

STATUS OF ARMED FORCES ABROAD

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The United States long ago recognized the fact that the only true security in the world today is collective security. In furtherance of this concept, the United States has entered into many alliances with other nations of the free world in order to protect itself as well as assist in the protection of these friendly countries. One such alliance is the North Atlantic Treaty Organization. And, as a part of our contribution to this partnership, we have stationed a sizable number of our military forces in Europe. In other friendly countries throughout the world our armed forces are assigned in more limited numbers. This is the first time in history that in time of peace military forces of the United States have been assigned to foreign areas for an indefinite period of time.

The understanding with each country in which our forces are stationed includes specific arrangements with respect to jurisdiction over these forces. All told, there are approximately 60 countries with which the United States has some type of jurisdictional arrangement regarding American servicemen stationed within their borders.

It is my purpose to consider the provision of these agreements which relates to the authority of the host state and the military authorities of the sending state to exercise jurisdiction over offenses committed by members of the

visiting force within the territory of the host state. This phase of the relationship between our forces and the host state is the most controversial. It has received the greatest amount of publicity and is of prime interest to commanding officers.

Before considering the division of jurisdictional authority established by these agreements, however, it may be helpful first to see what would be the status of our service personnel abroad in the absence of any agreements.

A sovereign nation exercises absolute and exclusive jurisdiction within its own territory. If the commander of a visiting friendly military force convenes a court-martial to try a subordinate for some purely military offense, such as failure to obey the lawful order of a superior officer, the commander impinges upon the exclusive jurisdiction of the sovereign.

Yet, the maintenance of discipline within a military force is recognized as the inherent responsibility and duty of the commander. In order to overcome this impasse, and at the same time preserve the integrity of both of these principles, International Law recognized the further proposition that where a sovereign permits a friendly foreign military force to enter his territory, he implicitly waives jurisdiction over the force with respect to matters of military discipline. This implied immunity is

strictly construed and extends only to the right to discipline and punish as may be required for the government of the force. Whatever may be their acceptance in many law texts, however, the hard fact of today's international situation is that such broader exceptions are not accepted in our world of rising nationalistic feelings.

This state of the law may come as a surprise to some who recall that during World War II we exercised exclusive jurisdiction over our armed forces wherever they were situated. In point of fact, we exercised exclusive jurisdiction during the war years solely as the result of wartime agreements that reflected wartime requirements and the relative circumstances of the parties at the time of negotiation.

Most of the agreements in force today were negotiated in time of peace to meet peacetime requirements. They vary all the way from granting exclusive jurisdiction to the United States in a few instances, such as in Korea, Greenland, and Ethiopia, to the establishment of a system of concurrent jurisdiction, such as in Bermuda, the Bahamas, and the NATO countries. In general, the type of jurisdiction which is granted to the United States is largely dependent upon the mission of the force assigned, its size, the laws of the host country and the willingness of the host country to waive its jurisdiction in favor of the United States. There are no agreements by which a foreign state exercises exclusive jurisdiction over our forces.

Under the circumstances, it would be error to say that in completing these jurisdictional arrangements the United States Government has surrendered any rights of the American serviceman who is stationed abroad. On the other hand, it can be said that every agreement which has been negotiated amounts to a specific gain for our service personnel abroad.

In many countries there may be more than one category of our forces,

each category being present by virtue of a different agreement and, therefore, each being in a different jurisdictional status.

Under the mutual defense assistance agreements, the personnel assigned to the MAAG units enjoy the same immunity as embassy personnel of corresponding rank.

The agreements that establish the various military and naval missions provide that personnel assigned to this duty will remain subject to United States military law and only in some instances subject to local jurisdiction.

Personnel serving in the Ryukyus are under the exclusive jurisdiction of the United States, due to the fact that we exercise control over the area.

Most of our forces stationed abroad are a part of the NATO Defensive Organization and are serving in the various countries which are members of the NATO alliance. The status of these forces is controlled by the Status of Forces Agreement, a multilateral convention entered into by all of the signatories of the NATO alliance with the exception of Iceland, which does not maintain an armed force of its own. This agreement was negotiated in 1951, and ratified by the Senate of the United States in 1953. It is by far the most important convention relating to the status of our forces abroad.

