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Criminal Jurisdiction Over Visiting Armed Forces

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

CHAPTER VII

THE TREATY ERA¹

The United States had exclusive jurisdiction over its forces in most, though not all,² foreign countries in World War II. Our allies did not, however, always grant the same immunity to other friendly forces stationed in their territories,³ nor did the United States to the forces of its allies stationed in the United States.⁴ Decisions of the Supreme Court of Canada, the Supreme Court of New South Wales and the Mixed Court of Cassation of Egypt⁵ supported the view that the grant of exclusive jurisdiction to the United States over its forces by its allies was not compelled by any rule of international law but was in the nature of a concession. Many of our allies emphasized that the grant of exclusive jurisdiction was prompted by the circumstance of war and would

¹ There are, in addition to the agreements which will be discussed below, classified agreements with certain countries. No reference will be made even to their existence, except where this has been made public, and the situation will be described as though the agreements did not exist, although this necessarily involves giving a distorted picture.

The significant agreements to which the United States is a party are given in abridged form in the Appendix. Where no citation is given for an agreement, it may be assumed it can be found in the Appendix. There are no status of forces agreements with certain countries, e.g., Panama, Iran, Hong Kong, Gibraltar.

² The United States did not have exclusive jurisdiction under the Leased Bases agreement.

³ The status of the forces of the United Kingdom's allies, other than the United States and the Commonwealth countries, continued to be governed throughout World War II by the Allied Forces Act, 1940. See p. 127, *supra*.

⁴ P. 131, *supra*.

⁵ Pages 135-138, *supra*. Several judges of the High Court of Australia took occasion, in their opinions in *Chow Hung Ching v. The King*, 77 Commw. L.R. 449 (Aust. 1948), to indicate their view that visiting foreign forces did not enjoy a general immunity; their views differed as to the scope of any limited immunity which might exist. The decision denying immunity to the defendants was, however, based on the conclusion that they were not in any event members of a military force.

terminate with the end of hostilities. Their attitudes and actions in the immediate post-war period showed that they considered the distinction between war and peace significant, and were not prepared to grant immunity to visiting forces in peacetime. Canada in 1947 passed the Visiting Forces (United States of America) Act⁶ under which visiting foreign forces, including those of the United States, did not enjoy immunity from local criminal jurisdiction.⁷ The United Kingdom, although it did not repeal the United States of America (Visiting Forces) Act, 1942, until it implemented the NATO Agreement in 1952, repeatedly raised the issue of termination of the Act.⁸ In the meantime, in

⁶ 11 Geo. v [1], c. 47 (Can.).

⁷ Section 4(1) provided that: "Nothing in section three of this Act [authorizing United States military authorities to exercise jurisdiction over U.S. troops in Canada] shall affect the jurisdiction of any civil court in Canada to try a member of a United States force for any act or omission constituting an offence against any law in force in Canada whether or not proceedings with respect to such act or omission have been instituted by a United States service authority or before a United States service court." Certain sections of the Criminal Code were, by Section 9(1), made inapplicable to a member of the United States force acting in the course of his duty.

Mr. Claxton, Minister of National Defence, in introducing the bill to implement the NATO agreement, said that "[W]ithout such legislation in effect in this and other countries the forces of Canada and the other North Atlantic treaty nations when in another country would have no more rights or immunities than tourists. In respect of the laws of the country they were visiting they would be in the same position as one traveling on civilian business." H.C. Deb. (Canada), 2nd Session, 1951, Vol. 1, 1061.

⁸ " * * * [T]he British indicated they would terminate it when the hostilities were over and they sent official notes to us at least twice [April 30, 1948 and June 6, 1950], and several informal communications, that they wanted to terminate this wartime situation.

"They indicated to us that they wanted to terminate this jurisdiction which they had given to us entirely as a wartime measure. As a matter of fact, they did it with great reluctance and only under conditions in which they were in no position to refuse." Mr. Yingling, Department of State, Hearings on H.R. 309, Before the House Committee on Foreign Affairs, 84th Cong., 1st Sess. 347 (1955).

The Home Secretary stated in the Commons that " * * * [A]s various hon. members have pointed out, the arrangements made in 1942 whereby exceptional privileges of exclusive jurisdiction were conferred on the United States, while they might be appropriate in wartime and the aftermath of war, are not appropriate for peace-time; and it would be better to substitute our proposals of concurrent jurisdiction." 505 H.C. Deb. (5th ser.) 1588 (1952). See also the comment of Mr. Silverman, *id.*, at 1069.

