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Criminal Jurisdiction Over Visiting Armed Forces

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CHAPTER XIII

ENFORCEMENT

The military authorities of a visiting armed force must necessarily have the power to exercise enforcement jurisdiction in the receiving state. This generalization by no means implies, however, that they must have all the many powers which a state may exercise in its own territory. A state, in the ordinary enforcement of its criminal law, may, anywhere in its territory, through its police, conduct investigations, make arrests, and hold individuals in custody. A state may try an accused and, in that connection, summon witnesses and punish those who fail to appear, refuse to testify, or give false testimony. Those who participate in the trial can be protected against claims for or charges of defamation. If the accused is convicted, a sentence may be imposed and carried out. A state may, in general, exercise these powers with respect to any person found in its territory, subject only to the limitations imposed by its constitution and by denial of justice doctrines.

International law, in the absence of treaty, hardly accords the panoply of such powers to the military authorities of the sending state. Nor does it necessarily deny all of them to the receiving state, even if the visiting forces are in general immune from its jurisdiction.¹ This is, moreover, a peculiarly sensitive area. Military police of a foreign state, operating in a receiving state, represent a visible, tangible encroachment on the receiving state's "sovereignty," even if they exercise power only over members of the visiting force. If they exercise power over a national of the receiving state, resentment is inevitable. Conversely, the incidents that attend the arrest, interrogation and confinement of a member of the visiting force by the local authorities may peculiarly arouse the resentment of the sending state and its citizens.

The police of a visiting force may not exercise their powers

¹ *Supra*, p. 92; 130 *et seq.*

within the receiving state without its consent, express or implied. Consent to the presence of a visiting force does not necessarily imply permission for its police to exercise their powers, e.g., permitting the crew of a warship to come ashore does not necessarily imply permission for the landing of a shore patrol.² Such consent may imply permission for the police of the force to operate within a base (as they may on a warship in a foreign port) or where the forces are engaged in actual military operations. It does not necessarily imply permission for the police to operate elsewhere in the receiving state, or to exercise power over anyone not a member of the force, except possibly on a base or where the forces are engaged in actual military operations.

Courts-martial of a sending state may certainly sit in the receiving state and try an accused member of the force. They can summon members of the force as witnesses, and punish them for contempt or perjury. They quite clearly cannot exercise such power with respect to those not members of the force. Presumably, the sending state can carry out a sentence of imprisonment or, perhaps, execution on a base or where the force is engaged in actual military operations; perhaps it cannot do so elsewhere in the receiving state.

Presumably the police of the receiving state can arrest and hold in custody a member of the visiting force for any offense for which they can try and punish him. Probably they can also take any reasonable steps to restrain him when he is in the act of committing a crime. It may be, however, that they can do none of these on a base—the analogies of the inviolability of an embassy and of a warship are relevant here—or where the force is present as a force, in actual military operations.

These general conclusions are necessarily tentative. Authority is too sparse and inconclusive to give clear answers. Also here as elsewhere varying circumstances may suggest different conclusions on some or all of the problems.

The post-World War II agreements to which the United States is a party have dealt more or less comprehensively with these problems. The agreed solutions have varied here as they have in other areas.

² Article 0625, U.S. Navy Regs., *supra*, p. 75, n. 35.

POLICE POWER

The NATO Agreement is both less than precise and less than comprehensive with respect to enforcement jurisdiction.

The sending state has the right "to police any camps, establishments, or other premises which they occupy" by agreement, and its military police "may take all appropriate measures to ensure the maintenance of order and security of such premises."³ But "outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force."⁴ There is no express provision on the question of whether the police of the sending state may arrest one not a member of the visiting force for an offense on a base. Perhaps the general grant to "take all appropriate measures" on a base is qualified by the blanket provision denying the sending state any right to exercise jurisdiction over other than members of the force.⁵

The right of the police of the receiving state to arrest members of the visiting force is recognized in the provision that "the authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents * * *."⁶ It is implicit in the provision that "The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or dependent."⁷ The phrase "assist each other" is less than clear. Neither provision sets any limitation on the power to arrest, as on a base.⁸

³ Article VII, 10(a).

