction is defined as the "power of a court to adjudicate cases and issue orders" and the "territory within which a court or government agency may properly exercise its power" (Cornell Legal Institute, no date). Importantly in this account of jurisdiction, there is a clear link between jurisdiction and power and an implicit privileging of a territorially defined account of jurisdiction. Sovereign territorial jurisdictions continue to dominate contemporary scholarship. However, the importance attached to the sovereign territorial jurisdictions of nation-states "should not obscure the variety of ways in which jurisdictional attachments can be, and have been, formed, as well as the different ways in which territory itself has been articulated"(McVeigh 2007, p. 9). Historically, jurisdiction has not always been dominated by territorial definitions. In Roman and pre-modern settings, sovereignty was connected to personal political denomination, office, or religious affiliation, rather than land (McVeigh 2007, Dorsett and McVeigh 2009). Indeed, Richard T. Ford has demonstrated that "rigidly mapped territories within which formally defined legal powers, exercised by formally organized governmental institutions...are relatively new and intuitively surprising technological developments" (Ford 1999, p. 843 as quoted in Matthews 2014, p. 2). And as Matthews goes on to say, "Notwithstanding its relatively recent emergence, jurisdiction conceived as territorial delimitation remains an essential part of jurisdictional thinking and cartography an essential technique in maintaining the jurisdictional integrity of legal communities" (Matthews 2014, p. 2). However, jurisdictional thinking as dominated by territorial conceptions of social ordering is being challenged and reified in interesting ways by legal theorists and scholars in the more recent literature of the past 10 or so years.

With the advent of the Internet, time-space compression through technological advancements, and the rise of transnational corporations and the globalized economy, sovereign territorial jurisdictions of nation-states are being promoted and contested in how the law is providing protections for citizens in an ever-globalizing world (Kogan 1991; Berman 2002). For example, jurisdictional questions are being raised by the activities of online companies. Where a plaintiff may bring a charge against a company, determining what jurisdiction this case should be adjudicated to can prove difficult (Kogan 1991, Ford 2013). If the plaintiff resides in California, and the physical offices of the company are located in Ireland, yet the server through which the activity in question was negotiated is physically located in Rio de Janeiro – under whose jurisdiction is this case most appropriately adjudicated? Where is it appropriate for this case to take place? In what sovereign territory did the crime occur? Is determining the territorial authority of the crime the best way to find justice, or are there better ways to construct jurisdiction, such as around a cosmopolitan notion of community, that would facilitate better systems of providing justice (Berman 2002)?

As Austin Sarat notes, the legitimacy of law often depends on the crafting of boundaries, an activity that occurs so frequently and without much consideration that it is often viewed as inevitable. Viewed in this way, "jurisdiction" can be seen as synonymous with territory. However, "[w]hen linked to territory, jurisdiction seems to come before justice and the assertion of jurisdictional prerogatives may stand in the way of its realization"(Sarat 2013, p. 1). And so we must recognize that much as territory is only one way that geographers conceive of space, so too is territory only one way to conceive of the scope of legal authority, or jurisdiction. In our efforts as geographers to understand and interrogate the ways in which law and space are mutually constituted towards improving mechanisms of justice, we must take up the concept of

jurisdiction as a central concern of legal geography as "new jurisdiction[al] understandings may foster rather than impede justice" (Sarat 2013, p. 1).

With this effort in mind, I turn to the question "what is jurisdiction?" through the origins of the word itself. Literally translated from the Latin *ius dicere* as "to speak the law," we can think of jurisdiction as connoting authority and as synonymous with power, but more importantly it is the "act of speaking – of declaring the law" (Dorsett and McVeigh 2012, p. 4). In this way, jurisdiction "manifests law as performative through speech; it signifies not just a spatial demarcation of law's reach but also a staging of authority to make pronouncements that present themselves as being 'law'" (Sarat 2013, p. 1). Thus, we can conceptualize jurisdiction as a discourse – a way of speaking and understanding the social world (Ford 1999). Jurisdiction is, however, more than a discourse – as "to exercise jurisdiction is to bring law into existence," and as such, jurisdiction has real material and spatial implications related to power (Dorsett and McVeigh 2012, p. 4). However, as can be discerned through the discussion thus far, jurisdiction is not easily defined and is often contested both by scholars and social actors. Much like the concept of "space" within the discipline of geography, the concept of jurisdiction has no singularly agreed upon definition and has been approached through various theoretical, methodological, and disciplinary lenses. An exhaustive overview of the literature on jurisdiction is outside the scope of this study as numerous volumes have been written covering the various aspects, applications, and administrative levels of jurisdiction in international law (Capps et al. 2003), extraterritorial theories and practices (Meessen 1996) and more specific works on topics such as maritime jurisdictions (Chambers 2015), international tribunals (Guzman and Meyer 2012), to name two prominent examples.

The approaches to the jurisprudence of jurisdiction, or philosophy of law, also vary widely from formalist, realist, and positivist accounts of law to critical, feminist, and utilitarian schools of thought that often overlap and intersect and are used in combination by various legal scholars (Matthews 2014). From a critical legal geographic viewpoint, the most fruitful of these schools or strains of legal thought are those that are first, engaging questions of law and justice where a re-centering of jurisdiction to studies of law and legal theory is of prime importance and second, those which are disrupting the simple reduction of jurisdiction to territory.

Approaches, Challenges, and Reconfiguring Jurisdiction

A common leitmotif that runs throughout the body of literature concerned with re-engaging with jurisdiction critically and a theme that I continue in this study, is that jurisdiction has been an overlooked and undertheorized category of jurisprudential thinking (Matthews 2014, p. 3). Often viewed as a technical issue or as a problem requiring a linear solution such as in formalist approaches which theorizes that legal rules stand separate from other social and political institutions and jurisdiction is clearly determined by the rules over the subject matter, type, and location of the offense (Cornell Legal Institute, no date), the body of literature covered here takes a more nuanced view, conceiving "jurisdiction broadly as a set of practices and techniques that give voice to legal authority"(Matthews 2014, p. 3) that may be influenced by social interests, public policy and political considerations. Taken in this broader context, jurisdiction can be considered and explored in a number of different ways.

Approaches

First, jurisdiction can be explored through its expressive powers and functions. Here, the focus remains on the speech of law and the conditions that allow for the law to emerge or be

inaugurated. Approaching jurisdiction through this expressive register allows for an examination of the metaphysics of jurisdiction – essentially the conditions that allow for the law to emerge. Questions that arise through a metaphysical approach include: “How does jurisdiction (and so law) arise in its original form?” and “What utterance inaugurates a jurisdiction and establishes a power to legislate in its act of speech?” (McVeigh 2007, p. 6). By focusing on these speech acts, the ability of the law to separate the legal from the non-legal can be identified and the consequences of the acts and performance of law may be explored (Drakopoulou 2009; Matthew 2014). Attending to the metaphysics of jurisdiction – these inaugural acts also allow for the “development of a critical, acoustic, subject” (Douzinas 2009 as quoted by McVeigh 2009, p.6) and “provides the conditions of possibility of the ‘visibility’ of law’s power” (Drakopoulou 2009 as quoted by McVeigh 2009, p.6). The ontological focus of this approach of jurisdiction offers an opening to an interesting critique on the fragility of jurisdiction. By attending to the limits of the expressive elements of jurisdiction – speaking for the law, how law inaugurates itself – leaves space to challenge the ways in which jurisdiction secures authority and determines who, what, and how is subject to the law or sovereign authority (Matthews 2014).

Second, jurisdiction can be viewed as a procedural matter or a method of ordering relations between nation-states, various sovereign entities, and other bodies with legal authority. Though formalist legal examinations of these procedural matters and orderings are treated like a mathematics or a science in which the appropriate governing body is decided by a logical deduction of facts, legal principles and rules, critical examinations of jurisdictional ordering and jurisprudence question the logic underlying these ordering schemes and focus on the qualitative elements of jurisdiction, such as examining *how* jurisdictions govern differently from various spatial scales (Valverde 2009, 2014).

Often, it is within this second approach that one finds much of the legal geography literature. Frequently concerned with the social construction of boundaries and place-making, the subject matter within this literature is diverse. Investigations include critical analysis of how federal courts construct and reject legal and spatial boundaries of workers (Bakan and Blomley 1992), studies of law in relation to the reification of public/private signifiers such as hedges (Blomley 2007), and contested international boundaries such as those between Israel and Palestine (Kedar 2003) and legal spaces of outer space through satellite ownership (Collis 2009?). In doing so, these negotiations of spatio-legal orderings “illustrate how the dissolution or construction of a spatial-legal boundary becomes critically important to mapping and remapping the status and legal entitlements of the worker” or citizen, homeowner, satellite owner, etc. (Bakan and Blomley 1992, p. 637).

Thirdly, jurisdiction can be approached or viewed through the techniques that represent legal space including mapping and cartography. As noted by multiple scholars (Chase 1998; Ford 1999, 2013; Dorsett 2007), as a technology of jurisdiction, "mapping allows space to be reconceptualized as place, allows the assertion of jurisdiction over far-flung horizons and – along with its counterpart technology, surveying – allows the legal space of jurisdiction to be mapped on to the physical space of the land and sea"(Dorsett 2007, p. 138). The main concern of scholars approaching jurisdiction through the technology of mapping is the way or ways in which a jurisdiction is inaugurated through the mapping of physical space (Dorsett 2007, p. 138). Importantly, this approach is most helpful at understanding how jurisdiction came to be so heavily linked to territory. Through the development of modern cartography, the general understanding of legal authority as related to a person's status eroded and was replaced by the domination of seeing jurisdiction through a territorial lens (Ford 1999). By mapping jurisdiction

on physical space we produce borders and create political and social identities (inside and outside). But importantly, through the act of mapping we perform territory, that is, jurisdiction is also a social practice (Ford 2013, p. 133). As a social practice, "mapping makes possible the legal concept of territory " and though the map is not the territory itself, it does "represent a particular spatial embeddedness of authority and jurisdiction " (Chase 1998; Dorsett 2007, p. 138). Thus, scholars in this approach consider mapping as a jurisdictional device, "a practice through which jurisdictions are embodied as territories and through which (as a result) people, places, and events in that territory become juridified"(Dorsett 2007, p. 138). In other words, territorial jurisdictions produce social and political identities (Ford 1999, p. 844) but importantly this relationship between territorial jurisdiction and identity is mutually constitutive.

Challenges

Of greatest concern to the recent current critical engagement with jurisdiction is in moving past the basic questions of the court's competencies or the intricacies of conflict of law analysis. Indeed, much of the recent literature suggests that "by attending to jurisdictional techniques and practices a series of jurisprudential questions emerge that, rather than pursue a purely ontological inquiry into legal categories, assess how the law crafts and manipulates legal personalities and concepts through artifice and technicity" (Matthews 2014, p. 3). Maintaining this focus on techniques and practices of law allows us to move past the question of "what" jurisdiction is and the characteristics of jurisdiction to more important questions of "how." As noted by Edward Mussawir, "the language of jurisdiction still occupies a much larger place in the procedural domain of law than in its theory or jurisprudence" because critical theorists of law often dismiss questions of jurisdiction as "overly technical, as merely institutional, critically unreflective or as in some way minor to the overarching social thematics of a case of problem"

(2010, p. 463-464). However, though it has remained difficult for critical social theory to find a useful theoretical framework or language through which to adequately address the technical and technological issues of law's performance – or jurisdiction – attending to the question of “how” through a focused assessment of actual practices of law through various critical lenses may provide a path to a better framework. Various, questions of “how” in regard to jurisdiction may include: How do the practices and techniques of jurisdiction order space (spatiality), shape the movement of individuals, define who is inside and outside of the law, and most importantly to this study – how do the practices of jurisdiction govern differently and affect the experiences of security and justice of individuals who are involved in a crime, both perpetrators and victims/survivors?

For Mussawir and others (Moore 2005, 2007; Lefebvre 2008; Sutter 2009; Colebrook and Hanafin, 2009) the work of Gilles Deleuze has been instructive towards examining jurisdiction. Rather than focusing on matters of representation, Mussawir and others shift the focus to matters of representation by asking the questions of “who?” and “how?” rather than “what?.” In doing so, these examinations privilege “the techniques, practices and effects (i.e. matters of expression) rather than abstract or essentialist notions (i.e. matters of representation)” (Matthews 2014, p. 3 footnote 8). This has special importance to matters of judgment – which in this study are linked to the variable experiences of security under the jurisdictional practices of SOFAs. For Mussawir, civil procedures are an important element for theoretical accounts of legal power and the jurisdiction of judgment, however,

This importance...has not been commonly acknowledged within either legal or critical theory. As a consequence, the genres of jurisprudence attending to the procedural domain of law have remained largely technical, while the theoretical critiques of judgment and subjectivity – and critical theory more generally – have become only increasingly metaphysical. A reconciliation of critical theory with its

somewhat “discontinued” genres of procedural jurisprudence would call for a renewed attention to the dramas and activities of judgment (2010, p. 483).

In other words, it is essential that critical approaches to law and legal theory, including critical legal geography, attend to the actual practices, procedures, and techniques of law and jurisdiction to fully appreciate matters of judgment and relatedly, the varieties of the security experience.

Reconfiguring Jurisdiction

Taken up by a handful of legal geographers, but more frequently seen in work by legal anthropologists, sociologists, and critical legal theorists is the effort at reconfiguring jurisdiction. Studies of the spatiality of law and the relation of the practice of law to space can be found in a variety of works by geographers including studies on social activists’ litigation over truth and reconciliation trials in South Africa (Akinwumi 2012) and the role of lawyers in place-making through zoning litigation in the American South (Martin et al. 2010). A focus on governance and a fairly well-defined engagement with both space and time can be found in legal and critical legal anthropology and the study of legal pluralism. This body of literature is more engaged with specific sites of legal interactions and practices. Two edited collections by legal anthropologists, Keebits and Franz von Benda-Beckmann, *Rules of Law and Laws of Ruling: On the Governance of Law* (2009) and *Spatializing Law* (with Anne Griffiths) (2012), demonstrate the breadth of studies in legal anthropology and their engagement with governance practices and the geographic concepts of space and place. The former body of scholarship is largely concerned with the relationship between jurisdiction and the social construction of space in a theoretical sense, whereas the latter is generally more concerned with examining the role of legal pluralism and the interaction of jurisdictions and governance, in specific cases.

In efforts to reconfigure jurisdiction, scholars have attended to how changing perceptions of social space are influencing jurisdictional practices. Work by legal scholars Terry Kogan (1991) and Paul S. Berman (2002) demonstrate two very different ways to investigate this line of inquiry in an increasingly globalizing world. As both Kogan and Berman are legal scholars engaging with critical human geography, the tensions between theory, practice, and the construction of space are at the forefront of their work. Kogan asserts that theorists do not pay close enough attention to the role of social understandings of space in their assessments of why courts may or may not choose to accept the validity of litigation of out-of-state courts for defendants. Specifically, Kogan challenges Justice Scalia's "bright line territorial rule, rooted deeply in the nineteenth century," stating that it "fails to comprehend the more complex meaning that out-of-state litigation has for contemporary Americans" (p. 657). At hand here is the question of whether a plaintiff in California who brings charges against a defendant in Florida is valid or invalid in their assertion of jurisdiction in California because of the undue burden on the defendant in Florida. Under a more antiquated understanding of social space – where interstate travel took days or weeks – this assertion that the jurisdiction is invalid would make sense. However, Kogan asserts that in our more modern understanding of social space, there no longer is an undue burden because of the relative ease of interstate travel.

Paul S. Berman, on the other hand, takes a wider view of jurisdiction – examining the complex jurisdictional arrangements in an ever-globalizing system where the local and global often clash under questions of law, authority, and jurisdiction – promoting a cosmopolitan approach of jurisdiction. Berman asks "What does it mean in social terms to assert jurisdiction? How are conceptions of jurisdiction related to the ways people experience physical space, territorial borders, distance, and community? Why should the nation-state be the only player on

the field of legal jurisdiction? Are there other forms of community affiliations that the law might recognize?" (Berman 2002, p. 544). Important to the study at hand is how Berman and Kogan's work reconfigures the approach by critical legal theorists through the work of critical human geography with a focus on the indeterminate characteristics of jurisdiction and space. Whereas Kogan demonstrates how antiquated views of social space effect the validation of the assertion of jurisdiction, Berman challenges the very construction of jurisdiction as spatially defined by presenting jurisdiction as constructed around community. In the cases of the SOFAs, these types of questions arise again and again – how should jurisdiction be defined and practiced to provide adequate justice to survivors of these crimes? As Berman notes "There is more to the assertion of jurisdiction or the extraterritorial imposition of norms, however, than simply questions of political legitimacy or efficient dispute resolution. The assertion of jurisdiction, like all legal acts, can also be viewed as a meaning-producing cultural product" (Berman 2002, p. 424). With this argument in mind, in challenging the often taken-for-granted territorial delineation of jurisdiction an important question arises – in cases where extraterritorial jurisdiction is a factor that often challenges notions of sovereignty, justice, and territory – would it be more constructive to build new jurisdictional arrangements based around cosmopolitan notions of community? How do our changing understandings of social space in an era of increasing tensions between globalization and localization influence how we understand valid jurisdictional practices?

By bringing this discussion back to valid jurisdiction practices, I focus here on the recent efforts at connecting jurisdictional practices to the governance of security incorporating the conceptual tool of spatial scale with an emphasis on not foregrounding the importance of the spatial to the detriment of the importance of time in jurisdictional practices. This work has been

largely pioneered by legal theorist and professor of criminology Mariana Valverde. For Valverde, rather than examining “what” security is, it is more constructive to focus on security projects “defined nominalistically as the governing networks and mechanisms that claim to be promoting security at all scales” (2014, p. 382). In studying these security projects, which include the extraterritorial bases and missions covered in this study and the accompanying Status of Forces Agreements, Valverde argues that it can be useful to first ask questions regarding the values and the telos (the ultimate objective or aim) of a security project and then ask questions about “scale effects” – including the temporal scale of such projects (Valverde 2008, 2009, 2014). Here, questions of “who,” “what,” or “where” is being secured are often asked. From there, Valverde notes that one can move on to the somewhat related and yet separate question of jurisdiction.

As jurisdiction cannot be quickly or easily equated to territory as we have seen from the prior discussion of the current literature, deciding who governs where – the basic jurisdictional question – is not important in itself. Determining jurisdiction affects *how* something is governed, thus “shifting jurisdiction from one organization or level of government to another as the effect of automatically changing how something is governed” (Valverde 2014, p. 382). By focusing on the qualitative aspect of jurisdiction – “how” something is governed – Valverde states that it is appropriate, once jurisdiction is established, to move towards documenting the effects of the techniques of security that are used, as certain logics of governance tend to go together with certain techniques, though this link is by no means fixed (2014, p. 382).

Valverde’s work has largely centered on urban forms of jurisdiction and governance, drawing together work on criminology with work on security through a Foucauldian lens and a focus on practices rather than clarifying concepts or theory. My work aims to build on the work of

Valverde, paying attention to the practices of security and the governance of security through the assertion of jurisdiction by a variety of overlapping legal authorities on the bodies of men and women under these security projects.

Throughout this work, I recognize that jurisdiction is instrumental in constructing identities, as jurisdiction creates and delineates legal statuses. An example comes from Blomley and Bakan's earlier work on worker safety in the US and Canada (Blomley and Bakan, 1992). They show how the identities of "citizen" and "employee" carry different implications depending on whether or not places of work are regarded as "private" or "public." Jurisdiction's construction of legal statuses is similar in that it also defines rights and abilities such as voting rights or lack thereof (Ford 1999, 2001).

As important as it is to unpack jurisdiction through social theory as many socio-legal theorists continue to do, we also must understand how jurisdiction functions and is used in the real world. As Berman states:

[J]urisdictional rules have never simply emerged from a utilitarian calculus about the most efficient allocation of governing authority. Rather, the exercise of jurisdiction has always been part of the way in which societies demarcate space, delineate communities, and draw both physical and symbolic boundaries. Such boundaries do not exist as an intrinsic part of the physical world; they are a social construction. As a result, the choice of jurisdictional rules reflects the attitudes and perceptions members of a community hold toward their geography, the physical spaces in which they live, and the way in which they define the idea of community itself." (2012, p. 427)

Valverde echoes many of the same sentiments, drawing our attention to the fact that, "the allocation of jurisdiction organizes legal governance, initially by sorting and separating." The importance of this feature of jurisdiction, and one that will be examined and discussed repeatedly throughout the three cases (Haiti, Okinawa, Italy) within this study will demonstrate that the result of this separation is "state-scale or global-scale constitutional rights are rarely coordinated

or harmonized with low-level regulations governing specific urban spaces” (Valverde 2009, p. 141). It is only through examining concrete examples, with Ford’s multifaceted view of jurisdiction in mind, that we can understand the “complex governing maneuvers enabled by the legal game of jurisdiction” (Valverde 2009, p. 139).

Chapter 3: Spaces of Violence and (In)justice in Haiti: A Critical Legal Geography Perspective on Rape, UN Peacekeeping, and the United Nations Status of Forces Agreement^{3*}

We only want to challenge the frozen manner in which law, space, and locality are frequently conceived...they must not be taken as given, and we should be wary of their effectiveness in naturalizing relations of oppression and exploitation” – BLOMLEY and BAKAN (1992, p. 687)

Introduction

In 2010, a high magnitude earthquake hit Haiti, inflicting immediate and extensive damage. The United Nations Stabilization Mission in Haiti (MINUSTAH) had already established a presence in the country in the six years preceding the earthquake in an effort to stabilize Haiti after the 2004 civil conflict in the city of Gonaives and the ousting of then President Jean-Bertrand Aristide (UNSC 2004). Following the earthquake, the United Nations Security Council (UNSC) passed multiple resolutions increasing the UN peacekeeping presence to protect the already precarious state of the country’s political system (UNSC 2010). Throughout MINUSTAH’s tenure, a significant number of rape allegations involving UN personnel have been reported. Forty allegations involving military and police personnel alone were reported in the years following the earthquake (UNGA 2014). We stress here the number of allegations involving military and police personnel because unlike UN civilian personnel and contractors, the UN does not have jurisdictional authority over military contingents and limited authority over police personnel.

As the UN has no standing military force of its own, it “borrows” military and police personnel from its Member States (Kanetake, 2010; Burke, 2011; Nordas and Rustad, 2013). These Troop Contributing Countries (TCCs) retain exclusive jurisdiction over their military and police personnel while these soldiers are on a mission in the host State, in this case Haiti. UN peacekeepers are deployed by the

³ *Parts of this chapter have been published as a co-authored article with Shannon O’Lear in the journal *Territory, Politics, Governance* (2016 Vol. 4, Issue 4). Sections of that article written by my co-author have been extracted from this chapter.

United Nations Security Council under the authority of Status of Forces Agreements (SOFAs), which outlines their legal status, including their privileges and immunities, when on a mission. This status includes immunity from host State prosecution for crimes committed under the doctrine of functional necessity. The unintended consequence of the immunity from local prosecution and the retention of jurisdictional authority by the personnels' sending State is the creation of an uneven landscape of jurisdictional spaces and authority and a complex assemblage of spaces of violence, sovereignty, and justice. On one hand, abiding by the SOFAs brings troop-contributing countries into legal alignment with the UN and thereby normalizes that arrangement of power in the eyes of the international community, but on the other hand, the SOFAs sever the space of violence from the space where justice may be determined. These arrangements establish a spatial dissonance in which processes of justice do not require the inclusion of the rape victims, their home state, or even the UN thereby silencing and marginalizing the voices of the victims and the host State. Our contention is that the jurisdictional immunity of security forces and the marginalization of the survivors of rape and sexual assault by these forces is a result of conflicting logics of scale, governance and security played out through the blackboxing of jurisdiction (Valverde, 2009).

My concern here is how the governance of security arranged by the UN SOFA agreement produces a new space of complex legal assemblages wherein relations among sovereignty, territory, authority, and jurisdiction work towards inhibiting justice for survivors of crimes committed by UN military and police personnel (Sassen, 2006; Allen, 2011). Here, we critically examine the “frozen politics” (Blomley and Bakan 1992, p. 688) of UN SOFAs to make the argument that although the jurisdictions established by these SOFAs “make sense” within the context of an international community focused on militarizing stability, these jurisdictions are simultaneously obstacles to justice for rape survivors and their home state. That is, the SOFAs as currently practiced, create spatialities of injustice.

In the interest of uncovering the complexities and contingencies in these spatialities of violence and injustice, we examine two cases of civilian rape by UN peacekeepers. My aim is twofold. First, through these examples we will highlight the idiomatic quality of these spaces of jurisdiction as created

by the UN SOFA guidelines. This allows us to examine questions of authority and authorization and to highlight who can or cannot speak and who hears or listens in the matter of jurisdiction (Dorsett and McVeigh 2012). Second, by examining practical examples we can begin illuminate a specific facet within the variety of governance projects that reside under the banner of governing through security. In doing so, we can begin to sharpen our analytical tools and enhance theories of the governance of security and the spaces of jurisdiction authorized by these governing practices by mining the intellectual resources within legal practice, rather than legal doctrine (Valverde 2008, Valverde 2014).

This paper is divided into three sections. The first section includes a brief discussion the role of the discourse of security in the justification and a critique of this discourse through the anti-security and critical security literatures. In the second section, we turn to a discussion of critical legal geography, the lens through which we view our case studies and present the two cases and an overview of the mechanics of Status of Forces Agreements and the legal concept of jurisdiction. The third and final section integrates these elements together to examine two specific cases and to highlight how the governance of these cases and the corresponding jurisdictional logics effectively silence and marginalize the survivors of rape and sexual assault by international security forces. We argue that these cases highlight that the current practices and jurisdictional arrangement created by the UN SOFA in cases of sexual abuse and exploitation are inadequate in addressing the needs of survivors and that justice for these individuals is inconsistent and often absent, necessitating a need to rethink the absolute immunity granted to peacekeepers from the host State and UN disciplinary measures.

Before we delve into the theoretical and practical interventions of this article, we want to make clear that this study is happening within a dynamic and much larger context of trauma and sexual violence and security in contemporary Haiti. While this study is directly concerned and limited to instances of civilian rape by UN peacekeeping personnel and the resulting trauma and marginalization due to current jurisdictional practices under the UN Status of Forces Agreement, the issue of trauma, rape and sexual violence in Haiti is deeply rooted and pervasive in contemporary Haiti. This point is thoroughly studied and elaborated upon in poignant works including Erica Caple James' in-depth study *Democratic*

Insecurities: Violence, Trauma, and Intervention in Haiti (2010), which examines the multi-scalar politics of intervention and spaces of (in)security in Haiti, Anne-Christine D'Adesky's report and photo essay *Beyond Shock* (2012) that deftly details issues of vulnerable populations, legal justice, and health care for survivors of sexual violence in Haiti from 2010-2012, and Bendetta Faedi Duramy's recent work *Gender and Violence in Haiti* (2014), which details the complex relationship of Haitian women as victims and agents of violence. Furthermore, we want to acknowledge the complex and often problematic representations of sexual violence in Haiti by the international media. Finally, while this study is specifically concerned with one aspect or dimension of sexual violence in Haiti – that of the spaces of injustice as formed by the jurisdictional arrangements under the UN SOFA agreement for survivors of sexual violence at the hands of peacekeeping personnel – we acknowledge that this study, as with any study that examines one particular dimension of violence, is inexorably linked and entangled in a much larger, complex context of history, colonialism, geopolitics, governance practices, and globalization.

Critique of Security

The current discourse of security as ensured by the presence of military troops has been used to justify forms of long-term military deployment and occupation and the creation of spaces where violence may flourish without repercussion. Although the presence and status of UN peacekeepers in Haiti and elsewhere adheres to international laws (see Charter of the United Nations, Chapters VI and VII; UNGA 1946) and agreements, Gregory reminds us that, “law is a site of political struggle not only in its suspension but also in its *formulation, interpretation, and application*” (2007, p. 205, emphasis in original). Legal structures such as SOFAs are justified within the logic of international security, but there is a growing body of critical security work that approaches the notion of security as an extension of the managerial state with selective meanings of security framed by neoliberalism and militarism (Bigo, 2002; Harvey, 2005; Pain and Smith, 2008; Dalby, 2010). The politics that crystalize and materialize this discourse of security rarely question what is being secured, and who will enjoy this security (Dalby 2009,

Hyndman 2007, Schafer 2013). Invoking security politics (Neocleous 2007) effectively shuts down productive conversation about dynamic meanings of or broader perspectives on security:

The constant prioritizing of a mythical security as a political end – as the political end – constitutes a rejection of politics in any meaningful sense of the term. That is, as a mode of action in which differences can be articulated, in which the conflict and struggles that arise from such differences can be fought for and negotiated, in which people might come to believe that another world is possible – that they might transform the world and in turn be transformed. Security politics simply removes this; worse, it removes it while purportedly addressing it (Neocleous 2008, p. 185).

Anti-security scholars aim, “to show that security is an illusion that has forgotten it is an illusion...The more we talk about security, the less we talk about the material foundations of emancipation” (Neocleous and Rigakos 2011, p. 15). By questioning an understanding and mobilization of security centered on occupation and empire, a more human-centered and cooperative interpretation of security becomes possible (NCA 2009). This paper’s focus on the sexual violence of rape and the marginalization if not outright neglect by the UN and the national governments of the troop contributing countries of the possibility of justice for civilian victims of rape is in line with the expanding field of feminist security studies (Sjoberg 2010, Detraz 2012). That body of work also challenges dominant narratives of security by recognizing that “‘real world’ events are not adequately addressed by androcentric accounts that render women and gender relations invisible” (Peterson 1992 as cited by Sjoberg 2010, p. 197). Baines’ (2004) work on refugees, for instance, has looked at ways in which struggles over the body politic at the national level simultaneously involve struggle over the “displaced body at the local level” with the UN responding, if at all, in ways that only reinforce limiting gender stereotypes. Although an in-depth consideration of critical security studies and feminist security studies is beyond the scope of the paper, we acknowledge those bodies of work as relevant to this project.

Here we draw from critical legal geography scholarships as it allows us to operationalize critical security studies in that it provides for a more nuanced examination of bodily and jurisdictional assemblages of violence and justice (or lack thereof) as a way to highlight a particular and problematic spatiality of dominant security praxis. The disjointed jurisdictional systems under the UN SOFA are

legitimized by current practices of international security and humanitarian aid. Countries contributing troops to the UN prefer to maintain jurisdiction over their own troops in the interest of protecting the rights of their soldiers while on peacekeeping missions. However, the reality is that the lack of accountability of illegal actions by some of these soldiers while in a host State contributes to very real damage at the levels of the body, community, and host State.

Critical Legal Geography

It is tempting to examine jurisdiction solely in terms of its material/spatial attributes, as if it were simply an object or a built structure. But jurisdiction is also a discourse, a way of speaking and understanding the social world. (Ford 1999, p. 855)

Law is always somewhere. The world around us, our homes, our cities, all of our lived spaces and social spaces are bound up with a multitude of legal meanings. Scholarship centered in this intersection of law and space has produced the interdisciplinary project of legal geography. Early works in legal geography recognized that the interpretive turn in the social sciences, geography included, could be useful in moving beyond “law and geography” towards a more nuanced understanding of the relationship between space, law, and power (Bakan and Blomley 1992, Blomley 1994, Chouinard 1994).

Rather than a coherent subdiscipline, legal geography and critical legal geography (CLG) has instead been termed an “interdisciplinary project” (Braverman et al, 2014, Delaney 2015). The project is characterized by a wide and diverse subject matter and generally lacks any common methodological theme and is theoretically pluralistic. As such, providing an overview of the last 30 years of legal and critical legal geographic scholarship that does the project justice is outside the purview of this particular study. Instead, following David Delaney’s recent progress report (2015), I think it is more pertinent to demonstrate why *critical* legal geography is a useful lens in assessing and discerning spaces of injustice as created by the UN SOFA in Haiti through a brief overview of other recent scholarship in critical legal geography which takes discerning justice as a central theme of analysis.

Whereas legal geography is concerned with studying spatial representations in laws and legal practices (e.g., discerning between private vs. public spaces, creating spaces of exclusion by establishing environmental protection zones, etc. (See the Law and Geography 2002 contributions), CLG (Bakan and

Blomley 1992) questions the assumptions and power dynamics of uneven spaces of representation and justice emerging from particular laws and draws our attention to the taken for granted spaces, norms, and inequalities naturalized and legitimized by law highlighting the ability of law and legal decisions to “shape, demarcate, and mould human geographies and social space” (Kedar 2003, p. 407).

A central project in CLG scholarship is to question the legitimating power of law and uncover ways in which law perpetuates social injustice and marginalization. As “conventional spatial imageries tend to invisibilize injustices, obscure their contingencies and causes, and uncouple injustice from responsibility”, practitioners of critical legal geography aim to correct these imageries and “investigate the contingencies and constraints of spatial justice” (Delaney 2015, p. 2). By focusing on how space, law, and (in)justice are related and co-produce one another, studies in critical legal geography often demonstrate how it is that unjust geographies are made and potentially unmade (Delaney 2015). We stress here the importance of the continued development of a critical spatial awareness of unjust geographies and spaces of (in)justice, as without such “the creation and maintenance of unfair geographies are likely to remain invisible and unchallenged” (Soja 2010, p. 42).

In tandem with a critical spatial awareness of law and power, it is imperative to expose law and more specifically jurisdiction, the medium through which law speaks, as indeterminate (Dorsett and McVeigh 2012). This indeterminate aspect of jurisdiction is one that legal and critical legal geography have begun to examine in greater depth and scrutiny, most notably by Richard Ford (1999, 2001) and Mariana Valverde (2008, 2009, 2014). Through the cases of rape by UN military personnel and police of civilians that are the focus of this study, it becomes clear that not only is a critical spatial awareness of these cases important to understand the makings of these unjust geographies, but equally important are the technical and procedural aspects of these cases, especially that of jurisdiction. As important as it is to unpack jurisdiction through social theory, we also must understand how jurisdiction functions and is used in the real world. Valverde draws our attention to the fact that, “the allocation of jurisdiction organizes legal governance, initially by sorting and separating” (2009, p. 141). The importance of this feature of jurisdiction, and one that we will demonstrate through my analysis of two case studies in Haiti, is that the

result of this separation is “state-scale or global-scale constitutional rights are rarely coordinated or harmonized with low-level regulations governing specific urban spaces” (Valverde 2009, p. 141). It is only through examining concrete examples, with Ford’s (2001) multifaceted view of jurisdiction in mind and a critical spatial awareness, that we can understand the “complex governing maneuvers enabled by the legal game of jurisdiction” (Valverde 2009, p. 139).

I have noted that one of the tenets of CLG is to expose the manipulation of law to legitimize marginalization and inequality as well as to silence and harm. Such a lens allows us to see rape as an assemblage of violence (Springer 2011): where an international discourse of and structure for peacekeeping, UN SOFAs granting peacekeepers immunity, a wide array of cultural and legal notions of rape, and the circumstances of an act of rape are all interwoven materially, spatially, and discursively. Conversely, I am also interested in understanding how jurisdictional practices authorize or prevent associated spaces of justice to address violence.

Spatialities of Justice

While spaces of justice have been examined extensively in regard to environmental spatialities (Bickerstaff and Agyeman 2009, see also the September 2009 special issue of *Antipode* on this theme), few studies in legal geography and CLG have grappled with the subject of spaces of justice. I link CLG and spaces of justice, taking the position that spaces of justice include assemblages of spaces, structures, and processes in which alleged perpetrators of crimes are tried for their crimes and, if found guilty of these crimes, survivors receive some form of socio-legal compensation for their trauma. Spaces of justice, then, include the courts where the perpetrators are tried and the places/spaces in which they receive their punishment if convicted of the crime(s). These spaces of justice are also those in which the survivors can face their attackers, give testimony, and be heard as to their wishes regarding the trespasses made against them and know about the outcomes of the trials of the accused. In many cases of rape involving UN peacekeepers and citizens of the state in which they are deployed, a material and spatial divide prevents survivors from giving testimony or even participating in legal processes of justice. An overriding discourse of international security and peacekeeper safety allows little room for a meaningful

consideration of the harmful impacts of sexual crimes both on individuals and on communities and societies in which these crimes occur. Though numerous reports by the UN have been commissioned and training of UN personnel on sexual abuse and exploitation has been implemented, sexual abuse and exploitation of men, women and minors and a perceived impunity for these crimes continues to persist (UNGA, 2014).

To achieve justice from the law, as noted by PhilIppopoulos-Milhallopoulos (2011) is only the beginning. We must also, simultaneously, find justice within space. Spatial justice, then, is both found in space and law, but does not belong solely to one or the other. This understanding of spatial justice conceptualizes space as a physical location in Cartesian space and provides only a limited understanding of justice as well as a limited understanding of the practice of jurisdiction. This point draws our attention to the question of what kind of justice can there be following an act of sexual violation on an individual's body, the pain of which can only be truly comprehended by the survivor (Scarry, 1985). Arguably, damage inflicted on an individual's body, to their psyche, and even to their standing or acceptance within a social community may not be reversible. Legal recognition of such damage may do little to address the harm done, but it may go far in reassuring the individual as well as the society in which the event occurred that there are protocols of behavior worth protecting. Legal recognition of violence inflicted on an individual, then, may foster a sense of belonging within a structured community that holds values of human and civil rights in high esteem. Conversely, the lack of a legal recognition of an act of bodily violence may compound the damages already done and foster a sense of isolation and estrangement. Spatialities of justice, then, may be understood as a topological sense of place and sense of one's safety within and with respect to a wider social grouping. This study examines particular spatialities of justice as created by the UN SOFA in Haiti, though other spaces, those of (in)security experienced by women and girls in Haiti have been explored by other scholars, notably Erica Caple James (2010) and Benedetta Faedi Duarmy (2014).

Spatialities of justice, if we are to take seriously the efforts of critical legal geography, then involve the means of manifesting power through legal action such that the survivor's experience is

acknowledged and somehow addressed within society. This brings us back to the question of the idiomatic qualities of jurisdiction. In the construction of jurisdictional spaces under the guidelines of the UN SOFA who can be heard and who listens? If the survivor cannot provide testimony or is not informed of case proceedings, as in some military tribunals, for example, then how do we understand the corresponding space of justice? In the two cases I examine, only a limited form of spatial justice is met through the withdrawal of the offender from the physical location of the violence. However, a more comprehensive spatiality of justice is evaded through the game of jurisdiction and the manipulation of power, description, and action by Troop Contributing Countries that isolates and silences not only the rape survivors, but also Haitian authorities.