1948, it entered into an agreement with France which gave British forces in France immunity from French jurisdiction only for *inter se* offenses.⁹ Some of the Western European countries took an even firmer position with respect to the liability of our forces to local criminal jurisdiction and in a few instances American troops were in fact tried in the local courts.¹⁰ The Brussels

Surprisingly, the Lord Chancellor, Lord Simonds, in moving the second reading of the Bill implementing the NATO Agreement in the Lords, quoted Oppenheim's views on the status of forces (*infra*, p. 197) and at least suggested they reflected "the true position." 177 H.L. Deb. (5th ser.) 453 (1952).

⁹ U.K.T.S., 1948, No. 44.

"Article 4(1). The United Kingdom military authorities will exercise their exclusive jurisdiction in the case of an offence committed by a member of the United Kingdom Armed Forces in the following circumstances:

- (a) When the victim of the offence is a member of the United Kingdom Armed Forces; or
- (b) When the offence is contrary to United Kingdom military law but not to French law.

In all other cases the French authorities will examine with the greatest consideration any request which may be received from the United Kingdom authorities, before a French Court has passed sentence, for the transfer of the accused before a United Kingdom Military Court."

¹⁰ Many of the post-war agreements have not been published. The situation which prevailed before the NATO Agreement was ratified was summarized in a letter of Acting Secretary of State Smith to Senator Wiley of April 22, 1953, Senate Foreign Relations Committee, "NATO Treaties," S. Exec. Rep. No. 1, 83rd Cong., 1st Sess. (1953).

"My dear Senator Wiley: I understand that the question has been raised as to the relation of the NATO status treaties with present arrangements which we now have governing the criminal jurisdiction of our forces abroad.

I think that the following points are controlling:

1. As appears on page 28 of the record of the hearings before the Committee on Foreign Relations on April 7 and 8, 'With respect to criminal jurisdiction, we will have generally better rights under these treaties than under the interim arrangements. The sole exception is the situation in the United Kingdom' where the NATO formula will shortly become applicable in any event. For example, in one case, we have an interim arrangement where some of our personnel can be tried by our authorities, while the remainder are entirely subject to local law. This arrangement is an informal one and lacks legal standing.

In another case we do not even have exclusive jurisdiction of our personnel for offenses committed in performance of official duty.

In a third case it is agreed that we will have exclusive jurisdiction until the NATO status-of-forces treaty becomes effective; should it not

become effective, we anticipate that this agreement would have to be renegotiated.

In still another case we now have no jurisdiction over offenses of our personnel against local law.

Other arrangements incorporate the terms of the NATO status-of-forces agreement. In some cases we have no arrangements whatsoever.

All of the foregoing arrangements are informal *ad hoc* interim arrangements providing a confusing and varying pattern of rights and responsibilities. The arrangements have perforce been limited by the existing legislation in each country, which in most cases is not as favorable as that of the NATO status-of-forces formula. The present arrangement therefore lacks operational uniformity as well as legal sanction, and does not provide adequate protection of our forces abroad.

2. Under the present interim arrangements, we have been working out our problems solely by reason of the cooperative spirit of the other countries and their authorities. It is not easy for the authorities of these other governments to cooperate with us in every case, as their present legal structure in most cases does not provide for as favorable treatment as that established by the treaties. The treaties would clarify, codify, and authorize on a firm legal basis the treatment which has been extended to us solely as a matter of grace and good will."

A letter from Secretary of Defense Wilson to Chairman Gordon of the House Committee on Foreign Affairs, of July 1, 1957, Hearings on H.R. 8704, Before House Committee on Foreign Affairs, 85th Cong., 1st Sess. 3447 (1957), reads in part:

"Prior to the ratification by the Italian Government of the NATO Status of Forces Agreement, we had no status agreement with Italy. During this period, the Italian Government felt obliged to take the position under its constitution that our troops were entitled to no immunity from the jurisdiction of their courts. It also felt obliged under Italian law to maintain that United States courts-martial could not constitutionally operate on Italian soil. We do not believe that the Italian view on either of these points can be written off as one of their national idiosyncrasies."

See also the statement of General Hickman, Hearings Before a Subcommittee of the Senate Armed Services Committee, 84th Cong., 1st Sess. 35 (March 29, 31 and June 21, 1955), that in Italy prior to its ratification of the NATO Agreement, jurisdiction was "governed by the Italian legal system which precludes foreign courts from exercising jurisdiction within Italian territory."

