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Edward D. Re

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STATUS OF FORCES AGREEMENTS: THE AMERICAN EXPERIENCE

EDWARD D. RE †

INTRODUCTION

OF the many legal problems that followed the close of World War II, few indeed have been so thoroughly examined, if not vehemently debated, as those stemming from the stationing of American servicemen on friendly foreign soil. Perhaps no treaty has been so severely criticized as the NATO Status of Forces Agreement. It has been stated that "this unprecedented Agreement reflects a callous disregard of the rights of American Armed Forces personnel," and that it amounts to "penalizing the American soldier in an effort to please our NATO allies."¹ The legal criticism fundamentally stemmed from the belief that "the rule of international law as laid down by Chief Justice John Marshall [in the *Schooner Exchange* case] . . . is that troops of a friendly nation stationed within the territory of another are not subject to the local laws of the other country, but are subject only to their own country's laws and regulations for the government of the armed services. . . ."²

The voices that objected to the approval of the NATO Status of Forces Agreement were not silenced by its ratification by the Senate by a vote of 72 to 12.³ Many patriotic Americans and organizations continued to clamor for the abrogation of status of forces arrangements patterned on the

† Member of the Board of Higher Education of the City of New York; Professor of Law, St. John's University School of Law.

¹ 99 CONG. REC. 4818, 4819 (daily ed. May 7, 1953) (remarks of Senator Bricker).

² *Ibid.*

³ 99 CONG. REC. 9088 (daily ed. July 15, 1953).

NATO Status of Forces Agreement.⁴ Since the objections were founded upon the conviction that such agreements were "violative of the rights of American nationals,"⁵ even the procedural safeguards, expressly set forth in the NATO Status of Forces Agreement itself, did not satisfy the critics.⁶ Regardless of its provisions, it was felt by those who opposed the Agreement that America had suffered rather than gained, since, in the absence of the Agreement, American servicemen would have been immune from the jurisdiction of the courts of the foreign country. It was not maintained that international law could not be changed by mutual agreement, but rather, that the Agreement in question deprived the American serviceman of an immunity that he would have otherwise enjoyed.

It has been shown that under the principles of international law, as gleaned from judicial precedents, the writings of publicists and state practice, no such immunity exists.⁷ As indicated by the following quotation, it is futile to rely upon the case of *The Schooner Exchange v. McFaddon* in support of the principle of immunity or waiver of territorial jurisdiction.

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. . . . All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.⁸

Clearly, therefore, the general rule is one of territorial supremacy, and all exceptions thereto "must be traced to the consent" of the territorial sovereign.

⁴ See *Hearings on H.R. 8704 Before House Committee on Armed Services*, 85th Cong., 1st Sess. 3572 (1957).

⁵ 99 CONG. REC. 9032 (daily ed. July 14, 1953) (remarks of Senator McCarren).

⁶ See 99 CONG. REC. 9032 (daily ed. July 14, 1953).

⁷ See authorities cited in *Re, The NATO Status of Forces Agreement and International Law*, 50 Nw. U.L. REV. 349 (1955).

⁸ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). See also *Cozart v. Wilson*, 236 F.2d 732 (D.C. Cir. 1956).

The practical observation has been made that, by virtue of the ratification of the NATO Status of Forces Agreement, these interesting legal questions are now merely of academic interest.⁹ It is perfectly true that from a practical standpoint the actual operation of these jurisdictional arrangements within the foreign country is what really matters. Nevertheless, it ought to be pointed out that since the existing legal precedents did not deal with a more or less permanent stationing of troops in time of peace, they could not possibly have authoritatively disposed of the international legal questions involved. Also one ought to mention that it was unfortunate to speak of the NATO Status of Forces Agreement. The word "Agreement" tended to give the impression that an executive agreement or other informal arrangement was involved rather than a solemn treaty duly ratified by the Senate. This added to the misunderstanding of servicemen, their parents and relatives, who were fearful of trials before foreign criminal courts.

