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Criminal Jurisdiction Over Visiting Armed Forces

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The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. government, the U.S. Department of the Navy or the Naval War College.

## APPENDIX VI

### GERMANY. CONVENTION ON RIGHTS AND OBLIGATIONS OF FOREIGN FORCES, AS AMENDED<sup>1</sup>

Convention between the United States, the United Kingdom, France and Germany on the Rights and Obligations of Foreign Forces and their Members, May 26, 1952, as Amended by Schedule II to the Protocol on the Termination of the Occupation Regime, October 23, 1954. 6 UST 4117, 5608, TIAS 3425.

#### ARTICLE 1

#### DEFINITIONS

In the present Convention and the Annexes hereto the following terms shall be given the meanings hereinafter indicated:

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#### 7. Members of the Forces:

a. Persons who, by reason of their military service relationship, are serving with the armed Forces of the Three Powers of other Sending State and are present in the Federal territory (military personnel);

b. Other persons who are in the service of such armed Forces or attached to them, with the exception of persons who are nationals neither of one of the Three Powers nor of another Sending State and have been engaged in the Federal territory; provided that any such other persons who are stationed outside the Federal territory or Berlin shall be deemed to be members of the Forces only if they are present in the Federal Territory on duty (followers).

The following are considered "members of the Forces": dependents who are the spouses and children of persons defined in

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<sup>1</sup> Terminated on 1 July 1963 with the coming into force of The Agreement on the Status of Forces in the Federal Republic of Germany, TIAS 5331. See next Appendix.

subparagraphs a and b of this paragraph or close relatives who are supported by such persons and for whom such persons are entitled to receive material assistance from the Forces. The definition "members of the Forces" shall include Germans only if they enlisted or were inducted into, or were employed by, the armed Forces of the Power concerned in the territory of that Power and at that time either had their permanent place of residence there or had been resident there for at least a year.

8. Germans: Germans within the meaning of German law.

9. Accommodation: Land, including all property permanently attached thereto, and all rights of use related to land, including such property, used or to be used by the Forces within the Federal territory.

10. Installations: Land, buildings or part thereof, and all property permanently attached thereto, which, pursuant to the provisions of the present Convention, are allotted for the exclusive use or occupancy (im ausschliesslichen Besitz) of the Forces. This definition shall not apply to Article 20 of the present Convention.

## ARTICLE 2

### OBSERVANCE OF GERMAN LAW: POLITICAL ACTIVITY

1. The members of the Forces shall observe German law, and the authorities of the Forces shall undertake and be responsible for the enforcement of German law against them, except as otherwise provided in the present or in any other applicable Convention or agreement.

2. The members of the Forces shall abstain from any activity inconsistent with the spirit of the present Convention and shall in particular refrain from any political activity.

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### Section I. Criminal Proceedings

## ARTICLE 6

### CRIMINAL OFFENCES: JURISDICTION AND APPLICABLE LAW

1. Except as otherwise provided in the present Convention, the authorities of the Forces shall exercise exclusive criminal jurisdiction over members of the Forces. A death sentence shall not

be carried out in the Federal territory by the authorities of the Forces as long as German law does not provide for such penalty.

2. Where, under the law of the Power concerned, the service tribunals are not competent to exercise criminal jurisdiction over a member of the Forces, the German courts and authorities may exercise criminal jurisdiction over him in respect of an offense under German law committed against German interests, in accordance with the following provisions :

(a) No criminal proceedings, other than those provided for in Article 7 of the present Convention, or urgent preliminary investigations, after consultation, as far as practicable, with the authorities of the Forces, shall be instituted by the German courts or authorities until the authorities of the Forces have been consulted by the appropriate German authorities and been given the opportunity, within twenty-one days from the receipt of information as to the facts involved, to make representations and recommendations in regard to the effect upon the security of the Forces of any such criminal proceedings; any such representations and recommendations shall be given due weight by the German courts or authorities. Such consultation shall, however, not be required where the alleged offence is one the penalty for which, under German law, is merely detention for not more than six weeks or a fine not exceeding DM 150 (Übertretung), unless the German authorities consider that the security of the Forces is or might be involved in the case in question ;

(b) The German courts and authorities shall, within the discretionary powers conferred on them by German law, abstain from prosecution in any case in which

(i) such abstention is permitted by German law ; or

(ii) the offender has been suitably punished by disciplinary action of the authorities of the Forces ;

(c) The German courts and authorities shall decide upon questions of arrest, detention and execution of punishment in accordance with the provisions of German law. The authorities of the Forces shall execute any warrants of arrest and detention. An accused person so taken into custody by the authorities of the Forces shall remain in their custody until, by virtue of a final (rechtskräftig) judicial decision, he is released or sentenced. The authorities of the Forces will take appropriate measures to prevent any prejudice to the course of justice (Verdunkelungsgefahr). They will hold an accused person so taken into custody

at the disposal of the German courts and authorities, will grant access to him at any time by the German courts and authorities and on request present him to the German courts and authorities for the purposes of investigatory proceedings, trial and the serving of any sentence which may be imposed. Where an accused person is not taken into custody, the authorities of the Forces will take measures to ensure that he is at the disposal of the German courts or authorities for the purposes aforesaid;

(d) Any sentence of imprisonment shall be served in a German penal institution. For the purposes of this paragraph, the expression "offence under German law committed against German interests" shall mean any offence under German law other than an offence directed against the Forces, their members, or the property of the Forces or their members.