Former UN Secretary General Kofi Annan's 2004 inquiry into criminal acts committed by peacekeepers treats these crimes as an unanticipated emergence but stops short of questioning problematic assumptions underlying the UN's "securitizing" mission, the arrangements of power that the approach by Annan enables, and the multitude of insecurities that it fosters (UNDPI 2004). To fully appreciate how and why UN SOFAs create obstacles to justice through these jurisdictional assemblages and contribute to the process of the materialization of exception in ordinary space, it is necessary to provide a brief discussion of SOFAs, and in particular UN SOFAs.

Status of Forces Agreements (SOFAs)

The issue of rights and privileges granted to foreign forces while in the territory of another sovereign state has been debated throughout history (Burke 2011). A number of legal tools have been used to dictate the rights, immunities, and privileges these forces have while passing through or stationed in the territorial boundaries of another sovereign space. The most common of these tools in use currently is the Status of Forces Agreement (SOFA). This section of the paper outlines what SOFAs are, their intended purpose, and how SOFAs of the United Nations differ from other bilateral and multilateral Status of Forces Agreements. For the purpose of this paper, this discussion will only focus on the jurisdictional aspects of criminal offenses under a SOFA.

SOFAs are bilateral or multilateral agreements among a host State, the state where foreign forces will be stationed or through which they will be transiting, and the sending State, the state(s) of origin of the foreign forces. In the case of UN SOFAs, the sending states are called troop contributing countries or TCCs. The details of a SOFA establish the rights, privileges, and immunities of the foreign forces while in the Host State. Immunity granted to foreign forces from criminal prosecution of the local and national courts of the host State is based on the doctrine of “functional necessity”. That is, troops are immune from local prosecution to ensure that they can carry out their mission unimpeded. This functional immunity is laid out in the body of the model UN SOFA agreement of 1990 – the template on which most UN SOFAs are written -- paragraph 47(b):

Military members of the military component of the United Nations peacekeeping mission shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in [host country of territory] (UNGA 1990).

The troop contributing countries retain legal jurisdiction over their troops should a situation arise in which criminal or civil prosecution is necessary, such as in the case of sexual assault or rape of civilians as I discuss, since these crimes are viewed as criminal activities outside the boundaries of the appointed mission objectives. Though immune from prosecution of the Host state, this agreement does not mean that UN peacekeepers are immune from any prosecution regarding crimes they commit in the Host state. Paragraph 48 of the model UN SOFA outlines the responsibility of the Secretary General (SG) of any peacekeeping operation to acquire formal assurances from TCCs that they will exercise their jurisdiction over their members of the military contingent if a crime occurs. However, in practice, the written agreements are often not obtained, nor are the formal assurances, if obtained, fully implemented (Burke 2011).

In the case of UN SOFAs, the host State and the sending State (TCC) have little room for political exchange or control over the outcomes of cases in which foreign troops are alleged to have committed civil or criminal offenses against host country citizens or the host State. While each UN SOFA

is written and maintained by the UN, neither the host State nor the UN have any jurisdiction over military contingents. This point is made by the UN Conduct and Discipline Unit:

Members of military contingents deployed on peacekeeping missions remain under the exclusive jurisdiction of their national government. The responsibility for investigating an allegation of serious misconduct and taking subsequent disciplinary action rests with the Troop Contributing Country, in accordance with the revised model memorandum of understanding.... The Troop Contributing Country involved must then report back to the UN on the outcome of misconduct investigations and actions taken.
(UNCDU 2010)

This excerpt makes clear the UN's stance that it assumes no authority over military personnel including UN peacekeeping forces when a crime has been alleged in a host country. The only action the UN can take beyond repatriating the individual(s) involved is to require a report of actions taken after the fact. The immunity for foreign troops that these UN SOFAs establish create a context where there is no space of mediation between the host State and the sending State. The stated purpose for this arrangement is the protection of troops' legal and human rights, but an effect is to render powerless the host State where a crime is alleged to have occurred. Additionally, in the case of accused rape, the rape survivor has little to no role whatsoever in prosecuting, testifying against, or even learning the final, legal ramifications for the accused. If we are to take seriously the efforts of recent international conventions such as the *Convention of the Elimination on All Forms of Discrimination Against Women* (UNGA 1979) and the establishment of the *UN Action Against Sexual Violence in Conflict* (UN ACTION 2012), then cases such as those detailed below and others that are lost to complete inaction by TCCs must be given more priority and attention by the international community and legal bodies.

SOFAs, Peacekeepers, and Civilian Rape in Haiti: Two Cases

As of 2014, the United Nations has sixteen active peacekeeping operations. The only active operation in the Western hemisphere is the on-going mission in Haiti. The United Nations Mission for Stabilization of Haiti (*Mission des Nations Unies pour la stabilisation en Haiti*, known as MINUSTAH) was established through the adoption of Resolution 1542 by the UN Security Council on April 30th, 2004

to address political instability following the armed conflict in the city of Gonaives and the ousting of then President Aristide in February of 2004. The multinational military contingent of peacekeepers has remained in the country continuously since June of 2004. Following the earthquake in January of 2010, the mandate of MINUSTAH was extended to help stabilize the country. Countries that have contributed military personnel include:

Argentina, Bolivia, Brazil, Canada, Chile, Ecuador, El Salvador, France, Guatemala, Honduras, Indonesia, Jordan, Nepal, Paraguay, Peru, Philippines, Republic of Korea, Sri Lanka, United States and Uruguay (MINUSTAH, ND).

Following the 2010 UNSC mandate, the combined MINUSTAH military and police forces numbered more than 13,000 with the majority of these forces hailing from Brazil, Uruguay, Sri Lanka, and Nepal. Peaking at 13,000 individuals in 2010, in the following years the size of the peacekeeping force decreased to 9,000, in part due to accusations of widespread rape and the cholera epidemic brought by soldiers from Sri Lanka and compounded by improper waste disposal in UN peacekeeping camps (*The Economist* 2012, Lantagne et al. 2013). The cholera epidemic has so far killed upwards of 8,000 Haitians (*The Economist* 2012, Knox 2013), though the UN continues to deny responsibility in the face of mounting scientific evidence supporting the source of the epidemic from a MINUSTAH camp.

Throughout the tenure of MINUSTAH, including the original mandate following the 2004 civil conflict and into the post-earthquake years of the mission, accusations and verifications of sexual abuse and rape cases by UN military troops and police forces of Haitian civilians have occurred (UNGA 2014). The use of rape as a military strategy and the rape of civilians by occupiers has an extensive history spanning many spatial and temporal contexts. (Brownmiller 1975, Mackinnon 1994, Card 1996, Bourke 2007, Buss 2009). Legal codes regarding civilian rapes in war and conquest have been recorded throughout the last 2,000 years in ancient Hebrew law, Roman law, medieval European codes of conduct and into US codes of conduct as early as the Civil War of 1863 (Healy 1995, Askin 1997, El Fadl 2001). A crucial point often overlooked in general considerations of rape is that across national penal codes, the crime of rape varies considerably. For instance, laws defining rape may be gendered, only pertaining to the rape of females by males, or ungendered, whereby any unwanted sexual contact regardless of the

biological sex of either party, is considered rape. The age of consent also varies from 12 to 18 years of age, so the definition of statutory rape, in which consent cannot be given by those under a defined age, varies widely. The age of consent in Haiti, for instance, is 18 years of age, though to date rape has not been legally defined in Haitian law, adding an additional barrier to prosecution efforts (D'Adesky 2012, University 2013). Some definitions of rape include only nonconsensual vaginal penetration by a male's penis, whereas other definitions of rape include any nonconsensual sexual contact or penetration of any orifice(s) by any object or body part. These distinctions are important when considering that many countries are loaning peacekeeping troops and police to Haiti. The above listed TCCs have different penal codes regarding what is considered rape, who can claim to be raped, as well as varying punishments for the crime. By allowing the TCCs to retain absolute jurisdiction of their troops, the UN SOFA constructs an uneven legal playing field and thus very uneven and variable outcomes of justice.

According to the UN Conduct and Disciplinary Unit (CDU), a body that investigates all allegations of sexual exploitation and abuse by UN personnel (military, police, civilian and contractors), during this period (2010-2014) there were 31 substantiated cases, 36 unsubstantiated cases and 17 cases are pending for all categories of SOFA personnel (UNCDU 2015, UNGA 2014) although it should be noted that, "Allegations were often found to be unsubstantiated because of factors such as a lack of conclusive evidence, a lack of witnesses or the impossibility of positively identifying alleged perpetrators" (UNGA 2011, p. 6). Here, I focus on two cases that have been highly visible in the international media, thus providing more details about the cases than are readily available through the UN and the Member States of the accused. While the UN Secretary General does release a yearly report on special measures for protection from sexual exploitation and abuse via the UN Conduct and Disciplinary Unit (CDU) as well as supplementary information regarding the information on substantiated allegations, the reports and supplementary documents do not include many important details. For example, this excerpt from 2011 document is an example of how these cases are reported:

In terms of military and police personnel, 23 referrals were made to troop- and police-contributing Member States for disciplinary action following investigations into allegations of misconduct. The Department of Field Support

received responses from six Member States indicating that disciplinary action would be or had been taken following substantiated allegations of sexual exploitation or abuse. In their responses, the Member States indicated having taken measures against their personnel that included arrest pending court martial procedures, imprisonment for periods ranging from several days to two years and the barring of those personnel from any future employment at United Nations peacekeeping operations. (UNGA 2011, p. 6).

Missing from these reports are the important details such as: where the accused are from, details regarding the disciplinary actions (who asserted jurisdictional authority, where they took place, who oversaw them), and details regarding the disciplinary actions taken (what were they formally charged with, what were the length and nature of the sentences handed down). Also missing from these documents is any voice of the survivors themselves. The only details about the survivors of these crimes are if they were adults or minors. Though the two cases I examine here are subset of the total number of substantiated cases in the study period, it is in these details that I find the most compelling information, and these details are only found (publicly) in the media coverage of these cases.

Case One: Uruguay v. Johnny Jean

In July of 2011, six UN Peacekeepers, one naval officer and five marines, all from Uruguay, were involved in sexually assaulting and raping a teenage boy named Johnny Jean. The soldiers were immediately repatriated to Uruguay and were placed in jail during the initial investigation by authorities. One month after the initial reports of the rape were made public, a cellphone video of the incident was released and subsequently went viral on the Internet. According to Ansel Herz, a journalist in Port Salut where the incident took place, the video footage was “passed around via mobile phones after two Haitian men saw the video and copied it while they were exchanging music with a Uruguayan soldier via Bluetooth” (*Al Jazeera* 2011).

Even though there was outrage both in Haiti and internationally upon the release of the video that showed the victim being gang-raped by the marines amidst what appears to be laughter and taunting, the marines were released from prison. The reason for the release, according to the Uruguayan prosecutor in charge of the case, was that due to the inability to locate the victim for his testimony, the case had effectively stalled (Mosk et al. 2012). This position was quickly refuted by the victim, Johnny Jean, in a

cellphone interview with an AP reporter stating, “They know where to find me. If they take me, I will go” (*Al Jazeera* 2012). In May of 2012, the victim, Johnny Jean, did travel to Uruguay to give his testimony to a judge in charge of the investigation (*Al Jazeera* 2012). Following the completion of the investigation and trial, four of the five marines were convicted in March of 2013. The four convicted marines were sentenced to 2 years and 1 month in prison for the crime of “private violence” which, according to Uruguayan law, is “violence or threats to force someone to do, tolerate or allow something to be done” (BBC 2012, CEPR 2013). Private violence is considered a lesser charge than that of rape or sexual assault, and carries a sentence of three months to three years in prison, as opposed to a rape charge which would carry a minimum sentence of two years and a maximum of twelve (Ives 2013). The reason for this lesser charge, according to prosecutor Enrique Rodriguez in a statement to reporters, was that “the evidence did not support a finding of rape,” regardless of the video evidence and witness accounts (D’Adesky 2014, p. 138). The relative silence by the United Nations in regard to the light punishment handed down by Uruguay of a crime for which the UN has a ‘zero-tolerance’ policy demonstrates an overall lack of concern for the safety and security of the very people that are supposedly the focus of these missions.

By denying Johnny Jean the legal acknowledgement of being a survivor of rape, he is denied the claim of being a “real victim” of rape, thus promoting and solidifying the marginalization of his pain, trauma and the violation of his bodily integrity (Stewart et al. 1996). If Uruguayan rape law was gendered, that is, if the rape of a male was not legally viewed as rape, then that might help to explain the judgment that underplays the incident. However, Uruguayan rape law recognizes that males can be raped, so this incident should reasonably be considered as an act of rape according to Uruguayan law. Instead, this conviction of a lesser crime downplays the violence and marginalizes the victim.

What is evident here is that not only has the UN SOFA left the rape victim almost entirely outside the process of justice, it also eliminates Haitian authorities from enacting their own legal process of justice on behalf of Haitian citizens. The guidelines effectively marginalize the authority and sovereignty of Haiti while privileging that of Uruguay. As noted by Dorsett and McVeigh in their critical assessment

of jurisdiction, authority and legal authority falls “somewhere between the reason and persuasion of equals and the forceful subordination of inferiors” (2012, p. 32). The structure of the UN SOFA and the allocation of criminal jurisdiction over military and police personnel solidifies Haiti’s and Haitian citizen’s subordinate position in these matters. Although Johnny Jean’s case is the only case in this study in which the victim was able to testify against the accused, the marginalization of the victim in this case and the encumbrance placed upon him to travel to Uruguay to testify is legitimized through the UN SOFA’s privileging of the sending State’s jurisdictions over that of the host State’s. What is more, the story promoted by Uruguayan officials to international news outlets about not being able to find the victim, when the victim clearly was interested in pursuing prosecution of his attackers, demonstrates a play to construct a space of communication or procedure that was not inclusive.

Case Two: Pakistan and the Extraterritorial Military Tribunal

In January 2012, it was alleged that three members of a UN formed police unit from Pakistan had raped a mentally challenged 14-year old boy (Bracken 2014). The UN disclosed the case in early 2012 and stated that an investigative team was being dispatched to Haiti. Following the investigation, it was reported that not only did the three Pakistani police members rape the 14-year old boy, but that the abuse had been on-going for years and that the boy had been “passed from one UN contingent to the next” (Bracken 2014). Furthermore, when the Pakistani contingent commander was alerted to the arrival of the investigators, the Pakistani Mission tried to cover-up the crime by making arrangements for the victim to be moved to another town to prevent the investigation from going further (CEPR 2012, Bracken 2014). Similar to the previous attempt by the Uruguayan government in the claim that the victim could not be located, in this instance the Pakistani Mission actively tried to hide and silence the victim to prevent them from substantiating their claim of abuse. Since the Pakistani individuals were members of the formed police unit and not part of the military contingent, the UN had investigative authority over the case. It also had the authority to revoke the immunity granted to these individuals by the SOFA. Furthermore, under the Guidelines for Formed Police Units on Assignment with Peace Operations, “[m]embers of FPU are subject to the jurisdiction of the host country/territory in respect of any criminal offences that may be

committed by them in the host country/territory...not related to the performance of their official functions” (UNDP 2006, p. 9). As the disciplinary authority does remain with the police contributing country (PCC), normally in cases where allegations are substantiated, the offending officer is immediately repatriated to their home State. In light of past offenses by UN personnel and exasperation by the Haitian government, outcry over this particular case drew international attention and the Haitian Senate adopted a resolution calling for the immunity over the officers to be lifted. Under pressure, UN officials attempted to negotiate with the Pakistani government to hold a trial in Haiti with the promise that the accused, if found guilty, would not serve time in Haiti’s prisons (Bracken 2014). However, in this instance, even with many backroom meetings between the UN and Pakistan regarding a local trial, following the verification of the crime, military judges from Pakistan traveled to Haiti in March of 2012, and a closed Pakistani military tribunal was convened in the Haitian city of Gonaives without any mention to the UN or the Haitian government (D’Adesky 2012, Bracken 2014). As noted by the survivor’s family, they never learned the names of the accused and only heard of the courts-martial through the media after the proceedings were long since over (Bracken 2014). The three accused Pakistanis were found guilty of the crime of rape, discharged, and sentenced to one year of hard labor in Pakistan (Delva 2012). This is the first and only time, to date, that members of the UN military or police on deployment in Haiti have been placed on trial and sentenced in Haiti (Delva 2012), but not by any form of Haitian authority.

This response by the Pakistani government raises questions about jurisdiction and issues of marginalization as well as communication as they relate to assemblages of violence and spaces of justice. We must ask ourselves the consequences and motivations of this extraterritorial practice. By the Pakistani military authorities holding this tribunal in the Haitian sovereign space without their knowledge we see a further decoupling of sovereignty from territoriality (Raustiala 2005, Gregory 2006). This decoupling can only take place through the political maneuverings of allocating jurisdictional authority the justification of which is housed within a discourse of, or an interest in, security. Since it is difficult to find UN documentation of these incidences to be able to comment on “normal” or “typical” responses to UN peacekeeper rape of civilians, I can only observe in this instance how the Haitian government, the rape

victim, and – in this case – even the UN were marginalized if not altogether sidelined from the process and any vision of justice. The construction of such a proximate yet isolated space of justice is a puzzling response to the accused crime. Though the case was initially “applauded as being a ‘rare’ and ‘swift’ trial in Haiti” by advocates, rights groups and Haitian advocates soon saw the tribunal as “travesty of justice”(D’Adesky 2012, p. 138). By excluding both Haitian authorities and the rape victim, this space of justice is clearly severed from personal and national justice from the perspective of the victim and his home State. The regularity of cases such as these, the relative lack of accountability for these crimes, and the seeming disregard for any recognition of the wishes of the victim or the host State, again raises questions about the real priority of these missions (Vezina 2012). If the goal is security, whose security are these missions there to protect?

Spaces of Violence and (In)justice: Haiti and Beyond

“The United Nations, and I personally, are profoundly committed to a zero-tolerance policy against sexual exploitation or abuse by our own personnel. This means zero complacency. When we receive credible allegations, we ensure that they are looked into fully. It means zero impunity. When allegations are found to have merit, all personnel -- whether military, police or civilians -- are held accountable based on applicable national jurisdictions.”
- United Nations Secretary-General Ban Ki-moon (UNSG 2008, np)

“They know where to find me. If they take me, I will go [to testify].” – Johnny Jean, Rape Survivor

Established law reflects and enacts a particular discourse and arrangement of power, but it is important to question the motives, assumptions, and exceptions reflected in these arrangements and, thus, to question particular laws and their spatial and justice implications. Equally important is to examine the techniques, practices and mechanisms of law, especially jurisdiction, as it is here that we see the materiality of these laws played out in the lives of individuals. Through the lens of legal CLG, we can begin to understand the multiple, concurrent, and variable legal spaces, in essence the spacio-legal landscape, created by the jurisdictional guidelines and immunities of the UN SOFA agreement. The stated intent of the temporal and spatially finite immunities for these peacekeepers is aligned with the doctrine of functional immunity. However, we can see how this immunity, intended to help these peacekeepers

function in their mission to provide security and protection for people in situations of instability, actually provide for assemblages of violence, in this case rape, to be constructed around those same vulnerable individuals with few or no consequences. This disjuncture exposes the contradiction of “security” for these missions and draws attention to the power dynamics that have delineated this limited discourse, spatiality, and material reality of (in)security. The same powers that are exempted from the local laws, the UN and the TCCs have the ability, position, and authority to shape the stories that emanate from these missions. Very few of the victims of these crimes are ever heard. In the UN reports and those of the TCCs, names, details, and specifics of these cases are all but absent.

The construction of a disjointed constellation of jurisdiction created by the UN SOFA agreement very neatly divorces the spaces of justice from those of violence. These cases also demonstrate the unlocalizable nature of such spaces. Though the space of the crime or violence may be easily identified, the particular space of justice is unpredictable as TCCs retain full discretion over where, how and under what legal system they deem appropriate for the incident. The spaces of jurisdiction and the character of jurisdiction itself are not static geographies, but rather processes that materialize in observable spaces temporarily. These spaces are always in the process of transformation (Belcher et al. 2008). As these soldiers move through the space of Haitian sovereignty, they alter the embodied space and sovereign authority around them through the functional immunity granted to them. In doing so, they are continuously transforming space as they move through it, continually creating new jurisdictional spaces. The allocation of jurisdiction by the UN SOFA to sending States organizes the legal governance of the peacekeeping forces and separates the perpetrators’ jurisdictions from that of the victims. This organization and separation is possible because certain technologies of jurisdiction. The creation of the UN SOFA through the material technology of writing the guidelines of the immunity and privileges of the military and police personnel effectively authorizes the creation of extraterritorial spaces of jurisdiction around these individuals. The SOFA as a treaty, provides a “means through which law is transmitted and communicated through space and time” (Dorsett and McVeigh 2012, p. 57-58) and also inaugurates and maintains these jurisdictional spaces and orderings while these individuals are present (Dorsett and

McVeigh 2012). The result of this ordering is that the state- and global- level constitutional rights are not harmonized nor coordinated with lower level regulations governing the spaces and bodies where and which these crimes occurred (Valverde 2009). In the case of Johnny Jean, thousands of miles had to be traveled by the survivor to attain a minimum amount of justice for a crime in which there was visible evidence. In the case of Pakistan, though the military tribunal took place in Haiti, and thus could have easily provided a space for the victim to be present, neither the victim, his family, nor the Haitian government were alerted, acknowledged, or consulted. That the courts martial took place in Haiti was likely due to a recommendation under a UN special report on eliminating future sexual exploitation and abuse in UN peacekeeping operations created in 2005 and headed by Jordan's Prince Zeid. One recommendation was for TCCs to "hold on-site courts martial, since that would facilitate access to witness and evidence in the peacekeeping area" (Zeid 2005, p. 4). However, though the Pakistani military may have taken this recommendation into consideration, which may explain why this particular case was tried in the Haitian territory, the lack of engagement with local authorities, the victim or witnesses demonstrates that it was likely never intended to fulfill the intention outlined in the report. The lack of accountability and punishment by sending States of the troops who commit these crimes raises questions regarding the material consequences of the ordering of the spaces of violence and justice as well as to why this continues to be the case.

In looking at these two cases with a critical legal perspective we can expose the failings of the Troop Contributing Countries to sufficiently provide justice for the survivors of crimes committed by members of their military forces. This exposure highlights the jurisdictional conflicts and consequences of granting absolute immunity to these troops under the doctrine of functional necessity. I have demonstrated through these cases how the UN SOFA and the jurisdictional assemblages that the agreement creates, legitimates the marginalization, silence and harm these individuals through the discourse and prioritization of international security. I can therefore make a case towards promoting limited functional immunity for UN peacekeepers. Limited, rather than absolute, immunity from local prosecution or other regional human rights courts may be useful in providing greater protection for

civilians from rape, sexual assault, and sexual exploitation. If the host State or regional human rights courts had some recourse for pursuing justice for the survivors, it may prevent some of these crimes. While this maneuver also might prevent some States from contributing troops in future missions, maybe it would cause the UN to adjust some of its practices, re-evaluate how it runs these missions and promote new ways in thinking about jurisdiction and justice in these cases (VEZINA, 2012). Finding justice for the victims and survivors of the cholera epidemic through a special tribunal in Haiti might be one place to start. If the cholera case demands greater accountability by the UN and the sending States for activities of these troops on these missions, this could make room for victims of sexual assault –or other crimes– to seek a more substantive form of justice as well.

Chapter 4: The Scales of Justice: Security Practices under the US-Japan Status of Forces Agreement

“Exactly *whose* security, from whom or what, and through what means tend to be crucial unasked questions.” Luckham and Kirk, 2013 p. 340

Introduction

From 1945 to the present, the island of Okinawa has been considered an important piece of the United States-Japan Security Project. Continually justified through a discourse of local and regional security, the US military’s presence on the island has changed over time. Influenced by geopolitics both locally and globally, the US military’s authority, administrative structure, legal mechanisms, and jurisdictional authority have evolved, responding to the changing relationship with Japan, shifting security threats both within the Asia-Pacific theatre and more broadly in the “war on terror.” In Okinawa, the US military has played a number of roles on the island following the end of World War II from occupier to reformer and administrator to strategic partner following the reversion of Okinawa to Japan in 1972 (Honma, Sonnenberg and Timm, 2001). Throughout the US military’s tenure in Okinawa, however, reports of rape and sexual assault of civilians by US military personnel have surfaced many times, prompting mass protests and a call for the removal of the US military and military installations from the island. These assaults call into question the security of local residents and threaten the stability of the security arrangement between the United States and Japan as well as the relationship between the governments of Okinawa and mainland Japan.

The center point of study will be on cases of rape and sexual assault that have occurred on the island of Okinawa rather than the entirety of the Japanese territory due to the longer administrative tenure of the island by the US military relative to the rest of the Japanese territory

following Japan's surrender in 1945 and the triangular politics created with the colonial relationship of Okinawa with Japan. These cases are also of particular interest due to the relatively large presence of the US military in Okinawa (representing 0.6% of Japan's land area, Okinawa hosts 74.4% of all US military installations, Military Base Affairs Office, 2004) in comparison with the US military's presence on the other islands of Japan (such as Honshu) and the overt political tensions that have been amplified by protests and legislative moves to remove the US military from Okinawa entirely. Thus, the aim of this chapter is to examine cases of sexual assault involving US military personnel in relation to the US – Japan Security Project through a sociopolitical and geolegal lens to determine 1- How the security project between the United States and Japan has shifted focus and scope over time, 2 – How jurisdiction and authority over cases of rape and sexual assault under various treaties and agreements have changed along this timeline, and 3 – how different legal techniques and practices, security governance, and the geolegal landscape have been influenced by these changes and by the ever-shifting geopolitics at the local, national and international scales. A set of interrelated questions will be applied to the cases within this chapter with a view to addressing the above listed aims. These questions bring together theoretical and practical elements to open the door towards linking legal practices and techniques with geographical theory through an empirical study of rapes committed by US servicemen while stationed on Okinawa. Throughout the analysis, attention will also be paid to the notion of security, as this is the overwhelming justification for why these bases must remain in operation. If the goal is security, what is security and at what scale or scales is of greatest concern? If the main objective of stationing US troops throughout the Japanese sovereign territory of Okinawa is to maintain and increase not only the security of

Japan, but also the security of the region, exactly *whose* security, from whom or what, and through what means are questions that seem to often go unasked (Luckham and Kirk, 2013).

Though it may seem necessary to define “security” or at least discuss what security ought to be, as noted by Mariana Valverde, social science makes important contributions by examining security *projects*; that is, rather than looking at security as a thing or as a noun we should instead turn our gaze away from the concept of security and towards “the activities and practices carried out in the name of ‘security’” (Valverde 2014, 383). This adjustment from philosophizing about *what* security is to the empirical question of *how* security is, effectively redirects our attention to the techniques and practices of security and the complex relations that shape how we understand security and the variable experiences of security at a variety of spatial scales. (Valverde 2008, 2014). By starting with the actually existing practices of governance that participants within the US-Japan security project describe as promoting security in some way, rather than beginning with the abstract noun of “security,” this study hopes to draw some conclusions about exactly how “security” is developed at the individual, local, national and regional/international realms (Valverde 2014, 384). Furthermore, in looking at these practices at different levels of scale and jurisdictions, we can begin to uncover and study the “varieties of security experience” (James 1994 [1936] as quoted by Valverde 2014, Pg. 384) under these security projects by studying the existing “practices of governance that the participants themselves – not outside observers – describe as promoting security in some way (Valverde 2014, pg. 383).

The theoretical approach of this chapter is necessarily critical and follows a system developed by sociolegal scholar Mariana Valverde. Drawing on a number of heterogeneous analytical tools defined and discussed in the following research context section, including Bahktian chronotopes and Boa de Sousa Santos’ concept of interlegality, this method attempts to

bridge the divide between traditional theory and empirical study (Valverde 2015). While these tools may not share a common political aim or “single provenance,” by utilizing them in combination I am able to demonstrate more effectively how various governance mechanisms and jurisdictions are influenced and shaped without privileging the spatial over the temporal and vice versa. The equal attention paid to both the spatial and temporal aspects of these cases is important in that both the spaces and the times in which these crimes occur directly influence *how* such a case is governed.

Jurisdiction governing US military personnel while in a host state is tied not only to their status as a soldier, but also jurisdiction may ebb and flow over that person in relation to the activities they are carrying out while a crime is committed. Under the doctrine of functional necessity, crimes committed while a mission is being carried out, or during active duty, are exempt from host state jurisdiction and laws – so that personnel are not restricted in carrying out their mission, this is so-called “functional immunity.” In this way, time is essential, the *when* of the crime is directly related to what entity retains jurisdiction and whether or not an event can even be labeled a crime. Though it is unlikely that rape or sexual assault could ever be justified in the context of a mission, the element of time remains important to *how* such crimes are governed, not only under jurisdictional allocation, but also relating to community awareness and outcry relating to a crime – in effect placing increased pressure on authorities to prosecute to the full extent of the legal statutes. Including aesthetic and affective dimensions in the analysis of these cases is essential to fully appreciating how these crimes are governed and will be more fully explored and discussed throughout this chapter. By employing chronotope analysis and integrating temporal, spatial, and affective and aesthetic aspects of the laws and governance in Okinawa throughout the last six decades I am able to highlight the dynamic nature of the

practices of law and jurisdiction in juxtaposition to the rather static black letter of the law. It is through studying and understanding the practices that we might discover ways to improve such laws and practices towards enhanced security at a multiplicity of spatial scales.

Jurisdiction as Practice

Often in legal and critical legal geography, law and space are examined through their mutual constituency--the effects law has on space and vice versa--and how the construction of legal spaces shapes our understanding of space and the movements of individuals. What is missing from much of the scholarship, though, is a focused and critical assessment of the practices of law itself, namely through the workings or “games” of jurisdiction (Valverde 2009, 2014; Dorsett and McVeigh 2012). The importance of focusing on jurisdiction lies in the establishment of what jurisdiction is applied to, not only in determining the when, what spaces or what perceived injustices are governed, and by whom, (i.e. the correct sovereign), but more so in that the “game of jurisdiction ends up quite literally determining the ‘how’ of governance, the qualitative element” (Valverde 2014, 388). This study follows a growing trend in the legal geography literature in highlighting the complexity and constitutivity of legal spaces and the legal landscape (Delaney 2014), but unlike with other studies, I am primarily concerned with practice of law and governance of security through the “how” of governance: jurisdiction.

Perhaps surprisingly, jurisdiction is often treated uncritically, both in the legal geography literature and as well as studies in criminology (Valverde, 2014). Jurisdiction is often taken for granted or used synonymously with legal space and viewed as neatly bound realms of authority that often match up with a particular scale or territory. While not altogether untrue in theory, in practice, the workings of jurisdiction are much more complex and nuanced. Jurisdiction can be

multiple and layered in space, with numerous authorities controlling or having jurisdiction over various aspects of a place including natural resources and environmental concerns, economic activities, criminal activities, and so on. Governance practices and jurisdiction are also influenced by time, as noted by Santos (1987) and Mariana Valverde (2015): “authorities choose different spatial scales of governance depending on the time frame of their projects, with longer-term governance usually covering a larger territory and ‘day-to-day’ problems being handled tactically at the micro scale” (Santos 1987, p. 284 as quoted by Valverde 2015, p. 33).

Furthermore, jurisdiction need not be tied to the administration of objects and activities within a defined physical space but may be tied to the status of individuals, (e.g. refugees, soldiers, diplomats) (Dorsett and McVeigh, 2012). The movement of such individuals through other legal spaces and places is a fruitful avenue through which to examine and display the knotty nature of the constant creation and recreation of legal spaces. However, a select few studies in the critical literature in both legal geography and legal studies have called for an increased engagement in problematizing the taken-for-granted nature of jurisdiction (Dorsett and McVeigh 2012; Valverde 2008, 2014, 2015).

The importance of a concentrated study of jurisdiction and the practices of law is that it is here that we can build our workshops and engage with the “how” of governance. Scholarship under the umbrella of legal geography is not short in the number of topics covered but often these studies concentrate on the “what” and the “who” of law. From satellites (Collis 2009) and stray dogs (Srinivasan 2012) to the regulation of the homeless (Blomely 2009) and proper defecation (Braverman 2009), the range of topics covered in the legal geography literature is remarkably diverse. Notably absent from this highly diverse literature, however, is a concentrated and theoretically robust body of work on the *how* of law - the practices and

technologies of law. For example, few studies within the interdisciplinary project examine jurisdiction with any theoretical scrutiny (Ford 2001) or the role of lawyers in making law and place (Martin et al. 2010). Though largely overlooked up to this point, it is in these very technologies and practices where we may find some of the most fruitful endeavors in developing greater theoretical groundings for legal and critical legal geography (Martin et al. 2010, Delaney 2014, Valverde 2014).

Two Legal Worlds: The Japanese Legal System and the United States Military Legal System

The two legal systems within this case study, the Japanese Legal System and the United States Military legal system, follow very different logics and legal philosophies that they function within and under. These differing logics produce variable applications of law, sentencing, goals for the prosecution of the accused, and services to the survivors. These variations, especially the values, telos, and goals of the two legal systems, reflect their underlying logic of security. The two legal systems under study here are the products of two very different historical backgrounds and cultural systems, those of Japan and the United States, the former as Confucian and autocratic, while the latter as Western and democratic (Sonnenberg and Timm 2001). Further complicating this situation is that the legal structure under which the US military operates is different than the US civilian legal system. To fully appreciate the complexity and issues surrounding the jurisdictional negotiations and practices in Okinawa, as well as to better understand the geolegal landscape and techniques of governance over the course of the period under analysis in this chapter, it is necessary to provide some background history and context to both legal systems, the United States military justice system and the Japanese criminal justice system, respectively. My purpose in providing this brief overview of pertinent aspects and differences between the two criminal legal systems is to provide a solid foundation

on which to more clearly demonstrate the impact of the changes in jurisdictional authority across the timeline of the US-Japan security project.

United States Military Justice System

“But the Pentagon is not yet sovereign. The military is simply another administrative agency, insofar as judicial review is concerned.” – Honorable William Douglas (Ramo, 2014; p. 54)

Since the very inception of the United States as an independent nation, the US military has maintained its own legal system separate from the US civilian system of law. The US military legal system is not unique and owes much of the character, structure, and logic of order and discipline to earlier military legal systems in the Roman Empire, early Britain, and Northern Europe that developed long before the colonization of the new world (Morris 2010).

As noted by former Army judge advocate and chair of the Criminal Law Department at the Army Judge Advocate General’s School, Colonel Lawrence Morris (2010), the core demand of a military organization is obedience to lawful orders as “military discipline is tied to the effectiveness of the organization” (p. 2). Therefore, if there is a single reason for the continued existence for a separate legal system for the US military, it is the “enforcement of discipline to manage the peculiar demands of maintaining an effective fighting force” (Morris 2010, p. 3). Though both the civilian and military justice systems are Constitutionally-based, owing to the unique demands, limitations, and demands of an active military force, the US military justice system functions differently in important ways (MacDonnell 2002). First, the jurisdictional authority for the military justice system comes from Congress, “which received authority under the Constitution to ‘make Rules for the Government of the land and naval Forces.’” (Morris 2010, p. 34). Thus, though still Constitutionally-based, as with civilian legal authority, military jurisdictional powers and the class of persons who are subject to military law and the offenses

that military law encompasses is set by Congress (Morris 2010, p. 34). Second, the protections of the Constitution are applied differently to the military when “military necessity collides with the freedoms, expectations, and procedural guarantees of the Constitution” (Morris 2010, p. 10). Specifically, military personnel enjoy fewer protections under the First, Fourth, and Sixth Amendments⁴, while receiving greater protections against self-incrimination (Fifth Amendment) under Article 31 of the Uniform Code of Military Justice⁵ (Morris 2010). Important to this study in particular is understanding the procedural differences in how offences are handled by the US military justice system. This leads to the third, and arguably most important difference between US military and civilian systems of justice – the structure and levels of military courts.

Originally, conduct of the US military was governed by the 69 Articles of War first drafted in 1775 and updated throughout the 1770s (Morris 2010, p. 14-15). Substantial changes to the Articles of War were made in 1806 with the addition of 32 further articles, which thereafter remained largely unchanged until the 20th century. Offences committed by military personnel from the founding of the US military justice system in 1775 until the present day have been tried and sentenced in the courts-martial system rather than a civilian legal system. The courts-martial system⁶ has evolved over the past 240 years from a system dominated by corporal punishment including hangings, lashings, and other physical forms of punishment to maintain

⁴ Morris 2010, p. 10 “Military members enjoy fewer First Amendment protections (they can read and write what they want but cannot, for example, march in partisan parade while in uniform, narrower Fourth Amendment protections (their military barracks and gear – and bodies – can be inspected without probable cause), and some aspects of the Sixth Amendment are made expressly inapplicable to them (no right to indictment by grand jury.”

⁵ Morris 2010, p. 50 “Because they are citizens, soldiers enjoy the full protections of the *Miranda* decision... Soldiers, however, have additional rights against self-incrimination that predate *Miranda* and have a different rationale. Article 31 of the UCMJ provides that any soldier subject to official questioning has the right not to answer the question and the right to know the offenses about which she is being questioned.”

⁶ The Constitutionality of the courts-martial system was upheld by the US Supreme Court in 1857 in *Dynes v. Hoover*.

order and discipline within its ranks, to an increasingly professionalized system where justice for soldiers and the retention of their Constitutional rights while in the military, though still limited in some regards, has been a key motivating factor for recent changes, most notably the creation and adoption of the Uniform Code of Military Justice in 1951 (Morris 2010, p. 5).

As noted by Morris (2010),

“[t]he most distinctive procedural feature of the military justice system is that decisions on what to charge, whether to prosecute, and at what level to prosecute are made exclusively by commanders. This reflects the concept that runs throughout the system – that commanders are in charge, not lawyers or other disciplinary officials” (Morris 2010, p. 4).