This convention superseded many bilateral agreements which had previously controlled the status of forces among the NATO countries. It establishes uniformity in relations between the member of a force, the civilian components, and their dependents, with the authorities of the receiving state, and it clarifies and broadens the right of the sending state to exercise jurisdiction over its own forces.

The major concept of this arrangement is the establishment of concurrent jurisdiction with a scheme designed to divide the exercise of jurisdiction between the authorities of the sending

state and the host state, based upon the principle of primary interest.

The military authorities of the sending state are given the primary right to exercise jurisdiction over a member of a force or civilian component when the offense involves the property of the sending state or the person or property of a member of the force, a civilian component of the sending state or a dependent, or the offense arises out of the performance of official duties. In all other cases the receiving state has primary jurisdiction.

It may be appropriate at this point to invite your attention to the status of dependents under this jurisdictional arrangement. While the Uniform Code of Military Justice places dependents within the category of persons who are subject to military law when accompanying our forces abroad and the status of forces agreement gives to the military authorities of the sending state the authority to exercise all criminal and disciplinary jurisdiction authorized by the laws of their own state, the agreement reserves to the host state primary jurisdiction over offenses committed by dependents.

One of the important features of the status of forces arrangement is the official duty determination, which controls in a great many cases whether the military commander or the authorities of the host state shall have primary jurisdiction. Two aspects of this provision are worthy of note: namely, what is to be the definition of official duty, and who will make the decision. The agreement answers neither question, although it would appear from the working papers of those who drafted the agreement that it was intended that the military authorities of the sending state make the decision. This is the position urged by the United States, although it has not been accepted by all of the signatories. For instance, in the United Kingdom, British Courts make the final decision in official duty

questions. Substantially the same practices are followed in Japan and Turkey. In all other NATO countries, however, the determination of the official duty question by the authorities of the visiting force appears to be final.

You may be interested in a recent development in Turkey. The Turkish courts have been construing the phrase "In performance of official duty" far stricter than United States authorities, with the result that Turkey was prosecuting cases which our military commanders considered to be official duty cases. The difficulty was found to lie in the fact that in translating this phrase into Turkish it acquired a more limited meaning. As a solution, Turkey enacted a law authorizing an interpretation which would include an offense committed "In connection with the performance of official duty." One of the immediate results of this change was the release to the Army for trial by court-martial of a sergeant, who was being held for trial for a traffic death which occurred while he was driving a government vehicle on temporary duty.

Another important feature of the agreement provides that the state having the primary right to exercise jurisdiction shall give sympathetic consideration to a request from the authorities of the other state that jurisdiction be waived in its favor. It is the policy of the United States to request a waiver in every case in which it does not have primary jurisdiction. Also, it is the policy of the United States not to waive jurisdiction in any case in which it has primary jurisdiction. Our military authorities have been successful in securing a waiver by the host state of primary right in a great number of cases. It may be said that in most instances the host state is willing to waive its right except where the offense is one which arouses public indignation or grossly offends morals or national pride.

In a supplemental exchange of notes with the Netherlands, that state agreed

to waive primary jurisdiction except where it is determined that an offense is of particular importance to the Netherlands authorities. Under this arrangement, we are given the right to act in substantially all cases involving persons subject to military law. This is known as the "Netherlands Formula," and has been adopted with respect to our forces in other countries.

The right to request a waiver is particularly important in the case of dependents. As noted earlier, the primary right to exercise jurisdiction over dependents rests with the host state. Thus, a dependent is in somewhat the same status as a tourist, and upon the commission of an offense will be tried by the courts of the receiving state unless jurisdiction is waived. It might be added in passing that service personnel and members of civilian components are also in the status of tourists when in a leave status in a country other than the one in which they are stationed unless there is some special understanding with that country.

Whether a case involves the question of official duty or the waiver of primary jurisdiction by the host state, the administrative steps required to protect the interests of the accused must be promptly and effectively pursued, beginning with the immediate commanding officer and extending all the way to the highest authority who deals with the foreign office on the government level. Our experience in gaining the right to try such a large number of cases in which the receiving states have had the primary right is due to effective administration at all levels and the general feeling of mutual respect and fair dealing that typifies the relations between our forces and the officials of the host countries. I do not believe that the importance of maintaining such amiable relationship can be overemphasized.

Without attempting to burden you with statistics, let me indicate the

degree of success we are having by giving you a few figures just received from Japan. For the six months' period ending 1 June 1956, there were 2,675 offenses committed by United States personnel subject to Japanese jurisdiction. A waiver was received in 2,610 cases—of the remaining, 44 have been tried—16 were sentenced to confinement, but only 4 were sentenced to confinement unsuspended.

