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Comparative Study of the Law of Criminal Procedure in NATO Countries under the NATO Status of Forces Agreement

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COMPARATIVE STUDY OF THE LAW OF CRIMINAL PROCEDURE IN NATO COUNTRIES UNDER THE NATO STATUS OF FORCES AGREEMENT

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I. INTRODUCTION

The purpose of the ensuing discussion is not to consider the wisdom of the Status of Forces Agreement (known as NATO SOF) or of any of its provisions but to show the growing necessity for lawyer's training in comparative law in view of the fact that our international commitments have become more complex. This is particularly true since the Senate has seen fit to sanction ratification of that Agreement.[1] When the Senate advised and consented to the ratification of the NATO SOF, it attached certain reservations.[2] They give rise to questions of their constitutional

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[1] 99 Cong. Rec. 9088 (July 15, 1953).

[2] The Senate's Resolution, 99 Cong. Rec. 9088 (July 15, 1953), provides as follows:

". . . .

"In giving its advice and consent to ratification, it is the sense of the Senate that:
1. The criminal jurisdiction provisions of Article VII do not constitute a precedent for future agreements;
2. Where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state, under the treaty the Commanding Officer of the armed forces of the United States in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States;
3. If, in the opinion of such commanding officer, under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request the authorities of the receiving state to waive jurisdiction in accordance with the provisions of paragraph 3(c) of Article VII (which requires the receiving state to give "sympathetic consideration" to such request) and if such authorities refuse to waive jurisdiction, the commanding officer shall request the Department of State to press such request through diplomatic channels and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives;
4. A representative of the United States to be appointed by the Chief of Diplomatic Mission with the advice of the senior United States military representative in the receiving state will attend the trial of any such person by the authorities of a receiving state under the agreement, and any failure to comply with the provisions of paragraph 9 of Article VII of the agreement shall be reported to the commanding officer of the armed forces of the United States in such state who shall then request the Department of State to take appropriate action to protect the rights of the accused, and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives."

impact and of their effect upon trials of members of the Forces, civilian components and dependents in continental NATO countries.

Although the present status of the Federal Republic of Germany (Western Germany) is governed by the Convention on Relations between the Three Powers and the Federal Republic and related Conventions referred to in Article 8 of the aforementioned Convention, it has been included in this study, as it is already a member of NATO and as it can be reasonably expected that the NATO Agreement will be extended to the Federal Republic in the near future.

II. Analysis of Article VII of the NATO SOF Agreement

Since the reservations contained in the Senate's Resolution pertain only to Article VII of the NATO Status of Forces Agreement, they must be viewed in the light of that provision. Article VII of the NATO SOF Agreement determines criminal jurisdiction of the sending and receiving state over members of a visiting Force, civilian component and their dependents. For this purpose, Article VII divides offenses into three categories. In the first category are offenses punishable by the law of the sending state, but not by the law of the receiving state. The right to exercise jurisdiction over those offenses is given *exclusively* to the military authority of the sending state. In the second category are offenses punishable by the law of the receiving, but not by the law of the sending, state. The right to exercise jurisdiction over those offenses is given *exclusively* to the authorities of the receiving state. For the remaining third category—offenses which are punishable under both, the law of the sending and of the receiving state—the authorities of the sending and receiving state have concurrent jurisdiction. However, insofar as those offenses are directed solely against the property or security of the sending state or against a person or the property of another member of the Force or civilian component of that state or a dependent, or arise out of any act or omission done in the performance of official duty the military authorities of the sending state have the *primary* right to exercise jurisdiction. In all other instances of concurrent jurisdiction the primary right to exercise jurisdiction lies with the authorities of the receiving state. As a result, the authorities of the receiving state may have either exclusive or primary jurisdiction over members of a visiting Force or civilian component and their dependents, depending on the nature of the offense involved.

It is understandable that receiving states are not willing to surrender jurisdiction over visiting Forces, where their laws have been violated, and that sending states are hesitant to waive jurisdiction, where their laws have been breached. Article VII is the result of those conflicting

interests.[3] Its constitutionality has not yet been successfully challenged.[4] Whether Article VII constitutes a departure from general principles of international law,[5] is an academic question; for it overrides those principles if it conflicts with them.

III. The Legal Effect of the Senate's Reservations

In *New York Indians v. United States*[6] the Supreme Court of the United States was called upon to interpret the treaty with the New York Indians. When the Senate advised and consented to it, it provided for

[3] General Walter Bedell Smith, Undersecretary of State, stated on July 7, 1953, before the Senate Committee on Foreign Relations:

"The problem of jurisdiction in the case of criminal offenses, and that has always been a vexing one, had to be settled. This country, of course, did not wish to surrender all of its rights with respect to criminal jurisdiction for offenses which might be committed by foreign personnel stationed here. We had also to recognize the fact that other nations were reluctant to surrender corresponding rights; but, at the same time, we fully appreciate that the government which sends persons abroad would wish to insure that any trials of his personnel by foreign courts were appropriately conducted, and in our case were conducted with due regard for our system of legal safeguards and the rights of the individuals.

"As the result, there has been the creation of a jurisdiction that provides that offenses committed in performance of duty or treason or espionage against his own country will subject a person to trial by his own authorities. Other offenses against the laws of the foreign country where a man is stationed will be subject to trial in the foreign courts, but the foreign government must give sympathetic consideration to requests for waiver of that right. The normal safeguards of fair trial, the right to counsel, the right to a fair and speedy trial, the right to procure witnesses, the protections against double jeopardy, all of which we consider essential, are expressly covered and expressly protected.

"The committee is aware that under the administrative agreement with Japan we agreed to conclude immediately with Japan at its option, once we have ratified this status of forces agreement, another agreement on criminal jurisdiction similar to the provisions of this agreement which is now before you."

[4] In United States v. Dulles, 220 F. 2d 390 (1954), *cert. denied*, 348 U. S. 952 (1955) the wife of Private Richard Thomas Keefe sought to obtain writ of habeas corpus or mandatory order requiring the Secretary of State to effectuate Private Keefe's release from French civil authorities on the ground that his constitutional rights had been violated by the French. However, Mrs. Keefe did not actually challenge the constitutionality of Article VII of the NATO SOF.