Though commanders often rely upon the advice and guidance of judge advocates (uniformed military lawyers), this advice is nonbinding and “commanders enjoy tremendous discretion and near plenary authority to bring charges, pick juries, approve (or disapprove) findings and sentences, and grant clemency” (Morris 2010, p. 4). This “command-run system” has potentially significant implications in cases involving their personnel in extraterritorial situations such as those examined here. For instance, the 2013 incident involving an Air Force pilot in a sexual assault case in Italy who was convicted, only to have his sentence overturned by an Air Force General⁷ highlights the potential complications of this system (Alexander 2013).

⁷ See article from David Alexander (2013):

“Lieutenant General Craig Franklin, commander of the Third Air Force, was removed in September as the officer responsible for the case against Airman First Class Brandon Wright, who was accused of raping a female sergeant at Aviano Air Base in Italy, an Air Force spokeswoman said. Following a probable cause hearing, Franklin agreed with his legal advisers that the evidence against Wright was not strong enough to proceed to trial, the spokeswoman said. The case has since been shifted to a new jurisdiction and Wright has been charged again with rape.” Accessed at: <http://www.reuters.com/article/US-USa-military-sexassault-idUSBRE9BJ04N20131220>

Under the military justice system then, incidents involving military personnel are investigated by the policing arms of the respective agencies (e.g. Naval Criminal Investigative Service (NCIS) for Navy personnel, US Army Criminal Investigation Command for the Army) and punitive measures are distributed through a variety of means from non-judicial punishments including demotion and loss of pay, to honorable and dishonorable discharges from the military, to incarceration (Morris 2010). Military personnel, civilian contractors and in some cases accompanying civilians subject to the UCMJ can be charged under the codes of military justice for almost any conduct anywhere on the globe once it is clear that the individual's status makes them subject to the UCMJ and the offense is one that the UCMJ can address (Morris 2010). Important to this study is that "[s]oldiers can be tried for any offense committed anywhere, regardless of whether the offense might also be a crime under some other laws in the jurisdiction where the offense occurred" (Morris 2010, p. 36). If it is determined that the US military will exercise its jurisdiction over an individual there are three types of court-martial that may be applied, which are "distinguished by their maximum punishments, the level of command that has authority to convene the court or order it into being, and the extent of the appellate process available" to the individual (Morris 2010, p. 41).

While much has been and could be written on the structure and logic of the court-martial system (Lurie 2001, Morris 2010, Fidell 2016), I will briefly outline the general characteristics of the system as needed for the discussion of this study. The three levels of court-martial are: summary court-martial, special court-martial, and general court-martial. Briefly, a general court-martial is similar to a civilian felony court. Here the most egregious crimes are allocated including murder, rape, and treason. A general court-martial consists of a military judge, trial

counsel or prosecutor, defense counsel, and a jury⁸ of a minimum of five officers⁹. The special court-martial level is most closely related to a misdemeanor court where less egregious offenses are tried (drug possession, larceny, willful dereliction of duty). A special-court martial has the same personnel structure as a general court-martial with the exception of the jury consisting of a minimum of three officers¹⁰. The lowest level of the court-martial system is the summary court-martial, which is “a unique mechanism that, because of features such as the absence of a defense attorney and jury, is not considered a federal conviction because such a court is not a criminal prosecution under the Sixth Amendment” (Morris 2010, p. 41). The level and type of punishment handed down under a summary court-martial also differs by the level of the pay-grade of the accused. For instance, those at a pay grade of E-4 or below can potentially receive demotions of rank under a summary court-martial while those at a pay grade of E-5 and above (generally noncommissioned officers) whose positions or ranks are “considered to be worthy of increased protection” as opposed to their enlisted counterparts (E-4 and below) receive greater protections and prohibitions against receiving demotions under summary-courts martials (Morris 2010, p. 42).

As the level of punishment or sanctions increases and differs at each level from summary court-martial to general court-martial, the amount of due process and procedural protections for the accused officer or officers increase accordingly. As such, “[c]ourts-martial are best understood by reference to the maximum punishment they can adjudge, or their jurisdictional limit” (Morris 2010, p. 41). Of course, there are also nonjudicial forms of punishment including

⁸ How these members are chosen has recently been the subject of some debate and potential calls for reform. See Lamb (1992) The Court-Martial Panel Selection Process: A Critical Analysis, *Military Law Review*.

⁹ Enlisted soldiers can request that at least one-third of the jury consist of other enlisted personnel.

¹⁰ As with a general court-martial, enlisted soldiers can request that the jury sitting in judgment consist of at least one-third enlisted personnel.

loss of pay and demotion, which are at a level below even the summary court-martial. These nonjudicial forms of punishment have been found to be applied to cases of sexual assault and the application of such varies widely among the various military branches, though these cases are almost exclusively intramilitary cases and so this particular trend, while interesting, may say less about cases involving SOFA personnel and local nationals.

A final note on the UCMJ important to this study is the applicability of this system extraterritorially. Though most US laws do not have extraterritorial jurisdiction, because soldiers are deployed all over the globe, the UCMJ specifically applies to soldiers regardless of their physical location. As noted earlier, though jurisdiction is often thought of or conceptualized as neatly bound containers of authority, in this case the status of the individual (as a soldier) determines what jurisdiction they fall under, in this case the US military and the Uniform Code of Military Justice. This particular character of worldwide applicability is necessary to protect soldiers from being “subject to the jurisdiction of a foreign nation that might be adversarial, if not hostile” or to legal systems and courts that may violate the basic human rights of the soldiers (Morris 2010, p. 7).¹¹ While the logic of this applicability and the protection of the rights of soldiers are not in dispute in this study, the uneven application of punishment for violations of sexual assault against local civilians requires the same level of attention and scrutiny that the military has recently received for intramilitary sexual assault and violence if we are to maintain a disciplined and effective fighting force and also to maintain our relationships with host nations and the international community.

¹¹ I would like to note that the complexities of the military justice system are not fully appreciated in this brief overview due to the limitations of space and time for this study. However, Lawrence Morris’ (2010) *Military Justice: A Guide to the Issues*, provides an in-depth and very accessible account of both the history and discussion of the military justice system which has been instrumental in my own research and understanding of these issues and procedures.

The Criminal Legal System of Japan

The Japanese legal system is a complex amalgamation of laws and structures influenced by not only Japan's own history and Confucian philosophy but also by other Eastern and Western legal philosophies. The focus of this section will remain on the fundamental differences between the Japanese and US military justice systems as they relate to procedural justice. The reason for this particular focus is because concerns over procedures, due process, and the protection of the individual rights of military personnel are often the main justifications of the US military for retaining jurisdiction over their personnel. Though I will be narrowly focused on the procedural justice aspects of the Japanese criminal justice system (due process, rights of the accused, etc.), Carl Goodman's (2008) *The Rule of Law in Japan: A Comparative Analysis* provides an in-depth and comprehensive analysis of the differences between the rule of law in the US and Japan beyond criminal law and procedural justice. Specifically, his inclusion of a "What You See May Not Be What You Get" section within each subject covered in the massive volume is instrumental for gaining a full appreciation of the cultural and philosophical differences in the practice and application of law under each of these systems. As noted by Castberg (2004) in his review of Goodman's work, by placing considerable emphasis on the cultural and historical explanations for differences in law between the US and Japan one can gain a better understanding of "why, for example, sexual equality is guaranteed by the Japanese Constitution but is something quite different in practice" (Castberg 2004, no page #). These sections highlight an important point that is echoed throughout my own study. That is, what is written in the black letter of the law, in this case the guidelines of various SOFA agreements may

not always be what you get in practice through various legal and cultural interpretations of the legal language itself.

Briefly, the modern Japanese legal system grew out of developments beginning in the late 19th century between Western nations and Japan under the Tokugawa regime and the Meiji Restoration period. The Tokugawa shogunate (1603-1867), the last military government of Japan (Nussbaum 2005), transitioned into the Meiji period in 1868 with the resignation of last Shogun, Tokugawa Yoshinobu¹² following the fall of the Japanese capital of Edo (modern Tokyo) to the forces of Emperor Meiji during the Boshin War (Kornicki 1998, Jansen 2000). During the Meiji Restoration, the new government under the Emperor sought to “Westernize” Japan, which included the creation of a Western-style legal system. The rationale for the creation of such a legal system was two-fold: first, such a system would undermine the treaties created during the Tokugawa period that created the Consular court system where Westerners living in treaty zones were not subject to Japanese jurisdiction but to the Western-controlled Consular courts, thus re-establishing full Japanese sovereignty. Second, authorities in the Meiji government believed that such a legal system was needed so that Japan could advance both economically and politically as they were continuing to leave behind their isolationist policies that existed under the prior feudal system (Goodman 2008).

To develop such a Western style system, Western scholars were invited to Japan to advise on the creation of the system and Japanese scholars were sent to the West to study the systems of France and Germany (Goodman 2008, p. 21). However, there were some difficulties in that some words were not easily translatable from French and German to Japanese, but more

¹² In accordance with Japanese cultural norms, historical names are presented with the surname listed prior to the given name. However, more recent figures are addressed in Western fashion, with the surname last as this has become a more regular practice with the increased interaction between Japan and the US.

importantly some concepts that are deeply rooted in the philosophical roots of Western legal systems had no clear counterparts in Japan. For example, the notion of “droit” or “recht” (rights) in French and German law did not carry the same meaning in Japan. As noted by Goodman, there is a fundamental difference in the conceptual basis of the meaning of “rights” between the West and Japan. In the West, ‘rights’ were and are viewed as protecting individual interests, whereas in Japan ‘rights’ were “to be considered in a contextual setting so that as circumstances change so too might the ‘right’” (Goodman 2008, p. 22). This cultural difference in the understanding of ‘rights’ continues to influence the Japanese legal system even though in the creation of the modern system the Meiji government heavily borrowed, sometimes in wholesale, parts from the German and French legal systems (Goodman 2008). As such, in the process of this drafting of the new legal system, many of the rules and procedures are based on Civil law and look much like the German and French civil-based legal systems.

Though there are many differences between the legal systems of Japan and the US military, as noted previously the focus here will remain on differences in procedural justice. As noted by Goodman (2008) there are fundamental differences between these two legal systems as they relate to procedural justice. In the US legal system, including the military legal system following the passage of the UCMJ in 1951, procedural fairness lies at the core of the system. That is, for an individual suspect or defendant, their procedural rights must be protected to uphold the ideal that everyone has a right to fair trial (Goodman 2008, p. 387). Where this system fails in US civilian courts “is primarily in those areas where, for socio-economic reasons the end result of the system casts doubt on the efficacy of the protection” whereas in the military system the emphasis on order and discipline as well as politics, both intramilitary and internationally, may in some instances also challenge this ideal.

Rather than procedural fairness, the focus in Japan's legal system is on substantive justice, that is "getting the correct decision," where the guilty should be convicted and the innocent set free (Goodman 2008, p. 387-88). With this focus, the approach of law in practice has "less to do with rights, laws and formal rules than it does with the reality of what actually occurred and why" (Goodman 2008, p. 388). This point is most important because as Goodman notes "what you see in Japan in the way of constitutional rights and statutory rules may not be what actually is at work in the system – at least as those rights and rules are viewed through an American lens that has ingrained on it American procedural values" (Goodman 2008, p. 388). The difference between the two systems in the emphasis on procedural rights versus substantive justice is an effect of the different goals and values of the idea of justice. Whereas the American system is based on punitive goals and future deterrence – the punishment fits the crime and defendants are innocent until proven guilty – the focus of the Japanese legal system is on the rehabilitation of the offender and community healing rather than punishment (Goodman 2008, p. 388). And so we see here stark differences in the goals of the legal systems themselves – punishment and separation in the US system, rehabilitation and community reintegration in the Japanese system. In the interest of achieving these goals, in Japan efforts are made to keep offenders out of prison and for the community to rehabilitate them, so the legal system is built in such a way to promote ownership of committed offenses and recognition of one's failings by accused themselves. The result of this focus is that great emphasis is placed on confession, remorse, apology, and restitution to the victims of crimes by offenders. And importantly for those US military personnel who are acculturated in the US civilian and military legal system but stand trial in Japanese courts for crimes of rape and sexual assault against local civilians these factors and "the accused's willingness to accept them is a central feature of the Japanese criminal

justice system” (Goodman 2008, p. 388). The structure of Japanese criminal proceedings also differs significantly, where the accused stands trial before a professional judge or a panel of three professional judges ranging in age and experience¹³ rather than a jury of lay people as is the norm in criminal trials in the United States or a jury consisting of fellow military personnel in special and general courts-martial (Burns 2005). However, though I have noted the general goals and logic of each individual legal system, when these two systems and the individuals governed by them clash and historical legacies and feelings of subordination and colonization shade the proceedings, the legal and jurisdictional practices in cases where military personnel are tried in a Japanese court of law can yield some interesting results.

A Clash of Legal Systems and Cultures

Because of how the US-Japan Status of Forces Agreement was written and the terms agreed upon between the two parties, the current jurisdictional arrangement creates a situation in which jurisdictional authority exists concurrently both spatially and temporally in Okinawa under both US Military and Japanese law as enacted in Okinawa. While many offenses under the arrangement are clearly placed within either sole Okinawan or US military jurisdiction, in some cases, including sexual assault cases involving local national survivors, concurrent jurisdiction with primary and secondary rights applies. The differing logics and practices of the systems (jurisdictions), in effect, produce a variable legal landscape in which both US service personnel and Okinawan residents exist and move within and through. Most important to note in this legal landscape is that it is the bodily existence of personnel covered under the US SOFA that

¹³ For an in-depth examination of how rape, sexual assault, and harassment are treated within the Japanese legal system, see Catherine Burns’ (2005) detailed examination of judicial decision-making of Japanese cases of sexual violence, *Sexual Violence and the Law in Japan*.

inaugurates US military jurisdiction outside of the material boundaries of the military bases themselves. What I mean here, is that due to the characteristic of jurisdiction as tied to the status of US SOFA personnel, the movements of these individuals change the jurisdictional landscape as they move through the sovereign space of Okinawa.

In examining these cases of rape and sexual assault we see a clash not only of legal systems, legal cultures, and spaces but also a clash of cultural norms and mores influenced by time (both historically and in the immediate sense). Utilizing the analytical tool of the chronotopes as developed by Mariana Valverde (2015) and examining the influence of affect on how these cases proceed, or do not proceed, may be a particularly fruitful approach. Briefly, we can understand “chronotopes” as synonymous with “spacetime” whereby neither space nor time is privileged over the other in the analysis of a case but rather both are considered equally. The spacetime or chronotope of the crime committed directly influences what laws or legal mechanisms may be applied to the case and consequently how the offense is governed. Not only is the spacetime (chronotope) important in directing how the offense is governed but also in the allocation of jurisdiction. Jurisdiction, though often viewed as nested or clearly delineated spaces can also be attached to the individual. In the case of military personnel, as noted previously, jurisdiction is not necessarily determined by the space in which the crime took place but rather to the status of the person within a given space (Dorsett and McVeigh 2009). As such, the jurisdiction of the crime and the applicable laws are determined by the presence of a military person as the perpetrator of a crime.

Though Japan is granted primary jurisdiction over cases where a Japanese civilian is the survivor of a sexual assault or rape perpetrated by US military personnel in the black letter of the law, there is an important distinction to make here about law as practiced. Through an informal

agreement, the US military often applies for a waiver of jurisdiction in any case involving their personnel where they do not have primary jurisdiction¹⁴; as noted by Finn (1992) and Sonnenberg and Timm (2001), Japan has been generally faithful in carrying out this understanding unless the case is of ‘special importance.’¹⁵ However, more recently, as communicated to me by a Judge Advocate General (JAG), obtaining jurisdiction from Okinawan authorities over cases of sexual assault and rape involving survivors that are local nationals has been difficult and infrequent (personal communication May 2016). As noted in the analysis section of this chapter this shift is likely due to a number of factors, including changing geopolitical relationships between mainland Japan, Okinawa, and the US; changing norms regarding sexual assault in Okinawa; and changing norms regarding sexual assault within the US military itself due to increased visibility of these crimes because of efforts by US lawmakers and civilian watchdog groups. But these historical shifts over time have a significant impact over the legal practices, therefore supporting Valverde’s assertion that (2015) “different legal processes are shaped and given meaning by particular spacetimes” (p. 11).

An added layer of complexity is the question of whether or not an offense was committed while a US SOFA member was on official duty, whereby the US military retains full jurisdictional control over their personnel regardless of whether or not the victim was a local national. For instance, if a Marine was driving a military vehicle from one base to another through Okinawan sovereign territory and hit and injured a pedestrian that was a local national,

¹⁴ It is common practice by the US military to always “maximize jurisdiction” over their personnel. Partly this is due to military culture where there is an assumed duty to protect and ensure the rights of their personnel as often these individuals are putting themselves in harm’s way as part of their job (personal communication, April 2016).

¹⁵ See Fukurai (2010) p. 101 for a more in-depth discussion of the “secret SOFA” and jurisdictional arrangement between the US and Japanese governments that prevented Japanese prosecutors from indicting US service members for crimes committed in Japan under the conditions where Japan should have primary jurisdiction.

since this incident occurred while the Marine was on official duty, US military jurisdiction applies. While noting that this layer of complexity exists and is worth further study, in the case of sexual assault and rape, as is the focus here, sexual assault and rape can never happen in the course of official duties and activities¹⁶. As this is the case, the variable of whether or not the crime occurred during “official duty” does not have to be considered in the analysis of the cases within this study.

Lastly, regarding the clash of legal systems and cultures and the effect this has on the practices and outcomes of cases of sexual assault and rape by US SOFA personnel against local nations is the notion of the influence of affective and aesthetic dimensions of legal networks (Valverde 2015). These dimensions of different governance rationalities, as noted by Valverde (2015), are rarely considered in legal studies but I would argue that these dimensions exert a significant influence on the cases at hand within this chapter. As she states in her recent monograph *Chronotopes of Law* (2015):

“...the choice of spatial and temporal scale that each legal network in fact contains (whether the scales were chosen deliberately or unthinkingly) has significant, even constitutive effects on governance. And affect or mood can be regarded as a kind of variable, along with space and time, that will have different values in different networks; or, to put it qualitatively, affect or mood can be treated as a choice made at the outset by each act of governing, whether the choice is deliberate or not” (p. 79-80).

¹⁶ Some activities, such as military personnel driving from their residence to a military base through the sovereign territory of the host state might not be actively part of an official duty, if an accident were to occur, the personnel would still be considered within the jurisdiction of the US military as the course of driving is still connected to their duties and obligations, thus the event falls within the primary jurisdiction of the US military. Rape and sexual assault, as it has been communicated to me, can and will never be considered to have happened during the course of official duties or activities.

Here, this variable can be best explained as the influence that the mood or feelings that the Okinawan community have towards the military, and towards a particular case and survivor of a crime, can have on the case at hand. As noted previously, in the Japanese legal system the emphasis is placed on substantive justice and community healing – so the affective and aesthetic dimensions of a particular case or crime can have significant influence on whether the survivor brings charges against the accused. In one case a survivor of sexual assault did not move forward with her case because she did not feel sufficiently supported by the Okinawan community to proceed, whereas a very similar case some months later did proceed because the survivor did receive community support in the form of protests and outcry surrounding the case (Angst 1997, 2003). I make this point because in Okinawa, not unlike in the United States, survivors of rape and sexual assault are often revictimized through court cases, or survivors may not proceed with charges against their accused attackers because of the cultural stigmas and victim blaming and shaming that often occurs. Strong community support in such cases, or lack thereof, can be influential in how the case moves forward (Angst 1997, 2003; Enloe 2000).

The affective and aesthetic dimensions of a particular case and how it is governed are often bound up in the particular chronotopic or spatiotemporal dimensions of a case in the immediate sense. For instance, the 1995 case of a 12-year old girl who was abducted by three US marines in the middle of the day, bound and raped, and left on a beach may be viewed differently¹⁷ than the case of a 21-year old woman who was attacked and raped at night in an entertainment district. Though the crimes were both violent sexual attacks, the differences in

¹⁷ See Linda Isako Angst (2003) “The Rape of a Schoolgirl: Discourses of Power and Gendered National Identity in Okinawa” in Hein and Selden’s (2003) *Islands of Discontent: Okinawan Responses to Japanese and American Power*, for an in-depth discussion on how this 1995 rape of a 12-year old Okinawan girl transformed into a metaphor for the continued violence experienced by Okinawans under Japanese and US military colonial rule.

where (space) the attacks occurred, on a beach vs. in an entertainment district; when (time) the attacks occurred, middle of the day vs. late at night; and other aesthetic and affective properties, a young girl vs. a 21-year old woman, the presence of alcohol, etc. all directly influence *how* the crime is governed¹⁸. Consequently, we cannot ignore the influence of the affective and aesthetic dimensions of these cases when analyzing how the governance of these cases has changed over time and space both between jurisdictional practices and within jurisdictional practices.

Timeline of the United States – Japan Security Project

The purpose of this section is to explore the ongoing security project of the US military in Okinawa to fulfill the first objective outlined in the beginning of this chapter, that is, exploring how the security project between the United States and Japan has shifted focus and scale over time. Briefly, I will provide an overview of the overarching US-Japan Security Project through its various manifestations and its continual evolution with a focus on how jurisdictional allocation has followed the changing relationship between Japan and the United States. As noted by Sonnenberg and Timm (2001),

“The Japan-US Security Treaty (1960) and the Agreement regarding the Status of US Forces in Japan as main instruments of the law of visiting forces in Japan have been utilized flexibly to meet the military needs required by the US government from the standpoint of global strategy. However, the application of this Treaty and Agreement has been influenced not only by military convenience, but also by the interest to achieve harmonization with everyday life of residents in Japan.” (p. 367).

¹⁸ For instance, different legal instruments, laws, and sentencing recommendations are often provided for the sexual assault of minors versus those statutes that address the sexual assault of adults. Furthermore, in Japan, as well as the United States, the presence of alcohol, the way in which a victim was dressed, the amount of physical resistance by the survivor, or other aspects of their behavior or sexual history are often offered as evidence to lessen the charges or excuse the assault. See pgs. 110 – 130 in Catherine Burns (2005) *Sexual Violence and the Law in Japan* and Carl Goodman (2008) *The Rule of Law in Japan* for a further discussion of these practices.

The relationship between the harmonization of everyday life for Okinawan civilians and the US military's needs and authority over their personnel has been at times difficult. The case studies in the third section of this chapter will examine the tension created by crimes of sexual assault and rape committed by US personnel and jurisdictional practices in light of the aforementioned relationship between Okinawan civilians and the US military.

Throughout this exploration of the US-Japan Security Project, the aims of the Security Project will be of primary importance with subsequent questions focusing on the scalar effects of the Security Project, both spatial and temporal. For example, the initial US occupation and administration of Okinawa were deemed necessary due to the actions of Japan during World War II and the conditions of Japan's surrender. This initial period of US military administration of the island was generally focused on the security of Okinawa and to a greater extent the entirety of the sovereign territory of Japan (Sonnenberg and Timm 2001). The aims, scope, and scale of the security project between Japan and the United States shifted in later years with the emergence of the Korean War and geopolitical situation that arose around the Cold War. The scope then was not only the security of the sovereign territory of Japan, but also of the greater 'Far East,' as expressed in Article 6 of the 1960 Japan-US Security Treaty (US –Japan SOFA 1960). The scale of the US-Japan Security Project has continued to increase. During the period where Okinawa was formally returned to Japan in 1972 following the 1969 Agreement between the United States and Japan concerning the Ryukyu Islands and the Daito Islands (Okinawa) (Sonnenberg and Timm 2001) the government of Japan agreed that United States military installations should remain in Okinawa to defend Japan from the specter of communism (Cooper 2008). The value of Okinawa in the global constellation of US military bases has remained consistent, if not increased, in light of the growing importance of the Asia-Pacific theatre and the

US involvement in the global war on terror. The strategic value of Okinawa to the US military efforts in the Pacific theater is often reflected during the tense negotiations in the so-called “triangular politics” between the governments of Okinawa, mainland Japan, and the United States over the continued presence and authority of the US military following highly visible events of sexual assault or other harmful incidents caused by US military personnel (Cooper 2008). Within the following discussion of the changing objectives and focus of the US-Japan Security Project, the changing nature of jurisdiction will be highlighted.

Throughout the US military’s tenure in Japan, and more specifically the island of Okinawa, a significant number of crimes has been committed by US military personnel, not only against citizens of Okinawa but also against one another, including sexual assault and rape (Fischer 1987). Jurisdictional allocation of the crimes has changed with the nature of the US military’s presence and authority. During the United States’ post-war military occupation of Okinawa (1945-1972), both citizens of Okinawa and US servicemen were under the exclusive jurisdictional authority of the US military (Honma, Sonnenberg, and Timm 2001). This arrangement was revised in the years following under various administrative agreements and security treaties, and, through the evolution of the US-Japan Security Project, the allocation of more, yet still limited, jurisdictional authority was negotiated by the governments of Okinawa and Japan (Treaty 1951, Treaty 1960, Honma, Sonnenberg and Timm 2001). As jurisdiction not only determines who governs what and where, it also, and more importantly, determines how something is governed; and so the question of jurisdiction as a practice becomes particularly important.

The following section provides a brief historical overview of Okinawa’s changing relationship with not only the US military from the early days of occupation (1945-1951)

through the administrative period (1952-1972) and into to the more current state of as a strategic partner following the reversion of Okinawa to Japan (1972-current). This overview, while not exhaustive, provides the background in which to better appreciate how cases of sexual violence have been treated differently over time due to changes in jurisdictional authority, geopolitical relationships, and fluctuations of political power between Okinawa, mainland Japan, and the United States that are examined in the analysis section of this study.

1400 – World War II

The island of Okinawa, largest of the Ryukyu Island chain, lies in the East China Sea. Located a little over one thousand miles to the south of mainland Japan, the island is closer to Taiwan and mainland China than to Tokyo (Cooley 2008, p. 138). Okinawa's location has long made it strategically valuable. Prior to World War II the island's value lay in its location on trade routes between China, Japan, and various other smaller regional trading partners. During and after the end of World War II, the value of the island shifted from trade to military defense, first for Japan and later for the United States military¹⁹.

¹⁹ As noted by Kerr (1958) the strategic importance of Okinawa was recognized by the United States as early as the 1850s by Commander Perry before the Ryukyu Islands were formally annexed by Japan in 1879.



Figure 1: Map of Okinawa in the East China Sea

Okinawa is the central administrative island in the Ryukyu archipelago, so named after the independent Ryukyu Kingdom that once ruled the islands (Inoue 2007). The Ryukyu Kingdom was established in the early 15th century and was a tributary of both China and Japan, and was therefore an important trading partner with and between the two regional powers (Kerr 1958). Invaded in 1609 by Satsuma, the southernmost feudal clan in modern day Japan, to gain control of the trading profits, Okinawa remained a kingdom, although politically and economically subordinate to Tokugawa Japan²⁰ (Kerr 1958). Formal independence of Okinawa

²⁰ Though outside the purview of this study, George Kerr's (1958) *Okinawa: The History of an Island People* discusses in detail the history of Okinawa from 1314 BCE through 1945 from the foundations of the Ryukyu kingdom in the 14th and 15th centuries, the island's relationship as a trading partner and tributary to both China and Japan, the on-going strategic role the island played due to its location as both trading partner and defensive position for Japan beginning as early as the mid-19th century, into the era of forced assimilation practices by the Japanese government from 1880-1940, ending with the Battle for Okinawa in 1945.

ended when the Meiji government formally annexed the Ryukyu Kingdom in 1879 through the “Ryukyu measures,” effectively forming Okinawa into a prefecture of Japan (Inoue 2007, p. 2-3; Rabson 2012). Following this annexation, the Meiji government ran a directed campaign of forced assimilation and Japanization programs to “shape Okinawans into ‘real’ imperial subjects loyal to the emperor” (Inoue 2007, p. 3).

Important to this study is the understanding that the experience of Okinawans, historically, has been one of colonization and subjugation, both by mainland Japanese governments and the US military administration and the construction of Okinawans as “second class citizens,” by mainland Japanese governments. This notion has been echoed throughout much of the literature on Okinawa and the experience of Okinawans both past and present through both the Japanese periods of colonization (Inoue 2007, Rabson 2012) and the US military periods of occupation and administration (Chalmers 1999, Hein and Selden 2003, Inoue 2007, Cooley 2008) and plays into the affect and aesthetics of cases of sexual violence as experienced by Okinawans – that is, the singular cases of sexual assault and rape as experienced by Okinawans are symbolic of the historical abuse, subjugation, and violence experienced by the community and land as a whole.

During World War II, the island’s value shifted from trade to military defense; as US forces were making their way towards Japan in the Asia-Pacific theatre, the island of Okinawa and others in the Ryukyu island chain were used as the front line of defense for the mainland islands (Kerr 1958). Okinawa itself was the only part of Japanese territory that experienced direct combat from US forces (Inoue 2007). Okinawans themselves have stated that they were sacrificed by Japan to prevent US troops from coming to the mainland island of Honshu or to at least stall the advance. As noted by Inoue (2007), “the image attached to Okinawans as the

second-rate nationals...led Imperial Japan to use Okinawa as a strategic sacrifice to protect the mainland from US military attack” (p. 4). In 1945, Okinawa was the site of one of the fiercest battles in the Asia-Pacific theatre, often known as the “typhoon of steel,” where over 100,000 - 150,000 civilians or a quarter of the island’s population lost their lives during the three-month offensive before the island fell to US forces (Ota 1999, Inoue 2007, Cooper 2008, Rabson 2012)²¹.

Okinawa under US Military Occupation and Administration 1945 – 1972

The Occupation Period 1945-1951

Following the three-month long Battle for Okinawa, or the so-called Typhoon of Steel, US forces defeated the Japanese military forces and occupied the island, utilizing it as a staging base for bomber raids against Tokyo and other major Japanese cities, as well as the main staging area for what was anticipated as the full invasion of the home islands (Fisch 1987, p. 3). However, six weeks after the conclusion of the invasion, the war between the US and Japan was concluded and military operations on Okinawa were drastically scaled down. At this point the Military Government of the Ryukyus began to assess the role of the United States on the island and reconstruction of the devastated areas moving forward. This particular time period is complex for a variety of reasons²².

²¹ It should be noted, that there are numerous stories of Japanese atrocities against Okinawan civilians during this battle including forced suicides, massacres, rapes, and other violent offenses. Though sufficient space to this cannot be given here, others have covered these episodes and the on-going battle between Okinawans and mainland Japan in how this time period was covered in history textbooks, and official accounts. See Chalmers 1999, Inoue 2007 and (<http://apjif.org/-Aniya-Masaaki/2629/article.html>)

²² Under the unconditional surrender of Japan and with the consent of the other Allied Powers, the United States undertook full administration and occupation of Japan in its entirety. General Douglas MacArthur was appointed Supreme Commander for the Allied Powers (SCAP) and in this position began “exercising administrative control over the Japanese legal and political system” altering the previous governmental philosophy of Japan as “Rule by Leader” to a system more like that of the US as “Rule by Law.” Under

As noted previously, the relationship between the home islands of Japan and Okinawa has often been difficult, shaded by colonialism, forced assimilation campaigns, and the general treatment and perceptions of Okinawans as second-class citizens (Kerr 1958, Fisch 1987, Eldridge 2001, Hein and Selden 2003, Inoue 2007). Consequently, there were mixed feelings and expectations of the new occupying power on the island, the US military. As noted by Fisch (1987), most Okinawans expected a quick departure of the troops following the end of hostilities, others looked to the occupying forces as a means to fully separate from Japan and restore the Ryukyu kingdom, while some favored full annexation by the United States (pg. 4). Not only were there mixed expectations or desires by the population of Okinawa, but there was also a fundamental disagreement over the nature of the occupation between the US State Department and the US Military, where the former favored the retention of Okinawa by Japan and the latter favored annexation or at least long-term, full administrative authority (Fisch 1987, Eldridge 2001). Little systematic research has been completed on this period of time (1945-1951), and much of what research does exist are Japanese works, of which only a few have been translated into English (See Eldridge 2001, p. *xix*). Of the existing work, the most detailed of the accounts for this period available in English (1945-1952) are Arnold Fisch's (1987) military history, *Military Government in the Ryukyu Islands 1945-1950*, Robert Eldridge's (2001) dissertation, *The Origins of the Bilateral Okinawa Problem* and Kensei Yoshida's (2001) *Democracy Betrayed: Okinawa Under US Occupation*.

The fundamental disagreement between the US State Department and the US Military was that the former argued for the retention of the Ryukyu Islands by Japan so as to avoid future

his directives and this philosophical shift, reforms of the political and legal systems of Japan were significant, affecting "the press, military general staff, enfranchisement of women, economic institutions, education, war criminals, industry, the Imperial Household, war taxes, agrarian reform, the state religion, trade unions, and political, civil, and religion liberties" (Sonnenberg and Timm, 2001 p. 380-81).

political and legal issues regarding the governance of the island as a US territory, while the latter, headed by the Joint Chiefs of Staff (JCS), argued for “exclusive and absolute control of the islands” and potentially annexation due to its strategic value (Eldridge 2001, p. 4). This political and military “clash” as Eldridge terms it, affected the US-Japan relationship throughout the years following the end of World War II and into the early years of the Cold War, as Okinawa was to become increasingly valuable against the growing threat of Communism for the US Military, who were determined not to relearn the lessons of World War II in under-defending the Asia-Pacific theatre. It also highlights the different views of the focus and scope of the security project between the US State Department and the US Military, where the concern of the US State Department was more narrowly concerned with the stabilization and rehabilitation of Japan and its surrounding prefectures, whereas the US Military’s concerns were much more broad and concerned with regional stability and security against the other regional powers.

The compromise between the US State Department and the US Military was that Japan did retain “residual sovereignty” over Okinawa and the other Ryukyu Islands but that the US Military would stay on as the administrating government of the islands far longer than the occupation period experienced by mainland Japan²³. As the occupying power on the islands, the US military set up the US Military Government of the Ryukyus, which oversaw the reconstruction of the island²⁴. Most germane to this study is that under this arrangement, the *US*

²³ The actual status of Okinawa and the other Ryukyu Islands was somewhat in dispute during this time period. As noted by Fisch (1987) and Eldridge (2001), at the Potsdam Conference in July 1945, the United States, Great Britain, China and the Soviet Union agreed that “Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, and Shikoku and such minor islands as we determine” (US State Department). However, the vagueness of “such minor islands” made the status of Okinawa unclear and “contained the seeds of potential territorial discord among the interested nations” (Fisch 1987, pg. 70).

²⁴ As noted by Fisch 1987, the economic and administrative support from the United States during the administration and reconstruction of Okinawa was not always consistent and in some instances suffered from apathy and neglect from the United States and the US Military, see Fisch (1987) pages 69-87.

military retained sole and exclusive jurisdictional authority over the military and civilian personnel stationed on the island during the years following World War II. Also of note, is that during the occupation period (1945-1952) the Uniform Code of Military Justice was not in effect as signed into law by President Truman until 1950 and not operationalized until 1951. Therefore, during much of the occupation period, crimes committed by US military personnel were governed at the discretion of commanding officers and military leaders on the island under the Articles of War as outlined in the US Military Law section of this chapter²⁵.

On September 8, 1951, the Allied Powers, with the exception of the Soviet Union, supported and concluded the Peace Treaty with Japan. Better known as the San Francisco Peace Treaty, the seven chapters of the treaty “marked the end of hostilities between the signatories, provided for the termination of the occupation, and specified the details of the settlement of war-related issues” (Price 2001, online resource). On this same day, the Japanese government formally concluded a Security Treaty with the US government (US-Japan Mutual Security Treaty). Importantly, the San Francisco Peace Treaty included two noteworthy clauses regarding the law of US forces stationed in Japan. The first clause formalized Japan’s ability to convene a self-defense force and conclude security arrangements voluntarily allowing for further negotiations with the US regarding the long-term stationing of US troops on the mainland islands of Japan. The second clause, most importantly, authorized the Allied Powers to control directly certain islands including Okinawa, formally separating the island from the other parts of Japan (Honma 2001, 371).

²⁵ The UCMJ and the Manual for Courts-Martial (MCM) were passed by Congress and signed into law by President Truman in 1950, taking effect in 1951. The word “uniform” is used to signify the consistent application of rules, procedures, jurisdiction, and punishments across all branches of the military for crimes outlined in the UCMJ. The UCMJ and the MCM replaced the earlier Articles of War and Disciplinary Laws of the armed forces (Morris 2010).

As the conditions of the 1951 San Francisco Peace Treaty (hereafter called “Peace Treaty”) and the US-Japan Mutual Security Treaty²⁶ went into effect²⁷, Okinawa was officially separated from mainland Japan, and effectively became a possession of the US military. This condition was justified under the rather ambiguous Article 3 of the Peace Treaty. Though outside the bounds of this study in regard to the legality of this arrangement, I would note that some have gone so far as to argue that the authorization of US forces to exercise direct control over Okinawa following the end of the formal occupation period (1945-1951) was founded on a legal fiction based on Article 3 of the Peace Treaty²⁸ (Honma 2001, pg. 373). Though I want to acknowledge that the legality of this arrangement is disputed in the literature, it does not change the jurisdictional practices that occurred during this time period – which is the focus of this study. Under the conditions of the 1951 Peace Treaty and the Mutual Security Treaty, as interpreted by the US and Japanese governments, Japan officially ceded control of Okinawa and

²⁶ The US-Japan Mutual Security Treaty is a 10-year renewable military agreement that outlined the “security arrangement for Japan in light of its pacifist constitution. US forces would remain on Japanese soil after Japan regained sovereignty. This early security pact with Washington dovetailed with the Yoshida Doctrine —a grand strategy for postwar Japan laid out by then prime minister Shigeru Yoshida that saw Japan rely on the United States for its security needs so the country could focus on its own economic recovery” (Xu, 2014).

²⁷ The treaty and corresponding security agreement was expedited by the United States due to the escalating war in Korea (Sonnenberg and Timm 2001).

