Pace International Law Review

Volume 4 | Issue 1 Article 8

January 1992

Criminal Jurisdiction of United States Forces in Europe

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COMMENT

CRIMINAL JURISDICTION OF UNITED STATES FORCES IN EUROPE

INTRODUCTION

Following World War II, the new international political reality of Western collective security under the North Atlantic Treaty Organization (NATO)[1] resulted in the stationing of large numbers of American troops in NATO countries. It became necessary to determine the rights and duties of Americans stationed in NATO countries. The Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces[2] was formed for this purpose. This agreement is a multilateral, reciprocal treaty designed to implement the provisions of the North Atlantic Treaty.

The NATO-SOFA was signed in London, United Kingdom, on June 19, 1951, and ratified by the United States Senate on July 15, 1953, by a 72 to 12 vote.[3] The purpose of the agreement was to establish the terms and conditions that would determine the rights, duties, privileges and immunities belonging to the troops of one country when sent into or stationed in the territory of another country, and both countries are parties to the agreement.[4] The agreement also sought to insure that the pres-

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[1] The North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. This Agreement lays down certain rights and obligations of the service men of NATO members when in the territory of other members, and of the receiving state. The following countries are parties to the Agreement: Belgium Feb. 27, 1953, Canada Aug. 28, 1953, Denmark May 28, 1955, France Sept. 29, 1952, GDR June 1, 1963, Greece July 26, 1954, Italy Dec. 22, 1955, Luxembourg Mar. 19, 1954, Netherlands Nov. 18, 1953, Norway Feb. 24, 1953, Portugal Nov. 22, 1955, Spain Aug. 10, 1987, Turkey May 18, 1954, United Kingdom May 13, 1954, and the United States July 24, 1953. *Id.*

[2] June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO-SOFA].

[3] *See* 99 CONG. REC. 9,088 (1953).

[4] Edward D. Re, *The Nato Status of Forces Agreement and International Law*, 50

ence of friendly troops on foreign soil would be accompanied by all possible goodwill and preserve the friendly relations among the NATO allies.[5]

This article analyzes the criminal jurisdiction provisions of the NATO - SOFA, Article VII. Part I begins with a discussion of United States Supreme Court decisions regarding the status of military forces under international law. This section will conclude with a discussion of the development of the European understanding of the status of forces under international law, which manifested itself in the Brussels agreement and later NATO-SOFA. Part II provides an analysis of Article VII, discussing the issues of jurisdiction, waiver and the rights of the accused. Part III offers suggestions for changes to Article VII to better enable the agreement to accomplish its objectives.

I. Development of the Status of Forces Law

A. *International Law Prior to NATO-SOFA*

Prior to NATO-SOFA, jurisdiction in the absence of a treaty was not uniform. Two general principles of international jurisdiction have developed over the years, each of which works at cross-purposes with the other. The first principle, the law of the flag,[6] is a theory supported by more influential nations such as the United States. The second principle, the territorial sovereignty doctrine, is the principle of the occupied.[7] The conflict between these two competing principles is pervasive throughout any jurisdictional analysis, in particular the status of military forces under international law.

During the July 15, 1953 Senate debate, American legal scholars placed great emphasis on Article VII of the agreement.[8] The United States Supreme Court first addressed the issue of the status of military forces of friendly foreign troops in

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NW. U. L. Rev. 349 (1955).

[5] James S. Fraser, *Some Thoughts on Status of Forces Agreements*, 3 Conn. L. Rev. 335, 337 (1971).

[6] Serge Lazareff, Status of Military Forces Under Current International Law, 11 (1971).

[7] *Id.* at 17.

[8] This focus is manifested by the introduction of the Bricker Amendment. *See infra* note 22.

Schooner Exchange v. McFaddon.[9] This famous case involved an action filed in the United States District Court by American citizens who claimed to be former owners of the schooner "Exchange", a vessel allegedly seized by the French government and converted into a ship of war.[10] In *Schooner*, Chief Justice Marshall established the rule that although the jurisdiction of a nation within its own boundaries is absolute and only circumscribed by limits it so decides to place,[11] a country is implied to waive the exercise of its jurisdiction when it allows foreign troops to pass through its boundaries.[12] This implied consent is given by the country unless such country expressly conditions the deployment of such troops to certain terms.

This opinion was referred to sixty years later in *Coleman v. Tennessee.*[13] In this case, the United States Supreme Court expanded the scope of the *Schooner* holding, by stating "[i]t is

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[9] 11 U.S. (7 Cranch) 116 (1812).

[10] *Id.*

[11] *Id.* at 136.

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> 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. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

Id.

[12] *Id.* at 139.

> . . . [A] sovereign is understood to cede a portion of his territorial jurisdiction . . . where he allows the troops of a foreign prince to pass through his dominions.
>
> In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

Id. at 139-40.

[13] 97 U.S. 509, 516 (1879).

well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from civil and criminal jurisdiction of the place."[14] Thus, *Coleman* expanded the *Schooner* holding to troops stationed in the host nation as well as to troops passing through the host nation. This is significant because for the first time troops passing through a nation and troops permanently stationed in a host nation were to be treated the same.

