

**Couching Intervention: Norms, Interests, and Trends in Jurisdictional Allocation in Status of Forces Agreements (SOFAs)**

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ABSTRACT

Much ink has been spilled on the way justifications for and patterns of military intervention have changed, particularly since the end of the Cold War. One aspect of intervention that has not been well explored in this literature, however, is jurisdictional allocation, or which country should try service members who commit crimes while deployed overseas. The sending country normally seeks to retain jurisdiction to protect their service members from criminal systems that may expose them to human rights abuses or lower legal standards than they would enjoy at home. Host countries, on the other hand, often argue against this violation of their sovereignty, which undercuts their legal institutions and ability to regulate internal order. What have been the trends in jurisdictional allocation over time? Has it been consistently allocated to host countries or sending countries, and how has this been justified? What could explain these trends? I explore this question using two cases. The first case focuses on the allocation of jurisdiction in UN peacekeeping Status of Forces Agreements (SOFAs) from 1948-2013, and debates in the 2000s over reforming jurisdictional allocation in the UN's model SOFA and Memorandum of Understanding in light of allegations of rape committed by UN peacekeepers on mission. The second case looks at negotiations surrounding the US-Iraq SOFA in 2008 and 2011. Overall, I argue that patterns of SOFA jurisdictional allocation have consistently favoured the sending country. This is better explained by state interests, or sometimes a mix of interests and norms, rather than norms alone. This paper ultimately points to the need to take a more nuanced look at the dynamics of interventions, which may follow different patterns over time. In other words, not all aspects of intervention may be evolving in the same way.

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Much ink has been spilled on the way justifications for and patterns of military intervention have changed, particularly since the end of the Cold War<sup>1</sup>. Scholars have highlighted several key shifts, including: an increased focus on multilateralism; more wide-ranging mandates that allow for institutional engineering; and interventions justified on the grounds of human rights protection (Bellamy and Williams 2010; Finnemore 2003; Zaum 2009). One aspect of intervention that has not been well explored in this literature, however, are the detailed legal agreements, or Status of Forces Agreements (SOFAs)<sup>2</sup> that define the rights of the intervenor (sending country) and intervened (host country). These agreements outline a host of privileges that play a critical role in the implementation of military interventions, ranging from tax exemptions to freedom of movement and permission to bear arms. One particularly contested question is jurisdictional allocation, or which country should try service members who commit crimes while deployed overseas. The sending country normally seeks to retain jurisdiction to protect their service members from criminal systems that may expose them to human rights abuses or lower legal standards than they would enjoy at home (ISAB 2015: 1). Host countries, on the other hand, often argue against this violation of their sovereignty, which undercuts their legal institutions and ability to regulate internal order.

Jurisdiction allocation thus represents a worthy subject of inquiry for three reasons. First, jurisdiction allocation is a critical but often underappreciated dynamic that has important implications for the success of military interventions. Sending states may delay or withdraw their forces if jurisdiction cannot be settled. Deep tensions can arise in host states when foreign service members walk free after committing perceived or actual crimes. Understanding these dynamics is important because the way in which interventions take place can impact the future likelihood of further crises and shape the legitimacy of local institutions (Caplan 2012: 16; Duffy Toft 2009; Zaum 2009). Second, examining the state interests and/or norms at play in these agreements has been largely unexplored in the literature (Voetelink 2015: 7). Most studies of SOFAs and jurisdiction have been anchored in the legal realm (Voetelink 2015). Situating this question in the International Relations literature could help us to understand the broader forces shaping these decisions, and when states act according to their interests or alter their behavior according to norms. The need for evidence on the role played by interests and/or norms has been

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<sup>1</sup> Here I focus on military invasions or peacekeeping missions and exclude other activities that involve sending military personnel overseas, such as humanitarian relief, military exercises, or to be posted at a base. There are several reasons for this. First, I seek to keep the relative capacity of sending and host states constant to make my cases more comparable. In invasions or peacekeeping missions the sending state/organization is often stronger than the host state, however with bases or exercises the host and sending state may be more equal, which can change bargaining power and thus jurisdictional allocation patterns (Cooley and Spruyt 2009), confounding my conclusions. Second, my approach keeps the interests involved relatively constant. Invasions or peacekeeping missions involve physically sending personnel abroad for potentially long periods of time, however agreements for humanitarian relief or exercises can concern the possibility of sending personnel in the future or for very limited periods of time. Thus jurisdictional allocation is often a more acute question in the case of invasions or peacekeeping.

<sup>2</sup> Here I define a SOFA as “an arrangement, no matter in what form, delineating the legal status of service- men from a sending State who stay with the consent of the host State on its territory, and that at least includes rules on the exercise of criminal jurisdiction over the sending State’s servicemen.” (Voetelink 2015: 17)

identified by scholars on both sides of this academic debate (Zaum 2009: 2). Finally, not all aspects of intervention may be evolving in the same way. Indeed, much of the literature focuses on when and how sending states protect foreign citizens from abuses. Jurisdiction, however, is more directly about the privileges extended to the sending states' own citizens. Different aspects of intervention may thus tap into distinct sets of norms and interests and change over time in equally distinct ways. Our understanding of whether jurisdiction allocation has in fact evolved in similar or different ways from other aspects of intervention, however, appears limited.

The specific questions guiding this essay therefore are: What have been the trends in jurisdictional allocation in SOFAs over time? Has it been consistently allocated to host countries or sending countries, and how has this been justified? What could explain these trends? To answer these questions, this paper is structured in the following manner. First, I outline the changing nature of military intervention from the Cold War to present day, focusing on the way that sovereignty has become increasingly conditional on good governance rather than formal legal recognition and self-determination. The purpose of this section is to describe how shifts in the global power balance (my independent variable) have affected norms of sovereignty and patterns of military intervention. My aim is not to authoritatively explain how this shift occurred, nor to argue that changes in the global power balance are the only factor that have shaped sovereignty norms, but rather to highlight its role in permitting key changes in the nature of military intervention. Second, I introduce my dependent variable, which is jurisdictional allocation in SOFA agreements. Debates over jurisdiction speak to the tension between sovereignty as self-determination and sovereignty as conditional on good governance as host and sending states seek to maximize their jurisdictional powers. Third, I outline my theoretical expectations in terms of how SOFA jurisdictional patterns may change (or not) over time based on norms and/or interests. Do patterns of jurisdictional allocation track with the post-Cold War shift in sovereignty norms, which justify greater intervention into host state affairs, or not? Fourth, I test my hypotheses using two cases. The first case focuses on the allocation of jurisdiction in UN peacekeeping SOFAs from 1948-2013, and debates in the 2000s over reforming jurisdiction in the UN's model SOFA and Memorandum of Understanding in light of allegations of rape committed by UN peacekeepers on mission. The UN presents the most likely case for the norms-based hypotheses as it is harder for powerful countries to impose their interests in multilateral institutions. My second case looks at negotiations surrounding the US-Iraq SOFA<sup>3</sup> in 2008 and 2011. This is a likely case for the interest-based hypotheses as it is a bilateral agreement between a superpower and a fragile country. The SOFA, however, surprisingly allows for Iraq to prosecute US soldiers in certain circumstances.

For the UN case, I find evidence that jurisdictional allocation is driven more by interests or a mix of interests and norms. For members of national military contingents jurisdiction has rested with the sending country in UN SOFAs over time. This jurisdiction has also not been made contingent on improved governance, and there have been few systematic appeals to sovereignty norms to justify this position, lending evidence to the interests hypotheses. For UN experts and officials, on the other hand, host states have more power to try them in criminal cases (although this is

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<sup>3</sup> The full name of the 2008 SOFA agreement is the *Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq*. It will simply be referred to as the US-Iraq SOFA for the remainder of this essay.

circumscribed). This is often justified by appealing to the contingent sovereignty norm, however there remains great debate over how conditional immunity should be for such staff in cases where the host state has some quality of governance. This could fit under the mixed norms/interests (no change) hypotheses or interests hypotheses. For the Iraq-US case, I find that the US continued to effectively hold jurisdiction over its personnel in practice, this jurisdiction was not made contingent on improved governance, and the increased jurisdictional powers of Iraq appear to be due to the bargaining leverage that Iraq held rather than norms. Overall I argue that this case supports my interests based hypotheses.

The findings from the UN and Iraq cases are mitigated, however, by a lack of Cold War cases to compare against, and a lack of access to primary documents on jurisdictional allocation negotiations. While these findings are somewhat limited, this paper ultimately points to the need to take a more nuanced look at the dynamics of interventions, which may follow different patterns over time. Indeed, while host countries may have enjoyed greater non-interference in their affairs during the Cold War in other aspects of intervention, jurisdictional allocation appears to consistently be a key area where host state sovereignty has been compromised over time, and interests have played a key role in shaping allocation decisions.

### **Independent Variable: Balance of Power and Sovereignty from Cold War to Present**

Sovereignty is generally defined as “the recognition of the claim by a state to exercise supreme authority over a clearly defined territory” (Zaum 2009: 3). This implies that sovereign states have the right to non-intervention and self-governance (ibid). Contained in this general concept of sovereignty, however, is a bundle of sometimes conflicting norms that touch on matters such as territory, people, and autonomy (Cooley and Spruyt 2009; Krasner 1999; Zaum 2009: 4). Indeed, Krasner identifies four different meanings of sovereignty: international legal sovereignty (“recognition extended to territorial entities that have formal juridical independence”), Westphalian sovereignty (“the exclusion of external actors, whether de facto or de jure, from the territory of a state”), domestic sovereignty (the presence of a legitimate authority in a country “and the extent to which that authority can be effectively exercised”) and interdependence sovereignty (“the capacity of a state to regulate movements across its borders”) (1999: 4). States can possess certain types of sovereignty but not others, and the exercise of one type of sovereignty can undercut another (ibid). In addition, these different aspects of sovereignty can change in strength at distinct rates. This has implications for the patterns and justifications of intervention over time.

This is evident in the different aspects of sovereignty that risen and fallen in importance have before and after the Cold War. During the Cold War, Westphalian and international legal sovereignty were generally ascendant. In other words, formal borders, rather than the ability of a state to effectively exert authority in its territory, was key to determining statehood (Zaum 2009: 4). Indeed, with increasing decolonization after WWII, the norm of self-determination norm became more powerful, and was integrated into the Charter of the United Nations (Bain 2003; Krasner 1999: 218). There are several factors that contributed to this trend. Finnemore posits that this was due in part to an expanding understanding of human rights, as non-Europeans became seen as rights holders, including the right to self-determination (2003: 71). The horrors committed during WWII, as well as the contributions of colonized people to the war effort,

further bolstered the idea that countries should be able to govern themselves (Bellamy and Williams 2010: 82). The European powers additionally found it increasingly difficult to maintain their empires in the face of increased financial costs and the rise of nationalist movements in the colonies (Krasner 1999: 186).