PROCEDURAL AND OTHER SAFEGUARDS

It will be remembered that Paragraph 9 of Article VII of the NATO Status of Forces Agreement contains specific procedural safeguards that must be accorded an offender to be tried by the foreign court. In addition to these enumerated safeguards, prior to the ratification of the treaty, the Senate adopted a Statement or reservation which imposed certain duties upon American Commanding Officers when a member of their command was to be tried by a foreign tribunal.¹⁰ From all this there emerged the "Trial Observer," whose function is to report any violation of the guaranties contained in the relevant international agreements or any instances of unfairness in the trial before the foreign court.¹¹

⁹ See Schuck, *Concurrent Jurisdiction Under the NATO Status of Forces Agreement*, 57 COLUM. L. REV. 355 (1957).

¹⁰ For a discussion of the procedural safeguards in Paragraph 9 of Article VII and the Senate Statement, see Re, *The NATO Status of Forces Agreement and International Law*, 50 NW. U.L. REV. 349, 358-62 (1955).

¹¹ For a brief description of the duties of the Trial Observer, see Brown,

Also, in order to assure competent legal representation, Congress passed a law authorizing the Secretaries of the military departments to incur expenses incident to the representation of their personnel before foreign judicial or administrative tribunals.¹² In addition to these measures designed to guarantee a fair trial, in the event of a conviction and incarceration in a foreign jail, a Department of Defense directive provides for periodic visits by a representative of the armed forces.¹³

The foregoing safeguards, both legal and moral, refute the charge that these agreements reflect a "callous disregard of the rights of American Armed Forces personnel." In the words of Professor Baxter, "the United States does all that it can to protect the American serviceman who is tried in a foreign court."¹⁴

THE OPERATION OF THE AGREEMENT

Have these jurisdictional arrangements been implemented in the spirit of cooperation that was envisaged by their draftsmen and proponents?

A sufficient length of time has elapsed to permit a fair and objective evaluation of their actual operation. Have they operated satisfactorily? The question is designed to ascertain whether American servicemen tried by foreign courts have been treated with justice and fairness.

If this question were to be summarily answered, it would be perfectly accurate to state that both the annual reports of the Department of Defense to the United States Senate¹⁵

Function of the Trial Observer Under the NATO Status of Forces and Other International Agreements, 1957 JAG J. 9.

¹² 70 Stat. 630 (1956), signed by the President and effective on July 24, 1956. The law was designed to protect American personnel against possible disadvantages which might have arisen as a result of the unfamiliarity with local laws, customs and language.

¹³ See DEPARTMENT OF DEFENSE DIRECTIVE No. 5525.1, November 3, 1955.

¹⁴ Baxter, *Criminal Jurisdiction in the NATO Status of Forces Agreement*, A.B.A. SECTION ON INTERNATIONAL AND COMPARATIVE LAW 61, 65 (1957).

¹⁵ For the latest see *Hearing Before a Senate Subcommittee of the Committee on Armed Services*, 86th Cong., 2d Sess. 1 (1960). See also REPORT OF THE COMMITTEE ON ARMED SERVICES, SENATE SUBCOMMITTEE ON THE OPERATION OF ARTICLE VII OF THE NATO STATUS OF FORCES AGREEMENT 2 (1960).

and private investigations in the field¹⁶ reveal that the criminal jurisdictional arrangements concerning American servicemen abroad have operated satisfactorily, and that they have not adversely affected either the morale or the discipline of the American forces. It follows clearly that they have not had a detrimental effect on the accomplishment of the important United States military mission in the various countries.

Many of the original fears about the NATO Status of Forces Agreement and similar treaties were founded on the belief that American servicemen would not receive what the American considers "due process of law," and that certain countries imposed cruel and unusual punishments. The significant inquiry, therefore, deals with the results of those trials involving American personnel. In this important respect, the following statement from House Report No. 2213, 25 May 1956, Union Calendar No. 825 of the Committee on Foreign Affairs, relative to the Mutual Security Act of 1956, is reassuring and bears repetition:

The hearings did not bring to light a single instance where it is claimed that an American serviceman believed to be innocent has been imprisoned by a foreign court, or an American sentenced for an act which in the United States would not be considered a crime. Neither has any case of mutilation, flogging or any other cruel, unusual, or excessive punishment been cited.