The last Supreme Court decision, prior to NATO-SOFA, regarding the status of forces was *Tucker v. Alexandroff*.[15] In *Tucker*, the Supreme Court reaffirmed the line of cases handed down from *Schooner* and *Coleman*, but recognized the importance of maintaining military discipline.[16] In the *Tucker* case, a detachment of the Imperial Russian Navy, with the consent of the United States, entered the United States for the purpose of manning a vessel that had been built in the United States for the Russian Navy.[17] Pursuant to a treaty provision,[18] the Supreme Court held that the commanding officer of the Russian detachment was entitled to have a deserter arrested and returned to his control. Justice Brown stated, "[I]f foreign troops are permitted to enter, or cross our territory, they are still subject to the control of their officers and exempt from local jurisdiction."[19] This opinion recognizes that maintaining military discipline is one of the major justifications for the law of the flag doctrine.[20]

At the same time, however, *Tucker* also adheres to the partial contradictory line of decisions set forth by *Schooner*. *Tucker* is generally cited for its statement concerning the holding of *Schooner*, which reads as follows:

> [The *Schooner Exchange*,] however, only holds that the public armed vessels of a foreign nation may, upon principles of com-

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[14] *Id.* at 515.

[15] 183 U.S. 424 (1902).

[16] *Id.*

[17] *Id.*

[18] Treaty of Navigation and Commerce, Dec. 18, 1832, U.S.- U.S.S.R, art. IX, 8 Stat. 444-53.

[19] *Tucker*, 183 U.S. at 433.

[20] *Tucker*, 183 U.S. at 424.

> ity, enter our harbors with the presumed license of the government, and while they are exempt from the jurisdiction of the local courts; and, by parity of reasoning, that, if foreign troops are permitted to enter, or cross our territory, they are still subject to the control of their officers and exempt from local jurisdiction.[21]

Thus, friendly troops outside the scope of their military mission, such as naval troops in a port of call, are exempt from jurisdiction if they disembark. This is a significant recognition of the law of the flag doctrine, where the high court recognizes such a doctrine to the detriment of the American exercise of jurisdiction.

In conclusion, the United States Supreme Court has decided that nations can bargain for jurisdiction regarding their respective forces. The United States, being a nation of great international presence, favors the doctrine of the law of the flag. However, this doctrine is not universal and as a result, American concern for the rights of its servicemen abroad has intensified. Thus, American policy of attainment of jurisdiction, regardless of the circumstances, lies deep within American interests.[22]

B. *The Development of the Treaty of Brussels*

The European development of international law regarding the status of military forces is unique. Throughout its evolution, developing law can be identified according to the historical context of the significant era: The first era is the World War I pe-

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[21] *Id.* at 433.

[22] Evidence of the great American concern for the rights of American servicemen is evident in the proposed *Bricker Amendment*. 99 CONG. REC. 9080 (daily ed. July 14, 1953) (statement of Sen. Bricker). Many Americans believed at this time that the rule of international law as laid down by Chief Justice John Marshall is that friendly troops stationed in a host nation are not subject to the local laws and regulations of the host country, but are subject only to their own country's laws. 99 CONG. REC. 4818; 4819 (daily ed. May 7, 1953). Thus they believed that the United States was giving rights away and compromising where it need not. Senator Bricker proposed the following amendment:

> The military authorities of the United States as a sending state shall have exclusive jurisdiction over the members of its force or civilian component and their dependents with respect to all offenses committed within the territory of the receiving state and the United States as a receiving state shall, at the request of a sending state, waive any jurisdiction which it might possess over the members of a force of civilian component of a sending state and their dependents with respect to all offenses committed within the territory of the United States.

Id. The Bricker amendment was rejected 53-27. 99 CONG. REC. 9080, 9083.

riod, the second is the World War II period, and the third is the current post World War II period. [23]

1. *World War I Era*

The principle of the law of the flag predominated agreements made during the first world war. Jurisdictional power could not "be separated from the exercise of disciplinary power, which is an essential part of military organization" and effectiveness.[24] During this time, France concluded agreements with her allies pursuant to which the military courts of the allied nations were given an exclusive jurisdiction for offenses committed by members of their armed forces.[25]

During time of war, jurisdiction of an occupying force is completely independent of the constitution and laws of the occupied country.[26] This tenet greatly influenced the agreements of this era. The World War I agreements were designed to cope with a situation involving an army of occupation by consent.[27] The Allied troop deployment was similar to an occupying force in their zones of operation.[28] The context of the agreements must be considered in light of the circumstances of the period. In this era, dominance of the law of the flag doctrine was prevalent.[29] The allied nations were given jurisdiction as if they were an occupying force. In fact, within the zones of operation of the respective allied countries, such allied forces not only had retained jurisdiction over their own forces, but also over the civil-

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[23] LAZAREFF, *supra*, note 6, at 19.

[24] *Id.*

[25] Re, *supra* note 4, at 383. *See also* G.P. Barton, *Foreign Armed Forces: Immunity From Supervisory Jurisdiction*, 26 BRIT. Y.B. INT'T L. 380 (1949) ; G.P. Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction*, 27 BRIT. Y.B. INT'L. L. 186, 187-94 (1950) [hereinafter Barton]; Archibald King, *Jurisdiction Over Friendly Foreign Armed Forces*, 36 AM. J. INT'L L. 539 (1942).

[26] *Id.*

[27] A representative agreement during this period was the Franco-Belgium Agreement of August 14, 1914. A key provision of this agreement was that "every force retains its jurisdiction as to the offenses liable to bring prejudice to it, whatever territory it is stationed on, and whatever the nationality of the offender." *See also* Franco-American Agreement of Jan. 14, 1918, which also demonstrates the principle of law of the flag. LAZAREFF, *supra* note 6, at 20.