One key variable that shaped sovereignty norms during this time, however, was the bipolar power system of the Cold War. Indeed, the US and Soviet Union thought that the best way to preserve their freedom and ideology would not be to balance the other power, but to eliminate it (Finnemore 2003: 125). Both countries, however, sought to avoid large-scale, direct confrontation. With the vast military assets and nuclear warheads that each possessed, outright war could lead to the annihilation of both countries (Anderson 2016; Grieco, Ikenberry, and Mastanduno 2015: 56; Weiss 2007: 35). As such, both the US and Soviet Union were generally opposed to outright violations of Westphalian sovereignty. The US and Soviet Union thus competed indirectly for influence in the newly independent, non-aligned countries of the developing world (Grieco, Ikenberry, and Mastanduno 2015: 56) and in Europe through their spheres of influence<sup>4</sup> (Krasner 1999: 218). Both countries tolerated great brutality by allied regimes as long as they continued to support their ideology (Finnemore 2003: 126). As a result of this tension, the UN Security Council was limited during this time as the US and Soviet Union used their vetoes to prevent interventions<sup>5</sup> (Bellamy and Williams 2010: 85).

With the end of the Cold War and the rise of the US as the ascendant superpower, prevailing notions of sovereignty and patterns of intervention changed. In this period, the norm of non-intervention came into conflict with other standards of behavior such as human rights, rule of law, and democratic governance (Wilde 2012: 272; Zaum 2009: 40). Sovereignty thus became increasingly conditional on the way states treat their own citizens (Zaum 2009: 4). This opened the door for states to justify interventions that involved not only keeping the peace, but also reforming and even replacing the institutions of host countries. This thinking is represented, for instance, in the Responsibility to Protect (R2P) doctrine, which states that when a state is unwilling or unable to uphold the basic rights of its citizens or commits serious atrocities against them, it is acceptable for other countries to violate that states' sovereignty through measures such as military intervention (UNGA 2005). Further indicative of this shift is the involvement of the UN in more frequent, expansive, and interventionist, peacekeeping missions. Indeed, we have increasingly seen violations of the traditional three pillars of peacekeeping (consent, impartiality, and non-use of force) with more Chapter VII missions, which allow UN intervention without the consent of the host state, and the rise of multidimensional peacekeeping, which involve not only a military, but also civilian component, and tackle socio-political and/or humanitarian issues (see, for instance, UNTAG and UNTAC) (Fetherston 1994: 23-5).

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<sup>4</sup> In Latin America the US also interfered in places such as Cuba, Haiti, Nicaragua, El Salvador, and Grenada (Krasner 1999: 224). New countries in Asia and Africa enjoyed greater independence in part because they held little strategic value for the US and Soviet Union (Krasner 1999: 218).

<sup>5</sup> The UN was not entirely neutered during this time as it undertook observer and full peacekeeping missions (for example UNFICYP in 1964 where UN civilian police were deployed for the first time, and UNTEA/UNSF in 1962 where the UN assumed authority over West New Guinea) (Fetherston 1994: 17-8).

There are arguably several reasons for this trend (Jakobsen 2002). With a steady stream of worldwide news it became possible to see the atrocities of war firsthand, spurring greater support for intervention (ie the CNN effect) (ibid). In addition, the success of peacekeeping operations from 1988-1991 increased confidence in their efficacy to bring peace, and ensure human rights (ibid). Governments furthermore needed an outlet for the military capacities they had built up during the Cold War, and the poorest states could participate to earn international status as well as foreign exchange (ibid). Finally, the end of proxy wars and external patrons meant that more parties sought to end civil wars through third parties and monitored ceasefires (ibid). A key factor, however, is the shift to a unipolar balance of power led by the US. In this context, states could consider intervention without fear of causing a global war (ibid). The dissolution of the Soviet Union also freed the UN Security Council to pursue more interventionist peacekeeping missions (ibid)<sup>6</sup>.

The conditions under which states may legitimately interfere with other states' sovereignty has thus evolved over time, generally tracking with shifts in the global balance of power. During the Cold War, Westphalian and international legal sovereignty reigned supreme, contributing to an understanding of sovereignty as self-determination. After the Cold War, however, sovereignty became more conditional on the ability and will of states to respect the rights of their own people. To reiterate, the purpose of this section is not to argue that shifting greater power balances were the sole determinants of changing patterns of intervention and sovereignty norms, nor to advocate for a particular theory to explain these changes. What is clear, however, is that the global power balance has played an important role by making certain actions and justifications of intervention more feasible at different points in time.

### **Dependent Variable: Jurisdictional Allocation in Status of Forces (SOFA) Agreements**

This does not mean that the norm of sovereignty as self-determination disappeared after the Cold War. Indeed, interventions that sideline or reform domestic institutions can spark deep grievances in host countries. This tension becomes particularly salient in the context of SOFA agreements. SOFAs are agreements struck between the sending and host country that define the privileges, immunities, and legal status of foreign military personnel while they are in the host country (ISAB 2015: 1; Sari 2008). SOFAs have a number of uses. They help with the resolution of disputes that could undermine strategic relationships, and lessen administrative and financial uncertainties (ISAB 2015: 2, 13). SOFAs are often signed not only in the context of peacekeeping or other military interventions. They are also established when a country establishes a permanent military base or temporarily sends its forces overseas to carry out joint military exercises or undertake international disaster relief work (ISAB 2015: 30-1). SOFAs can be signed bilaterally or between international organizations (such as the EU, UN, AU, and NATO), and individual countries<sup>7</sup>.

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<sup>6</sup> Twelve draft Security Council resolutions were vetoed from 1990-2002, compared to an average of 43 vetoes per decade between 1945-1990 (Bellamy and Williams 2010: 95).

<sup>7</sup> The form of SOFAs is also extremely diverse. Some, such as the NATO SOFA, are highly detailed and supplemented with bilateral SOFAs for specific projects (ISAB 2015: 2-3). Others come in the form of short diplomatic notes, treaties, or are embedded in longer defense agreements (ISAB 2015: 3, 30; "UN Peacekeeping and The Model Status of Forces Agreement" 2011).

SOFAs cover a myriad of issues, ranging from fees and taxes to regulatory and legal exemptions, (ie waiving visa and residency requirements, freedom of movement within the country, licensing requirements, permissible communications bandwidths, carrying weapons and uniforms, property rights, access to facilities and equipment, etc)<sup>8</sup> (ISAB 2015: 16-20). A key common issue is settling which jurisdiction foreign forces will be held under if they commit a crime (Voetelink 2015: 3). There are several possibilities. First, the sending country can have exclusive jurisdiction over its own service members. Second, jurisdiction may rest entirely with the host state, however this is exceedingly rare. Third, jurisdiction can be split or concurrent between the host and sending country. This is the case with most NATO SOFAs, whereby the sending and host states are allocated jurisdiction over offenses that violate their own law, but not the law of the other country. When an individual breaks the law of both countries, however, a hierarchy may be introduced, for instance by giving the sending state primary jurisdiction for violations that occur while a service member is on duty, and the host state jurisdiction for offenses committed while off duty (Conderman 2013).

Jurisdiction is often an intensely negotiated point, as both sending and host countries aim to maximize the jurisdiction they hold. Sending states argue that they hold organic jurisdiction, or the right to regulate their own organs and officials, even across borders (Sari 2015: 339-41). Indeed, if sending state forces are released from their home state jurisdiction when sent abroad this could make them exempt from national service laws and interrupt the functioning of military forces (Sari 2015: 339-41). It was largely on these grounds that the “law of the flag,” which implied that foreign forces stationed abroad with the consent of the host state were not subject to host state laws, enjoyed general support before WWII (Sari 2015: 332). Sending countries additionally argue that they need to protect their service members from potentially unfair justice systems that may abuse their rights (ISAB 2015: 1). This echoes the logic of making sovereignty, and self-determination, conditional on the will or ability of host countries to fulfill certain standards (Zaum 2009: 233). For example, while concurrent jurisdiction is more common when a SOFA is signed between countries with equal legal standards and governing capacity, as in the case of NATO, criminal jurisdiction has often been in favour of the sending state in UN peacekeeping missions, which operate in countries where the legal system and rights norms may be weak<sup>9</sup> (Sari 2015: 334-5).

If one defines sovereignty as linked to the territory of a state, however, then the host state should hold jurisdiction over visiting forces (ISAB 2015: 3). Indeed, immunity from host state laws removes service members from local legal and democratic control, violates the right to a remedy or appeal for victims, and creates a lack of accountability and rule of law in the host country (Zaum 2009: 238). Modern international law reflects this understanding, and establishes the right of states to regulate political and legal order within their borders (Sari 2015: 337). Indeed, since WWII, SOFAs have generally allowed for greater jurisdictional powers on the part of the host country. This may be due to the large numbers of soldiers that countries stationed abroad during WWII, making host state jurisdiction a sharper question (Sari 2015: 362-3). As stated to in the

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<sup>8</sup> Protections for contractors has also become a key question, as they are usually not covered by the SOFA in terms of jurisdiction protection (ISAB 2015: 21). This is a larger debate that lies outside the scope of this essay.

<sup>9</sup> Normally such military forces are immune from the criminal jurisdiction of the host state on the understanding that their home state will prosecute them if a law is broken (Voetelink 2015: 81).

previous section, during the Cold War states were also able to assert their right to self-determination more aggressively.

Negotiations over jurisdictional allocation can thus become highly politicized in sending and host countries. When host countries are unable or unwilling to sign a SOFA, sending countries may delay or cancel operations (ISAB 2015: 4; “UN Peacekeeping and The Model Status of Forces Agreement” 2011: 18). On the part of host countries, a lack of local jurisdiction can lead to mass protests, damage to the reputation of the sending state or international organization, and denigrate local institutions. Indeed, there have been several high-profile incidents in which crimes committed by US service members posted overseas sparked largescale protests. For example, when two Army Sergeants killed two Korean girls with their armoured minesweeper in 2002, and the US declined to prosecute them, tens of thousands of people protested<sup>10</sup> (Koo 2011).

### **Theory and Hypotheses**

Because the contexts in which SOFAs are signed varies so widely there is no single approach to settling how to allocate jurisdiction (Sari 2015: 332). Indeed, while other authours have noted that sending states in UN peacekeeping missions normally hold criminal jurisdiction over their military personnel and the law of the flag has eroded since WWII, to this authour’s knowledge there has been little detailed investigation of this claim, how it has changed (or not) over time or between bilateral and multilateral organizations, and how state interests or norms shape jurisdictional allocation. What have been the trends in jurisdictional allocation in SOFAs over time? Has it been consistently allocated to host countries or sending countries? Does this track with the overall shift in sovereignty norms, which have become increasingly contingent on good governance after the Cold War? What could explain these trends?

Theorists often attempt to explain state behavior through either norms or interests. Krasner posits that the decisions of leaders regarding violations of sovereignty are guided either by the logic of consequences, which entails considerations of rational interests and preference maximization, or the logic of appropriateness, which speaks to the “rules, roles, and identities that stipulate appropriate behavior in given situations” (1999: 5). In circumstances where the logic of appropriateness is clear but the logic of consequences is not, Krasner argues that states will follow the logic of appropriateness. Similarly, when there are “multiple and contradictory roles and rules, or no rules at all, but the results of different courses of action are obvious, a logic of consequences will prevail” (1999: 5). Krasner posits that the international system is driven by the logic of consequences, as roles and rules are ambiguous and contradictory (1999: 50). In other words, “The extent to which...rules and norms will be followed, depends on the power and interests of rulers” (Krasner 1999: 228).

