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Criminal Jurisdiction Over Visiting Armed Forces

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CHAPTER VIII

CLASSES OF PERSONS COVERED BY STATUS OF FORCES AGREEMENTS

Prior to the treaty era, sending states were prone to claim blanket immunity for their troops, and receiving states to claim complete jurisdiction over them. The treaty era has been characterized by more qualified claims, giving rise to allocations of jurisdiction recognizing the legitimate interests of both sending and receiving states. The status of the accused, in terms of his relationship to both the sending and receiving states has, in this connection, come under closer scrutiny. Every relationship to the sending state's armed forces is not of itself enough to affect jurisdiction.

Delimiting the categories of individuals who should be covered by the NATO Agreement gave rise to one of the major controversies in the NATO negotiations. The solutions reached in the NATO Agreement, as well as in other status of forces agreements, were predicated on the assumption that American courts-martial could constitutionally try civilian employees of the armed forces and dependents.¹ Those solutions will be analyzed initially without reference to the later decisions² of the Supreme Court denying such jurisdiction to American courts-martial in peacetime. The analysis indicates that some civilian employees and, particularly, dependents were commonly not included among those, jurisdiction over whom was qualified by the treaty. This suggests that the impact of the Supreme Court decisions was somewhat less than many have assumed, although the appraisal should take into account that many receiving states were prepared, prior to the Supreme Court decisions, to waive their jurisdiction over civilian employees and dependents in many instances.

¹ *Madson v. Kinsella*, 343 U.S. 341 (1952).

² *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Gresham v. Hagen*, 361 U.S. 278 (1960); *McElroy v. Guagliardo* and *Wilson v. Bohlander*, 361 U.S. 281 (1960).

MEMBERS OF THE ARMED FORCES

There was no significant difference of opinion among the NATO negotiators regarding the appropriateness of granting the agreed range of immunities to all members of the armed forces.³ There was substantial agreement that the relationship between a state and a member of its armed forces was the paramount relationship. Nationality, even in the receiving state, should not affect the status of members of a visiting force.⁴ This is also true under

³ It seems clear enough that the NATO agreement does not modify the rule of international law regarding the status of the crews of warships in the territorial waters and ports of another state when on board. It is true that the Agreement uses the phrases "when in the territory," "within the territory" and the like, e.g., in Article I 1 (a), defining "force" as "the personnel belonging to the land, sea or air armed forces of one Contracting Party when in the territory of another Contracting Party," and it could be said that "territory" includes territorial waters and ports. See *Cunard v. Mellon*, 262 U.S. 100 (1923). It seems implicit in Article VII as a whole, however, that it was intended to apply only to armed forces on land, and such phrases as that in the Preamble, "Considering that the forces of one Party may be sent, by arrangement, to serve in the territory of another Party," point to the same conclusion. Apparently the point was never raised in the negotiations; it seems inconceivable that if the negotiators had intended to change the well-established rule regarding the crews of warships, they would have done so without discussion.

It is equally clear that the status of crews of warships on shore is governed by the Agreement.

⁴ Apparently only the Portuguese Representative felt that nationality in the receiving state should prevail over membership in the visiting force. "He pointed out that under the present text, nationals of the receiving State who were members of a foreign force present in the territory of the receiving State, could escape by this means from the application of the laws of their country. He thought it would be unfortunate if there were any difference of treatment between a Portuguese soldier, for example, who was a member of the Portuguese army, and a Portuguese soldier who was a member of a United States force present in Portugal. The same restriction should be adopted for the members of a force or for those of a civilian component."

The Chairman answered, in part, that "it might be dangerous in certain cases, under Articles VII [on criminal jurisdiction] and VIII, for example, to withdraw the privileges given * * * from nationals who were members of a force." MS-R (51) 13. See also MS (D) 51-16.

The soundness of the NATO solution is evident when, as under the NATO Agreement, members of the visiting force enjoy only a qualified immunity, for *inter se* offenses and offenses committed in the performance of duty. It is less evident, though on balance still defensible, when the immunity of the members of the visiting force extends to private acts which are not *inter se*

other recent agreements, with some exceptions.⁵ The NATO approach is consistent with prior practice⁶ and with prevailing attitudes with respect to the crews of merchant vessels as well as

offenses. Then to disregard nationality means that one who, while in the pursuit of his private interests, commits an offense in the state of which he is a national against a fellow national, is immune from that state's jurisdiction.

⁵ The Convention with West Germany provided: "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 at least a year."

The Protocol of Signature to the Agreement with West Germany takes a different approach, providing in the Agreed Minutes Re Article I that "Except in cases of military exigency, the Governments of the sending States will make every effort not to station in territory of the Federal Republic as members of a force persons who are solely Germans."

Under the Leased Bases Agreement the United States was accorded primary jurisdiction (Art. IV (1) (C)) in cases in which "A person other than a British subject shall be charged with having committed an offence of any other nature within a leased area. * * *" Under the Agreement the "person" could be a member of the United States armed forces, so that in this instance the status of a member of such forces did vary from the norm if he was a British subject. Under the revised Leased Bases Agreement, however, "British Subject" is defined so as to exclude "a member of a United States force" (Art. IV, para. (9)), and nationality no longer affects the status of American troops.

The definitions of the term "United States Forces" in both the United States-Ethiopian Agreement and the United States-Libya Agreement are so phrased as to leave some doubt whether nationality affects the status of a member of the force. The problem is not likely to arise in either country. Under the Philippines Agreement, on the other hand—and there the matter is of practical importance—the possibility that nationality could affect the status of a member of the United States force is expressly negated in the crucial case. The Agreement gives the United States jurisdiction over "Any offense committed by any person within any base except where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty) * * *."

⁶ See Note 14, *infra*. None of the agreements there cited excepts from the members of a force nonnationals of the sending state, including nationals of the receiving state. The Anglo-French treaty of Dec. 15, 1915 (*supra*, p. 116) referred to "persons belonging to these Armies * * * of whatever nationality the accused may be," and the Franco-American notes of January 3 and January 14, 1918 (*supra*, p. 116) to "persons subject to the jurisdiction of those forces whatever be * * * the nationality of the accused," a phrase which was repeated in both drafts of the proposed World War I Anglo-American Agreement (*supra*, p. 122, n. 30).

warships, although as to diplomats the trend is to the contrary.⁷

The NATO Agreement also resolved, on the whole in favor of the sending state, several lesser issues which had caused difficulty in the past. It had been asserted that any immunity which visiting forces might enjoy under international law was accorded to them only as members of a unit. Therefore, it was said, a member of an armed force was not entitled to immunity in a country other than that in which his unit was stationed, even though he was there on duty. The same attitude was expressed in the course of the NATO negotiations.⁸ The Agreement nevertheless clearly accords the agreed immunities to such detached members of a force, as well as to those on leave or even AWOL in the state in which their unit is stationed; they are in the state "in connexion with their official duties."⁹ Those on leave or AWOL in a member state in which no unit of their force is stationed are as clearly not entitled to immunity.¹⁰ Technically, the same is true regarding those on leave in a state in which units of their force, but not their unit, are stationed. In practice, however, they are accorded the agreed immunities.¹¹

⁷ Article 38 of the Vienna Convention on Diplomatic Relations, signed April 18, 1961, provides: "1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions." Paragraph 2 of Article 38 limits the immunities of other members of the staff and servants to those "admitted by the receiving State." See also Articles 8 and 37 of the Convention, and Section 77 of the Restatement, *Foreign Relations Law*, p. 255.