[28] A major portion of the allied forces were located in France and Belgium of comparatively narrow and well-defined zones of operations. Barton, *supra* note 25, at 193.

[29] Re, *supra* note 4, at 384.

ians in those areas.[30]

Although the law of the flag predominated during this period, it was not the only basis for European agreements. The United Kingdom demanded that the principle of territorial sovereignty be recognized in that country.[31] The British government insisted, as early as September 1917, that the only rights of jurisdiction which could be granted to the American forces would relate to the offenses committed within American military establishments.[32] The United States refused to accept these demands and, in response, the British government promulgated the Regulation under the Defense Realm Act, on March 22, 1918.[33] This act read:

> the Naval and military authorities and ports of an ally may exercise in relation to the members of any naval or military force of that ally, who for the time being be in the United Kingdom, all such powers as are conferred on them by the law of that ally.[34]

Despite these concessions, the United States refused to recognize the United Kingdom's claim to territorial sovereignty.[35]

The importance of whether the crime is committed within or outside the zone of operation is important in the analysis of this era. The assertion could be made that crimes committed outside of these zones are under the jurisdiction of the host nation.[36] The negotiations between the United Kingdom and Italy fortify this assertion. Italy recognized the exclusive jurisdiction of the British service courts in northern Italy within the "zone of operations."[37] "Outside of such zones, however, the Italian courts also claimed jurisdiction to try British soldiers who committed offenses against Italian Law."[38] Thus, this period of the law's development focuses jurisdictional questions around geography. World War I was the first time a nation found itself with large numbers of friendly troops situated within its borders. The

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[30] Re, *supra* note 4, at 384.
[31] LAZAREFF, *supra* note 6, at 21.
[32] *Id.*
[33] *Id.*
[34] *Id.* (quoting Foreign Relations of the United States, 1918, supp. 2, at 733-60).
[35] *Id.*
[36] Barton, *supra* note 25, at 192.
[37] Re, *supra* note 4, at 385.
[38] *Id.*

answer, as historian G.P. Barton asserted, was to combine the law of the flag with a geographical limitation.[39]

2. *World War II Era*

The Second World War presented new challenges to the laws of the status of military forces. The static lines and trench warfare had given way to a new kind of warfare. Prior to D-Day, allied troops were scattered throughout the United Kingdom. The motorization of the forces had increased the rhythm of their movement.[40] As a result, Allied troops mixed with the population, using public roads and consuming local goods and services.[41] Their presence raised a unique set of legal questions never before addressed.[42] In response to this, the British adopted the Allied Forces Act.[43]

The Allied Forces Act gave jurisdiction to the allied military courts for questions of discipline and administration, regarding members of forces where offenses were punishable under both the law of the receiving state and under the sending state. Such cases were of concurrent jurisdiction.[44] In contrast, violent crimes, such as murder and rape, were subject to the exclusive jurisdiction of the British courts.[45] The Allied Forces Act was the basis for all of the subsequent agreements the British entered into with allied nations.[46]

One such agreement was the Anglo-Czech Agreement of October 25, 1940.[47] This agreement was a typical agreement that the United Kingdom entered into with various governments in exile. The agreement did not provide for jurisdictional immunity as called for by the law of the flag. For example, Article 2 of the Anglo-Czechoslovak agreement provided that acts or omissions constituting offenses against the law of the United Kingdom

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[39] *Id.*

[40] LAZAREFF, *supra* note 6, at 23-24.

[41] *Id.* at 24.

[42] *Id.*

[43] Allied Forces Act, 1940. 3 4 Geo. 6, ch. 5.

[44] *Id. See* Lazareff, *supra* note 6, at 24.

[45] Allied Forces Act, 1940, 3 4 Geo. 6, ch. 5. *See* LAZAREFF, *supra* note 23, at 24.

[46] LAZAREFF, *supra* note 6 at 24.

[47] Anglo-Czechoslovak Agreement, October 25, 1940, (Great Britain-Czechoslovakia).

shall be liable and tried by the civil courts in the United Kingdom.[48] Even offenses which are offenses against military discipline are subject to concurrent jurisdiction if they involve a local law.[49] This is a departure from the practice followed in World War I and from the law of the flag doctrine, although, during World War I, the United Kingdom was one of the few territorial sovereignty advocates in the European community.

In 1942, American forces arrived in the United Kingdom. In accordance with its traditional policy, the American government sought exclusive jurisdiction over its forces. In light of the wartime situation and the great need for American troops, the British government made an exception to its doctrine and agreed to allow American jurisdiction over its own troops.[50] This concession was manifested by the British in its enacted law: The United States of America Visiting Forces Act.[51] The American forces were the only forces enjoying a complete immunity from jurisdiction by the United Kingdom.[52] Surely, the British government considered this a great departure from the traditional system and practice of the United Kingdom.[53] Barton asserts, from reading the British notes and the debates in both Houses of Parliament, that these arrangements were temporary and exceptional, dictated by the conditions of war and tolerated only because of the mutual feelings of comradeship between the contracting parties.[54]

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[48] *Id.*, art. 2.

[49] For example, an assault on a fellow soldier of the same nationality could also be punishable under British law. Anglo-Czechoslovak Agreement, October 25, 1940, art. 1.

[50] Barton, *supra* note 25, at 199.

[51] Visiting Forces Act, 1942, 5 6 Geo. 6, ch. 315.

[52] *Id.* Norman Bentwich, *The United States of America Visiting Forces Act, 1942*, 6 MOD. L. REV. 68, 72 (1942); Egon Schwelb, *The Status of United States Forces in English Law*, 38 AM. J. INT'L L. 50, 53 (1944).