3. The exclusive jurisdiction of the German authorities over persons who are subject to German criminal jurisdiction shall include those cases in which the criminal offence is directed against the Forces, their members, or the property of the Forces or their members.

4. With the consent of the German authorities the authorities of the Forces may transfer to German courts or authorities, for investigation, trial and decision, groups of, or particular, cases for which they are exclusively competent under paragraph 1 of this Article.

5. With the consent of the authorities of the Forces, the German authorities may transfer to the authorities of the Forces for investigation, trial and decision, particular cases of the nature described in paragraph 3 of this Article in which the alleged offender is not a German.

6. In cases under paragraphs 1 and 5 of this Article, the authorities of the Forces will apply their own law. If such cases involve acts which are punishable under German law, but not under the law of the Power concerned, German law shall apply.

#### *POSTWAR SETTLEMENTS*

7. In cases under paragraphs 3 and 4 of this Article, German law shall apply.

#### ARTICLE 7

#### ARREST, SEARCH AND SEIZURE

1. Members of the Forces who properly identify themselves by

means of an identity document issued under Article 24 of the present Convention shall not be subject to arrest by German authorities.

2. German authorities may, however, take into custody a member of the Forces, without subjecting him to the ordinary routine of arrest, in order immediately to deliver him, together with any weapons or items seized, to the nearest appropriate authorities of the Forces.

(a) when so requested by the authorities of the Forces ;

(b) in the following cases in which the authorities of the Forces are unable to act with the necessary promptness :

(i) when apprehended *in flagrante delicto*

(1) for the commission or attempted commission of a criminal offence which results or might result in serious injury to persons or property, or serious impairment of other legally protected rights (Rechtsgüter) ; or

(2) insofar as this appears necessary to abate an already existing serious disturbance of public order ;

(ii) if there is danger of flight, for the commission or attempted commission of espionage to the prejudice of the Federal Republic.

3. (a) The German authorities may search a member of the Forces or the property in his immediate possession

(i) when so requested by the authorities of the Forces ;

(ii) if he is taken into custody under paragraph 2 of this Article, to the extent necessary to disarm him or to seize any item constituting proof of the criminal offence for which he is taken into custody.

(b) The provisions of the fourth sentence of paragraph 5 of Article 35 of the present Convention shall not be affected.

(c) The official quarters of a member of the Forces, or where there are none the residence occupied by him with permission of the authorities of the Forces, may not be searched by German authorities, except at the request of the authorities of the Forces. If such residence of the member of the Forces is not an installation, either his consent or that of the authorities of the Forces to the search shall be sufficient.

4. The German authorities shall notify the appropriate authorities of the Forces of the arrest of any person working in the service of the Forces.

5. The appropriate authorities of the Forces may

(a) arrest members of the Forces ;

(b) take into custody a person who is subject to German criminal jurisdiction, without subjecting him to the ordinary routine of arrest, in order immediately to deliver him, together with any weapons or items seized, to the nearest appropriate German authorities

(i) when so requested by the German authorities ;

(ii) in the following cases in which the German authorities are unable to act with the necessary promptness :

(1) when apprehended *in flagrante delicto* for the commission or attempted commission of a criminal offense against the Forces, their members, or the security, property or other legally protected rights (Rechtsgüter) of the Forces or their members ; or

(2) if there is danger of flight, for the commission, or attempted commission, of a criminal offense under Sections 1 to 9 inclusive of Annex A to the present Convention ;

(iii) within an installation, when there are reasonable grounds to believe (dringender Verdacht) that his presence is unauthorized or that he has committed a criminal offence within the installation.

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## ARTICLE 8

### PROCEDURE AND CO-OPERATION IN CRIMINAL PROCEEDINGS

1. The authorities of the Forces shall take such measures against members of the Forces who have committed criminal offences against German interests as they would take if such offences had been committed against the Power concerned, the Forces or their members, or their property.

2. The German authorities shall take such measures against persons subject to their criminal jurisdiction for criminal offences against the Forces, their members, or the property of the Forces or members, as they would take if such offences had been committed against the Federal Republic, its Länder or its nationals, or their property.

