

THE STATUS OF ARMED FORCES ABROAD

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The question of the status of armed forces abroad presents a problem to the United States only because this era has seen, for the first time, the stationing of our troops on foreign sovereign soil for lengthy periods—in peacetime. The impact of this situation is, of course, greater on the Army and Air Force than upon the Navy, which is more accustomed to sailing foreign seas, and which has fewer personnel ashore. Nevertheless, a multitude of problems confronts *all* our forces in the wake of the policy of the United States that the interests of this country are best served with a security system of allied nations, each contributing toward common defense goals and each at the same time remaining politically and economically stable. Because of the independent political stature of these nations, our armed forces stationed abroad must not be considered as occupying forces—although Communist “Ami, Go Home” propaganda would have the world think so. They are present with the consent of the local government and can legally remain there only with that consent. The rights and duties of our forces in these countries are normally spelled out in *agreements* of varying scope—and it is these status of forces arrangements which I will discuss, with emphasis on problems of jurisdiction.

Our military, air and naval forces are permanently stationed in foreign jurisdiction in several capacities:

First: the Mission groups most frequently found in South and Central America consisting of advisors who remain subject to United States military law and who are subject only in some instances to local jurisdiction. Their privileges and immunities are specified in the various Mission Agreements.

Second: MAAG personnel, functioning under our Mutual Defense Assistance Agreements, who enjoy full diplomatic immunity in some cases, and are subject to the concurrent jurisdiction of the United States and of the local jurisdiction in others. Generally, MAAG personnel are assigned to the United States Embassy and receive privileges of personnel of corresponding rank in the diplomatic mission.

Third: Members of the International Military Headquarters of NATO who receive privileges and immunities as specified in the applicable NATO Agreements, particularly the Headquarters Protocol.

Fourth: Forces in such places as the Ryukyu Islands, which, although *not* United States territory, are subject only to the jurisdictional control of the United States.

Fifth, and most important: Ordinary forces stationed in nations allied with the United States—performing garrison duty, maintaining defense installations, or performing logistical tasks. The question of the legal status of this largest group—military personnel, civilian

employees and dependents—and its relationship to the local authorities is the source of the problem I am to discuss today.

A demand for extraterritorial rights—that is, *complete* immunity from local jurisdiction—is often impossible in light of the extreme sensitivity of the host government towards such arrangements. However, we have been able to secure in some countries—such as the Philippines and Saudi Arabia—the right to use and occupy *specific areas* in a manner that is, in many ways, extraterritorial.

Rights as extensive as these, however, can not always be secured. The spectre of colonialism and imperialism is a frightening one to many of our allies and extraterritoriality is envisaged as a symbol of exploited peoples. *Agreements* guiding the relationship between our armed forces and the authorities of the receiving state are therefore indispensable. These arrangements differ in their details because of varying conditions in host countries. Account must be taken of the number of forces to be stationed, their composition, their particular mission, and the law of the host country. The situation in Italy is illustrative of the necessity for an agreement with the national government. Italy has not ratified the NATO Status of Forces Agreement. As a result, our forces there must operate with informal local agreements which have doubtful standing, and under the law miscreants can, in most instances, expect trial only in Italian courts.

The Status of Forces arrangements which bring some order into this seeming chaos have three principal purposes. They are designed to reduce to the fullest extent possible the administrative burden of the commanders of the forces by limiting local interference; second, to reduce the area of possible dispute with the host countries; and, thirdly, to protect the rights and property of members of the forces and the inhabitants of the host country. Underlying these

purposes is the principle that these agreements must enhance the mission of the forces in the regional arrangement concerned. For example, the forces must be free to move, when required, across national frontiers without undue restriction. This is particularly necessary, of course, in Europe.

Most of these agreements have been negotiated during a period of peace. During time of war, the mission of the forces is of such importance that rights normally considered basic can be surrendered or waived by the host country with no loss of national prestige. An example of this can be seen in the Korean conflict, where an exchange of notes on 12 July 1950 provided that United States courts-martial would exercise exclusive jurisdiction over all members of United States forces for all offenses.

The Status of Forces Agreement, on the other hand, negotiated among the NATO nations, is primarily designed as a peacetime agreement. It contains a provision that upon the outbreak of hostilities its claims provisions will not apply to war damage, and that with 60 days' notice *any* provision of the agreement can be suspended. The Agreement with Japan is similar. Some Forces Agreements include a provision that in the case of war, exclusive criminal jurisdiction for *all* offenses will rest in the United States.