⁴ Article VII, 10(b).

⁵ Article VII, 4.

⁶ Article VII, 5(a). Article 6(c) provides that "the authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence * * *."

⁷ Article VII, 5(b).

⁸ The Agreement with Iceland varies just enough from the NATO Agreement, with regard to enforcement, to raise further troubling doubts. Thus, in Article 2(10), the military police of the United States are given authority outside the agreed areas "subject to arrangements with the authorities of Iceland and jointly with those authorities." In the NATO Agreement the language is not "jointly with" but "in liaison with."

The Agreed Minutes which supplement the arrangement with Japan clarify and implement the provisions relating to police power. The American authorities have exclusive power to arrest within facilities and areas in use and guarded by our forces, subject only to the power of the Japanese police to arrest with American consent or when in pursuit of a flagrant offender. The United States undertakes also to arrest, within such facilities and areas, those not subject to its jurisdiction whose arrest is requested by the Japanese. In addition, the United States authorities may arrest in the vicinity of such facilities and areas those committing an offense against their security. The United States authorities are required immediately to turn over to the Japanese authorities those not subject to American jurisdiction.⁹ There are no implementing provisions regarding the power to police outside such facilities and areas.

The Agreement with West Germany goes much further in clarifying and implementing the NATO provisions. The Article dealing with jurisdiction within an "accommodation" is not precise; it seemingly recognizes the power to police of the sending state, but the power is not exclusive.¹⁰ The right of the police of the visiting force to patrol "on public roads, on public transport, in restaurants (Gaststätten) and in all other places to which the public has access and to take such measures with respect to the members of a force, of a civilian component or dependents as are necessary to maintain order and discipline" is expressly affirmed.¹¹ The right of the authorities of the sending state to arrest a person not subject to their jurisdiction, if he is caught or pursued *in flagrante delicto*, or has committed or is attempting to commit an offense within or directed against an installation of the sending state, is recognized, subject to detailed safeguards.

⁹ Agreed Minutes re paragraphs 10(a) and 10(b), 1. The Japanese agree also not normally to exercise the right of search, seizure or inspection within the facilities and areas, nor with respect to property of the United States armed forces, wherever situated. Whenever such search, seizure or inspection is desired by the Japanese authorities, the United States is committed to undertake it upon request. Agreed Minutes re paragraph 10(a) and 10(b), 2.

¹⁰ Article 53.

¹¹ Article 28. The military police are required, where public order and safety are endangered or disturbed by an incident involving members of a force, etc., to take measures to maintain or restore order or discipline, if so requested by the German authorities.

The person taken into custody must be delivered to the German authorities without delay.¹²

The other agreements to which the United States is a party vary over a wide range. The American forces in Korea are immune from arrest by the local authorities "in view of prevailing conditions, such as the infiltration of North Koreans into the territory of the Republic, United States forces cannot be submitted, or instructed to submit, to the custody of any but United States forces." The United States authorities can, on the other hand, arrest Korean nationals "detected in the commission of offenses against the United States forces or its members," but must of course deliver them to the Korean authorities "as speedily as practicable." The Agreement with Denmark on Greenland apparently is to the same effect, within those defense areas for which the United States is responsible.¹³ At the other extreme, the Agreement with Saudi Arabia apparently contemplates that Dhahran Airfield be patrolled by Saudi Arab guards, accompanied by Americans, and that the Saudi Arabs have power to arrest there, as they expressly do in the remaining areas to which Americans may go.¹⁴

The Agreement with Ethiopia gives the United States exclusive authority to make arrests, including arrests of Ethiopian nationals, within the Installations occupied by the United States.¹⁵ It may exercise police powers outside the Installations "by arrangement" with the Ethiopian authorities.¹⁶ The Ethiopian authorities may arrest members of the United States forces "outside

¹² Article 20. The Convention with West Germany was, of course, much more favorable to the sending state regarding the exercise of the power to police. Members of a force were immune from arrest by the German authorities, although they could be taken into custody, and searched in certain cases, e.g., when apprehended *in flagrante delicto*. Authorities of a force could arrest members of a force, and also those subject to German jurisdiction in certain cases, e.g., within an installation. See generally Article 7.