²⁸ As noted by Honma (2001) “authorization of US forces to exercise direct control over Okinawa” following the end of the formal occupation period “was founded on a legal fiction based upon Article 3 of the Peace Treaty with Japan...according to Art. 3, Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansai Syoto (including Okinawa and the other Ryukyu Islands) and several other islands. Depending on such a proposal and affirmative action thereon, the United States will have the right to exercise all powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters. This rule could lead to grave contradictions. On the one hand, it is essentially unreasonable to apply the trusteeship system of the United Nations to Okinawa. The object of the system is to make any trust territory into an independent state. However, Okinawa has always been a part of an independent state, Japan. On the other hand, the control by US forces over Okinawa could be continued indefinitely, unless the US government should make its proposal to the United Nations of placing Okinawa under the UN trusteeship system” (p. 373-74).

the Ryukyu Islands to the US, giving the *US military sole administrative, legislative, and jurisdictional authority over the islands and the surrounding territorial waters* beginning in 1952 while the rest of Japan regained full sovereignty and independence following the post-WWII occupation period by the Allied Forces (Honma 2001, Cooley 2008). Importantly, while Japan did cede full control and administrative powers over Okinawa and the Ryukyu Islands to the US government, the negotiations between the US military and the US State Department, who did not want to separate the islands from the mainland government, resulted in Japan retaining “residual sovereignty” over Okinawa and the Ryukyu Islands. Under this arrangement “the islands would remain Japanese possessions but would be administered by the United States with no guarantees of reversion until the ‘security situation in East Asia’ allowed it”(Cooley 2008, p. 145).

In February of 1952, the Administrative Agreement between Japan and the United States was concluded under Article III of the 1951 US-Japan Mutual Security Treaty. The purpose of the Administrative Agreement was to “establish more concrete, practical rules relating to the stationing of US forces in Japan (Honma 2001, p. 373), which can be thought of as a precursor to a formal Status of Forces Agreement (SOFA). However, these rules only applied to US forces that remained on the mainland islands of Japan and did not apply to Okinawa or the Ryukyu Islands. As noted by Honma (2001), [i]t can be said that the only laws to be applicable to US forces in Okinawa [during the administration period 1952-1972] were the military laws of the United States or its other domestic laws” (p. 374). Under these conditions, throughout the twenty years covered by the administration period from 1952 to 1972 the US military “exercised *exclusive jurisdiction and extraterritoriality over all crimes committed by US personnel* on the islands” (Cooley 2008, p. 146, emphasis added).

During the administration period of Okinawa, the US military governed the island through a “set of parallel US and local institutions designed to serve the military’s operational needs” (Cooley 2008, p. 145). The parallel institutions included the US Civilian Administration of the Ryukyu Islands (USCAR) at the top of the institutional hierarchy followed by the indigenous Government of the Ryukyu Islands (GRI), “composed of an executive, a local parliament, and a local court system” (Cooley 2008, p. 145). USCAR directly appointed the governor of the indigenous governmental body (GRI) until popular elections were allowed in 1968. Notably, though this local governmental, legislative, and judicial structure existed in Okinawa throughout the administration period, “[i]n practice, USCAR retained the power to veto and override all GRI executive decisions, legislation, and judicial orders, ‘subject to requirements of military security’²⁹” (Yoshida 2001, p. 43 as quoted by Cooley 2008, p. 145).

Beginning in 1951, the US military constructed numerous military bases and installations on the main island of Okinawa, spurred on by geopolitical developments including the Korean War, the Vietnam War and other regional objectives such as the defense of the Taiwan straits (Cooley 2008). By 1953, these installations would cover more than 14% of the island and much of the land was procured from local civilians. The level of administrative expertise and the amount of logistical, material, and monetary support provided by the US government and military waxed and waned throughout the administration period following regional developments and threats in the Asia-Pacific theatre (Eldridge 2001). Issues regarding the US military’s practices of land requisition from Okinawan farmers and citizens, crimes committed by US military personnel, and various other “policies and political missteps” throughout the 1950s and 1960s helped to fuel the growing movement towards reversion by Okinawan citizens (Inoue

²⁹ “Directive for United States Civil Administration of the Ryukyu Islands” October 4, 1950 as quoted by Yoshida 2001, p. 43.

2007; Hein and Selden 2003; Cooley 2008, p. 147). For instance, USCAR controversially asserted their jurisdiction over civil cases that were originally heard in the GRI court system (Cooley 2008) and the matter of extraterritorial jurisdiction over US military personnel became a high profile issue fueled by various violent crimes, including rape, sexual assault, and murder by US military personnel against Okinawan civilians (Cooley 2008). In 1962, these matters came to a head and the Okinawan legislature “unanimously passed a resolution that accused the United States of practicing colonial rule again prevailing United Nations ordinances” (Sarantakes 2000, p. 61-62 as quoted by Cooley 2008, p. 147) and by the late 1960s the reversion movement had reached its apex. Domestic, regional, and international politics combined with strong public support to push through a plan for reversion, completed through back-channel negotiations between President Richard Nixon and Prime Minister Sato in 1969. The reversion of Okinawa and the Ryukyu islands to Japan would be concluded by 1972; however, the deal allowed US military bases to “remain on the island subject to the general terms of the 1960 Mutual Security Treaty (and SOFA) between the Japan and the United States” that had governed the legal status of US military personnel on the main islands of Japan for the previous decade (Cooley 2008, p.149). The Okinawa Reversion Agreement was signed by the governments of Japan and the United States on June 17, 1971 and the official reversion ceremony followed a year later in June of 1972 (Cooley 2008, Okinawa Reversion Agreement 1971).

Following reversion, Okinawa and the other Ryukyu Islands that had been formally administered by the US military once again became a prefecture of Japan. Consequently, the guidelines of the 1960 Mutual Security Treaty between the United States and Japan, and the corresponding Status of Forces Agreement (SOFA) were now applicable to Okinawa and the other Ryukyu Islands. The 1960 Treaty of Mutual Cooperation and Security Between Japan and the United States of America and the corresponding Agreement regarding Facilities and Areas and the Status of US forces in Japan (hereafter called the 1960 Security Treaty and the US-Japan SOFA) replaced the existing Security Treaty of 1951 and the Administrative Agreement of 1952. The new 1960 Mutual Security Treaty and SOFA as they went into effect on Okinawa and the other Ryukyu Islands is especially important, as these instruments included rules that prescribed and constituted “fundamental laws of visiting forces in relation to US forces in Japan” (Honma 2001, p. 374). Under the 1960 Mutual Security Treaty and SOFA, the black letter of the law allocated jurisdiction over crimes committed by US service members under Article XVII³⁰. The allocation of jurisdiction and other provisions regarding the violation of Japanese law and the Uniform Code of Military Justice (UCMJ) are outlined as follows:

ARTICLE XVII of the 1960 Treaty of Mutual Cooperation and Security Between Japan and the United States of America p. 10-11:

1. Subject to the provision of this Article,

³⁰ As noted by Sonnenberg and Timm (2001) the jurisdictional allocation formula in the 1960 Japan-US SOFA was mostly unchanged from the jurisdictional arrangement as outlined in the Japan- US Administrative Agreement of 1951. This agreement was heavily influenced by the negotiations on foreign criminal jurisdiction (FCJ) in the NATO SOFA of 1951 which was particularly contentious and many US officials fought any loss of jurisdictional authority over US troops as many perceived this as a loss of sovereignty and not in keeping with the customary international legal standard of extraterritoriality (p. 383-84).

- a. the military authorities of the United States shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;
 - b. the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan.
- 2.
- a. The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of Japan.
 - b. The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces, the civilian component, and their dependents with respect to offenses, including offenses relating to the security of Japan, punishable by its law but not by the law of the United States.
 - c. For the purposes of this paragraph and of paragraph 3 of this Article security offenses against a State shall include
 - i. treason against the State;
 - ii. sabotage, espionage or violation of any law relating to the official secrets of that State, or secrets relating to the national defense of that State.
3. In cases where the right to exercise jurisdiction is concurrent that following rules shall apply:
- a. The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to

- b. offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces of the civilian component or of a dependent;
- c. offenses arising out of any act or omission done in the performance of official duty.
- d. In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.
- e. 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 a waiver to be of particular importance.

In short, the 1960 Security Treaty and corresponding SOFA provides the US military sole jurisdiction over US service members who violate the UCMJ but not Japanese law, including offenses related to security that are punishable by the law of the United States (e.g., treason, sabotage, espionage, secrets relating to national defense of the United States, etc.), but not the law of Japan. Article XVII allocates to Japan sole jurisdiction over crimes committed within the territory of Japan by US personnel, members of *civilian components, and dependents* who violate Japanese law but not the UCMJ. Finally, section 3(a) covers concurrent jurisdiction.

The concurrent jurisdiction articles cover the allocation of jurisdiction when a crime violates both the UCMJ AND Japanese law, and provides primary jurisdiction, or first rights to prosecute along certain parameters. These parameters include whether or not the crime was committed during the performance of official duty, granting primary jurisdiction to the US military, or “offenses committed solely against the property or security of the United States or

offenses solely against the person or property of another member of the United States armed forces of the civilian component or of a dependent” (Treaty 1960, p. 11). This is an especially important point; for example, if a rape happens off-duty and off-base, within Japanese sovereign territory, but between two US military personnel, the US military retains primary jurisdiction over the case. I stress the point to highlight the complex spatiality or geolegal landscape of authority and jurisdiction within the sovereign space of Okinawa due to the presence of US military personnel as stationed long-term under the Status of Forces Agreement, in that even if a rape happens within Japanese sovereign territory, if it involved two US military personnel, US civilian SOFA personnel, or dependents, Japan has no jurisdictional authority to try the case. If, on the other hand, the rape occurred off-duty and off-base, but the survivor is not a member of the US military, or if both victims are US civilians not affiliated with the SOFA, then the Japanese government is granted primary jurisdiction³¹.

Though revisions have been made to the Japan – US Treaty of Mutual Cooperation and Security in reaction to changing geopolitical conditions and the expanding purview of the Asia-Pacific command with regard to growing security concerns of North Korea, China, Russia, and other relatively unstable regional governments (1978 Guidelines for Japan-US Defense Cooperation, 1997 Guidelines for Japan-US Defense Cooperation, see Honma 2001 p. 377-78), criminal jurisdiction governing crimes committed by US military personnel has largely remained the same as outlined in the original Japan-US Security Treaty of 1960 and the corresponding

³¹ See Hook et al. (2015) *Regional Risk and Security in Japan: Whither the Everyday*, for a thorough discussion of the complex geolegal landscape in Okinawa between the porous boundaries of US military bases and Okinawan sovereign space and the movement of US military personnel between these two legally defined areas that are governed by two very different legal and cultural systems. Hook’s analysis of Okinawa effectively demonstrates how externally focused security policies “can blow back as harm for the domestic population” specifically focused on the US military presence in Okinawa (p. i). See Part 3 of chapters 9-12.

SOFA, though some of the agreed upon practices have changed in light of high-profile cases, as discussed in the following section. Substantial revisions to the agreement have been difficult due to the particularly complex “triangular” politics between Okinawa, mainland Japan, and the United States. Okinawa hosts 75% of the US military installations in Japan, though the island only represents 0.6% of Japan’s surface area (Fukurai 2010). To compensate Okinawa for this “special burden” of hosting over 25,000 military personnel, civilian contractors, and their dependents and as well as the tens of thousands of landowners who were displaced in the 1950s to build the US military bases and installations, millions of dollars and yen have been sent to Okinawa. In the early decades, this economic boost was in part to rebuild the island after much of the infrastructure was destroyed in the Typhoon of Steel. Following the rebuilding of the island, much of the economic support was, and continues to be, political compensation from Japan for the continuous burden of the US military presence Okinawans face (Inoue 2007).

As noted above, throughout the post-reversion period, jurisdictional formulas and practices between the US, Japan, and Okinawa have remained largely unchanged with a few notable exceptions³². Repeated episodes of high profile crimes, often the rape and murder of local Okinawan women, has continued to ignite such fervent anti-base sentiment that efforts have been made to relocate US military installations to other parts of the island. Plans such as the 2006 “Roadmap to Realignment Implementation” were drawn up to relocate Futenma Air Station on the northern edge of the island, but environmental concerns and issues regarding the threat to

³² Following the widely publicized rape of a 12-year old girl by three Marines in 1995 and the mass demonstrations by Okinawans across the island, in 1996 changes were made to the “sympathetic consideration” agreement between the US and Japan/Okinawa, “that changed the primary jurisdiction over American soldiers who allegedly committed heinous crimes while off duty. Following this change in practice, the U.S. government has agreed in future criminal cases to give a special consideration to Japanese requests and made possible the pre-indictment turnover of military suspects to Japanese authorities” (Fukurai 2010, p. 120). Previously, in accordance with the 1960 SOFA agreement, the US military had the right to retain their personnel until the accused was officially charged by the Japanese or Okinawan authorities.

a local endangered species, and on-going protests by citizens in northern Okinawa, have largely put this plan on indefinite hold. Other plans included moving large numbers of the Marines currently stationed in Okinawa to other islands in the Pacific, such as Guam. However, rising tensions with regional powers such as North Korea and China have made these changes difficult, as well. In light of these tensions, crimes of rape and sexual assault against local Okinawans by US military personnel often remain in the jurisdiction of Okinawa, and the military does not press for a waiver of jurisdiction, unlike in the case of many other crimes where the US military may have secondary jurisdiction. In fact, often the military will prosecute US personnel who are accused of rape and sexual assault of an Okinawan citizen when Okinawan authorities decline to move forward with the case (Personal communication May 2016). Though it is difficult to make any solid inferences from these trends, one might conclude that local pressures both in Okinawa as well as the United States regarding sexual violence in the military and the political dynamics between the US military and citizens of Okinawa might be directly or indirectly influencing the legal and jurisdictional practices around these crimes.

Cases of Rape and Sexual Assault by US Military Personnel and Techniques of Security

“The everyday workings of jurisdiction – which exercise power continuously whether or not anyone is noticing it or challenging it – tend to naturalize the simultaneous operation of quite different, even contradictory, rationalities of legal governance” (Valverde 2009, 142).

The third section of this chapter documents the techniques of security and jurisdiction utilized by the US military and the Japanese authorities regarding specific cases of rape and sexual assault by US military personnel while stationed in Okinawa³³. Valverde notes that

³³ Numerous authors who have explored this same subject have noted that it is difficult, if not impossible, to separate crimes of rape and sexual assault from forced and coerced prostitution. I agree that this is true, and in many cases small forms of “payment” such as a piece of chocolate or piece of clothing have been

“[c]ertain logics of governance tend to go with certain techniques, but this link is not fixed, and so studying the techniques somewhat separately from the logic, the scale and the jurisdiction can be important” (2014, 382). As noted by Pajon (2010), this notion of “logics” is key to understanding the complex governance of crimes sexual assault and rape in Okinawa:

“The issue of U.S. bases in Okinawa is indeed particularly complex because it combines different logics and sometimes contradictory dynamics at three levels of governance. Internationally, the presence of American forces on its soil is a *quid pro quo* for US protection of Japan in the case of an attack. The bases are also key focal points of Washington’s regional and global military presence. At the local level, the U.S. military presence has shaped the history, the territory, as well as the economic, social and cultural profile of Okinawa over the last sixty years. It also causes significant disturbances to local communities. The management of these issues by the central government in Tokyo raises the question of its relationships with geographical and cultural fringe regions like Okinawa” (p. 2).

The techniques discussed in this section will focus primarily on how charges of rape and sexual assault are dealt with differently by the various systems of justice that fall under two of the three levels of governance mentioned by Pajon (2010): the US military legal apparatus and investigative procedures, on one hand, and the Japanese police and criminal court system on the other, as it functions in Okinawa. Each operates under its own logic (discipline and order under the US military legal system vs. substantive justice by the local Okinawan criminal court under the Japanese legal system), within a particular spatiotemporal context or *chronotope*, and with a specific purpose and goal (discipline vs. justice). The analysis also examines how these cases have been governed differently across time and within different temporalities, from the period of occupation and administration through post-reversion as Okinawan and mainland Japan became strategic partners to the US.

given or forced upon women in dire circumstances, to avoid the label of rape or sexual assault. However, because of the focus of this particular study – that it, jurisdiction practices for the crime of rape and sexual assault – I have largely left this discussion to others. See Tanaka 2002, Obermiller 2006, Bowen Francis 1999, Inoue 2007, Roehner 2009.

The outcomes under the different legal regimes and across various time periods seem to produce varying experiences of security aligning with the major aims or goals of each legal system and the geopolitical conditions of the moment in which the crime occurred. This section also discusses the influence of affect on the outcome of the cases under study. Certain cases of sexual assault by US service personnel on the island have precipitated mass demonstrations by civilians, calls for the removal of the US military from Okinawa and for the perpetrators to face the local civil justice system, while other cases seem to have received little attention. The influence of affect and public outrage on cases and in particular the sentencing of perpetrators who are found guilty is important, as some note that in the heavily covered 1995 rape case of a 12-year old Okinawan girl by three US Marines, the sentences they received upon being found guilty were longer than what many Okinawan citizens would have received for a similar crime (Pollack 1996). As such, the influence of affect as well as geopolitics must be taken into consideration when assessing the outcomes of the various mechanisms of justice in these cases.

With these variables in mind, one would expect that each system governs instances of rape and sexual assault within its jurisdiction differently to fulfill particular goals and aims of the legal structures, all of which is strongly influenced by geopolitical conditions and relative levels of political, economic, military, and ideological power within the so-called Okinawa-Japan-US triangle (Cooley 2012). While the main focus of this analysis section is on the techniques of governance used *after* an incident occurs, I do include a brief discussion on techniques of governance to prevent such crimes, including the introduction of curfews for US military personnel, efforts by the local Okinawan government to limit the presence and expansion of US military bases, and political movements to remove US military bases and installations from the island altogether.

Cases of Sexual Assault 1945 -1951

“Okinawa has become a dumping ground for Army misfits and rejects from more comfortable posts. In the six months ending last September, U.S. soldiers committed an appalling number of crimes – 29 murders, 18 rape cases, 16 robberies, 33 assaults” – Article by Frank Gibney from *Time* magazine, “Forgotten Island” November 28, 1949.

Within the first month of the arrival of US troops to Okinawa in 1945 during the military assault on Okinawa, which quickly became an occupation force, cases of rape and sexual assault of local Okinawans by US military personnel were documented (Wright 2008). One of the first actions of the Japanese government following its defeat and surrender to the Allied Forces had been the creation of the “Recreation and Amusement Association (RAA),” for the purpose of providing sexual services to the occupying armies and thereby supposedly “protecting” other women from sexual violence (Burns 2005, Mackie and Tanji 2015). However, this practice was discontinued soon after the end of World War II due to pressure from the Allied countries who viewed this practice as not being in line with their ideology (Tanaka 2002). As the occupying force on the island, the US military held full jurisdictional authority over the territory and people following the surrender of Japanese forces after the Battle of Okinawa and later the full surrender of Japan to the Allied Forces at the end of World War II. During the early years of the occupation, a number of rapes and sexual assaults by US military personnel against local civilians were documented (Fisch 1987, Yuki 1995, Fujime, 1997, Chalmers 1999, Obermiller 2006, Svoboda 2009). Due to the sensitive nature of the crimes themselves and Okinawan civilians’ hesitancy to report the crimes because of the fear of retribution as well as cultural

norms prohibiting the reporting of such events³⁴, the numbers as reported by various sources are likely much lower than the actual number that occurred. However, from comments and statements made by military officials and personnel on the island at that time as well as personal accounts of Okinawan civilians who lived through the occupation period, we can surmise that these events occurred with some frequency while the successful prosecution and punishment of the crimes was perhaps inconsistent and not without serious concerns of racial bias and scapegoating³⁵ (Fisch 1987, Obermiller 2006, Svoboda 2009).

As instances of rape and sexual assault of civilians by US military personnel began to occur almost immediately following the arrival of US military personnel in Okinawa, the prevalence of such crimes was significant enough to warrant the attention of General Wallace, the Commanding General of the island, who in early May of 1945 advertised the death penalty for offenders “in a vain attempt to curb the instances of rape” (Fisch 1987, p. 82). Not more than one week following this advertisement, two soldiers from the 293rd Port Company were arrested for attempting to rape three Okinawan women (Fisch 1987, p. 82). In November of that same year, an Okinawan policeman was shot and killed by one of three US military personnel who were being sought at the time by civilian and military police for the abduction of an Okinawan girl (Fisch 1987). Differing statistics and numbers of cases of rape and sexual assault during the

³⁴ As noted by Obermiller (2006) of the reported numbers “These accounts, however, represent just a fraction of the sexual crimes committed because even more than other categories of violent crimes, sexual assaults were vastly underreported. One reason stems from the stigma women have historically encountered: the burden of chastity has been primarily borne by women, hence rape has often been perceived as a woman’s fault. Women, not surprisingly, were reluctant to come forward since ‘justice’ was rarely achieved. Adding to this stigma was the particular Confucian notion that women had the sole responsibility for protecting their chastity, hence reporting such crimes would bring shame upon the entire family” (p. 184).

³⁵ Often black troops were accused of committing the majority of the crimes attributed to US military personnel in Okinawa, both by Okinawan citizens as well as some individuals in the military, as noted by Fisch (1987), Obermiller (2006), and Svoboda (2009).

years between 1945 and 1951 can be found in the research covering this time period. Some of the discrepancies or variance in the number of crimes can be attributed to documents regarding US military activities during these years only recently becoming declassified, while some of the variance is related to the source of documentary evidence as some researchers cite military records and while others cite Okinawan police records (Caron No Date, Obermiller 2006).

For example, David John Obermiller states that between 1945 and 1950 “nearly 110 sexual assaults were reported” of which many of the assaults were committed by more than one individual (Obermiller 2006, p.179). Published findings by Tengan Morio have demonstrated that of these 110 cases, 332 occupation personnel were involved. As noted by Obermiller of Morio’s findings “[o]ne such case occurred in Shuri on March 14, 1947, when a thirty-six year old woman was raped by six American soldiers” (Morio 1999 as quoted by Obermiller 2006, p. 181). Cathleen Caron cites Okinawan police records that demonstrate between 1945 and 1950, there were 278 reported rapes by US servicemen, including the rape of a 9-month old girl in 1949 (Caron, No Date). In 2002, the non-profit group “Okinawa Women Against Military Violence” published a document that records the number of rapes between 1945 and 1952 by year as: 23, 41, 37, 17, 18, 15, 10, and 6, using research from local police records for that time period (Roehner 2009, p. 284)³⁶. Curiously, throughout the majority of the handful of studies that consider these cases within the early occupation years, a discussion of the courts-martial and sentences, or lack thereof, handed down by the military for these crimes is largely absent. As noted by retired Colonel Ann Wright, in Okinawa between the years 1945 and 1947, 107 cases of

³⁶ Reports of rape and sexual assault of Japanese women and girls by US forces was not unique to Okinawa. As noted by Fujime (1997), police statistics indicated per year reported rape cases by US personnel are as follows: 1946: 30 cases, 1947: 283 cases, 1948: 265 cases and in 1949 there were 312 cases reported. Similarly, as noted by Yuki Tanaka (1995) in the first 10 days following the occupation of Japan by US forces, 1,336 cases of rape were reported in the prefectures near the port of Tokyo.

rape or sexual assault were reported, thirty cases in 1945³⁷, 40 in 1946, and 37 in 1947. However, the first conviction of a US military soldier for rape did not occur until 1948 (Wright 2008). However, it should be noted that even in cases where a court-martial did occur and a there was a conviction and sentence handed down, these were not always carried out. In one case, as discussed by Tanaka (2002), that took place near Hiroshima in 1946 a young Japanese woman was raped by two Australian occupation soldiers. At the court-martial that followed, one of the accused soldiers was found guilty and sentenced to ten years of penal servitude and the court's decision was forwarded to Australia for confirmation. However, sometime later the documents pertaining to the sentencing and conviction were returned "marked 'Conviction quashed because of insufficient evidence'" (Tanaka 2002, p. 127). Though this is but one case, it is telling that even in crimes where there were multiple witnesses and convictions were handed down, justice was sometimes overturned or circumvented.

The general lack of recorded courts-martial, convictions, and potential punishments or sentences handed down for these crimes prior to 1948 might explain the lack of discussion of these accounts, as well as the brazen nature of some of the incidents³⁸. However, currently we can only make inferences based on partial and incomplete data, as Theresa Svoboda (2009) and Bertrand Roehner (2009) have both noted the surprising lack of data regarding the number of

³⁷ A report by the US military confirmed that between December 10, 1945 and May 24, 1946, 1754 misdemeanor cases were investigated by the US Fleet's 9th Military Battalion, of which 30 cases were rape or attempted rape of Okinawan civilians (McLauchlan 2014, p.364)

³⁸ As noted by Obermiller (2006) instances include the abduction of a young girl by multiple personnel at 10 am from the village of Funakoshi. The same group then shot and killed one of the seven civilian police officers that were in pursuit. The abductors were soon arrested by military police that had come to reinforce the civilian police, however, the punishments handed down by the US military are unknown.

rapes in occupied Japan by US servicemen³⁹. According to Svoboda's in-depth research:

“[r]ecorded courts-martial for rape during the occupation are few. The Judge Advocate General's Board of Review for the year 1946, when the R.A.A. closed, shows only 6 courts-martial. The Return of General Prisoners from the 8th Army stockades in Tokyo, where all GI prisoners were incarcerated prior to being returned to the U.S., lists 6 soldiers sentenced for rape during 1946. The Index to the Board of Review Opinions of the Branch Office of the JAG (1942-1949) shows only two courts-martial listed during the same period” (2009, no page#).

In part, the missing records may be attributed to the underfunding of the National Archives which can make older records more difficult to locate; the 1973 fire at the National Archives which could have possibly destroyed some of the records; and some of the records are likely still classified (Obermiller 2006, Svoboda 2009, Roehner 2009). The reason for these records remaining classified, as noted by Svoboda, is that there is perhaps a racial and a political element involved. She states:

“[t]he US government, with Japanese collaboration, has suppressed important information about crime and punishment during the occupation: it has concealed the numbers of rapes and the identity of the perpetrators; it has concealed the prosecutions, arrests and executions for rape and other crimes. There is reason to believe that the information is not only politically charged in terms of the US-Japan relationship, but that it is racially charged. Specifically, the extreme punishment of blacks charged with rape—in several cases including execution—is a reminder of the Jim Crow justice of an earlier era” (Svoboda 2009, no page #).

The executions mentioned here were of black soldiers tried and convicted of rape on the main islands of Japan in the months following the end of WWII. There are no records of similar punishments of soldiers in Okinawa, though the threat of such punishment was publicly issued.

³⁹ Exhaustive research by Yuri Tanaka (2002) demonstrates the frequency of rapes and sexual assaults in the early years of occupation in the main islands of Japan by both American and Australian soldiers (see Tanaka Chapter 5: Sexual Violence committed by the Allied occupation forces against Japanese women: 1945 -1946), though she notes these reports are also incomplete. Data regarding rape and sexual assault of civilians that took place in Okinawa, from what is noted in her research, is even sparser than for the main islands of Japan.

To be sure, there was racial bias in who was generally accused of rape and sexual assault in Okinawa; overwhelmingly these crimes were attributed to black US troops, though there is no concrete evidence to substantiate these claims (Fisch 1987, Obermiller 2006). While it is difficult to understand how such crimes could go largely unpunished or underpunished, it is worth looking at the material conditions of the island and the US military during this period as well as geopolitical conditions and the focus of security at this time as influencing factors.

Immediately following the end of World War II, the Allied Forces had a number of immediate tasks at hand – securing the areas that were previously under the control of the Axis Powers, liberating prisoners of war across the various theatres, as well as treating the wounded of their own ranks and survivors of concentration camps in the European theatre. During this period, US strategic concerns in Europe were given first priority, with mainland Japan following. Concern for the Ryukyu Islands largely diminished by July 1946 when the islands were placed under the Command of General MacArthur as head of the Far East Command (FEC) and placed in the last position on the FEC’s command hierarchy (Obermiller 2006). The FEC at this time was largely underfunded and General MacArthur often did not receive adequate material support for the occupation of Japan and its territories. The Ryukyu Islands, including Okinawa, suffered even more neglect than mainland Japan, as they possessed “almost no indigenous bureaucracy to assist in the occupation” (Obermiller 2006, p. 162). Added to the already dismal institutional conditions and general lack of material support from the US government, over 90% of the island had been destroyed during the Battle of Okinawa and those citizens that survived remained in abject poverty (Fisch 1987, Obermiller 2006, Inoue 2007, Roehner 2009). Agricultural land had been heavily damaged in the battle, many areas were now being used as military installations and the island had no industry to speak of, thus was fully reliant on US aid for food, housing,

clothing and medical needs (Fisch 1987, Obermiller 2006, Roehner 2009).

The lack of material support, the demobilization of the original Navy civilian affairs team and the replacement of many of the administrative support members with individuals deemed subpar, or a “sorry crew” as noted by Navy Lt. Commander James Caldwell, combined with negative perceptions of Okinawans by high level personnel in the Ryukyus Command structure⁴⁰ (RYCOM) may explain the lack of courts-martial and other legal practices to curb the instances of rape and sexual violence against Okinawans beyond threats of capital punishment printed in the local military newspaper (Obermiller 2006). From 1946 until 1949, the Ryukyus, including Okinawa, suffered “neglect, indifference, and incompetence at all levels of the U.S. military bureaucracy...received little material support to repair the war-devastated island, incompetent or indifferent military officers, and the worst performing units or units with history of discipline problems...this ‘dark age’ was replete with lawlessness, uncertainty, fear and crushing poverty” (Obermiller 2006, p. 158). I include this discussion of the material and institutional conditions of this period not to excuse the lack of courts-martial for the offenses committed by US military and civilian personnel during this time period, but to further the discussion of these cases within the objectives of this chapter.

During the early years of the US military occupation of Okinawa, the general neglect of the island and Okinawans, is informative in relation to understanding the focus and scope of the US-Japan Security Project. That is, the focus during this time remained on rebuilding and administering the former Axis territories in Europe now under Allied control, and in establishing a new constitution and democratic government on the main islands of Japan – replacing the old

⁴⁰ As noted by Obermiller (2006) Brigadier General William Crist, Deputy Commander for RYCOM, stated, “we have no intention of playing Santa Claus for the residents of the occupied territory” (p. 162).

system of Imperial rule. Under the Ryukyu command or RYCOM structure, Okinawa was governed directly by the United States military, who, consequently, had full jurisdictional authority over any case involving US military or civilian personnel under this arrangement. The geopolitical conditions of this time led to an overall lack of institutional support towards systematic courts-martial and sentencing of personnel for offenses of sexual assault and rape against Okinawan civilians by US military personnel, as Okinawa was largely seen as a burden and would not be strategically valuable again until the start of the Korean War in 1950. The legal techniques and practices used by RYCOM during this period are fraught with violations of the civil liberties of Okinawan civilians as noted by Obermiller (2006). Illegal searches and seizures by US Military Police of Okinawans was common, and sexual violence was prevalent enough that RYCOM required American women on the island to carry a sidearm for their personal protection not from “the poor docile natives – but to protect from our own troops” (Paul Skuse, no date indicated as quoted by Obermiller 2006, p. 182). Incidents where US military personnel entered villages and took young girls from their homes at gunpoint, who then later returned with their clothes torn off, were frequent enough that villages developed a warning system during this period⁴¹. If a US soldier approached a village, a bell would be rung in a village to alert the women and girls. As noted by Tanaka (2002) and Obermiller (2006) these warning bells were used primarily so that the young girls of the village would go into hiding until the soldiers had left to avoid being assaulted (Tanaka 2002, p. 112).

The seven years of occupation in Okinawa was likely also affected by the fact that during this time period, conduct of US military personnel, courts-martial, and sentencing was still

⁴¹ Tanaka (2002) While some girls did return after these attacks, some were killed and as noted by Tanaka, the perpetrators were never caught (p. 112).

governed by the Articles of War, as the UCMJ would not be operational until 1951. As such, as noted by Svoboda, “The decision of whether to report a rape, and whether the offense will come to trial, is made by military commanders who retain enormous discretion, particularly in an investigation’s early stages, such as the preliminary inquiry. If an officer decides that reporting a rape would be detrimental to military objectives, he may not report it” (Svoboda 2009, no page #). Unfortunately, due to the lack of courts-martial records, and the fact that there would be no record of such pre-trial decisions, we do not know how often decisions not to prosecute were made beyond the reports that were made to the Okinawan police, which still likely only represent a fraction of the actual cases.

Cases of Sexual Assault 1952-1972

“Most of the 100 or so U.S. installations still on Japanese soil are of marginal value, but we cling to them. The huge buildup of Okinawa into a nuclear-weaponed Gibraltar is an example of the development of the U.S. Far Eastern security policy with scant regard to the people it was supposed to secure” Frank Gibney October 21, 1969 in *Look Magazine* as quoted by Chalmers Johnson 1999, p.109

Following the successful passing of the 1951 San Francisco Peace Treaty, the 1951 US-Japan Mutual Security Treaty, and the 1952 Administrative Agreement between Japan and the United States, the conditions of these Treaties and Agreements stipulated that while Japan regained its sovereignty from the United States, Okinawa remained under the direct administration and control of the US military. The rather odd nature of this political and administrative situation between the US, Japan, and Okinawa can be attributed to the disagreement between the US State Department and the US military over whether to fully annex Okinawa or return it to full Japanese sovereign control following the end of the US occupation of the Japanese mainland. Similar “triangular politics” can be found in the Azores between the United States, Portugal and the Azoreans. See Cooley’s comparative discussion of these two

cases of triangular politics between the US military, the mainland government, and the island host (Cooley 2008, p. 137-174). The availability of records and documentation of courts-martial and other legal practices is generally sparse during the administration period of Okinawa. What is known, at least from studies and records available in English, is that during this period the US military ran a campaign to restore “Ryukyu pride and culture,”⁴² introducing numerous economic, political, and cultural projects throughout the 1950s. The task of governing the island and its citizens during this time was given to the United States Civil Administration of the Ryukyu Islands (USCAR), formally established in December of 1950 (Inoue 2007). USCAR, under this charge, established the central bank of Okinawa, Bank of the Ryukyus, as well as the Government of the Ryukyu Islands (GRI) in 1952, which was completely run by Okinawans themselves, though the indigenous government was ultimately required to obey the directives of USCAR (Inoue 2007).

During the administration period (1952-1972), the island experienced the rapid development of military installations and its overall infrastructure, and Okinawa and the surrounding islands became an important forward stationing base for both the Korean War (1950-1953) and the Vietnam War (1955-1975). Crimes against local civilians by US military personnel continued throughout this period, though it is difficult to say whether or not the frequency increased or diminished in comparison to the occupation period, as courts-martial records during this time are sparse (many are likely still classified (Svoboda 2009, Roehner 2009)) and the US military administration government during this period failed to keep accurate

⁴² Interestingly, the term “Ryukyu” was the name given the inhabitants of the island of Okinawa and the surrounding smaller islands by the Sui dynasty in China in the 7th century, whereas “Okinawa” was the name given to the island by mainland Japan in the 8th century. The promotion of the term “Ryukyu” over “Okinawa” by the USCAR was a subtle manipulation of the identity of the peoples of the region – strengthening the ties to China while seeking to weaken those to Japan (Inoue 2007).

records of crimes committed by US personnel against local civilians (Mercer 1997). However, a few high-profile incidents do provide a window into the shifting practices towards greater accountability and a more systematic process of adjudication for these crimes within the US military court-martial system during this period.

On September 4, 1955, a 6-year old Okinawan girl named Yumiko Nagayama was found raped and murdered in a rural area. On December 6 of that same year, 31 year-old Sgt. Isaac J. Hurt was convicted of the rape and murder after an 11-day long court-martial (Obermiller 2006). The 11-man jury came back with a guilty sentence in less than one hour (Chicago Tribune, 1955). Though initially sentenced to death, Hurt's sentence was reduced to 45 years "heavy labor servitude" upon his return to the United States. The RYCOM Compensation Examining Committee informed the family they would receive \$2000 in compensation, which is reportedly one eighth the amount originally claimed (Okinawa Times, 1995). The case resulted in large protests and outrage by Okinawan civilians who called for the case to be tried in a local, civilian court – a request that was repeatedly ignored and denied (Tanji 2007). With the escalation of the Vietnam War through the late 1950s and early 1960s, Okinawa was used "against its will, by the U.S. military as a base, now fully equipped with nuclear weapons, B-52s, and poison gas, for dispatch, logistics, and training for the Vietnam War" (Nakano 1969, p. 520-595; OPPMM 2001, p. 130-131, as quoted by Inoue 2007 p. 50). The island was also used for "R&R" (Rest and Recuperation) by US soldiers fighting in Vietnam. With the training activities as well as the constant movement of active troops, Okinawans "witnessed in their everyday life continued and increased base-related crimes and accidents" including sexual assaults and murders of Okinawan women by US military personnel (Inoue 2007, p. 50). A sampling of such crimes over an 11-year period includes the following. On October 28th, 1959, a 23-year old woman was strangled to

death on Center Street of Koza City; two days later, a 24-year old US serviceman was arrested for the crime and sentenced to three years in prison. On July 3rd, 1963, a 22-year-old woman was strangled to death; a 19-year old Marine confessed to the crime and was sentenced to 18 years imprisonment by court-martial. On January 24th, 1967 a 24-year-old woman was strangled to death by a 19 year-old US Marine, who was arrested and sentenced to 35 years hard labor by court-martial. On June 20th, 1968, a 23-year old woman was raped and injured on the beach of Ginoza Village by a member of the military police while on duty; no sentence or court-martial was recorded. On May 30, 1970, a 16-year old high school girl was assaulted and stabbed; a 22 year-old US serviceman was arrested by Koza Police and the US army and subsequently sentenced to three years in prison, a sentence criticized by villagers as “too light” (List of Crimes from an article in The Okinawa Times October 12, 1995, translated by the Okinawa Peace Network of Los Angeles).