[5] See Re, *The NATO Status of Forces Agreement and International Law*, 50 Nw. U. L. Rev. 349 (1955); Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 Colum. L. Rev. 1091 (1953); King, *Jurisdiction over Friendly Foreign Armed Forces*, 36 Am. J. Int'l L. 539 (1942); King, *Further Developments Concerning Jurisdiction over Friendly Foreign Armed Forces*, 40 Am. J. Int'l L. 257 (1944). In the United States, Exchange v. McFaddon, 7 Cranch 116 (1812), has laid down the law on this question. See Hyde, International Law § 247 (2d ed. 1945); Oppenheim, International Law 759, 760 (8th ed. 1955). See also Coleman v. Tennessee, 97 U. S. 509 (1879); Dow v. Johnson, 100 U. S. 158 (1880); Tucker v. Alexandroff, 183 U. S. 424 (1902). However, compare United States v. Thierichen, 243 Fed. 419 (1917); Department of Justice, *International Law and the Status of Forces Agreement*, 99 Cong. Rec. 9062-70 (July 14, 1953). See further, Barton, *Foreign Armed Forces: Immunity from Supervisory Jurisdiction*, 26 Br. Yearbook Int'l L. 380 (1949); Barton, *Foreign Armed Forces: Immunity from Criminal Jurisdiction*, 27 Br. Yearbook Int'l L. 186 (1950). In the latter article the author concludes, at p. 234, that "there exists a rule of international law according to which members of visiting forces are, in principle, subject to the exercise of criminal jurisdiction by the local courts and that any exceptions to that general and far-reaching principle must be traced to express privilege or concession."

[6] 170 U. S. 1 (1898). See also Transill, *The Treaty-Making Power of the Senate*, 18 Am. J. Int'l L. 459 (1924).

certain reservations. The Resolution containing these reservations did not, however, appear in the original form or in the published copy of the treaty nor in the proclamation of the President reciting the action of the Senate upon the treaty. The Court, for these reasons, refused to consider the reservations as part of the treaty. It said:

> ". . . while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate, and House of Representatives. . . . The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the Presidential proclamation, contained all the terms of the arrangement."[7]

Later, in the case of the *Fourteen Diamond Rings v. United States*,[8] the Supreme Court considered the legal effect of reservations which the Senate made when it advised and consented to the treaty terminating the Spanish-American War. The Court stated:

> "We need not consider the force and effect of a resolution of this sort. . . . The meaning of the treaty cannot be controlled by subsequent explanations of some who may have voted to ratify it;"

and

> "It cannot be regarded as a part of the treaty, since it received neither the approval of the President nor the consent of the other contracting power."[9]

Thus, it appears that, since the Senate may or may not consent to a treaty, it may consent unconditionally or conditionally.[10] In the latter case it may state its conditions in the form of amendments to the proposed treaty. If it consents conditionally, it has not consented to the treaty unless the conditions have been met, *i.e.*, unless the proposed amendments have been incorporated into the treaty. There can be no doubt that the advice and consent given to the NATO SOF Agreement was unconditional, since the Senate's reservations were not designed to affect the text of the Agreement. However, even though those reserva-

[7] New York Indians v. United States, 170 U. S. 1, 23 (1898).
[8] 183 U. S. 176 (1901).
[9] Fourteen Diamond Rings v. United States, 183 U. S. 176, 180, 182 (1901).
[10] In Fourteen Diamond Rings v. United States, note 8 *supra*, the Supreme Court stated at p. 183: "Obviously, the treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President acting for the United States and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty."

tions have no effect under international law, they may or may not have legal consequences under the domestic law of the United States. The reservation that "the criminal jurisdiction provisions of Article VII do not constitute a precedent for future agreements," appears to be at best a statement of future policy that is not binding upon the Senate.[11] A more serious question is presented in regard to the reservation that "the Commanding Officer of the Armed Forces of the United States shall examine the laws of the receiving state with particular reference to the procedural safeguards contained in the Constitution of the United States, whenever a person subject to the military jurisdiction of the United States is to be tried by the authorities of the receiving state, and that he shall request the authorities of the receiving state to waive jurisdiction in accordance with the provisions of paragraph 3(c) of Article VII, if, in his opinion, under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States." For two reasons it is arguable that this reservation is beyond the jurisdiction of the Senate. If it contains a command, it interferes with the right of the President of the United States to exercise such command over the Armed Forces.[12] If it purports to be legislative, it lacks the legislative process provided in the U. S. Constitution.[13] Ergo, it is purely hortatory, containing no sanction except that flowing from the powers of the Senate as a co-ordinate body of the legislative branch. That, nevertheless, the President or the Secretary of Defense may voluntarily adopt the advice of the Senate, as he actually did,[14] is a different matter.

IV. The Meaning of the Senate's Resolution

On the one hand, Section 2 of the Senate's Resolution requires an examination of the law of the receiving state by the Commanding Officer of the Armed Forces of the United States with particular reference to the *procedural safeguards contained in the Constitution of the United States.*[15] On the other, Section 3 of the Resolution makes it mandatory upon him to request a waiver of jurisdiction, if, in his opinion, under all the circumstances of the case, there is danger that the accused will

[11] Senators Bricker and Ferguson discussed this point. Senator Ferguson stated: "That is always true as a legal proposition. If we pass a law today, we may repeal it tomorrow. It does not become a precedent. If we ratify a treaty today, we may refuse to ratify an identical treaty with any other nation tomorrow. There is nothing in the reservation that would foreclose the right of the Senate and of the Congress to act." 99 Cong. Rec. 9057 (July 14, 1953). Senator Bricker said: "An unpleasant fact cannot be brushed aside in any such fashion. If Article VII is approved, it will constitute a precedent for further agreements, any statement to the contrary notwithstanding." 99 Cong. Rec. 9047 (July 14, 1953).

[12] U. S. Const. art II, § 2, cl. 1.

[13] U. S. Const. art I, § 1.

[14] Ratified by the President of the United States of America, subject to Senate's statement, July 24, 1953; entered into force August 23, 1953.

[15] Section 2 of the Senate's Resolution is set out in note 2 *supra.*

not be protected because of the absence or denial of *constitutional rights he would enjoy in the United States.*[16] It goes without saying that "procedural safeguards contained in the Constitution of the United States" are not identical with "constitutional rights he would enjoy in the United States," since the latter include rights such as freedom of speech, press, religion, etc. The Report of the Committee on Foreign Relations and the debate of the NATO SOF Agreement in the Senate appears to indicate that the Senate was primarily concerned with procedural safeguards in NATO countries.[17] It must, therefore, be assumed that it was the intent of the Senate that a request for the waiver of foreign jurisdiction should be made only where those procedural safeguards do not exist in NATO countries. What then did the Senate mean by "procedural safeguards contained in the Constitution of the United States"? Are they those applicable to courts martial,[18] state[19] or federal courts?[20]

This study is predicated on the assumption that the Senate's Resolution refers to procedural safeguards which the U. S. Constitution prescribes for trials in State courts.[21]

[16] Section 3 of the Senate's Resolution is set out in note 2 *supra.*

[17] Senator Ferguson stated: "Mr. Secretary, what about countries where there is no presumption of innocence; where, for instance, the presumption of innocence does not apply, as it does in America?" *Hearings Before the Senate Committee on Foreign Relations,* 83d Cong., 1st Sess., at 19 (1953).

Senator Knowland stated: "I think the basic point that Senator Ferguson raised is that fact that if Americans or their civilian dependents are placed under laws of foreign countries, where the presumption of innocence does not apply, but the presumption of guilt does apply, it is a very basic change in what we have asked Americans to do.'" *Hearings, supra,* at 21.

