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Criminal Jurisdiction Over Visiting Armed Forces

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## CHAPTER XII

### WAIVER

A state may waive jurisdiction in any case<sup>1</sup> and so also may it waive the immunity of any of its representatives. Since any immunity is predicated on an interest of the state, it is a privilege not of the person but of the state he represents.<sup>2</sup> This principle applies to members of the armed forces as well as to diplomats.<sup>3</sup> The possibility of such a waiver is specifically noted in the *Manual for Courts-Martial, United States, 1951*.<sup>4</sup>

The NATO Agreement provides for waiver of the primary right to jurisdiction by either the receiving state or the sending state.<sup>5</sup> Waiver by the receiving state has played a larger role than the negotiators seemingly anticipated. There is reason also to suppose that the negotiators contemplated waiver by the sending state would be more common than has been the case.<sup>6</sup> Other

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<sup>1</sup> As when a state agrees to the extradition of an individual it could try and punish, or the littoral state yields jurisdiction to the flag state where an offense is committed by a member of the crew of a warship or merchantman in a foreign port in circumstances in which the littoral state would admittedly have a prior claim to jurisdiction.

<sup>2</sup> Article 32, *Vienna Convention on Diplomatic Relations*, April 18, 1961; Article 26, *Draft Convention on Diplomatic Privileges and Immunities*, Harvard Research, 26 A.J.I.L. (Supp.) 125 (1932).

<sup>3</sup> *Wilson v. Girard*, 354 U.S. 524 (1957); *Chung Chi Cheung v. The King* [1939], A.C. 160 (P.C.); *Gounaris v. Ministere Public*, Mixed Court of Cassation, Egypt, 1943, [1943-1945] Ann. Dig. 152 (No. 41); 1 Hyde, *International Law* 819 (2d ed., 1945).

<sup>4</sup> Par. 12, pp. 16-17.

<sup>5</sup> Article VII, 3(c) provides that where the right to exercise jurisdiction is concurrent, "If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other States for a waiver of its right in cases where the other State considers such waiver to be of particular importance."

<sup>6</sup> Waiver by the sending and by the receiving State were treated separately in the earlier drafts, and the sentence enjoining sympathetic consideration

agreements provide for waiver in comparable terms,<sup>7</sup> except that where the United States has exclusive jurisdiction, waiver only by the United States is, of course, contemplated.<sup>8</sup>

In the past, it has been the general practice of the United States, as a sending state, to ask for a waiver in all cases in which the receiving state has primary jurisdiction.<sup>9</sup> It has in addition negotiated bilateral agreements with the Netherlands and Greece<sup>10</sup>

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for a requested waiver was added first to the provisions relating to waiver by the sending state. MS-D(51)11. The Norwegian representative later noted that "Such a proviso would facilitate the adoption of the final document by the respective Parliaments." MS-(J)-R(51)5. The provisions were combined and the "sympathetic consideration" sentence made applicable to both, in MS-D(51)11—2d Revise.

<sup>7</sup> See Article XVII, 3(c) of the Japanese Agreement and the Agreed Minutes regarding 3(c); Article 2, 4(c) of the Iceland Agreement; Article XIII, 3 and 4 of the Philippines Agreement; Article 8, (3) (c) of the Australian Agreement. See also Article V, (4)(c) of the Bahama Islands Agreement regarding waiver by the United States. The Bahama Islands Agreement differs because where there is concurrent jurisdiction the concept of primary and secondary jurisdiction is not used, the Agreement simply providing that "the case shall be tried by such court as may be arranged between the Government of the Bahama Islands and the United States authorities."

<sup>8</sup> See Article XVII, 3 of the Ethiopian Agreement and Article VIII of the Agreement with Denmark regarding Greenland. See also Article 6, 4, of the superseded Convention with West Germany, and Article XX, (2) of the Libyan Agreement. Neither the Korean Agreement nor the expired Dominican Agreement refers specifically to waiver.

<sup>9</sup> The U.S. authorities in Italy were given authority to exercise discretion in requesting waivers in minor cases, with the result that the waiver rate increased from 14 to 20 per cent. Hearings Before the Subcommittee of the Senate Committee on Armed Services On Operation of Article VII, NATO Status of Forces Treaty, 87th Cong., 1st Sess., 26 (1960). The United States has, conversely, waived its primary jurisdiction in cases of multiple offenders in order to make possible a single prosecution.