The NATO countries have agreed that the authorities of both the sending and the receiving states shall assist each other in arresting members of a force, civilian component or dependents in the territory of the receiving state, and in handing them over to the authority which is to exercise jurisdiction.

This provision is of particular interest to the Navy, since a ship when in a port of a foreign country physically is within the territory of that country, notwithstanding the fiction of extraterritoriality which is traditionally applied to men-of-war when visiting foreign ports. Normally, treaty provisions prevail over general principles of International Law, and we find this rule to apply in this case.

Thus, where a naval ship is in the port of a NATO country and a member of the crew is charged by local authorities with the commission of an offense over which they have the right to exercise primary jurisdiction, the commanding officer, upon the request of local authorities, may be required by the agreement to deliver up the accused. In other words, such a case would be handled in the same fashion as though the accused were based ashore.

In contrast with the requirement in NATO ports, let us consider the status of a crew member of a vessel of war in the port of a country not a member of NATO. In accordance with the extraterritorial status of the ship a member of the crew when he returns to his ship becomes immune from arrest by local authorities so long as he remains on

board; and his commanding officer is not authorized to alter this status. If the foreign authorities desire custody of such a crew member, they must proceed through diplomatic channels.

Now let us consider an actual case involving this question.

Within the past year a destroyer made a recreational visit to an island belonging to a friendly power. There was no agreement between the United States and this power relative to the surrender of personnel and there was concurrent jurisdiction over any offenses committed ashore by members of the crew. John Doe, a member of the destroyer's crew, was alleged to have assaulted one of the local uniformed customs officials. The next day, amid considerable confusion and local pressures brought about by an acute local political situation, the commanding officer turned John Doe over to the local authorities with the understanding that it was solely for the purposes of identification and questioning and that Doe would be returned to his ship on completion of the interview. But Doe ended up behind the bars of the local jail, the local officials refused to surrender custody, and the ship was required to sail leaving Doe behind. There were no United States military activities in the island.

Three weeks later, after some two dozen messages, the employment of two local attorneys, the return to the island of two officers and seven enlisted men from the ship on TAD to testify for the defense, two trials, a six-month sentence to confinement, which was reduced to a \$126 fine, and the expenditure of some \$1,200 in Doe's defense, which was raised from among the American residents in the island, the fine was paid and John Doe was returned to the United States by commercial air at government expense. Subsequently, the Navy Department reimbursed all who had contributed to the defense fund. And now for the final chapter of this

story. According to the investigation conducted by the ship, it was actually a case of mistaken identity.

In view of the importance of this jurisdictional question and the many different situations that may be encountered due to differing treaty provisions in some instances, and the absence of treaty arrangements in others, with the risk of being a bit repetitious, let me quickly restate the general guidelines on this point.

In countries where we do have a treaty or agreement pertaining to criminal jurisdiction over personnel of the naval forces, such as a status of forces agreement, an obligation may exist which will require a commanding officer to turn a suspected serviceman over to local authorities for possible prosecution in the foreign courts.

In countries where we do not have treaties or agreements regarding the exercise of criminal jurisdiction over personnel in our naval forces, the general rule of International Law applies. That law specifies that where personnel are ashore for liberty or recreation they come under the jurisdiction of the foreign country, and they can therefore be tried in local courts. However, such jurisdiction can only be exercised when the foreign country also has custody or physical control over the suspected person.

Where we do not have treaty commitments and an offense has been committed within the foreign territory but the suspect has returned to his ship, the situation is different. In this case, if the foreign state desires to exercise its jurisdiction it must press its claim for delivery of the suspect through diplomatic channels.

The status of forces agreement has been criticized in some quarters for allegedly doing away with the constitutional protection which our service personnel have in this country. Such an approach seems to be in step with the proposition that the constitution

follows the flag—a view no longer considered tenable. As a matter of fact, this agreement introduced for the first time provisions whereby the receiving state undertook to guarantee certain specific rights to members of the visiting forces accused of an offense before a foreign court. These guaranteed rights are: The right to a prompt and speedy trial; the right to be informed in advance of trial of the specific charges against him; the right to have compulsory process for obtaining witnesses; the right to be confronted with the witnesses against him; the right to have legal representation of his own choice, and the services of an interpreter; and the right to communicate with a representative of his own government.

