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JURISDICTION OF FOREIGN COURTS OVER CRIMES COMMITTED ABROAD BY AMERICAN MILITARY PERSONNEL

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On July 15, 1953, by a vote of 72 to 15, the United States Senate ratified the *Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty.*[1] It came into force August 23, 1953.

This agreement sets forth the rules which will control the status of forces sent by one state into the territory of another state. Both such states are parties to the agreement. Article VII covers criminal offenses committed within the receiving state by members of the forces of the sending state. The military authorities of the sending state shall have the right to exercise criminal and disciplinary jurisdiction given by the laws of the sending state. The authorities of the receiving state shall have jurisdiction over offenses committed by members of the visiting force punishable under local law. There is thus a kind of concurrent jurisdiction.

What are the possible conflicts of jurisdiction? What are the cases in which only one state has jurisdiction? Each state has sole and exclusive jurisdiction over all security offenses such as treason and sabotage which are punishable by its law but not by the law of the other state.[2] The sending state has the primary right to exercise jurisdiction wherever the offense is solely against its property or security, or solely against the property or person of another member of that force, or where the offense arises out of any act or omission done in the performance of legal duty.[3] In all other cases the receiving state has the primary right to exercise jurisdiction. There may be a waiver by either state of its primary right to exer-

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1. The agreement is set out in 48 Am. J. Int. L. Supp. 83-101 (April 1954). For discussions of the agreement see *Murray L. Schwartz, "International Law and the NATO Status of Forces Agreement"*, 53 Col. L. Rev. 1091 (1953); *Edward D. Re, "The NATO Status of Forces Agreement and International Law"*, 50 N. W. U. L. Rev. 349 (1955). See also Recent Cases, 65 Harv. L. Rev. 1072 (1952).

2. Article VII, § 2.

3. Article VII, § 3. There is no provision for compulsory arbitration of the issue whether the offense was committed in the performance of a legal duty as there is in the case of tortious acts. But this defect has been thought to be a minor one. See 65 Harv. L. Rev. 1072 at 1074 (1952).

cise jurisdiction. The Agreement provides that "the authorities of the other state shall give sympathetic consideration to a request from the authorities of the other state for a waiver of its rights in cases where that other state considers such waiver to be of particular importance."[4]

Suppose a war begins, what happens then? This article may be suspended as to any of the contracting parties at the option of that party.[5]

During the debate in the Senate, Senator Bricker offered a reservation intended to withhold from a receiving state all jurisdiction over crimes committed by members of United States forces. Conversely the United States would have been compelled to waive at the request of a sending state its own jurisdiction over foreign forces present in our country. Thus the foreigner would not be subject to American jurisdiction no matter what his crime, and no matter how unrelated his crime might be to the line of duty. The proposed reservation was defeated by a vote of 53 to 27.

Before ratification of the Agreement the Senate adopted a statement[6] to the following effect: The Commanding Officer of American forces stationed abroad is to assure that members of those forces tried by the receiving state are granted the procedural safeguards guaranteed by the U. S. Constitution. In case this is not done, the Commanding Officer is to request the authorities of the receiving state to waive their jurisdiction. If waiver is refused, the Commanding Officer is to request the State Department to press the issue through diplomatic channels. Finally a representative of the United States is to attend such trials and to report any failure to satisfy the procedural safeguards.

During the Senate debate it was argued that the agreement was inconsistent with accepted principles of international law.[7] It is my opinion that this is not true under either treaty law or non-treaty

4. Article VII, § 3 (c).

5. Article XV, § 2.

6. *Murray L. Schwartz, "International Law and the NATO Status of Forces Agreement"*, 53 COL. L. REV. 1091, 1093 (1953); *Edward D. Re, "The NATO Status of Forces Agreement and International Law"*, 50 N. W. U. L. REV. 349, 359-360 (1955).

7. On September 8, 1955, Frank E. Holman in a letter to the House Foreign Affairs Committee alleged that under international law foreign soldiers were subject only to their own laws. He also concluded that the State Department advocated the Treaty mainly in order to secure ratification by France of E.D.C. (European Defense Community). See THE CHICAGO TRIBUNE, September 9, 1955.