In 1956 Father Snee and Professor Pye, of the Georgetown Law Center, made a field study of the actual operation of Article VII of the NATO Status of Forces Agreement in France, Italy, Turkey and the United Kingdom. This study reached the following conclusions:

From our study of the case material and our discussions with the men working in the field, we believe that the trials of American military personnel in the four countries visited are conducted fairly and impartially. The few cases in which we disagreed with the result reached were, in our opinion, marginal cases. In no case studied did we feel that the fundamental rights of any serviceman were violated, or that procedures were followed or results were

¹⁶ See, *e.g.*, SNEE & PYE, STATUS OF FORCES AGREEMENT AND CRIMINAL JURISDICTION (1957).

reached which were such as to shock the conscience or offend against a concept of ordered liberty.¹⁷

A study of the testimony, reports and other materials submitted to Congress reveals unmistakably that these treaties have worked well in practice.¹⁸ These documents will also reveal that the Department of Defense has adhered strictly to the policy of protecting "to the maximum extent possible the rights of United States personnel who may be subject to criminal trial by foreign courts. . . ." ¹⁹

The reports of the Department of Defense on the operation of the criminal jurisdictional arrangements throughout the world, submitted annually to a Subcommittee of the Committee on Armed Services of the Senate, summarize the American experience and set forth the relevant statistical data. In the most recent hearing before the Subcommittee, the Assistant General Counsel of the Department of Defense stated that "our experience under these agreements continues to be generally satisfactory."²⁰ Predicated upon the testimony, statements, and statistical exhibits submitted, the Committee on Armed Services of the Senate, on June 29, 1960, published its most recent Report. This Report, made by its Subcommittee on the operation of Article VII of the NATO Status of Forces Agreement, declared its view of the operation of these agreements as follows:

It is the view of the subcommittee that generally the criminal jurisdictional arrangements regarding United States troops abroad have operated satisfactorily and have not adversely affected during the reporting period the morale and discipline of our forces, nor have

¹⁷ SNEE & PYE, STATUS OF FORCES AGREEMENT AND CRIMINAL JURISDICTION 124 (1957).

¹⁸ See, for example, Statement of Monroe Leigh, Assistant General Counsel, Department of Defense, in Operation of Article VII, NATO Status of Forces Treaty, *Hearing Before a Senate Subcommittee of the Committee on Armed Services*, 84th Cong., 2d Sess. 2-5 (1956).

¹⁹ See DEPARTMENT OF DEFENSE DIRECTIVE No. 5525.1, November 3, 1955.

²⁰ *Hearing Before a Senate Subcommittee of the Committee on Armed Services*, 86th Cong., 2d Sess. 1 (1960) to review, for the period December 1, 1958, through November 30, 1959, the operation of Article VII of the agreement between the parties to the North Atlantic Treaty, together with the other criminal jurisdictional arrangements throughout the world.

they had a detrimental effect on the accomplishment of our military missions in the various countries.²¹

It is interesting to note that the Report states at the outset that the subcommittee did not consider the constitutionality of the treaty. Moreover, the subcommittee made no attempt to determine whether it is wise or unwise, as a matter of national policy, for the United States to enter into reciprocal arrangements which recognize the exercise of criminal jurisdiction of foreign countries where United States troops are stationed. The Report adds that any "re-examination of the broad policy questions would properly come before the Senate Foreign Relations Committee."²²

STATISTICAL DATA OF OFFENSES

The Report contains the statistics regarding offenses subject to foreign jurisdiction and their disposition, for the year ending November 30, 1959, on both a NATO and a world-wide basis. World-wide, there were 12,909 cases subject to foreign jurisdiction, of which 7,745 were in NATO countries. In 62.43% of the world-wide total, jurisdiction of the receiving state was waived, as compared with waivers in 58.37% of the NATO cases. However, the NATO figure was higher by 1.6% than in the preceding year, although the overall percentage of waivers had decreased slightly. It is interesting to note that jurisdiction of Japanese courts was waived in 96.31% of the 3,580 cases involved.

In interpreting the statistical data submitted, it is significant to note the high degree to which the traffic cases constitute the offenses subject to foreign jurisdiction. Of the 12,909 offenses world-wide, 9,335 were traffic violations. In the NATO countries, of the 7,745 offenses, 5,914 were traffic violations. World-wide, of the 4,070 trials of Americans, 2,720 were for traffic violations.

²¹ REPORT OF THE COMMITTEE ON ARMED SERVICES, SENATE SUBCOMMITTEE ON THE OPERATION OF ARTICLE VII OF THE NATO STATUS OF FORCES AGREEMENT 2 (1960).