[53] Bentwich, *Supra*, note 52, at 68, 70-72; Re, *supra* note 4, at 387.

> The British public had demonstrated uneasiness about the matter of jurisdiction. The British were afraid that American soldiers who committed crimes against British subjects would not be punished enough. This fear proved unwarranted, since American military law punished for violent crimes with greater severity.

Re, *supra* note 4, at 387.

[54] Barton, *supra* note 25, at 200:

> Despite the British belief that the United States of America Visiting Forces Act was to be temporary, it would later serve as the model for later agreements between the United States and some of Britain's other allies. The NATO-SOFA is one such agreement.

3. *Post World War II Agreements*

The end of hostilities did not bring about the withdrawal of all the foreign forces stationed in Europe as had been the case in prior European conflicts.[55] The Western European nations were faced with the jurisdictional question of friendly foreign forces without the necessities of war. On March 17, 1948, the Treaty of Brussels was signed.[56] This was the first manifestation of the European states' desire to organize close co-operation with regard to judicial resolution of legal conflicts.[57] Belgium, France, Luxembourg, the Netherlands and the United Kingdom are parties to the Treaty of Brussels.[58]

This multilateral agreement parallels NATO-SOFA. The

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[55] LAZAREFF, *supra* note 6, at 30. The post World War II agreements can be divided into three classifications, differentiated by the manner in which jurisdiction is provided for the sending state. These classifications are exclusive jurisdiction, geographical repartition and concurrent jurisdiction. *Id.* at 38.

Exclusive jurisdiction is seldom used in the post World War II period. Few host nations grant exclusive jurisdiction to a sending state over sending state troops deployed within its territory. In the early 1950's, the United States entered into such agreements with Korea, Ethiopia and Japan. *Id.* at 38. However, the political situation was such that these nations had no other choice.

Geographical repartition is used outside the European continent in mainly third world countries with unusual laws. The American agreement with the Royal Kingdom of Saudi-Arabia is an example of a bilateral geographical repartition agreement. United States-Saudi Arabia Agreement, June 18, 1951, T.I.A.S. No. 2290, art. 13.

Article 13 of the American-Saudi agreement provides, "all United States military personnel members of the mission, and all civilian employees of the mission who are United States nationals or the nationals of other friendly states and their dependents at Dhahran Airfield shall obey all applicable laws and regulations of the Kingdom of Saudi Arabia." *Id.* This part of the agreement recognizes the territorial sovereignty of Saudi Arabia.

Article 13(c)(i) adds the jurisdictional aspect of the agreement: "any member of the armed forces of the United States [who] commits an offense inside Dhahran Airfield will be subject to United States military jurisdiction." Thus, the confining of military servicemen to a specific area is similar to the situation during World War I. This similarity leads to a similar jurisdictional arrangement even today.

Concurrent jurisdiction is the most common post World War II agreement arrangement and a favorite of the European community. LAZAREFF, *supra* note 23, at 47. The NATO-SOFA agreement and the Treaty of Brussels are the only two agreements of this type. The main characteristic of concurrent jurisdiction is that it is concluded between states of comparable social and political maturity where the judicial organization and the legal principles present similar guarantees. LAZAREFF, *supra* note 23, at 30-56.

[56] Treaty of Brussels

[57] LAZAREFF, *supra* note 6, at 45.

[58] *Id.*

Treaty of Brussels recognized that no extensive principle of immunity existed.[59] This treaty terminated the notion of universal acceptance of complete immunity for friendly foreign military forces in host nations. In fact, under the Brussels agreement, the rise of territorial jurisdiction came to pass. Exclusive jurisdiction can only rest with the receiving state.[60] The Treaty does not provide for the exclusive jurisdiction of the sending state.[61]

The new dominance of the receiving state's jurisdiction became evident in cases of concurrent jurisdiction, where an offense was punishable under both the law of the sending state and the law of the receiving state and both states could legitimately take action. The Treaty of Brussels resolved the jurisdictional conflict in favor of territorial jurisdiction.[62] The Treaty of Brussels, like the NATO-SOFA, established a system of priorities which assigned jurisdiction to either state depending on the importance of jurisdiction to either party.

The Treaty of Brussels divided offenses into two categories:

a. Offenses against the law of the Sending State or against its property, or against a member of the Force to which the offender belonged,

b. All other offenses.[63]

Under subdivision a, the receiving state could prosecute if it believed that special considerations required it to do so.[64] This creates an ambiguity. Which state defines what those special circumstances are? It would appear that the receiving state would have priority, leaving jurisdiction to the sending state only if the receiving state declined jurisdiction over the offense. Although waiver is provided in strong terms to the benefit of the sending state, the waiver provision is not mandatory.[65] Under subdivision b, jurisdiction lies solely with the receiving state. Thus, the Treaty of Brussels represents the new belief that territorial ju-

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[59] Treaty of Brussels, art.7, subd. 2.

[60] The receiving state enjoys an exclusive right of jurisdiction only when the offence against its law is not punishable under the laws of the sending state. Treaty of Brussels art. 7, para. 2.

[61] LAZAREFF, *supra* note 6, at 47.

[62] *Id.*

[63] Treaty of Brussels, art. VII, para.2.

[64] LAZAREFF, *supra* note 6, at 47.

[65] *Id.*

risdiction is a recognized doctrine and makes it evident that the law of the flag is not universally accepted.

