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Jurisdiction to Try American Servicemen for Crimes Committed Abroad

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JURISDICTION TO TRY AMERICAN SERVICEMEN FOR CRIMES COMMITTED ABROAD

During August of 1951 the Defense Department made public certain information which indicates that one, Major William V. Halohan, who had been reported as "killed in action" in 1944 while serving with the O.S.S. in Italy, may have been murdered by his own subordinates. The accused are two Italian ex-partisans and two American servicemen, both of whom have long since been discharged from the Army and returned to civilian status.

The two Italians have been indicted for murder and await trial in Italy but the possibility of subjecting the accused Americans to prosecution has created a unique legal problem projecting into the fields of international law, conflict of criminal laws, and constitutional law.

The Court of Assizes in Novara near Turin, in the district where the murder took place, has requested the Italian Government to ask for extradition of the Americans. Whether the request will be granted is an open question. Extradition between the United States and Italy is governed by a treaty[1] dating back to 1868 which provides essentially that the two governments mutually shall deliver up all "persons" who, having been convicted of or charged with certain specified crimes committed within the jurisdiction of the contracting parties, should seek asylum in the other.

The Italian courts have interpreted the word "persons" in the treaty as not including citizens of the asylum country. The United States Supreme Court, however, in Charlton v. Kelly[2] considered themselves bound under the treaty to allow extradition of an American citizen, charged with murder, to Italy, although reciprocally under the same treaty, Italy would not deliver up her nationals.

The reason for what may appear to be inconsistent results, is understood by examination of the underlying conflicting theories of jurisdiction of the respective countries.

Criminal jurisdiction in Italy, as in most European countries, is based upon the principle of nationality. Therefore an Italian who commits a felony is by virtue of his citizenship subject to the criminal jurisdiction of the Italian courts, regardless of where the crime is committed.[3]

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1. Treaties . . . etc. (Malloy 1910) 966, 967; 15 stat. 629.

2. 229 U. S. 447 (1912).

3. Italy: Art. 9, *Codice Penale.*

On the other hand, in the Anglo-American countries, following the principle of territoriality, criminal jurisdiction is determined by the locus where the crime is committed with the one exception that attacks intended to have effect within a territory, such as treason are deemed to have been committed within that territory.[4]

The net result is that a civil court[5] in the United States does not have jurisdiction to try an American for a crime committed outside of the territorial limits of the United States, while an Italian court under similar circumstances would. Thus it can be seen why, when viewed through the eyes of an Italian court, the same words can justifiably connote a meaning diametrically opposite to that of an American court.

Contraposing the Kelly decision[6] there has been a growing sentiment in recent years against the extradition of one's own citizens. This was evidenced in the Neidecker case[7] where the Supreme Court interpreted Article V of the Extradition Treaty of 1909[8] which provided that "neither of the contracting parties shall be bound to deliver up its own citizens or subjects. . ." as meaning that the government of the United States was without power in any instance to surrender citizens of the United States to France. However, in absence of treaty provisions, it had been the practice of the United States to surrender it citizens.[9] In the opinion of the Neidecker case[10] the court alluded to repeated refusals of the French Government to deliver her own nationals under the treaty which indicates that the United States may be more demanding of reciprocity from its contracting parties than before.

The crucial point of the problem presented by the Halohan case crystallizes when one asks: Is the United States relegated to the determination of a foreign tribunal as to the guilt or innocence of two American servicemen for a crime committed against their commanding officer while on an official military mission for the United States Government? Under the law as it exists at the present time this must be answered affirmatively, as evidenced by a final ruling of no legal recourse by the Defense Department, on July 31, 1951.

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4. Hackworth, Digest of International Law, Vol. II.

5. "Civil" in this context refers to non-military courts.

6. Supra. N. 2.

7. *Valentine et al v. United States Ex Rel Neidecker,* 299 U. S. 5 (1936).

8. France: Treaty of Extradition, 1909, Malloy pg. 2580, 37 Stat, 1526, 1530.

9. C. f—Oppenheim, International Law, 1948 pg. 638-9; Hackworth, Digest of International Law, Vol. IV pg. 55.

10. Supra N. 7.

Since the crime occurred overseas, it is outside of the jurisdiction of the United States civil courts and because of a judicial construction of Article 2 of the Articles of War[11] by the Supreme Court in the Hirshberg case,[12] a serviceman once separated from the service, even as little as one day, could not be court-martialed for a crime committed while on active duty.

The new Uniform Code of Military Justice of 1950[13] has apparently plugged this gap and a person charged with a crime, punishable by five years or more, committed while in the service, who cannot be tried by the courts of the United States, is not released from ammenability to trial by court-martial by reason of the termination of said status. This section, however, is not retroactive.

Not as resigned to inaction as the legal experts of the Pentagon, Professors Arthur Lenhoff[14] and Edward S. Corwin[15] have suggested an amendment to the present Uniform Code making it retroactive.[16] Such an amendment, it is pointed out, would not violate the "ex post facto" prohibition of the United States Constitution[17] for it would neither create nor aggravate a crime which did not so exist at the time of the commission of the act.

Murder was a crime defined and punishable under the Articles of War[18] for which, by specific exception, no statute of limitations was prescribed.[19] The proposed amendment would merely constitute a reassertion of the military jurisdiction existing when the act was committed.

Sound precedent for trials before tribunals created after the commission of crimes can be found in the trial of war offenses of international character. Judge John J. Parker,[20] in reference to the recent Nurenberg war trials stated: "It is

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11. An Act of June 4, 1920, C.h. 227, Sub. C.h. II Sec. 1, 41 Stat. 787, 10 U. S. C. Sec. 1473 (Sup. IV 1951).

12. *United States Ex Rel Hirshberg v. Cooke, Commanding Officer*, 336 U. S. 210 (1949).

13. An Act of May 5, 1950 Ch. 169 Sec. 1, 64 Stat. 109, U. S. C. Title 50, Sec. 553.

14. Professor of Law, University of Buffalo.

15. McCormick Professor Emeritus of Jurisprudence at Princeton University.

16. See N. Y. Times Aug. 26, 1951 pg. 8E, Col. 5; Sept. 2, 1951 pg. 6E, Col. 6; Sept. 13, 1951, pg. 30C, Col. 6; Sept. 14, 1951, pg. 24C, Col. 6.

17. U. S. Constitution, Art. I, Sec. 10.

18. An Act of June 4, 1920, Ch. 227 Sub. Ch. II, Sec. 1, 41 stat. 805 10 U. S. C. sec. 1564 (Supp. IV 1951).

19. An Act of June 4, 1920, Ch. 277 sub. Ch. II, Sec. 1, 41 stat. 794, 10 U. S. C. Sec. 1510 (Supp. IV 1951).

20. Chief Justice of the United States Court of Appeals, 4th circuit.

no violation of the "ex post facto" rule set up a tribunal to try what has theretofore been recognized as a crime."[21]

It is believed that such an amendment would be an answer to the objectionable status quo and would be in the best interest of justice for both the United States Government, whose prime function is to protect the lives of its citizens and in the interest of the accused Americans to defend themselves before an American court.

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21. See The International Trial at Nurenberg, American Bar Association Journal, Vol. 37 pg. 551.