²² *Ibid.*

Of the 4,070 cases tried in foreign courts throughout the world, 214 resulted in acquittal, 3,608 in fine or reprimand only, 148 in suspended sentences of confinement, and 100 (or 2.45%) in confinement. Of the 2,740 cases tried in foreign NATO tribunals, 114 resulted in acquittal, 2,485 in fine or reprimand only, 90 in suspended sentences of confinement, and 51 (or 1.86%) in confinement. Since the various effective dates of the NATO Status of Forces Agreement (through November 30, 1959), of 39,827 cases subject to jurisdiction in foreign NATO courts, 15,107 were tried—a waiver rate of just over 62%. There was actual confinement of 389 persons, or 2.57% of those tried. On a world-wide basis for a comparable period of time, of a total of 72,598 cases, 69.19% were waived. Sentences of confinement, not suspended, resulted in 2.79% of the cases tried.

Later statistics are now being prepared by the Department of Defense, but will not be released prior to their submission to the Senate Subcommittee. It is anticipated that figures for the year ending November 30, 1960 will be available in a report to be issued in June of 1961. It is anticipated that the most noticeable difference in the statistics of the new reporting period, as compared with previous years, will be in the low number of United States personnel confined in foreign penal institutions pursuant to sentences in foreign courts. The latest published figures show a total of 73 Americans confined on November 30, 1959. As of February 28, 1961, the total had been reduced to 49, distributed as follows: 2 in Bermuda, 1 in Canada, 10 in France, 1 in Italy, 26 in Japan, 1 in New Zealand, and 8 in the United Kingdom.

It is expected that the new figures will show no significant change in the waiver rate, although there has been an increase in foreign trials of United States dependents and civilian employees, as a result of the much publicized decisions of our Supreme Court which held unconstitutional the trial of such persons by courts-martial.

PERTINENT DECISIONS OF THE SUPREME COURT

(1) *Court-Martial Jurisdiction Over Dependents and Civilian Employees.*

In 1956, in the cases of *Reid v. Covert*²³ and *Kinsella v. Krueger*,²⁴ the Supreme Court upheld the constitutionality of the court-martial convictions of Mrs. Clarice Covert, for the murder in England of her husband, an Air Force sergeant, and Mrs. Dorothy Krueger Smith, for the murder in Japan of her husband, an Army colonel. Both defendants were dependents who had accompanied their husbands, armed forces personnel, abroad. After a rehearing, in an historic decision rendered on June 10, 1957,²⁵ the Court reversed itself and ordered Mrs. Covert and Mrs. Smith released from custody. The Court held that Article 2(11) of the Uniform Code of Military Justice, providing for the trial by court-martial of persons accompanying the armed forces of the United States in foreign countries, cannot, in capital cases, be constitutionally applied to the trial of civilian dependents accompanying members of the armed forces overseas in time of peace. In acting against its citizens abroad, said the Court, the United States can act only within the limitations imposed by the Constitution, including Article III, paragraph 2, and the fifth and sixth amendments; and no agreement with a foreign nation can confer on Congress, or any other branch of the government, power which is free of the restraints of the Constitution. Under the Constitution, courts of law alone are given power to try civilians for offenses against the United States.

The effect of these decisions was broadened on January 18, 1960 by other decisions of the Supreme Court. *Grisham v. Hagan*²⁶ involved a civilian employee of our armed forces in France, convicted by court-martial of murder. The Court held that civilian employees could no more be tried by court-

²³ 351 U.S. 487 (1956).

²⁴ 351 U.S. 470 (1956).

²⁵ *Reid v. Covert*, 354 U.S. 1 (1957).

²⁶ 361 U.S. 278 (1960).

martial for capital offenses than could dependents, and, therefore, on the authority of *Reid v. Covert*, reversed a lower court decision which had denied a writ of habeas corpus.

In *Kinsella v. United States ex rel. Singleton*,²⁷ the Court held that no distinction could be drawn in these cases between capital and noncapital offenses. An Army private named Dial, and his wife, had been convicted by court-martial in Germany for involuntary manslaughter in the death of one of their children. The court-martial conviction of Mrs. Dial, a dependent accompanying a member of the armed forces abroad, for this noncapital offense, was held to be unconstitutional.