¹³ Article VIII.

¹⁴ Paragraphs 12 and 13.

¹⁵ That the United States authority to arrest is exclusive is implicit in Article XVII, 6: "The United States authorities shall deliver to the Ethiopian authorities for trial and punishment all Ethiopian nationals and other persons normally resident in Ethiopia who have been charged by the Ethiopian or the United States authorities with having committed offenses within the limits of the Installations." Article XVII, 7, gives the United States power "to police the Installations and take appropriate measures" etc.

¹⁶ Article XVII, 8.

the Installations for the commission or attempted commission of an offense.”¹⁷ The Agreement with Libya, although in general modelled on the NATO Agreement, is, with respect to the power to police, much like the Ethiopian Agreement.¹⁸

The Agreement with the Philippines is explicit that only the United States may exercise the power to police on a base,¹⁹ except with the permission of the commanding officer. There is no provision expressly authorizing the United States to exercise the power to police outside a base, nor for the Philippine authorities to arrest a member of the American forces outside a base, but both powers are implied.²⁰

The revised Leased Bases Agreement gives the United States the exclusive right to arrest members of the United States forces and United States nationals subject to United States military law in a leased area;²¹ it does not deny the right of the local govern-

¹⁷ Article XVII, 5.

¹⁸ Article XX(8), which gives the United States power to police the agreed areas and maintain order therein, adds the clause: “[A]nd may arrest therein any alleged offenders and, when they are triable by the Libyan courts, will forthwith turn them over to the Libyan authorities for trial.” This strongly suggests the United States power to police the agreed areas is exclusive, even though under Article XX(3) “The United States and Libyan authorities will assist each other in the arrest and handing over to the appropriate authority of members of the United States forces” etc.

¹⁹ Article XIV. This is implicit also in Article XIII, 7, in which the United States agrees not to grant asylum in a base to any person fleeing Philippine jurisdiction. The commanding officer must, under Article XIV, on request arrest an offender against Philippine law, where the Philippines have jurisdiction, and surrender him to the Philippine authorities.

²⁰ Article XIII, 1, 3, and 4.

²¹ Article VI of the Leased Bases Agreement of March 27, 1941 was not changed when the provisions on jurisdiction were amended. Paragraph (2) of Article VI is an agreement of the Government of the Territory to give reciprocal facilities for the arrest and surrender of offenders. This hardly implies that the United States may not arrest members of the American forces outside a base, though presumably that requires a separate arrangement with the local authorities.

Article IX(12) of the Agreement with The Federation of the West Indies gives the United States express power to “police the defence areas” and to “take all appropriate measures to ensure the maintenance of order and security within such defence areas.” It is not stated that these powers are exclusive, nor is it expressly stated that the powers granted include the power to arrest others than members of the United States Forces, although the language used is broad enough to extend to that power. This interpreta-

ment to arrest others in a Leased area, nor contain any other provisions on the power to police. The Dominican Agreement, on the other hand, implicitly recognized the right of the United States to arrest anyone on a "Site" but otherwise referred only to assistance by the Dominican authorities in arresting offenders subject to American jurisdiction.

From this review it is apparent that all the agreements, including the NATO Agreement, deal only partially with the problem of the power to police of the sending and receiving states. They leave much to implication or to customary law, and much to implementation by supplemental agreements and municipal legislation. Even their explicit provisions show no common pattern. The only generalizations that seem permissible are that a distinction is made between the power to police on and off a base, and between the power to arrest members of a force and nationals or residents of the receiving state.

CUSTODY

Custody of the accused pending disposition of the charges against him is, from one point of view, a detail. No jail is, however, a pleasant place to be, and in a situation where emotions are so easily aroused, that a national and particularly a member of the armed forces of one state is held in the jail of another state can trouble international relations. Custody is at the same time not a necessary concomitant of jurisdiction to try and punish. There is, in brief, room for accommodation here without sacrifice of any major principle.