The above list of crimes as outlined by The Okinawa Times notes that many of the women were strangled and killed with no mention of sexual violence. Because of the culturally sensitive nature of such events and the notion of honor and chastity in Confucian culture, it is likely that that these women were sexually assaulted prior to their deaths. As a recent article in the Japan Times notes, “[b]etween 1965 and 1975, at least 17 Okinawans were killed by Americans, and many more were robbed, raped or assaulted. Most at risk were those whose work brought them into daily contact with U.S. service members – maids, taxi drivers and bar workers” (Mitchell, 2015). Many of the women listed as victims of these strangulations were hostesses, servers, and maids. Though it is difficult, if not almost impossible, to view individual court-martial records for this time period, a recently released document by the Japanese Foreign Ministry provides some insight into the rates of crimes committed by US service personnel

between 1964 and 1968 and some statistical information on the rate of prosecution. According to the document, a total of 5,367 crimes were committed by US military personnel in Okinawa between 1964 and 1968. Of these crimes, 504 were considered violent, which includes murders, robberies, and rapes. Of the over 5,000 crimes, according to the report, only 33.6% resulted in prosecution (Ryukyu Shimpo, 2011; English translation by Megumi Chibana and Mark Ealey). This statistic is perhaps not surprising, considering that many lesser offenses likely were addressed through summary courts-martial and, as noted previously, often resulted in nonjudicial forms of punishment, and also considering that the convictions in summary courts martial are “not considered a federal conviction because such a court is not a criminal prosecution under the Sixth Amendment” (Morris 2010, p. 41).

According to a second confidential report, titled “Civil affairs related basic issues and Okinawa’s reversion” dated January 19, 1970, 973 crimes were committed in Okinawa in 1964. Additional statistics included in this report show that of those 973 crimes in 1964, 77 were considered violent crimes. Of the 77 violent crimes, 17 were incidents of rape, of which 52.9% of the cases were prosecuted. In 1966, according to the same report, another 17 rape cases were recorded, and again 52.9% resulted in prosecution (Ryukyu Shimpo, 2011; English translation by Megumi Chibana and Mark Ealey). Again, these statistics exclude any convictions in summary courts martial. With the increase in the relative importance of Okinawa to the US military’s constellation of bases for the security of the Asia-Pacific theater, especially the island’s strategic value as a forward stationing base for the Korean War as well as the Vietnam War later, it is perhaps not surprising that we see some improvement over time in the application of military laws for offenses committed by US troops against Okinawan civilians⁴³. In addition, following

⁴³ With the passage of the UCMJ and the increase in manpower and resources to Okinawa during the administration period, one might expect that military trials and courts-martial would also improve.

the passage and operationalization of the Uniform Code of Military Justice in 1951, prosecution rates for these crimes may have benefitted from the improved structure of the courts-martial system as well as the more well-defined nature of the level of court and sentencing recommendations for crimes such as sexual assault and rape.

However, it must also be noted that during this period of time, likely many more cases of rape and sexual assault occurred than the records indicate. Numerous studies have noted the increase in sexual violence and prostitution from the 1940s through the later years of the Vietnam War in Okinawa when the island was one of the main hubs for R&R for US troops involved in the combat forces (Morris 1968, Obermiller 2006, Enloe 2000, Angst 2001, Moon 2009). During the years where the Vietnam War saw an increase in US combat forces, hundreds of thousands of US troops moved through Okinawa for brief R&R stays, training, and other operational duties. With very brief stays on the island and the movement of thousands of troops between Okinawa, Naval ships, and transports to Vietnam, tracking, locating, and bringing perpetrators in to a court-martial was likely a difficult, if not often impossible, task for many reported incidents of rape and sexual assault. And so, much like the years prior to 1952, the numbers of reported cases of rape and sexual assault, as well as the cases tried and sentenced in the court-martial system are likely vastly underestimated.

With the changing relationship of the United States and Japan from that of a defeated and occupied territory to a strategic partner, the scope and focus of the security project and

However, I want to note one case in 1968 that involved a black US marine who was convicted of rape and given a 5-year sentence, who then asked for his case to be reopened upon filing affidavits from other Marines stating that the man was falsely accused. According to the report, the accused had been involved in a fight with a white Marine. Following the fight, three white Marines came up with a plot to falsely accuse Lance Corp. Ronald V. Johnson of rape, with the help of an Okinawan woman who was a mess hall employee. Affidavits from other Marines stated they knew of the plot and that the victim had told them the accused had never touched her (The New York Times, November 12, 1969). Johnson was cleared in a retrial in 1970 while serving an 8-year sentence (The New York Times, December 7, 1970).

agreement between the two nations began to shift in light of the geopolitical developments in the region - the Korean War in the early 1950s and the US involvement in the Vietnam War from the mid-1950s through the mid-1970s and changes in the power dynamics of East Asia and Eurasia. The focus shifted from securing and democratizing the former Imperial state to more broadly addressing the security concerns of the larger East Asian region – including protecting South Korea, Vietnam, and other East Asian nations from the looming Communist states of China and the Soviet Union. The scope of the project widened from securing Japan and the surrounding islands, to the much broader project of maintaining the security of the region. With the passage of the Mutual Security Treaty and the Administrative Agreement in 1951 and 1952, respectively, and the corresponding Status of Forces Agreement, mainland Japan regained its sovereignty as well as its ability to try and prosecute US military personnel who violated Japanese law.

Unfortunately, Okinawa did not benefit from this agreement until the reversion of the island to Japan in 1972 as Okinawa remained under US military administrative, legislative and judicial control until the official reversion of the island to Japan. The formal movement toward reversion was set in motion following numerous protests of Okinawans and reversion referenda crafted by Okinawan politicians over increased concerns of the local population regarding crimes and accidents by US personnel against local civilians as well as general outrage at the land procurement practices and military base development by the US military throughout much of the 1950s and 1960s (Chalmers 1999, Honma 2001, Hein and Selden 2003, Inoue 2007, Cooley 2008). However, though jurisdictional authority over crimes committed by US military personnel against Okinawan civilians remained with the US military during the administration period, much as it was during the occupation period of 1945-1951, there were significant changes. With the passage of the UCMJ, the jurisdictional *practices* themselves changed in light of the new

uniformity as prescribed by the code across all branches of the military. During the administration period, the creation of the U.S. Civilian Administration of the Ryukyu Islands (USCAR) and the indigenous Government of the Ryukyu Islands (GRI) created institutional structures and provided greater resources to address such crimes in a more consistent manner (Cooley 2008). Though it is noted that the GRI still held limited independence from the directives and priorities of USCAR, the ability for the local population to assemble and voice their opposition to particular practices by the US military also likely had an effect on higher profile cases, such as the aforementioned case of rape and murder of a young Okinawan girl in 1955. These geopolitical changes at the local, national, and international scales influenced the geolegal landscape and practices as demonstrated by small, yet not insignificant, numbers of rape and sexual assault cases which were tried and prosecuted by the US military, whereas prior to 1952 the island experienced a general lawlessness as noted by Obermiller and cases that were addressed were done so on an ad hoc basis with little overarching structure or logic beyond an effort to maintain discipline and order within the ranks (Obermiller 2006).

Cases of Sexual Assault 1972-Present

Cases and Legal Practices: 1972- 1995

In post-reversion Okinawa, cases of rape and sexual assault involving US personnel and local civilians have still occurred, though perhaps with less frequency⁴⁴. From accessible records,

⁴⁴ Though cases involving local civilians have occurred with less frequency, I want to note that intramilitary cases of rape and sexual assault are quite high as detailed by two investigative reports. In 1995, the *Dayton Daily News* released their findings of records received from a FOIA request that demonstrated that between 1988 and 1995, 169 courts-martial were held for sexual assault. Of these 169, nearly one-third of the courts-martial were special courts-martial where the maximum sentence allowed is 6-months in confinement. Overall, 107 of the 169 defendants were found guilty of sexual assault in general court-martials, but only half of those found guilty, 54, received sentences of more than 6-months.

we know that the number of arrests of SOFA personnel has declined since peaking in 1977 where there were 396 arrests on 342 crimes to 280 arrests in 1980, 74 in 1990, 67 in 2000, 38 in 2013, 27 in 2014. According to an investigative report by the Dayton Daily News completed in 1995, records obtained from a FOIA request demonstrated that between 1988 and 1995, there were six courts-martial for rape or sexual assault in which the victim was Japanese. In these cases, we see that although Japanese legal authorities should have had primary jurisdiction over these cases, for reasons unknown due to lack of details from the records, the six cases were retained by the US military. In these six cases of US personnel who were accused, three were found guilty and received sentences ranging from 5 to 10 years in prison (Carollo and Nesmith, 1995). However, the five-day long exposé also revealed that in 1988, a marine received a simple reprimand, a form of non-judicial punishment, for having "poor judgment" in the attempted rape of a 17-year old Okinawan girl (Carollo and Nesmith, 1995; Caron, No date). In recent years, the number of rape cases involving local national survivors has been relatively low. In 2014 there was only a single arrest for rape by US SOFA personnel, a case that was later dropped by Japanese prosecutors (Burke and Sumida, 2015). However, violent incidents still do occur, and as noted by Eric Robinson (2015), even one case is one too many – a sentiment echoed by Okinawans as such incidents, however infrequent, have continued to fuel anti-base opposition movements across the island.

In a separate report from the Associated Press published in 2014, though the number of cases of rape and sexual assault involving military personnel had overall increased, this trend was not seen in cases in Japan (most involving personnel in Okinawa). In cases between 2005 and 2013, 475 sexual assault allegations were recorded within the Navy and Marine Corps units, of which 116, or 24% ended up in courts-martial. In the analysis, it was found that the Marines were the most likely to serve jail time when found guilty in a court-martial, followed by the Navy, with the Air Force having the fewest number of cases, but also were the most lenient in punishments handed down (Guardian, 2014).

The reversion of Okinawa to Japan brought a great deal of change to the relationship between Okinawa and the US military. As part of the agreement between the United States and Japan, though the military bases would remain on the island and the US military would retain much of its authority and ability to use these areas as needed, the general terms of the 1960 Mutual Security Treaty and corresponding SOFA now applied to Okinawa, including the jurisdictional formulas as outlined in Article XVII (see pages 27-29 of this chapter) over crimes committed by US military personnel. This change was particularly welcomed by Okinawans as the three years between the signing of the Reversion Agreement in 1969 and its implementation in 1972 were some of the most politically volatile on the island. Many protests and demonstrations occurred between 1969-72, “many of them violent⁴⁵, to protest the terms of reversion and aspects of the U.S. military presence, especially the criminal jurisdictional procedures”(Cooley 2008, p. 149).

In the new geolegal landscape of post-reversion Okinawa, incidents of rape and sexual assault perpetrated by US military personnel against local civilians would now be under the primary jurisdiction of Okinawan authorities and the Japanese legal system. However, under the guidelines of the 1960 SOFA, though local authorities had primary jurisdiction over the case itself, access to the accused could be denied by the US military until formal charges were brought by Japanese legal authorities (Fukurai 2010). Article 17(5)(c) states, “[t]he custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged” (US-Japan SOFA 1960). In practice, this means that US military

⁴⁵ In December 1970, as noted by Cooley, following the U.S. military court’s acquittal of a U.S. officer of manslaughter, over 700 Okinawans rioted for over 6 hours, broke into Kadena airbase, and burned 73 vehicles owned by U.S personnel (Cooley 2008, p. 149).

authorities can retain potential suspects on military bases until a formal indictment is filed by Japanese or Okinawan prosecutors.

Perhaps shedding light on some of the jurisdiction practices are the recent discoveries of two secret bilateral agreements signed in 1953 and 1957 within which Japanese authorities agreed to renounce their primary right of jurisdiction in crimes committed by military personnel unless the case was of “of material importance to Japan” (Fukurai 2010, p. 119). Consequently, though provided greater jurisdictional authority over certain cases involving US military personnel following the reversion of Okinawa to Japan in the black letter of the law, in practice there were still significant impediments to Japanese and Okinawan authorities in accessing and bringing to trial US military personnel accused of rape and sexual assault.

The Rape of a Schoolgirl, 1995: A Renewed Discussion of the Meaning of “Sympathetic Consideration” and Access to US Military Suspects pre-Indictment by Japanese Authorities

As previously noted, many cases in the 1980s were retained by the US military legal system. However, significant changes in these practices followed the widely publicized case involving the kidnapping and gang-rape of a 12-year-old Okinawan girl by three US marines in 1995. On September 5 of that year, three Marines in a rented vehicle, kidnapped a 12-year old Okinawan girl in the afternoon, bound her arms and legs with duct tape, brutally gang-raped the girl, and left her for dead on a nearby beach. The girl survived the attack and crawled to a local house for help (Angst 2003, Inoue 2007). The three Marines were arrested shortly thereafter by US military police and held in US custody. The Okinawa Prefectural Police made a formal request to the US military to turn over the suspects for questioning, a request that the US military refused, citing the US-Japan SOFA guidelines that required that until Japanese prosecutors

issued a formal indictment the US military was not legally obligated to turn the men over (SOFA 1960, Fukurai 2010). Following the formal filing of the indictment and transfer to Okinawan custody, the three Marines were tried in the District Court of Naha. All three Marines were convicted of rape and received sentences ranging from six and a half to seven years in a Japanese prison⁴⁶.

The public demonstrations and protests in Okinawa that occurred as a result of the incident reached levels not seen since the years following the reversion of Okinawa to Japan. The details of the case, the high level of outrage by Okinawans, and the callous response by one US military official shook the foundations of the US-Japan alliance and security project⁴⁷. As a consequence of the social and political fallout caused by the particularly violent details of the case, adjustments were agreed upon between the US and Japan regarding the indictment requirement of US personnel by Japanese authorities. The adjustment permitted that in cases that are particularly heinous or severe in nature, the US military could hand over suspects to the Japanese authorities before a formal indictment was issued as an instance of “sympathetic consideration” (Robinson 2015). However, as noted by Fukurai, “the ultimate decisions to turn over military suspects to the Japanese prosecutors still remained in the hands of the US military,

⁴⁶ Japanese prosecutors asked for sentences of 10 years but the court showed leniency in the sentencing as all of Marines were “young and showed regret” (Watanabe 1996, Fukurai 2010). This show of leniency is in line with Japanese legal practices when defendants show regret or apologize for their crimes as noted in the section within this study covering the Japanese criminal legal system. Also see Wagatsuma and Rosett (1986) *The Implications of Apology: Law and Culture in Japan and the United States*. *Law and Society Review*, 20: 461.

⁴⁷ While the trial was on-going and large scale protests on the island were occurring, U.S. Navy Admiral Richard C. Macke, the commander of all U.S. forces in the Pacific theatre stated at a press conference at Pearl Harbor [regarding the 1995 rape case] that “I think it was absolutely stupid. I have said several times: for the price they paid to rent the car [used in the crime], they could have had a girl [prostitute]” (Eisman 1996 as quoted by Fukurai 2010 p. 98). The admiral was forced into early retirement for his comment (Fukurai 2010).

not the Japanese authority because the SOFA, which outlines the extritorial agreement under which the US forces operate in Japan, had not been changed” (2010, p. 99). Furthermore, since 1996 the US military has yet to “effectively comply with Japanese requests for pre-indictment handover of their officers who allegedly commit heinous criminal acts” (Fukurai 2010, p. 99) as a specific definition for what constituted a “heinous crime” was never outlined in the agreement.

The fallout from the 1995 case also led to the creation of the Special Action Committee on Okinawa (SACO), which was operationalized in 1996. The goal of SACO was to “reduce the burden on the people of Okinawa and thereby strengthen the Japan-US alliance” (Ikeda, Kyuma, and Mondale 1996). The final SACO report outlined the purpose, aims, and goals of the committee towards addressing the base issues in Okinawa while maintaining the capabilities and readiness of the US forces in Japan to address security and force protection requirements (Ikeda, Kyuma, and Mondale 1996). Importantly, though the SACO report repeatedly called for improved measures in addressing base issues in Okinawa, the members of the Security Consultative committee (SCC) in accordance with the April 1996 Japan-US Joint Declaration on Security, “emphasized the importance of close consultation on the international situation, defense policies and military postures, bilateral policy coordination and efforts towards a more peaceful and stable security environment in the Asia-Pacific region” (Ikeda, Kyuma and Mondale 1996). The SCC further instructed the Security Sub-Committee to pursue the above outlined goals while addressing the Okinawa-related issues at the same time (Ikeda, Kyuma and Mondale 1996). With these adjustments, agreements, and committees, we can see that efforts have been made to address base-related crimes and the “burden” of the on-going US military presence in Okinawa as experienced by local civilians. However, as noted by the SACO report, it is clear that these efforts are always balanced against the effectiveness of the US military in

maintaining regional and international security. In examining the conditions for the creation of SACO and other minor adjustments to the legal practices under the SOFA guidelines we gain some insight into the balance between the security of local Okinawans and the broader security of the Asia-Pacific region.

Cases and Practices 1995 - 2016: Evolving Jurisdictional Practices Following the 1995 Case and the Pivot to Asia

A number of high-profile cases of rape and sexual assault in Okinawa have followed in the wake of the 1995 case, which has continued to strain the US-Japan Security Project and political alliance. Following the highly publicized 1995 rape case, the treatment of such events fundamentally changed in the decades following. The retention of jurisdiction by Japanese authorities over such cases was influenced by the political crisis ignited by the 1995 case but also because of changing nature of the relationship between the United States, Japan, and Okinawa. The rising affluence of Okinawans raised the political profile and power of the Okinawan government to pressure both the mainland Japanese government and the United States military. Furthermore, Japan's increased role as a financial and military ally to the United States allowed for greater Japanese and Okinawan authorities to resist US requests for jurisdiction waivers in cases that were deemed important to Japan and Okinawa. The decreasing stigmatization of rape victims in such cases has also played a role in changes of how such cases are handled -- more victims are willing to go to trial, the public is more supportive of the survivors of these crimes and the local police are more receptive to investigating such crimes, as will be highlighted in the following cases beginning with the 2001 case of Air Force Staff Sergeant Timothy Woodland.

In 2001 an Air Force Staff Sergeant, Timothy Woodland, was tried and convicted for

rape and sodomy of a 20-year old Okinawan woman⁴⁸. Sergeant Woodland was the first US soldier to be turned over to Japanese prosecutors prior to a formal indictment; a full five years after the sympathetic consideration agreement took effect. Following 30 hours of interrogation, Woodland was sentenced to 2 years and 8 months in prison by a Japanese judge (Fukurai 2010). In 2002, Major Michael Brown was given a one-year suspended sentence for the rape of a 40-year old Okinawan woman by a three-judge Okinawan panel. In 2005, a Japanese court found Armando Valdez guilty of sexually molesting a 10-year old Okinawan child and sentenced him to a four-year suspended sentence where as long as he commits no crimes during the four-year period, he will see no further jail time beyond the 18 months he served during the duration of the trial (Allen 2005a, Allen 2005b, Fukurai 2010). In 2008, a US Marine was arrested and accused for raping a 14-year old Okinawan girl. However, one month after his arrest, the Marine was released after Japanese prosecutors decided not to press charges after the victim/survivor decided not to pursue the case. As noted in an article by Chisa Fujioka, the chief prosecutor in the case was quoted as stating: “We’ve determined it isn’t appropriate to indict the suspect by applying charges...out of consideration for the victim’s feelings...The girl herself wants to be left in peace” (Fujioka 2008)⁴⁹. In 2013, two US sailors were tried and convicted in a Japanese court of violently raping and robbing an Okinawan woman outside of her apartment. The trial lasted two days, during which security footage that captured the entire attack was examined in detail. Prosecutors sought a 12-year sentence for one defendant and a 10-year sentence for the other

⁴⁹ It should be recognized that affect and community support can play important roles in the continued prosecution of cases. Though there is no direct evidence in this case of the girl being coerced or shamed into dropping the case, her age and the insinuation that charges were dropped because the survivor wanted to be “left alone” suggests a lack of support in moving forward. Cynthia Enloe outlines a case in 1993 that never went to trial following the apprehension of the assailant because “the girl was persuaded to drop charges when she realized the damage that a public trial would do to her ‘reputation’” (Enloe 2000).

defendant. Both men were sentenced to 9 years in a Japanese prison. In March 2016, a US sailor was arrested for raping a Japanese tourist he found sleeping in the hall of her hotel. The sailor pled guilty in a Naha District court on May 28, 2016. Final arguments are scheduled for June 27, and sentencing is scheduled for June or July of 2016 (Japan Times, 2016; Sumida, 2016). Finally, as of the writing of this chapter, protests involving tens of thousands of Okinawan citizens have been occurring across the island, calling for the closure of all military bases following the formal indictment and charges against the former US Marine and current US military contractor (the accused was previously a Marine, but after leaving the US military stayed on in Okinawa as a US military contractor) of the rape and murder of a Japanese woman in Okinawa. Though the accused has admitted to dumping the body of the woman in the woods, since mid-May he has invoked his right to silence (Yamamoto 2016).

Geopolitics of Security, the Influence of Crimes by US Military Personnel, and Jurisdictional Practices in Post-Reversion Okinawa

In the early years following the reversion of Okinawa to Japan, though primary jurisdiction over cases of rape and sexual assault of by US personnel of local civilians was held by Japan, from the records we have access to, it appears that many of these cases were retained by the US military, likely granted through waivers of jurisdiction obtained by the US military. However, the trend over the last 20 years, following the 1995 case, is that Okinawan and Japanese authorities have largely retained their primary jurisdiction over such cases and the practices between the US military and local authorities seem to have shifted as well. Though pre-indictment access to US military personnel accused of crimes still does not happen with great frequency, it does happen, especially in cases of rape and murder (Fukurai 2010). The reasons for these shifting practices, and the retention of jurisdiction by Japanese and Okinawan authorities, are both geopolitical and practical in nature. Taking changing geopolitical conditions

into consideration first, the end of the Cold War “prompted both the United States and its SOFA allies to rethink their national security arrangements in light of the diminished threat of armed conflict and Communist expansion from the former ‘Evil Empire’” thus, SOFA allies (including Japan) were less likely to “view the presence of large numbers of U.S. troops as a necessity, and more likely to see them as infringing on sovereignty” (Eichelman 2000, p. 26).

In this post-Cold War world, the United States did not hold as much bargaining power as it did immediately following World War II when most of the SOFA agreements were negotiated. No longer a decimated and defeated power, Japan was now a world class economic power with a substantial Self-Defense Force, “well equipped and adequate to defend their interests,” thus the US military’s predominant exercise of criminal jurisdiction over its military personnel was increasingly viewed as an affront to Japan’s and Okinawa’s sovereignty (Eichelman 2000, p. 20). This was especially true in Okinawa, where years of resentment from perceived colonialist practices and land seizures were still felt keenly by the local population. Repeated episodes of rape, as detailed previously, also put a strain on the relationship between Okinawa, mainland Japan, and the United States. Large-scale demonstrations and refusals by Okinawan political leaders to re-sign land-rent agreements with the US military, prompted tense negotiations between all three governments, at times threatening trade agreements, the security alliance, and other bilateral negotiations between the United States and Japan⁵⁰ (Sieg 2008, Chanlett-Avery et.

⁵⁰ As noted by a CRS Report for Congress (2008) “A series of high-level agreements to upgrade the U.S.-Japan alliance in 2005-2006 may be in jeopardy due to the changing political circumstances as well recent allegations that a U.S. Marine in Okinawa raped a young Japanese girl” (p. 1) and “The reduction of Marines on Okinawa seeks to quell the political controversy that has surrounded the presence of U.S. forces on the island for years. The recent charge that a U.S. Marine raped a young Japanese girl renewed public outcry against the bases that had existed since the 1995 rape of a Japanese schoolgirl by American servicemen” (p.9). From this report, we can note that these incidents are not taken lightly and are recognized as serious issues concerning the ongoing security alliance between the US and Japan (Chanlett-Avery et. al 2008).

al 2008). From personnel communications with JAG officers, it is clear that these national level political concerns do, at times, influence the legal practices and negotiations around cases involving US military personnel and local civilians. Finally, recent international geopolitical development in the Asia-Pacific theatre, the so-called “Pivot to Asia” has prompted placing a renewed value on military installations and security agreements with Japan, South Korea, and the Philippines. These changes at all geopolitical levels (local, national, and international) do seem to have indirect effects on the legal practices around the recent cases of rape and sexual assault of local civilians by US military personnel –such as the military’s increased willingness to hand over suspects before formal indictments have been filed and increased cooperation in investigations involving both the military and Okinawa Prefectural police (Fukurai 2010, Robinson 2015).

Regarding the practical adjustments that have influenced legal techniques and practices: recent changes in the Japanese legal system have potentially increased the democratization and transparency of trials – thus relieving some of the concerns regarding procedural fairness and the protection of the human rights of US military personnel. As outlined in detail by Hiroshi Fukurai (2010) the establishment in 2009 of two systems of lay adjudication, the Saiban-in Seido (a lay assessor system) and a new revised grand jury system, the Kensatsu Shinsakai (Prosecutorial Review Commissions, PRC), hold the “potential to democratize the Japanese judiciary by transforming the purely professional, inquisitorial structure into an equitable justice system with greater transparency and accountability” (Fukurai 2010, p. 100). Under the new system, Fukurai estimates that a sense of greater sense of accountability will be experienced by Okinawan civilians over cases involving US military personnel as Okinawan residents selected at random from local electoral rolls will be included on the judicial panel, thus promoting greater popular

participation (2010, p. 100). The Prosecutorial Review Commission, a revised grand jury system, would offer the potential to “ensure that military personnel who commit heinous crimes against Okinawans will be fairly indicted and duly prosecuted” (Fukurai 2010, p. 101). Though there still does exist cause for some concern regarding the pre-indictment treatment of US personnel in Japanese custody⁵¹, the introduction of these two new lay assessor systems give Okinawan citizens a greater voice in the adjudication of heinous crimes committed by US military personnel against Okinawans⁵² and provide greater transparency throughout the indictment and trial processes.

Discussion and Conclusion

“I remember walking into a large hall where the anti-base activists were meeting. A man pointed his finger at me as I entered – ‘You! You always only raise the violence against women issue. That’s not political. That’s not what the U.S. – Japanese Security Treaty is about!’ I just pointed my finger back at him and said, ‘You know only one-half of what security means if you don’t think military violence against women is part of this issue!’” – Suzuyo Takazato, prominent activist for women’s rights and an elected Okinawan official, as quoted by Cynthia Enloe (2000, p. 120).

The presence of the US military on the island of Okinawa has continuously been justified

⁵¹ As stated by Eichelman (2000) “In Japan, confession is considered good for the soul and plays an important part in the criminal justice system and in the rehabilitation of suspects. Thus, confessions are highly “encouraged”. The United States refusal to turn accused service members over to the Japanese until they are formally charged probably stems, in large part, from the fact that suspects can be detained for a total of twenty-three days without being formally charged. Throughout this time, the suspect is isolated from both family and legal counsel and subject to unrestricted police interrogation. During interrogation, a suspect may have to barter with investigators for "privileges" such as food, water, or bathroom visits. The ultimate purpose of the interrogation is to demand and obtain a confession; Japanese police and prosecutors rely on confessions instead of extrinsic evidence gathered through investigative skill.

⁵² The first instance of a US military serviceman being subject to a lay assessor trial with a jury consisting of three Okinawan civilians as lay judges and three professional judges took place on May 24, 2010 (Fukurai 2010).

through a discourse of security - anchored by the US –Japan Security Treaty. During the early period of occupation, the security project at hand was the new world order following the end of World War II, democratizing Japan, and protecting the newly pacifist nation from the regional powers of China and the Soviet Union and the spread of Communism. During the period of US military administration of Okinawa (1952 – 1972), the security project widened in scope to encompass the greater East Asian region through the use of the island as a forward stationing base during the Vietnam War and the fortification and base building on Okinawa in the face of the expanding reach of the Communist powers. In the post-reversion period the security project was firmly in the grip of the logic of the Cold War, which gave way to the growing global War on Terror following the collapse of the Soviet Union. In these current conditions, the US-Japan Security Project has expanded in scope yet again. Okinawa has continued to serve as an important base for the Gulf War, Desert Storm, and more currently in the efforts to combat terrorism at the global level, thus moving beyond the securitization of the East Asian region. The US is also supporting the further militarization of Japan and the inclusion of Japanese security personnel in missions beyond that of their own self-defense⁵³ (Enloe 2000). And the so-called “pivot to Asia” has once again reaffirmed the importance of Okinawa to the US military’s strategy in securing the Asia-Pacific region due to its strategic location in relation to China, Taiwan, Japan, South Korea, and the Philippines.

Outward Security Policy vs. Local Security Practices

⁵³ As noted by Enloe of the period following the upheaval of the 1995 rape case: “While U.S. personnel were being reduced in the Pacific as a whole, those based in Okinawa were set to play a more vital role in strategic planning for the new century: American forces stationed in Okinawa were to become responsible for a region stretching from North Korea to Somalia; Japan’s own Defense Force was due, under the new bilateral agreement, to play a more expansive role in supporting future U.S. military operations” (p. 121).

Throughout the tenure of the US military in Okinawa the focus has been on security beyond the borders of the island itself, evolving with the changing geopolitical conditions of the region. However, questions of the consequences of this outward facing security project on the security of the population of Okinawa itself have continued to be raised, not only by Okinawans themselves, but also increasingly by scholars and activists (see Okinawan Women Against Military Violence, Hook et al. 2015, DiFilippo 2015). The main reason for this concern is that the consequences of the outward facing security project have real material consequences on the security of those inside the borders of the island in the form of accidents and incidents committed by US military personnel, often with little consequence or justice for the victims and survivors (Hook et al. 2015). Though the security conditions of the region may have changed over the 70 years following the end of World War II, what remains consistent throughout the entirety of the US military's presence on Okinawa is the continued occurrence of accidents⁵⁴ and incidents involving US military and SOFA personnel that negatively affect the local citizens that live near the military bases.

One particularly influential category of crime that has impacted the security alliance between the US and Japan, as highlight by this chapter, is rape and sexual assault. How these crimes have been addressed, however, has changed over time as the jurisdictional practices and authority over these crimes has changed along the timeline of the US-Japan Security Project through various treaties and agreements. I argue that the most significant changes have occurred within the last thirty years, sparked by the widely publicized case in 1995 involving the gang-rape of a 12-year old Okinawan school girl by three Marines. Large-scale protests in Okinawa

⁵⁴ See Inoue 2007 for a full discussion of the impact of fatal accidents in Okinawa caused by the US military or US military personnel.

following the incident underscored a political movement to remove US military bases from the island entirely that has impacted the US-Japan alliance itself⁵⁵, gave rise to the Special Action Committee on Okinawa, and prompted the development of adjustments to pre-indictment practices between the US military and Okinawan/Japanese prosecutors in subsequent cases of a “heinous nature” such as rape and murder under the umbrella of “sympathetic consideration.” These adjustments, in conjunction with the developments in the new lay assessor trial system and the Prosecutorial Review Committee in the Japanese legal system, have created conditions whereby it is more likely that US military and SOFA personnel accused of the rape or sexual assault of an Okinawan or Japanese civilian will be prosecuted in a Japanese court of law⁵⁶. Parallel to these changes in legal techniques and practices, jurisdictional allocation, and pre-indictment access to the accused, it is worth noting significant changes in practices by the US military to prevent the occurrence of future incidents.

Pre-Incident Policies to Reduce the Occurrence of Crimes Against Okinawans

Following the perpetration of many of these crimes, the US military in Okinawa has instituted changes in the freedom of movement throughout the island of their personnel. Often this takes the form of tighter curfews, restriction of personnel from entering “entertainment districts”, or in some cases restricting the movement of US military and SOFA personnel solely to within the boundaries of the US military bases themselves. Following the 1995 rape case,

⁵⁵ As noted by Xu (2014) following the 1995 rape, then prime minister of Japan, Ryutaro Hashimoto asked President Clinton to return Futenma military base to Japanese control.

⁵⁶ In an informal discussion, it was brought to my attention that in some cases, the US military court-martial system does provide greater protections for survivors of sexual assault. These cases are often intramarital rape cases between US military personnel who are married to Okinawan civilians. Due to cultural practices, Okinawan authorities often decline to investigate or prosecute cases of rape within marriage; however, the US military often will take on such cases as the UCMJ contains a broader scope of authority to try them. Such cases do shine a light on areas in which the US military legal system can be beneficial to these survivors (Personal communication, May 2016).

restrictions were put into place and the sale of alcohol on US military bases was halted at 9 p.m. (Pollack, 1995). A midnight curfew and other restrictions were placed on all military bases in Okinawa for a month following the arrests of two US military and SOFA personnel for the rape and murder of a local Okinawan woman and the rape of a Japanese tourist (Kidd 2016). So-called “liberty policies” are often amended for cases other than rape and sexual assault such as drunk driving accidents and sometimes differ depending on the rank of the military personnel (Robson 2014). In 2014, following a period of earlier curfews, liberty was extended from 12 a.m. to 1 a.m. Though the earlier curfew of midnight was unpopular with US military personnel, it was “credited with cutting off-base incidents after two visiting U.S. sailors raped an Okinawan woman in October of 2012” (Robson 2014). Interestingly, in a story regarding the amendment of the liberty policy, a spokesman for the USFJ was quoted as stating, “The highest priority of the liberty policy is safeguarding host-nation relations while maximizing quality of life for service members and their families” (Robson 2014), which fails to directly mention the safety and security of local nationals⁵⁷, but instead focuses on safeguarding the “host-nation relations.”

Such policies also include an interesting temporal element, assuming that many of these incidents occur late at night and due to the presence of alcohol – as often the liberty restrictions include the stopping the sale of alcohol earlier in the evening or restricting personnel from drinking off-base (Robson 2014, Kidd 2016). While these restrictions are often credited for reducing off-base incidents, they fail to recognize that some of the high profile cases as discussed in this chapter occurred earlier in the day, or well before the earlier curfew of midnight. For instance, the 1995 case occurred in the late afternoon and early evening. However, what these

⁵⁷ Though the comment from the USFJ spokesman might reveal the real incentives for adjusting liberty policies, as noted by Robson (2014), before being granted liberty privileges the US military does require that personnel undergo sexual assault training and Japanese cultural training.

practices and shifting liberty policies do in practice is to institute interesting security governance practices in space and time, in effect creating new legal chronotopes. As many of the liberty policies require that US military personnel be either in their barracks or a hotel room between midnight and 5 a.m. while on liberty, the policy creates a legal chronotope or space/time where the bodily presence in spaces outside of these designated liberty areas is against policy and thus punishable by military regulations. These policies also change the geolegal landscape, though temporarily, where spaces normally accessible to military personnel, are now off-limits as these areas are seen as “dangerous” or more likely to provoke illegal activity during particular hours of the day⁵⁸.

Conclusion

The entire 71-year tenure of the United States Military in Okinawa has been marred with the continual occurrence of accidents and incidents that have negatively affected the local Okinawan population. Though the continued justification of the military’s rather large footprint on the island has been in the stated interest of security, the significant number of both minor and heinous crimes experienced by Okinawans who are often considered outside the jurisdiction of their own justice system calls into question *whose* security are these forces tasked with protecting. In examining the entire history of the US military’s tenure in Okinawa, what is most interesting is how these jurisdictional formulas and applications of justice for cases of sexual assault and rape against local civilians has changed, often influenced by the changing

⁵⁸ While these policies may, in fact, reduce the number of incidents against local populations by restricting the movement of US military and SOFA personnel to their barracks or hotels during the early hours of the day, records of sexual assault and rape obtained by the an Associated Press FOIA request of NCIS records of courts-martial from 2006-2011 in Okinawa indicate that often intramilitary incidents of rape and sexual assault frequently occurred in barracks, hotel rooms, and off-base apartments. Consequently, this questions the effectiveness of preventing incidents, rather than shifting the occurrence of incidents between local civilians to other military personnel.

geopolitical situation of the region and the relative power dynamics within the triangular political arrangements between the Okinawan prefectural government, the national Japanese government, and the United States. Evidence of conditions in the early days of the US military occupation reflects a rather grim picture regarding the security experiences of local civilians in cases of rape and sexual assault, including those against American wives, daughters and female military personnel. Following the operationalization of the Uniform Code of Military Justice, the rebuilding of the island's infrastructure and government, and the development of the US military administration of the Ryukyus, while cases of rape and sexual assault did still continue to occur with alarming frequency, the application of courts-martial qualitatively changed from an ad hoc and inconsistent application aimed at maintain some semblance of order and discipline in the early occupation days to a more structured and uniform application. From what we know, prosecution rates hovered around 53% of those cases that were brought forward, which excludes those cases in which non-judicial forms of punishment were handed down such as forfeiture or pay or reduction in rank. Though we can only speculate on how any cases were not addressed, and we can remain critical that jurisdiction over these crimes remained firmly in the jurisdiction and power of the US military, qualitatively, I think we can assume there was some improvement in jurisdiction and governance practices of these crimes as compared to the early years of occupation.

The most substantial qualitative changes followed the reversion of Okinawa to Japan and the application of the 1960 SOFA to Okinawa, whereby local authorities regained sovereign control over those lands outside the borders of US military bases and received legal and jurisdictional authority over some offenses and crimes committed by US military personnel against their local nationals. It was during this time, as the relative political power and affluence

of Okinawans increased, that jurisdictional practices also changed – the secret agreements between the US and Japan over concurrent jurisdictional claims were challenged, revisions to the SOFA jurisdictional guidelines were called for in referenda, and Okinawan authorities were granted access military personnel prior to formal indictments in particularly heinous cases following the outcry over the 1995 rape case of a local school girl. Okinawa now stands poised to yet again be an important piece of the US military’s Asia-Pacific constellation of military bases in light of the pivot to Asia and the growing aggression of China in the South and East China Seas and the new 2015 US-Japan Defense Cooperation Guidelines that provide Japan an even greater and more even role in the defense and security of the Asia-Pacific region (Guidelines 2015, Singh, 2016). The changes in the US-Japan alliance, one that proves to be more equitable in Japan’s ability to provide for its own security as well as the security of the region, in conjunction with changes to Japan’s legal system and the inclusion of lay assessors alongside professional judges, implies that, qualitatively, the jurisdictional practices and governance of crimes of rape and sexual assault by US military personnel against local civilians will shift once more.

These qualitative changes in the application of jurisdiction and the structure of the court itself – with the inclusion of local civilians alongside profession judges – raises an interesting question regarding the security experiences of the US personnel who stand accused of crimes against the local population. How will these changes affect their treatment and sentencing when accused of such crimes? Often the justification of extending extraterritoriality over military personnel is housed under concern of protection against hostile courts or violations of their human rights – though so far cases under the new lay assessor system are seemingly fair to US defendants – surely these changes are of some concern to US military legal advocates (Fukurai

2010, Hook et al. 2015).