The French attitude is indicated by the statement of Deputy Under Secretary of State Murphy that "in the debates in the French Parliament, a good many members of the French Parliament would insist that they would rather not have American troops there if they had to concede on the question of jurisdiction." Hearings, H.J. Res. 309, *supra*, note 8, at 346.

In *Nusselein v. Belgian State*, Court of Cassation, 2d Chamber, Feb. 27,

Treaty Powers made their position clear by entering into a status of forces arrangement which provided that “‘Members of a foreign force’ who commit an offence in the ‘receiving State’ against the laws in force in that State can be prosecuted in the courts of the ‘receiving State.’”¹¹ Even defeated Japan, where the United States as an occupying power at first exercised exclusive jurisdiction over its forces, insisted that the status of the United States forces in Japan should be the same as in the NATO countries when the NATO Agreement was ratified.¹²

1950, [1950] Int’l L. Rep. 136 (No. 35), it was held that a Belgian court had jurisdiction over a Netherlands soldier for crimes committed against the safety of the state in Belgium or abroad.

¹¹ Agreement of December 21, 1949, 22 *Dept. State Bull.* 449, (March 20, 1950) Cmd. 7868. There was no exception to the recognition of the jurisdiction of the receiving state, although it was enjoined to waive its jurisdiction in certain instances.

A statement of the State Department submitted in the Hearings, H.J. Res. 309, *supra*, note 8, at 290, read in part:

“[T]he Brussels Pact countries had already dealt with this question in regard to their forces in the territories of each other before the NATO Status of Forces negotiations began. This agreement * * * recognized the full jurisdiction of the host state even as to duty offenses, providing only for sympathetic consideration of requests for waiver. These countries constituted the bulk of the NATO countries and these had already shown their willingness to send forces although they would be subject to the laws of their allies, and their unwillingness to grant immunity from their own laws to the forces of their allies.”

¹² The Administrative Agreement with Japan under Article III of the Security Treaty, February 28, 1952, 3 UST 3341, TIAS 2492, provided:

“ARTICLE XVII

1. Upon the coming into force with respect to the United States of the ‘Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces’, signed at London on June 19, 1951, the United States will immediately conclude with Japan, at the option of Japan, an agreement on criminal jurisdiction similar to the corresponding provisions of that Agreement.”

During the Hearings on H.J. Res 309, *supra*, note 8, at 324, Congressman LeCompte read into the record an editorial from the Des Moines Register which said:

“During the World War II emergency, several countries gave the United States temporarily, the right to try United States soldiers charged with civilian crimes abroad, but this couldn’t last. Higher pay and higher living standards are irritating enough without extraterritorial rights in criminal law.

“Western countries used to insist on such rights in Eastern lands and this was a terrific grievance to Japanese, Turkish, and Chinese national

Several reasons are discernible as to why states which had been willing to grant immunity to visiting forces in war-time were unwilling to do so in time of peace. A grant for the duration of

pride until the 'capitulations' and the 'unequal treaties' were at last canceled many years ago. The United States can hardly expect that kind of special rights on a permanent basis anywhere today."

Deputy Under Secretary of State Murphy commented (*Id.*, at 325):

"What is said in that editorial about capitulations, of course, provides the backdrop for the emotional situation that you have in the Japanese Parliament, on this very subject, because they did submit to a capitulatory system for a number of years and now their self-assertion is very great and any concession of jurisdiction on their part is quite an enormous thing. That is why we are gratified that the NATO Status of Forces formula is applicable to Japan."

Again Mr. Murphy said (*Id.*, at 288):

"I was acquainted with a great many members of their Diet who want our forces there, sincerely want our forces there, and who I think appreciate the value to Japan of their presence.

"At the same time, on an emotional issue like this court jurisdictional question—and I discussed it with many of them—you have to think of the history connected with it, the distinction that is made between the races, the fact that capitulations existed in that area. You have a whole emotional historical background for this purpose.

"I am convinced if we today, regardless of the major elements that you talk about, and where the line of defense is and where the major interests of the country should lie, that on an emotional question like this one in the Japanese Diet tomorrow we would get less than we have today. That is my honest conviction, just based on the observation that I made while I was there.

"I want to make that distinction between the factors that you mention of the larger strategic concepts, the appreciation of the population, where their major interests lie, and this issue."