This interests-based argument is particularly applicable to the context of SOFAs for two reasons. First, debates over jurisdiction are subject to conflicting norms of sovereignty as it is decided who should take on authority for what. This can result in great ambiguity as to the appropriate

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<sup>10</sup> The Korean Ministry of Justice requested that the US waive primary jurisdiction, however this was refused. The service members stood trial in US military proceedings and were acquitted, which sparked protests that attracted thousands of people (Koo 2011).

roles and rules to follow, particularly when the state is weak or in transition. On the other hand, as previously described, the interests of each state to maximize their control of jurisdiction are clear. In seeking to maximize jurisdiction, sending states are acting to preserve the rights of their own people. For host states, they seek justice for wrongs committed against their own citizens. There is less need to appeal to other norms such as human rights to justify such action as each state is acting to protect its own citizens, not foreigners.

Second, as previously mentioned, due to the wide-ranging structure of SOFAs, they do not follow a “uniform legal regime,” as in the case of the law of diplomatic relations<sup>11</sup> (Sari 2015: 326). There are three reasons for this: i) states send their military and civilians abroad for a wide range of purposes, from exercises to large scale peacekeeping missions; ii) the operational context differs widely from one case to another, ranging from stable environments to post-conflict weak states; and iii) great powers often use their dominant position to ensure they have better conditions for their forces abroad than for foreign militaries in their own territory (Voetelink 2015). Again, this suggests that negotiating over matters such as how to appropriately allocate jurisdiction should be liable to more ambiguity, meaning states should seek to maximize their own interests rather than be constrained by norms.

Finally, stronger states can impose violations of sovereignty on weaker states via coercion and imposition (Krasner 1999: 224). While weaker states may be able to mitigate such impositions when they have more bargaining leverage, such as control over strategic assets desired by the stronger state (Cooley and Spruyt 2009), this is likely to be the exception rather than the rule. Thus, on average, the interests of the stronger state should prevail. This draws from realist theories, which argue that the relative balance of power between states is the decisive factor in determining behavior<sup>12</sup> (Mearsheimer 2001; Posen 1993; Waltz 1979). Given that my analysis focuses on SOFAs struck in the context of military interventions into weak states, the interests of the sending state should generally prevail over those of the host state.

***Interests (H1): The pattern of jurisdiction allocation in SOFAs should not change significantly after the end of the Cold War. On average, jurisdiction should be held by the sending state.***

Other scholars, however, argue that norms are a key factor that shapes state behaviour. Indeed, why would states intervene in strategically unimportant countries such as Somalia and Cambodia? (Finnemore 2003: 52-3). Authors working in the English School (for instance Bull 1995) and constructivist (for instance Finnemore and Sikkink 1999; Ruggie 1998; Wendt 1992) traditions explain such actions by arguing interests are not entirely fixed. Instead, interests can be shaped by norms, which are “intersubjectively held ideas” (Zaum 2009: 2) that provide “a standard of appropriate behaviour for actors with a given identity” (Finnemore and Sikkink 1999: 251). Given that norms are social concepts, they are thus endogenous to the interaction of

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<sup>11</sup> Indeed, as Krasner notes, rules about the treatment of diplomats have been some of the least contested (1999: 52). This is potentially because diplomatic immunity is granted in a reciprocal manner between host and sending countries, thus benefitting both states. Such reciprocal benefits are not always offered in SOFAs.

<sup>12</sup> This balance of power can be determined by assets such as material and economic wealth, military size, and population size.

actors that hold certain ideas about matters such as sovereignty, and can change (Zaum 2009: 2). More specifically, norms can shape behavior in the following ways: i) states' interactions with one another are determined by their shared identity (ie sovereign states should treat each other in a specific way, including by not intervening in their internal affairs); ii) norms shape the identity of actors, giving them certain interests (ie sovereign states should have a right to non-intervention and will act to defend that); and iii) norms prescribe an identity for certain agents (ie sovereignty requires a specific type of state that respects human rights, and those that fall short of this standard may be marginalized or intervened upon) (Zaum 2009: 7-8). In this sense, norms can shape the goals that states hold as well as the acceptable means to pursue those goals (Finnemore 2003). Thus, the ways that actors trade off certain types of sovereignty should depend not only on material or strategic interests, but also on what they think are acceptable costs and benefits, and what are legitimate aims. Even when actors pursue the logic of consequences, actors should maximize their interests via different tradeoffs based on the norms they hold.

In the context of intervention, changing sovereignty norms thus provide new justifications for intervention, and should shape the nature of the intervention itself (Zaum 2009: 233). For instance, making sovereignty conditional on domestic matters such as human rights, rule of law, and democracy, rather than simply the international legal recognition of sovereignty that largely held sway in the Cold War, means that states can invoke new reasons for intervention (ibid). This additionally justifies more expansive interventions that limit the self-determination of the host state, including reforming institutions and transferring otherwise sovereign powers (including jurisdiction) to the sending state or organization. For instance, the UN international administrations in Kosovo and East Timor justified using international rather than local judges in the justice system because of a lack of local capacity, as well as a lack of rule of law and human rights (ibid).

If identity and interests are shaped by norms, then the menu of permissible or legitimate actions should change over time as well. This should be reflected by a shift in the pattern of jurisdiction allocation before and after the Cold War. During the Cold War intervention should be generally guided by sovereignty norms that emphasize non-intervention and self-determination. Interventions should thus interfere less in the domestic matters of rule of law and rights, and leave jurisdiction to the host state. After the Cold War, however, the conception of sovereignty as conditional on other matters such as human rights and rule of law should result in more wide-ranging interventions, including interfering with the jurisdiction of host states.

***Norms (H1): The pattern of jurisdiction allocation in SOFAs should change significantly after the end of the Cold War. On average, jurisdiction should be held by the host state during the Cold War. On average, jurisdiction should be held by the sending state after the Cold War.***

To adjudicate between these hypotheses it is important to examine not only actual behavior (ie the actual allocation of jurisdiction in SOFAs) but also justifications. Justifications are important because they are attempts "to connect one's actions with standards of justice or, perhaps more generally, with standards of appropriate and acceptable behavior" (Finnemore 2003: 15).

Examining justifications can thus allow us to identify the international standards that hold sway and how they shift over time (ibid).

States can invoke certain norms but fail to act in accordance with them. For instance, while states may have promulgated the rhetoric of human rights after the end of the Cold War, they have still failed to intervene in cases of massive rights abuses, such as the Rwandan genocide (Finnemore 2003: 56). This does not mean justifications are useless to examine. First, norms can play a constitutive rather than strictly causal role, as they tell us about beliefs regarding appropriate violations of sovereignty, rather than what causes states to violate sovereignty or not in a specific circumstance (Wendt 1998). Second, if a state continues to justify its actions by appealing to the norm it is violating, this tells us something about the importance of that norm as a standard for acceptable behaviour. For instance, when the US committed acts of torture at Guantanamo Bay, the government referred to such acts as “enhanced interrogation techniques” (Bianchi 2008; Pearlman 2015; Shaw 2009). This demonstrates the strength of the prohibition against torture which is so widely recognized in domestic laws across the world, as well as in international instruments, that it has reached a *jus cogens* status from which no derogation is permitted (Bianchi 2008; Hathaway 2005; Pearlman 2015; Shaw 2009).

Therefore, if norms are at work, we should see a shift in the way that states justify jurisdiction allocation. More specifically, after the Cold War, states should justify overriding host states’ judicial systems by appealing to the idea that sovereignty is contingent on rights and rule of law. If interests are at work, there would not be a need to justify jurisdiction allocation by systematically appealing to different sovereignty norms. Instead, given that fixed state interests and balance of power guide action, states may appeal to whatever norms or aspects of sovereignty best suit those interests at the time. For instance, instead of appealing to the need to protect their soldiers from rights abuses in the host country, sending states may argue that ceding jurisdiction would harm their military effectiveness.

***Interests (H2): Justifications regarding the allocation of jurisdiction in SOFAs should not systematically change after the Cold War.***

***Norms (H2): Justifications regarding the allocation of jurisdiction in SOFAs should systematically change after the Cold War. Before the Cold War, justifications for host country jurisdiction should centre on respecting the right of countries to self-determination. After the Cold War, justifications for the sending country jurisdiction should centre on the will or ability of the host state to provide adequate rule of law and rights.***

If jurisdictional allocation is made contingent on improved governance of the host state, this would provide additional evidence that norms are at work. This is part and parcel of the emphasis on sovereignty as conditional on the achievement of certain levels of governance, particularly concerning the rule of law and rights. If only interests are at play, sending states would have no reason to make jurisdiction allocation contingent on improvements in the host state. They would want to protect their own citizens in all circumstances.

We might find conditionality clauses in SOFAs themselves or in negotiations and justifications. For instance, if states evaluate the health of the host states' legal system at the time that a SOFA is renegotiated, and base jurisdictional allocation decisions on that, that would constitute evidence for conditionality and therefore norms.

***Interests (H3): On average, jurisdiction for sending countries should not be contingent on improvements in host country governance before or after the Cold War.***

***Norms (H3): On average, jurisdiction for sending countries should be contingent on improvements in governance in the host country after the Cold War. Before the Cold War, host states should unconditionally hold jurisdiction.***

There are other hypotheses that are possible based on an interaction of norms and interests. As previously mentioned, host states have a vested interest in ensuring that they hold jurisdiction over foreign forces. Host states can argue against ceding jurisdiction to sending states by appealing to Westphalian sovereignty and their right to self-determination. The power of this normative appeal over great power interests, however, may have changed over time. During the Cold War, the interests of the super powers were clearly organized around preventing the other side from expanding its influence. Thus, invocations of self-determination may have had no power during this time to secure jurisdiction for the host state, as the US and Soviet Union sought to control domestic politics for their own ends<sup>13</sup>. After the Cold War, such appeals to self-determination may have found more success as superpower interests were less defined. In other words, it became less risky to allow host states to determine their own affairs, as there was no longer the danger that they would join the Soviet or US bloc. Indeed, given that there are now interventions occurring in less strategically important countries, there may be more room for such arguments by host states. Overall, therefore, host state justification for jurisdiction allocation would always focus on the norm of sovereignty as self-determination. The force of that norm, and the pattern of actual allocation, would change due to shifting super power interests.

Given that jurisdiction would be allocated according to state interests during the Cold War, we should not see sending states systematically justifying their decision with reference to a certain set of sovereignty norms, nor making jurisdiction conditional on host governance quality. After the Cold War, however, we should see sovereignty as self-determination being accepted as a justification. Furthermore, states appealing to self-determination norms would not make jurisdiction contingent on internal conditions such as the rule of law. This is because sovereignty as self-determination does not depend on such matters.