The central observation of this particular case study is that the outcomes under the different legal regimes (sole US military jurisdiction vs. shared, concurrent jurisdiction with Okinawan and Japanese authorities) across the various time periods (occupation, administration, and post-reversion) seem to produce varying experiences of security aligning with the major aims or goals of each legal system and the geopolitical conditions of the moment in which the crime occurred. Though I would argue that the security of the local populations living and working around the US military bases is still less of a priority within the state-centric and regional security policies of Japan and the United States (Hook et al. 2015), qualitatively, the jurisdictional practices and the governance of crimes of sexual assault and rape of local civilians by US military personnel has improved. Set within the wider project at hand, the Okinawa case demonstrates some consistency in the prioritization of regional and state-centric conceptions of security over that of the security of the local population, much like similar scalar security clashes in the Haiti case. So too, do we see the justification of the retention of jurisdictional authority housed within the discourse of the protection of the rights of the security personnel over the experience of justice and security for the survivors or victims of such crimes. And again, it is international attention, grassroots protests and political movements, and concern regarding geopolitical alliances that often push through improvements in jurisdictional practices and governance of such crimes. However, these improvements are much different in the case of Okinawa due to the nature of the agreement itself – as a bilateral treaty – as well as the changing nature of the relationship between the two powers and the triangular relationship between Japan, Okinawa, and the United States.

As the relationship of Japan to the United States evolved from the US viewing Japan as a

defeated enemy state to an economically and politically powerful ally, while Okinawa gained in affluence and political power in its own right, the ability of Okinawa to influence the United States through Japan qualitatively changed the governance practices over violent crimes. Haiti, as an economically and politically poor state with little to no legal infrastructure of its own –has little power to influence the legal practices over peacekeepers within its borders and, as the host to a UN mission, has little recourse to negotiate with the troop-contributing countries themselves. Within these geopolitical relationships and the ability to negotiate the conditions of the jurisdictional formulas within the SOFAs lies the most important aspect of understanding the potential security experiences of local civilians who come into contact with extraterritorially housed military personnel. With these cases in mind, the next case study examines a multilateral, reciprocal SOFA agreement negotiated between states of equal political power and similar legal histories to determine if these more equal relationships prove to provide more security for local populations around military bases.

Chapter 5: Sexual Assault and the NATO SOFA: How Reciprocity and Sub-Bilateral Agreements Create an Uneven Legal Geography

Abstract

The conclusion of World War II ushered in a new international geopolitical reality led by two opposing powers – the United States and the Soviet Union. This political reality, coupled with the vulnerable position of a heavily damaged Western Europe, drove the need for Western collective security that developed under the North Atlantic Treaty Organization (NATO). This collective security alliance resulted in the unprecedented practice of long-term stationing of American troops in the territories of other friendly states who were party to the treaty in peacetime. This third and final case study examines the NATO Status of Forces Agreement (SOFA) that was negotiated to establish the rights, duties, and immunities of these extraterritorially housed troops. The terms and jurisdictional formulas under the NATO SOFA apply to each member state equally as the SOFA is a reciprocal agreement. However, NATO host states have developed sub-bilateral supplemental agreements regarding criminal jurisdictional formulas and practices with sending states, interpreting and operationalizing the terms set out in the NATO SOFA differently both in space as well as over time. Thus, this final

case focuses on these supplemental agreements and the different jurisdictional interpretations and operationalized practices surrounding criminal jurisdiction over crimes of sexual violence perpetrated by United States NATO forces while stationed in three different NATO member states: the United Kingdom, Italy, and Germany.

Whereas the first case study, which examined the UN SOFA in Haiti following the 2011 earthquake, highlighted the spatial dissonance, marginalization of sexual violence survivors, and uneven legal geography as determined by the full retention of jurisdictional control by sending states under a multilateral, non-reciprocal SOFA over a relatively brief period of time; the second case study of the US-Japan SOFA in Okinawa instead highlighted the jurisdictional changes, legal practices, and the geolegal landscape in relation to crimes of sexual violence by US military personnel upon local civilians under a bilateral nonreciprocal agreement over the 71 years of the US military's presence in Okinawa as influenced by shifting geopolitical conditions at the local, national, and international level. The third and final case study of the NATO SOFA brings in elements of both of previous two case studies while highlighting the important differences present in a *reciprocal*, multilateral agreement.

Introduction

Much of Western Europe lay in ruins following the end of World War II. Having experienced two devastating wars within a 30-year period, continued peace and security remained a concern of many during the efforts to rebuild the infrastructure and economies of both the victors and the vanquished. The concern for peace and security was brought to the fore in Western Europe as tensions between the Soviet Union on one hand, and France, the UK, and the United States on the other, increased through disagreements over the future of the German state. Such tensions were magnified through a series of events in 1948 and 1949 including the

Soviet blockade against West Berlin (Fleck 2001b). Further concerns for security were influenced by the rise of Communism in the Soviet sphere of influence and the strength of the Communist party in Italy. In light of these events and the deteriorating geopolitical conditions in the region, the United States, Canada, and numerous Western European states began negotiating an agreement of collective defense, security, and cooperation. The end result was the North Atlantic Treaty, signed by the United States, Canada, Belgium, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, and the United Kingdom on April 4th, 1949. Following the initial creation of NATO, the organization has since expanded to include 26 countries, many of which were formally part of the Soviet-led Warsaw Pact. The new international political reality of Western collective security under the new North Atlantic Treaty Organization (NATO) resulted in what was, at the time, an unprecedented number of foreign troops housed extraterritorially within the territories of friendly nations in *peacetime* (Pagano 1992).

The majority of these troops were American forces stationed in other NATO countries, which precipitated the need for a new Status of Forces Agreement to outline the immunities, privileges, duties, and rights for these forces. New SOFAs were seen as a necessity as the original agreements negotiated during World War II were viewed as insufficient for the stationing of foreign forces in friendly territories in peacetime and provided too much immunity to foreign troops from local courts and jurisdictions (Fleck 2001a). Negotiated over a period of years following the signing of the North Atlantic Treaty, the final NATO Status of Forces Agreement (NATO SOFA) was signed in London by the original NATO parties on June 19th, 1951. Unique to the NATO SOFA is its reciprocal character “which underscores the equal position of the Member States” and “emphasizes the balanced nature of the provision on criminal

jurisdiction” (Voetelink 2015, p. 93). However, undermining the equitable and reciprocal jurisdictional formulas as determined by Article VII of the NATO SOFA are provisions included in the agreement that allow for member states to negotiate sub-bilateral agreements that dictate more specific terms of jurisdictional allocation and practices between the sending and receiving states. The effect that these “supplemental agreements” have on jurisdictional practices will be a central focus of this chapter as the sub-bilateral supplemental agreements between Member States regarding jurisdictional practices and the automatic granting of waivers by host States to sending States can and have produced arrangements that are practically synonymous with absolute immunity (but not necessarily impunity) by visiting forces (Voetelink 2015, p. 93-94). These supplemental agreements and, most importantly, the practices they produce, create an uneven legal geography of jurisdictional practices across those areas of Western Europe that house foreign NATO forces. This uneven legal geography produces not only variable experiences of security and justice for the survivors of the crimes perpetrated by individuals among these forces, but also variable experiences of security for the US service personnel accused of such crimes. Again, through the investigation of the actual cases, custody arrangements, and jurisdictional practices within this chapter, the complicated scalar arrangements and assemblages of security and violence come into focus both for survivors and perpetrators of sexual violence and rape.

Aims, Theory, and Methods

The overarching study at hand set out to assess the legal spaces constructed by three different Status of Forces Agreements and the jurisdictional practices as structured by the jurisdictional formulas under each Agreement regarding cases of sexual assault of local civilians

by SOF military personnel. Each of the three cases in this overall study was chosen specifically to meet the four goals outlined in the introductory chapter of this study: 1 - to examine the intersection or confluence of law, space, and power under different SOFAs; 2 - to critically examine jurisdiction in the construction of space, as a technology and as the 'how' of governance; 3 - to examine these cases through the lens of critical legal geographies, highlighting the ways in which power, authority, and law interact in creating spatialities of injustice and investigating the contingencies and constraints of spatial justice; and 4 - to illustrate the dynamic relationships between proximate and distant legal spaces created by these SOFAs with the objective of breaking down the traditional boundaries between the local/global, familial/state, and personal/political objects of study resulting in a more nuanced understanding of the varied experiences and practices of security under these agreements.

To this end, I began with an examination of the UN SOFA in Haiti, a multilateral, non-reciprocal SOFA. The jurisdictional formulas within this SOFA provide that sending states retain full jurisdictional authority over their troops while stationed in the territory of the host state. Under these conditions, Haitian civilians encountered numerous military contingents from a number of UN member states, bringing with them their own laws, jurisdictional authority, and legal practices in cases where crimes were committed by these military personnel against local civilians. The retention of jurisdiction by these sending states and the complete lack of authority by the host state, Haiti, over cases of sexual assault of civilians by military members of these forces often resulted in a removal or spatial dissonance of the spaces of justice from the spaces in which the violence occurred. More importantly, the retention of jurisdiction by the sending states resulted in the marginalization of victims of such crimes and in some cases provided for near impunity of the perpetrators, calling attention to the dynamic relationships between the

proximate and distant legal spaces created by this SOFA where these crimes are simultaneously local and global, personal and political.

The second case within this wider study focused on the evolving jurisdictional formulas throughout the US military's tenure in Okinawa, from the early days of occupation following World War II through the present day, with Japan becoming an important US ally. Here, the focus is not on how multiple sovereign authorities enact jurisdiction and laws differently within a host state, but rather how jurisdictional allocation and practices between two sovereign authorities can change over time, influenced by the changing relationship and the balance of power between the two states as well as being influenced by the evolving geopolitical conditions at multiple spatial scales (local, regional, international). Most importantly within this case is our ability to witness the evolution of jurisdictional allocation from exclusive jurisdiction held by the sending state (the US) over crimes of sexual assault by military personnel upon local civilians through to shared concurrent jurisdictional formulas whereby the host state (Okinawa/Japan) holds primary rights to such cases. Through this evolution we are able to see the impact of such a shift on *how* such cases are practiced and the spatialities of justice achieved.

Whereas the Haiti case study highlighted a complex and uneven legal geography created by a multilateral, non-reciprocal SOFA in a very brief window of time (four years), the Okinawan case study highlighted the jurisdictional changes and formulas of a single visiting military force in one territory over a significantly longer period of time (71 years). The Okinawa case study focused not on the dynamic relationship of proximate and distant legal spaces or the separation of the spaces of violence from the spaces of justice, as in the Haiti case. Instead, what the Okinawa case highlighted are the ways in which power, authority, and law interact in creating and challenging spatialities of injustice with the added variables of temporal scale and

affect. Significant to this study is the understanding that this bilateral, non-reciprocal case demonstrates that power, authority, and law are not static. From the changing relationship between the United States and Japan from the end of World War II into the present we see through the Okinawa case study that different legal techniques and practices, security governance, and the geolegal landscape are influenced by the changing and ever-shifting geopolitics at the local, national, and international scales.

The third and final case study of the NATO SOFA, examined here, holds key similarities to both the aforementioned cases as well as important differences. In terms of similarities, the UN SOFA and the NATO SOFA are both multilateral agreements designed to accommodate military personnel from numerous sending states into a foreign territory for prolonged periods of time. However, these two SOFAs differ in two ways: first, the UN SOFA's jurisdictional formulas allows for sending states to retain full jurisdiction over military personnel while in the host state, whereas in the NATO SOFA concurrent jurisdiction formulas exist for offenses that are present in the legal systems of both the sending and host state. Second, the UN SOFA is a non-reciprocal agreement, therefore only military personnel from sending states while in a host state enjoy the immunities, benefits, and legal status as outlined by the SOFA. The NATO SOFA, conversely, is a reciprocal agreement. For example, German troops housed extraterritorially in the Netherlands enjoy the same rights and immunities as Dutch troops would if housed extraterritorially in Germany.

As for the US-Japan SOFA, it too shares important similarities and differences with the NATO SOFA. Like the UN SOFA, the US-Japan SOFA differs from the NATO SOFA in that it is also a non-reciprocal agreement. Consequently, Japanese military personnel, if they were stationed in the United States or a US territory, would not benefit from the US-Japan SOFA. The

US-Japan SOFA also differs from both the UN SOFA and the NATO SOFA in that it is a *bilateral* agreement between two states, rather than a multilateral agreement. However, the US-Japan SOFA contains jurisdictional formulas that are very similar, if not almost identical, to the NATO SOFA, including concurrent jurisdictional allocation with primary and secondary rights over crimes that are included in the laws of both the receiving and sending state. Not only are the jurisdictional formulas of the US-Japan SOFA and the NATO SOFA practically identical, the history and character of the NATO SOFA is much more similar to the US-Japan SOFA than the UN SOFA and peacekeeping mission to Haiti⁵⁹.

The NATO SOFA was signed in 1951 by twelve original member states and ratified by those states throughout the following three years with much of the debate surrounding ratification centered on the criminal jurisdiction formulas over military personnel (Rowe 2001, Conderman 2001). In light of these concerns, some latitude was given to member states to form sub-bilateral agreements regarding the legal and jurisdictional status of troops so long as these agreements did not violate or contradict the basic tenets of the NATO SOFA (Pagano 1992, Rowe 2001). Similar to the US-Japan Security Treaty and SOFA, changes in the scope, character, and membership of NATO as well as geopolitical shifts and expansion of NATO missions outside of the defined Treaty area and the changing relationships between the members themselves have influenced the interpretations and practices of concurrent criminal jurisdiction over visiting forces.

Aims

⁵⁹ The NATO SOFA and the US-Japan SOFA have both been in existence for similar durations of time and the roots of both agreements can be found in World War II. Both Agreements have also shifted and evolved along with the changing geopolitical conditions from the end of World War II through the Cold War and into the current geopolitical climate which is more focused on issues in the Middle East and more broadly the “War on Terror.”

With the aforementioned similarities in mind, the aims of this final case study are: 1- to determine how the reciprocity of the NATO SOFA, which is not present in either the Haiti or Okinawa case, influences the jurisdictional practices of cases sexual assault by military personnel of civilians differently than from the previous two case studies; 2 – to determine how NATO member states have interpreted and operationalized the NATO SOFA criminal jurisdictional formulas differently through sub-bilateral supplementary agreements, thus creating an uneven legal geography of jurisdictional practices under one overarching agreement (SOFA); and 3 – to investigate how geopolitical relationships influence the practice of jurisdiction in light of these variable interpretations in the cases of rape and sexual assault to further explore conflicts in regional vs. individual security. With 26 member states and numerous other partnerships with regional bodies and non-member states, this chapter could easily be a dissertation unto itself. Thus, this case study is limited to investigating jurisdictional practices of crimes committed by US military personnel under NATO command in three member states: the United Kingdom, Italy, and Germany.

These member states were chosen as they represent three very different geopolitical relationships to the United States that existed at the time of the formation of NATO and the negotiations of the NATO SOFA – the United Kingdom was a World War II ally and original NATO member state, Italy was a enemy state turned ally prior to the end of the war and also was an original NATO member state, and Germany represents a defeated enemy and an occupied territory, which then became a NATO member years after the formation of NATO. The focus on US military personnel perpetrators is done to limit the variables – in this way comparison between the jurisdictional practices remains more consistent, though this in no way is a suggestion that US personnel are the only individuals who have perpetrated such crimes.

As with the US-Japan SOFA case study, a set of interrelated questions will be applied to the cases within this particular case study towards addressing the three aims listed above. These questions bring together theoretical and practical elements to open the door to linking legal practices and techniques with geographical theory through an empirical study of rapes committed by US servicemen under NATO command while stationed in the UK, Italy, and Germany. Throughout the analysis, attention will also be paid to the notion of security since, as with the prior two cases, this is the overwhelming justification for the continued stationing of US personnel in large numbers in bases throughout Western Europe. If the goal is security, what is security and at what scale or scales is it of greatest concern? If the main objective of stationing US troops throughout Western Europe is to maintain the security of Western Europe, but also the security of the region and other NATO member states and partners, exactly *whose* security, from whom or what, and through what means, are questions that seem to often go unasked (Luckham and Kirk, 2013). These questions are especially important as some have questioned the continued purpose of NATO, as many of the original conditions and security threats that underscored the need for such an organization are no longer present in the current geopolitical reality of 2016.

Theoretical Approach and Methods

The theoretical approach in this case, like the preceding two cases, is necessarily critical. While the first case of the UN SOFA in Haiti focused on spatial dissonance between spaces of violence and justice and the marginalization of victims due to this dissonance, which stemmed from a lack of jurisdictional authority from the host state, the second case centered in Okinawa demonstrated jurisdictional changes over time as influenced by geopolitical shifts and the scope of the US-Japan Security Project with increasing jurisdictional authority gained by Okinawa and Japan as the relationship between the US and Japan evolved from enemy to

essential ally. The NATO SOFA case study, as examined here, builds on the previous two cases by increasing the attention paid to the influence of geopolitical conditions and relative power relations between the host state and sending state(s) on the operationalization and practices of jurisdiction over foreign troops housed in friendly territory in times of peace. By doing so I aim to develop a better understanding of various manifestations of jurisdictional practices formed by the confluence of space, power, and law – as understood through an investigation of different legal interpretations of the jurisdictional practices as outlined in the concurrent criminal jurisdiction formulas in the NATO SOFA over crimes of sexual assault involving US NATO military personnel and local civilians under a reciprocal agreement. Methodologically, this final case study remains consistent with the two preceding studies as a qualitative, exploratory, and critical examination of the jurisdictional and disciplinary practices of actual cases of sexual assault perpetrated by United States NATO personnel against local civilians in Germany, the UK, and Italy. The following section provides an overview of the creation of both NATO and the NATO SOFA, important changes to the organization throughout its over 60 years in existence and the influence the NATO SOFA has had on other SOFAs. After this brief historical overview and contextual section, this case study will move into the examination of actual cases of sexual assault involving US military personnel in three NATO member states: the United Kingdom, Italy, and Germany.

The case analysis is limited to cases that have occurred since 1995. There are several reasons to limit the focus to the recent practices under the NATO SOFA. First, the ability to obtain reliable data from the early years following the ratification of the NATO SOFA has been largely unsuccessful and much of what is available prior to 1995 is unreliable. Second, comparing cases of sexual assault within each of the three NATO member states included within

this case study would be difficult to do adequately as the US military personnel present in each State has changed over time both in quantity and character making comparisons largely meaningless. Third, by limiting the case analysis to the time period after the end of the Cold War, comparison to both the recent cases present in Japan and those cases analyzed in Haiti is more manageable since all these events have occurred in an approximately similar time window.

Historical Background

Visiting Forces in World War I and World War II: Key Arguments and Negotiations Prior to the NATO SOFA

The North Atlantic Treaty Organization (NATO) represents one of the most important and enduring political and military alliances within our modern geopolitical system. The SOFA negotiated by the original NATO member states is equally important as it serves as a model for many current SOFAs due to its comprehensiveness. However, we cannot fully appreciate the formation of the NATO SOFA, especially regarding jurisdictional formulas over visiting forces, without a brief discussion of the origins of laws regarding visiting forces. While the “seeds of modern law related to the status of forces in the territory of another state were sown prior to WWI in the Supreme Court decisions of *Schooner Exchange v. McFadden*,” *Coleman v. Tennessee*, and *Tucker v. Alexandroff*⁶⁰ (Rowe 2001, p. 12; Pagano 1992), it is in WWI and

⁶⁰ *Schooner Exchange v. McFadden* 11 U.S. 16 (1812) is a Supreme Court case regarding jurisdictional claims over a visiting foreign naval vessel. In the case, an action was filed by American citizens in the US District Court who claimed to be former owners of a schooner named “Exchange,” which had allegedly been seized by the French government and converted into a warship (Pagano 1992). As the ship had docked in a US port of call, the former owners wanted to seize the ship and reclaim their rightful ownership. However, this claim was denied by the Supreme Court through a lack of US jurisdiction over the ship. As noted by Pagano (1992), in the *Schooner* case, “Chief Justice Marshall established the rule that although the jurisdiction of a nation within its own boundaries is absolute and only circumscribed by limits it so decides to place, a country is implied to waive the exercise of its jurisdiction when it allows

WWII that we find the most pertinent arguments and origins of the practices regarding the laws and agreements over disciplinary action and jurisdiction of visiting forces in regard to the NATO SOFA guidelines.

Under the conditions of World War I, troops of allied countries were often deployed and stationed in the territories of other friendly allies (most often UK and US forces in France), necessitating the development of legal arrangements, agreements, and laws regarding the status of the visiting forces. The laws during WWI in this regard were messy, and it was common for agreements to “exempt members of the visiting forces from the military courts of other allies for breaches of the local law in combat areas” (Rowe 2001, p. 12). More complex arrangements were necessary outside of the combat areas such as when US forces were stationed in the UK. Though an agreement was “proposed to give exclusive jurisdiction to US forces while in the UK” this agreement was never concluded due to the cessation of hostilities and the end of the war (Rowe 2001, p. 14). Though visiting forces during WWI were generally granted the right to maintain exclusive jurisdiction while in the territory of an ally in practice, this is not to say that concerns over the loss of territorial sovereignty by host states were not present (see Pagano 1992, Rowe 2001). However, the conditions of the war led to host states having little bargaining power to negotiate concurrent jurisdictional formulas, and for practical reasons exclusive jurisdiction by the sending state was often maintained, especially in combat areas (Rowe 2001).

foreign troops to pass through its boundaries. This implied consent is given by the country unless such country expressly conditions the deployment of such troops to certain terms” (p. 191). This decision was affirmed and expanded upon by *Coleman v. Tennessee* (1879) where jurisdictional immunity from host state prosecution applied not only to foreign troops passing through a nation but also to those permanently stationed in a host nation. Finally, in *Tucker v. Alexandroff* (1902) this jurisdictional immunity from host state prosecution was reaffirmed and in doing so recognized the importance of maintaining military discipline as the justification for such immunity (See Pagano 1992, p. 191-914 for further discussion and the relation of these cases to the law of the flag doctrine).

Throughout World War II, the negotiations and the patterns that status of foreign forces agreements began to take became more consistent. Many of the parliamentary discussions regarding ratification and the proposal of sub-bilateral agreements reflected several of the arguments and constitutional implications that took place throughout the development of the NATO SOFA. Though covered in more detail by Rowe (2001), briefly the most salient issue during the negotiations of the rights of visiting forces throughout the European theatre was the issue of exclusive jurisdiction granted to the sending state by host states. Following the law of the flag doctrine as confirmed by previous Supreme Court decisions including *Schooner* and *Tucker v. Alexandroff* (see footnote 1), the United States in entering World War II sought to retain full jurisdictional authority over their personnel. While some of the allied nations in World War II were concerned with what they saw as a potential issue where the military courts of another nation would supersede the authority of civil courts within their sovereign territory, the conditions of World War II were such that states like the UK and France were not in a position to effectively bargain otherwise⁶¹ (Baxter 1958, Rowe 2001). However, though these allied nations were not in a position to negotiate for shared jurisdiction, they did somewhat successfully argue and negotiate for reciprocity in the agreement such that British troops would benefit from the same immunity in the sovereign territories of the United States⁶². Though the debates and negotiations regarding the status of visiting forces during World War II occurred under significantly different conditions than those underlying the development of the NATO SOFA (a declared war vs. time of peace), it is these negotiations and agreements that laid the foundation

⁶¹ As noted by Rowe (2001), members of the UK parliament also noted that as the UK had also requested and negotiated a similar degree of immunity from local courts in France during World War I, this put them in a “poor debating position” when attempting to resist US efforts for the same arrangement (p. 16).

⁶² While reciprocity was initially requested by British MPs in 1942 during the original negotiations regarding the status of US forces in Britain, the answer by the United States would not come until 1944, where reciprocity was agreed to by the 78th Congress (See Rowe 2001, p. 17 footnote 33).

for the negotiations and parliamentary debates on the conditions and jurisdictional formulas of the NATO SOFA.

NATO and the NATO SOFA: Background and Development

As noted in the introduction to this final case study, the geopolitical conditions following the end of World War II prompted the development of a multilateral, cooperative organization of key Western European nations, the United States, and Canada aimed at maintaining the security of Western Europe from the perceived threat of the Soviet Union and the specter of Communism, more broadly. Signed on April 4, 1949 in Washington, D.C. by Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States, the North Atlantic Treaty set out the conditions and guidelines for the cooperation and collective defense of the organization members in Article 5:

“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually, and in concert with the other Parties, such action as is deemed necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area” (NATO 1949).

Following the signing of the Treaty and the creation of NATO, the European Allies estimated that they could field an estimated twelve active army divisions, whereas the perceived threat, the expansionist ambitions of the Soviet Union, had the forces to field 175 units (Lindley-French 2007). Thus, the continued defense of Western Europe necessitated the presence of a substantial number of US forces stationed long-term throughout the NATO area.

At the time of the signing of the North Atlantic Treaty, the buildup of US forces in the UK had already begun. However, the status of these forces was not determined under a formal treaty but under “informal and long-standing arrangements between the United States Air Force and the RAF for visits of goodwill and training purposes” (*Hansard* papers, 1948 as quoted by Rowe 2001, p. 19). By 1951 the number of US Air Force personnel stationed in the United Kingdom had increased to 15,000. Thus, as noted by Rowe (2001), “the unusual situation of large numbers of the members of a visiting force being present in the territory of another state during peacetime and with the consent of the host state, had therefore come about” (p. 19). It was clear under the geopolitical conditions of the Cold War era and the relative force strength of European NATO members versus that of the Soviet Union that the numbers of US personnel permanently stationed throughout Europe would only increase along with the movement of NATO member states troops throughout the North Atlantic Treaty area. However, following the end of World War II “a certain restiveness arose” in many of the states in which US forces were stationed, especially in regard to the exclusive jurisdiction the United States enjoyed under the original agreements negotiated during the War, as the reason for the initial grant of exclusive jurisdiction, World War II, had vanished (Baxter 1958, p. 73). As such, a new agreement outlining the status of such forces would need to be negotiated by the NATO member states.

Development, Negotiations, and Key Debates of the NATO SOFA

The NATO SOFA is unique in that it was the first SOFA to outline the status of visiting forces stationed extraterritorially in friendly states in peacetime for long durations (Pagano 1992, Rowe 2001). No previous agreement for visiting forces provided a precedent for such a situation.

Consequently, the terms for this particular SOFA needed to reflect this unique situation, provide for equal treatment among the numerous parties to the Treaty, and be as comprehensive as possible (Rowe 2001). To meet these rather unique conditions it was determined that rather than a series of bi-lateral agreements between the parties to the Treaty a multilateral agreement would “for ‘psychological’ reasons be the only answer and would ensure ‘equalization’ as between all sending and receiving states” (Lazareff 1971, Rowe 2001, p. 21).

Though the NATO SOFA provides a comprehensive document setting the status, rights, privileges, and immunities granted to NATO military personnel as visiting forces, the SOFA does provide latitude for sub-bilateral agreements to provide further detail to the status of visiting forces as long as the sub-bilateral agreement does not violate the guidelines of the NATO SOFA. As noted by Rowe (2001), in some countries supplementary legislation would be required in addition to the NATO SOFA “to give effect to those parts of an international agreement which related to the jurisdiction of the criminal and civil courts” including the rights of arrest and detention of visiting forces in a host state (p. 21). Over the many decades since the drafting and ratification of the SOFA by member states, the NATO SOFA has been “supplemented... by a multitude of specific implementing agreements, often on a bilateral basis, on specific matters, and an accumulated pattern of practices and understandings” (International Security Advisory Board 2015, p. 28).

These supplemental agreements play a prominent role within this particular case study as “the United States has entered into supplemental agreements under the NATO SOFA that are designed to create what is in effect a presumption the United States will be able to obtain jurisdiction in ‘concurrent jurisdiction’ situations” (International Security Advisory Board 2015, p. 28). That is, although the NATO SOFA stipulates that crimes of sexual assault by military

personnel against local civilians fall within the concurrent jurisdiction formula where the host state has primary rights to the case, the United States has in some cases negotiated sub-bilateral agreements bypassing this formula. Sometimes referred to as the “Netherlands formula” such a supplemental agreement with another NATO partner stipulates that the host state agrees “that in all cases, except those of ‘particular importance’ to it, it will automatically ‘waive back’ to the United States the primary jurisdiction that it could exercise over U.S. personnel” (International Security Advisory Board 2015, p. 19). Importantly to this study, these supplementary agreements, in effect, create *de facto* exclusive jurisdiction for US military personnel in certain NATO member states. However, as these agreements differ between member states, an uneven jurisdictional geography is created underneath an overarching set of jurisdictional formulas designed to create equality between all of the member states.

If the phrase “except those of ‘particular importance’” seems familiar, we see similar arguments and phrasing in the preceding chapter regarding the US-Japan SOFA as practiced in Okinawa. This is not a coincidence, as it has been noted just how influential the NATO SOFA has been on subsequent SOFA agreements, including the renegotiation of the 1952 US-Japan SOFA in 1960. Though concurrent jurisdiction formulas were absent in the original Administrative Agreement between the two States, Japanese authorities successfully argued for equal treatment in the 1960 SOFA concluded between the US and Japan, citing the jurisdictional formulas present in the NATO SOFA⁶³. As early as 1957, Edwin Schuck noted that “[i]t seems

⁶³ In the original Administrative Agreement between the United States and Japan, the United States was granted exclusive jurisdiction over US forces, their civil component, and their dependents. Japanese authorities prepared and submitted an amendment to the exclusive jurisdiction claim, requesting a revision as soon as possible. This request was realized in 1953, though the renegotiation of terms was not decided until 1957. See Honma (2001) pg. 413-415 for a more detailed discussion of the influence the NATO SOFA played in the renegotiation of terms between the United States and Japan from 1953-1960, specifically in regard to exclusive and concurrent jurisdiction formulas.

quite probable...that having been so widely accepted among NATO countries, the NATO SOFA will serve as a model for any future agreement to which the United States may become a party and which defines the legal status of troops stationed in the territory of a friendly State in peacetime” (Schuck 1957, p. 355-56). This probability has largely become reality in the vast majority of SOFAs negotiated after 1951⁶⁴ including the EU SOFA and the 1990 model UN SOFA, though in the UN SOFA the concurrent jurisdictional formulas over military forces are notably absent and instead we see sending states maintaining full jurisdiction over their personnel, as seen in the UN-Haiti case study.

The adoption of many of the guidelines and Articles in the NATO SOFA by so many other multilateral and bilateral agreements, especially those Articles which outline criminal and civil jurisdictional formulas (Article VII and VIII, respectively), demonstrates the influence that this SOFA has had over the many decades since its creation in 1951. As some have noted, the NATO SOFA has achieved a degree of legitimacy unmatched by other SOFAs, and is often used as the “yardstick against which other status of forces agreements are measured” (Pagano 1992; Sari 2008, p. 359). More specifically, regarding multilateral agreements, the almost wholesale adoption of much of the NATO SOFA by the European Union in their own status of forces agreement has “confirmed the pre-eminent position of the NATO as a model for multilateral status of forces agreements governing the legal position of visiting forces deployed among politically equal partners” (Sari 2008, p. 353).

NATO Expansion and the Changing Mandate of NATO

⁶⁴ Sari (2008) notes that “[s]ince its adoption in 1951, the NATO SOFA has been applied to or reproduced in a large number of cases...in particular Article VII on criminal jurisdiction and Article VIII on civil jurisdiction and claims has been employed in other multilateral and bilateral instruments” (p. 358). See Sari (2008, p. 358-59) for a detailed discussion of how various bilateral and multilateral agreements have adopted Article VII either whole or in part.

The original manifestation of the North Atlantic Treaty Organization was largely a product of the Cold War between the US and the Soviet Union and engineered by Britain to restore the balance of power between Western Europe and the USSR (Williams 1994, p. xii). However, the overall mission, purview, and reach of NATO have expanded greatly over the decades (see Noetzel and Schreer 2009, Rynning 2014). As the analysis portion of this case study focuses on legal cases that occurred after the end of the Cold War, this section briefly outlines the expansion of NATO from the original twelve members to the current NATO coalition of 28 full member states and numerous partnerships with non-NATO member states and other international organizations⁶⁵ and the changing geopolitical conditions, mission, and security concerns facing the current NATO organization (NATO 2015b).

The Expansion of NATO

In the early years following genesis of NATO, the organization was not the only cooperative agreement between Western European nations. The 1950s also saw the development and creation of the European Defense Community⁶⁶ (EDC), the European Coal and Steel Community, and the federation of Western European states (Western European Union) (Lindley-French 2007). However, even with the development of these other cooperative agreements in addition to NATO, geopolitical events prompted the further expansion of NATO to strengthen the strategic balance against Soviet-backed movements to extend the reach of communism

⁶⁵ International member organizations include: Euro-Atlantic Partnership Council, the UN, the EU, NATO's Mediterranean Dialogue, the Organization for Security and Co-operation in Europe, the Istanbul Cooperation Initiative. Non-member State partners that are not parties to the aforementioned structures include: Afghanistan, Australia, Iraq, Japan, Pakistan, Republic of Korea, New Zealand, and Mongolia (NATO Partners, 2015).

⁶⁶ The development of the EDC unfortunately failed in 1954, see Lindley-French (2007) and Fleck (2001) for a further discussion of the failure of the initiative.

globally⁶⁷. These efforts to expand NATO began with invitations to Greece and Turkey to join NATO in 1951 and repeated calls to include Western Germany as an equal member of the alliance⁶⁸. Though heavily contested by some NATO members, the accession of the Federal Republic of Germany occurred on May 6, 1955, though the formal accession to the NATO SOFA did not occur until 1963⁶⁹ (NATO 2015a, Fleck 2001, p. 353). The organization did not experience further expansion until Spain joined the Alliance in 1982 and, with the reunification of Germany in 1990 following the fall of the Soviet Union, the new German Länder in the East joined NATO (NATO 2015a). Further expansion has taken place largely within the last 30 years following the end of the Cold War, the fall of the USSR, and the dissolution of the Warsaw Pact⁷⁰. The beginning of the post-Cold War expansion of the Alliance began with the accession of the Czech Republic, Hungary, and Poland in 1999 followed by Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia in 2004⁷¹, and Albania and Croatia in 2009.

The Changing Mandate of NATO

⁶⁷ The invasion by North Korea that began the Korean War in 1950 was seen by the US as further evidence of a “Soviet-backed plan to expand communism globally” which prompted the US to strengthen its position supporting the re-armament of West Germany (Lindley-French 2007, p. 23).

⁶⁸ The early 1950s were a politically volatile time regarding the cooperative defense community and organization of Western Europe and North American allies. See Lindley-French (2007) p. 27-30 for a detailed discussion of these events.

⁶⁹ The legal status of allied forces in the Federal Republic of Germany prior to the accession to the NATO SOFA was “first regulated by the Bonn Convention in which the right of the Three Powers relating to the stationing of armed forces in the Federal Republic was confirmed” and further supplemented by the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany (*Truppenvertrag*) (Fleck 2001, p. 353).

⁷⁰ The Warsaw Pact, also known as The Warsaw Treaty Organization was a political military alliance formed in 1955 between the Soviet Union and a number of Eastern European states including Albania, Poland, Czechoslovakia, Hungary, Bulgaria, Romania, and the German Democratic Republic (East Germany). The Warsaw Pact can be understood as a collective security and political alliance formed by the USSR in response to NATO (Office of the Historian, no date). Similarities in status of forces agreements within the Warsaw Pact to the NATO SOFA as well as other similarities to NATO in terms of practices and structure are well discussed by Rowe (2001) pg. 26-27.

⁷¹ Though these seven states were invited to join through the launch of the Membership Action Plan at the Washington Summit in 1999, formal accession did not occur until 2004 (NATO 2015a).

The importance of the expansion of NATO to the study at hand is that the inclusion of many former Soviet controlled States within the Alliance blunted the original threat and justification for the formation of NATO⁷². With the original threat largely defeated, the mission, scope, defined Treaty area, and security threats began to shift⁷³. These shifts in mission⁷⁴ are initially outlined with the New Strategic Concept as defined by NATO in 1991:

“To protect peace and to prevent war or any kind of coercion, the Alliance will maintain for the foreseeable future an appropriate mix of nuclear and conventional forces based in Europe...the overall size of the Allies’ forces, and in many cases their readiness, will be reduced and the maintenance of a comprehensive in-place linear defensive posture in the central region will no longer be required...For the Allies concerned, collective defense arrangements will rely increasingly on multinational forces, complementing national commitments to NATO”(NATO 1991, paragraph 46).

These adjustments necessitated changes in military structure, strength, and the character and stationing of NATO troops throughout the expanded Treaty area as well as far beyond the borders of the Treaty area (Noetzel and Schreer 2009). Such adjustments in mission and the expansion to new member States also prompted a new round of sub-bilateral supplemental

⁷² As noted by Noetzel and Schreer (2009) when the existential threat of the USSR disappeared “the alliance was able to adjust to the emerging post-Cold War order” by “developing new strategic concepts (1991 and 1999), incorporating new members, reorganizing its military structures and deploying troops to theatres across the world” (p. 211).

⁷³ Though an in-depth discussion of the changing security strategies of NATO over time is outside the scope of this study, Sten Rynning (2014) presents a thorough discussion of the changing geographic and geopolitical landscape of NATO following the end of the Cold War. As he notes, “NATO’s founding Washington Treaty is permanent, but NATO’s Strategic Concepts change along with the security environment...In 1991 NATO had a clear hierarchy of tasks, with defence dominating all of the ‘fundamental’ ones...These boundaries did not withstand the test of time. Collective defence turned out to involve not only strategic balances but also new threats such as terrorism; NATO forces have been fighting bloody battles far from Europe; in-place forces have been ditched in favour of expeditionary capacities; and diplomacy has become important far beyond instances of crisis management” (p. 1386).

⁷⁴ As noted in the 1991 NATO New Strategic Concept in paragraph 5: “The historic changes that have occurred in Europe, which have led to the fulfillment of a number of objectives set out in the Harmel Report, have significantly improved the overall security of the Allies. The monolithic, massive and potentially immediate threat which was the principle concern of the Alliance in its first forty years has disappeared. *On the other hand, a great deal of uncertainty about the future and risks to the security of the Alliance remain*” (NATO 1991, paragraph 5, emphasis added).

agreements with the new member States within the NATO SOFA as well as adjustments to existing supplemental agreements between the original member States (Fleck 2001, Rynning 2014, International Security Advisory Board 2015). Such supplemental agreements between NATO member States and other partner organizations and states have continued to adjust to the evolving security threats facing NATO member States and their allies. The Alliance has increasingly turned its gaze outward, as noted in the 2010 NATO Strategic Concept:

“Terrorism poses a direct threat to the security of the citizens of NATO countries, and to the international stability and prosperity more broadly. Extremist groups continue to spread to, and in, areas of strategic importance to the Alliance, and modern technology increases the threat and potential impact of terrorist attacks, in particular if terrorists were to acquire nuclear, chemical, biological or radiological capabilities” (NATO 2010, p.11).