Finally, in *McElroy v. United States ex rel. Guagliardo*²⁸ and *Wilson v. Bohlender*, the Court considered the cases of two civilian employees convicted by courts-martial of noncapital offenses—one in Morocco for larceny, and the other in Berlin for sodomy. As had been true of capital offenses, the Court held that no distinction could be drawn between dependents and civilian employees convicted by courts-martial of noncapital offenses. All are unconstitutional.

It will be noted that all of these cases questioned the constitutionality of provisions of the Uniform Code of Military Justice, rather than the jurisdictional arrangement involved. As to the Uniform Code of Military Justice, the law is now clear. A provision which would give to the United States, as sending state, either exclusive or primary jurisdiction over an offense committed abroad by a dependent or civilian employee, does not authorize trial by courts-martial in view of the constitutional limitations upon the use of courts-martial. Nor can waiver of its primary jurisdiction over an offense by a receiving state, under the terms of a Status of Forces Agreement, permit an otherwise unconstitutional trial by court-martial. As a result, a receiving state having primary jurisdiction in such a case will not be inclined to waive it; nor will our government be either in-

²⁷ 361 U.S. 234 (1960).

²⁸ 361 U.S. 281 (1960). (This case was heard together with *Wilson v. Bohlender*.)

clined or justified in requesting a waiver. Rather, a waiver is to be expected where the primary jurisdiction is ours.

The Supreme Court decisions holding that civilian employees and dependents are not subject to trial by court-martial in times of peace have raised complex problems for the executive branch. Since the decisions are based on constitutional grounds, it is beyond the power of Congress to cure the situation by legislation insofar as trial by court-martial is concerned. All of the alternatives to the trial of such personnel by court-martial involve the most complex substantive and procedural problems, ranging from a constitutional amendment to overseas trials before special American tribunals. Apart from administrative sanctions for relatively minor offenses, no practical alternative has been found other than trial by the foreign courts. Commenting on this "only practical alternative," Snee and Pye assert that the Supreme Court "for all practical purposes denied to the overseas dependents the possibility of trial by any American court, even a court-martial!"²⁹

It may be added that this is what might have been expected in the absence of a Status of Forces Agreement. The fact that the particular Agreement cannot, by virtue of our own Constitution, transfer jurisdiction to an American court-martial, is certainly no ground for adverse criticism of the Agreement.

(2) *Constitutionality of the Status of Forces Agreement — the Girard Case.*

The constitutionality of a provision of a Status of Forces Agreement was called directly into question in a case which drew even wider public notice than those which have been mentioned—the case of *Wilson v. Girard*.³⁰ Girard was an Army sergeant stationed in Japan. He was confined by United States military authorities for the purpose of being delivered to the Japanese authorities for trial for the killing

²⁹ SNEE & PYE, STATUS OF FORCES AGREEMENT AND CRIMINAL JURISDICTION 44 (1957).

³⁰ 354 U.S. 524 (1957).

of a Japanese while, according to United States authorities, on official duty. The Japanese contended that the act was not done on official duty, and that the primary jurisdiction rested with them, as receiving state, rather than with us. A Joint Committee was unable to agree on this question, and referred the matter to higher authority, whereupon the United States waived whatever jurisdiction it might have had over the offense.

Girard petitioned for a writ of habeas corpus in the United States District Court for the District of Columbia, contending that the Japanese had no jurisdiction over the offense, and that his detention, for purpose of delivery to the Japanese for trial, was illegal. On June 18, 1957, the district court found the act to have been performed on official duty, giving primary jurisdiction to the United States, which waived it. The question was then posed whether Girard had a constitutional right to trial by an appropriate American tribunal, which right would have been violated were he to be delivered for trial to the Japanese. The district court answered the question in the affirmative and held that to deliver Girard for trial to the Japanese would violate his constitutional rights. The court consequently enjoined the military authorities from delivering Girard to the Japanese. The petition for a writ of habeas corpus, however, was denied, inasmuch as Girard was still a member of the armed forces and was subject to trial by court-martial for the same offense.³¹

On July 11, 1957, the Supreme Court reversed the judgment granting the injunction and affirmed the denial of the writ of habeas corpus. After going into the history of the Status of Forces Agreement with Japan, the Court found that the United States and Japan had signed a Security Treaty on September 8, 1951, which was ratified by the Senate on March 20, 1952, and proclaimed by the President to be effective April 28, 1952. Article III of this treaty authorized the making of Administrative Agreements concerning United States armed forces in Japan. On February 28, 1952, the two nations signed such an Administrative Agreement on