In the Hearing on H.R. 8704 of July 24, 1957, *supra*, note 10, at 3460-61, Mr. Murphy said of the negotiation with Japan:

"We were faced with the grim determination on the part of the Japanese legislative body * * * the impact of their opinion on the Government was very clear and very determined. Because they insisted that as soon as the NATO status-of-forces formula was accepted by the other nations, they could not accept anything less. * * * There was a great sensitivity about equality and sovereignty, which was a growing body of public opinion, which was reflected in their Diet."

Japan had asserted jurisdiction over British sailors from the warship *Belfast* for an offence committed on shore (robbing of a taxi driver) in June 1952, although the warship had been engaged in action in Korean waters until just before her visit to Kobe. *Japan v. Smith and Stinner*, High Court of Osaka (Sixth Criminal Division), Nov. 5, 1952, [1952] Int'l L. Rep. 221, (No. 47).

the war was thought of in terms of a short period. The present uneasy peace is thought of as likely to last for an indefinite period.¹³ The need for the presence of foreign troops is as real; however, it may not be so obvious and urgent to the general public. Military exigency may require that a commander retain as complete control over his troops in peace as in war, but the argument is seemingly less compelling. Since war could break out at any moment, it is possible that the exercise of jurisdiction over visiting troops by the receiving state could interfere with military operations as much as in war-time.

Troops in time of war are exposed repeatedly to danger and hardship. No one is likely to think of them then as a privileged class. In time of peace, danger and hardship lie largely in the uncertain future—troops have more leisure, travel facilities are more readily available, and they are more likely to mingle with the local population. Perhaps for these reasons the people of a receiving state are psychologically less prepared to accept what they view as an infringement of their state's sovereignty, through granting immunity to foreign troops, as they are less prepared to accept a curtailment of their own rights and privileges.¹⁴ A comparable shift in the attitude toward the appropriate prerogatives and perquisites of a state's own armed forces has occurred often enough. The rise of nationalism since World War II has accented these tendencies in some areas, and in certain instances unhappy memories of extraterritoriality have made their contribution. Even in the United Kingdom, sensitivity regarding the proper recognition of its sovereign equality has been a larger factor than might have been anticipated.¹⁵

¹³ "[T]his is the first time that we have ever really envisaged a state of affairs in which visiting forces in large numbers would spend an indefinite period on British soil in what is technically a time of peace. * * * That makes a great deal of difference." Viscount Bridgeman, 177 H.L. Deb. (5th ser.) 471, (1952).

¹⁴ "Recently nations have found it necessary to their security to permit foreign armies to remain in their territory for indefinite periods. Under these circumstances the receiving state is naturally concerned with the protection of its citizens and, except in unusual circumstances, will be reluctant to waive, expressly or impliedly, the right to assert jurisdiction over offenses against local law in matters affecting them." Draft Restatement, *Foreign Relations*, Sec. 44, Comment a at 137 (Tent. Draft No. 2, 1958).

¹⁵ Perhaps half the debate in Parliament on the Bill implementing the

After World War II, the United States withdrew from its position that its troops abroad were in all circumstances entitled to immunity under international law,¹⁶ and turned to the negotiation of status of forces treaties.¹⁷ What may be called the treaty

NATO Agreement related to ensuring that the United States granted reciprocal treatment to British forces stationed in the United States. All concerned agreed that reciprocity was essential although all understood that no significant number of British troops were likely to be stationed in the United States.

¹⁶ The Restatement, *Foreign Relations Law*, Section 60, p. 189, states: "Except as provided in Secs. 61 and 62, a state's consenting to the presence of a foreign force within its territory does not of itself imply that the state waives its right to exercise enforcement jurisdiction over members of the force for violations of the criminal law of the territorial state."

Comment a to Section 60 states in part that "The concern of the territorial state with the protection of persons and property normally precludes the implication of such a waiver. Exceptions to the rule stated in this Section arise only when the exercise of local jurisdiction would be inconsistent with the reason for granting entry to the force or would prevent effective prosecution of its mission."

The Reporters' Note to Section 60, p. 191, distinguishes *The Schooner Exchange*, 11 U.S. (7 Cranch) 116 (1812) as concerning troops in passage, and cites the opinion of the Supreme Court in *Wilson v. Girard*, 354 U.S. 524 (1956) as well as the British attitude in World War II.