For earlier views, see Hall, p. 229, footnote, and Preuss, "Capacity for Legation and the Theoretical Basis of Diplomatic Immunities," 10 N.Y.U.L. Rev. 170, 176 (1932).

⁸ MS-R (51) 13. Comment a to Section 54 of the Restatement, *Foreign Relations Law*, p. 182, states that "Detached military personnel on recreational status or on individual assignment are not within the meaning of the term 'force.'"

⁹ "The Working Group recognized that the Article should be so amended as * * * not to exclude the case of members of a force on leave in the same State in which their force was present." MS-R (51) 13.

¹⁰ The words "in connexion with their official duties" were inserted to meet the objection of the Danish and Norwegian representatives who felt "that members of a force who might be present in Denmark on leave, for example, could hardly be covered by the Agreement." MS-R (51) 13.

¹¹ Snee and Pye, *Status of Forces Agreements and Criminal Jurisdiction* 13 (1957). The Agreement between the Federal Republic of Germany and

The practical consequences of including those on temporary duty or, in some circumstances, on leave among those covered by a treaty should be kept in mind in considering whether according that status is justified. Under the NATO Agreement it can mean primary jurisdiction in the sending state only for offenses in the performance of duty and *inter se* offenses. For those on leave or AWOL, it can normally mean only immunity for *inter se* offenses. Not all the earlier treaties dealt with temporary duty and leave situations in the same way as the NATO Agreement does,¹² nor do all the post-World War II treaties.¹³

the United States of America on the Status of Persons on Leave, signed the same day as the Agreement with West Germany, specifically accords the standard immunities to members of the armed forces and civilian employees stationed in Europe or North Africa and their dependents when on leave in West Germany.

¹² The Anglo-French Declaration of Dec. 15, 1915 (*supra*, p. 116) used the phrase "persons belonging to these Armies in whatever territory and of whatever nationality the accused may be." The American agreements with France (*supra*, p. 116, n. 13) and Belgium (*supra*, p. 117, n. 14) read: "persons subject to the jurisdiction of those forces whatever the territory in which they operate or the nationality of the accused," as did the Draft Agreement proposed by the British and the United States governments (*supra*, p. 122, n. 30). Either phrase, read literally, seems broad enough to cover those on temporary duty and on leave, but in *Rex v. Aughet*, *supra*, p. 119, n. 21, the British government apparently took the position that the Anglo-Belgian treaty, comparable to the Anglo-French Declaration, did not cover those on temporary duty. The holding was, however, that it did. All these agreements gave exclusive jurisdiction to the sending state.

¹³ It appears that under the Agreements with Korea, Saudi Arabia, Ethiopia, the revised Leased Bases Agreement, and the Agreement with the Philippines, the occasion for the presence of a member of the United States forces in the receiving state is immaterial, as it was under the Convention with West Germany. But the Agreement with Iceland uses the phrase "all such personnel being in the territory of Iceland in connection with operations under this Agreement"; that with Libya "who are in the territory of Libya in connection with operations under the present Agreement"; that with the Federation of the West Indies "who are there solely for the purposes of this Agreement"; and that with Australia "in Australia in connection with activities agreed upon by the two Governments." See also the British Agreement with Ethiopia, [1951] 93 U.N.T.S. 320. In none of these states could the situation arise of a member of the United States forces being on temporary duty or on leave in a state in which no United States forces were stationed, as it can in some NATO countries.

CIVILIANS

Whether civilians employed by visiting armed forces—the so-called “civilian component”—should have the same immunity from the jurisdiction of the receiving state as members of visiting armed forces provoked prolonged debate among the NATO negotiators. There was, however, general agreement that dependents should not enjoy such immunities.

The comments of writers regarding the immunity of armed forces characteristically make no reference to the civilian component and prior agreements show no consistent pattern.¹⁴ There

¹⁴ “That Act [The United States of America (Visiting Forces) Act, 1942 of the United Kingdom] goes beyond the [Anglo-French] declaration of 1915 and international usage in its inclusion of persons and groups who are not technically members of military forces but are associated with them and are subject to military law.” Rand, J., in *Reference Re Exemption of U.S. Forces from Canadian Criminal Law*, [1943] 4 D.L.R. 11, 48. See also *Chow Hung Ching v. The King*, 77 Commw. L.R. 449 (Aust. 1948), distinguishable because the civilians there involved were not accompanying an armed force.

The Anglo-French Declaration of Dec. 15, 1915 (*supra*, p. 116), the model for many of the World War I agreements, referred to “the exclusive competence of the tribunals of their respective Armies with regard to persons belonging to these Armies,” and left to local jurisdiction “persons not belonging to” the armies. The Exchange of Notes of January 3 and 14, 1918 between the United States and France used the broader phrase, “persons subject to the jurisdiction of those forces whatever be the territory in which they operate or the nationality of the accused,” and the word “persons” was defined to include “together with the persons enrolled in the Army, Navy and Marine Corps, any other person who under the American or French law is subject to military or naval jurisdiction, especially members of the Red Cross regularly accepted by the Government of the United States of America or the Government of the French Republic in so far as the American or French law and the customs of war place them under military or naval jurisdiction.” The Belgian-American Exchange of Notes of July 5 and September 6, 1918 incorporated the same provisions, as did the American draft of the proposed agreement with Great Britain of August 13, 1919; the British draft of May 31, 1919 had omitted the provision defining “persons.”

The United States of America (Visiting Forces) Act, 1942, 5 and 6 Geo. 6, c. 31, applied to “a member of the military or naval forces of the United States of America,” but further provided that “For the purposes of this Act and of the Allied Forces Act, 1940, in its application to the military and naval forces of the United States of America, all persons who are by the law of the United States of America for the time being subject to the military

or naval law of that country shall be deemed to be members of the said forces.”

The World War II agreements show no consistent pattern. The Chinese-American Arrangement of May 21, 1943, 57 Stat. 1248, E.A.S. 360, [1948] 14 U.N.T.S. 358, and the Agreement between the United States and Belgium relating to the Congo, [1951] 109 U.N.T.S. 150, refer only to “members of such forces.” The Sino-British Agreement of July 7, 1945, [1948] 14 U.N.T.S. 462 “* * * includes uniformed members (i) of political or civil staffs attached to the British forces, (ii) of the women’s auxiliary to the said forces, (iii) of the nursing staffs, male and female, (iv) of the staff of the Navy, Army and Air Force Institutes * * * members of the crews (other than Chinese nationals) of merchant ships belonging to or chartered or requisitioned by or on behalf of the Government of the United Kingdom * * * who are operating in conjunction with the British naval authorities.”