Steps have been taken to insure that these rights are made available to service personnel. The resolution of the Senate of the United States, in ratifying the status of forces agreement, imposed upon the armed services specific responsibilities aimed at insuring fully to each serviceman subject to foreign trial all of the rights guaranteed him by the agreement.

It is required that a "designated" commanding officer be appointed for each country where a force is stationed, whose duty it is to supervise the operation of this jurisdictional arrangement within his area; to complete a study of local criminal law and procedure; and, when a serviceman is an accused before a foreign court, to request through diplomatic channels a waiver of jurisdiction or release from custody in any case where it is considered that he will not receive a fair trial, or fair treatment before or after trial.

He must designate an observer to attend the trial of each accused. This observer must be a lawyer in all but minor cases, and he must submit a written report to the designated commanding officer and the Judge Advocate General of the accused's service.

Legislation passed at the last session

of Congress authorized the military departments to employ counsel, pay counsel fees, court costs, and to furnish bail in any case where a person subject to military law is an accused before a foreign court.

Resolving questions relating to the exercise of criminal jurisdiction is not all that is involved in the relationship between service personnel and the host state. The very presence of a visiting force in a foreign state, in many cases with accompanying dependents and for indefinite periods, has an impact upon the economic, social and cultural pattern of the local population. The result is somewhat the same as that experienced in communities within the United States when military or naval activities are established within their midst for the first time.

The status of forces agreement has undertaken to meet these circumstances by providing the members of the visiting force with immunity from local laws, taxation and customs regulations in keeping with their temporary status, and by imposing upon the members of the force a civil responsibility in keeping with the needs of the local community.

A great number of the nonmilitary offenses committed by our personnel abroad involve incidents in which personal injury or property damage is sustained by third persons. A speedy and fair settlement of claims growing out of such incidents gives great assistance to our efforts to obtain a waiver of jurisdiction by the host state. All too often the determination of the local authorities to exercise their jurisdiction may be traced to the pressure brought to bear on behalf of an injured claimant, who is unhappy over an apparent delay in making restitution for the wrong he has suffered. Such a claim may be one for which the sending state has a legal responsibility, as when the injury was caused by a member of the force while in the performance of an official duty. Or, the claim may be one for which

there is no legal responsibility and which is considered and settled gratuitously by the sending state. Claims of the first category are investigated and paid by the host state on the basis of the law of the host state. The cost of such settlement is borne 75 per cent by the sending state and 25 per cent by the host state. In the latter category of claims the host state investigates and evaluates the claim and then informs the sending state of the amount it considers appropriate should the sending state desire to make an *ex gratia* settlement.

It is true that from the military or naval Commander's point of view the ideal jurisdictional arrangement would be to have complete and exclusive jurisdiction over all personnel attached to and accompanying his command overseas. From a practical point of view, however, this is impossible. We have seen that International Law gives no such right to a military commander in the absence of an agreement to that effect with the host nation. We are therefore required to rely upon concessions obtained by agreements with the nations where our forces are stationed or may otherwise be present.

The NATO Status of Forces Agreement is the key agreement in this respect. Its terms were agreed to only after lengthy and careful negotiation, and represent the maximum concessions in jurisdiction that NATO receiving states were willing to surrender to sending states in a multilateral treaty. Its

provisions govern the status of larger members of our military personnel more than any other single agreement, and its terms have been stated to represent the minimum jurisdictional standards which are acceptable to the Congress and Department of Defense. The problem has not been laid to rest, however, for our military and diplomatic officials consistently have sought wherever possible, by additional bilateral agreements and by informal working arrangements, to obtain even greater jurisdictional concessions.

As a result of these arrangements, the jurisdiction exercised in actual practice by United States military authorities is in excess of that to be found in the basic NATO SOF Formula in practically every country in which we have forces assigned. In reporting to the Senate on the experience of our armed forces under the Status of Forces Agreement, Senator Ervin stated that the jurisdiction arrangements regarding our forces abroad have not adversely affected morale and discipline of our personnel nor have they interfered with the accomplishment of our military missions in those countries. This success may be credited to the recognition by the authorities of the United States and the host nations of a mutual responsibility in this undertaking and to our interest in the military man as an individual and our dedication to the protection and preservation of his rights to the best of our ability.