II. Current Status of Forces Law in Europe

A. *The North Atlantic Treaty Organization, Status of Forces Agreement and Jurisdiction*

The NATO-SOFA is based on concurrent jurisdiction for most situations. When jurisdiction is concurrent, the primary right to exercise jurisdiction is given to either the sending or the receiving state, depending upon the type of offense and the circumstances in which the offense was committed.[66] Article VII delineates the method of determining whether the sending state or the receiving state shall have either exclusive or concurrent jurisdiction to try offenders.[67]

In cases of concurrent jurisdiction, Article VII prescribes which state obtains the primary right to act.[68] Concurrent jurisdiction arises when both states punish, by law, acts of the offender.[69] Since both states have a right to prosecute for the same offense, Article VII provides a method whereby one state receives the primary right to try the case and the other state steps aside. In contrast, exclusive jurisdiction, under NATO-SOFA, implies that only one state has the right to try the offender because the offense only violates the laws of that country.[70]

Article VII sets forth the respective criminal jurisdiction for the sending and the receiving states.[71] Paragraph I of Article VII

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[66] *See* NATO-SOFA, *supra* note 2, at art. VII, paras. 1, 3.

[67] *Id.* at art. VII, para. 1.

[68] *Id.*

[69] *Id.*

[70] *Id.* at art. VII, para. 2.

[71] 1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.

2-(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with

provides for concurrent jurisdiction.[72] Without this section, difficulties would arise. Due to the responsibility of a military command for the maintenance of discipline, and according to the principle of the law of the flag, the sending state has an interest in and the authority to try the case. The receiving state, as the territorial sovereign, is equally competent to prosecute an offense against its public order. To achieve these ends of managing the legitimate rights of both parties to the agreement, Article VII provides a system of priorities, as spelled out in paragraph 3 of Article VII.[73]

According to Article VII paragraph 3(a), the sending state has the primary right to exercise jurisdiction when the offense is solely against its personnel or property, or when the offense has been committed in the performance of official duty.[74] The receiving state has primary jurisdiction in all other cases.[75]

Primary jurisdiction in concurrent cases for the sending state thus falls into two categories. In the first case, the receiving

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respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
(b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.
(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include
(i) treason against the State;
(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.
3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
(ii) offences arising out of any act or omission done in the performance of official duty.
(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

Id. at art. VII, paras. 1-2, 3(a),(b).

[72] *Id.* at art. VII, para. 1.

[73] *Id.* at art. VII, para. 3.

[74] *Id.* at art. VII, para. 3(a).

[75] *Id.* at art. VII, para. 3(b).

state's interest is minimal because neither its nationals nor its territory have been violated. In this instance, only the sending state has an interest and the right to choose whether to prosecute an offender. The second category is probably the most controversial section and has led to the most discord. The issue here is what constitutes an act or omission done in the performance of official duty.

The principle holding that the local courts of the receiving state are not competent to try foreign servicemen committed in the performance of official duty is well established.[76] The serviceman, in the performance of official duty, is carrying out instructions that he has received from the sending state, which may not be before the court of the receiving state.[77] Therefore, the sending state is not confronted with the problem of answering to the courts of the receiving state for the orders given to the serviceman offender. This is the full import of paragraph (c)(ii) of paragraph 2 of Article VII.

Differences arise in the application of this section. Paragraph 3(a)(ii) of NATO-SOFA fails to provide any guidance as to the bounds of official duty. If the sending state determines official duty, it will make such determinations by its own criteria and in furtherance of its own policies, because each state has an interest in exercising jurisdiction to the fillest extent possible. Accordingly, sending states will define official duty in the broadest sense and receiving states will define official duty narrowly. Therefore, which state defines official duty is of considerable importance.[78]

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[76] LAZAREFF, *supra* note 6, at 170.

[77] *Id.*

[78] The vagueness of what is official duty was recognized in the Working Groups which formulated the drafts of the NATO-SOFA during its negotiations. In the first draft official duty was subject exclusively to the sending state's criminal jurisdiction. In the second and third drafts it was put in the concurrent section, with the sending state having the primary right to define the term. DR(51)15. During the negotiations, a great number of representatives believed that scope of duty should be clearly defined. The Italian delegate felt the act must be "done not only in the performance of official duty, but also within the limits of such duty." LAZAREFF, *supra* note 23, at 174. He gave an example of a driver traveling from one town to another on official business who for personal reasons deviated from the most direct route. If an accident occurred, this was not official duty. MS-R(51)14. The Canadian delegate was of the opinion that the act done in performance of official duty must be "within the duty orders of the person concerned." LAZAREFF, *supra* note 23, at 174. The Belgian representative was of the opinion that the

To fill this void in the agreement, the United States has generally relied upon *ad hoc* agreements with the various allies.[79] Thus, the outcome of paragraph 3(a)(ii) can be different depending upon which NATO country is involved. Consequently, serious disputes regarding the definition of official duty have been avoided. Most nations have agreed to accept a certificate of the United States authorities as to performance of official duty.[80] In the United Kingdom, the law which implements the agreement with the United States reads as follows:

> Where a person is charged with an offense against United Kingdom law and at the time when the offense is alleged to have been committed he was a member of a visiting force, a certificate issued by or on behalf of the appropriate authority of the sending country, stating that the alleged offense, if committed by him, arose out of and in the course of his duty as a member of that force or component, as the case may be, shall in any such proceedings as aforesaid be sufficient evidence of that fact unless the contrary is proved.[81]

Thus, the British accept the United States certificate as merely a presumption that may be rebutted by evidence to the contrary. In Turkey, a statute makes the United States certificate determinative.[82] In France, a circular of the French Ministry of Justice provides that the determination of the sending state will

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sending state should not have primary right to exercise jurisdiction in any case if a national of the receiving state was involved, even if the offense occurred in the performance of official duty. MS(J)R(51)2.