Senator Smith stated: "How do you handle the point that Senator Ferguson raised a moment ago? Here we have the presumption of innocence in criminal cases, and over there that presumption fo innocence does not exist. How do we deal with that?" *Hearings, supra,* at 31.

See also *Hearings, supra,* at 43, 44 (as to trial by jury); at 22 (as to bail); at 48 (as to double jeopardy); at 55, 57 (as to public trial); and 59, 60, 65 (as to cruel and unusual punishment). See also, S. Exec. Rep. No. 1, 83d Cong., 1st Sess., p. 12 (1953): "Further, the American on trial in a foreign court will have all the rights to which a citizen of the country in question is entitled, and he must specifically be accorded such rights as those to a prompt and speedy trial, to be confronted with the charges and witnesses against him, to subpoena witnesses in his own behalf, to be represented by counsel, to have an interpreter, and to communicate with his Government."

[18] It has been generally stated that to those in military or naval service of the United States the military law is due process. United States ex rel. French v. Weeks, 259 U. S. 326 (1922); Kahn v. Anderson, 255 U. S. 1 (1921); Reaves v. Ainsworth, 219 U. S. 296 (1911).

[19] See cases cited notes 22 through 30 *infra.*

[20] See U. S. CONST. amend. IV, V, VI, VII, VIII.

[21] The same assumption is made in a memorandum submitted by Hon. Wilber M. Brucker, then General Counsel, Department of Defense. *Hearings Before the House Committee on Foreign Affairs,* 84th Cong., 1st Sss., pt. 1, at 249 (1955). However, in the Department of Defense Directive entitled "Status of Forces Policies and Information," November 3, 1955, which purports to implement the Senate's Resolution, the following language appears at page 939:

"Designated commanding officers in countries which are members of the North Atlantic Treaty Organization and in Japan shall make and maintain a current study of the laws and legal procedures in effect in their respective countries.

What are the U. S. constitutional procedural safeguards available in state court trials? The constitutional rights enjoyed in state court trials originate from the 14th Amendment. It is well established that the 14th Amendment does not subject state criminal procedure to the detailed requirements of the 5th and 6th Amendments laid upon the Federal Government.[22] Therefore, the states remain free to remodel their procedural practices so long as they retain the essence of "due process of law."[23] Under the due process clause of the 14th Amendment a fair trial requires that:

1. the accused is tried by an impartial court;[24]

2. he is given a public trial;[25]

3. he is entitled to counsel of his own choosing and, under certain circumstances, at the expense of the Government, if he is indigent.[26]

4. he is present at his trial when his presence has a reasonable relationship to his opportunity to completely and fully defend himself;[27]

5. he is entitled to cross-examine witnesses against him;[28]

6. he is entitled to compulsory process in order to obtain witnesses in his favor;[29]

7. he is presumed to be innocent until it is shown beyond reasonable doubt that he is guilty;[30]

8. he must not be convicted upon evidence of guilt obtained in disregard of liberties deemed fundamental under the Constitution;[31]

Studies of the laws of other than NATO countries and Japan shall be made as directed. This study shall be a general examination of the substantive and procedural criminal law of the foreign country, and shall contain a comparison thereof with the procedural safeguards of a fair trial in the *military and civil* courts of the United States."

[22] Adamson v. California, 332 U. S. 46 (1947); Twining v. New Jersey, 211 U. S. 78 (1908); Maxwell v. Dow, 176 U. S. 581 (1900); Hurtado v. California, 110 U. S. 516 (1884).

[23] CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 247 (1954).

[24] Moore v. New York, 333 U. S. 565 (1948); Fay v. New York, 322 U. S. 261 (1947); Thiel v. Southern Pac. Co., 328 U. S. 217 (1946); Tumey v. Ohio, 273 U. S. 510 (1927); Frank v. Mangum, 237 U. S. 309 (1915).

[25] Re Oliver, 333 U. S. 257 (1948); Gaines v. Washington, 277 U. S. 81 (1928). See also 6 WIGMORE, EVIDENCE § 1834 (3d ed. 1940); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 385-87 (1947); Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381 (1932); Notes, 35 MICH. L. REV. 474 (1937); 8 U. DET. L. J. 129 (1945); Annot., 156 A. L. R. 265 (1945).

[26] Noegen v. Pennsylvania, 335 U. S. 437 (1948); Powell v. Alabama, 287 U. S. 45 (1932).

[27] Snyder v. Massachusetts, 291 U. S. 97 (1934).

[28] Stein v. New York, 346 U. S. 156 (1953); Re Oliver, 333 U. S. 251 (1948). See also Salinger v. United States, 272 U. S. 542 (1926); Mattox v. United States, 156 U. S. 237 (1894).

[29] Re Oliver, 333 U. S. 251 (1948) (dictum).

[30] The U. S. Supreme Court held that presumption of guilt may violate the 14th Amendment. McFarland v. American Sugar Refining Co., 214 U. S. 79 (1915); Bailey v. Alabama, 219 U. S. 219 (1911).

[31] Leyra v. Denno, 347 U. S. 556 (1954); Rochin v. California, 342 U. S. 165 (1952); Harris v. South Carolina, 338 U. S. 68 (1948); Chambers v. Florida 309 U. S. 227 (1939); Brown v. Mississippi, 297 U. S. 278 (1935).

9. he must not be subjected to cruel or unusual punishment.[32]

On the other hand, the following rights have been held not to be guaranteed by the due process clause of the 14th Amendment:

1. right to bail;[33]

2. indictment by grand jury;[34]

3. exclusion of evidence obtained by unreasonable search and seizure;[35]

4. trial by jury;[36]

5. double jeopardy within the meaning of the rule laid down in *Brock v. North Carolina* and *Polko v. Connecticut*;[37]

6. privilege against self-incrimination;[38]

7. writ of state habeas corpus.[39]

V. Does the Law of Criminal Procedure in Continental NATO Countries Meet Due Process Requirements Under the 14th Amendment?[40]

a. Impartial Courts.

1. Under the 14th Amendment.

In *Frank v. Mangum*[41] and in *Moore v. Dempsey*[42] the Supreme Court held that the accused is entitled to a trial free from mob violence. In *Tumey v. Ohio*[43] the Supreme Court ruled that "every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law." In *Offutt v. United*

[32] Application of Middlebrooks, 88 F. Supp. 943 (1950). See also Weems v. United States, 217 U. S. 349 (1910); In re Kemmler, 136 U. S. 436 (1880).

[33] The Eighth Amendment provides only that "excessive bail shall not be required." This implies and safeguards the right to bail at least before trial. United States v. Mottow, 10 F. 2d 657 (1926). However, the due process clause of the 14th Amendment does not include the right to bail.

[34] Hurtado v. California, 110 U. S. 516 (1884).