law.[8] There has been such a great variety of treaties on the subject that one can conclude that there exists no general rule of international law against jurisdiction. Even agreements made during war have not always precluded local jurisdiction. This was true as to both World War I and World War II. When in 1942 the British gave American military courts exclusive jurisdiction over Americans, Secretary Anthony Eden stated that this was "a very considerable departure . . . from the traditional system and practice of the United Kingdom." The British Visiting Forces Act of 1952 vitiates this 1942 agreement and closely resembles the present NATO Agreement. During World War II only two states were able to obtain exclusive jurisdiction over their own forces on friendly foreign soil: the United States and Great Britain.[9] The treaties which have been made in time of peace show conclusively that in time of peace the nations of the world recognize no rule of absolute immunity.[10] Our treaty with Iceland is quite similar to the NATO Agreement, and so is our treaty with the Philippine Republic. Not a single multilateral treaty recognizes absolute immunity. It may be stated quite definitely that the NATO Agreement grants the sending state at least as much exclusive jurisdiction over its own forces as do comparable treaties. In 1944 Congress passed the only federal statute ever to deal with American jurisdiction over visiting foreign forces. This statute did not confer absolute immunity from American jurisdiction.[11]

Suppose there are no treaties on the subject, is there then a want of jurisdiction? The cases show that immunity is then given in only one situation: an offense committed in the line of duty. But the NATO Agreement also clearly gives immunity as to such offense. It seems reasonably clear that under the NATO Agreement the sending state acquires more jurisdiction over its forces than it would have in the absence of the Agreement.

In actual practice the nations of Europe have recognized no principle of immunity as to American troops stationed therein.[12] England, France, Italy, Turkey, and Bermuda have tried American service-

8. See Recent Cases, 65 HARV. L. REV. 1072 (1952) stating that "there is no settled rule of international law as to how far local courts are thereby deprived of jurisdiction". See also *Murray L. Schwartz, "International Law and the NATO Status of Forces Agreement"*, 53 COL. L. REV. 1091 at 1111 (1953); *Edward D. Re, "The NATO Status of Forces Agreement and International Law"*, 50 N. W. U. L. REV. 349, 362-383, 390-394 (1953).

9. *Murray L. Schwartz, "International Law and the NATO Status of Forces Agreement"*, 53 COL. L. REV. 1091 at 1097 (1953).

10. *Ibid*, 53 COL. L. REV. 1098-1102 (1953).

11. *Ibid*, 53 COL. L. REV. 1102-1103 (1953).

12. *Ibid*, 53 COL. L. REV. 1110-1111 (1953).

men for local offenses. The sentences imposed were almost always lighter than those under court-martial and the vast majority of prison sentences were suspended. And only two cases, one for rape and one for black marketing, resulted in sentences of three year confinement, the maximum imposed.

The Agreement sets very high standards of criminal procedure for the receiving state. These include the right to confrontation of witnesses, compulsory process, prompt and speedy trial, counsel of choice, and information as to the specific charges.[13] There is no requirement for grand jury or petit jury, nor any privilege against self-incrimination.[14] But there may not be double jeopardy "within the same territory".[15] Thus the agreement seems a reasonable compromise between the traditions of the common law and of the civil law.

The Defense Department has recently been preparing legislation providing for the defense of American military personnel tried by foreign courts.[16] The Defense Department now accepts the responsibility of defending its personnel. Hearings are expected to start in the House Armed Services Committee after Congress convenes in January 1956. The New York County Lawyers Association has been urging the Defense Department to sponsor such legislation.

International law also confers certain rights on an alien criminal defendant, including, I presume, a member of an alien military force. I have elsewhere summarized[17] these rights as follows:

1. There must be some grounds for his arrest.

2. He must be given an opportunity to communicate with the consul of his state if he requests it.

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13. There is also a right "to communicate with a representative of the Government of the sending state." But the right to have such a representative present at the trial exists only "when the rules of court permit." Article VII, § 9 (g). This is regarded as a serious defect by *Edward D. Re, "The NATO Status of Forces Agreement and International Law"*, 50 N. W. U. L. REV. 349, 361 (1955).

14. But it has been contended that the "privilege against self-incrimination is, of course respected in all free European countries." *Hermine H. Meyer, "German Criminal Procedure: The Position of the Defendant in Court"*, 41 A.B.A.J. 592, 667 (1955).

15. But the Agreement would not prevent a second trial if the Army removed the soldier from the foreign state. This is harsh as the Agreement specifically permits a military court to retry an individual if his act also violated "military rules of discipline." Article VII (8). See 65 HARV. L. REV. 1072 at 1073 (1952).

16. *The New York Times*, September 6, 1955. See also *Edward D. Re, "The NATO Status of Forces Agreement and International Law"*, 50 N. W. U. L. REV. 349, 393-394 (1955).

17. *Orfield, "What Constitutes Fair Criminal Procedure Under Municipal and International Law"*, 12 U. PITTS. L. REV. 35, 42-43 (1950).

3. He must be brought before a judge within a reasonable time after his arrest, and must be fairly treated in the meantime.