¹⁷ It nevertheless gave ground only grudgingly. In the NATO negotiations the United States Representative noted that the Article on criminal jurisdiction "was based on the principle that the jurisdiction of the receiving State applied to 'foreign forces and civilian personnel, hereafter described by the term 'contingents.' This principle, on which the United States Draft was based, differed from International Law which provided that, in the absence of any special agreement, the sending State retained the right of jurisdiction over its forces stationed outside the national territory. The International Law on the subject was largely inspired by the decision of Chief Justice Marshall in the case of *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812)." MS-R (51) 4. A discussion in the Juridical Subcommittee indicates the Netherlands representative agreed with this view, but the Belgian and Italian representatives did not. MS-(J)-R (51) 2.

The NATO Agreement was negotiated by a Working Group, assisted by a Juridical Subcommittee, and referred for approval to the NATO Council Deputies. The available materials on the deliberations of the Working Group consist of the Summary Record of their meetings, MS-R (51) 1-26 and Documents, MS-D (51) 1-34; those on the work of the Juridical Subcommittee consist of the Summary Record of their meetings, MS-(J)-R (51)

era has not, however, been characterized by an abandonment of efforts to secure the maximum protection for American troops abroad. Nor has it meant ignoring the established bases for determining jurisdiction. These have continued to shape the attitudes of treaty negotiators, and have in a sense marked out the permissible limits of negotiation. It has been recognized, however, that the invocation of such abstract ideas as the territorial principle provides no clear and acceptable answer to many practical problems. The circumstances in which troops are stationed abroad are too varied, and the interests of the sending and receiving states too complex. Treaties have made possible more subtle differentiations in the allocation of jurisdiction, taking account of the multiple interests of sending and receiving states and the complex and differing scales through which they must be equated. Perhaps not all the treaty arrangements represent the optimum allocation of jurisdiction, but experience suggests that on the whole they have created a more workable pattern. International frictions have been reduced—no system has been devised which could eliminate them altogether.

The NATO Agreement is the most important of the post-war treaties. Perhaps the majority of our forces abroad are governed by its provisions, if one takes into account the arrangements with Japan and Iceland which are virtually identical. The Agreement with West Germany incorporates its provisions. Moreover, it has become the bench mark from which all status of forces arrangements are measured. The United States Senate has made it clear it will approve no arrangement which gives American troops a status inferior to that given them by the NATO Agreement. On the other hand, states outside NATO have not uncommonly asked for no less jurisdiction than the NATO Agreement gives a receiving state, in effect taking what may be termed a most-favored-nation approach. There are, however, agreements with non-NATO countries which reflect certain local circumstances and give the United States exclusive jurisdiction over its own forces.

1-6. Professor Joseph M. Snee, S.J., was kind enough to make copies of these materials available to the writer.

For the actions of the Council Deputies, references in that most valuable source, Snee & Pye, *Status of Forces Agreements and Criminal Jurisdiction* (1957) have been used.

It should be borne in mind always that *the above materials are reporters' summaries, not verbatim transcripts* of the proceedings.

Agreements for Exclusive Jurisdiction

A multipartite Convention between the United States, the United Kingdom, France and West Germany of 1952, as amended in 1954 governed the status of American forces in West Germany until July 1, 1963, when the present Agreement became effective. The Convention stated: "(1) Except as otherwise provided in the present Convention, the authorities of the Forces shall exercise exclusive criminal jurisdiction over members of the Forces * * *." ¹⁸ An Exchange of Notes of July 12, 1950 (the invasion of South Korea began June 25, 1950), which gives exclusive jurisdiction over members of the United States Military Establishment in Korea to courts-martial of the United States, is still in effect. ¹⁹ The Ethiopian Agreement of May 22, 1953 which gives the United States the right to occupy and use certain military facilities and installations in Ethiopia likewise gives the United States exclusive jurisdiction over its forces. ²⁰ In the

¹⁸ Article 6, par. 2, provided: "Where under the law of the Power concerned, the service tribunals are not competent to exercise criminal jurisdiction over a member of the Forces, the German courts and authorities may exercise criminal jurisdiction over him in respect of an offense under German law committed against German interests" on certain conditions. [1955] 4 UST 4288, TIAS No. 3425.

¹⁹ The Exchange of Notes does not cover the United States Military Advisory Group to Korea. The Agreement to establish the Military Advisory Group, January 26, 1950, 2 UST 2696, TIAS No. 2436, 178 U.N.T.S. 102, provides in Article IV that "The Group and its dependents will be considered as a part of the Embassy of the United States in the Republic of Korea for the purposes of enjoying the privileges and immunities accorded to the Embassy and its personnel of comparable rank."