The Agreement of March 31, 1942 between the United States and Liberia, 56 Stat. 1621, E.A.S. 275, [1948-49] 23 U.N.T.S. 302, covered “the military and civilian personnel of the Government of the United States and their families.” The United States-Netherlands Agreement of May 16, 1944, [1951] 1 UST & OIA 601, TIAS No. 2212, [1952] 132 U.N.T.S. 356, and the Anglo-Belgian Agreement of the same date, [1951] 90 U.N.T.S. 284, contained virtually identical provisions, that in the former reading “the Service courts and authorities of the Allies * * * will have exclusive jurisdiction over all members of their forces and over all persons of non-Netherlands nationality not belonging to such forces who are employed by or who accompany those forces and are subject to their naval, military or air force law.” The Agreement between the United States and France of August 25, 1944, *supra*, p. 114, provided that “British or American nationals not belonging to such forces who are employed by or who accompany these forces, and are subject to Allied Naval, Military or Air Force Law, will for this purpose be regarded as members of the Allied Forces. The same will apply to such persons, if possessing the nationality of another Allied state provided they were not first recruited in any French territory. If they were so recruited they will be subject to French jurisdiction in the absence of other arrangements between the authorities of their state and the French authorities.” The Agreement of September 3, 1947 between the United States and Italy, 61 Stat. 3661, TIAS No. 1694, [1950] 67 U.N.T.S. 16, stated:

“13. The term ‘United States Forces’ when used in this agreement shall be defined as United States Armed Forces including persons of non-Italian nationality not belonging to such forces but who are employed by or who accompany or serve with those forces and the dependents of such persons, and Governmental organizations and accredited agencies operating under or in conjunction with such forces whenever applicable. Included in the foregoing are:

Class I. United States citizens who are:

1. War Department civilian employees
2. Personnel of the American Red Cross
3. Personnel employed by the Army Exchange Service

is a discernible functional basis for granting such civilians immunity, but the functions they serve are so diverse that one cannot generalize, and in any event the argument seems less compelling than in the case of military personnel. Perhaps a better case can be made on the basis that maintaining discipline and control over the armed forces requires that the commander also be able to maintain discipline and control over those accompanying the force, and this requires exclusive jurisdiction in the sending state. It can hardly be said, however, that any rule of international law accords immunity—except, possibly, for official acts—to civilian employees accompanying armed forces, whatever the rule may be regarding members of such forces. The success of the American representatives in securing the same immunities for the civilian component as for members of the armed forces under the NATO Agreement involved a major concession by other NATO members.¹⁵

The original American draft would have given the same status to military personnel and the civilian component, together constituting the “contingent,” defined as those subject to the military

4. Other personnel possessing United States Armed Forces orders, for the period covered by the order.

Class II. United States citizens and aliens who are:

1. Dependents of United States Armed Forces personnel, regardless of nationality.
2. Dependents of Class I personnel indicated above.

It can be said of these agreements, in general, that the United States and Great Britain (but not other states) were largely successful in obtaining immunity for civilians accompanying their forces—the dominant but not exclusive criterion being that the civilians were “subject to military or naval law”; that nationality in the receiving state, or in a third state, often disqualified a civilian; and that dependents were specifically referred to in only two agreements, those with Italy and Liberia.

¹⁵ Section 64 of the Restatement, *Foreign Relations Law*, p. 199, states that “Except as otherwise expressly indicated by the territorial state, civilians accompanying a force that is present in the territory of another state with its consent are treated as members of the force for the purposes of the rules stated in Sections 58–63 only if

(a) they are employed by the sending state to perform duties closely related to the operation of the force and

(b) they are subject to the rules governing the discipline and internal administration of the force under the law of the sending state.”

See also the Reporters’ Note 2 (e) to Section 65, which states that the NATO Agreement “reflects the rule of international law stated in Section 64.”

law of the sending state.¹⁶ This approach met with vigorous opposition, particularly from the British representative.¹⁷ The disagreement was resolved by incorporating a separate definition of the civilian component, which speaks of those “in the employ of an armed service” of the sending state rather than those subject to its military law, thus according the civilian component a separate status.¹⁸ Some of the negotiators believed, however, that

¹⁶ The American representative stated the definition “arose out of United States Military Legislation, which assimilated certain categories of civilians to the military personnel; military legislation applied to them, even in time of peace, outside the national territories and certain territories under United States control.” MS-R (51) 2. He quoted Article 2 (11) and (12) of the Uniform Code of Military Justice, 70 A Stat. 37, 10 U.S.C. 802.

¹⁷ His objections were: (1) civilians accompanying the armed forces abroad were, under the law of perhaps a majority of states, subject to military law in time of peace, but under British law were so subject only in time of war; (2) as a result, the civilians of some sending states might not enjoy the same status as those of other sending states; (3) civilians were accorded no immunity under the Brussels Treaty; (4) civilians accompanying the United States forces in the United Kingdom did not have the same status as the armed forces (but see note 14, *supra*); (5) civilians accompanying armed forces are few in number, move as individuals or in small groups, and are not subject to the same close discipline as the armed forces; (6) their duties are so various that defining those to be included would be difficult, and would require a system of identification which, in time of stress, might be difficult to control. MS-R (51) 2; MS-D (51) 3. But in the debate on the Bill to implement the NATO Agreement, the British Attorney General said: “We know that visiting forces, including our own, are likely to have people with them who are not citizens of the receiving country. They are for all practical purposes a part of the visiting forces. In these circumstances it does not seem in the least unreasonable that they should be covered.” 505 H.C. Deb. (5th ser.) 1155, (1952).

¹⁸ The United States Representative first agreed to eliminate the reference to military law, proposing to substitute “persons serving with, employed by, or accompanying the armed forces.” He then agreed, when it was objected that “accompanying” was too vague, to eliminate that word, “since the civilians in question were accompanying the military forces ‘in the execution of orders’, and, for this reason, they could be regarded as serving with the military forces or employed by them.” Finally, it was agreed it would be preferable to cover civilians by a separate definition, which should apply to all civilian components of the armed forces “whether they were employed by the armed forces or acting under orders.” MS (J)-R (51) 1.

The definition ultimately incorporated in the Agreement, Article I 1 (b) is “the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to

members of the civilian contingent who were nationals of the receiving state should in no event be immune from its jurisdiction. They had agreed that the relationship between a member of a visiting force and the sending state should be controlling, but were not prepared to agree that the relationship between a member of the civilian contingent and the sending state should prevail over nationality in the receiving state. The definition of "civilian component" was therefore framed to exclude nationals of the receiving state and also those ordinarily resident in that state. This, coupled with the exclusion of stateless persons and nationals of states not members of NATO, falls significantly short of a requirement of nationality in the sending state.¹⁹

the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located."

Difficulties of identification remain. The British Home Secretary, in the debate on the Bill to implement the NATO Agreement, noted that "* * * the description of civilian component in the Agreement has not enough legal certainty to be translated into terms of United Kingdom law, particularly as the arrangements vary in the different countries. * * *." The Bill hence set up a procedure for passports to be marked by the sending state and endorsed by an official of the United Kingdom. 505 H.C. Deb. (5th ser.) 568 (1952).