[35] Irvine v. California, 347 U. S. 128 (1954); Wolf v. Colorado, 338 U. S. 25 (1949). See, however, modification of this rule in Rochin v. California, 342 U. S. 165 (1952).

[36] Maxwell v. Dow, 176 U. S. 581 (1900).

[37] Brock v. North Carolina, 344 U. S. 424 (1953); Palko v. Connecticut, 302 U. S. 319 (1937). See also Frank v. Mangum, 237 U. S. 309 (1915).

[38] Adamson v. California, 332 U. S. 46 (1947); Twining v. New Jersey, 211 U. S. 78 (1908). In Regan v. New York, 349 U. S. 58 (1955) defendant was not permitted to invoke the privilege against self-incrimination, after he had executed a waiver of immunity against prosecution under a provision of the Charter of the City of New York and New York Constitution under which he was faced with the alternative of executing the waiver or losing his job as New York City policeman. See also Note, 41 Cornell L. Q. 294 (1956).

[39] Carter v. Illinois, 329 U. S. 173 (1946).

[40] With the exception of "right to public trial," note 56 *infra*, the writer will not attempt to list the pertinent law of each member of NATO. Primary consideration has been given to the law of Germany and France with the belief that such law normally will be representative of the other civil law countries of NATO.

[41] 237 U. S. 309 (1915).

[42] 261 U. S. 86 (1923).

[43] 273 U. S. 510 (1927).

States[44] the Supreme Court admitted that this stringent rule may sometimes bar trial by judges who have no actual bias and who have done their very best to weigh the scales of justice equally between the contending parties. However, the Supreme Court said to perform this high function "justice must satisfy the appearance of justice." In *Re Oliver*[45] the Supreme Court found that the judge authorized by Michigan Law to act as a so-called "one man grand jury" cannot consistently with the due process clause of the 14th Amendment summarily convict a witness of contempt of conduct in secret hearings. Finally in *In Re Murchison*[46] the Supreme Court was presented with the question whether a contempt proceeding complies with due process where the same judge presiding at the contempt had also served as the "one man grand jury" out of which the contempt charge arose. The Court held that it would be very strange if our system of law permitted a judge to act as a grand jury and then try the very person who is accused as a result of his investigations. "Having been a part of the accusatory process, a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." Similar considerations apply to jurors,[47] if, as and when a trial by jury is provided under state law.

2. In continental NATO countries.

The right to a trial by an impartial court is not enumerated in the list of rights set forth in paragraph 9 of Article VII of the NATO SOF Agreement. However, the law of criminal procedure in continental NATO countries usually provide[48] that judges may be challenged for good cause. The same applies to jurors.[49]

b. Public Trial.

1. Under the 14th Amendment.

It was held in *Gaines v. Washington*[50] and in *Re Oliver*[51] that under standards of due process, as provided in the 14th Amendment, an accused is entitled to a public trial, as distinguished from a trial in camera, behind closed doors. Its purpose manifestly is to protect the rights of a person accused of crime so that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of

[44] 348 U. S. 11 (1954). [45] 333 U. S. 257 (1948).
[46] 349 U. S. 133 (1955).
[47] Fay v. New York, 322 U. S. 261 (1947).
[48] Under French criminal procedure, the accused may challenge the judge for any of the causes enumerated in Art. 378, CODE DE PROCEDURE CIVILE. In Germany a judge is disqualified to have a criminal case for any of the reasons set forth in Sec. 22, CODE OF CRIMINAL PROCEDURE. In addition, he may be challenged for any reason which justifies lack of confidence in his impartiality.
[49] As to France, see Art. 400, 401, CODE D'INSTRUCTION CRIMINELLE; as to Germany, see Sec. 31, CODE OF CRIMINAL PROCEDURE.
[50] 277 U. S. 81 (1928).
[51] 333 U. S. 257 (1948). See also Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381, 389 (1932); Notes, 6 SYRACUSE L. REV. 339 (1955), 7 WESTERN RES. L. REV. 78 (1955); 19 ALBANY L. REV. 281 (1955).

spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. While the requirement of a public trial is well settled, it is not so well settled what is meant by a public trial. In cases, such as *Regan v. United States*,[52] *Callahan v. United States*,[53] and many others,[54] it was held that a criminal trial judge, in the exercise of a sound discretion, may exclude members of the public, as it may become reasonably necessary to protect a witness or party from embarrassment by reason of having to testify to delicate or revolting facts, as a child, or where it is demonstrated that the one testifying cannot, without being freed from such embarrassment, testify to facts material to the case. Moreover, in *Melanson v. O'Brien*[55] both the Supreme Judicial Court of Massachusetts and the U. S. Circuit Court of Appeals (First Circuit) held that the 14th Amendment was not violated by a Massachusetts statute that, in the trial of certain sex crimes where the victim is a minor under eighteen years of age, the presiding judge shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

2. In continental NATO countries.

The NATO SOF Agreement does not require a public trial. Since paragraph 9(g) of Article VII entitled the accused only to have a representative of the Government of the sending state present at his trial, when the rules of the court permit, the accused's right to a public trial within the meaning of the 14th Amendment has been left to the rules of the court by which the accused is tried.

While, in general, trials in continental NATO countries are public, the public may be excluded, if there is danger that the security of the state or the good morals of the people would be jeopardized.[56] In sub-

[52] 202 Fed. 488 (1913). [53] 240 Fed. 683 (1917).

[54] Clemons v. State, 17 Ala. App. 533, 86 So. 177 (1920); Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914); State v. Nyhus, 19 N. D. 326, 124 N. W. 71 (1909); Pierpont v. State, 49 Ohio App. 77, 195 N. E. 264 (1934); State v. Osborn, 54 Or. 289, 103 P. 62 (1909); State v. Damm, 62 S. D. 123, 252 N. W. 7 (1933); Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631 (1886); State v. Jordan, 57 Utah 612, 196 Pac. 565 (1921).

[55] 191 F. 2d 963 (1951). The Mass. statute provides that, in the trial of certain sex crimes where the victim is a minor under eighteen years of age, "the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." Likewise, the Supreme Judicial Court of Mass. held that this statute is not on its face a violation of the due process clause. Commonwealth v. Blondin, 324 Mass. 569, 87 N. E. 2d 455 (1949).

[56] Requirement of Public Trial in the NATO countries.

(1) Belgium: The BELGIUM CONSTITUTION art. 96, provides: "The hearings of courts shall be public, unless publicity would be dangerous to public order or morals; and in that case, the court shall so declare in a judgment.

"With respect to political crimes and crimes involving the press (delits de presse), a closed session may be ordered only by unanimous vote."

(2) Canada: Under the CRIMINAL CODE, trials are normally public. Sessions may be secret, however, where the defendant is under 16, where a sexual offense is involved, or where the judge considers it necessary for public order to exclude the general public. The Criminal Code is at present undergoing revision to reduce the discretion of the court in ordering trials to be closed to the public.

stance, this conforms to the requirements of the 14th Amendment understood by numerous courts, federal and state, in the United States.

c. Representation by Counsel.