It would seem that, in the absence of agreement, a state which took an individual into custody could retain custody if it had jurisdiction, concurrent or exclusive, to try and punish him. Normally, of course, a state does not take an individual into custody unless it has such jurisdiction, but it may as a preventive

tion is reinforced by the broad grant of powers to the United States in Article II.

Clauses (5) (a) and (5) (b) of Article IX make it clear that either the authorities of the Territory or the military authorities of the United States may arrest members of the United States Forces, at least outside the "defence areas."

Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain expressly recognizes the right of both the Spanish authorities and the United States military authorities to arrest members of the United States Forces, without express limitation as to place. See Articles 3, 3j and 7.

measure or by arrangement with another state. The problem is further complicated when the concept of primary and secondary jurisdiction is introduced.

The same clause of the NATO Agreement which directs the authorities of both states to assist each other in making arrests, directs such assistance "in handing them over to the authority which is to exercise jurisdiction * * *."²² This is qualified, however, by the provision that "The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State."²³ The sending state may, in brief, request custody of the accused only if it has exclusive or primary jurisdiction to try; it may retain custody where the receiving state has such jurisdiction to try, but may not ask custody as a matter of right.²⁴

Agreements supplemental to the NATO Agreement have been made with the Netherlands and with Greece varying the NATO arrangements regarding custody where the receiving state has jurisdiction. The Netherlands Agreement gives the United States custody "pending trial";²⁵ that with Greece "pending completion of trial proceedings."²⁶ Under the more detailed provisions of the 1963 Agreement with West Germany,²⁷ the sending state may

²² Article VII, 5(a).

²³ Article VII, 5(c). As to the possible meanings of the word "charged" under the law of the several NATO members, see Snee and Pye, *Status of Forces Agreements: Criminal Jurisdiction*, 92-93 (1957).

²⁴ While neither of the provisions imposes an explicit obligation on the sending state to take a member of its force into custody for a violation of local law, nor to keep him in custody if he has been arrested, nor to keep him in the receiving state, these are generally considered to be implicit obligations.

The Agreement with The Federation of the West Indies contains, in Article IX, (5) (a) and (5) (b), provisions comparable to those found in the NATO Agreement, but adds the sentence: "In cases where the United States authorities may have the responsibility for custody pending the completion of judicial proceedings, the United States authorities shall, upon request, make such a person immediately available to the authorities of the Territory for purposes of investigation and trial and shall give full consideration to any special views of such authorities as to the way in which custody should be maintained."

²⁵ Paragraph 3 of the Annex.

²⁶ Article III.

²⁷ Article 22.

in general retain or request custody, except where the offense is "directed solely against the security of the Federal Republic," until release, acquittal or commencement of the sentence. The sending state is expressly obligated to make the accused "available to the German authorities for investigation and criminal proceedings."²⁸ The Agreed Minutes supplementing the arrangement with Japan provide that where Japan has primary jurisdiction "The Japanese authorities will, unless they deem that there is adequate cause and necessity to retain such offender, release him to the custody of the United States military authorities provided that he shall, on request, be made available to the Japanese authorities, if such be the condition of his release. The United States authorities shall, on request, transfer his custody to the Japanese authorities at the time he is indicted by the latter."²⁹ The Philippines Agreement similarly gives the United States custody, but "pending trial and final judgment";³⁰ that with Libya provides that "The Libyan authorities will, if the United States authorities request the release on remand of an arrested member of the United States forces, release him from their custody on the United States authorities' undertaking to present him to the Libyan courts for investigatory proceedings and trial when required."³¹ There are, of course, no comparable provisions, other than those simply calling for surrender of an arrested member of the American forces, in those agreements, e.g., with

²⁸ The Supplemental Agreement with the Netherlands imposes a comparable commitment; that with Greece simply states that "Custody of the accused shall be maintained in Greece."

²⁹ Re paragraph 5.

³⁰ Article XIII, 5. The commanding officer is required to "acknowledge in writing that such accused has been delivered to him * * * and that he will be held ready to appear and will be produced before said court when required by it."