¹⁹ "13. With respect to paragraph (b) THE FRENCH REPRESENTATIVE proposed that the definition of the civilian personnel should specify that such personnel should possess the nationality of the sending State. Problems difficult to solve might arise, particularly under the application of Article VII, if the members of the civilian component belonged to a third nationality or were stateless.

"14. THE UNITED STATES REPRESENTATIVE argued that under United States military regulations, civilian personnel accompanying the forces were subject to the same discipline as the military personnel. Moreover, the United States would certainly include in the civilian component persons belonging to a different nationality from that of the sending or receiving States. The restriction proposed by the French Representative would leave members of a civilian component belonging to a third nationality without protection.

"15. THE FRENCH REPRESENTATIVE said that the French Government was primarily concerned to obviate those difficulties which would arise at the time of entry into France of persons not belonging to the nationality of a NATO country or stateless persons. In some cases, such persons would be liable to be refused entry by the French Government.

"16. THE CHAIRMAN proposed that Article I (b) should specify that the Agreement covered members of a civilian component who were not nationals of the receiving State, and further were neither stateless nor the nationals of a country other than the NATO countries.

The definitions in Article I of the NATO Agreement are important only because they are relevant to the meaning of the crucial provisions of Article VII, granting and allocating jurisdiction. By Article VII 1. (a) the military authorities of the sending state can exercise in the receiving state the criminal and disciplinary jurisdiction conferred on them by the sending state's law "over all persons subject to the military law of that State." To the extent that this gives such authorities the right to exercise jurisdiction over others than members of their armed forces, the grant goes beyond any requirement of international law. The record indicates the concern of some of the negotiators that this grant might be interpreted too broadly.²⁰ Ultimately

"17. THE FRENCH REPRESENTATIVE signified his willingness to submit this new wording to his Government."

MS-R (51) 13. See also MS-D (51) 19.

²⁰ "15. In the same paragraph, several amendments had been submitted with a view to altering the categories of persons subject to the jurisdiction of the military authorities of the sending State. There were two alternative proposals: either to replace the existing phrase 'all persons subject to the military law of the sending State' by the wording 'members of its force or civilian component', or to add 'dependents'.

"16. Several Representatives expressed the opinion that the existing wording was too comprehensive. Its effect would be to enable the receiving State to render anyone subject to its jurisdiction, merely by amending those provisions in the national legislation which specified which categories of persons were subject to military law. On the other hand, the deletion of the term 'persons subject to military law' would prevent the sending State from exercising its jurisdiction in cases where it would be normal for it to do so (for example, in the case of a spy). It was argued in reply, that a distinction should be drawn between two separate problems, first, which persons were subject to military law, and secondly, what were the powers of the military courts. In certain cases and in certain countries, persons who were not subject to military law (for example, nurses) were nevertheless subject to the jurisdiction of military courts. Lastly, a number of Representatives were doubtful whether dependents could be included.

"17. THE FRENCH REPRESENTATIVE recalled that the existing text was already a compromise which had been reached after a lengthy discussion. He suggested that the difficulty might be solved by retaining the existing text as it stood, while adding the paragraph proposed by the Danish Delegation, which read as follows:

'The above provisions shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or permanent residents in the receiving State, unless they are members of the forces of the sending State'.

"18. This proposal was accepted by the Working Group, subject to the

they were apparently satisfied that it would not, generally, be interpreted to include others than members of a force and the civilian component.²¹ They wished, however, to preclude any possibility that nationals or residents of the receiving state who had no relation to the visiting force would be considered subject to the jurisdiction of the sending state. The concern with respect to the civilian component was primarily that nationals of the receiving state should continue to be punishable under the local criminal law; with respect to those having no relation to the visiting force, the primary concern was to protect them from foreign jurisdiction.²² It will be recalled that nationals of the

Chairman's reservation of his position with respect to the definition of residents."

MS-R (51) 14.

²¹ "8. It was recalled that it had been previously agreed [though the documents do not so indicate] that the phrase 'persons subject to the military law' should be replaced by the phrase 'members of a force or civilian component.'

"9. THE CHAIRMAN pointed out that this paragraph did not call for the amendment which had been made in other Articles, since there was no risk of misunderstanding its meaning. The original wording was retained.

"10. THE FRENCH REPRESENTATIVE was prepared to accept this wording, but felt bound to point out that the phrase 'subject to military law' had a very restricted meaning in France in peacetime. This wording would therefore appreciably reduce the powers of France as a sending State. The French Government, on their side, would regard members of a force or civilian component as falling within the scope of the paragraph. The Italian and Belgian Representatives associated themselves with this statement.

"11. The Working Group agreed that this official statement by the Representatives of France, Italy and Belgium should be placed on Record." MS-R (51) 18.

²² The point was raised by the Danish Government:

"The Danish Government assumes that the sole purpose of the draft Agreement is to regulate the status of members of a 'force' or a 'civilian component' and, to a certain extent, of 'dependents' of the Contracting Parties. It is, therefore, assumed that the jurisdictional provisions of the draft do not purport to grant any authority to exercise jurisdiction over any person that is not a member of its force or civilian components. This interpretation of Article VII is presupposed in the definition contained in Article 1 (f) of the draft, and in the provision in paragraph 8 of Article VII, which also seems to appear from NATO document MS (J)-R (51) 6, paragraph 11.

"In the opinion of the Danish Government there exists, however, the possibility that, apart from the context, the provisions in paragraph 1(a), paragraph 2, 1st subsection, and paragraph 3(b) might be interpreted as grant-

receiving state had been subjected to the jurisdiction of foreign military authorities in combat zones in wartime. The first of the World War I agreements had been designed expressly to negative such jurisdiction. There seems to be no basis whatever for saying they would be so subject in time of peace, except possibly for offenses committed on a base being used by a foreign force. The NATO Agreement, nevertheless, out of what may be considered an abundance of caution which suggests the major importance attached to the issue, expressly negatives any inference that the grant of jurisdiction in Article VII 1. (a) extends to nationals of or those ordinarily resident in the receiving state, other than members of the visiting force.²³

ing to the military authorities of the sending State the right to exercise jurisdiction (as regards paragraph 3(b): subsidiary jurisdiction) even over nationals and permanent residents of the receiving State, i.e., to the extent to which these persons, in time of peace or war, come under the military law of the sending State. In order to clarify this matter beyond all doubt, the following alternative amendments to Article VII are submitted:

(a) In paragraph 1(a) and paragraph 2, 1st subsection, the words 'all persons subject to the military law of that State' and 'persons subject to the military law of that State' should be substituted by 'members of their force or civilian component', or

(b) In paragraph 1(a) and paragraph 2, 1st subsection, the words 'all persons' and 'persons' should be substituted by 'members of their force or civilian component', or

(c) A new paragraph shall be inserted before the present paragraph 4;

"The above provisions shall not imply the right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or permanent residents in the receiving State, unless they are members of the forces of the sending State." MS-D (51) 18. The first two amendments proposed were rejected but the third adopted. See note 20, *supra*.

²³ Article VII 4 states: "The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State."

The Agreement with the Federation of the West Indies provides in Article XI(4) that: "The foregoing provision of this Article shall not imply any right for the military authorities of the United States to exercise jurisdiction over persons who belong to, or are ordinarily resident in, the Federation unless they are military members of the United States Forces." See also Article 8(4) of the Agreement with Australia.