1. Under the 14th Amendment.

It is well established that under the due process clause of the

(3) Denmark: Under the COURT PROCEDURE ACT, as amended, trials are normally public. The public may be excluded, however, if it is necessary to preserve order in the courtroom, if public hearings would hinder the adjudication, if publicity would affect Denmark's relations with another power, for reasons of morality, if the accused is under 18 years of age, or if the court finds that publicity would unnecessarily damage some person. Minors may be excluded in the discretion of the judge.

(4) France: All criminal trials in France, even those for crimes carrying a penalty of less than 10 days in jail or 12,000 francs fine, must be public, unless the court finds, and issues a judgment, that publicity would be dangerous to public order or morals. Minors may be excluded in the discretion of the judge. CODE D'INSTRUCTION CRIMINELLE, art. 153, 190, 310.

(5) Great Britain: "As a general rule all persons have a right to be present in court, provided there is sufficient accommodation and there is no disturbance of the proceedings. It is usual, where cases involving indecent details are called on, to direct females and boys to leave the court; but if an adult woman should insist on being present at the hearing of a case, there is probably no power to prevent her being present. There is, however, an inherent jurisdiction in the court to exclude the public if it becomes necessary to do so for the administration of justice." (Citing Scott v. Scott (1913), A.C. 417 (H.Lds.)).

"It is expressly provided by statute that, when a person who in the opinion of the court is under 16 is called as a witness in any proceedings in relation to an offense against . . . decency or morality, the court may order the exclusion of all persons not being members or officers of the court or parties, their counsel or solicitors, and the bona fide representatives of a newspaper or news agency. . . .

"On a trial under the Official Secrets Act, the court, on the application of the prosecution, may order all, or any portion, of the public to be excluded during any portion of the hearing if the publication of any evidence to be given . . . would be prejudicial to the national safety." 9 HALSBURY, LAWS OF ENGLAND 362 (Hailsham ed. 1930).

(6) Greece: All criminal trials must be public unless the court finds that publicity would be detrimental to public morals. CONSTITUTION OF GREECE, art. 92.

(7) Iceland: Generally speaking, the public is not allowed to attend a criminal proceeding in the trial court. However, the public prosecutor refers all grave offenses to the supreme court where public attendance is allowed.

(8) Italy: Under art. 423, CODE OF CRIMINAL PROCEDURE, all trials must be public. The court may order closed sessions where publicity would be dangerous to state security or public order, morality, or health.

(9) Luxembourg: The trials must be public except that in cases affecting public morals the court may exclude all persons except representatives of the press. The latter may not print sordid details. Judgment must always be pronounced publicly.

(10) Netherlands: The DUTCH CONSTITUTION, art. 168, provides:

"All judgments shall state the grounds upon which they are based, and in penal cases they shall indicate the legal provisions upon which the condemnation is based.

"The pronouncement of sentence shall take place with open doors.

"Without prejudice to the exceptions made by law, the hearing shall be public."

(11) Norway: Trials are required to be held in public. The court may order the exclusion of the public if (a) it is required in the interest of Norway's relations with other nations; (b) the accused is under 18 years of age; (c) publicity would prejudice some private persons unnecessarily; and (d) there are other reasons satisfactory to the court.

(12) Portugal: Hearings must be public, unless the court finds that publicity would be contrary to public order or morality. Secret sessions are very rarely ordered.

(13) Turkey: The CONSTITUTION OF TURKEY, art. 58, provides:

"Court trials shall be public.

"However, the court may decide to hold secret sessions in accordance with the laws on court procedure."

14th Amendment every accused is entitled to be represented by counsel of his own choosing, if he is able to procure one.[57] However, a different question is whether and to what extent the due process clause requires states to supply an accused with counsel if the accused is unable to engage counsel because of poverty. It has been held that procedural due process does not in all non-capital cases absolutely and inflexibly require states to furnish counsel to an indigent accused in contrast with the mandate of the 6th Amendment under which counsel must be assigned to an indigent prosecuted in federal courts in every case. Instead, the question of constitutional right depends very much on the circumstances of the particular case, the age of the accused, his education, intelligence and experience, whether the offense charged is simple of comprehension or complicated, the occurrences at the trial, such as how effectively the trial judge protects the rights of the accused, and whether or not the proceedings turn upon intricacies of substantive law or procedure, in short, whether the accused is handicapped by lack of counsel to such an extent that his constitutional right to a fair trial is denied.[58]

2. In continental NATO countries.

Paragraph 9(e) of Article VII of the NATO SOF Agreement entitles the accused "to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving state." Consequently, in trials in NATO countries an accused is always entitled to counsel of his own choosing. On the other hand, "free" legal representation is available to him only if the law of the NATO country so provides. As a rule, the law of continental NATO countries entitles an indigent accused to counsel in instances in which he is tried for major offenses.[59] It has been stated[60] that the role of defense counsel in continental countries is more limited than under common law procedure, due to the fact that

(a) trials in continental countries lack the truly adversary characteristics of common law trials,

(b) no exclusionary rules of evidence exist, and

[57] Quicksall v. Michigan, 339 U. S. 660 (1950); Uveges v. Pennsylvania, 335 U. S. 437 (1948); Gryger v. Burke, 334 U. S. 728 (1948); Bute v. Illinois, 333 U. S. 640 (1948); Foster v. Illinois, 332 U. S. 134 (1947); Hawk v. Olson, 326 U. S. 271 (1945); White v. Ragen, 324 U. S. 760 (1945); Williams v. Kaiser, 323 U. S. 471 (1945); Betts v. Brady, 316 U. S. 455 (1942); Powell v. Alabama, 287 U. S. 45 (1932).

[58] Palmer v. Ashe, 342 U. S. 134 (1951); Gallegos v. Nebraska, 342 U. S. 55 (1951); Gibbs v. Burke, 337 U. S. 773 (1949); Wade v. Mayo, 334 U. S. 672 (1948); Gryger v. Burke, 334 U. S. 728 (1948).

[59] As to France, see art. 294, CODE D'INSTRUCTION CRIMINELLE, and art. 28-30, Law of 22 January 1951; as to Germany, see sec. 140, CODE OF CRIMINAL PROCEDURE.

[60] McCandey, *American Courts in Germany: 600,000 Cases Later*, 40 A.B.A.J. 1043 (1954).

(c) the presiding judge plays the leading part in such trials. This statement is based upon a misconception of continental trials.[61] In continental countries conscientious counsel plays a part as active as he does under common law procedure: he must thoroughly familiarize himself with all details of the pre-trial investigation; he seeks to obtain all evidence favorable to the accused; he objects to leading and other inappropriate questions; he questions witnesses either himself or through the presiding judge; he files appropriate motions and exceptions; he presents closing argument in the manner most favorable to the accused.

d. Presence of the Accused.