This possibility highlights the potential ongoing strength of the norm of sovereignty as self-determination. Indeed, making sovereignty contingent on domestic rights records has not been an unequivocal success, and may still be in flux. For instance, the R2P doctrine has not been universally embraced, and has even been critiqued as a tool for imperialist intervention into weaker states (MacFarlane, Thielking, and Weiss 2004). Thus, as Krasner highlights, there may

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<sup>13</sup> The US was in a position to ensure this outcome in UN peacekeeping missions during the Cold War as it provided the single largest share of UN peacekeeping expenses and supplied advanced military logistic capabilities that enabled UN missions to access important areas (Vuong 2003: 808-9).

be multiple sovereignty norms that coexist and even clash with one another in a single time period.

***Mixed (change) (H1):*** The pattern of jurisdiction allocation in SOFAs *should* change significantly after the end of the Cold War. On average, during the Cold War jurisdiction should be held more often by the sending state. On average, after the Cold War jurisdiction should be held more often by the host state.

***Mixed (change) (H2):*** Justifications regarding the allocation of jurisdiction in SOFAs *should* change after the Cold War. During the Cold War, justifications for sending country jurisdiction should not follow a systematic pattern. After the Cold War, justifications for the host country jurisdiction should centre on respecting the right of countries to self-determination.

***Mixed (change) (H3):*** On average, jurisdiction for host countries *should not* be contingent on improvements in governance.

Finally, an interaction of norms and interests could also lead to the jurisdiction staying always with the sending state. As previously argued, states that appeal to self-determination during the Cold War may not have been successful because the interests of the great powers (and their capacity to enforce those interests) were so dominant. After the Cold War, however, jurisdiction may remain with sending states because of the power of the conditional sovereignty norm.

This is potentially problematic because this yields the same jurisdictional allocation pattern as predicted by the interests hypothesis. To differentiate these two, it will be important to examine the pattern of justifications. Under the interests approach, there should be no systematic change in the way that states justify jurisdictional allocation over time. Indeed, states could appeal to whatever arguments would best fit their interests, which may or may not include norms relating to sovereignty. Under the mixed scenario, however, there should be a change in justification after the end of the Cold War, centering on the inability or lack of will of the host country to provide adequate rule of law and rights. In addition, consistent with the conditional sovereignty norm, jurisdiction should be made contingent on the quality of host country governance.

***Mixed (no change) (H1):*** The pattern of jurisdiction allocation in SOFAs *should not* change significantly after the end of the Cold War. On average, it should rest with the sending state.

***Mixed (no change) (H2):*** Justifications regarding the allocation of jurisdiction in SOFAs *should* change after the Cold War. During the Cold War, justifications for sending country jurisdiction should not follow a systematic pattern. After the Cold War, justifications for the sending country jurisdiction should centre on the will or ability of the host state to provide adequate rule of law and rights.

***Mixed (no change) (H3):*** After the Cold War, jurisdiction for sending countries *should* be contingent on improvements in governance in the host country.

<b>Theory</b>	<b>Variable</b>	<b>Cold War</b>	<b>Post-Cold War</b>
<b>Interests</b>	Jurisdiction	Sending	Sending
	Justification	No systematic norm appeals	No systematic norm appeals
	Contingent?	No	No
<b>Norms</b>	Jurisdiction	Host	Sending
	Justification	Self-determination	Contingent sovereignty
	Contingent?	No	Yes
<b>Mixed (change)</b>	Jurisdiction	Sending	Host
	Justification	No systematic norm appeals	Self-determination
	Contingent?	No	No
<b>Mixed (no change)</b>	Jurisdiction	Sending	Sending
	Justification	No systematic norm appeals	Contingent sovereignty
	Contingent?	No	Yes

Table 1: Summary of hypotheses

To test these hypotheses I proceed in the following way. First, I examine trends in the way jurisdiction has been allocated in UN peacekeeping SOFAs before and after the Cold War. Examining UN SOFAs provides a good test for several reasons. First, the UN is one of the few actors that signed a number of SOFAs related to military intervention before and after the Cold War. Other bodies that signed SOFAs for similar peacekeeping missions such as the EU and AU were established after the Cold War, and during the Cold War individual countries like the US signed SOFAs for more limited purposes such as joint military exercises, relief efforts, and to establish overseas bases, which fall outside the scope of this essay (see footnote 2) (ISAB 2). Examining UN SOFAs thus allows us to test changes in jurisdictional patterns over time. Second, the UN provides a hard test of the interest-based hypotheses. As a multilateral organization, it is less likely that the interests of a single strong state will prevail as may be the case in bilateral SOFAs. Finally, there is great variation in terms of the scope and scale of the peacekeeping missions that the UN has undertaken both before and after the Cold War. Some missions were small observer missions while others were large multidimensional peacekeeping operations. One would expect that a host state would consider it to be a greater violation of its domestic sovereignty to abdicate jurisdiction in the context of missions with more foreign personnel involved. Thus, if we see a consistent change in the pattern of jurisdictional allocation before and after the Cold War, even across missions of varying sizes and degree of intervention, this would lend strength to the importance of norms and/or interests as guides for state behavior.

To this end, I collected the SOFA agreements of UN peacekeeping missions from 1948-2013<sup>14</sup>. I read the text of each agreement to determine if jurisdiction was allocated solely to the host state, sending state, or if it was concurrent. I also examined how jurisdiction was allocated in the UN's model SOFA and MOU agreements, which were created after the Cold War to serve as a template for future UN SOFAs/MOUs. To examine justifications I looked at the debates surrounding the potential modification of the model SOFA and MOU in light of allegations of

<sup>14</sup> The text of the agreements was collected from <https://treaties.un.org/>.

rape committed by UN peacekeepers. These debates mostly took place in the Ad Hoc Committee on the criminal accountability of United Nations officials and experts on mission from 2006-2008, and then in a Working Group of the Sixth Committee of the UN General Assembly<sup>15</sup>. I read all documents generated by these bodies, including the reports of the Ad Hoc committee from 2007 and 2008, related UN General Assembly Resolutions from 2006-2016, Sixth Committee Working Group reports (2007-2015), related Reports of the Secretary General, and the Report of the Group of Legal Experts<sup>16</sup>. Ideally I would compare these justifications to those from a Cold War UN peacekeeping mission, however it appears that primary documents related to jurisdiction negotiations in this time period are only available in New York. In addition, SOFA negotiations are often secret, thus these primary documents likely hold little detail in any case. Thus, I am unable to test my justification hypotheses fully.

In my second case, I look at negotiations surrounding the US-Iraq SOFA in 2008. This case is interesting for a few reasons. First, it is a bilateral SOFA. This should therefore be a harder case for my norms based hypotheses, as there is no multilateral body to mitigate strong state interests. It is therefore surprising that the US did not retain full jurisdiction in 2008, and in 2011 negotiations broke down due entirely, precipitating the exit of the US from Iraq. As in the UN case, it is not possible to access primary documents relating on the details of these SOFA negotiations. Instead, I researched Bush (and then presidential candidate) Obama's general positions on the war, as well as proposed bills, resolutions, and debate transcripts, mostly from House of Representatives Foreign Affairs Committee from 2007-2008 where the SOFA was approved<sup>17</sup>. Again, it would be ideal to match this with a bilateral SOFA struck in the Cold War period, however as previously stated it appears such agreements were largely created for exercises or bases during this time period, which fall outside the scope of this essay.

## UN SOFAs

### *Trends in UN SOFA Jurisdictional Allocation*

From 1948-2013 I counted a total of 78 UN peacekeeping missions. Twenty-five of these started before the end of the Cold War in 1991. I found 10 SOFAs from this era. Of the 53 post-Cold War missions, I found 39 SOFAs. There are several reasons why I could not find SOFAs for all missions. In some cases SOFAs were never signed because the mission was too short, the government was uncooperative, the mission was too sensitive, or the UN was present without permission of the host state. In other cases a SOFA was signed but it was classified. Another possible reason is that using to legal frameworks such as human rights instruments became more common after the Cold War (Finnemore 2003), leading to a deficit of legal agreements during the Cold War. Overall, therefore, my collection of SOFAs likely represents a set of agreements that are linked to longer missions in more permissive environments. I would therefore expect a greater influence of norms in these agreements, as states would have more room and security to make concessions based on normative considerations.

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<sup>15</sup> The Sixth committee examines legal questions for the General Assembly.

<sup>16</sup> These documents can be found at [http://legal.un.org/committees/criminal\\_accountability/](http://legal.un.org/committees/criminal_accountability/).

<sup>17</sup> These records can be found at [www.c-span.org](http://www.c-span.org) and [www.congress.gov](http://www.congress.gov).

There are two trends in the way jurisdiction changed during and after the Cold War. The first trend is the type of host state law peacekeepers are immune from: criminal law and civil law. In criminal cases, a law has been broken. Civil cases, on the other hand, are brought by private individuals or groups who seek compensation for some damage. The second trend is delineating the status of civilian versus military members of peacekeeping missions.

During the Cold War, peacekeepers were generally exempt from both criminal and civil law in the host countries. Indeed, nine of the SOFAs during this period reference the 1946 Convention on the Privileges and Immunities of the United Nations, which grants UN experts immunities from any legal process “In respect of words spoken or written and acts done by them in the course of the performance of their mission.” (UNGA 1946: Article VI) and UN officials immunity “from legal process in respect of words spoken or written and all acts performed by them in their official capacity” (ibid: Article V). While this means that personnel could technically be tried by the host state for crimes committed while off-duty, determining what “off duty” means in court has been a contentious issue (Voetelink 2015). Two SOFAs explicitly state that the sending country holds exclusive criminal jurisdiction over its forces at all times, although personnel may be tried in civil cases for matters not relating to their official duties, which once again has an unclear definition (see UNEF I and UNFICYP). The criminal and civil law jurisdictional status of civilian peacekeeping staff and observers was not defined separately from that of military peacekeepers, although civilian staff often enjoyed slightly different privileges (unrelated to criminal or civil jurisdiction) depending on whether they were classified as officials or experts, and most senior staff enjoyed diplomatic immunity. Finally, the SOFAs during this period were less detailed, as they all took the form of an exchange of letters between the host state and the UN. Thus, overall, it appears that both civil and criminal jurisdiction normally lay with the sending state.

In the post-Cold War era, all SOFAs continue to reference the 1946 Convention. Military members are also still unconditionally under the exclusive criminal jurisdiction of their home country. In 30 of the 39 SOFAs I found, however, civilian members of peacekeeping missions may be tried by the host country in civil or criminal cases under certain circumstances. In criminal cases the UN will conduct an inquiry and agree with the host government whether or not a criminal trial should proceed. Both military and civilian members may be liable to civil proceedings, however, if the case is not related to actions performing in the course of their official duties. In the remaining 9 SOFAs that do not spell out such exemptions, they simply reference the 1946 Convention, which as explained above provides protection for all UN officials from both civil and criminal cases related to acts performed in the course of their mission. Thus, in contrast to the Cold War SOFAs, it appears that host countries gained some leeway to try foreign service members, particularly civilian peacekeeping members for criminal cases, although the UN still has the power to stop such proceedings if it disagrees with the host government.