Several jurisdictional agreements have been negotiated within the framework of the North Atlantic Treaty Organization. Three of these were submitted to, and have been ratified by, the Senate. One agreement gives the North Atlantic Treaty Organization a juridical personality and enumerates rights and privileges of the persons attached to the Organization. Generally, international representatives of the internal staff, most of whom are civilians, receive the same privileges as are accorded to similar persons in the United Nations and in the Organization of American

States. The second NATO Agreement is the Headquarters Protocol to the Status of Forces Agreement, which gives international military headquarters such as SHAPE and SACLANT and the Channel Command juridical personality and enumerates the rights and duties of its personnel. The Status of Forces Agreement (in shorthand—NATO SOF) is the third of these NATO subsidiary agreements, and it concerns itself with the rights and duties of the ordinary military forces, the civilian components, and their dependents, and contains extensive provisions guiding the jurisdictional prerogatives of both the sending and receiving states.

While these NATO agreements are more extensive than those which we have negotiated with other countries, they reflect the problems we meet around the world. In summary, the provisions of NATO SOF can be outlined as follows insofar as jurisdiction is concerned:

In a few rare cases the sending state—that is, the United States in the cases of our forces abroad—has exclusive criminal jurisdiction. For example, where an act is a violation of United States law but not of the law of the host country, the United States has exclusive jurisdiction. Conversely, the receiving state has exclusive jurisdiction in some instances. This is over acts which are offenses against the local law but not the law of the sending state. These are generally security offenses, espionage, et cetera.

For the most part, the Agreement provides a system of *concurrent* jurisdiction. This is the nub of the setup. If the offense is committed by a member of the visiting forces and is solely against the property or security of the sending state, or if the offense is solely against the person or property of another member of the force or civilian component or of a dependent of that state, or if the offense arises out of any act or omission done in the performance of official

duty, then the jurisdiction of the sending state is deemed primary. They have the first right to try.

In all other cases the host or receiving state has the first right to try, and this category includes the ubiquitous breach of peace and traffic offense. Once the accused is tried by one state, he can not be tried in the same country for the same offense by the other state. The authorities of the state having the primary right to exercise jurisdiction are required to give "sympathetic consideration" to requests for a waiver of jurisdiction by the other state, in important cases.

In trials before courts of the receiving state, definite rights must be accorded for the protection of the accused. He is entitled to a prompt and speedy trial; he must be informed in advance of the charges against him; he has the right to confront witnesses; he has the right to a competent interpreter and to legal counsel; and, finally, to communicate with his government. In every case arisen so far where a person subject to our military law has been tried in a foreign court, an observer from the armed forces—usually a lawyer—has been present to note the proceedings and render a report. If it is considered that a criminal proceeding has resulted in a denial of justice, or that a member of the forces has not received proper procedural treatment, diplomatic overtures will be made to secure redress. The Senate, in ratifying the Status of Forces Agreement, stated that a waiver of jurisdiction should be sought wherever there is a danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States. If the waiver is denied, the Senate has directed that the commanding officer shall request the Department of State to press the request through diplomatic channels. The Attorney General in the paper before you expresses the view that these

criminal jurisdictional arrangements afford the soldier greater protection than he would enjoy without them.

Each of the services maintains an up-to-date record of the actual operation of these criminal jurisdictional arrangements, and reports thereon are rendered regularly to the Congress, which has shown great interest in these treaties and agreements.

There is nothing like a series of scintillating statistics to bring any audience to its knees. Realizing this, I am going to give you only five sets which point up our worldwide experience.

During the period from 1 December 1954 to 31 May 1955, four thousand four hundred and fifty-eight (4,458) persons subject to United States military law were accused of offenses which fell under the jurisdiction of foreign courts. A waiver of jurisdiction was obtained from the foreign authorities in 66.2% of these cases. One thousand two hundred and fifty-eight (1,258) persons were tried by foreign tribunals during this six-months period, and of these only one hundred and forty-one (141) could be considered serious offenders. It is particularly interesting to note that sentences to confinement were actually imposed—not suspended—in only fifty-one (51) cases during this period.

Perhaps the most notorious case seized upon by the press is that of Privates Richard Keefe and Anthony Scaletti. Sad tales have been told of how these lads, engaging in a boyish prank, seized a taxi and went joyriding. For this they were reportedly sentenced to five years in solitary confinement in a small cell in France, where they have been ignored and forgotten by their countrymen.