³¹ Article XX(3). Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain provides that the United States will, upon request, be given custody of a member of the United States Forces arrested by the Spanish authorities (Article 3 (a), (b), (c), (d) and (e)) and that the United States shall retain custody of a member of the United States Forces arrested by United States authorities. (Article 3j). If the Spanish authorities are to exercise jurisdiction, custody "shall remain with the United States authorities until such time as the trial is concluded and the sentence pronounced. The United States authorities shall accept the responsibility of assuring the presence of the offender at the appointed time of trial." Article 8(c).

Saudi Arabia and Ethiopia, under which the United States has exclusive jurisdiction.

The agreements cited display an increasing tendency to treat custody as a separate issue from jurisdiction, and to permit the sending state to have custody of an accused member of its forces even when he has been arrested by the receiving state for an offense as to which the receiving state has primary jurisdiction. It is submitted that, since permitting the sending state to have custody in no way prejudices any significant interest of the receiving state and can minimize international friction, it has obvious merit.

WITNESSES

The right of courts-martial of sending states to sit in the receiving state is clear.³² The courts-martial may, of course, compel members of their forces to appear as witnesses and testify. The NATO Agreement does not, however, contain any express provision for compulsory process to compel the attendance of nationals of the receiving state as witnesses before a court-martial, although a general provision requires reciprocal assistance "in the collection and production of evidence."³³ The negotiators contemplated that under this provision receiving states would be obligated to compel the attendance of their nationals.³⁴ Only the United States³⁵ and the United Kingdom³⁶ have, however, implemented the obligation.

Where a member of a visiting force is tried in a court of the receiving state he is, on the other hand, entitled "to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving state."³⁷ The receiving state can in ordinary course summon members of the visiting force as well as its own nationals, though it may need the as-

³² Article VII, 1(a) of the NATO Agreement provides that "[T]he military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State." See p. 88, *infra*.

³³ Article VII, 6(a).

³⁴ Snee and Pye, *op. cit. supra*, note 22, at 95.

³⁵ Service Courts of Friendly Foreign Forces Act, 22 USC 703.

³⁶ Snee and Pye, *op. cit. supra*, note 22, at 97.

³⁷ Article VII, 9(d).

sistance of the commanding officer to effect service on a base.³⁸ Paradoxically, then, a member of a force may be more effectively protected in this regard when tried by a foreign court than when tried by a court-martial.

The Agreement with West Germany reaffirms the obligation of the sending state to compel a member of its force or civilian component to appear before a German court.³⁹ More important, it imposes on Germany the express obligation to secure the attendance of witnesses before courts-martial "in accordance with German law."⁴⁰ The Agreement with Iceland adds comparable commitments to the NATO provisions.⁴¹ The Libyan Agreement, which follows the language of the NATO Agreement in many provisions, adds to the paragraph modelled on Article VI(a) relating to reciprocal assistance "in the collection and production of evidence," the words "including the attendance of witnesses at the trial."⁴² The Agreement with Ethiopia imposes the reciprocal obligations in more explicit language.⁴³ The Agreement with the Dominican Republic, on the other hand, was less explicit even than the NATO Agreement⁴⁴ and the revised Leased Bases Agreement is, in this regard, vague.⁴⁵ Other agreements, e.g.,

³⁸ Snee and Pye, *op. cit. supra*, note 22, at 94. Compelling a member of the American forces to appear as a witness in a foreign court in which he may not be protected against self-incrimination raises difficulties. *Id.*, at 98 *et seq.*

³⁹ Article 37, 1(a). The obligation with respect to dependents is qualified by the phrase "insofar as the military authorities are able to secure their attendance." Article 37, 1(b).

⁴⁰ Article 37, 2.

⁴¹ Article 2, 7(b).

⁴² Article XX (4).

⁴³ Article XVII, 4.

⁴⁴ Article XV. The reciprocal obligations are phrased in terms only of "the collection of evidence"—but not its production—and "the seizure and in proper cases the handing over of exhibits and all objects connected with the offense."