In addition to these mission-specific SOFAs, I examined the UN’s model SOFA (drafted in 1990) and the model MOU for troop contributing countries in peacekeeping missions (originally drafted in 1997, the latest one is from 2007). The model SOFA is meant to: i) frame discussions with states in the event of peacekeeping interventions, and ii) define the default privileges and immunities that peacekeepers hold until a mission-specific SOFA can be signed (Fleck 2013).

The model MOU serves a similar function in terms of defining the logistical, financial, and administrative conditions that countries must meet when they contribute troops to UN missions (Burke 2014: 47). These models are thus particularly critical ones to analyze because they show the UN's default position on jurisdiction allocation.

In the 1990 model SOFA (UNGA 1990) we see much the same framework as in the other post-Cold War SOFAs. Civilian and military members may be liable to civil proceedings in matters unconnected with their official duties. In criminal proceedings, the UN will conduct an inquiry to decide whether a case should proceed when the accused is civilian personnel, however military members are under the exclusive jurisdiction of their home country. Immunity may be waived by the Secretary-General, however it appears this is very rare ("UN Peacekeeping and The Model Status of Forces Agreement" 2011: 24). While it does not appear that the 1997 model MOU is easily accessible, in the 2007 version, both military and civilian members are under the exclusive jurisdiction of their home government "in respect of any crimes or offences that might be committed by them while they are assigned to the military component of [United Nations peacekeeping mission]" (UNGA 2011: Art 7.22). While there have been some changes in terms of the code of conduct to which peacekeepers are beholden<sup>18</sup>, the most recent model MOU therefore still holds peacekeepers under the exclusive jurisdiction of their national government (UNGA 2011: Art 7.22).

Thus across a large range of missions, from small observer ones to large multidimensional peacekeeping missions, from both before and after the Cold War, we see that jurisdiction has largely been with the sending state. In the post-Cold War and model SOFAs there are some increased powers given to host states, although these are circumscribed. To wit, while the host state may try civilian and military members in civil proceedings for actions committed off-duty, it is often unclear what off-duty means. In addition, while host states may pursue criminal law prosecution against civilian members of peacekeeping missions, the UN can potentially stop these proceedings. The ongoing exemption of military peacekeepers from criminal cases is significant, because it speaks more directly to the ability of the state to ensure the rule of law. Indeed, allowing military peacekeepers to be tried in civil proceedings for off-duty actions means they are only liable when private parties bring a case forward, not when they break the law. Overall, therefore, I argue that we find evidence supporting the interests hypothesis or mixed interests/norms (no change) hypothesis. By examining justifications, we may be able to find some additional evidence to delineate which set of hypotheses is at work.

### *Justifications*

There have been vigorous debates regarding how to update the model SOFA and model MOU in light of allegations against peacekeepers who sexually abused civilians while they were deployed. While peacekeepers may be under the criminal jurisdiction of their own state, that state may be unwilling or unable to prosecute their own peacekeepers, leading to a jurisdictional

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<sup>18</sup> These include "Ten Rules: Code of Personal Conduct for Blue Helmets (Ten Rules)" and "We Are United Nations Peacekeeping Personnel"; standards of conduct on international humanitarian law, international human rights law, sexual exploitation and abuse, and making those standards binding; and clarifying that troop contributing countries must investigate and settle allegations ("UN Peacekeeping and The Model Status of Forces Agreement" 2011: 23-4)

gap. Indeed, UN Member States have argued that peacekeepers should be held accountable not only because such crimes are generally “unacceptable” and cause harm to individuals and host communities, but also because they damage the relationship between the UN and host country citizens, making it difficult for the UN to fulfill its mandate, and undermining its reputation (UNGA 2008a paras 14, 66; UNGA 2008b). As such in 2005 the UN General Assembly asked the Secretary General to amend the model MOU to address the recommendations that arose from the Special Committee on Peacekeeping Operations and the Zeid report, which detailed cases of sexual abuse and sexual exploitation committed by peacekeepers while they were deployed (Burke 2014: 48). Examining Member State debates to amend the model SOFA and MOU allows us to examine the justifications that states use regarding jurisdiction allocation.

These debates reveal a much more diverse set of stances regarding jurisdiction than suggested by the SOFA trends discussed in the previous section. One key document that frames this debate is the Group of Legal Experts Report, which was produced in 2006 in response a request by the General Assembly for an in-depth examination of the criminal immunity of UN peacekeeping personnel. The Report, drafted by a team of experts, confirms that members of national military contingents are subject to the sole jurisdiction of the sending state, however UN officials (including staff and UN Volunteers) and UN experts (UN police, military observers, military advisers, military liaison officers, and consultants) may be subject to the authority of the host state under certain circumstances (UNGA 2006 paras 1, 7). There have been several technocratic reasons put forward to distinguish the status of military members of national contingents versus other UN peacekeeping personnel. One is that national military service members are representatives of their sending state, and thus their service conditions are addressed by an MOU between their sending state and the UN (UNGA 2007b paras 55, 56). Their activities are thus governed by their national laws (UNGA 2007a para 18). Military observers and other personnel, on the other hand, are nominated by their Governments and thus directly serve the UN as individual “experts” (UNGA 2007b paras 55, 56).

Thus, debates between Member States have focused on UN experts and officials. For such personnel, the Group of Experts Report argues that priority should be given to the jurisdiction of the host state<sup>19</sup>, and that “The United Nations should not readily assume that the host State is unable to exercise jurisdiction merely because a peacekeeping operation is carried out in a post-conflict area” (UNGA 2006). The Report puts forth a number of reasons for favouring host state jurisdiction: a) the crime was committed on host state territory, giving it jurisdiction; b) most of the witnesses and evidence are likely in the host state, decreasing the cost and delays of transporting said evidence and witnesses abroad; c) ceding jurisdiction to the host state reflects the obligation of UN peacekeeping personnel “to respect all local laws and regulations as a corollary to their enjoyment of privileges and immunities in the host State”; and d) a local trial allows citizens to see justice being done, “demonstrating the commitment of the United Nations to the rule of law” (ibid para 27). Even if the host state lacks the capacity to arrest and prosecute individuals, or ensure basic procedural and human rights, other states may help it: “Jurisdiction is not an indivisible concept and the host State and other States may be involved in different but mutually supportive aspects of the overall exercise of criminal jurisdiction” (ibid: 2).

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<sup>19</sup> Where a peacekeeping mission is granted an executive mandate, which allows it to hold governmental powers, the UN as the host state will hold criminal jurisdiction (UNGA 2006 para 31).

The Group of Legal Experts thus advocates for an “extradite or prosecute” regime. This means that if the host state does not or cannot prosecute an individual, the sending state should extradite the individual to face justice (ibid: 2). Thus, while the Group of Legal Experts Report “is of the view that all States should establish jurisdiction over serious crimes against the person...committed by their nationals in peacekeeping operations,” this is to reduce impunity “where the host State is unable to act” (ibid para 47). The UN General Assembly Secretariat similarly published a note in 2007 that recommends members of national military contingents should remain under the jurisdiction of their sending state (ibid: 2), but other personnel should be held under an “extradite or prosecute” approach to jurisdiction (UNGA 2007b para 32).

Pursuant to this Group of Legal Experts Report, the General Assembly created an Ad Hoc Committee<sup>20</sup>, open to all Member States, to follow up on these recommendations. Member States, however, have remained split in terms of whether the host or sending state should retain criminal jurisdiction, and under what circumstances. Indeed, some delegates argued that host states should retain jurisdiction due to territoriality (UNGA 2007c para 19). Others emphasized the primacy of host state jurisdiction in criminal investigations, and called for assistance to allow the host state to enforce its own laws (UNGA 2007a para 25, 28; UNGA 2008a paras 5, 16). It was suggested that objective criteria could be used to assess the ability of the host state to exercise its jurisdiction before limiting it.

Other Member States preferred sending state jurisdiction and clarifying sending state responsibilities to avoid impunity (UNGA 2007a para 19). Indeed, some argued that while the host state may play a key role in criminal investigation, ultimate jurisdiction should rest with the sending state due to the international status of the individuals involved and the need to ensure due process rights are respected (UNGA 2008a para 5). Other delegates have highlighted emphasized the inability of host states to protect prosecuted individuals, ensure human rights, protect of victims, and effectively exercise jurisdiction (UNGA 2007c para 19; UNGA 2008a para 2). There was a proposal to grant troop contributing countries exclusive criminal jurisdiction on the condition that they actual exercise it to prosecute peacekeepers who have committed crimes, however this did not pass (Burke 2014: 54).

With such a split Member States have been unable to agree whether they should draft a binding convention as recommended in the Group of Legal Experts Report that would set jurisdiction on an “extradite or prosecute” regime (UNGA 2006; UNGA 2007a; UNGA 2007c para 20; UNGA 2009; UNGA 2015a). Some delegates argued that negotiating a convention could aid the UN’s image and bolster victim protection, aid in international coordination between Member States themselves as well as with the UN, and avoid legal ambiguities by clearly setting jurisdiction according to the nationality of the suspect (UNGA 2007a para 17; UNGA 2009 para 4). Thus, a convention could send “a strong political signal” that criminal behavior would not be allowed, and help countries to make domestic level changes (UNGA 2009 para 4). Other delegates argued that it was too soon to pass a binding convention as the challenges to prosecution and

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<sup>20</sup> The full name of this committee is the Ad Hoc Committee on the criminal accountability of United Nations officials and experts on mission. Since 2007 the work of the Ad Hoc Committee has continued through a Working Group of the Sixth Committee. The Working Group met in 2007, 2008, 2012, 2015, and plans to meet 2018, demonstrating that jurisdiction allocation remains a live and contested issue for the UN.

cooperation were unclear, and it may be more useful to change wording in the model SOFA or MOU, encourage Member States to improve their own legislation, or pass a UN General Assembly resolution (UNGA 2007c para 25; UNGA 2008a para 18; UNGA 2009 para 5). Some argued that procedures to waive immunity should be more uniform while others posited that immunities should remain unchanged (UNGA 2007c para 20). There was additionally debate over the need to expand the application of instruments to cover officials and experts, staff of specialized agencies, and other operations (UNGA 2007a para 19). Some delegates even posited that a binding convention should also apply to military personnel (UNGA 2009 para 4; UNGA 2015b para 4). As of the most recent Sixth Committee records in 2015, Member States continued to debate essentially the same points (UNGA 2015b para 4).

Overall, therefore, we see that sending states have justified retaining jurisdiction not only because of the international status of UN personnel, but also based on the quality of governance in the host country and its ability to ensure the rights of UN experts and officials, in line with the contingent sovereignty norm. While there has been movement to make such jurisdiction conditional on improvements in governance, and to respect the norm of sovereignty as self-determination, these arguments has remained mired in debate. Thus, it is hard to determine how this case speaks to the contingency criteria of my hypotheses. As in the UN SOFAs from before and after the Cold War, however, the status of military members as exempt from host country jurisdiction has remained almost above reproach, even in the midst of intense debate regarding peacekeeper accountability. Indeed, there appear to have been few systematic appeals to sovereignty norms to justify their separate status or to make it conditional on host country governance quality, in line with the interests hypotheses.