An earlier Agreement of August 24, 1948, [1951] 79 U.N.T.S. 62, had provided that "the Commanding General, United States Armed Forces in Korea, shall retain exclusive jurisdiction over the personnel of his command, both military and civilian, including their dependents, whose conduct as individuals shall be in keeping with the pertinent laws of the Republic of Korea."

The New York Times, June 23, 1962, p. 2, reported that the United States had agreed to negotiate a status of forces agreement with South Korea. "Such an agreement would give Korea jurisdiction over the American troops for crimes committed while off duty."

²⁰ The Agreement (Art. XVII, Part 1) provides simply that: "* * * 3. Members of the United States forces shall be immune from the criminal jurisdiction of Ethiopian courts. * * *" An Agreement of December 19, 1944, 93 U.N.T.S. 320, between the United Kingdom and Ethiopia gave the United Kingdom exclusive jurisdiction over its forces. See par. 5 of the Annexure to Article VI.

Agreement with Denmark for the Defense of Greenland provision is made that: "The Government of the United States of America shall have the right to exercise exclusive jurisdiction over those defense areas in Greenland for which it is responsible under Article II (3), and over any offenses which may be committed in Greenland by the aforesaid military or civilian personnel or by members of their families, as well as by other persons within such defense areas except Danish nationals, * * *" ²¹ To these agreements one should add the many Mutual Defense and Military Aid agreements to which the United States is a party. Although these agreements differ in detail, in general they recognize the exclusive jurisdiction of the United States over the personnel assigned to implement the agreements. Normally this is accomplished by assimilating such personnel to members of the diplomatic mission.²²

Finally, there are those agreements which differentiate between war and peace. The negotiators of the NATO Agreement discussed at several sessions whether the Agreement should be drafted to govern in time of war.²³ They were in accord that the

²¹ Article VIII. The World War II Agreement of April 9, 1941, E.A.S. No. 204, 35 A.J.I.L. (Supp.) 129 (1941) provided in Article VI that: "* * * the Government of the United States of America shall have exclusive jurisdiction over any such defense area in Greenland and over military and civilian personnel of the United States, and their families, as well as over all other persons within such areas except Danish citizens and native Greenlanders * * *."

²² "In Yugoslavia, Spain, Greece, Ethiopia, and Thailand, military assistance advisory group personnel enjoy full diplomatic immunity. In Iran, Iraq, Turkey, and Saudi Arabia they are subject to the concurrent jurisdiction of the United States and local courts.

"In the Philippines, senior officers enjoy full diplomatic immunities, while others are subject to jurisdiction of Philippine courts to the extent that other members of our forces stationed therein are subject thereto.

"In the Netherlands, Great Britain, Luxembourg, Norway, Belgium, France, Korea, Japan, Pakistan, Formosa, Brazil, Indonesia, Indochina, Colombia, Cuba, Denmark, Portugal, Chile, and Italy, their status is that of personnel of corresponding rank of the United States diplomatic mission." Deputy Under Secretary of State Robert Murphy, Hearings, H.J. Res. 309, *supra*, note 8, at 304.

See part 3 of the Reporters' Note to Section 65 of the Restatement, *Foreign Relations Law*, p. 209, for a discussion of the status of military advisory and assistance groups.

²³ The original United States Draft, as explained by the United States Representative, "provided that in time of war the sending State shall exer-

arrangements as to criminal jurisdiction on which these discussions centered were appropriate only for a time of peace.²⁴ The effort to formulate correlative arrangements to govern in time of war was finally abandoned. Rather the Agreement provides for review and modification by bilateral agreement of the parties concerned, reinforced by the right of any party to suspend any provision on sixty days' notice, in the event of hostilities.²⁵ The United States gave explicit notice that it would, in time of war,

cise sole jurisdiction in the case of offences committed by the members of its 'contingents'. This had a purely practical purpose: in time of war, it would be inadvisable that members of the force or assimilated personnel should be withdrawn from the control of their military authorities by reason of their subjection to the jurisdiction of the receiving State. The assumption of paragraph 10 did not appear in the Brussels Agreement, since the latter did not provide for time of war." MS-R (51) 4.