The documents of the "travaux preparatoires" are the following: Minutes of the Working Group MSR(51)1-26; Documents of the Working Group MS-D(51)1-34; Minutes of the Juridical Sub-committee MS(J)R(51)1-9. The "Travaux Preparatoires" of the NATO-SOFA have been published under the title of "International Law Studies 1961," U.S. Naval War College.

Thus, two sides can be demonstrated. The adherents of national sovereignty, e.g., the French and Belgians, sought a precise definition of the concept of official duty. The more precise definition leaves less discretion to the sending state in determining, according to its own criteria, whether an act or omission was done in the performance of official duty. Opposing this view, the U.S. representative was adherent to the law of the flag, and consistently opposed any precise definition of official duty, claiming such right for the sending state alone. LAZAREFF, *supra* note 23, at 174-177.

[79] *1 The Law of the Peace*, Dept. of the Army, Pam. 27-161-1, at 10-8 (1979) [hereinafter *Law of the Peace*].

[80] *Id.*

[81] Visiting Forces Act of 1952, para. 11(4).

[82] Turkish Law no. 68-76 (1956).

be accepted as conclusive if it is rendered by a staff judge advocate or legal officer.[83] The German resolution of this conflict takes a middle approach of the various examples. Article 18 of the Supplementary Agreement of August 1959 provides:

> 1. Whenever, in the course of criminal proceedings against a member of a force or of a civilian component, it becomes necessary to determine whether an offence has arisen out of any act or omission done in the performance of official duty, such determination shall be made in accordance with the law of the sending State concerned. The highest appropriate authority of such sending State may submit to the German court or authority dealing with the case a certificate thereon.
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> 2. The German court or authority shall make its decision in conformity with the certificate. In exceptional cases, however, such certificate may, at the request of the German court or authority, be made the subject of review through discussions between the Federal Government and the diplomatic mission in the Federal Republic of the sending State.[84]

This procedure makes the certificate determinative but allows questions to be asked. These questions, however, are left to diplomatic channels.[85] Article VII, paragraph 3(a)(ii) of NATO-SOFA allows jurisdiction to be different depending on how the states have agreed to sort out this ambiguity. Receiving state acceptance of the United States certificate ranges from prima facie to determinative.

B. *Exclusive Jurisdiction*

The sending state, pursuant to Article VII paragraph 2(a) of NATO-SOFA, has the right to exercise exclusive criminal jurisdiction over persons subject to its military law. This jurisdiction renders offenses punishable by the law of the sending state, but not by the law of the receiving state.[86] The same provision for the receiving state regarding exclusive criminal jurisdiction does not provide such limitation. The treaty clearly provides that ex-

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[83] LAZAREFF, *supra* note 6, at 181.
[84] *Id.*
[85] *Id.*
[86] NATO-SOFA, *supra* note 2, at art. VII, para. 2(a).

clusive criminal jurisdiction rests with the sending state only in cases of violations by the members of the military force and not in cases of offenses committed by the civilian components or dependents. It was not the drafters' intent to make United States laws enforceable in Europe except in a military disciplinary context.[87] This distinction is evident since civilian employees and dependents are not amenable to military courts and therefore are excluded from this provision.[88]

Pursuant to Article VII, paragraph 2(b) of NATO-SOFA, the receiving state has the right to exercise exclusive criminal jurisdiction over military employees, civilian employees and dependents, who can be punished by its law but not by the law of

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[87] Thus for example, the drafters sought to avoid the unnecessary enforcement of American law in areas beyond its jurisdiction. For example, it is against the law to drive on the left side of the road in the United States. If an American goes to Europe and drives on the left side of the road, it is proper according to European law. The treaty does not provide for the exercise of criminal jurisdiction where no law of the receiving state has been broken, although, the same conduct would be a crime if done in the sending state.

[88] The Supreme Court on three separate occasions has restricted the exclusive jurisdiction of the United States as a sending state by eliminating dependents and United States civilian employees from the category of "persons subject to the military law" of the United States.

In Reid v. Covert, Kinsella v. Kruger, 354 U.S. 269 (1957), the Supreme Court rejected the idea that when the United States acts against citizens abroad it can do so without regard for the Bill of Rights. The United States is entirely a creature of its Constitution. The Court held that all the constitutional safeguards apply to civilian employees and dependents and consequently in all cases these two groups are not subject to either military courts or military law. The dissent, by Justice Clark, who later wrote the majority opinion in *Guagliaro* and *Bohlender*, emphasized the importance of trial by the defendant's own countrymen and made reference to NATO-SOFA, finding that the intent of Congress was to obtain jurisdiction over all members of our forces, including civilian employees and dependents. Justice Clark felt that to decide as the majority did would frustrate the intent of Congress and actually reduce the scope of the United States jurisdiction over its nationals abroad.

Three years later in McElory v. Guagliaro, Wilson v. Bohlender, 361 U.S. 281 (1960), the Supreme Court held that civilian employees of overseas military forces were not subject to court-martial jurisdiction for non-capital offenses. The Court reasoned that a civilian, entitled by the Sixth Amendment to the Constitution to trial by jury, cannot constitutionally be made liable to the military law and jurisdiction in time of peace.