⁴⁵ Article VI, Leased Bases Agreement of March 27, 1941, denies to the Territory the right to serve process—defined to include a summons, subpoena, warrant, writ or other judicial document for securing the attendance of a witness—on a base without the permission of the commander, but imposes on the commander the obligation to serve the process. The Article then provides that where the courts (only civil ?) have jurisdiction, the Territory "will on request give reciprocal facilities as regards the service of process," which may or may not include service on a local national. See also Article IV (4).

The Agreement with the Federation of the West Indies makes no reference

those with Saudi Arabia, Denmark regarding Greenland, and Korea, make no reference whatever to the problem.

Some, though not all recent agreements, have made more explicit than does the NATO Agreement the obligations of the sending and receiving states with respect to compelling the attendance of witnesses before the other's tribunals. Requiring such assistance, particularly by the receiving state when the sending state is exercising jurisdiction, does raise an issue of policy. So long, however, as the assistance is in the form of using the receiving state's own process to compel attendance, the advantage to the receiving state from the trial and punishment of offenders would seem to outweigh the disadvantages. Only two agreements, apparently, go farther, and deal specifically with the matters of contempt and perjury.⁴⁶ Only the Agreement with West Germany refers to the immunity of participants in a trial.⁴⁷

CIVIL RIGHTS OF THE ACCUSED

The NATO Agreement contains only two provisions which relate to the rights of a member of a visiting force against the sending state. One is that a death sentence shall not be carried out in the receiving state if its legislation does not provide for such punishment in a similar case.⁴⁸ The provision, for which there are precedents,⁴⁹ reflects a compromise prompted by the antipathy of many NATO members toward capital punishment. The second, a qualified double jeopardy provision, provides that one tried and acquitted or punished by one state may "not be tried again for the same offence within the same territory by the authorities of another Contracting Party."⁵⁰ Normally, of course, this is more restrictive vis-à-vis the receiving than the sending state. Moreover, an exception makes the restriction inapplicable to trials by the military authorities of the sending state "for any violation

to the "defence areas" as such in this connection, but simply provides, in Article IX (6) (a) that: "To the extent authorized by law, the authorities of the Territory shall assist each other in the carrying out of all necessary investigations into offences, in providing for the attendance of witnesses, and in the collection and production of evidence * * *."

⁴⁶ Article XVII, 9 of the Ethiopian Agreement and Article XX (7) of the Libyan Agreement.

⁴⁷ Article 39.

⁴⁸ Article VII, 7 (a).

⁴⁹ *Supra*, p. 129.

⁵⁰ Article VII, 8.

of rules of discipline." There is no provision requiring trial in the vicinity of the crime, for which there is also precedent.⁵¹ The provision, where it has appeared, was seemingly motivated by a desire to protect the interests of the receiving state and its nationals rather than those of the accused.

The Japanese, Icelandic, Australian, and Federation of the West Indies Agreements also contain the restriction with respect to the death penalty. No other agreement does. The Icelandic Agreement varies the double jeopardy provision by making it applicable only to Iceland. The revised Leased Bases Agreement makes the defense unavailable where a civil court of the Territory and a United States court-martial have jurisdiction, but the court conducting the second trial is directed to take into account any punishment previously awarded.⁵² Several agreements include restrictions on the place of trial. The Agreed Minutes supplementing the Japanese arrangements require that in certain cases the trial "shall be held promptly in Japan within a reasonable distance from the places where the offenses are alleged to have taken place unless other arrangements are mutually agreed upon."⁵³ The Convention with West Germany provided that where an offense was against "German interests" the trial had to be held within the Federal territory except in cases of military exigency.⁵⁴ The Agreement with West Germany has a comparable provision.⁵⁵ The Agreement with Ethiopia is unique in that it requires trial "within the installations or outside Ethiopia."⁵⁶

In general, then, subject to these limited restrictions in some receiving states, the civil rights of an accused, tried by a court-martial of the sending state, depend on that state's law only.

The civil rights of a member of a visiting force tried by a court of the receiving state depend on the law of that state, international law, and the terms of any applicable treaty. They depend in no way on the law of the sending state, which governs

⁵¹ *Supra*, p. 130, n. 51; 134.