³¹ Girard v. Wilson, 152 F. Supp. 21 (D.D.C. 1957).

jurisdiction over offenses committed in Japan, with a provision permitting waiver by the state having primary jurisdiction. This Agreement was to become effective on the same day as the treaty, and was considered by the United States Senate before it gave its consent to the treaty by its ratification. The Agreement also provided that upon the coming into effect of the NATO Status of Forces Agreement, which had been signed on June 19, 1951, the United States and Japan would conclude a similar agreement on criminal jurisdiction. The NATO Agreement became effective August 23, 1953; and on September 29, 1953 the United States and Japan signed a Protocol Agreement embodying the NATO provisions, effective October 29, 1953. The Supreme Court held that, in approving the Security Treaty, the Senate authorized the making of the Administrative Agreement and the Protocol.

Citing the *The Schooner Exchange* case for the proposition that "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender of its jurisdiction," the Court held that Japan's cession to the United States of jurisdiction to try American military personnel for offenses against the laws of both countries was conditioned by the covenant that the state with primary jurisdiction would give sympathetic consideration to the request of the other state for waiver. Addressing itself squarely to the issue whether the carrying out of this provision, authorized by the treaty, for waiver of the qualified jurisdiction granted by Japan, was prohibited by the Constitution or legislation subsequent to the treaty, the Court held that there was no constitutional or statutory barrier to the provision. In the absence of encroachment upon constitutional rights, said the Court, "the wisdom of the arrangement is exclusively for the determination of the Legislative and Executive Branches." The Court thus upheld the constitutionality of a waiver of primary jurisdiction by the United States under the Agreement, and, by implication, sustained the constitutionality of the Status of Forces Agreement.

SOME DIFFICULTIES AND SPECIAL PROBLEMS

Notwithstanding the rare exceptional case that is newsworthy because it is essentially an oddity, any impartial examination of the literature and documents will demonstrate that these agreements have worked well. In this connection, one may repeat with complete accuracy the statement made by Senator Wiley, who, referring to the bilateral arrangements subsequent to World War II and before NATO, said that "our experience with these countries with respect to this problem has been good."³² This, of course, does not mean that special problems have not arisen.

In this latter category may be placed our experience in Turkey. Because of the substantial difference between the official rate and the free rate of exchange for Turkish lire, certain "black-market" activities had led to arrests and trials of American servicemen by the Turkish courts. While the Agreement has worked well in Turkey and excellent community relations exist between American personnel and the Turkish people, the length of Turkish trial proceedings has caused disturbing problems. To the American it is difficult indeed to understand that under standard Turkish criminal procedure, trials are carried on in numerous intermittent hearings—that may possibly continue for a year. Although this practice is not peculiar to Turkish law, little comfort is derived by the serviceman who, as a result, is retained in Turkey after his normal rotation date. Although the results have been just, repeated efforts have nevertheless been made through the State Department to accelerate such trials when American servicemen are involved. Also, although discussions during this past year indicate that a solution may be at hand, another disturbing factor has been the reluctance of the Turkish government to waive its primary jurisdiction over offenses committed by American servicemen.

Another problem relates to the practice of permitting the prosecution to take an appeal after an acquittal by the trial court. Although this procedure is not unusual, and exists in

³² 99 CONG. REC. 9030 (daily ed. July 14, 1953).

Japan, France and Turkey, it is repugnant to the American legal mind. For example, although the Japanese Constitution expressly prohibits double jeopardy, under their system of law a person is not twice put in jeopardy until all of the appellate proceedings have been concluded. It can only be said in this connection that, in those countries where this procedure exists, the American authorities are doing everything possible to minimize its adverse effects.

Special reference must be made to the situation in Iran. The United States has no jurisdictional arrangement in Iran, and of the eight cases that arose in the year ending November 30, 1959, no waivers of jurisdiction were granted by the Iranian authorities. The American commanders in Iran report that the lack of a jurisdictional agreement with Iran has had an adverse effect upon the morale of their commands. At this juncture, it is well to mention that although there is now a Status of Forces Agreement with the Federal Republic of Germany,³³ prior thereto, the uncertainty as to the authority to exercise jurisdiction over civilians produced disturbing results upon both morale and discipline. This uncertainty has now been settled by the Supreme Court of the United States by its holdings that civilians cannot be tried by courts-martial.