In the same year in Grisham v. Hagan, 361 U.S. 278 (1960), the Supreme Court held that the Army's treatment of dependents and civilian employees for court-martial amenability was unconstitutional.

The result of limiting court-martial status to only capital offenses is a compromise, which protects United States nationals from possible harsh results of foreign courts while allowing lesser crimes to be handled by foreign courts.

the sending state.[89] This provision for exclusive criminal jurisdiction is limited by the application of Article 134 of the Uniform Code of Military Justice (UCMJ).[90] This provision reads as follows:

> Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[91]

The application of this catchall provision makes many violations of local law a military violation of the UCMJ as well. The applicability of the UCMJ provision is significant because, if the offense is within the exclusive jurisdiction of the receiving state, there is no possibility of securing a waiver of jurisdiction under Article VII, paragraph 3(c) of NATO-SOFA. If the act is chargeable under Article 134, however, a waiver of jurisdiction can be requested and the receiving state must, according to NATO-SOFA, give it sympathetic consideration.[92] Thus, the jurisdiction of the receiving state can be greatly curtailed by the flexibility of Article 134 of the UCMJ.

In view of the American policy of reducing the scope of foreign jurisdiction over American forces, a broad interpretation of Article 134 is not undesirable.[93] The criteria for establishing a transgression of Article 134 is that the violation of foreign law must either be a disorder or neglect to the prejudice of good order and discipline or bring discredit upon the armed forces.[94] Merely causing personal injuries as a result of simple negligence does not automatically constitute an offense under the UCMJ.[95] The most frequent criminal offenses brought against all groups

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[89] NATO-SOFA, *supra* note 2, at art. VII, para. 2(b).

[90] Uniform Code of Military Justice, art. 134.

[91] *Id.*

[92] J.Rouse and G. Baldwin, *The Exercise of Criminal Jurisdiction under The Nato Status of Forces Agreement*, 51 AM. J. INT'L L. 29,39 (1987) [hereinafter Rouse].

[93] *Id.*

[94] United States v. Eagleson, 11 C.M.R. 893 (1953).

[95] United States v. Kirchner, 4 C.M.R. 69 1952).

of United States personnel involve traffic accidents and charges related to the damages resulting from such accidents.

The practical use of Article 134 is not clear. The United States military law recognizes that negligent homicide is an offense violative of either the first or second clause of Article 134.[96] It can be logically argued that personal injury of an individual resulting from simple negligence, differing from negligent homicide only by the fortuitous circumstance that the injured party did not die, likewise constitutes conduct of a nature to bring discredit upon the armed forces.[97] Thus, an expansive reading of article 134 of UCMJ can eliminate the receiving state's exclusive jurisdiction over only the armed forces of the sending state.

C. *Waiver of Jurisdiction by a Party*

The effect of waiver by one state of its primary right to exercise jurisdiction is an important aspect of Article VII. Paragraph 3(c) of Article VII provides for waiver of jurisdiction.[98] The section reads as follows:

> (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other state considers such waiver to be of particular importance.[99]

The United States, in order to obtain the broadest possible jurisdiction, always requests waiver in cases involving individuals covered by NATO-SOFA.[100] The significance of this waiver provision is evidenced by the fact that in a one-year period, be-

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[96] The court when seeking to define the scope of Article 134 held " we believe that acts of simple negligence, other than those causing homicide, do not injure the reputation of the armed forces within the meaning of Article 134." The court went on to hold that many factors must be considered when weighing the application of Article 134. United States v. Wolverton, 10 C.M.R. 641, 643 (1953).

[97] *Eagleson*, 11 C.M.R. at 897.

[98] NATO-SOFA, *supra* note 2, at para. 3(c).

[99] *Id.*

[100] Note, *Criminal Jurisdiction over American Armed Forces Abroad*, 70 HARV. L. REV. 1043, 1061 (1957).

tween December 1, 1954, and November 30, 1955, in the North Atlantic Treaty area, a waiver of local jurisdiction was obtained in 2,840 cases, representing more than half the offenses subject to foreign jurisdiction.[101] The Department of Defense has reported that the Army secured waiver of jurisdiction in over eighty-three percent of the offenses subject to the jurisdiction of NATO countries.[102] This high percentage of waivers is due in great measure to the good will between member nations in using informal as well as formal methods in securing waiver of jurisdiction.[103]

The ambiguity that arises from the waiver of criminal jurisdiction results from its effect on the rights of the respective states, rather than from how it is obtained. Once a waiver is sought and granted, can the nation that waived its right to jurisdiction get it back, if the state obtaining waiver later takes no action on the case? In view of the American policy to obtain

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[101] Letter dated October 12th, 1954 written by Mr. Struve Hensel of the Department of Defense to Senator Saltonstall. *Reprinted in* Re, *supra* note 4, at 356.

Mr. Hensel summarizes the report as follows:

> During this period, throughout the world, there were 3,787 offenses committed by personnel of the Army, Navy and Air Force and by persons associated with those forces which were subject to the jurisdiction of foreign courts. In 2,987 or 77% of these cases, the foreign authorities waived their jurisdiction. 627 cases were tried by the local courts, and these proceedings resulted in 77 sentences to confinement, of which 44 were subsequently suspended. Thus, in only 9/10 of 1% of cases subject to the jurisdiction of foreign courts were individuals forced to serve terms of confinement in foreign prisons.
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> In countries which are parties to the North Atlantic Treaty, including both nations which had ratified the NATO Status of Forces Agreement and those which had not, there were 1761 offenses committed which could have been tried in foreign courts. Waivers of jurisdiction were granted in 1259 or 70.5% of the cases. 384 individuals were tried in the courts of NATO Countries, and 45 received sentences to confinement, which were suspended in all but 20 of these cases (1.1% of all cases subject to the jurisdiction of NATO States).