⁵² Article IV, (5) (b). In the unlikely event that the offence is within the jurisdiction of a civil court of the Territory and a civil court of the United States, trial by one excludes trial by the other. Article IV, (5) (c). The Agreement with the Federation of the West Indies, in Article IX (8), reverts to the NATO pattern.

⁵³ Re paragraph 3 (c), 2.

⁵⁴ Article 8, 4.

⁵⁵ Article 26.

⁵⁶ Article XVII, 4.

only the rights of an accused person with respect to acts of that state.

Whether members of the American forces, tried in foreign courts, would be accorded adequate protection has, quite properly, caused much concern. The NATO Agreement enumerates a significant list of rights to which the accused, whether a member of a force or of the civilian component or a dependent, is entitled.⁵⁷ The Agreed Minutes supplementing the arrangements with Japan add others,⁵⁸ as does the Agreement with Libya⁵⁹ and that with Spain.⁶⁰ Other agreements, including of course

⁵⁷ Article VII, 9 reads:

Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

- (a) to a prompt and speedy trial;
- (b) to be informed, in advance of trial, of the specific charge or charges made against him;
- (c) to be confronted with the witnesses against him;
- (d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
- (e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving state;
- (f) if he considers it necessary, to have the services of a competent interpreter; and
- (g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

The Agreement with the Federation of the West Indies repeats the NATO list, in Article IX(9), but adds that the trial "shall be public except when the court decrees otherwise in accordance with the law in force in the Territory." Article 8(9) of the Australian Agreement is substantially the same as Article VII, 9 of the NATO Agreement.

⁵⁸ Re paragraph 9. The added rights specifically stated are:

- (a) He shall not be arrested or detained without being at once informed of the charge against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel;
- (b) He shall enjoy the right to a public trial by an impartial tribunal;
- (c) He shall not be compelled to testify against himself;
- (d) He shall be permitted full opportunity to examine all witnesses;
- (e) No cruel punishment shall be imposed upon him.

⁵⁹ Article 20 (5).

⁶⁰ Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain lists the rights accorded by the NATO Agreement and (1) Pro-

those under which the United States has exclusive jurisdiction, make no reference to civil rights.

The Senate, in its resolution giving its advice and consent to the ratification of the NATO Agreement, stated it to be the sense of the Senate that:

“2. Where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state, under the treaty the Commanding Officer of the Armed forces of the United States in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States;

3. If, in the opinion of such commanding officer, under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request the authorities of the receiving state to waive jurisdiction in accordance with the provisions of paragraph 3 (c) of Article VII (which requires the receiving state to give ‘sympathetic consideration’ to such request) and if such authorities refuse to waive jurisdiction, the commanding officer shall request the Department of State to press such request through diplomatic channels and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives;

4. A representative of the United States to be appointed by the Chief of Diplomatic Mission with the advice of the senior United States military representative in the receiving state will attend the trial of any such person by the authorities of a receiving state under the agreement, and any failure to comply with the provisions of paragraph 9 of Article VII of the agreement shall be reported to the commanding officer of the armed forces of the United States in such state who shall then request the Department of State to take appropriate action to protect the rights of the accused, and notifica-

tection against an *ex post facto* law, (2) Protection against Bills of Attainder, (3) Have a public trial and be present at his trial, (4) Have the burden of proof upon the prosecution, (5) Be tried by an impartial Court and (6) Be protected from the use of a confession obtained by illegal or improper means.

tion shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives."

The Department of Defense has fully performed the mandate with which it was charged by the Senate, both within NATO member states and elsewhere. It has, in this connection, had to determine whether the standard of comparison should be the constitutional rights the accused would enjoy in a Federal court, or those he would enjoy in a state court, or those he would enjoy in a court martial. The Department of Defense has adopted the standard of the constitutional rights an accused would enjoy in a state court, although literally read, the mandate of the Senate apparently refers only to those he would enjoy before a court martial. Reports have been regularly made to the Armed Services Committees, and have consistently shown, with the rarest of exceptions, no violations of the rights of the accused. The laws of our allies have, in brief, adequately protected the rights of members of our armed forces brought before their courts for trial.