<sup>10</sup> Paragraph 3 of the Annex to an Agreement of August 13, 1954 with the Netherlands provides that "The Netherlands authorities, recognizing that it is the primary responsibility of the United States authorities to maintain good order and discipline where persons subject to United States Military law are concerned, will, upon request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, except where they determine that it is of particular importance that jurisdiction be exercised by the Netherlands authorities." The Netherlands in the period from Dec. 1, 1959 to Nov. 30, 1960 waived jurisdiction in all the 171 cases which arose. Hearings Before a Subcommittee of the Senate Committee on



and with Libya<sup>11</sup> designed to make waiver by those governments the norm, to be granted in all except the unusual case. The Agreement with West Germany carries this approach a step further, providing for a blanket waiver of West German jurisdiction on application of the sending state, which West Germany may recall in special cases.<sup>12</sup> The concept of waiver has in this Agreement shifted almost 180 degrees, since the sending state which requests a blanket waiver has primary jurisdiction in all cases, subject only to an option in the receiving state, West Germany, to reassert its jurisdiction in a particular case.

Receiving states have waived jurisdiction admittedly theirs over members of the American forces in some two-thirds of all

Armed Services, Operation of Article VII, NATO Status of Forces Treaty, 87th Cong., 1st Sess., 25 (1961).

Article II, 1, of the Agreement with Greece of September 7, 1956, is substantially the same as the provision in the Agreement with the Netherlands. Greece in the period from Dec. 1, 1959 to Nov. 30, 1960, waived jurisdiction in all but three of 30 cases. *Id.*, p. 24.

The Agreement with the Federation of the West Indies provides, in Article 9(3)(c), that: "The authorities of the Territory will waive, upon request, their primary right to exercise jurisdiction \* \* \* except where they in their discretion determine and notify the United States authorities that it is of particular importance that such jurisdiction be not waved."

<sup>11</sup> "\* \* \* [T]he Government of the United Kingdom of Libya \* \* \* henceforth undertakes to waive its criminal jurisdiction in relation to members of the United States forces under the terms of the Agreement except in the case of an offense \* \* \* which is considered by the Government of the Kingdom of Libya to be of particular importance to the United Kingdom of Libya such as an offense against the safety of the Libyan state, an offense against the sovereignty or honor of the Libyan state, or an offense which the Libyan state considers to be of serious public concern, including sexual offenses which cause serious public concern. It is understood with respect to a case involving such an offense which is considered of particular importance to the United Kingdom of Libya that the Libyan authorities taking into account the spirit of cooperation expressed in Article XX of the Agreement, will in the course of appropriate consultations between the Libyan authorities and the United States military authorities give sympathetic consideration to a request from the United States authorities for a waiver of the jurisdiction of the Libyan authorities in such a case. \* \* \*"

<sup>12</sup> Article XIX of the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, etc.; Agreed Minutes Re Article XIX, Protocol of Signature to the Supplementary Agreement, Aug. 23, 1959.

See also Articles 3g, h, i and j, 4 and 8 a of Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain.

cases.<sup>13</sup> This is the average, world-wide. In some countries, the figure approaches 100% ;<sup>14</sup> in others it is much lower ;<sup>15</sup> in some, it is zero.<sup>16</sup> The significance of the number of waivers granted by

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<sup>13</sup> For the year from Dec. 1, 1954 through Nov. 30, 1955, there were 10,249 offenses committed by those subject to U.S. military law over which receiving states had jurisdiction. Waivers were obtained in 6,769 cases, or 66.04 per cent of all cases. Hearings Before the House Committee on Foreign Affairs on H.J. Res. 309, Part II, 84th Cong., 2d Sess., 562 (1956). The experience in other years has been similar. That waivers were not obtained in the other cases does not, of course, mean that 3480 Americans were imprisoned. Charges were dropped in 274 cases; there were acquittals in 225 others. Fines only were imposed in 2595 cases. Sentences to confinement were imposed in only 266 cases, and in all except 120 the sentences to confinement were suspended. *Ibid.*