1. Under the 14th Amendment.

The Supreme Court of the United States held in *Snyder v. Massachusetts*[62] that under the due process clause of the 14th Amendment an accused has the right to be present at the trial, where his presence has a reasonable relationship to his opportunity to completely and fully defend himself. In the same case, however, the court held that the failure to afford an accused the opportunity to accompany the jury to the scene of the crime does not constitute an infringement of his rights under the 14th Amendment, even though the jury's attention was directed to various features of the scene by the prosecution. On the other hand, the right of an accused to be present at his trial does not include the right to prevent a trial by unseemly disturbance. He cannot complain of an order which was made necessary by his own misconduct and which he could at any time have terminated by signifying his willingness to avoid creating disturbance.[63] Moreover, it has been said that he may waive any trial at all, since he may plead guilty and thus subject himself to the severest penalty which might be imposed.[64]

2. In continental NATO countries.

No provision entitling the accused to be present at his trial is contained in the NATO SOF Agreement. As a rule, in continental NATO countries the accused is entitled to be present. However, trials may be partly or fully held in the absence of the accused:[65]

(a) if the accused voluntarily absents himself or has been removed

[61] See Meyer, *German Criminal Procedure: The Position of the Defendant in Court*, 41 A.B.A.J. 592 (1955).

[62] 291 U. S. 97 (1954). See also Frank v. Mangum, 237 U. S. 309 (1915); Howard v. Kentucky, 200 U. S. 164 (1905); Lewis v. United States, 146 U. S. 370 (1892); Schwab v. Berggren, 143 U. S. 442 (1892).

[63] Annot., 1913C L.R.A. See also ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 414 (1947).

[64] Frank v. State, 142 Ga. 741, 83 S. E. 645 (1914); Thomas v. State, 117 Miss. 532, 78 So. 147 (1918); State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887). See also United States v. Sorrentino, 175 F. 2d 721 (1949); United States v. Kobli, 172 F. 2d 919 (1949).

[65] As to France, see art. 149, 186, 187, CODE D'INSTRUCTION CRIMINELLE; as to Germany, see sec. 277, CODE OF CRIMINAL PROCEDURE. See also sec. 230-34, GERMAN CODE OF CRIMINAL PROCEDURE.

because of misbehaviour, after he has been heard on the charges preferred against him;

(b) if the charges involve minor offenses and the accused has been notified that the trial will be held even in his absence;

(c) if the charges involve minor offenses and the location of the accused is not known or if he is abroad and it appears impossible or impracticable to bring him within the jurisdiction of the court. In this case, the accused must be notified of the charges and of the date of trial either through service by publication or, if his address is known, through personal service.

While (a) and (b) may be construed as a waiver of presence by the accused, (c) may result in a criminal default judgment, if he is served by publication. However, the accused may move for the reopening of the trial, if it subsequently turns out that his absence from the jurisdiction of the court was justified or if there are other reasons why the trial should be reopened.[66] Thus, while continental absentee procedure might not completely satisfy the due process requirements, it does not present a clear-cut case of violation of the accused's right to be present at his trial. Moreover, the law of some continental countries does not permit trials in absentia against citizens of foreign countries.[67]

e. The Right to Confrontation.

1. Under the 14th Amendment.

The provision of the Sixth Amendment of the Federal Constitution entitling the accused to confrontation with witnesses against him does not apply to proceedings in state courts.[68] Furthermore, the Supreme Court held in *West v. Louisiana*[69] and *Stein v. New York*[70] that the accused is not entitled to such confrontation under the due process clause of the 14th Amendment. In the last mentioned case the Supreme Court stated:

> "Wissner, however, contends that his federal rights were infringed because he was unable to cross-examine accusing witnesses, *i.e.*, the confessors. He contends that the 'privilege of confrontation' is secured by the Fourteenth Amendment, relying on one sentence in *Snyder v. Massachusetts*, 291 U. S. 97, 107. However, the words cited were quoted verbatim from *Dowdell v. United States*, 221 U. S. 325, 330, in which the language was

[66] In France, the defaulting accused may file a motion for reopening of the trial within three or five days after service of judgment. As to Germany, see sec. 282 C, CODE OF CRIMINAL PROCEDURE.

[67] *E.g.*, sec. 277 (4), GERMAN CODE OF CRIMINAL PROCEDURE.

[68] West v. Louisiana, 194 U. S. 258 (1904); Maxwell v. Dow, 176 U. S. 581 (1900); Brown v. New York, 175 U. S. 172 (1899); Spies v. Illinois, 123 U. S. 131 (1887).

[69] 194 U. S. 258 (1904).

[70] 346 U. S. 156 (1953).

> used to describe the purpose of the Sixth Amendment provision on confrontation in federal cases. It was transposed to Snyder solely to point out the distinction between a right of confrontation and a mere right of an accused to be present at his own trial. The Court in *Snyder* specifically refrained from holding that there was any right of confrontation under the Fourteenth Amendment, and clearly held to the contrary in *West v. Louisiana,* 194 U. S. 258, in which it was decided that the Federal Constitution did not preclude Louisiana from using affidavits on a criminal trial."[71]

However, the Court indicated in *Re Oliver*[72] that its previous ruling was not meant to deprive the accused completely of the opportunity to meet and cross-examine witnesses against him in state courts, even though the state courts have a certain latitude in deviating from the common law principle of confrontation which the federal courts do not have.[73]

2. In Continental NATO countries.

Paragraph 9(c) of Article VII of the NATO SOF Agreement provides that the accused shall be entitled to be confronted with the witnesses against him. Due to the fact that, as a rule, in continental countries witnesses are not examined and cross-examined by the parties, the purpose of confrontation cannot be to secure the opportunity of cross-examination. It might therefore well be that at the time, when the NATO SOF was negotiated, the parties had a different understanding of that concept. The question then arises whether the lack of cross-examination in a different system of law amounts to a violation of due process. The right to cross-examine witnesses has been called "the greatest legal engine ever invented for the discovery of truth" and "the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure."[74] Nevertheless, it is submitted that absence of examination and cross-examination, as provided in the continental system, carries certain advantages. Whereas under common law procedure the examining prosecuting attorney or defense counsel endeavors to elicit from the witness one-sided statements, the presiding judge's aim in examining witnesses in continental countries is to ascertain both sides. It is for this reason that he permits the witness to relate his observations, as long as he does not indulge in statements of

[71] Stein v. New York, 346 U. S. 156, 195 (1953).
[72] 333 U. S. 257 (1948).
[73] Thus, it was held in Mattox v. United States, 156 U. S. 237 (1894), that testimony of a witness given at an earlier trial may be used in a retrial of the case, where the witness in question has died, and in West v. Louisiana, 291 U. S. 258 (1903), that depositions may be used where the accused was present at the taking of the deposition and the witness is permanently absent from the jurisdiction.
[74] 5 WIGMORE, EVIDENCE § 1367, p. 29 (3d. ed 1940).

irrelevant facts or opinions. Furthermore, whereas under common law procedure the success of cross-examination in criminal trials depends upon the ability and experience of defense counsel, this element does not exist in continental countries. On the other hand, a skilful lawyer can do anything with cross-examination; he may "make the worse appear the better reason, to perplex and dash maturest counsels—may make the truth appear like falsehood."[75] Therefore, all that can be said is that the two methods are different and that each has its advantages and disadvantages.

f. Compulsory Process for obtaining Witnesses.