Therefore, I find mixed evidence from these justifications. It appears that the status of UN officials and experts may be more sensitive to changing sovereignty norms, thus supporting the mixed interests/norms (no change) hypotheses. This evidence, however, could also arguably support the interests hypotheses, as Member States may simply be appealing to the norms that best suit their interests, rather than having their behavior shaped by the norm itself. To more conclusively settle this, however, I would need to compare the justifications from this post-Cold War debate to a Cold War era peacekeeping mission, and see if there has been a systematic change over time in terms of appeals to sovereignty. For peacekeepers working as members of national contingents, however, they appear to fall more conclusively under the interests hypothesis. Their status appears to be little debated, and there are few appeals to sovereignty norms to justify their position. Again, to more persuasively clarify this I would need to examine a Cold War era case, but this is not possible at the moment.

<b>Actor</b>	<b>Variable</b>	<b>Cold War</b>	<b>Post-Cold War</b>
<b>Members of national military contingents</b>	Jurisdiction	Sending on-duty, host off-duty (no distinction civil and criminal law)	Sending criminal law, host civil law for off-duty matters
	Justification	<i>No data</i>	No systematic norm appeals
	Contingent?	No in SOFAs	No in SOFAs and justifications
<b>UN officials and UN experts</b>	Jurisdiction	Sending on-duty, host off-duty (no distinction civil and criminal law)	Host criminal with UN approval, host civil law for off-duty matters
	Justification	<i>No data</i>	Contingent sovereignty
	Contingent?	No in SOFAs	No in SOFAs, potentially yes in justifications

Table 2: Evidence Summary

## The US-Iraq SOFA Negotiations

### *Background and Outcome*

The deliberations surrounding the US-Iraq SOFA<sup>21</sup> in 2008 and 2011 also provide fertile ground to explore the tension between sovereignty as self-determination and sovereignty as conditional on rights protection and rule of law. UN Security Council resolution 1790, which governed the mandate of the US-led multinational force in Iraq, was set to expire on 31 December 2008. Without a new UN resolution<sup>22</sup> or a bilateral agreement the US would have no legal basis to keep its forces in the country and it would have to cease all military operations by January 1<sup>23</sup> (DeYoung and Raghavan 2008). In order to fill this legal gap, normalize US-Iraq relations, and to end the “most contentious issue of his presidency” Bush proposed a SOFA with Iraq (Caplan 2012: 253). The agreement would be the first time Iraq would have a direct say regarding the permission of foreign troops to stay in the country since the invasion (“Rice: U.S., Iraq Close on Timetable Agreement” 2015; Rush 2009).

<sup>21</sup> At the same time as the 2008 SOFA, the *Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq* was being negotiated. It outlined cooperation on a number of cultural and economic levels including politics and diplomacy, culture, economics and energy, health and environment, information technology and communications, and law enforcement and the judiciary. In contrast to the SOFA it was a non-binding political agreement and it did not address core questions of security (Rush 2009: 36-7). For more details on the US exit from Iraq see Appendix A.

<sup>22</sup> Obtaining another UN resolution would not be easy, and the US opposed anything but a one year extension (Ignatius 2008)

<sup>23</sup> After Saddam was deposed in 2003 by the US invasion of Iraq, the UN Security Council recognized the Coalitional Provisional Authority (CPA). Based on UN authorization and the law of occupation, CPA order 17 ensured immunity for US personnel from Iraq legal processes (ISAB 2015: 41).

The first round of SOFA negotiations lasted several months, starting around March 2008<sup>24</sup> (Bassiouni 2010). The provisions of the SOFA were hotly debated. The Iraqis had balked at initial US demands, chiefly to its open-ended exit strategy based on “time horizons” that would be determined by “conditions on the ground” (Susman 2008). Other contentious issues included “the use of fifty-eight long-term military bases, authority to detain prisoners independently of the Iraqi judicial system... and the ability to conduct military operations without approval from the Iraqi government” (Caplan 2012: 253-4). The question of jurisdiction was also a key one. The US wanted complete immunity (ie exclusive sending state jurisdiction) for both troops and contractors to ensure that operations the US considered legitimate would not be interpreted as a war crime by Iraqi courts who would then seek the execution or imprisonment of US troops (Cole 2011b).

The Iraqis ultimately won several concessions, including jurisdictional allocation<sup>25</sup>. In reality, however, these concessions are quite limited. In the 2008 SOFA Iraq holds jurisdiction over members of the US Forces and its civilian component for certain grave crimes when those crimes are committed outside of agreed areas and outside of duty status<sup>26</sup> (SOFA 2008 Art 12, para 1). As in the post-Cold War UN SOFAs, however, defining when a service member is off duty is tricky. Indeed, it is questionable if a service member ever is truly off duty in an active war zone (T. Wright 2017). In addition, service members are very rarely ever off base in Iraq (ibid). It would thus be highly unusual for personnel to be in a context when they could be tried by Iraq according to the conditions set by the SOFA<sup>27</sup>. If the Iraqi authorities do arrest a member of the US forces or its civilian component, they are to notify and hand them over to US forces, who will hold them in custody (SOFA 2008 Art 12 para 5). In addition, such personnel “shall be entitled to due process standards and protections consistent with those available under United States and Iraqi law” if they are tried in Iraqi courts (ibid Art 12 para 8). The US and Iraq may furthermore request the other authority to waive its primary jurisdiction (ibid Art 12 para 6). While the SOFA does not explicitly reference civil law, Art 21 para 2 states that the “United States Forces authorities shall pay just and reasonable compensation in settlement of meritorious third party claims arising out of acts, omissions, or negligence of members of the United States Forces and of the civilian component done in the performance of their official duties and incident to the non-combat activities of the United States Forces.” Such cases, however, “shall be settled expeditiously in accordance with the laws and regulations of the United States” (ibid Art 21 para

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<sup>24</sup> First, teams from President Bush’s administration and Prime Minister Maliki’s administration came together to negotiate and draft the SOFA. It was then sent to Maliki’s executive council for approval before being sent to the cabinet, which included representatives from the leading Sunni, Shi’a and Kurdish political blocks (*Al Jazeera* 2008). The final step of the process was Parliamentary approval.

<sup>25</sup> Other concessions included a clear deadline for US troops to withdraw from Iraqi cities, towns and villages by July 2009 and totally withdraw by 31 December 2011 (*Al Jazeera* 2008; Susman 2008; Moubayed 2008). The Americans also agreed to transfer control to Iraq of between 16 000 to 21 000 Iraqis held in US custody (Susman 2008; “Rice: U.S., Iraq Close on Timetable Agreement” 2015).

<sup>26</sup> Iraq holds primary jurisdiction over US contractors and contractor employees (SOFA 2008 Art 12 para 2). The issue of jurisdiction over contractors relates to larger debates that do not fit within the space of this essay.

<sup>27</sup> There was a notable case in which US military service members left their base to rape and kill a 14-year old Iraqi girl along with her family near the town of Al-Mahmudiyah in 2006. All five service members were tried and convicted through US civilian or military courts.

2). Thus, while Iraq held more power to try US personnel than in many other UN SOFAs, this power was still highly circumscribed<sup>28</sup>.

Even with changes to allow Iraq more jurisdictional power, the SOFA barely passed in Iraqi parliament<sup>29</sup> with just over half voting in favour of the agreement in November 2008 (Wallerstein 2008). As the SOFA approached its expiration date in 2011, debates about extending the agreement began once again. All of the major Iraqi political blocs, except the highly anti-American Sadrists, expressed support for the continued presence of US troops behind closed doors (Arango and Schmidt 2011; Boot 2011; Karon 2011b). On the American side, despite Obama's campaign promise to end the war quickly, the US preferred to leave at least a residual force as a safeguard against further violence as well as to assure neighbouring countries like Saudi Arabia (Gordon 2012; Karon 2011b; Jeffrey 2014). Once again, a chief concern was immunity for US personnel from Iraqi law (Cole 2011b). This time the SOFA did not even make it to a Parliamentary vote as Iraqi politicians rejected it. There are a number of potential reasons for this, including changing political alliances<sup>30</sup> (Arango and Schmidt 2011), improved security (Jeffrey 2014; Kessler 2014), Iranian influence among Shi'a politicians to stop the SOFA (Karon 2011a), and great hostility against granting immunity to US soldiers<sup>31</sup>. While the exact reasons for the collapse of the negotiation are complex, it was clear that jurisdictional allocation remained a contentious issue in Iraq.

#### *Justifications: The 2008 SOFA*

Given the short collapse of the 2011 negotiations, this section focuses on the 2008 SOFA. Details of the SOFA negotiations, including around jurisdictional allocation, are unfortunately

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<sup>28</sup> There are no articles in the 2008 SOFA that explicitly alter the jurisdiction of the Uniform Code of Military Justice (UCMJ) which places US military service members under the jurisdiction of the US military court system for any acts committed on or off duty. As I am not a military lawyer, however, I will not delve into the intricacies of the UCMJ and when it may be limited.

<sup>29</sup> At this point in time the three main parties in the Iraqi parliament were the Shi'a United Iraqi Alliance (UIA) with 128 seats, followed by the Democratic Patriotic Alliance of Kurdistan with 53 seats and the Sunni Iraqi Accord Front with 44 seats (Katzman 2006). All of the main Shi'a, Kurdish, and Sunni parties were in favour of the SOFA (Wallerstein 2008). Opposing the SOFA were followers of the Shi'a cleric Muqtada Sadr and a few Sunni lawmakers (Raghavan and Sarhan 2008).

In contrast, the Iraqi cabinet approved the SOFA by a 27-1 vote (a Sunni delegate cast the one opposing vote) (Rasheed and Susman 2008).

<sup>30</sup> The last election had left Maliki's party with insufficient seats to form a majority, and he entered into a coalition with the anti-American Sadrists to achieve this (Cole 2011a; Karon 2011b). Maliki split from the UIA to form his own coalition, the State of Law Coalition, which was dominated by Maliki's Shi'a Dawa party ("In Iraq Election, Familiar Faces but New Coalitions - Graphic - NYTimes.com" 2015). The UIA became the Iraqi National Alliance (INA) and it included SCIRI, the Sadrists, Badr, Ahmed Chalabi's Iraqi National Congress party, and other smaller parties (*Al Jazeera* 2010). Maliki's party held 120 seats while the Sadrists had 40 of the 325 total parliament seats (Jeffrey 2014).

<sup>31</sup> This quote from a senior US official (McGurk) in a 2011 Senate hearing is telling: "A recent poll by an independent research institution is consistent with what I heard across Baghdad over the summer and fall. Nearly 90 percent of Iraqis in Baghdad and more than 80 percent nationwide supported the withdrawal of U.S. forces from Iraq. Had the issue been framed in terms of granting legal immunity to U.S. personnel, the numbers would surely be higher" (McGurk and Dempsey 2011).

not public, making an in-depth examination of justifications difficult. An examination of Congressional bills, records, and records from the House of Representatives Foreign Affairs Committee from 2007-2008 where the SOFA was approved<sup>32</sup>, however, leaves some clues. There was recognition that the justice system of Iraq was weak, and therefore the troops would need protection to ensure due process and protect their rights. Several proposed bills, for instance, called for Iraq to pass legislation or other measures to protect the rights of women and minorities, and to strengthen the ability of the police to conduct criminal investigations, control crime, and protect Iraqis (Udall 2007; Tauscher 2007). In one proposed resolution, representatives pointed to the need to clarify the laws and “procedural safeguards that must be observed by Iraqi courts to ensure due process and equal justice” if private military contractors were charged with a crime (Lee 2008). In a Senate Hearing from 2011, General Dempsey stated that the Iraqi judicial system was “evolving and immature,” and thus “We did not believe it was appropriate or prudent to leave service men and women without judicial protections in a country that still had the challenges we know it has and a very immature judicial system (McGurk and Dempsey 2011). In addition to ensuring the rights of their own troops and due process, “the larger concern was that there would be some kind of incident that would put us at odds with the Iraqi security forces trying to arrest one of our soldiers” (ibid).