“During the period December 1, 1958, through November 30, 1959, 12,909 U.S. personnel were charged with offenses subject to the primary or exclusive jurisdiction of foreign courts throughout the world (9,355 of these offenses were traffic offenses). Foreign authorities waived jurisdiction in 8,060, or 62.43 percent, of these cases and tried 4,070 cases (2,720 of which were traffic violations). In the remaining cases the charges were dropped or remained pending at the end of the reporting period. Foreign courts acquitted 214 individuals, an overall acquittal rate of 5.25 percent, imposed reprimands or fines only in 3,608 cases, and confinement in 248 cases. Confinement was suspended in all but 100 of the cases in which confinement was adjudged. There was no sentence, including indeterminate sentences, which exceeded 10 years.” Brig. Gen. Decker, Hearings Before the Subcommittee of the Senate Committee on Armed Services, *supra*, note 9, at 13. For the period December 1, 1959, through November 30, 1960 foreign authorities waived jurisdiction in 6,125 or 58.33 percent of 11,516 cases. Brig. Gen. Todd, Hearings Before the Subcommittee of the Senate Committee on the Armed Services, *supra*, note 10, at 14.

It is interesting that in the same period foreign authorities waived jurisdiction in 399 of 517 cases involving civilians and in 375 of 499 cases involving dependents, although the cases of *Kinsella v. Singleton*, 361 U.S. 234, *Gresham v. Hagan*, 361 U.S. 278, and *McElroy v. Guagliardo and Wilson v. Bohlender*, 361 U.S. 281, were decided on January 18, 1960, early in the period. *Id.* at 3.

<sup>14</sup> During the same period, Dec. 1, 1959 to Nov. 30, 1960, Japan waived in 2,094 of 2,797 cases; France in 3,358 of 3,939 cases. *Id.* at 26, 24.

<sup>15</sup> During the same period, Dec. 1, 1959 to Nov. 30, 1960, Canada waived in only 25 of 358 cases; Panama tried 150 of 171; the United Kingdom 1,668 of 1,946; Iceland granted waivers in only 3 of 268; the West Indies in only 15 of 305. *Id.* at 24, 28, 25, 26, 27.

<sup>16</sup> During the same period, Dec. 1, 1959 to Nov. 30, 1960, Turkey waived in no cases of 50. *Id.* at 25. It is understood the Turkish authorities take the position that no Turkish official is authorized by law to waive jurisdiction. Morocco at one time refused to grant waivers, but in the period Dec. 1,



a particular country must, of course, be read with the provisions of the agreement with that country in mind. One would not expect as high a percentage of waivers in, say, the Phillippines, where the United States has jurisdiction over all on-base offenses, as in France, where it has primary jurisdiction over only *inter se* and duty-connected offenses. Over all, it seems probable that most offenses are subject to the primary jurisdiction of the receiving state, so that, with waivers normally granted in two-thirds of the cases, waiver has assumed a major role.

It has been argued that according so large a role to waiver is undesirable; that discretion, subject to influence by many considerations, has been substituted for the rule of law.<sup>17</sup> Perhaps there is merit to this view since the high percentage of waivers suggests that the allocation of jurisdiction in the various agreements may not represent solely a realistic balancing of the national interests involved. Put another way, it suggests that receiving states are in fact prepared to admit that the interests of a sending state in maintaining discipline and control over its forces outweighs those of the receiving state in maintaining the public order in its territory in more cases than the status of forces treaties recognize, e.g., in the NATO countries, in more than *inter se* and duty-connected cases. The difficulty, of course, is in formulating additional rules where the considerations involved are so numerous and subtle.

The supplemental bilateral agreements with the Netherlands <sup>18</sup>

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1959 to Nov. 30, 1960 it waived jurisdiction in 3 of 36 cases. *Id.* at 27.