The status to be accorded dependents occasioned much less difficulty. Apparently no representative vigorously urged that dependents were entitled to immunity under international law or should be accorded any immunity under the Agreement. There appears to be a complete absence of authority for the conclusion that any immunity enjoyed by a visiting armed force extends to dependents. The earlier treaties which regulated the status of visiting forces only rarely mentioned dependents expressly,²⁴ and it is doubtful that the language of other treaties could be interpreted broadly enough to include them. In part this reflects the fact that the problem is largely new.

It has now become not uncommon for dependents to accompany armed forces, including those of the United States, to some though not all foreign countries in which such armed forces are stationed. The negotiators of the NATO Agreement anticipated this in the NATO area. They did not, however, believe that giving dependents immunity of any kind in so far as criminal jurisdiction is concerned could be justified.²⁵ It has been convincingly demonstrated²⁶ that an analysis of Article VII of the NATO Agreement as a whole leads to the conclusion that dependents are not included among those accorded the agreed immunities—though they in fact enjoy certain immunities in some countries²⁷—and that the negotiators did not intend they should be.

²⁴ The Agreement between the United States and Liberia of March 31, 1942, 56 Stat. 1621, E.A.S. 275, [1948-49] 23 U.N.T.S. 302, gave immunity to "the military and civilian personnel of the Government of the United States and their families"; the Agreement of September 3, 1947 between the United States and Italy, [1950] 67 U.N.T.S. 16, *supra*, note 14, also gave treaty status to dependents. See also the Anglo-Egyptian Treaty of 1936, U.K.T.S. No. 6 (1937).

The Reporters' Note 2 (e) to Section 65 of the Restatement, *Foreign Relations Law*, p. 208, states with respect to the status accorded dependents in the NATO Agreement that: "[T]he parties were in a position to deal with this special situation not previously regulated by international law."

²⁵ "* * * [A] number of representatives were doubtful whether dependents could be included." MS-R (51) 14. One is tempted to suggest an analogy between dependents and passengers on a ship, or a "stranger to the vessel," but the differences are as real as the similarities.

²⁶ Snee and Pye, *Status of Forces Agreements and Criminal Jurisdiction* 34-40 (1957).

²⁷ The Agreement between the United States and West Germany on the Status of Persons on Leave covers dependents.

The status of dependents is nevertheless significant for other purposes.²⁸

Favorable as the NATO Agreement is to a sending state with respect to jurisdiction over members of a force and the civilian component, the jurisdiction which it accords to the military authorities of the sending state falls short of that which Article 2(11) of the Uniform Code of Military Justice purported to give to American military authorities. Article 2(11) contains no limitation based on nationality, no requirement that the individual be employed by the armed forces in a strict sense, and was deemed to include dependents.²⁹

The other post-World War II treaties to which the United States is a party have provisions different from those of the NATO Agreement defining the classes of persons covered other than members of the armed forces. Some define the classes broadly enough apparently to include all those covered by Article 2 (11) of the Uniform Code of Military Justice, including dependents. Provisions of this type appear in the superseded Convention with West Germany,³⁰ the United States-Ethiopian

²⁸ E.g., an offense by a member of a force or of a civilian component against a dependent is an *inter se* offense (Art. VII, 3(a)(i)) and a dependent is entitled, when tried by the receiving state, to the rights enumerated in Article VII, 9.

"Dependent" is defined, in Article I, 1(c) as "the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support." Parents are not included, but are in the Agreement with Japan, Article I (c) which, however, excludes children over 21 unless "dependent for over half their support." The Agreement with West Germany extends the concept to "close relatives" who meet certain requirements. Article 2, 2(c). But the Agreed Minutes provide that "The authorities of the forces shall limit as far as possible the number of close relatives * * * to be admitted to the Federal territory."

Many agreements use the term "dependents" without defining it.

²⁹ Snee and Pye, *op. cit. supra* note 11, at 15; *United States v. Weiman & Czevtok*, 3 U.S.C.M.A. 216, 11 C.M.R. 216 (1953). But see the decisions of the Supreme Court regarding the constitutionality of Article 2(11), *supra*, note 2.

³⁰ Article 1, 7 defines Members of the Forces to include:

"(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 persons who

Agreement,³¹ the United States-Libyan Agreement³² and the Agreement with Korea.³³ The Agreement with Japan defines "civilian component" more broadly than does the NATO Agreement;³⁴ hence under American primary jurisdiction with respect

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 subparagraphs (a) and (b) of this paragraph or close relatives who are represented 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."

³¹ Article XXIV states: "The term 'United States forces' includes members of the armed forces of the United States (including dependents of all such members) and persons accompanying, serving with or employed by said forces (including dependents of all such persons) who are subject to the military laws of the United States, but excluding indigenous Ethiopian nationals and other persons ordinarily resident in Ethiopian territory provided that such nationals or other persons are not dependents of members of the United States forces.

³² Article XXVIII states: "'United States forces' include personnel belonging to the armed services of the United States of America and accompanying civilian personnel who are employed by or serving with such services (including the dependents of such military and civilian personnel), who are not nationals of, nor ordinarily resident in Libya; and who are in the territory of Libya in connection with operations under the present Agreement."

The Agreement with the Federation of the West Indies includes in the definition of "Members of the United States Forces" in Article I: "[C]ivilian personnel accompanying the United States Forces and in their employ who are not ordinarily resident in the Federation and who are there solely for the purposes of this Agreement" and dependents. But see Article XI (4) of the Agreement, *supra* note 23.

³³ The United States is granted exclusive jurisdiction "over members of the United States Military Establishment in Korea"; the phrase is not further defined. The prior Agreement with Korea, 79 U.N.T.S. 62 (1951), did, however, accord such exclusive jurisdiction to the Commanding General "over the personnel of his command, both military and civilian, including dependents."

³⁴ Article 1 provides that

"In this Agreement the expression

* * * * *

(b) 'civilian component' means the civilian persons of United States

to the "civilian component" apparently extends to a larger class, but technically does not include dependents. The revised Leased Bases Agreement takes a different approach. It does not refer to persons "accompanying," "serving with" or "employed by" the armed forces. Rather it accords a special status to "a person subject to United States military or naval law," a phrase the reach of which has been much restricted by the recent decisions of the Supreme Court referred to above. Also, the status of those "subject to United States military or naval law" is not the same as that of a member of the armed forces. Under the Philippines Agreement, the concept of the civilian component and of dependents, as such, disappears altogether. Persons in those classes nevertheless are protected in a sense, in that the United States has exclusive jurisdiction with respect to all "on-base" offenses, by whomever committed. Outside a base, however, only members of the armed forces have an immunity of any kind. Finally, under the Agreement with Saudi Arabia, no persons other than "American military personnel," distinguished elsewhere in the Agreement from "civilian employees of the Mission" and "their dependents," have any immunity.

More interesting than these variations with respect to the composition of the civilian component and the inclusion of dependents in or their exclusion from those protected by a treaty are provisions excluding from either group those closely related to the receiving state.