3. (a) The authorities of the Forces shall at the request of the German authorities notify the latter of the arrest of any person for a criminal offence described in paragraph 1 of this Article.

(b) The German authorities shall at the request of the authorities of the Forces notify the latter of the arrest of any per-

son for a criminal offence described in paragraph 2 of this Article.

4. Trial of a member of the Forces for a criminal offence described in paragraph 1 of this Article, committed within the Federal territory, shall be held within that territory except in cases of military exigency. When military exigency requires that the trial of such an offence be held outside the Federal territory, the authorities of the Forces shall so inform the German authorities, with particulars of the time and place of trial. The German authorities shall be entitled to have observers present unless security considerations require otherwise and shall be informed of the result of the trial.

5. The German authorities and the authorities of the Forces shall extend mutual co-operation in the prosecution of criminal offences under paragraphs 1 and 2 of this Article. Unless security considerations require otherwise, they shall permit representatives of the appropriate authorities to attend the trial and, within the applicable regulations, grant them the opportunity to present their views on questions of law and fact. In addition to the cases provided under German criminal procedure, the Forces or their members shall also have the right to appear as co-prosecutors (Nebenkläger) before German courts, to the extent that the criminal offence is directed against the security or the property of the Forces or their members or is one of the offences listed in Annex A to the present Convention. On request the German authorities and the authorities of the Forces shall inform each other of an intent to initiate, to refrain from initiating, or to discontinue a prosecution or disciplinary proceeding and of the decision.

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## ARTICLE 11

### PRESENCE IN COURT. WITNESSES. SERVICE OF PROCESS

1. The authorities of the Forces shall, unless military exigency requires otherwise, secure the attendance of members of the Forces whose presence is required by a German court or authority, provided that such appearance is compulsory under German law. If military exigency prevents such attendance, the authorities of the Forces shall furnish a certificate stating the basis and duration of such disability.



2. German courts and authorities shall, in accordance with the provisions of German law, secure the attendance of persons whose presence as witnesses or experts is required by a service tribunal or other authority of the Forces.

3. The provisions of paragraphs 1 and 2 of this Article shall apply *mutatis mutandis* to all proceedings requiring the production of evidence.

4. Subject to the provisions of the present Convention or any other applicable agreement, the privileges and immunities of witnesses and experts before German courts or authorities, and service tribunals or authorities of the Forces, shall be those accorded by the law of the court, tribunal or authority concerned. Appropriate consideration shall also be given to the privileges and immunities which the witness or expert would have before a German court if he is not a member of the Forces, or, if he is a member of the Forces, before a service tribunal of the Power concerned.

5. The authorities of the Forces shall permit, or themselves effect, the service of process upon any person inside an installation, and upon members of the Forces. In all other cases service shall be made or permitted by the appropriate German courts or authorities.

6. Service by German courts and authorities on members of the Forces shall not be effected by publication or advertisement.

## ARTICLE 12

### OBSTRUCTION OF JUSTICE

Perjury, attempts to obstruct justice, any other criminal offences and contempts committed before or against a German court or authority or a service tribunal or authority of the Forces, and failure to comply with process duly served in accordance with Article 11 of the present Convention shall be dealt with by the court or authority having criminal jurisdiction or disciplinary authority over the person concerned, according to its own law, as if the act had been committed before or against its own courts or authorities.

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## ARTICLE 16

### OFFICIAL ACTS

1. Whenever, in a criminal or noncriminal proceeding before a

German court or authority, it becomes necessary to determine whether the act or omission which is the subject of the proceeding occurred in the performance by the person concerned of official duty for the Forces, the German court or authority shall suspend the proceeding and shall promptly notify the authorities of the Forces, stating the facts of the case. The appropriate authority of the Forces shall investigate the case and within twenty-one days after receipt of the notification transmit to the German court or authority a certificate describing the scope of the official duties of the person concerned at the relevant time and place. The certificate shall be signed by the highest ranking representative of the Forces having personal knowledge of the matter. The authorities of the Forces shall take appropriate measures to ensure that the certificate is compiled conscientiously as to form and content. After receipt of the certificate, but no later than twenty-one days after receipt by the authorities of the Forces of the notification, the proceeding shall be continued.

2. The authorities of the Forces may also submit such certificate to a German court or authority without having received a notification from such court or authority.

3. Such certificate shall be evidence only on the scope of official duties of the person concerned and shall be conclusive to this extent. The person who issued such certificate may, however, be called as a witness to explain or amplify its contents; and further, the provisions of this paragraph shall not be applied in such manner as to limit the constitutional rights of a party to a proceeding to testify or make a factual or legal statement on his own behalf. The German court or authority shall give to the fact that the act or omission constituted the performance of official duty such legal weight and effect as it is entitled to under German law.