The facts are somewhat different. Keefe and Scaletti, each of whom had an impressive record of courts-martial, met in a stockade in Germany. After being released from the guardhouse, they went AWOL again into France, got

drunk in Orleans, and, deciding to go to Paris, hailed a taxi. Upon leaving Orleans, they stopped the cab and beat and choked the sixty-five year old driver, leaving him beside the road. His injuries were so severe that he was incapacitated for about a month. After this demonstration of boyish glee, Keefe and Scaletti, with the cab, went to Paris, where they were arrested several days later. The French refused our request to waive jurisdiction and Keefe and Scaletti were tried by the Assizes Court in Orleans on 27 October 1953. They were charged with having stolen a vehicle, during the night, on a public highway, with violence. A French attorney was appointed by the French court to represent them, and they were tried jointly before a jury of seven persons. The French Penal Code provides that one who is guilty of theft under these circumstances may be punished at hard labor for life. Sentences against French persons for offenses similar to that committed by Keefe and Scaletti have ranged from ten years to life, and, even in the light of these sentences, French taxi drivers not long ago staged a nation-wide, one-hour protest strike because of the light sentences given to persons who robbed or attacked cab drivers. Although not required to testify, Keefe and Scaletti confessed their crimes before the French court and were sentenced to five years' imprisonment. This was later reduced by six months and they will be eligible for parole next month, two years later. The American observer at the trial stated that in his opinion the trial was fair and that no rights guaranteed by the NATO Status Forces Agreement, or usually enjoyed under American law, were denied them.

Keefe and Scaletti are presently confined in a French prison, where they are periodically visited by Army authorities. No reason for complaint has been found, and both men recently freely expressed satisfaction with their treatment.

This case had an impact in United States courts because Keefe's wife applied for a writ of habeas corpus. The courts denied release, holding that they had no jurisdiction. Although the courts did not decide on constitutional grounds, they did note that the French proceedings were reportedly fair. The Supreme Court recently denied certiorari.

Thus far, only one case has been reported in which the full formal procedure called for in the Senate Resolution has been invoked; i.e., report to Congress and diplomatic protest. This case arose in France and involved one Private First Class Jerry Baldwin, who was found guilty of an assault upon a French national by a French court at Orleans on October 7, 1953 and sentenced to pay a fine of 6,000 francs, or about \$18.00. In view of the fact that the accused had not been confronted with witnesses against him, as required by the Status of Forces Agreement, a protest was made to the French Ministry of Justice. The Ministry accordingly directed that the sentence of the court be appealed by the Public Prosecutor. Baldwin appeared in person at the appeal, represented by a qualified French attorney. No witnesses appeared, and the evidence was presented in the same manner as at the trial; that is, by hearsay. Private Baldwin reiterated his denial of the offense charged against him. The Prosecutor failed to advise the Appellate Court of the specific reason for the appeal by the Ministry of Justice, and, since as a rule such appeals are ordered by the Ministry *only* in cases where the sentence adjudged by the lower courts was considered inadequate, the Court of Appeals confirmed the lower court's conviction of Private Baldwin, and increased the fine to 12,000 francs. This bit of confusion thoroughly disconcerted everyone, and a new protest was made to the Ministry of Justice through the United States Embassy in

Paris. The Ministry of Justice then remitted the fine against Private Baldwin and instructed the prosecutor to insure the avoidance of similar errors in the future. The French Foreign Office has expressed its regret for the repetition of error on the part of the Appellate Court. Private Baldwin, with his fine remitted, desired that no further appeal be taken.

The effect of a waiver of jurisdiction by the foreign authorities raises one thorny problem which still plagues us. In November, 1953, an Air Force officer was involved in an automobile accident in France and a Canadian officer, who was a passenger in the car, was killed. Pursuant to the request of the appropriate United States commander, French authorities waived their primary right to exercise jurisdiction in this case. Thereafter, following formal investigation under the provisions of Article 32 of the Uniform Code of Military Justice, the "senior officer present" in France delivered a written finding to the effect that there was insufficient evidence to warrant court-martial action against the officer. Based on this finding, the Air Force officer's automobile insurance company refused the widow's demands for compensation. She thereupon initiated a personal action against the officer, *under the French Code*, which permits its courts to consider an action to adjudicate *both criminal and civil liability*.

The Air Force officer was tried and convicted of involuntary homicide and was sentenced to pay a fine and damages. During the trial, it was argued that France had waived its right to exercise jurisdiction. The court held, however, that the waiver by the public prosecutor did not deprive an individual of his rights under the French Constitution to initiate a personal action against another; that the court must entertain such action and determine both criminal and civil liability; and that waivers of jurisdiction are valid only in

cases in which third persons would have no cause of action for civil and criminal redress.

With respect to the double jeopardy provision of the NATO Status of Forces Agreement, the court held that the considerations of the commanding officer and his decision not to court-martial were administrative determinations without judicial significance as they did not put a defendant in jeopardy, and, as such, did not preclude action on the offense by the court. International wrestling, in an effort to solve this dilemma, still continues.