The revised Leased Bases Agreement excludes from those given immunity as persons "subject to United States military or naval law" one who is "a British subject or local alien" (Art. IV(1)(c)) but "local alien" is defined (paragraph (9)(b)) to exclude "a national of the United States who is ordinarily resident in the Territory." This Agreement is thus more favorable to the

nationality who are in the employ of, serving with, or accompanying, the United States armed forces in Japan, but excludes persons who are ordinarily resident in Japan. * * * For the purposes of this Agreement only, dual nationals, United States and Japanese, who are brought to Japan by the United States shall be considered as United States nationals."

See *United States v. Robertson*, 5 U.S.C.M.A. 806, 19 C.M.R. 102 (1955) for an elaborate review of the meaning of "civilian component" under the prior Administrative Agreement with Japan under Article III of the Security Treaty. Feb. 28, 1952, 3 UST 3341, TIAS 2492.

sending state than the NATO Agreement, in that it does not exclude from the "civilian component" either stateless persons and nationals of non-NATO states, or United States nationals ordinarily resident in the receiving state. The Agreement with Japan, on the other hand, is less favorable to the sending state than the NATO Agreement. Membership in the "civilian component" is subject to the affirmative requirement of United States nationality, and even United States nationals are excluded if they are "ordinarily resident in Japan." The Administrative Agreement is unusual also in that it expressly deals with the case of dual nationality; one who has both United States and Japanese nationality is considered as a United States national if "brought to Japan by the United States."

The United States-Ethiopian Agreement protects members of the armed forces, the civilian component (broadly defined) and dependents, but apparently excludes from the first two classes (but not from the third class, dependents) "indigenous Ethiopian nationals and other persons ordinarily resident in Ethiopian territory," apparently including United States nationals.³⁵

³⁵ The Convention with West Germany was even more complicated. It excepted from both members of the forces and the civilian component, those who were nationals neither of one of the Three Powers nor of another Sending State "and have been engaged in the Federal territory." The Convention then added dependents to the class of "Members of the Forces," and finally incorporated a general limitation, i.e., "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." This clause thus appeared (1) to exclude from the protected class even some members of the armed forces; (2) further to limit those in the civilian component entitled to immunity; but (3) not to limit dependents, who hardly either "enlist" or are "inducted into" or are "employed by" the armed forces.

The ideas which have found some recognition in the agreements may be catalogued as follows:

Civilians who accompany the armed forces have a relationship to the sending state which justifies according them the agreed immunities, but such immunities may nevertheless be denied to those who:

- (1) are not, strictly speaking, employed by the armed forces (e.g., the NATO Agreement), or
- (2) are not nationals of the sending state (e.g., the Agreement with Japan), or

It seems entirely appropriate that variations of these kinds should appear in the status of forces agreements, since the circumstances which the several agreements govern differ so widely. The dominant theme is that nationality in the receiving state disqualifies one for any immunity. This can be explained both in terms of the interest of the receiving state in continuing to control the conduct of its nationals and in protecting its nationals from the control of another state. Nationals of third states give rise to a distinct problem; if they are disqualified, it is presumably because the receiving state feels its interest in controlling their conduct while on its territory is superior to that of the sending state, based on the employment relationship alone, unsupported by the tie of nationality. Disqualification on the ground of residence in the receiving state apparently depends on the same factors as disqualification on the ground of nationality in that state, though the receiving state presumably has less interest in controlling and protecting its residents than in controlling and protecting its nationals. The balance between the interests of the sending state and the receiving state becomes even nicer when the individual is both employed by and a national of the sending state but ordinarily resides in the receiving state. The problem is illustrated by the Egyptian case in which a Greek national who had for long years resided in Egypt but enlisted in the Greek forces in Egypt, claimed immunity for an offense which consisted

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- (3) are not nationals at least of one of its allies other than the receiving state (e.g., the NATO Agreement, and see the superseded Convention with West Germany), or
 - (4) are nationals of the receiving state (e.g., the NATO, revised Leased Bases and Ethiopian Agreements), or
 - (5) ordinarily reside in the receiving state (e.g., the NATO and Ethiopian Agreements, the Agreement with Japan), or
 - (6) ordinarily reside in the receiving state and are not nationals of the sending state (e.g., the revised Leased Bases Agreement), or
 - (7) were engaged locally and are not nationals of the sending state or of one of its allies, or were not engaged in the sending state or did not reside there even though they were engaged there and are nationals of the receiving state (the superseded Convention with West Germany).

Dependents may be, but usually are not, accorded the agreed immunities. If they are, an exception may be made for dependents who are nationals of or ordinarily resident in the receiving state (e.g., the Libyan Agreement), but in other instances no such exception has been made (e.g., the Ethiopian Agreement and the superseded Convention with West Germany).

of a series of acts stretching back for years prior to his enlistment.³⁶

It might seem strange that in some agreements neither nationality nor residence in the receiving state disqualifies a dependent, even though it does a member of the civilian component. This distinction is, however, understandable, for it reflects the judgment that family ties provide a stronger link to the sending state and alienate the individual more completely from the receiving state than employment by the sending state. Dependents are likely to live within the foreign military community; local employees are not. Again, dependents will presumably in time become residents and nationals of the sending state; for local employees this is less likely.

THE IMPACT OF REID V. COVERT

The status of forces agreements negotiated prior to *Reid v. Covert*³⁷ were concluded on the assumption that American courts-martial could exercise jurisdiction over civilians accompanying our armed forces abroad. *Reid v. Covert* and the cases³⁸ applying and extending its doctrine have established that they may not—that Article 2 (11) of the Uniform Code of Military Justice,³⁹ in purporting to give such jurisdiction to courts-martial in peacetime, is unconstitutional. What is the effect of those decisions on the jurisdictional arrangements of these agreements?

The possible alternatives to the jurisdiction of courts-martial are (1) trial by a civil court of the United States in the receiving state (2) trial by a civil court of the United States in the United States or (3) trial by the receiving state. Are these permissible, or is any of them mandatory, under the several agreements?

It seems too clear for argument that a civil court of the United States cannot try civilians in any foreign state without the consent of that state. Characteristically, the existing agreements do not include such consent. Rather, the consent is specifically

³⁶ *Stamatopoulos v. Ministère Public*, Mixed Court of Cassation, Egypt, Nov. 23, 1942, [1919-1942] Ann. Dig. (Supp. Vol.) 170 (No. 88).

³⁷ 354 U.S. 1 (1957).

³⁸ *Supra*, note 2.