The United States later put forward a proposal that the Agreement should provide that "* * * in time of hostilities * * * the sending State shall have * * * the primary right to exercise criminal jurisdiction over members of its forces committing any offence within a receiving State except a security offense * * * committed against the receiving State." MS-D (51) 2. The United States later withdrew this proposal "as the whole question of conditions in war-time were being dealt with separately." MS-(J)-R (51) 5. See also MS-(J)-R (41) 9; MS-D (51) 11; MS-D (51) 11 (Revise); MS-D (51) 11 (2nd Revise); MS-R (51) 6; MS-R (51) 20.

²⁴ The French representative, in the course of a general discussion in the Juridical Subcommittee of the appropriateness of the proposed jurisdictional arrangements for war-time, observed "he thought that only Articles VII [on criminal jurisdiction] and VIII, and possibly III in so far as it referred to immigration regulations, might have to be withdrawn."

²⁵ "ARTICLE XV

1. Subject to paragraph 2 of this Article, this Agreement shall remain in force in the event of hostilities to which the North Atlantic Treaty applies, except that the provisions for settling claims in paragraphs 2 and 5 of Article VIII shall not apply to war damage, and that the provisions of the Agreement, and, in particular of Articles III and VII, shall immediately be reviewed by the Contracting Parties concerned, who may agree to such modifications as they may consider desirable regarding the application of the Agreement between them.

2. In the event of such hostilities, each of the Contracting Parties shall have the right, by giving 60 days' notice to the other Contracting Parties to suspend the application of any of the provisions of this Agreement so far as it is concerned. If this right is exercised, the Contracting Parties shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended."

insist on exclusive jurisdiction over its armed forces.²⁶ Other agreements similarly provide expressly for a shift in the arrangement regarding criminal jurisdiction in the event of war, to give the United States exclusive jurisdiction over its forces.²⁷

It may seem odd to group together agreements so diverse as those just reviewed, simply because they provide for or contemplate the possibility of exclusive jurisdiction in the United States as the sending state. The significant point, however, is the very diversity of the situations covered by these agreements. They demonstrate that there is no real norm with respect to the status of forces problem. Specifically, they show that there are a variety of situations in which exclusive jurisdiction in the sending state is or may be appropriate. The Convention with West

²⁶ "The United States Representative further recalled that in time of war the United States Government considered that those provisions relating to jurisdiction over its forces which were included in the Agreement, would no longer be adequate. In the event of hostilities, the United States Government desired to be able to exercise exclusive jurisdiction over their forces. He realized that under Article XV the United States Government had the right to denounce the Agreement in so far as the provisions in question were concerned." MS-R (51) 20. See also note 23, *supra*.

²⁷ The Agreement of March 14, 1947 with the Philippines, provides (Article XIII, 6) that "Notwithstanding the foregoing provisions, it is mutually agreed that in time of war the United States shall have the right to exercise exclusive jurisdiction over all offences which may be committed by members of the armed forces of the United States in the Philippines."

The revised Leased Bases Agreement with the United Kingdom spells out in detail the allocation of jurisdiction in war and in peace.

The criminal jurisdiction provisions of the Bahama Islands Agreement so closely parallel those of the revised Leased Bases Agreement that here as elsewhere references to the provisions of the revised Leased Bases Agreement may be considered as references to the Bahama Islands Agreement as well.

The Agreement with the Federation of the West Indies does not, on the other hand, call for any change in the agreed arrangements in the event of war.

The Agreement with the Dominican Republic provided in Art. XV (1) (a) that "Except as provided in subparagraph (b), the Government of the United States of America shall have the right to exercise exclusive criminal jurisdiction over any offenses committed in the Dominican Republic by: (i) Members of the United States Forces; (ii) Other persons subject to the United States military law except Dominican nationals or local aliens." Subparagraph (b) provided that "During a period of hostilities in which either government is engaged the principle stated in subparagraph (a) shall apply."