The overall picture of these arrangements has, I believe, been obscured by an intense and generally uninformed concern over the criminal jurisdictional provisions. Criminal jurisdiction is a subject of only one article among twenty in the Status of Forces Agreement—just *one* of the questions which must be answered.

Matters of taxation are very complex. What local taxes may the visiting force legitimately be required to pay, and to what extent should members of the forces be required to pay taxes? The Status of Forces Agreement considers in some detail the tax liability of individual members of the forces, civilian component and their dependents. Article X, for example, provides in effect that for purposes of taxation no member of the forces or civilian component shall be deemed a resident or domiciliary of the receiving state. This is quite clear, but difficulties arise because some taxes of the receiving state may fall upon persons whether they be residents or not. Generally, we can not complain when the tax is of the same general nature as those normally imposed upon service personnel while stationed in *this* country. Included are taxes imposed to supply services rendered to the forces, such as water supply, sewerage, street lighting, and electricity. But there are many other examples of taxes which it is clear our

personnel should not pay. This includes income taxes, personal property taxes and inheritance taxes. In negotiating status arrangements with other countries, therefore—and you would be amazed how many military man hours go into this pastime (one day it may be you)—it is necessary to contemplate the type of taxes which our people should *not* be required to pay. There is no easy solution. Patient negotiation with the host country is almost invariably required, together with a careful examination of foreign tax laws.

Status of Forces arrangements must consider customs and duties. The host country is anxious to prevent so-called luxury goods from falling into the local economy, where they are likely to disrupt trade and encourage black-market operation. Controls are therefore necessary, as well as exemptions. Article XI meets some of these difficulties by providing an exemption upon personal effects, private vehicles, and other goods imported for the use of members of the forces and their dependents. These goods can be imported free of customs, but they can not be disposed of on the local market. Of course equipment, provisions and ordinary supplies for the use of the armed services themselves are imported free of duty.

Besides taxation and customs problems there arises the ever-present matter of claims. Compensation should be provided for physical damage to property in the receiving state. However, since the visiting forces are present for mutual defense, the burden must be borne by both the sending and receiving state. Therefore, the Status of Forces Agreement provides that the receiving state shall waive smaller claims for damage to certain property. In questionable cases, the parties have agreed to abide by the decision of an arbitrator. A particularly interesting provision states that costs incurred in satisfying both public and private claims for damages caused by

the forces of the sending state shall be chargeable 25% to the receiving state and 75% to the sending state. This arrangement, also found in the Agreement with Japan, is designed to discourage a multitude of specious claims. The claims arrangement, I might add, functions so smoothly we hardly know it is there.

Jurisdictional agreements must also contemplate many questions surrounding the use and employment of local labor, the extent to which the forces must comply with local labor legislation, processing of employment claims, status of employment of nonappropriated fund activities (are they members of the civilian component?)—all these are ever-present questions.

Other problems include the status of the nonappropriated fund activities themselves, nongovernmental agencies such as the Red Cross, United States universities with troop educational programs, and like institutions. The Agreement touches visas, drivers' licenses, and currency control laws as well.

These Forces Agreements are an innovation for us, and their only true test is how they actually work. It has been the Army's position that by and large they are working well, although they have their growing pains and may have more. They do not provide answers for every problem, but they do constitute a base upon which to proceed. To make them work, good will and effort at the local level are required. It has been our experience that most foreign officials are as eager as we to eliminate sources of friction, especially in the inflammable field of criminal jurisdiction. For example, at our request Japanese authorities have arranged to confine in one modern Tokyo jail all United States

prisoners convicted in Japanese courts. In Luxembourg, where we have no troops but where many of our service people rent houses, local arrangements have been concluded by which these persons are treated as though members of the forces—not as tourists or itinerants. In Turkey, the primary jurisdiction of United States authorities has been extended to include all persons subject to United States military law, except United States contractors and Turkish residents.

Although statistics indicate that these status agreements are working well, we do not feel that we can be complacent. It is the duty of the services to assure to all personnel a fair trial and fair treatment. This must not be adversely affected by their being subjected to the jurisdiction of foreign courts.

If my remarks have had a tone about them which smacks of the defensive, I ask your indulgence. For the past several months, I have been a member of the Department of Defense team which has been opposing the plethora of bills in Congress (more than a dozen) which would call for our withdrawal from any treaty which permits American servicemen to be tried by a foreign court. Yet, these agreements are the basic charter under which we carry out our global strategy. Without them, our overseas bases could not exist. They are of utmost importance to the strategic and tactical programs which *you* must devise and implement. They are the law. We might wish they were more favorable to the United States, but they represent joint action by the allies. It is in our interest, as military men, to see that they work—that they provide an effective bridge with our allies, not a wall against them.