³⁹ 70A Stat. 37, 10 U.S.C. Sec. 802(11): "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following * * *."

limited to the exercise of jurisdiction by the military authorities of the sending state.⁴⁰ The only agreement which expressly contemplates that United States civil courts might sit in the receiving state are the revised Leased Bases Agreement and the Bahama Islands Agreement.⁴¹ Three other agreements may perhaps be read as consenting to the exercise of jurisdiction by United States civil courts: those with the Philippines,⁴² with Denmark regarding Greenland,⁴³ and the expired agreement with the Dominican

⁴⁰ Article VII of the NATO Agreement provides, in 1 (a), that "the 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"; in 2(a) that "The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State"; in 3(a) that "The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to" certain offenses. Where jurisdiction of the receiving state is concerned the phrase used is, in contrast, "the authorities of the receiving State," not "the military authorities." The Agreement with Japan, and the Defense Agreement with Iceland contain comparable language. The Convention with West Germany, Article 6, stated in 1 that "the authorities of the Forces shall exercise exclusive criminal jurisdiction over members of the Force." The Agreement with Korea provides that "exclusive jurisdiction over members of the United States Military Establishment in Korea shall be exercised by courts-martial of the United States." The Agreement with Ethiopia provides, in Article XVII, 2 that "The United States military authorities shall have the right to exercise within Ethiopia * * *," and that with Libya contains similar language.

⁴¹ The Bahama Islands Agreement—the revised Leased Bases Agreement is similar—provides in Article V that "(1) the Government of the United States of America shall have the right to exercise the following jurisdiction over offences committed in the Bahama Islands * * *", and jurisdiction is allocated in part on the basis of whether "a civil court of the United States is sitting in the Bahama Islands." Significantly, the jurisdiction allocated to the United States is greater if such civil court is sitting.

⁴² Article XIII provides that "The Philippines consents that the United States shall have the right to exercise jurisdiction * * *." Article XIV, 2 refers, however, to "cases where the service courts of the United States have jurisdiction under Article XIII, * * *."

⁴³ Article VIII provides that "The Government of the United States of America shall have the right to exercise exclusive jurisdiction * * *." But the Agreement was, in this respect, subject to being superseded by the NATO Agreement.

Republic.⁴⁴ The first alternative is therefore available, in any but these states, only if appropriate agreements are negotiated. Also, it would require that the United States extend its criminal law to offenses committed by the civilian component and dependents abroad, since they are no longer subject to the Uniform Code of Military Justice.

Whether trial by a civil court in the United States is a permissible alternative is a more complex question. Under the NATO Agreement, since American law does not, in most instances, now extend to offenses abroad, the receiving state now has exclusive jurisdiction over both the civilian component and dependents.⁴⁵

⁴⁴ Article XV (1) provided that "the government of the United States of America shall have the right to exercise exclusive criminal jurisdiction * * *." But Article XV (2) used the language "Whenever military authorities of the United States of America may exercise jurisdiction over an alleged offender * * *." Moreover, the jurisdiction conferred was limited to "Members of the United States Forces" and "[O]thers subject to United States military law * * *."

⁴⁵ "The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences * * * punishable by its law but not by the law of the sending State." Article VII 2(b). The receiving state always had primary jurisdiction over dependents. Article VII, 2(b), in giving the receiving state exclusive jurisdiction for offences not punishable by the law of the sending state, refers to "the law of the sending State," not the "military law" of that state. It can therefore be said that when Article VII, 3 refers to "cases where the right to exercise jurisdiction is concurrent," the meaning is "cases where the right of the military authorities of the sending State and the authorities of the receiving State is concurrent." If it is so read, the subsidiary clauses of Article VII, 3, including (b), which provides that "In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction," can be read as relating only to the allocation of jurisdiction between such authorities. Article VII, 5(a) points the other way, however, toward the conclusion that the NATO Arrangements were intended to cover the whole field. "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 in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions."

If the argument advanced was accepted, the United States could not, of course, claim that the civilian component and dependents had any immunity from the jurisdiction of the receiving state nor that the United States would have priority to exercise jurisdiction, and in normal course the receiving state would as a practical matter have the first opportunity to do so. Only

If, however, the United States should extend its criminal law to offenses by the civilian component and dependents abroad, the argument is available that it would be free to exercise jurisdiction through trials in the United States. The argument is that the NATO Agreement relates only to jurisdiction to enforce, not to jurisdiction to prescribe, that with respect to jurisdiction to enforce it purports only to allocate jurisdiction between the military authorities of the sending state and the receiving state's authorities; that hence it does not preclude the sending state from exercising jurisdiction over the civilian component and dependents in the manner a state may and normally does over its nationals and others, for offenses committed abroad.

Article VII is in essence confirmatory of the right of the military authorities of the sending state and of the authorities of the receiving state to exercise enforcement jurisdiction in the receiving state. The right of the military authorities is, however, limited to exercising jurisdiction over those "subject to the military law of that State," which for the United States now excludes and for some states always has excluded the civilian component and dependents.

If the argument suggested is not accepted,⁴⁶ or if the United States chooses not so to extend its criminal law, then, under the NATO Agreement the receiving State alone would have jurisdiction over the civilian component, as well as dependents, under existing arrangements.

The situation under other agreements than the NATO Agree-

a waiver by the receiving state would then give the United States priority. If the United States should elect so to extend and enforce its criminal law—in spite of the many obstacles, legal and practical, to effective administration—the negotiation of implementing agreements would seem to be at least advisable.

⁴⁶ It can also be argued that the inability of the United States to exercise jurisdiction by courts-martial, as contemplated in the NATO Agreement, among others, constitutes a waiver under the appropriate provisions of the agreement, giving jurisdiction to the receiving state. See *People v. Acierto*, Philippines, Sup. Ct., Jan. 30, 1953 [1953] Int. L.R. 148, holding that where the United States concluded a Philippine national employed on a piece-work basis by the United States on a base was not subject to court-martial jurisdiction, there was a waiver which entitled the Philippines to exercise jurisdiction under the Agreement. See generally Daniels, "The Legal Basis of German Criminal Jurisdiction over United States Forces Civilians," 3 JAG Bulletin 26 (1961). Cf. *Re Gadois*, France, Court of Appeal of Paris (Chambre des mises en accusation), Dec. 14, 1953, [1953] Int. L.R. 186.

ment may be but is not necessarily the same. The Libyan authorities appear now to have jurisdiction over the civilian component and dependents,⁴⁷ although again it would not necessarily be exclusive if the United States saw fit to extend its criminal law to cover offences in Libya. In Ethiopia,⁴⁸ Korea,⁴⁹ and perhaps the Philippines,⁵⁰ on the other hand, a hiatus may exist. This last situation could lead a receiving state to claim that, since the status of forces arrangements were made on the promise, express or implied, that the United States could and would exercise jurisdiction over the civilian component and dependents,⁵¹ its inability to fulfill that duty relieves the receiving state of the obligation to respect the arrangements relating to the civilian component and dependents. The result would appear to be a reversion to the rule of international law in the absence of agreement, i.e., no immunity for the civilian component and dependents, and concurrent jurisdiction.⁵²

⁴⁷ Article XX of the Agreement, (1) and (2), authorize the United States military authorities "to exercise * * * all criminal and disciplinary jurisdiction conferred on them by the laws of the United States of America over members of the United States forces * * * and in every case where such criminal and disciplinary jurisdiction exists, the members of the United States forces shall be immune from the jurisdiction of the Libyan courts," but "in other cases the Libyan courts shall exercise jurisdiction unless the Government of the United Kingdom of Libya waives its right to exercise jurisdiction." Since "such criminal and disciplinary jurisdiction" no longer exists, the immunity no longer exists with respect to the civilian component and dependents.