By the same token, however, representatives repeatedly highlighted the need to respect Iraqi Westphalian and domestic sovereignty. Indeed, rather than an appeal from an invaded territory, the SOFA was an official request from Iraq’s sovereign government to the US, asking them to assist in ensuring stability in the country (Rush 2009: 34). For instance, a proposed resolution in Congress from 2005 stated that “Iraq, as do all sovereign nations, has the duty and responsibility to indict, prosecute, and punish criminals within its jurisdiction” (Burgess 2005). While this resolution was mainly in reference to the Iraq Special Tribunal, which sought to try individuals who had committed crimes against humanity, war crimes, and genocide, the sentiment that the Iraqi state should have the authority and capacity to preside over events within its own territory was repeatedly emphasized by delegates. The SOFA itself was seen as an “affirmation” of Iraq’s status as a sovereign nation able to sign bilateral and multilateral treaties (Biden and Lugar 2008; Israel 2007a, 2007b; Weed 2008). Thus, the SOFA “is an important measure taken both to underline the sovereignty of the host country and to protect the military justice system of the visiting country” (Israel 2007a). In this spirit there were calls to clarify that the US “is not an occupying power” (Israel 2007a), and not build permanent or long-term military installations (Blumenauer 2007) or commit to any long-term security guarantees in case Iraq faces danger in the future (*Future U.S. Military Role in Iraq* 2008). One proposed bill called not only for the recognition of “the elected Government of Iraq as the legitimate government of a fully sovereign country,” but also to “encourage” the government “to take greater responsibility over its natural resources, security, and public safety within its borders” (Price 2007). While there was great debate between the Republican desire for a flexible exit more dependent on security conditions and the quality of governance, and the Democratic push to end the war quickly (McCain 2007; Obama 2007), the overall goal was to leave Iraq as a sovereign country.

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<sup>32</sup> The SOFA did not pass through the US Senate for debate as it was approved in the House of Representatives Foreign Affairs Committee instead (Bassiouni 2010). Some Congress members argued that Bush needed to ratify it via Congress due to the SOFA’s wide-ranging permissions, while others posited that the SOFA contained the same provisions as other SOFAs around the world and did not need Congressional approval (Bruno 2009).

The US was not driven to highlight the sovereignty of Iraq simply out of deference to the norm. A fully sovereign, unified, democratic and peaceful Iraqi state was also framed as part of the security interests of the US (DeLauro 2008; King 2007; Price 2007). Indeed, in their proposed bills, delegates posited that a failed Iraqi state could threaten the peace and security of the region and the US, and lead to a mass humanitarian emergency (Bordallo 2007; King 2007; Wolf 2007). Installing a democratic government that respected the rights of women and minorities was argued to be a necessary (though not sufficient, as concerns over security attest) element of the US exit strategy<sup>33</sup> (Gordon 2012). Indeed, under the Bush Doctrine, the installation of liberal norms and institutions around the world were seen to be a tool to advance the security and political interests of the US (Monten 2005). The US thus saw fit to violate the domestic sovereignty of Iraq to install liberal institutions and pursue this goal. For instance, in 2010 Obama asked Iraqi President Halal Talabani to give his post to Washington's favoured candidate, Ayad Allawi (Gordon 2012). The aim was to counterbalance Prime Minister Maliki's increasingly authoritarian approach to governance<sup>34</sup> (Gordon 2012). There were furthermore several bills proposed that would make continued US aid contingent on the Iraqi government progressing towards certain benchmarks such as changing the constitution to promote national reconciliation, share oil revenues equitably among citizens, hold free and fair elections, and passing legislation or other mechanisms to protect the rights of women and minorities (Langevin 2007; Shadegg 2007; Tauscher 2007; Udall 2007).

Iraqi politicians, however, were under great pressure to defend the idea of sovereignty as self-determination. Indeed, while many Iraqi politicians privately felt that the country lacked the capacity to stem violence and required US support (Hussein 2008; Sheridan and Londoño 2008; Robertson and Farrell 2008), with Iraqi provincial and federal elections slated for 2009, parties wanted "to look like fierce defenders of Iraq's sovereignty" ("Iraq, U.S.: The Latest on the Status of Forces Agreement" 2008). The Americans were framed as "occupiers" and had become highly unpopular among parts of the Iraqi population due in part to scandals such as Abu Ghraib scandal and Blackwater contractors opening fire on civilians in Baghdad in September 2006 (*Al Jazeera* 2008; Cole 2011a). The SOFA also stirred up memories of the agreement signed between Iran and the US in 1964, which granted US personnel full immunity from Iranian law. Opposition to this agreement constituted one of the main grievances that drove Ayatollah Khomeini's revolution in Iran (Rush 2009). The SOFA additionally reminded Iraqis of occupation under the British (*Radio Free Europe/Radio Liberty* 2008). Tensions around the SOFA reached such a pitch that journalist Muntazer al-Zidi threw his shoe at President Bush during the final SOFA press conference in a show of deep disrespect (Myers and Rubin 2008).

The Iraqis did not only mobilize the norm of sovereignty as self-determination. They also had strategic leverage. The Sunnis were no longer engaging in military confrontations against the US and Maliki had control of the increasingly capable Iraqi military that allowed him more independence from the US (Bassiouni 2010; Lynch 2008). The likely election of Obama on a platform to end the Iraq war also strengthened the Iraqis' position (Lynch 2009). Another factor was the great embarrassment the Americans would experience if they failed to reach an accord

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<sup>33</sup> For instance: "We will stay as long as necessary to make sure that the Iraqi people have a government of, by and for the Iraqi people. And then we'll come home." (Bush 2003)

<sup>34</sup> In the end the move failed (Gordon 2012).

after spending several months negotiating and making concessions to win over Maliki (Rasheed and Susman 2008). Indeed, if US troops were forced to leave Iraq on 31 December 2008 it would have been seen as a defeat (Cole 2011a). The US was additionally concerned that a hasty exit could allow unrest to rise again (Myers 2008). The desire on the US side to build the domestic and international legal sovereignty of Iraq gave the Iraqi politicians some leverage as well. Clearly running roughshod over Parliament to impose a “conditions on the ground” exit approach would have been contrary to the Americans’ aim of building the international legal and domestic sovereignty of the very government that they installed. Indeed, when the US was lobbying for a UN resolution to recognize Iraq’s first interim government back in 2003, an administration official commented: “We want to pave the way for international acceptance for a new government and get a blessing for its legitimacy. We can't afford to set up a government for failure and let the international community later say it doesn't recognize it” (R. Wright and Lynch 2003).

Summing up, it would appear that allocation of criminal jurisdiction to Iraq for US soldiers under certain contexts provides evidence for the mixed interests/norms (changed) hypothesis. Indeed, one could argue that the ability of the Iraqis to gain some jurisdictional powers despite not meeting basic benchmarks of good governance (as highlighted in Congressional proceedings emphasizing the weakness of Iraqi institutions) is evidence of the power of the sovereignty as self-determination norm. As described previously, however, the powers Iraq did secure were highly limited. In practice, therefore, the US retained jurisdiction over its own personnel as the sending state.

In terms of justifications, echoing the UN case we see that the US argued to retain jurisdiction over its soldiers not only to prevent possible confrontations between Iraqi and US soldiers, but also because the Iraqi system was seen as too weak to safeguard their rights. Convincing evidence for the sovereignty as conditional norm would connect improved governance conditions with greater Iraqi jurisdiction to try US soldiers. Indeed, the overall US presence was meant to be limited in Iraq, and under the Bush Doctrine exit would occur once certain governance and/or security benchmarks were met. This is in line with the contingent sovereignty norm. That being said, the initial bargaining position of the US in the 2008 and 2011 SOFA negotiations was total sending state jurisdiction, despite the fact that Iraq had made some improvements in governance and security in the intervening years. Indeed, it was in part insistence on this point that led to the negotiation breakdown in 2011. Thus, jurisdictional allocation did not change according to governance conditions. Instead, it appears to be the bargaining leverage of the Iraqis that tipped negotiations. This could arguably once again be taken as evidence of the power of the self-determination norm, as an outright violation of Iraqi sovereignty to impose an agreement with total US criminal jurisdiction was seen as an unacceptable option. That being said, it appeared that the US was concerned not so much about violating the norm itself than creating conditions that could lead to further instability that would threaten its security interests.

I therefore argue that this evidence is generally consistent with the interests hypotheses. The US in practice holds jurisdiction over its soldiers, this jurisdiction is not contingent on improvements in governance, and while most justifications from the US appealed to the contingent sovereignty norm, this could simply have been the most efficacious norm to mobilize to achieve US interests

and not evidence of the force of the norm itself shaping US behavior, given their continued insistence on retaining exclusive jurisdiction. In order to more conclusively settle this question I would need details from the SOFA negotiations themselves to see which arguments were used. If the US focused on matters such as military efficiency, or avoiding large scale confrontation, rather than systematically appealing to different ideas of sovereignty, this would bolster my interests-based argument. Ideally I would also compare these outcomes and justifications to a Cold War case to see patterns over time. Unfortunately for the reasons stated previously this does not appear to be possible without access to confidential documents.