1. Under the 14th Amendment.

The right of the accused to invoke the aid of the state in summoning witnesses in his behalf is clearly a principle of justice so rooted in the traditions and conscience of the American people as to be ranked as a fundamental requirement of the 14th Amendment.[76] However, the right of a defendant to compulsory process does not extend to witnesses beyond the state line. If they are beyond the limits to which the process of the court runs, the defendant is entitled to a commission to take their testimony by deposition, since he has the right to have their testimony before the court, even if its process is powerless to compel their attendance.[77]

2. In continental NATO countries.

Paragraph 9(d) of Article VII of the NATO SOF Agreement provides that a member of a Force or civilian component or dependent, if possible under the jurisdiction of the receiving state, shall be entitled to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the receiving state. Similar to the law in the United States, NATO countries will obtain the testimony of witnesses outside the jurisdiction of the receiving state either directly or by way of depositions, although this right is not guaranteed by the NATO SOF Agreement.[78] Failure to obtain the testimony of material witnesses constitutes a ground for appeal, unless the court assumes that the facts to be testified are true.[79]

g. Presumption of Innocence.

1. Under the 14th Amendment.

It has been held in *Bailey v. Alabama*[80] and *McFarland v. Ameri-*

[75] *Ibid.*

[76] Redmond v. State, 4 Ala. App. 190, 59 So. 181 (1912); State v. Yetzer, 97 Iowa 423, 66 N. W. 757 (1896).

[77] State v. Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305.

[78] This is a matter of international law. Most NATO countries, if not all, have entered into agreements with other countries providing for the taking of depositions of witnesses in civil as well as criminal cases.

[79] Thus, as to German law, decisions of the German Supreme Court in RGSt 75, 167; 61, 376, JW 31, 1602: NJW 54, 46.

[80] 219 U. S. 219 (1911).

can Sugar Refinement Co.[81] that under due process of law the accused shall be presumed to be innocent until it is shown beyond reasonable doubt that he is guilty and that presumptions of guilt may be established by state legislation only, if they have a rational connection with the facts required to be proved.

2. In continental NATO countries.

Paragraph 9 of Article VII of the NATO SOF Agreement omits any reference to the presumption of innocence. Therefore, the question whether the presumption exists is left to the domestic law of NATO countries. The fact that the laws of some continental countries do not explicitly provide for this presumption does not mean—as it is sometimes assumed—that it does not exist. On the contrary, whenever the presumption of innocence has not been explicitly provided, it is taken for granted. Therefore, continental courts have ruled that the presumption of innocence ("in dubio pro reo") exists, even though it is not explicitly provided in the law.[82] The fact that one of the judges, *i.e.*, the presiding judge, obtains the entire dossier with the pre-trial investigation prior to the date of trial does not necessarily make the court biassed, particularly since the other judges as well as the jurors have no knowledge of the dossier. The purpose of this procedure is to enable him to prepare the trial as effectively as possible. Furthermore, the comparatively numerous acquittals in continental trials seem to dispel the misapprehension that the court passes sentence on the accused, before the trial starts. Closely related to the question whether the innocence of the accused is presumed is the question whether he enjoys the privilege against self-incrimination and whether his silence may be used as evidence against him. It is true that, as a rule, this privilege is not available in continental countries and that, therefore, his silence may be interpreted as an admission of guilt. However, this rule, where it exists, does not differ substantially from the Supreme Court's holding in *Adamson v. California*[83] that state law may permit the court, counsel and jury to comment upon and consider the failure of defendant "to explain or to deny by his testimony any evidence or facts in the case against him."

h. Rules of Evidence.

1. Under the 14th Amendment.

It is well settled that application of the common law rules of

[81] 214 U. S. 79 (1915).

[82] As to Germany, see decisions of the German Supreme Court in RGSt 58, 299; OGHSt 1, 165. Even in those few minor instances in which the law creates a presumption of guilt, the court must endeavor to ascertain whether the presumption is rebuttable. RGSt 63, 283. As to France, see: DE VABRES, TRAITE DE DROIT CRIMINEL ET DE LEGISLATION PENALE COMPAREE 714 (1947); BOUZAT, TRAITE THEORIQUE ET PRATIQUE DE DROIT PENAL (1951); VOUIN, MANUEL DE DROIT CRIMINEL pp. 316, 320, 321 (1949).

[83] 332 U. S. 46 (1947).

evidence in criminal trials are not required under the due process clause of the 14th Amendment.[84] Thus, the Supreme Court held in *West v. Louisiana*[85] and *Stein v. New York*,[86] that the hearsay evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment. However, due process requires that an accused cannot be convicted unless it is shown beyond reasonable doubt that he committed the offense, with which he is charged.[87]

2. In continental NATO countries.

Paragraph 9 of Article VII of the NATO SOF Agreement fails to make any reference to rules of evidence. As general principle, exclusionary rules of evidence do not exist in continental countries. Instead, continental courts consider all pertinent evidence in the light of its probative value. Consequently, inferences may be drawn from the silence of the accused. This does not imply that silence alone suffices to convict the defendant. Furthermore, heresay is admissible, although, as a matter of logic rather than law, it is weighed for what it is worth. It is true that in theory confessions obtained by force or coercion may be taken into consideration. However, penal provisions may make it a serious crime to obtain such confessions from the accused.[88] Again, under the rule of probative value, courts will give involuntary confessions only such weight as they deserve under the circumstances. Under the continental doctrine of "in dubio pro reo" courts must be fully convinced of the accused's guilt.[89] Consequently, judgments will be reversed if they show any doubt, reasonable or otherwise, with respect to the guilt of the accused.

i. Cruel and Unusual Punishment.

1. Under the 14th Amendment.

In *Ex parte Kemmler*[90] as well as in *Louisiana ex rel. Francis v. Resweber*[91] the Supreme Court intimated that the due process clause forbids cruel and unusual punishment by states. Similar conclusions were reached by inferior courts.[92]

[84] Bandini Petroleum Co. v. Superior Ct., 284 U. S. 8 (1931); Adams v. New York, 192 U. S. 585 (1904); Fong Yue Ting v. United States, 149 U. S. 698 (1893).

[85] 194 U. S. 258 (1904).

[86] 346 U. S. 156 (1953).

[87] Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1911); Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35 (1910).