4. He is entitled to be informed of all the charges against him.

5. He is entitled to retain counsel.

6. He must be brought to trial within a reasonable time.

7. He is entitled to a fair trial before an impartial tribunal.

8. The provisions of the local law and of relevant treaties must not be disregarded.

9. He must be given the right to confront the witnesses against him.

10. He must be given the opportunity to summon witnesses in his own behalf and to interrogate them.

11. He must not be exposed to cruel and inhuman treatment during the proceedings nor by way of punishment after the proceedings.

In a number of matters foreign criminal procedure may be more favorable to the defendant than our own.[18] In our country the proceeding is usually commenced by an arrest; in many foreign countries a summons is used. European countries are much freer in releasing criminal defendants from jail without requiring bail. The European written accusation sets out the evidence against the defendant in detail while the American is a mere skeleton of charges. In Europe the defendant may at the end of the proceedings make an unsworn statement in which he may deny guilt, plead for mercy, attack the prosecution, or advance any argument he chooses. This does not subject him to cross-examination. Thus the criminal defendant is the last to address the court, whereas under our system the prosecution is last. In some European countries the jury shares in the determination of the penalty. In the United States the defendant may not appeal on the facts. In Europe he may. In the United States there is no right to compensation for wrongful conviction except in four states. Many European countries have long provided for compensation sometimes including even wrongful prosecution as well as wrongful punishment. Furthermore European penalties for criminal offenses are often much lighter.

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18. *Orfield, "What Constitutes Fair Criminal Procedure under Municipal and International Law"*, 12 U. PITTS. L. REV. 35, 39-41 (1950).

That European criminal law compares favorably with our own is pointed out by *Edward D. Re, "The NATO Status of Forces Agreement and International Law,"* 50 N. W. U. L. REV. 349, 360-361, 387; *Hermine H. Meyer, "German Criminal Procedure: The Position of the Defendant in Court"*, 41 A.B.A.J. 592 (1955); *Vouin, "The Protection of the Accused in French Criminal Procedure"*, 5 INT. & COMP. L. Q. 1 (1956).

On the other hand, foreign criminal procedure may be less favorable to the criminal defendant in a number of respects.[19] The American law of search and seizure restricts the prosecution more than the European. In European states once a criminal defendant is charged with crime, a general search may be made at any place if there is a presumption that material evidence relating to the crime will be found there. And there is no restriction as to the kinds of evidence which may be the object of a search; any object may be sought which has any relation to the crime. However it should be remembered that a majority of American state courts unlike the federal courts permit the use of evidence obtained by illegal search and seizure. The European countries do not use grand juries.[20] The European procedure prior to trial is quite different from the American preliminary examination. For example in France an examination is conducted by the *juge d'instruction,* an impartial judicial officer entrusted with the primary responsibility of bringing out the evidence necessary for a determination of probable cause. He may visit the scene of the crime, make searches and seizures, appoint experts to conduct special investigations, and interrogate the defendant. Upon concluding his inquiry he may dismiss the case or may make recommendations for a trial to the *chambre d'accusation,* a three judge court which then decides whether a trial shall be held. Under American procedure a defendant need not incriminate himself. Under European procedure the defendant is questioned very minutely at the preliminary stage by the magistrate and again at the trial by the judge. He is not warned upon arrest that he has a right to remain silent. There may be a comment on his failure to testify. Trial procedure is quite different. In the United States as in England a criminal trial is an adversary proceeding before a jury in which the judge is a moderator. In Europe the judge is an active inquisitor. In the United States the various stages of a criminal proceeding, particularly the trial, are conducted in public. In European states the preliminary proceedings are secret, but the trial, except in special cases, such as those involving public morals, is public. European rules as to the admissibility of evidence are much less restrictive than ours. Thus hearsay evidence may be admitted. Trial by jury is not used as widely in Europe, and when used is

19. *Orfield, "What Constitutes Fair Criminal Procedure Under Municipal and International Law",* 12 U. PITTS. L. REV. 35, 39-41 (1950).

20. However the Fifth Amendment of the United States Constitution, which provides for indictment by a grand jury, excepts "cases arising in the land or naval forces." And England which originated the grand jury abolished it in 1933. *Orfield, Criminal Procedure from Arrest to Appeal* 140 (1947).

not employed in quite the same way.[21] For example the verdict need not be unanimous and there are not always twelve members on the jury. In some European countries the defendant has no right to testify under oath in his behalf, and can only make an unsworn statement. Continental judges do not instruct the jury, as do our judges. In some European states there may be an appeal from an acquittal. This is not permitted in our country except in Connecticut and possibly one or two other states.

How is the NATO Agreement working out as of 1955? In March of this year, Munroe Leigh, assistant Defense Department counsel for international affairs, told a Senate Armed Services subcommittee that in "a very high percentage" of the cases involving Americans, about 87 per cent, foreign courts had waived jurisdiction.[22] Such waiver of course allows the exercise of American jurisdiction. Furthermore only 1.3 per cent of the servicemen tried in foreign courts ended up in foreign jails.