Though the shifting geopolitics and geography of NATO are covered more thoroughly by Julian Lindley-French (2007), Noetzel and Schreer (2009), and Rynning (2014), the focus here is on how the adjustments to the evolving security threats as perceived by NATO have concrete and practical implications for the military structures, practices, and supplementary agreements between members states on the status of visiting forces and criminal jurisdictional practices. Such agreements, such as the German Visiting Forces Act of 1995, and the German-Polish Visiting Forces Agreement of 2000, which outline jurisdiction waiver practices in criminal cases, has led to interesting flexibility in SOFA practices and interpretations of the concurrent jurisdiction formulas by member states⁷⁵. Focusing on these supplemental agreements, which are themselves a reaction to changing geopolitical conditions and perceived security threats, and the uneven legal geography they produce, provides an avenue for the achievement of the third aim of this study, namely, to investigate how geopolitical relationships influence the practice of

⁷⁵ Though outside the bounds of this case study, see Fleck 2001 for a discussion of the NATO SOFA, concurrent jurisdiction formulas, and supplementary agreements over fully integrated, multinational units.

jurisdiction within these variable interpretations and formulations of supplementary agreements in cases of sexual assault by NATO personnel to further explore conflicts in our understanding of international, regional, and individual security.

Case Analysis: Supplementary Agreements, Jurisdictional Formulas, and Practice between the United States and the UK, Italy, and Germany

While the preceding section outlined the development and evolution of NATO and the NATO SOFA more generally, the following section provides a more focused background and discussion of the criminal jurisdiction formulas as determined by the original NATO SOFA signed by the original NATO members in 1951. This overview will then be followed by specific background information of the supplementary agreements negotiated between the United States and the three NATO member States that are the focus of this case study: the United Kingdom, Italy, and Germany. This more targeted background information is needed to provide context to the analysis section in which actual cases of sexual assault of civilians within these three host states by US military will be examined.

Criminal Jurisdictional Formulas in the 1951 NATO SOFA

The criminal jurisdiction formulas present in the 1951 NATO SOFA are very similar to those present in the 1960 US-Japan SOFA⁷⁶⁷⁷ as discussed in the preceding case study over US

⁷⁶ As early as 1958 Baxter noted “Substantially similar arrangements on the score of jurisdiction exist between the United States and Japan, but outside the NATO area and Japan, jurisdictional agreements concluded by the US and other exporters of troops vary considerably and fall into no particular pattern” (Baxter 1958, p. 74).

⁷⁷ Though outside the bounds of this particular case study, there are similarities in the Agreement over the status of forces for NATO military personnel deployed outside of the Treaty area, specifically in the case of Bosnia and Herzegovina during the 1995 conflict. Under that SOFA between NATO and these two

forces in Okinawa. This resemblance can be traced to the successful renegotiation of terms by Japanese authorities who cited the more favorable jurisdictional formulas present in the NATO SOFA during the US-Japan SOFA revision talks during the 1950s (see Honma, Sonnenberg, and Timm 2001). The basic jurisdiction formulas as set out in the 1951 NATO SOFA are located in Article VII. The entirety of Article VII of the NATO SOFA is located in Appendix 2, but the formula of the SOFA regarding criminal jurisdiction has been effectively outlined by Baxter (1958):

Both the receiving or the host States and the sending State which stations its forces abroad have exclusive jurisdiction over those offences, including security offences, which are punishable by its law but not that of the other nation. In other cases, the right to prosecute is contingent on the existence of what the Agreement terms a ‘primary right to exercise jurisdiction.’ The military authorities of the sending State have this primary right to exercise jurisdiction over a member of the forces or an accompanying civilian employee if the offence is directed against the sending State or another member of the forces or civilian employee or a dependant. They also have jurisdiction over ‘any act or omission done in the performance of official duty.’ In all other cases the authorities of the receiving or host State have the primary right to exercise jurisdiction. *Essentially, the soldier or sailor or airman becomes subject to local jurisdiction when he is off duty and associating with the local population*” (Baxter 1958, p. 74, emphasis added).

While the formula itself is very similar to the 1960 US-Japan SOFA, so too are some of the practices, specifically that of applying for waivers of jurisdiction by the sending State (namely the United States) in cases where the host State has primary jurisdiction⁷⁸.

Though these similarities do exist between the two agreements, what is important to note and will be further explored in the analysis portion of this case study is the role that the

States, sending states retained full and exclusive jurisdiction over the personnel while deployed in the territories of Bosnia and Herzegovina, much like the UN SOFA as discussed in the first case study in Haiti. See Burger 2001.

⁷⁸ The NATO SOFA also requires that “the State having the primary right to exercise jurisdiction give ‘sympathetic consideration’ to a request for a waiver of jurisdiction in cases of special important” which bears a similarity to provisions present in the US-Japan SOFA as discussed in the preceding case study (Baxter 1958, p. 74-75).

reciprocity of the NATO SOFA plays in the jurisdictional practices in conjunction with the formal supplemental agreements outlining these practices present between NATO members, rather than the less formal secret agreements present in the US-Japan case in Okinawa.

As with the other status of forces agreements investigated within this wider study, the criminal jurisdiction formulas were and continue to be the point of greatest contention between sending and host States. Following the creation of the NATO SOFA in 1951, many of the most heavily debated portions of the Agreement during ratification by the original NATO members, especially the United States and the United Kingdom, were centered on the concurrent jurisdiction formulas⁷⁹ of Article VII⁸⁰. As noted by Dean (1984) Article VII of the NATO SOFA has been the most controversial article “because it has produced a jurisdictional overlap between the very different traditions of the common law and civil law legal systems⁸¹ represented among the NATO members” (p. 220).

Consequently, the NATO SOFA provides for the creation and negotiation of sub-bilateral

⁷⁹ As discussed by Schuck (1957) “[the] great bulk of the problems which have appeared in connection with the application of the jurisdictional provisions of the NATO SOFA have arisen out of the stationing of troops of the US in France in implementation of NATO. As might perhaps be expected, differences of opinion in the application and interpretation of the treaty provisions have occurred. Problems of this kind can, in many instances, be resolved by understanding and tact at the ‘operating’ level; others may be of such gravity as to be susceptible of solution only at the government level, provision for which is made in the treaty itself” (p.356-57). The provision as mentioned here is the allowance for sub-bilateral agreements between NATO member states provided they do not violate the guidelines of the NATO SOFA.

⁸⁰ See Dean (1984) for a full discussion regarding Minimum Fair Trial Standards under the NATO SOFA as related to concurrent jurisdiction.

⁸¹ As previously discussed, the Uniform Code of Military Justice has its roots in English military law. Within this case, both the US and the UK largely follow the common law tradition whereas Germany and Italy both largely follow the civil law tradition. The main difference between these two systems as it relates to this case study is the role of the judge - in civil law systems judges act more fully in an investigative capacity whereas in common law systems this role falls largely to the lawyers in the case. Other differences relate to sentencing where common law follows the precedent set by previous cases; in civil law systems, detailed statutes often dictate the definitions of crimes and the appropriate sentences to be handed down.

agreements to further refine and define jurisdictional practices between NATO members provided they do not violate or directly contradict the NATO SOFA itself (Schuck 1957, Pagano 1992, Rowe 2001, Fleck 2001).

Negotiations, Supplementary Agreements, and Waivers of Jurisdiction under the NATO SOFA between the United States, and the United Kingdom, Italy and Germany

Supplementary, bilateral agreements regarding criminal and civil jurisdiction over military personnel as well as other operational considerations are common between NATO members (See Rowe 2001, Fleck 2001, Voetelink 2015). The following section is specifically focused on supplementary agreements regarding criminal jurisdiction practices between the United States and three NATO member host States: the United Kingdom, Italy, and Germany. These three member states were chosen as they represent three of the longest relationships with the United States under the Alliance, have hosted and continue to host the vast majority of US forces stationed in Europe under the NATO SOFA, and represent three very different originating relationships with the United States that have shaped the characteristics of the supplementary agreements and practices of criminal jurisdiction over US forces within their territories. The variations in jurisdictional practices that are determined by the sub-bilateral supplementary agreements present under the reciprocal NATO SOFA provide an interesting counter case to the previous two case studies in Okinawa and Haiti.

Here, not only will the effects that these supplemental agreements have on survivors of sexual assault by US NATO personnel be examined, but we will also see the effect these agreements have on the US NATO personnel who are *perpetrators* of such crimes. Specifically, though US NATO personnel are all granted the same rights,

privileges, and immunities under the NATO SOFA jurisdictional formulas at large, as these personnel are stationed throughout many different NATO member states, the supplementary agreements between the US and these member states over jurisdictional practices means that these personnel are subject to different jurisdictional practices and legal treatments depending on which NATO member state they are stationed in at the time of the offence. Consequently, this investigation will not only focus on the individual security of the survivors of these crimes, but also of the individual security of the perpetrators under the uneven legal geography and jurisdictional practices as mediated by these supplemental agreements.

The United States and the United Kingdom: Jurisdiction and Reciprocity between Allies

The NATO SOFA was designed and signed by the original founding NATO MEMBER states in 1951; however, the SOFA still required ratification by the individual legislatures of the member states. It was during these ratification debates that many of the concerns over the criminal jurisdiction formulas were made, laying the groundwork and justification for sub-bilateral supplementary agreements. In the case of the United States and the United Kingdom, many of these arguments (concerns regarding the loss of sovereignty by the UK versus concerns over the loss of protection and jurisdiction over military personnel by the US) had already been presented by both US legislators and UK members of parliament during the negotiations over the United States Visiting Forces Act of 1942 regarding US forces stationed in the UK during the later years of World War II (See Rowe 2001). However, such arguments and debates had evolved in the post-war years when the United Kingdom was in a better position to argue against the exclusive

jurisdiction the United States had enjoyed under the Visiting Forces Act of 1942. The result of these parliamentary debates is the United Kingdom's Visiting Forces Bill of 1952, signed into law on October 27th. Of note is that the Visiting Forces Bill preceded the ratification of the 1951 NATO SOFA by Parliament, which did not occur until May 13th, 1954 (Fleck 2001).

The 1952 Visiting Forces Bill “applies those parts of the 1951 Agreement which affected the UK legal system” and defines “the procedure by which a state can be classified as a visiting force, permits the exercise of disciplinary powers by a visiting force, prohibits double-jeopardy, deals with arrest under UK law” among a number of other specific practices not explicitly dealt with by the 1951 NATO SOFA (Rowe 2001, p. 24). The 1952 Visiting Forces Act was also necessary in “order to apply the (NATO) SOFA to the United Kingdom, because the (US) Third Air Force was not assigned to NATO command” (Duke 1986, p. 119). Most relevant to this case study is the lack of discussion of primary rights within the discussion of concurrent jurisdiction formulas in the 1952 Visiting Forces Act. As noted by Rowe, the Act “appears to give exclusive jurisdiction to the visiting force in respect of offences against UK law where the primary right under Art. VII (3) of the 1951 (NATO SOFA) Agreement rests with that force” (Rowe 2001, p. 25). The reason given during the Parliamentary debates regarding the absence of any reference to a primary right was that it was assumed that British courts have an inherent right to deal with offences committed in the UK, regardless of the status of that person (*Hansard* 1952, Rowe 2001, p. 25).

In effect, the concern regarding this absence of a discussion of primary rights was that in practice, jurisdiction would be *de facto*, but not *de jure*, exclusive to the sending

state. However, while this concern has not proven to be true in practice, the appearance of the possibility for full immunity of visiting forces from prosecution by local courts in the UK is still occasionally presented in Parliamentary debates (see Rowe 2001, p. 25). Though not specifically termed a “supplementary agreement,” the 1952 Visiting Forces Act serves similar functions by refining the practices and guidelines present in the 1951 NATO SOFA to conform more directly to the UK legal system. Though the lack of discussion regarding “primary rights” under the criminal jurisdiction formulas in the 1952 Visiting Forces Act does potentially present some questions of immunity in practice, the 1952 Act overall largely confirms and conforms to the concurrent jurisdiction formulas present in the 1951 NATO SOFA. Therefore, in cases of sexual assault against local civilians where the perpetrator is a member of the US visiting forces, both the 1952 Visiting Forces Act and the 1951 NATO SOFA grant primary rights to the UK with no formal conditions or agreements regarding automatic waivers by the UK to the US, as we will see is the case in other supplementary agreements.

United States and Italy: Enemies, Co-Belligerents, and Allies

As an original Axis power, Italy was aligned with the Germany and Japan and thus was an enemy state of the United States as it entered World War II. However, following their defeat and liberation in 1943, Italy joined the Allied forces and the United States as a “co-belligerent” against the Axis powers (Cooley 2008). As a co-belligerent, the defeated state of Italy did not experience the severity of military occupation and governing arrangements that Japan experienced, though the United States built and has maintained a substantial military presence in Italy nonetheless. For example, the facilities

and bases built by the US in Japan following World War II were legally designated as US bases with the US maintaining sovereignty within the borders of the bases and facilities. In Italy, on the other hand, “US military installations and troops in Italy were designated as *Italian* facilities used for NATO purposes, a legal distinction that gave Italian rulers Western multilateral legitimacy and political cover (Cooley 2008, p. 176). Such basing arrangements were vigorously debated and criticized by the Italian political left, but eventually accepted as democratic commitments and remained largely unmodified until after the end of the Cold War (Cooley 2008). The NATO designated bases that were to house US military personnel were established between 1952 and 1954. The terms of use for these bases were negotiated through a bilateral agreement between the US and Italy in 1952 and were written to be deliberately vague and took the form of an exchange of notes, likely to avoid parliamentary debate in Italy (Cooley 2008).

The signing of the basing facilities implementation agreement was delayed by the Italian elections in 1953 and a vigorous round of debates and political theatre took place through much of 1953 and 1954 (See Cooley 2008, p. 198-99). An agreement was reached between the US and Italy in October 1954 and was quickly followed “by the Italian government’s signature of the Bilateral Infrastructure Agreement (BIA) as an executive agreement”(Cooley 2008, p. 199). As noted by Cooley, the exact terms of the BIA and the technical uses of the Italian facilities were kept secret and are still classified (Cooley 2008). The development and agreement to the BIA by the Italian government was followed by the ratification of the NATO SOFA by both chambers of the Italian Parliament in 1955⁸². The 1952 bilateral exchange of notes and the BIA of 1954

⁸² See Cooley (2008) for a discussion on the internal Italian politics that were instrumental in providing support for the housing of US troops within the Italian state as a means for guaranteeing internal security

remained in effect, unchanged, until 1995 when a the “Memorandum of Understanding Concerning the Use of Installations/Infrastructure by United States Forces in Italy” was signed in Rome on February 2, 1995. Importantly for this study, the 1995 MOU made no mention of jurisdictional practices or automatic waivers of jurisdiction for any cases involving US personnel except in those cases of “special importance” to Italian authorities (U.S. Department of Defense 1995). As such, there are no *known* bilateral supplemental agreements between the US and Italy that alter or augment the jurisdictional formulas or practices as determined by the NATO SOFA of 1951⁸³. Therefore, by the black letter of the law, Italian authorities have the primary right to cases of sexual assault by US military personnel stationed in Italy against local civilians.

Germany and the United States: Occupied Enemy to Important Ally

The occupation of Germany by Allied troops following its unconditional surrender to the Allied Forces in 1945 led to the stationing of a large number of foreign forces within its territory. These occupying forces were stationed within the territory as a measure to ensure the maintenance of both the internal security of Germany and the external security of Western Europe (Fleck 2001, p. 349). The four main Allies – the United States, the United Kingdom, France, and the Soviet Union – jointly occupied the German State, each taking responsibility for a different part of the territory for

and the geopolitical conditions of the 1950s in Italy and the surrounding States that pushed forward the ratification of the NATO SOFA and the US-Italy Bilateral Infrastructure agreement.

⁸³ That is not to say there have not been high profile accidents in which jurisdictional rights have not been challenged. The legal ambiguities of jurisdictional authority have arisen in at least two high profile events in the so-called “Sigonella affair” where US forces were deemed to have used an Italian military base outside of the mandate of NATO and the accidental cutting of a gondola wire by a low flying US military plane in which 19 Italian civilians were killed. See Cooley 2008 for further discussion.

administration, under an original understanding that the territory would eventually be reunified and restored (U.S. Department of State 2009). Though an in-depth history of occupied Germany is outside the bounds of this study, a brief overview of the developments in occupied Germany will be presented here.

Though initially the occupation and administration of the German territory by the four Allied powers following World War II seemed to function fairly well⁸⁴, disagreements over the ultimate fate of Germany (to be reunified vs. to be permanently dismembered and divided) led to the breakdown of relations between the United States, France, and the United Kingdom on the side for eventual reunification and the Soviet Union's position for permanent dismemberment. This disagreement over the fate of Germany, in combination with a mutual distrust between the Soviet Union and the US and its allies, ultimately led to the division of the German territory into two consolidated areas of West and East Germany. The Allied forces of the US, the UK, and France maintained control of the western areas of Germany⁸⁵ and West Berlin, and the Soviet Union controlled the eastern territory of Germany⁸⁶ and East Berlin.

Jointly administered by the United Kingdom, the United States, and France, in the western areas of Germany, hereafter referred to as the Federal Republic of Germany or FRG, the right to station allied forces within the territory, permanently, was based on a state treaty. This treaty, the Convention on the Presence of Foreign Forces in the Federal Republic of Germany was concluded on October 23, 1954 between the FRG and the three administrating Allies (Fleck 2001). Belgium, Canada, and the Netherlands joined the

⁸⁴ As early as 1948, questions regarding the rather peculiar legal status of occupied Germany under the four different Allied administrating governments had been raised. See Rheinstein (1948).

⁸⁵ Formally termed the Federal Republic of Germany.

⁸⁶ Formally termed the German Democratic Republic.

Convention in 1955 as three additional permanent sending States housing troops within the FRG. As noted by Fleck (2001) “[a]t the time of entry into force of this Convention, which was connected with the German contribution (of 495,000 troops) to NATO, some 535,000 allied troops were permanently stationed in the Federal Republic of Germany” (p. 352). The permanent housing of such a large number of foreign forces in the territory of the Federal Republic of Germany, in combination with the FRG’s contributions to NATO set the groundwork for the accession of the FRG as a full member of NATO and party to the NATO SOFA.

The full accession of the Federal Republic of Germany to NATO took place during the second round of the enlargement of NATO on May 6, 1955. Though protested by some NATO members, the accession was seen by other Allies as necessary in the defense of western Europe as well as for the rehabilitation of Germany (Fleck 2001, Haftendorn 2005). Though accession to NATO took place in 1955, the FRG did not accede to the NATO SOFA until 1963. Prior to the accession to the NATO SOFA, foreign forces were under the authority of the aforementioned Convention regarding foreign forces. At the time of the accession of the FRG to the 1951 NATO SOFA, an additional supplemental agreement was agreed to between the FRG and the six permanent sending states, of which the United States is one. The Agreement to Supplement the Agreement between the Parties of the North Atlantic Treaty regarding the Status of the Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (August 3, 1959), was seen as “necessary for Germany since [the] NATO SOFA provides only certain general rules which neither side considered sufficient, and existing rights and obligations which were established and further developed over the

years of occupation required some adaptation” (Fleck 2001, p.353-54). Most pertinent to the study at hand is that one of the main issues the Supplementary Agreement addressed was the distribution of responsibilities in the exercise of criminal jurisdiction (Fleck 2001). In effect, the supplemental agreement, while not directly challenging the concurrent jurisdiction formulas present in the NATO SOFA, grants automatic waivers of jurisdiction to the sending State in matters of criminal offenses committed by visiting forces (Agreement 1993; Conderman 2001, p. 113; Nevitt 2016, p. 435; Personal Communication 2016).

The Supplemental Agreement has been amended a number of times since being put into practice in 1963⁸⁷. Notably during the reunification of Germany, many of the agreements, including the NATO SOFA and the Supplemental Agreement remained limited to Western Germany. However, the final settlement treaty (the so-called Two plus Four Treaty) between the two German states, the UK, the US, France and the USSR and a number of “exchange of notes” in the years following reunification extended the NATO SOFA and the Supplementary Agreement to the former East German state. Most germane to this study is Article 19 of the Supplementary Agreement and the 1993 agreement between the United States Department of the Army and Federal Republic of Germany in which a Military Personnel Exchange Program was created.

Article 19 of the Supplemental Agreement between the Federal Republic of Germany and the six permanent sending states (Belgium, Canada, France, the Netherlands, the UK and the US) includes a waiver agreement. This waiver agreement outlined in paragraph 1 of the Article “provides for a general waiver of Germany’s

⁸⁷ Amendments have occurred on 21 October 1971, 18 May 1982, 18 March 1993 and 16 May 1994, (see Fleck 2001 p. 353).

primary right to exercise jurisdiction...Such a waiver effectively grants to the sending state the right to exercise jurisdiction in all concurrent jurisdiction cases” (Conderman 2001, p. 113). Similarly, under the guidelines of the exchange program, military personnel of both Germany and the United States are to retain jurisdiction over their personnel while stationed in the territory of their partner. As Article VIII, Section 6 states:

Military Exchange Personnel committing an offense under the laws of the Host Nation or the Parent Nation or otherwise violating the laws and regulations of the Host Nation or the Parent Nation may be withdrawn from this Exchange Program with a view toward further administrative or disciplinary action by the Parent Party. Disciplinary action, however, shall not be taken by the Host Party against Military Exchange Personnel...The Parties may support each other in the enforcement of administrative or disciplinary action imposed by the Parent Party against its Military Exchange Personnel” (Agreement 1993, p. 9).

Under this sub-bilateral, supplemental agreement, then, jurisdiction remains exclusive to the sending State in matters of the violation of host State laws by visiting personnel. However, Section 7 of the 1993 Agreement does note that in matters of jurisdictional conflict, the rights and privileges set forth in existing agreements over the status of visiting personnel (such as the NATO SOFA) shall take precedence over the 1993 Military Exchange Agreement. Consequently, the 1993 agreement does not directly contradict the concurrent jurisdiction formulas in the NATO SOFA. Notably this agreement is reciprocal; thus, German personnel stationed in the United States remain under the jurisdiction and command of the German military. Taken together, Article 19 of the Supplemental Agreement and the 1993 US-Germany Military Exchange Program structures jurisdiction over military personnel to reside with the sending State. Though some latitude is provided for in cases of particular importance to the host State, military

legal experts have communicated to me that, in practice, Germany is consistent in automatically granting waivers to the United States in almost all criminal cases involving US military personnel (Personal communication 2016).

Jurisdiction in Practice: Contemporary Cases of Sexual Assault by US Military Personnel against Civilians in the United Kingdom, Italy, and Germany under the NATO SOFA and Supplemental Agreements

The preceding sections have outlined the black letter of the law, so to speak, in the jurisdictional formulas as written in Article VII of the NATO SOFA and the various exchanges of notes and supplemental agreements between the US, Italy, Germany, and the UK. The current section examines specific cases and the actual jurisdictional *practices* carried out by the four parties in cases of sexual assault of civilians by US military personnel stationed in the UK, Italy, and Germany. The purpose of this analysis section is to examine how the jurisdictional formulas present in the NATO SOFA have been interpreted and operationalized differently by the four member states presented here. As noted by Parkerson and Lepper (1991), many receiving states in Europe were originally fairly willing to cede more jurisdiction to the United States over military personnel stationed abroad. However, recent developments in European human rights law have led some European receiving states to become more reluctant to allow the US to exercise any jurisdiction at all over capital offenses such as murder while stationed within their territories (Parkerson and Lepper 1991, p. 699).

Though rape and sexual assault are not capital offenses (unless related to a murder charge), changes and developments in law as well as relationships between States has led to changes in the interpretation and practice of jurisdiction under the SOFA guidelines

and amended supplementary agreements. As a consequence of these changes in practices and legal interpretation, an uneven legal geography has developed, affecting and influencing the personal security of both survivors and perpetrators of these crimes. Only by examining actual cases of sexual assault of civilians by extraterritorially stationed US military personnel in Europe and the subsequent jurisdictional practices can we gain a more complete understanding of the uneven legal geographies created by the sub-bilateral supplementary agreements.

Cases of sexual assault by US military personnel stationed in the United Kingdom

US military forces stationed in the United Kingdom are primarily, if not solely, Air Force personnel located at six Royal Air Force installations: RAF Alconbury, RAF Molesworth, RAF Croughton, RAF Fairford, RAF Lakenheath, and RAF Mildenhall (U.S. Department of Defense 2016). As such the number of US military personnel stationed in the United Kingdom is relatively small in comparison to the larger bases and installations in Germany and Italy. These installations also tend to be in more rural areas of the UK, which does limit interactions and the potential for incidents between US military personnel and local nationals. Consequently, the vast majority of sexual assault cases involving US military personnel stationed in the UK are *intramilitary* cases in which the perpetrator and the survivor are both US military personnel; thus, such cases remain under the sole and exclusive jurisdiction of the US military. However, within the timeframe parameters of this case study (1995-current) one case was discovered through recent court martial documents.

In 2012, Staff Sergeant Patrick Huey was tried in a US military court through a general court martial for rape and child pornography. Stationed at RAF Lakenheath, the 27-year old Staff Sergeant Huey met a local national on MySpace, recorded in the court documents as 16-year old “LH.” The two began dating and the relationship was of a sexual nature. Though a full account of the case background can be obtained through the US Air Force Court of Appeals,⁸⁸ in brief, Staff Sergeant Huey was convicted of sexually assaulting “LH” on multiple occasions between April 2006 and February 2008, and having in his possession pornographic images of a minor who was a friend of “LH” (U.S. Air Force 2013, 2015). Though the crime was originally reported by “LH” to the local British authorities, following the search and seizure of a number of items in Staff Sergeant Huey’s home, jurisdiction over the case was surrendered by British authorities to the US military (Air Force 2013). The reasons for the surrender of jurisdiction by British authorities, which held primary rights, to the US military are unclear through the available case documents. However, as jurisdiction was ceded to the US military, the accused was tried in a general court martial in 2012, convicted of wrongful sexual assault and non-sexual assault offenses (including the possession of child pornography), and sentenced to 4 years and 9 months confinement, dishonorable discharge, and a reduction of rank to E-1 (U.S. Air Force 2015, pg. 92). Though the accused appealed the judgment, the conviction and sentence were upheld by an Air Force Court of Appeals in December of 2013 (U.S. Air Force 2013).

⁸⁸ See United States v. Staff Sergeant Patrick Huey, Jr. ACM 28139,4 December 2013: <http://www.caaflog.com/wp-content/uploads/Huey-38139.u.pdf>

Although the NATO SOFA and the 1952 Visiting Forces Act between the UK and the US grant primary jurisdiction of cases such as the one detailed above to the United Kingdom, we see that jurisdiction over this particular case was quickly granted back to the US military. The reasons for this could be many – for instance, the local authorities may have assumed that the US military would be more successful in obtaining a conviction in this case due to nature of the crimes, or the legacy of prior agreements between the US and UK over jurisdiction of US forces during World War II may have been influential in the current practices. Without interviewing both the UK and US authorities involved in the case, it is difficult to draw any firm conclusions. However, this case does provide a recent instance in which the UK clearly had not only jurisdiction but also control and yet still ceded jurisdiction over to the US military, raising questions as to why – as this is clearly a case where local authorities do have an interest in justice as the survivors were both local nationals and minors.

Cases of Sexual Assault by US military personnel stationed in Italy

US military personnel are stationed in a number of Air Force, Army, and Naval installations across Italy, including the Aviano and Ghedi Air Bases; USAG Italy – the headquarters for U.S. Army Africa and the USAG Italy-Darby Military Community; and the U.S. Naval Air Station Sigonella and Naval Support Activity Naples. While some of these installations are remotely located and house a modest number of US military personnel, such as the USAG Italy-Darby Military Community located in a remote area of Tuscany, others are quite large and located near large civilian communities such as the USAG Italy Army installation near Vicenza (Military Installations, 2015). As a

consequence, US personnel stationed at these installations have a much higher chance of interaction with local civilians⁸⁹ as compared with the rather remote installations in the UK.

This higher likelihood of interaction is perhaps reflected in the higher number of incidents (and accidents) between US military personnel and local civilians as noted by Nancy Montgomery in multiple recent *Stars and Stripes* articles (2014a, 2014b, 2015a, 2015b, 2015c). Montgomery reported that between 2010 and 2015, there have been over 200 Italian prosecutions of US troops including cases of assault, sexual assault, and negligent homicide (Montgomery 2015). Of these many cases, this section will highlight three recent, connected cases to demonstrate the jurisdictional practices in Italy regarding US military personnel accused of sexually assaulting local nationals. I highlight these three connected cases rather than presenting large-N statistics, as the increased attention and coverage of the proceedings provides more in-depth and qualitative data. This qualitative data provide a much more useful window into the jurisdictional practices and workings of the legal systems towards addressing the main aims and questions posed in this case study.

In 2015, Private First Class (PFC) Jerelle Gray and Private (PVT) Darius McCollough were both sentenced to six-years incarceration by an Italian court for the rape and assault of a Romanian woman in Italy. The incident took place on April 9, 2015 when the two US paratroopers agreed to pay the Romanian woman for sex who then declined to have sex with the two men when they refused to wear condoms. Following

⁸⁹ Though it has been noted, most recently in a Vice article, that most of the US personnel and dependents living in and around the bases near Vicenza are fairly segregated, visiting their own bars and hang-outs away from the local population (Bianchi 2014).

the refusal by the Romanian woman, it was reported that they violently removed her from a vehicle and raped the woman for two hours. The survivor was hospitalized for two weeks following the attack (Montgomery 2015b). During the trial, PVT McCollough was kept under house arrest in the Del Din barracks whereas PFC Gray was kept in an Italian jail in Verona due to his escape from house arrest and the reported assault of two other women in December of 2014. Furthermore, PFC Gray was also already under investigation for the rape of a 17-year old Colombian girl that occurred in Italy in November 2013. This detention for an American service member in an Italian jail was noted as unusual, as it followed “previous, more lenient treatment from Italian authorities,” generally by allowing such accused members to remain under house arrest within the military installations (Montgomery 2015a).

Though the US Army requested jurisdiction in both the 2013 and 2014 cases, an Italian justice minister, agreeing with the requests of local authorities, denied the US request for jurisdiction. This ruling ensured that both cases would be heard in an Italian court of law, rather than in a US court-martial (Montgomery 2014a). The two US paratroopers were sentenced for the 2014 attack on April 9, 2015, each receiving a sentence of 6 years while PFC Gray remained in custody for the other mentioned offenses of 2013 and 2014. In these cases, we see Italian authorities asserting and retaining their primary jurisdictional rights over offenses committed by US military personnel stationed against local civilians. Interestingly, two of the four survivors in these specific cases were third party nationals (Romanian and Colombian), though Italian authorities and prosecutors legally treated them as Italian nationals. Most germane to this study though, is not only the retention of jurisdiction by Italian authorities even when jurisdiction was

requested by the US Army, but how many servicemen, when convicted by an Italian court, do not actually serve that time.

PVT McCollough, for instance, though sentenced to six years in an Italian prison following his conviction for rape and assault, may not see any jail time, as he was due to rotate out of Italy in the month following his conviction. This is not entirely unusual. As noted by Bianchi (2014) and Montgomery (2015a), in a similar case in 2005, SGT James Michael Brown was sentenced to six years and 100,000 euros in compensation by the same Vicenza court that tried the 2014 case for the violent assault and rape of a Nigerian woman. SGT Brown then rotated out of Italy to Germany and eventually to the United States, only serving one year of precautionary custody of the six-year sentence. His movement was allowed as he was not in Italian custody and US military officials noted they had no jurisdiction or authority to hold him since he was tried and convicted in an Italian court of law. Thus, in terms of jurisdictional practices, though we see not only a retention of jurisdiction and convictions by Italian authorities for these crimes, the custody practices allowed for the movement of the US military personnel out of Italy, effectively negating the sentences imposed due to a reluctance by the Italians to take custody of the US personnel. It should be noted, however, that though Italian authorities seemingly do retain jurisdiction and refuse waiver requests from the US military more frequently than in other jurisdictions including Okinawa, the UK, and Germany, a fair number of waiver requests are granted. As noted by Bianchi (2014) an investigative report by the Italian newspaper *Il Fatto Quotidiano* demonstrated that in an 18-month period through 2013-2014, Italy had relinquished their primary jurisdictional rights in 91 of 113 cases.

But, it is in the *physical custody* practices of those individuals that do remain in the Italian courts that are even more revealing. As noted previously, Montgomery (2015a) has noted that in the five years prior to 2015 there have been around 200 Italian prosecutions of US troops for crimes committed against local civilians including assault, sexual assault, and negligent homicide. Importantly, of those cases only one service member was jailed in an Italian prison. The majority of the time, US personnel, while under investigation and during the criminal trial itself, remain free or under house arrest on US military bases. However, due to the nature of the Italian justice system, criminal cases can take up to five years to work their way through the Italian court system and often soldiers are due to rotate out of Italy (most rotations of US service members are of a maximum of five years) or the statute of limitations expires far before the conclusion of a case. The reluctance of Italian authorities to take custody of US military personnel^{90 91}, the fact that many of the victims are not Italian citizens but often already marginalized third-party nationals, and the relative low level of attention such crimes receive by the

⁹⁰ Jailing US service members is often seen as last resort for Italian judges. Furthermore, Montgomery (2015a) notes, “In 2013, the European Court of Human Rights ruled that Italy's overcrowded prisons violated inmates' human rights, and sex offenders are targeted for especially harsh treatment.” Consequently, it makes some sense why Italian authorities are reluctant to take custody of US service members in Italian jails, as this treatment would likely cause diplomatic and practical tensions between the two States. When given the option to retain the accused US personnel in the US Army jail in Germany, Italian judges often refuse, as they are reluctant to send the personnel out of their jurisdiction into another State.

⁹¹ As noted by Montgomery (2015a) there are conflicting accounts of how accepting the Italian authorities are of US personnel rotating out of Italy during their proceedings and avoiding their sentences. While a US military SOFA expert in Naples noted that the US has no authority over troops who rotate out of Italy while facing criminal prosecution from an Italian court and that “Italians do not object to this state of affairs,” comments from Italian prosecutors would indicate otherwise. As Montgomery (2015a) notes from her interview with Italian prosecutor Nicola Canestrini “who represented a U.S. soldier facing rape charges who disappeared back to the U.S., called the system farcical.” As Canestrini stated: ““It doesn't make sense to have a trial if there will be no sentence served,” he said. “It is just a fiction. Everybody knows he is not going to serve one day.””

local media often leads to a climate of impunity whereby many cases either are not tried at all or, in those that are, the custody arrangements and transfers out of Italy prevent many of those convicted from serving any of their sentence (Bianchi 2014; Montgomery 2014a, 2015a). However, as noted more fully in footnote 30, there may be practical reasons for the reluctance to imprison US military personnel in Italian facilities due to prior issues of poor treatment and the potential violation of the human rights of such personnel. As will be discussed in the conclusion of this chapter, this point highlights another dimension of security – that of protecting US personnel themselves from inhumane treatment or legal practices while in the territory of a receiving/host state. Such concerns have often been the foundation for policies and arguments for always maximizing jurisdiction over US personnel when deployed or housed abroad (Fleck 2001).

Cases of Sexual Assault by US military personnel stationed in Germany

Germany houses the largest number of US military personnel in Europe, followed by Italy. Primarily Army and Air Force personnel, the military installations housing US personnel include: Buechel Air Base, Geilenkirchen NATO Air Base, Kalkar USAF Element, Ramstein Air Base, Spangdahlem Air Base, Ansbach Army Garrison, Stuttgart Army Garrison, USAG Bavaria, USAG Bavaria (Garmisch), USAG Bavaria (Hohenfels), USAG Rheinland-Pfalz, USAG Rheinland-Pfalz (Baumholder), USAG Wiesbaden (Military Installations, 2015). As of 2015, over 37,000 US military personnel were stationed in Germany (Zorthian 2015).

In accordance with the various supplemental agreements, as discussed previously, Germany automatically waives its primary jurisdiction over cases involving US military personnel unless the case is of special importance⁹², in which case Germany can request to retain its primary jurisdictional rights (Conderman 2001, Fleck 2001). As communicated to me in a personal conversation with a Judge Advocate General with experience and knowledge of jurisdictional practices under the NATO SOFA, these waivers of jurisdiction are often, if not always, automatically granted in a very timely manner⁹³ (Personal Communication 2016). Under these conditions, it is no surprise that the cases of sexual assault that I could locate that involved US military personnel (and dependents in one case) stationed in Germany against local civilians were all retained in the US military legal system.

The recent cases I was able to locate that occurred in Germany will expand the discussion and purview of this study slightly, as one case involves perpetrators that were US military dependents, not US military personnel, and another case involves a victim that is a US civilian who was not in anyway legally tied or considered to be under the guidelines of the SOFA. As is the case with most of the records I have investigated, the vast majority of cases of rape and sexual assault are *intramilitary* cases involving US military personnel, members of the US civilian component, and US civilian dependents. Again, this is likely due to the higher rate of interaction and proximity between these

⁹² Interestingly, Article 19 of the Supplementary Agreement which discusses the general waiver outlines the typical crimes which would likely be in the “interests of German administration of justice,” and thus within the realm where Germany would seek to retain jurisdiction, section 2 of paragraph 19 explicitly lists rape against local nationals as one of these crimes (Conderman 2001, pg. 113-114).

⁹³ In the same conversation, it was noted that Italian authorities, when they receive waivers may or may not grant them, but often the response can take months if not longer whereas German waiver requests are addressed and granted almost automatically (Personnel Communication 2016).

individuals relative to the level of interaction and proximity between US military personnel and local nationals.