[88] As to Germany, see sec. 343, GERMAN CRIMINAL CODE.

[89] As to Germany, see RGSt 66, 165; NJW 1951, 283; NJW 1951, 286-88. Violation of the principle of "in dubio pro reo" constitutes ground for appeal. RGSt 52, 319; JW 60, 1578 (1931); DR 1341, 780; OGH 1, 56.

[90] 136 U. S. 436 (1890).

[91] 329 U. S. 459 (1947). See also Sweeney v. Woodall, 344 U. S. 86 (1953) (dissenting opinion).

[92] Johnson v. Dye, 175 F. 2d 250 (1949), *reversed* in 338 U. S. 864 (1949); Application of Middlebrooks, 88 F. Supp. 943 (1950), *reversed on other grounds* in 188 F. 2d 308 (1951), *cert. denied* 342 U. S. 862 (1951).

2. In continental NATO countries.

Studies of the law of continental NATO countries do not disclose criminal sanctions violative of the due process clause of the 14th Amendment. As a rule, cruel and unusual punishment in the sense used in medieval times no longer exists. Whether in an individual case the actual penalty or its execution may be cruel or unusual depends on the circumstances of that case.

VI. Conclusion

In *Hurtado v. California*[93] the U. S. Supreme Court held that the states have great leeway in adopting a criminal procedure consistent with the 14th Amendment. The court stated:

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—suum cuique tribuere. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms."[94]

Upholding a Connecticut statute permitting appeals by the State in *Palko v. Connecticut*[95] Justice Cardozo pointed to some of the most cherished elements of common law procedure and then added:

> "Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as

[93] 110 U. S. 516 (1884).
[94] Hurtado v. California, 110 U. S. 516, 530 (1884).
[95] 302 U. S. 319 (1937). See also Schlesinger, *Western Germany: Recognition and Enforcement of Soviet Zone Criminal Judgments*, 2 Am. J. Comp. L. 396 (1953).

to be ranked as fundamental.' *Snyder v. Massachusetts, supra,* p. 105; *Brown v. Mississippi, supra,* p. 285; *Hebert v. Louisiana,* 272 U. S. 312, 316. *Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.* What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey, supra.* This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. *Brown v. Mississippi, supra.* Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself."[96] (Emphasis added.)

It has been said that the criminal procedure of the common law does not strike a fair balance between the rights of the accused and those of the victim. Thus, Judge Alexander Holtzoff[97] of the U. S. District Court for the District of Columbia recently expressed the view:

"Passing to another aspect of the general subject of law reform, inadequate enforcement of the criminal law has been one of the weak spots of our democracy. Many years ago William Howard Taft publicly deplored and denounced this shortcoming in our governmental system. Mr. Justice Jackson, Chairman of a Special Committee of the American Bar Association dealing with this momentous subject, has emphatically called attention to this vital problem. We are indeed justly proud of the fact that we have progressed far in the direction of protecting the rights of persons charged with criminal offenses. We do so in order to safeguard the innocent from the danger of an unjust conviction, and to protect even the guilty from oppression and abuse. We must not permit the pendulum to swing so far in that direction, however, as to neglect the interests of society as a whole and the rights of the victim of a crime become the forgotten man of law enforcement. He, too, has rights. He has the right to lead his life without harm or molestation by law breakers. In fact, the original

[96] Palko v. Connecticut, 302 U. S. 319, 325 (1937).
[97] Judge Alexander Holtzoff, *Leadership in the Struggle for Law Reform,* 17 F. R. D. 251 (1955).

and fundamental purpose for which government was established was to protect every individual against aggression by other members of the community. We must not forget the high-minded expressions of Thomas Jefferson in the Declaration of Independence, that all men "are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men. . . .

"In commendably trying to rehabilitate and reclaim the criminal and to transform him into a useful and honest member of society, we must not ignore the interests of his victim and perhaps let the latter drift into becoming an indifferent citizen because he has failed to receive that protection to which he is justly entitled."

In view of the latitude of criminal procedure granted by the due process clause of the 14th Amendment it must be concluded that, as a rule, the differences between the principles of criminal procedure in the States and in continental NATO countries, great, as they may be, do not necessarily amount to a lack of due process. Opinions to the contrary are often based upon misunderstanding, as aptly demonstrated by two recent law review articles.[98] That in a given case the due process rights of an accused in a NATO country may be violated should not cause more alarm than the fact that in *Re Oliver* the U. S. Supreme Court invalidated a Michigan statute for violation of the 14th Amendment, after it had been in operation for more than 30 years.

In addition, it may well be that one or the other of the procedural safeguards provided in the U. S. Constitution has no exact counterpart in the law of one or another NATO country, but that nevertheless, by virtue of other and different legal devices found in the law of that country, the over-all protection enjoyed by the accused is on balance equal to that granted by the U. S. Constitution. Thus, under German law,[99] for instance, defense counsel has the exceedingly important right to inspect the entire dossier, after formal pre-trial investigation has been completed or, in the absence of such investigation, the indictment has been filed with the competent court. This right affords the accused practically ironclad protection against the danger of surprise at the trial. Furthermore, under the same law defense counsel has the right to close the argument[100] and, in addition, the accused has the final

[98] McCauley, *American Courts in Germany*, 40 A. B. A. J. 1041 (1954); Meyer, *German Criminal Procedure: The Position of the Defendant in Court*, 41 A. B. A. J. 592 (1955). Mr. McCauley's article was relied upon by Congressman Frank T. Bow of Ohio in *Hearings Before the House Foreign Affairs Committee*, 84th Cong., 1st Sess. pt. 1, at 10 (1955).

[99] Sec. 147, GERMAN CODE OF CRIMINAL PROCEDURE.

[100] Sec. 258, GERMAN CODE OF CRIMINAL PROCEDURE.

word.[101] The psychological effect of this privilege upon the court, and even more upon the jury, need not be explained. On the other hand, it must be realized that the protective provisions existing in NATO countries usually do not have the rank and the dignity of constitutional law. The legislative branch of those countries has the power to repeal or amend them at any time. This means that the process of examining the relevant foreign laws should be a continuing one.[102] Therefore, only "the circumstances of the case," as the Senate well phrased it, can furnish a valid test whether there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States. The newly enacted legislation[103] providing for the employment of counsel and payment of counsel fees, court costs, bail, and other expenses incident to the representation of members of the Forces before judicial tribunals and administrative agencies of any foreign nation will be of great assistance in safeguarding their constitutional rights within the meaning of the Senate's Resolution.

[101] *Ibid.*

[102] The Department of Defense Directive entitled "Status of Forces Policies and Information," November 3, 1955, explicitly prescribes that "these country law studies shall be subject to a continuing review, and whenever in any such country there shall be a significant change in its criminal law, the change shall be forwarded by the designated commanding officer to each of the Service Judge Advocate Generals."

[103] Pub. L. No. 777, 84th Cong., 2d Sess. (July 24, 1956).