⁴⁸ Article XVII 3 of the Ethiopian Agreement provides: "Members of the United States forces shall be immune from the criminal jurisdiction of Ethiopian courts * * *."

⁴⁹ The Agreement with Korea provides that "exclusive jurisdiction over members of the United States Military Establishment in Korea will be exercised by courts-martial of the United States." See also Article VIII of the Agreement with Denmark regarding Greenland.

⁵⁰ The Philippines Agreement can be read to give the United States exclusive jurisdiction over "on-base" offenses, but was interpreted by a Philippines court merely to give it primary jurisdiction over such offenses. See *People v. Acierto*, note 46, *supra*.

⁵¹ For example, Article II of the NATO Agreement provides: "It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State * * *. It is also the duty of the sending State to take necessary measures to that end."

⁵² Unless, as may be true under the NATO Agreement, the result is exclusive jurisdiction in the receiving state.

Possibly, in the alternative, it could be said that since these agreements were predicated on a mistake of law⁵³ or, specifically, on a mistake as to the limitations of the American Constitution,⁵⁴ they are, as regards the civilian component and dependents, no longer effective. The result again would be a reversion to the situation under international law in the absence of agreement.

Another possible approach to the whole problem, suggested by the Court,⁵⁵ is to incorporate civilians into the armed forces. The extent to which that could be done appears to be more a question of constitutional law than of international law. The definitions in our agreements are broad enough to suggest some leeway, although there are undoubtedly limits beyond which we could not go without dissent from the receiving state.⁵⁶ The interested Departments have so far, however, rejected this solution.⁵⁷

⁵³ "Writers on international law are in general agreement that errors of law do not have the same juridical effect as is produced by errors of fact, and that international law does not recognize that States may take advantage of their ignorance of the law to free themselves from treaty obligations resulting from such ignorance." Harvard Research, *Law of Treaties*, 29 A.J.I.L. Supp., at 1129 (1935).

⁵⁴ But see 2 Hyde, *International Law*, 1385 (2d ed. 1945). Usually the argument is made by a state which seeks to avoid the consequences of a concession made by it in the treaty. The argument seems much less persuasive when the concession was made to it, and its internal law makes it impossible for it to claim the advantages of the concession.

⁵⁵ *McElroy v. Guagliardo*, 361 U.S. 281, 286 (1960).

⁵⁶ The NATO Agreement, in Art. I, 1(a), defines "force" as "the personnel belonging to the land, sea or air armed services of one Contracting Party." The revised Leased Bases Agreement, in Article IV, 9(c) defines "member of a United States force" as "a member (entitled to wear the uniform) of the naval, military or air forces of the United States of America." Compare *Chow Hung Ching v. The King*, 77 Commw. L.R. (Aust.) 449 (1948).

⁵⁷ "We have examined Mr. Justice Clark's suggestion that overseas civilian employees might be incorporated directly into the armed services, either by compulsory induction or by voluntary enlistment. For a variety of reasons, this proposal was rejected as undesirable and infeasible.

In addition, the following alternatives and combinations thereof are also under consideration:

1. Military status acquired through written agreement or oath to submit to the laws and regulations for the Government and discipline of the Armed Forces.
2. Constitutional amendment.
3. Host nation trials.
4. Domestic trials in Federal district courts.
5. Oversea trials in itinerant Federal district courts.

It should be kept clearly in mind that the decisions of the Supreme Court in no way affect members of the armed forces. Their status remains that accorded to them in the several status of forces agreements or, in the absence of an agreement, that recognized by international law. The status of the civilian component and of dependents accompanying our armed forces has, however, been markedly altered by those decisions. Their status can no longer be determined solely by reference to the relevant agreement, but only by reading the agreement in the light of the decisions. Generally, any immunity accorded them has been nullified, and the civilian component and dependents are subject to

6. Oversea trials in special tribunals convened by the military but consisting of civilian judges and juries.

Each of these involves various problems. The last three present the delicate question whether foreign nations would give their consent to such trials and whether the Congress would, if necessary, agree to reciprocal treatment for crimes committed by foreign civilians in this country. Trials abroad also present problems of impaneling grand and petit juries, subpoenaing foreign witnesses, and establishing staffs of prosecuting attorneys.

Trials in the United States present problems of our authority overseas to arrest offenders, of extradition, and of subpoenaing and transporting foreign witnesses.

In addition to these procedural problems, there are substantive ones as well. At the threshold is the constitutional question whether the Federal Government has the power to legislate concerning common-law crimes committed by American citizens overseas, particularly offenses against foreign nationals.

Assuming that this power exists, should new penal laws be confined to crimes committed "on base"—which is apparently the outer limit of the statutory "maritime and territorial jurisdiction" as defined in 18 U.S.C. 7(3)—assuming that section to be applicable—or extend to all crimes regardless of locus?

Should such laws apply to military employees and dependents, to all Government employees and their dependents, to tourists?

Could distinctions between classes of civilians abroad constitutionally be drawn?

What kind of crimes should be covered—minor as well as major?

What should the penalties be?

Should the District of Columbia Code be incorporated by reference?

If so, should subsequent amendments thereto be automatically extended to offenses abroad; should other Federal district courts be bound to follow the interpretations of the District of Columbia District Court?" Mr. Benjamin Forman, Asst. General Counsel, Department of Defense, Hearings Before the Subcommittee of the Senate Committee on Armed Services, 86th Cong., 2d Sess., June 8, 1960.

the jurisdiction of the receiving state, as they are under international law in the absence of a treaty.

This does not mean, however, that the concepts "the civilian component" and "dependents" are no longer significant. An offense by a member of a force may be an *inter se* offense, over which the sending state has primary jurisdiction, where the victim is a member of the civilian component or a dependent,⁵⁸ as well as where the victim is a member of the force. More important, a member of the civilian component or a dependent is commonly entitled, when tried by the receiving state, to all the rights guaranteed an accused member of a force.⁵⁹ It is most interesting that in the Australian Agreement, negotiated after *Reid v. Covert* and its companion cases⁶⁰ were handed down, both the terms "members of the civilian component" and "dependent" are defined very broadly.⁶¹ It is understandable that a receiving state should be prepared to agree to such broader definitions where the effect of inclusion in a class is not to qualify the receiving state's jurisdiction over the included persons, but the more limited effect noted.

⁵⁸ See Chapter IX, *infra*.

⁵⁹ See Chapter XIII, *infra*.

⁶⁰ Note 2, *supra*.

⁶¹ "Article 1.

In this Agreement, except where the contrary intention appears:

* * *

'members of the civilian component' means civilian personnel in Australia in connection with activities agreed upon by the two Governments who are neither nationals of, nor ordinarily resident in, Australia, but who are:

(a) employed by the United States Forces or by military sales exchanges, commissaries, officers' clubs, enlisted men's clubs or other facilities established for the benefit or welfare of United States personnel and officially recognized by the United States authorities as non-appropriated fund activities; or

(b) serving with an organization which, with the approval of the Australian Government, is accompanying the United States Forces;

'dependent' means a person in Australia who is the spouse of, or other relative who depends for support upon, a member of the United States Forces or of the civilian component."