Of the available recent court-martial records (2010-2015), the majority of the sexual assault and rape cases involving US military personnel involved survivors who were also US military personnel or dependents (U.S Air Force 2015). Within the cases involving US military dependents, many of the survivors were wives of US service members, the children of the perpetrator/US service member, or non-family related minors who were also dependents of other US military personnel (children of other US service members). Because the court-martial records are brief in their descriptions of survivors who are minors, it is often unclear whether or not these minors were US dependents also living on base or local nationals⁹⁴. As a consequence of the vague descriptors and generally brief court-martial accounts released by the US military combined with the understanding that the general waiver agreed upon by Germany with the US often, if not always, means that jurisdiction is retained by the US military, it can be difficult to ascertain how many of these cases may involve local German nationals. As a consequence, this particular sub-case study looks at two cases involving survivors that fall outside the bounds of the NATO SOFA guidelines, meaning they are not covered by the SOFA protections and thus Germany would have primary jurisdiction over the case should they choose to exercise that right, and yet were tried either by the US military legal system or by the US civilian system under the authority of the Military Extraterritorial Jurisdiction Act 2000.

⁹⁴ Often victims are described as “female friend” or by generic descriptors for example “third victim, 14 year old” to protect the identities of the survivors.

Case One: Military Extraterritorial Jurisdiction Act (2000) in Action

In April 2016, Joseph Martin, 20, and Christopher Heikkila, 21, were sentenced to 8 and 7 years respectively in an Arizona court of law for the sexual assault of a 17-year old German woman in the town of Landstuhl, Germany in 2013 (Svan 2016). At the time of the assault both of the men were employees of the Army and Air Force Exchange Service on Ramstein Air Base and were both dependents of US personnel stationed in Germany (*Your West Valley* 2015, Svan 2016). Though the survivor of the crime was a German national, jurisdiction was retained by US authorities. However, as the two men accused (and convicted) of the crime were not US military personnel but were civilian employees and dependents they could not be tried in the US military legal system by court-martial. Previously, cases of this nature were solely under the jurisdiction of the host state; however, due to certain agreements, practices, or circumstances, often the local courts either could not or would not prosecute offences committed by US military contractors, civilian contractors, or dependents (Doyle 2012). Concerns regarding this jurisdictional gap over dependents and the civilian component (and most directly military contractors) of military installations abroad resulted in the creation and passage of the Military Extraterritorial Jurisdiction Act (MEJA) in 2000⁹⁵. The passage of MEJA into law established federal jurisdiction over crimes “committed by civilians who accompany

⁹⁵ A supplemental act to MEJA was also introduced in 2010. The Civilian Extraterritorial Jurisdiction Act builds upon MEJA to further address some jurisdictional gaps over civilian and military contractors, civilian employees, and accompanying dependents in areas outside of the territorial jurisdiction of the US and outside the bounds and authority of the UCMJ and military legal system. However, CEJA has largely stalled and has yet to be passed and implemented. See Doyle 2012 and Kelly 2014 for a more complete discussion of the need and function of CEJA.

military forces outside the United States, as well as crimes committed by former members of the military who leave active duty before being prosecuted by courts-marital” (Yost and Anderson 2001, p. 446).

Interestingly, though MEJA addressed a significant jurisdictional gap, the practice of placing these cases back into US federal jurisdiction functions to separate the space of justice (where the trial and sentencing takes place) from the space of violence, similar to how the full retention of jurisdiction as determined by the UN SOFA in Haiti separated these two spaces. This is especially curious, as none of the concerns that typically justify this jurisdictional retention are present in the German case. Germany’s legal system is fully capable and highly functional, unlike many host states in UN peacekeeping missions. Furthermore, the German legal system, though a civil law system, is not known to be guilty of human rights abuses or unfair. So, it is somewhat surprising that Germany, with the victim being a German national and a minor, did not take full jurisdictional control of this particular case especially considering the overwhelming evidence through social media records that the sexual assault was planned by the two men⁹⁶ (DOJ 2015, Svan 2016).

Case Two: US Civilian Survivor Not Affiliated with the US Military or SOFA

In 2013, an Air Force officer, Captain Andrew J. Barilla was sentenced to 27 months confinement and dismissal from the Air Force following the conviction for his

⁹⁶ I think it is important to note that is case was investigated by the ARMY Criminal Investigation Division (CID) and the FBI’s Phoenix and Washington Field Office. The case was prosecuted by Trial Attorneys from the Criminal Division’s Human Rights and Special Prosecutions Section and the Assistant U.S. Attorney of the District of Arizona (DOJ 2015).

sexual assault of a family friend who was visiting from the United States. The assault occurred off base after both individuals had been returning from Oktoberfest celebrations (Svan 2013a). As the survivor was a US citizen but completely unaffiliated with the US military and the assault occurred off-base, German authorities would have primary jurisdictional rights to the case under the guidelines of the NATO SOFA. However, under the general waiver of the Supplemental Agreement, jurisdiction is automatically waived to the United States unless Germany requests retention, and in this case, Germany did not request retention of jurisdiction. Subsequently, since the perpetrator of the crime was a member of the US military, the case remained within the military justice system and tried in a general court martial. Though initially sentenced to 27 months confinement, a pre-trial agreement reduced the sentence to 18 months confinement in a military incarceration facility and dismissal from the Air Force following time served (Svan 2013a).

Case Three: Sexual Assault of a Local National by a US Service member

In January of 2014, Army officer Lieutenant Colonel Brian Lofton was convicted in a court-martial for the sexual assault of a 29-year old local civilian. The assault occurred in Lofton's apartment following the first date between Lofton and the local woman. Though the woman called the German police following the assault, who took both Lofton and the local woman in for questioning, the case "was later handed over to the U.S. authorities is as standard with U.S. service members in Germany" (Vandiver 2014, p. 8). Though found guilty of sexual assault following the court-martial, Lofton's sentence did not include any confinement or time in jail, nor was he dismissed from the military. The sentence handed down from the jury included a reprimand, a \$1,500

monthly pay forfeiture for one year and a two-month restriction limiting Lofton's movements from his home and his duty station (Vandiver 2014). In a statement by Lofton's defense attorney, Stephen Carpenter, "I think the sentence – no jail, no dismissal—reflects the fact that what happened is out of character, and Lt. Col. Lofton is a good person who deserves the right to continue his service" (Vandiver 2014, p. 8). While this statement is problematic for many reasons, not least of all the justification for a light sentence due to the accused's "character," the differences in treatment and sentencing highlight the inconsistent treatment of such cases within the military justice system (such inconsistencies are also prevalent in the US civilian justice system) due to how policies are interpreted and operationalized within each individual branch of the military. In the previously discussed case of Capt. Barilla he, too, had a number of character witnesses who testified to his positive service record and volunteer activities. However, in Barilla's case not only did he receive jail time upon his conviction but also dismissal from military service following his time served. This differential treatment of cases and sentencing can be traced to variable practices and interpretations of policies within the branches of the US military itself as well as the variability of the facts of the cases themselves.

Though there is a proposal to amend the UCMJ branch-wide to include automatic dismissal for those convicted of sexual assault, when these cases took place, only the Air Force had implemented automatic dismissal for documented cases of sexual assault⁹⁷. This guidance took effect July 3, and the Air Force policy was an extension of a Congressional requirement within the 2013 National Defense Reauthorization Act that

⁹⁷ The distinction here is "documented cases," as dismissal is not limited to cases in which a member is convicted through legal means, but can be more broadly used by commanding officers (Svan 2013b).

required “the services to discharge anyone convicted of rape, sexual assault, forcible sodomy (forced oral or anal intercourse) or attempts to commit those offenses.” However, US service members discharged under this guidance can file a waiver of retention under a lengthy list of requirements and stipulations (Svan 2013b). Importantly for the study at hand, these variable interpretations and practices within the branches of the military highlight not only a variable legal landscape built on the different interpretations and practices by host states of the NATO SOFA jurisdiction formulas, but a second scalar level of practice at the administrative level within the military. The multiple levels of jurisdictional practices and legal interpretations further support the very real need for legal geographers to focus more on the practices at multiple, simultaneous scalar levels to fully understand the contradictory, complementary, and divergent governance strategies and experiences of security through jurisdictional practices, techniques, and sentencing.

Discussion and Conclusion

The NATO SOFA is unique in that it is one of the only reciprocal SOFAs currently in practice (the other is the Partnership for Peace SOFA which is related to the NATO SOFA). Thus, this chapter set out to examine what influences or affect the reciprocity of the NATO SOFA might have on jurisdictional practices between member states, as this particular variable is not present in the UN SOFA or the US-Japan SOFA. Within this overarching question of the influence of reciprocity on jurisdictional practices, this case study set out to investigate how the NATO SOFA criminal jurisdiction formulas have been interpreted and operationalized differently by three different member states who host US service members within their territories through sub-bilateral supplementary agreements. The focus on the supplemental agreements and

the legal interpretation of the criminal jurisdiction formulas was essential as these agreements directly create an uneven legal geography of jurisdictional practices. Furthermore, by investigating how these agreements were shaped by and evolved under different originating relationships between the United Kingdom, Italy, and Germany with the United States led to interesting insights into the custody practices and the security of US service members accused of crimes while stationed extraterritorially. This investigation also raises further questions: Is there more to the geopolitical relationships between states than we can see from looking at these cases? How might those bi-lateral relationships be an influence on these cases and legal procedures? Through the study of the cases themselves, unforeseen concerns were raised through two new matters: 1- the custody practices of host states, in the case of Italy; and 2 - the variable interpretation and operationalization of sentencing practices and the use of automatic discharge across the US military branches.

From discussions and the historical analysis of the development, arguments, and negotiations over the NATO SOFA following the formation of the North Atlantic Treaty Organization (Lepper 1991, Pagano 1992, Gronimus 1992, Fleck 2001) we know that the reciprocity of the NATO SOFA directly influenced the creation of the concurrent jurisdiction formulas, as NATO member states would likely be acting as both sending and receiving states. Thus the development of the concurrent jurisdiction formulas was essential in balancing the loss of sovereignty and authority of member states under both conditions. These concerns over the loss of sovereignty are most clearly seen when the issue of reciprocity was raised during the ratification debates in the United States Senate and the United Kingdom Parliament (Fleck 2001). Often the concurrent jurisdiction

formulas present in the NATO SOFA were justified as reasonable because of the reciprocal nature since it stood to reason that NATO member states would often be sending and receiving states – thus the reciprocity and concurrent jurisdiction formulas balanced the concerns over the loss of exclusive jurisdiction by the militaries and the loss of the exclusive territorial jurisdiction by host states (Lepper 1991).

However, it is more difficult to directly ascertain how the reciprocity of the NATO SOFA affects or influences the jurisdictional *practices* of sexual assault cases involving NATO personnel through the cases investigated here, as there were no cases of sexual assault by Italian, British, or German service personnel stationed in the United States to use as a comparison. The ability to determine the influence of reciprocity on jurisdictional practices is further eroded by the negotiation of supplemental agreements regarding jurisdiction, namely in cases where the supplemental agreement between two member states grants blanket waivers to the sending state, as is the case between the United States and Germany⁹⁸.

It is in the negotiation of the bilateral supplemental agreements and the interpretation of the jurisdictional formulas into these supplemental agreements, often shaped by the geopolitical relationships between the involved parties where we find some of the most interesting practices and geolegal landscapes. For instance, when the supplemental agreement was negotiated with Germany (at the time this agreement was

⁹⁸ A similar supplemental agreement was negotiated between the United States and the Netherlands where the Netherlands agreed to automatically waive their rights in cases where they had primary jurisdiction except in cases that hold special importance to the Netherlands. This blanket waiver has recently been tested in cases where the accused service member potentially would face the death penalty if found guilty, as capital punishment is a violation of the European Human Rights Charter. See Lepper 1991.

only applicable to the Federal Republic of Germany), the permanent sending states were able to negotiate a blanket waiver, essentially guaranteeing *de facto* immunity for service personnel from German prosecution while stationed there. The ability to successfully negotiate this blanket waiver was likely due to the relatively uneven power relationship between the sending states at the time (the UK, US, France, the Netherlands, Belgium, and Canada) and the Federal Republic of Germany, as the United Kingdom, the United States and France still maintained some administrative control over the area and the Federal Republic of Germany relied heavily on the sending states for their security in the three decades following the end of World War II (Fleck 2001). We do not see the same blanket waivers present between the United States and Italy, and as a consequence Italy often retains jurisdiction when it has primary rights and frequently denies waiver requests from the United States.

Through the case analysis section, then, it becomes clear that the reciprocity of the NATO SOFA has led to the development of concurrent jurisdiction formulas and created a unique geolegal landscape of shared jurisdiction. On this geolegal landscape, cases of sexual assault and rape committed by visiting forces against local civilians should be under the primary jurisdiction of the host state⁹⁹. However, the reciprocity and concurrent jurisdictional structure is complicated by the development of sub-bilateral supplemental agreements between *some* member States. The characteristics of these sub-bilateral agreements are greatly influenced by the conditions of the time in which they were negotiated and the nature of the relationship between the two parties as well as the

⁹⁹ It should also be noted that these formulas influenced the development of jurisdictional formulas in other SOFAs, namely the US-Japan SOFA during the renegotiation of terms in 1960. Thus, the development of these formulas was influential beyond just the practices within the Alliance.

internal politics of the sending and host states during negotiations. These agreements have led to the variable interpretation and operationalization of the NATO SOFA jurisdiction guidelines. As a consequence, the supplemental agreements and variable interpretations of the guidelines themselves have altered the jurisdictional formulas through clauses that have affected the jurisdictional *practices*, namely through blanket waivers in which the sending States generally, if not always, receive jurisdiction even in cases where they do not have primary rights. The insights gained through investigating the aims outlined in the beginning of this study, such as the role of legal interpretation on jurisdictional practices, are interesting and important in and of themselves but, through the investigation of the actual cases, further variables, practices, and finer scale details related to custody practices and incidents involving civilian dependents and employees have come into focus.

Importantly, these insights related to custody practices of accused personnel and to legal mechanisms created to address incidents involving civilian dependents and civil employees that accompany the visiting forces bring into focus not only the complex structures of security for the survivors of crimes of sexual assault and rape, but also issues of security for the personnel of the visiting forces and the civilian component who are accused of and tried for these crimes (Parkerson and Lepper 1990).

Chapter 6: Discussion and Conclusion

“What might be understood in jurisprudence by way of a return to questions of jurisdiction?’ Behind this question lies the speculative claim that, without an account of jurisdiction, jurisprudence would be left speechless, left without the power to address the conditions of attachment to legal and political order.”
Shaunnagh Dorsett and Shaun McVeigh, *Jurisprudence of Jurisdiction* (2007)

“Becoming human in both the legal and lived senses is a social, legal, and political process. It requires prohibiting or otherwise delegitimizing all acts by which human beings as such are violated, guaranteeing people what they need for a fully human existence, and then officially upholding those standards and delivering on those entitlements.” – Catherine Mackinnon, *Are Women Human?* (2007)

“Herein lies the irony: the more obscene a crime, the less visible it is.” –Michael A. Sells (1996)

Studies of sexual violence do not often take jurisdiction or jurisdictional practices as one of the central concerns¹⁰⁰. Similarly, much of legal scholarship has largely ignored jurisdiction as a technology of law or a process, instead limiting the analysis of jurisdiction to questions of authority and its delimitation (Dorsett and McVeigh 2007). The interdisciplinary project of critical legal geography, too, has remained largely silent on the matter of jurisdiction and also on sexual violence. Therefore, I have positioned this study to sit at the confluence of these strands of inquiry – sexual violence, jurisdiction, and critical legal geography through an exploratory analysis of cases of rape and sexual assault of civilians by foreign military personnel under three different Status of Forces Agreements whereby troops are housed extraterritorially in host States in times of peace and are governed by variable jurisdictional arrangements and assemblages of law. The three Status of Forces Agreements examined in this study each vary considerably in

¹⁰⁰ One notable exception is Maria Drakopoulou’s excellent chapter in Dorsett and McVeigh’s (2007) edited volume *Jurisprudence of Jurisdiction*, “Of the Founding of Law’s Jurisdiction and the Politics of Sexual Difference: The Case of Roman Law” whereby she examines the morphological qualities of jurisdiction in terms of how or what is engendered and given shape through jurisdiction and how this process make visible or invisible gender in early Roman law (Drakopoulou in McVeigh (2007)).

their scope, duration, involved actors, scale, and geopolitical origins. While these different histories and contexts were discussed at length within each separate case study, there is one variable or condition that is shared by all three: that each agreement and the stationing of foreign forces in the territory of a host state outside the boundaries of war is justified within a discourse of security. Though there are differences in whose security, and from what or whom, these places are seeking security from, the fact remains that SOFAs and the practices, privileges, and immunities for foreign forces that they put into place exist within a context of security. However, these deployments, justified through a discourse of security, are not without their own issues and concerns. While forces are deployed extraterritorially in defense of the security of other nation states and regions from internal and external threats to the stability and sovereignty of the host state, there have been, and continue to be, instances of these forces committing crimes against the civilians they are charged with protecting.

The Complex Assemblages at the Intersection of Law, Space, and Power under SOFA Agreements

In order to build the framework in which to critically examine the contingencies and constraints of spatial justice for the survivors of sexual violence and rape at the hands of these foreign forces, I first examined how the intersection of law, space, and power manifests in various ways across place, legal systems, and temporalities under the three different Status of Forces Agreements. In examining the genesis and the justifications for each of the three Agreements included within this study, I outlined how the legal spaces were formed or inaugurated by these bi-lateral and multilateral agreements and why they took on certain characteristics or specific guidelines (e.g. reciprocity vs. non-reciprocity, concurrent jurisdictions vs. full retention by the sending state). The legal assemblages that formed due to the SOFAs

included not only the porous and uneven jurisdictional boundaries and spaces that the presence of the military personnel inaugurate, but also the material legal spaces of the various courts, tribunals, and court-martial hearings that are made by these agreements, as well as the use of waivers and custody practices to circumvent or alter the jurisdictional arrangements outlined in the black letter of the law. By looking at jurisdictional practices and overlapping jurisdictional arrangements created by these Agreements, I demonstrated how the notion of interlegality, or the understanding that “[w]e live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassing” whereby “[o]ur legal life is constituted by an intersection of different legal orders” (de Sousa Santos 2002, p. 427) manifests itself in some curious and unique ways as civilians and SOFA personnel interact and in some cases, come into conflict.

The ways in which these interlegalities manifest, and the effects that the multiple networks of legal orders have on the security of both the survivors of these crimes and the perpetrators, is determined by the various forms of power involved in the creation of the SOFAs and the jurisdictional guidelines, the temporality of the incident (historically and in the immediate sense), and the interpretation of the legal guidelines through jurisdictional practices, waivers, and custody arrangements (de Sousa Santos 1987, 2002; Valverde 2014). In the first case, the exploration of the UN SOFA in Haiti following the 2011 earthquake revealed a particular set of conditions and arrangements of political/military power that manifested in such a way that Haiti and the UN lacked any jurisdictional authority over crimes committed by UN peacekeepers against local civilians. This spatial separation between the spaces in which the violence occurred and the spaces where justice took place (when such cases were legally addressed by the troop-contributing state), raised important questions regarding the relationship

of proximate and distant spaces of violence and justice, as well as highlighted tensions between the scales of security: if security is the justification for the deployment of these peacekeepers into Haiti, how do these cases and the lack of justice experienced by many of the survivors call into question whose security is prioritized here? Though the UN mission into Haiti provided for some amount of stability or security at the scale of the state, what of the security of individuals who are sexual assault survivors? By focusing on the jurisdictional retention by troop-contributing countries and the judicial outcomes (or lack thereof), we began to gain a better understanding of the effects that these legal structures have at the scale of the individual and the conflicts between security at the human scale and security at the state or international scale. In the case of Johnny Jean, for instance, not only was the rape survivor required to travel thousands of miles to provide testimony in a foreign court, but he was ultimately denied his legal identity as a rape survivor as the perpetrators were found guilty of simple assault, even in the face of video evidence of the attack. If we are to understand jurisdiction as the way in which law speaks, we must ask ourselves in the face of cases such as this: how did the law speak to this survivor?

The multilateral nature of the UN SOFA, whereby multiple military units or commands, each governed by the laws of their respective sending states, allowed for an investigation into the creation of a rather complex and uneven legal geography. Within this legal landscape, survivors of these crimes, while all Haitian citizens, were in effect governed by a multitude of other laws, legal definitions of rape and sexual assault, as well as variable sentences and legal systems in which the cases were tried. Consequently, each survivor had a different and unique legal experience based on the nationality of their attacker with no ties to their own legal system or norms. The rather brief period of time covered by the first case study of the UN SOFA in Haiti did not allow for an in-depth examination into the role that time and temporality plays in the

manifestation and outcomes of the three cases analyzed within that particular case study. Instead, the UN SOFA case highlighted the spatial dissonance between the spaces of violence and spaces of justice created by the full retention of jurisdictional authority by the sending state or troop-contributing country and the subsequent affect this retention had on the effectiveness of justice and the impediments to justice for the survivors of such crimes (such as the requirement of Johnny Jean to travel to Uruguay to testify in the trial against his attackers).

The influence of temporality was highlighted in the examination of the US-Japan SOFA over the 71-plus years of its existence. Within the exploration of this bilateral and non-reciprocal SOFA, I demonstrated how the relationship between the United States, Japan, and Okinawa shifted from the post-World War II era through the Cold War and into the current era dominated by the War on Terror, the jurisdictional arrangements over US troops stationed on Okinawa shifted as well from full jurisdiction held by the US military in the early days of administration to the current concurrent jurisdictional arrangement where primary rights to crimes of sexual assault against civilians committed by US service personnel are held by Japan. In this case study I utilized chronotope analysis, following methods developed by Mariana Valverde (2015), to highlight how time, both historically and in the immediate sense, influenced how crimes of sexual violence by US troops against Okinawa civilians were governed and adjudicated. Most germane to the overarching goals of the study as outlined in the beginning of this study is that this case study, in particular, highlights the dynamic nature of jurisdictional practices and the intersections of law, space, and power through the lens of temporality and culture.

I demonstrated through the analysis of the NATO SOFA, as the only reciprocal SOFA within this study, how important and influential the development of concurrent jurisdictional formulas has been on the development or renegotiations of other SOFAs – namely the inclusion

of the concurrent formulas in the 1960 US-Japan SOFA. Through the investigation of the NATO SOFA it became clear that the intention of the concurrent jurisdiction formulas was to equitably navigate issues of sovereignty for the various member states who would likely be host states and sending states. However, the jurisdictional practices between the United States and the three host states included in the NATO case study manifested themselves differently due to the creation of various sub-bilateral supplemental agreements negotiated between the member states, creating a rather complex legal geography of jurisdictional practices, mainly through automatic waiver stipulations.

Jurisdiction, the Construction of Space, and the “How” of Governance

As noted by Leslie Moran (2007), “‘jurisdiction’ is a term that characterises law and legality as spatial and geographical phenomena” (p. 159) As such, she points to the intimate connection between the legal and the spatial reflecting on jurisdiction as a geo-jurisprudential term (p.159). I largely agree with this sentiment, as throughout this study place and space have continuously played significant roles in developing a nuanced understanding of how and why the cases at the center of this work develop in so many different ways. I discussed in the research context chapter how jurisdiction has changed over time from something determined by one’s status or relationship to a ruler, religion, or political entity to the current, predominant model where jurisdiction is based on territory (McVeigh 2007, p. 139). While the temptation to simply elide jurisdiction to territory is quite strong in the current geopolitical system, as Austen Sarat (2013) and Daniel Matthews (2014) effectively demonstrate, jurisdiction viewed exclusively as a technology or legal instrument in delimiting and defining territory and authority only tells part of the story. Therefore, I have demonstrated that under Status of Forces Agreements, both one’s

status and the territory in which these crimes occur both play a role in the determination of jurisdiction.

Through a critical examination of the role of jurisdiction in the construction of space I have demonstrated how the presence of military SOFA personnel in the sovereign territory of the host state inaugurate new temporary jurisdictional spaces where the laws of the host state may apply to cases where the citizens of the host state are victims. Consequently, the violation of the host state citizen's body is regulated and placed within the jurisdiction of a foreign territory and legal system. In this way, the body of the survivor can become a space-body interface "through which political struggles that make up the institutional, organisational, and functional boundaries of law's force (jurisdiction) take place" (Moran 2007, p. 161). Furthermore, the bodies of both the survivor and the perpetrator are deployed in different geographical categories simultaneously – national, international, and corporeal – as many of these cases take on political and geopolitical significance, thus requiring mitigation through diplomatic negotiations. These negotiations often take place at the national level, far removed from the bodies involved in the assault, and determine who, where, and how the case will be adjudicated, by what means justice for the survivor is obtained, and where the accused is to be imprisoned if found guilty of the crime.

In focusing on the jurisdictional practices themselves, I was able to illuminate the "how" of governance of these crimes. In the case of Haiti these jurisdictional spaces formed by the SOFA guidelines and the retention by host states often took characteristics of impunity or at the very least low levels of punishment. In Okinawa, there is an interesting shift to the role that territory plays in the nature of the jurisdictional spaces formed through time. As the authority of the Okinawan territory has changed – from an administered territory under the complete authority of the US military to a Japanese prefecture that has over time gained in prominence and affluence –

the jurisdictional powers and practices over civilian sexual assault by US military personnel also have changed. Consequently, though the status of the US military personnel has not changed over this time, per se, the territorial and political qualities of Okinawa have influenced jurisdictional practices and the governance of these crimes, which has, in turn, altered the construction and properties of jurisdictional space(s). Within the NATO case, jurisdictional spaces and practices were altered by the creation of sub-bilateral supplementary agreements, in effect circumventing the original jurisdictional formulas. Often these supplemental agreements allowed jurisdiction to be retained by the sending state (the United States) in cases where they clearly did not have primary jurisdictional rights.

A critical, and unexpected, insight gained by the investigation of the NATO SOFA case was the role that custody practices by Italian authorities play in potentially preventing the achievement of justice for civilian survivors of sexual assault. Though Italian authorities actively retain their primary jurisdictional rights to cases of rape and sexual assault of local nationals by US military personnel, their reluctance to place these individuals within Italian custody or allow for said individuals to be held in the US Army barracks in Germany has in some cases led to the accused military personnel being able to evade legal proceedings by rotating out of Italian jurisdiction prior to their trials. The ability of justice to be potentially circumvented or avoided due to the reluctance of Italian authorities to retain custody of these service members due to the poor conditions of their incarceration facilities highlights the territorial dimension of legal authority. By not being held in the custody of Italian authorities, accused service members retain their ability of movement. These movements can include moving outside of the territorial jurisdiction and area of authority of the Italian legal system, and with little political will to

extradite said service members back to Italy from either the United States or wherever else they might be currently stationed, the achievement of justice is unlikely.

A Critical Legal Geography of the Contingencies and Constraints of Spatial Justice under SOFAs

By examining the three SOFAs and related cases through the lens of critical legal geography, I highlighted the various ways in which power, authority, and law interact in creating spatialities of injustice and investigated the contingencies and constraints of spatial justice as influenced by the guidelines and jurisdictional practices within and throughout the three different SOFAs. In the Haitian case study, the political power of troop-contributing countries relative to the lack of power by the United Nations and Haiti as determined by the jurisdictional formulas present in the UN SOFA was instrumental in maintaining much of the legal authority in the hands of the troop-contributing countries. This power dynamic and the retention of legal and jurisdictional authority allowed for a multitude of overlapping laws, variable definitions of sexual violence and rape, and numerous forms of justice (or injustice in some cases) to act upon the territory of Haiti and more importantly, upon the bodies of Haitian civilians. In the case of Haiti, spatial justice is seemingly contingent on the troop-contributing country's willingness to first, address the crime, and second, to deploy the time and resources to bring the accused individual(s) into a court of law and try them for the offense. As we saw in the case of Johnny Jean and the Uruguayan government, little to no attempt was made to find Jean so that he could testify in his defense, potentially allowing (or perhaps intentionally causing) the case to fall apart. Following his travels to Uruguay to testify, further issues occurred while in the country, including a lack of a qualified translator for Jean to fully cooperate in his trial.

The jurisdictional guidelines present in the UN SOFA, while protecting peacekeeping forces from human rights abuses in the courts of the host states, as currently practiced by troop-contributing countries is placing a significant constraint on justice both personally to the survivors, and spatially to the host states. Similar constraints have been present in the past as noted in the US-Japan SOFA case study. In the early days of occupation, the full retention of jurisdictional authority by the US military over their troops during the administration period was a significant source of contention between the US military administration and the local Okinawan people. Numerous cases of rape and sexual assault went unaddressed and unpunished, especially in the years immediately following WWII. However, as power relations between the US, mainland Japan, and Okinawa began to shift, Japan became an important regional ally, Okinawa gained in prosperity and political clout, and the contingencies and constraints on spatial justice also shifted.

Though cases of rape and sexual assault of local civilians by US military personnel remains a concern, many of these cases are now retained by Japan, tried in a Japanese court of law, and a number of US military personnel have been sentenced and confined in Japanese prisons. Cooperation between the US military and the local Japanese courts in Okinawa ensures that the human rights of US military personnel are not violated, while simultaneously prioritizing justice and community healing for the survivors of these crimes. Importantly, in those cases where Japanese authorities do waive their jurisdictional authority, the US military often does proceed with a court-martial, ensuring that their personnel do not avoid taking responsibility for their offences against the local Okinawan community.

The interaction of power, authority, and law under the NATO SOFA manifests in unique ways regarding spatialities of (in)justice. As the only reciprocal SOFA within the study, and one

of the few currently in existence, one would think that the equality built into the jurisdictional formulas would ensure some semblance of uniformity in the treatment of cases of civilian sexual assault by visiting forces. However, as I have highlighted through the, admittedly limited, investigation of cases of sexual assault by visiting US forces in the territories of three NATO partners, the creation of sub-bilateral supplementary agreements alters the jurisdictional practices significantly. The automatic granting of waivers can perhaps be seen as granting *de facto* exclusive jurisdiction to the sending state, as was a concern by some in the UK Parliament. What turns out to be the most significant constraint on spatial justice is the current custody practices by Italian authorities. Through their reluctance to maintain custody of US personnel accused of sexual assault crimes against local civilians and the long lead time to the beginning of court proceedings, Italian authorities have lost their jurisdictional authority and ability to try said individuals when they rotate out of Italy. Consequently, space/territory, authority, and law, interact under these custody practices, effectively circumventing the achievement of justice for the survivors of these perpetrators.

Through the three case studies presented within this larger work, it is clear that the ways in which the jurisdictional formulas within SOFAs are interpreted and practiced vary widely, producing complex and uneven legal landscapes. Gaining a more nuanced understanding of how these interpretations and practices manifest in ways that can either enhance or prevent the achievement of justice, both spatially and personally for the survivors, is an area that legal geographers must take more seriously. To do so, legal geographers must make an earnest effort to include the role of legal practitioners in their work. This need became abundantly clear to me during a few informal discussions with a number of United States Judge Advocate Generals who are familiar with SOFA cases. The insight provided into the legal and sub-legal practices, and the

rationale underlying these practices was invaluable towards really understanding the legal geography of SOFAs and the variable jurisdictional practices. Only through these informal conversations was I really able to appreciate the dynamic relationships between the proximate and distant legal spaces created by these SOFAs.

Breaking Down the Traditional Boundaries between the Local/Global, Familial/State, and Personal/Political Objects

The long-term stationing of foreign troops within the territory of the host state, often near local civilians, allows for the possibility for incidents, accidents, and crimes to occur between the two populations. Though in some cases these interactions are minimized, either structurally through large base installations that meet the basic needs of the military personnel, or geographically by locating bases in remote areas, crimes and accidents still occur. The ways in which these events are legally addressed through the jurisdictional formulas present in SOFAs brings the individuals from different states, cultures, and histories together as well as bringing together different legal systems and governments with very different historical, cultural, and philosophical foundations. These cases, then, are simultaneously local and global as people, institutions, laws, and politics at both scalar levels quickly become entwined and entangled.

These cases, through these complex entanglements, break down the traditional boundaries of what we often consider low and high politics. Similarly, the nature of these cases and the actors involved create situations that can be considered simultaneously of local and global concern, perhaps another instance of “glocalization.” For instance, in Okinawa, a number of rape and sexual assault cases involving a local national survivor and US military service member as a perpetrator have scaled up from a personal conflict between two individuals at a local level to a highly political and politicized event that threatens the stability of the US-Japan

political and military alliance. Similarly, repeated cases of sexual assault by UN Peacekeepers in Haiti and the perceived inaction by the UN and troop-contributing countries to meaningfully address these incidents has led to a decrease in confidence in the effectiveness of UN Peacekeeping missions. This is not only limited to Haiti, however. Gross violations of local populations, especially the sexual assault and coercion of local civilians by UN peacekeeping forces has been documented in many UN operations. Human Rights Watch has also documented the widespread use of sexual assault and coercion by African Union troops in Somalia (see HRW 71-page report from 2014 “The Power These Men Have Over Us: Sexual Exploitation and Abuse by African Union Forces in Somalia). Interviews with local legal representatives has highlighted the structural and legal impediments to justice as determined by a lack of power by prosecutors and legal investigators as well as issues of jurisdictional retention by troop contributing countries and the inability or reluctance of survivors to travel to these countries to testify.

It is clear from a brief mention of these other geographic areas of concern that further research is needed in this area. Further comparative work including the aforementioned case in Somalia could begin to locate specific jurisdictional practices or formulas that are the most likely to create impediments to justice for the survivors of these crimes. As this was an exploratory study, many different methods were utilized to best address the conditions of each particular SOFA. However, moving forward, I believe it is imperative that critical legal geographers undertake more ethnographic and participatory research with legal practitioners to build a better understanding of the legal and sub-legal mechanisms and practices that are instrumental in continually forming and adjusting our legal landscapes.

Finally, this study has focused on exploring and highlighting the dynamic aspects of law and jurisdiction. Too often in legal geography research we are preoccupied with the black letter

of the law, the building of borders, and the theoretical aspects of legal and critical legal geographies. While I do not dispute the importance of these endeavors, I believe it is imperative that legal geographers take up the technologies and practices of law with more vigor and view these aspects of law as equally, if not more, important, as it is in these aspects that we see the greatest effects on the attainment or denial of justice for individuals. In this way, we can begin to build a more nuanced understanding of the intersection of law, space, and power. Most importantly, through a study of legal *practices* we can begin to build a better understanding of the variety of the experiences of security of those upon whom these laws act and the geolegal spaces and landscapes continually created and recreated by the inauguration of law through the jurisdiction.

Appendix 1: Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of America, 1960

“Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of American, Regarding Facilities and Area and the Status of United States Armed Forces in Japan” Entered into force June 23, 1960

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4 . The foregoing provisions of this Article shall not imply any right for the military authorities of the United States to exercise jurisdiction over persons who are nationals of or ordinarily resident in Japan, unless they are members of the United States armed forces.

□5.

(a) The authorities of Japan and the military authorities of the United States shall assist each other in the arrest of members of the United States armed forces, the civilian component, or their dependents in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

□(b) The authorities of Japan shall notify promptly the military authorities of the United States of the arrest of any member of the United States armed forces, the civilian component, or a dependent.

c) The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he charged by Japan.

6.

(a) The authorities of Japan and the military authorities of the United States shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects

b) The authorities of Japan and the military authorities of the United States shall notify each other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction. □

7.

(a) A death sentence shall not be carried out in Japan by the military authorities of the United States if the legislation of Japan does not provide for such punishment in a similar case.

(b) The authorities of Japan shall give sympathetic consideration to a request from the military authorities of the United States for assistance in carrying out a sentence of imprisonment pronounced by the military authorities of the United States under the provisions of this Article within the territory of Japan.

8. Where an accused has been tried in accordance with the provisions of this Article either by the authorities of Japan or the military authorities of the United States and has been acquitted, or has been

convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the territory of Japan by the authorities of the other State. However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of its armed forces for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of Japan.

9. Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;□

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;

(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the United States and to have such a representative present at his trial

10.

(a) 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 under Article II of this Agreement. The military police of such forces may take all appropriate measures to ensure the maintenance of order and security within such facilities and areas.□

(b) Outside these facilities and areas, such military police shall be employed only subject to arrangements with the authorities of Japan and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the United States armed forces.

11. In the event of hostilities to which the provisions of Article V of the Treaty of Mutual Cooperation and Security apply, either the Government of Japan or the Government of the United States shall have the right, by giving sixty days' notice to the other, to suspend the application of any of the provisions of this Article. If this right is exercised, the Governments of Japan and the United States shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended.

12. The provisions of this Article shall not apply to any offenses committed before the entry into force of this Agreement. Such cases shall be governed by the provisions of Article XVII of the Administrative Agreement under Article III of the Security Treaty between Japan and the United States of America, as it existed at the relevant time.

Appendix 2: Article VII of the 1950 NATO SOFA

Article VII

1. Subject to the provisions of this Article,
 - a. the 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;
 - b. the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.
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 offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
 - 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, including offences relating to the security of that State, punishable by its law but not by the law of the sending state.
 - c. For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include:
 - i. treason against the State;
 - ii. sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State
3. In case where the right to exercise jurisdiction is concurrent the following rules shall apply:
 - a. 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 dependent;
 - 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.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.
5.
 - a. The authorities of the receiving and sending states shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.
 - b. The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.
 - c. The custody of an accused member of a force or civilian component over whom the receiving state is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.
6.
 - a. The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.
 - b. The authorities of the Contracting parties shall notify one another of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.
7.
 - a. A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving state does not provide for such punishment in a similar case.
 - b. The authorities of the receiving State shall give sympathetic consideration to a request from the authorities of the sending State for assistance in carrying out a sentence of imprisonment pronounced by the authorities of the sending State under the provision of this Article within the territory of the receiving State.

8. Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

9. Whenever a member of a force or civilian component of a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled:
 - a. to a prompt and speedy trial;
 - b. to be informed, in advance of trial, of the specific charge or charges made against him;
 - c. to be confronted with the witnesses against him;
 - d. to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
 - e. to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
 - f. if he considers it necessary, to have the services of a competent interpreter; and
 - g. to communicate with a representative of the Government of the sending State and when the rules of the court permit, to have such a representative present at his trial.

10.
 - a. Regularly constituted military units or formations of a force shall have the right to police any camps, establishment or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises.
 - b. Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.

11. Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment, property,

records and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose.

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