<sup>17</sup> "There are undeniable advantages in the arrangements, generally of an informal nature, which permits such waivers. Were the attempts to be made to place these arrangements on a formal basis, whether in the form of an agreement or otherwise, it is quite possible that less might be secured by way of waivers than is now accomplished on a case-to-case basis. On the other hand, these waivers *ex gratia* by receiving states are subject to all of the vicissitudes of domestic politics. If the strength of public opinion makes itself felt in a particular case, jurisdiction over that particular case may not be granted to the sending state. Public emotion, newspapers, domestic politics, a sudden outburst of feeling against a particular foreign nation may thus influence a state to depart from its usual practice of waiving jurisdiction \* \* \*." Baxter, "Jurisdiction over Visiting Forces and the Development of International Law," *Am. Soc'y Int. L. Proc.*, 1958, 174 at 177-178. But see the comments of Mr. Evans, Mr. Leigh, Prof. Snee and Mr. Menne, *id.*, pp. 182-183; 186-187; 188-189; 191.

<sup>18</sup> *Supra*, note 10.

and Greece,<sup>19</sup> in a sense do no more than shift the burden of proceeding to the receiving state. The phrase used in both, "except where they [the authorities of the receiving state], determine that it is of particular importance that jurisdiction be exercised" is not a definitive guideline. The supplemental agreement with Libya<sup>20</sup> reflects an effort to define by illustration the unusual case, in terms of the nature of the offense. The language is "such as an offense against the safety of the Libyan State, an offense against the sovereignty or honor of the Libyan State, or an offense which the Libyan State considers to be of serious public concern, including sexual offenses which cause serious public concern." This approach is carried further in the supplemental agreements with West Germany. Article 19 of the Agreement to Supplement the [NATO] Agreement<sup>21</sup> refers only to cases "Where the competent German authorities hold the view that, by reason of special circumstances in a specific case, major interests of German administration of justice make imperative the exercise of German jurisdiction." The Protocol of Signature<sup>22</sup> is more specific, referring to offenses against the state and killing, robbery and rape, and attempts to commit such offenses.<sup>23</sup> There is precedent for this approach,<sup>24</sup> but its potential should not be overestimated. A receiving state may have a special interest not only in crimes against its security and major crimes of violence, but also in violations of its economic laws and in such

<sup>19</sup> *Supra*, note 10.

<sup>20</sup> *Supra*, note 11.

<sup>21</sup> *Supra*, note 12.

<sup>22</sup> *Supra*, note 12.

<sup>23</sup> The provisions of the Agreed Minutes and Declarations Re Article 19 refer "in particular" to

"(i) offenses within the competence of the Federal High Court of Justice (Bundesgerichtshof) in first and last instance or offences which may be prosecuted by the Chief Federal Prosecutor (Generalbundesanwalt) at the High Federal Court of Justice;

"(ii) offences causing the death of a human being, robbery, rape, except where these offenses are directed against a member of a force or of a civilian component or a dependent;

"(iii) attempt to commit such offences or participation therein."

<sup>24</sup> "The offenses of murder, manslaughter, and rape shall be tried only by the criminal courts of the United Kingdom." Art. 2, Annex III, British-Czechoslovak Military Treaty of October 25, 1940, quoted in Schwelb, "The Jurisdiction over the Members of the Allied Forces in Great Britain," *Czechoslovak Year Book of International Law*, 147 at 156, March, 1942.

minor crimes as traffic offenses. Moreover, a particular class of offenses may interest different states to a different degree, or the same state to a different degree at different times. A state's interest in punishing violations of its exchange control laws may, for example, vary depending on the condition of its balance of payments.

Other approaches are possible. Jurisdiction could be allocated in part on the basis of rank. It may be said this is undemocratic. Where, however, the basis for the sending state's claim to jurisdiction is military exigency, rank may be relevant and the democratic principle is not in fact involved. Rank is after all a determining factor where diplomatic immunities are concerned. Only those having diplomatic rank are clearly entitled to complete immunity; the members of the administrative and technical staff, and of the service staff, of a mission, and consuls, may have only a qualified immunity or no immunity.<sup>25</sup>

It may be that, as experience accumulates, a common law of waiver will develop which can serve as a basis for the formulation of new treaty rules. These rules should not, however, be too vague, nor should the procedure for deciding which state has jurisdiction under the rules be too complex. The first invites controversy, the second delay, which minimizes the effectiveness of trial and punishment by either state. Moreover, it seems unlikely that renegotiating our existing agreements would, in general, increase the number of cases over which the United States, as a sending state, now in fact exercises primary jurisdiction.

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<sup>25</sup> See Chapter II, *supra*.