<b>Actor</b>	<b>Variable</b>	<b>Post-Cold War</b>
<b>US military personnel and civilian component</b>	Jurisdiction	Host state for crimes committed off-base and off-duty, no specific mention of civil law although states will compensate third parties for damage done in combat and non-combat activities
	Justification	Contingent sovereignty
	Contingent?	No in SOFA and justifications

Table 3: Evidence Summary

## Conclusion

Scholars have highlighted a number of ways that intervention has changed since the Cold War, including more ambitious peacekeeping mandates that call for changes in host state institutions, and interventions justified by human rights protection (Bellamy and Williams; Finnemore; Zaum). While SOFAs and jurisdictional allocation play a critical role in the success of many of these interventions, they remain little explored in the literature. Have patterns in jurisdictional allocation matched these larger intervention trends which have resulted in increasing interference in, and even the displacement of, host states' domestic sovereignty? Or have host states been able to maintain jurisdictional powers? How are decisions regarding jurisdictional allocation justified? I proposed a number of potential ways jurisdiction could be allocated and justified over time depending on whether interests, norms, or a mix of the two guide such decisions. Overall, I have found evidence from both UN and US SOFAs that jurisdictional allocation has been shaped more by interests than norms, or a mix of the two in certain circumstances. Criminal jurisdiction over military personnel has consistently rested with the sending country in UN SOFAs both before and after the Cold War. This was not justified by systematic appeals to contingent sovereignty norms, nor made contingent on improved governance in debates over reforming the model MOU or SOFA. Military personnel may be tried in civil cases for off-duty matters, although defining off-duty is difficult. Criminal and civil jurisdiction over UN officials and experts appears to have shifted slightly to the host state, although this also remains highly limited, as the UN can stop criminal cases and civil cases may only be brought for off-duty actions. Member State negotiations to redraft the model SOFA and MOU reveal that protecting the rights of prosecuted UN officials and experts remains a key justification, in line with the interests or mixed interests/norms (no change) hypothesis, although it is unclear how contingent immunity is on improved host state governance. While the US-Iraq SOFA allows Iraq to prosecute US soldiers in certain conditions, I find that the US continued to effectively hold jurisdiction over its personnel. The US has justified this in part by appealing to the contingent

sovereignty norm, although it is unclear how much this norm has shaped the behavior of the US, as the US has not made increased Iraqi jurisdiction conditional on improved governance. Instead, Iraq's increased jurisdictional powers appear to be due to the strategic bargaining leverage that it held rather than norms. This fits with the interests hypotheses. These findings should be treated with caution, as I lacked access to detailed records of SOFA negotiations, and I lack any in-depth Cold War cases to compare against. Nonetheless, this essay emphasizes the utility of continuing to further break down the many different aspects of interventions to understand how such practices evolve over time. Indeed, while other aspects of intervention appear to have become more interventionist over time, jurisdiction appears to be governed more by a consistent set of interests that favoured displacing host state institutions both before and after the Cold War.

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## Appendix A: US Exit from Iraq

The US exit strategy from Iraq involved the slow transfer of sovereignty to the Iraqis. On 20 March 2003 the US led an international coalition to invade Iraq. The Bush administration justified the invasion on a number of grounds. It accused Saddam of keeping Weapons of Mass Destruction (WMDs) in violation of UN resolutions and harbouring terrorist organizations (Fallows 2004; “Iraq Policy Briefing: Is There An Alternative To War?” 2003). It also argued that Iraq was a threat to regional and global stability, and posed a grave threat to its own people (ibid). Militarily, the invasion was a success. Saddam’s regime collapsed on 9 April, and on 2 May President Bush declared the end of “major combat operations in Iraq” although the chaos and looting that broke out after the invasion prevented the US from effecting a quick exit (Diamond 2004). A Coalitional Provisional Authority (CPA) was established shortly after the US-led invasion in April 2003 in order to serve as a transitional government. Its members were drawn from the forces that invaded Iraq. In July 2003 CPA members appointed Iraqis to an Iraqi Governing Council (IGC) that was meant to serve as a consultative body. An interim constitution called the Transitional Administrative Law was drafted by the CPA and approved by the IGC on 8 March 2004 without a popular vote, stoking protests (“Unmaking Iraq: A Constitutional Process Gone Awry” 2005). Under the November 15 Agreement the administration transferred sovereignty on 28 June 2004 to a non-elected group of exiled Iraqi politicians who were allies of the US administration, led by Iyad Allawi (Dodge 2012:248). Earlier that month the UN Security Council passed a resolution deeming the interim government “fully sovereign” however US troops retained a wide ability to conduct operations and the interim government’s powers were limited by the temporary constitution to civil administration and setting the ground for the upcoming national elections (“U.S. Transfers Political Authority in Iraq (Washingtonpost.com)” 2015). Shi’a Grand Ayatollah Ali al-Sistani opposed the agreement and called for the direct election of future governments, causing demonstrations of 100 000 people in Baghdad in January (Dodge 2004: 43). On 30 January 2005 Iraq held its first national elections for the Transitional National Assembly which would draft a new constitution. This new constitution was approved through a national referendum on 15 October 2005. On 15 December 2005 Iraqis elected their first full term government since the US invasion. After months of political deadlock Nouri al-Maliki (Shi’a) was name the new Prime Minister on 22 April 2006. By 2007, however, Iraq had slipped into civil war as the Iraqi government was unable to control the increasing violence in the country (Dodge 2012: 252). Bush, facing the public recognition that the current trajectory in Iraq was not working, secure in his second term in office, and with the desire to salvage his administration’s reputation and US-Iraq relations, ordered a surge of thousands of troops on 10 January 2007 (Caplan 2012: 253, 255). It worked, and Iraq and American casualties dropped precipitously. The SOFA negotiations took place in the year after the surge.

### Appendix B: List of UN Peacekeeping Missions 1948-2013

Op_start	op_end	year_agree	found_agree	cold_war	crim_juris_send mil	except_send	immune_un	Mission	Location
May-48	Present		0	1			1	UNTSO	
Jan-49	Present		0	1				UNMOGIP	India, Pakistan
Nov-56	Jun-67	Feb-57	1	1	1	1	1	UNEF I	
Jun-58	Dec-58	1958	0	1				UNOGIL	Lebanon
Jul-60	Jun-64		0	1	1	1	1	ONUC	Congo
Oct-62	Apr-63	1962	0	1				UNSF	New Guinea
Jul-63	Sep-64	11-Jun-63	0	1				UNYOM	Yemen
Mar-64	Present	1964	1	1	1	1	1	UNFICYP	Cyprus
May-65	Oct-66		0	1				DOMREP	Dominican Republic
Sep-65	Mar-66		0	1				UNIPOM	India, Pakistan
Oct-73	Jul-79		0	1			1	UNEF II	
Jun-74	Present		0	1			1	UNDOF	Golan
May-88	Mar-90		0	1				UNGOMAP	Afghanistan, Pakistan
Aug-88	Feb-91	1988	1	1			1	UNIIMOG	Iran, Iraq
Jan-89	Jun-91	1989	0	1				UNAVEM I	Angola
Apr-89	Mar-90		0	1			1	UNTAG	
Nov-89	Jan-92	1989	1	1			1	ONUSCA	Costa Rica
Apr-91	03-Oct		0	1				UNIKOM	Iraq, Kuwait
Apr-91	Present	13-Dec-91	1	1			1	MINURSO	Western Sahara
Jul-91	Apr-95	1991	1	1			1	ONUSAL	El Salvador

Nov-89		Jan-90	1	1			1	ONUCA	Guatemala
Nov-89		Nov-89	1	1			1	ONUCA	El Salvador
Nov-89		Jul-90	1	1			1	ONUCA	Honduras
Nov-89		Aug-90	0	1				ONUCA	Nicaragua
		1982	1	1				MFO	Sinai Egypt
Mar-78	Present	1995	1	0	1	1	1	UNIFIL	Lebanon
Jun-91	Feb-95	1992	0	0				UNAVEM II	Angola
Oct-91	Mar-92	1992	0	0				UNAMIC	Cambodia
05-Jun		1995	1	0	1	1	1	UNPROFOR	Croatia
Dec-92		01-Jun-94	1	0	1	1	1	UNPROFOR	Macedonia
Feb-92	Mar-95		1	0	1	1	1	UNPROFOR	Bosnia and Herzegovina
Mar-92	Sep-93		1	0	1	1	1	UNTAC	Cambodia
Apr-92	Mar-93		0	0				UNOSOM I	Somalia
Dec-92	Dec-94	1993	1	0	1	1	1	ONUMOZ	Mozambique
Mar-93	Mar-95		0	0				UNOSOM II	Somalia
Jun-93	Sep-94	1993	1	0			1	UNOMUR	Uganda, Rwanda
Aug-93	09-Jun	1994	1	0			1	UNOMIG	Georgia
Sep-93	Sep-97	1993	1	0			1	UNOMIL	Liberia
Sep-93	Jun-96	1996	1	0	1	1	1	UNMIH	Haiti
Oct-93	Mar-96	05-Nov-93	1	0	1	1	1	UNAMIR	Rwanda
May-94	Jun-94		0	0				UNASOG	Aouzou Strip
Dec-94	May-00	1995	1	0			1	UNMOT	Tajikistan
Feb-95	Jun-97	1995	1	0	1	1	1	UNAVEM III	Angola

Mar-95	Feb-99	1994	1	0	1	1	1	UNPREDEP	
May-95	Jan-96	1995	1	0	1	1	1	UNCRO	Croatia
Dec-95	02-Dec	1996	1	0			1	UNMIBH	Bosnia and Herzegovina
Jan-96	02-Dec		0	0				UNMOP	Prevlaka
Jan-96	Jan-98	1996	0	0				UNTAES	Slavonia, Baranja and Western Sirmium
Jul-96	Jul-97	Jul-96	1	0	1	1	1	UNSMIH	Haiti
Jan-97	May-97	1994	1	0			1	MINUGUA	Guatemala
Jun-97	Feb-99		0	0				MONUA	Angola
Aug-97	Dec-97	Aug-97	1	0	1	1	1	UNTMIH	Haiti
Dec-97	Mar-00	1998	1	0	1	1	1	MIPONUH	Haiti
Jan-98	Oct-98		0	0				UNCPSG	Croatia
Apr-98	Feb-00	08-May-98	1	0	1	1	1	MINURCA	Central African Republic
Jul-98	Oct-99		1	0			1	UNOMSIL	Sierra Leone
Jun-99	Present	2001	1	0			1	UNMIK	Kosovo
Oct-99	05-Dec		1	0	1	1	1	UNAMSIL	Sierra Leone
Oct-99	02-May		0	0				UNTAET	East Timor
Nov-99	10-Jun	08-May-00	1	0	1	1	1	MONUC	Democratic Republic of the Congo
Jul-00	08-Jul	23-Mar-01	1	0	1	1	1	UNMEE	Ethiopia, Eritrea
02-May	05-May	2002	1	0	1	1	1	UNMISSET	Timor-Leste
03-Sep	Present		1	0	1	1	1	UNMIL	Liberia

04-Apr	Present		1	0	1	1	1	UNOCI	Cote d'Ivoire
04-Jun	06-Dec	2005	1	0	1	1	1	ONUB	Burundi
04-Jun	Present		1	0	1	1	1	MINUSTAH	Haiti
05-Mar	11-Jul	2005	1	0	1	1	1	UNMIS	Sudan
06-Aug	12-Dec	2006	0	0				UNMIT	Timor-Leste
07-Jul	Present	09-Feb-08	1	0	1	1	1	UNAMID	Darfur
07-Sep		15-Oct-09	1	0	1		1	MINURCAT	Chad
07-Sep	10-Dec	2009	1	0	1		1	MINURCAT	Central African Republic
10-Jul	Present		0	0				MONUSCO	Democratic Republic of the Congo
11-Jun	Present		0	0				UNISFA	Abyei (Sudan)
11-Jul	Present		1	0	1	1	1	UNMISS	South Sudan
13-Apr	Present		1	0	1	1	1	MINUSMA	Mali
14-Apr	Present		1	0	1	1	1	MINUSCA	Central African Republic
April 2012	12-Aug		0	0				UNSMIS	Syria
		2003	1	0			1	MINUCI	Cote d'Ivoire
			1	0				BINUB	Burundi