Germany was explicable as an interim arrangement for the period succeeding occupation. The Agreement regarding Greenland is plainly the product of the physical environment. Military personnel assigned to missions under Mutual Assistance Agreements do not constitute a military force, but serve in an advisory capacity. This makes their assimilation to the personnel of an embassy not unreasonable. The Agreement with Korea reflects the fact that, given the military build-up in North Korea, American troops in South Korea are necessarily maintained on a combat basis. Also, South Korea has relatively recently been ravaged by war, and this means that its social and governmental institutions, including its courts, were disorganized; there is also the continuing danger of Communist infiltration. Finally, there are many reasons for differentiating a war-time and peace-time situation, although the difference does not necessarily imply that a sending state should have exclusive jurisdiction in time of war.²⁸

The NATO Agreement

At the time the NATO Agreement was negotiated, Western Europe presented a quite different situation, for reasons which have no relation to the inherent capacity of a people to establish and maintain a just system of criminal law. The military threat was not so acute as in Korea, and there had been time since the end of World War II to reconstitute and revitalize the courts. The threat of Communist infiltration, while real enough, could apparently be effectively controlled. The number of visiting forces—particularly American forces—to be stationed in some of the Western European countries was expected to be large, much larger than in, say, Ethiopia. It was anticipated that they would be stationed in many different places in a single country, in circumstances which made likely much intermingling with the local population. Language barriers, although they existed, could be surmounted with relative ease. The legal systems of the several countries differed among each other and from that of the United States, but had enough common roots to make their major concepts familiar or at least readily understandable.

²⁸ The Agreement with Lebanon of August 6, 1958 provided, with respect to the status of the American forces then in the Lebanon, that "The military authorities of the United States shall have the exclusive right to exercise all criminal and disciplinary jurisdiction over all persons subject to its military law."

The Brussels Treaty Powers had shown their conviction that, in the conditions prevailing in Western Europe, the territorial principle should control, and visiting forces should enjoy no blanket immunity. The NATO Agreement reflects a modification of this attitude, but the territorial principle remains the norm. The Agreement, in keeping with that principle, for practical purposes gives the receiving state primary jurisdiction, and the sending state only secondary, subordinate jurisdiction over all offenses except those arising out of acts in the performance of duty and offenses in which both the offender and the victim are members of or accompany the armed forces. With respect to the excepted offenses, the sending state has primary jurisdiction.

It will be recalled that, in general, international law establishes no rules of priority where two or more states have concurrent jurisdiction over the same offense. The useful, conflict-resolving concept of "primary jurisdiction" and "secondary jurisdiction" is, in the status of forces area, a creation of treaties. It apparently first appeared in the Agreement of March 27, 1941, relating to the Leased Bases, and reached full flower in the NATO Agreement. Broadly speaking, however, the concept of primary and secondary jurisdiction is not new. It is involved somewhat in extradition treaties in those instances where a state may be requested to surrender one of its own nationals to the state where the offense occurred, even though the requested state could otherwise try this individual under its own laws. The same is true where an offense occurs on a merchant vessel in a foreign port. On the basis at least of comity the primary right to exercise jurisdiction is accorded the littoral state or the flag state, depending on such factors as whether the peace of the port was disturbed. The state of which the offending seaman is a national is, moreover, normally prepared to recognize the prior right of either the littoral or the flag state to exercise jurisdiction. Every immunity, moreover, can be said to involve no more than the recognition of a primary right to exercise jurisdiction, since an immunity can always be waived.

Formerly, in the status of forces area, either the sending state (or on occasion the receiving state, e.g., the United Kingdom, under the Allied Forces Act, 1940, with respect to murder, manslaughter and rape) successfully claimed exclusive jurisdiction; or, where the concurrent jurisdiction of the sending and receiving state was recognized, each case was a matter for separate negotia-

tion. Physical custody of the accused was presumably the most important factor. Thus, in Great Britain, neither the Visiting Forces (British Commonwealth) Act, 1933, nor the Allied Forces Act (1940) except with regard to the offenses mentioned above, made any provision for resolving the conflict inherent in the recognition of concurrent jurisdiction in the sending and receiving states. The use of the concept of primary and secondary jurisdiction to resolve such conflicts in advance represents a notable forward step.

The NATO Agreement also accords jurisdiction to the sending state—necessarily exclusive—over offenses solely punishable by the law of the sending state. This is significant largely with respect to security offenses and purely military offenses, e.g., AWOL. Since the receiving state could not exercise jurisdiction in these cases, the grant is not of immunity but simply of the right to exercise jurisdiction. The inclusion of the provision was probably unnecessary.

To summarize briefly, our allies have, since the end of World War II, made it clear they neither agreed that any rule of international law required they accord a sending state exclusive jurisdiction over its forces, nor believed that granting such exclusive jurisdiction was, except in special circumstances, appropriate at least in time of peace. The United States has accordingly obtained by negotiated agreements a qualified status for its armed forces.