A deficiency of the NATO Status of Forces Agreement, also present in the Japanese Administrative Agreement, which gave rise to the dispute in the *Girard* case, is the absence of a clause which provides who shall determine whether a particular offense arose out of the performance of official duty. The "Supplementary Agreement" signed on 3 August 1959 with the Federal Republic of Germany provides that this determination shall be made in accordance with the law of the sending state. It also provides that the German court or authority "shall make its decision in conformity with" the certificate of the military authorities.

In effect, therefore, the German authorities, in the first instance, accept the military certificate as conclusive. It is

³³ See A.B.A. SECTION ON INTERNATIONAL AND COMPARATIVE LAW, REPORT OF THE COMMITTEE ON STATUS OF FORCES AGREEMENTS 99, 132 (1960).

conclusive only in the first instance because it is also provided that in exceptional cases the certificate may be made, at the request of the German court or authority, the subject of review through the medium of discussions between the United States embassy and the Federal Republic of Germany. In conclusion, it may be added that this "Supplementary Agreement" is more favorable to the United States than the NATO Status of Forces Agreement.

One additional matter ought to be mentioned, even though it does not deal with the operation of any jurisdictional arrangement. The Department of Defense has reported that the statutory authority to pay counsel fees, court costs, bail and other expenses incident to the representation before foreign courts, has been of great assistance in assuring servicemen competent representation and the protection of their legal rights. In view of the Supreme Court decisions previously discussed herein, civilians, not being subject to military law, are no longer entitled to the benefits of that law.

CONCLUSION

From the foregoing, certain conclusions stand out in bold relief. Even the most stern critics would have to admit that none of the outrageous situations originally conjured up have actually occurred. Naturally, many difficult and some unanticipated questions were presented.³⁴ All the reports and statements of responsible authorities, however, reveal beyond any doubt that the agreements have worked "very satisfactorily,"³⁵ that prisoners have been treated fairly, and that there has been "no evidence of abuse or mistreatment."³⁶ Indeed, the recent reports indicate that whereas the existence of an agreement does not adversely affect morale or the accomplish-

³⁴ A good example is the *Whitley* case dealing with the effect of waiver or non-action. *Aitchison v. Whitley*, 43 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 602 (1954). Schuck, *Concurrent Jurisdiction Under the NATO Status of Forces Agreement*, 57 COLUM. L. REV. 355 (1957).

³⁵ See *Hearings Before a Senate Subcommittee of the Committee on Armed Services*, 84th Cong., 1st Sess. 6 (1955).

³⁶ See REPORT OF THE SENATE COMMITTEE ON ARMED SERVICES, 84th Cong., 2d Sess. — (July 12, 1956).

ment of the mission, the absence of an agreement does have an adverse effect upon morale and the accomplishment of the mission.

Those who envisaged nothing but difficulties and injustices will find the following words of the Assistant General Counsel of the Department of Defense, recently told to a Subcommittee of the Committee on Armed Services of the Senate, most reassuring: "I believe it evident that, with hundreds of thousands of U. S. Servicemen, civilian employees and dependents abroad, we are bound to experience difficult and continuing problems. . . . However, it can be said in all fairness that our operations under the NATO Status of Forces Treaty and similar agreements, continue to be workable and satisfactory."³⁷

If additional reassurance is required, one ought to note the statement of Senator Ervin that "as a general rule, the punishment meted out to American military and naval personnel by the foreign courts has been substantially less than the punishment which would probably be meted out in similar cases in American courts."³⁸

The legal and practical conclusion has been made that these agreements "contain express provisions, which go beyond the minimum requirements of international law, to assure fair trials."³⁹ When to this is added the statement of the President of the United States that "the maintenance of U. S. military strength in Europe is essential to the security of the Atlantic community and the free world as a whole,"⁴⁰ both the benefit and importance of the NATO Status of Forces Agreement become too obvious to question.

³⁷ *Hearing Before a Senate Subcommittee of the Committee on Armed Services*, 86th Cong., 2d Sess. 11 (1960).

³⁸ *Ibid.*

³⁹ COMMITTEE ON INTERNATIONAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *Report on Status of Forces Agreements 21-22* (1958).

⁴⁰ President John F. Kennedy, in message to the NATO Council in Paris, February 16, 1961.