A letter[23] to the Saturday Evening Post from Jerry Williamson of Indianapolis, Indiana states: ". . . Why shouldn't they quit? . . . Since the Senate carelessly ratified the NATO Status of Forces Treaty on July 15, 1953, thousands of American soldiers have been consumed by the strange maws of foreign prisons. We are not told the exact figure, that total being tabbed 'top secret . . .'" The editors of the Post reply: "The number is not 'top secret'. It is 58."

A recent case involving the NATO Agreement has been in the federal courts.[24] On February 28, 1955 the United States Supreme Court denied a petition for certiorari sought by the wife of Private Richard Thomas Keefe. Keefe had beaten a French hackman and stolen his cab. He was tried and sentenced by a French court to im-

21. It should be observed that a serviceman tried by a military court-martial has no right to trial by jury. *Edward D. Re, "The NATO Status of Forces Agreement and International Law"*, 50 N. W. U. L. REV. 349, 360 (1955). For a comparison of military procedure with federal criminal procedure see *Latimer, "A Comparative Analysis of Federal and Military Criminal Procedure"*, 29 TEMPLE L. Q. 1 (1955).

22. *The New York Times*, March 30, 1955. For earlier figures see *Edward D. Re, "The NATO Status of Forces Agreement and International Law"*, 50 N. W. U. L. REV. 349, 355-356 (1955); *A.B.A. Section on International and Comparative Law, Report of Committee on Military, Naval and Air Law* 141, 145-146 (1954). See also *"When GI's Get in Trouble"*, *News Week*, pp. 33-37, February 20, 1956.

23. *Saturday Evening Post*, September 3, 1955.

24. United States v. Dulles, 222 F. 2d 390 (D.C. Cir. 1954), *cert. denied* 75 S. Ct. 440 (1955), noted 30 ST. JOHN'S L. REV. 111 (1955). See *Arthur E. Sutherland, Jr., "The Flag, the Constitution and International Agreements"*, 68 HARV. L. REV. 1374, 1379-1380 (1955); *A.B.A. Section on International and Comparative Law, Report of Committee on Military, Naval and Air Law* 141, 146 (1954).

prisonment in a French prison. His wife petitioned for a writ of habeas corpus in the District of Columbia on the ground that the treaty permitted the trial in violation of the fifth amendment guarantee against self-incrimination. The district court dismissed the petition and the Court of Appeals affirmed. The Court of Appeals did not base its decision on the narrow ground that Keefe was out of the custody of American authorities. It held that the petition sought an order requiring the Secretary of State to engage in diplomatic negotiations for Keefe's release, and that a court cannot so order. But the court also found no violation of Keefe's constitutional rights. Thus the case does not hold that the NATO Agreement permitted a trial in an unconstitutional manner. Nor does it say that there would then be no judicial remedy. Yet it would seem that Keefe has no judicial remedy in the American courts. However, an ordinary American tried abroad has no judicial remedy either. The confusion arises because some American lawyers assume that the standard of individual rights set by the American Constitution applies throughout the world as a part of international law.

That the foreign courts are being fair to Americans is shown by a 1953 decision by the French Court of Appeal at Paris.[25] A fatal injury was inflicted on a Frenchman by an American army truck driven by an American soldier in the course of his duties. The French court held that the primary jurisdiction belonged to the United States even though there was no showing that the accused was prosecuted in an American court or that his act was punishable by American law. The French courts, therefore, had no jurisdiction.

The NATO Treaty does not place an unreasonable burden on peacetime military operations. Troops in their home country are usually subject to similar non military jurisdiction. That is true under American law and under French law.[26] Furthermore we prevent friction in the countries where many of our soldiers remain for rather long periods. We must never forget that we are dealing with partners and allies, not with conquered nations. Good Americanism and the spirit of the Constitution of the United States do not require that we lord it over friends and allies and that we assume that our own criminal procedure is the only fair one in this world.

In closing I would remind you of the words of Lord Acton spoken almost a century ago: "The man who prefers his country before every other duty shows the same spirit as the man who surrenders

25. 49 AM. J. INT. L. 415 (July, 1955).
26. Recent Cases, 65 HARV. L. REV. 1072, 1073 (1952).

every right to the State. They both deny that right is superior to authority."[27] Louis Bromfield may be near the truth when he says in his recent book "From My Experience" about us Americans: "We lack almost entirely the capacity of putting ourselves in the place of other peoples and the knowledge of the average citizen concerning the life and circumstances of other nations and peoples is primitive, frequently enough even among those who occupy high places in our Government."

27. *Essays on Freedom and Power* p. 164 (1955).