Id. In this letter, Mr. Hensel adds:

> I believe that these statistics demonstrate that those countries in which United States forces are stationed are exercising their jurisdiction with discretion and in a spirit of cooperation. I believe that it is also important to emphasize that the Department of Defenses has received no reports for this period of any proceeding under the NATO Status of Forces Agreement in which the individual has been deprived of constitutional safeguards he would have enjoyed had he been tried in the United States.

[102] Hearing before the House Committee on Foreign Affairs on H.J. Res. 309, 84th Cong., 1st (and 2nd) Sess., Pt. 1 (1956), p. 572.

[103] Rouse, *supra* note 92, at 46.

waiver in every case, the occurrence of non-prosecution is likely.

One NATO member has faced this issue and has answered it in its courts. In November 1983, Major Whitley, an Air Force officer stationed in France, suffered a blowout while driving home from Paris where he had attended a social function.[104] His passenger was a Canadian Air Force major, Squadron leader Aitchison.[105] Whitley lost control of his vehicle, which was thrown against a tree, killing the Canadian officer.[106] Whitley sustained only bruises.[107]

Pursuant to a request of Air Force authorities, the public prosecutor agreed to waive French jurisdiction over the incident.[108] An informal Air Force investigation, not conducted under Article 32 of the UCMJ, concluded that the evidence was insufficient to warrant court-martial charges against Major Whitley for the death of the Canadian officer.[109]

Aitchison left a widow, whom Whitley's insurance company refused to compensate, claiming a third party was responsible.[110] The widow, who under Canadian law could receive no pension if the husband was not killed while on duty, therefore initiated a mixed civil/criminal action in accordance with the French judicial system based on civil law.[111] Aitchison's widow raised the issue of the French prosecutor's initial waiver of jurisdiction.[112]

The Tribunal Correctionnel of Corbeil held that a waiver is not irrevocable, and that since the United States did not try Major Whitley for his alleged offense, the French court could try him without securing a waiver from the United States.[113] The Tribunal Correctionnel's sentence, as affirmed by the Cour d'Appel of Paris, was one month's imprisonment and a 50,000

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[104] Aitchision v. Whitley, Corbeil Criminal Court, April 5, 1954; Paris Court of Appeals, 12th Chamber, May 16, 1956; Court of Cassation, Criminal Chamber, March 25, 1958. *Construed in* LAZAREFF, *supra* note 23, at 200-03; Edwin G. Schuck, *Concurrent Jurisdiction under the NATO Status of Forces Agreement*. 57 COL. L. REV. 355, 357-58 (1957).

[105] Schuck, *supra* note 104, at 357.

[106] *Id.*

[107] LAZAREFF, *supra* note 6, at 200.

[108] Schuck, *supra* note 104, at 357.

[109] *Id.* at 358-59.

[110] LAZAREFF, *supra* note 6, at 201.

[111] *Id.*

[112] *Id.*

[113] LAZAREFF, *supra* note 6, at 204.

franc fine.[114]

Major Whitley appealed to the Cour de Cassation.[115] The Cour de Cassation annulled the judgment against Major Whitley.[116] The basis of the French court's decision was that the waiver pursuant to Article VII 3(c) of NATO was final and binding.[117] It held that subsequent prosecution is a separate issue of waiver.[118] The court further held that the United States must expressly waive jurisdiction if the French courts are to have the right to try the case again.[119] Thus, waiver is a complete relinquishment of the right to exercise jurisdiction.

D. *Rights of the Accused*

The overriding concern of today's American policy-makers, as at the inception of NATO-SOFA, is the protection of the constitutional rights of American servicemen. Paragraphs 8 and 9 of NATO-SOFA's Article VII reflect this concern.[120] Jurisdiction is withheld from the receiving state if the guidelines of paragraphs 8 and 9 are not adhered to. Paragraph 8 of Article VII provides:

> 8. Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of another Contracting Party.[121]

It is important to note in the first clause of paragraph 8 that the accused must have been tried in accordance with the provision of Article VII. Consequently, for the accused to escape a

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[114] Schuck, *supra* note 104, at 359.
[115] LAZAREFF, *supra* note 6, at 205.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 208.
[119] *Id.*
[120] NATO-SOFA, *supra* note 2, at art. VII, paras. 8, 9.
[121] NATO-SOFA, *supra* note 2, at art. VII, para. 8.

second trial, the first trial must have been by the state with the right to exercise jurisdiction.

There have been cases where an accused was tried by one state, where the other state had the exclusive or primary right to exercise jurisdiction.[122] This was the situation that faced the Cour de Cassation,[123] where an American serviceman had been prosecuted before a French court for the offense of driving his automobile in a reckless manner.[124] The serviceman was convicted, although he pleaded double jeopardy, as he had already been punished by the American military authorities by reduction in grade and withdrawal of his driver's license.[125]

The Cour de Cassation held that the offense, for which the accused was charged, came within the purview of paragraph 3(b) of Article VII, thus giving the French judicial authorities a priority to exercise jurisdiction.[126] In addition, the court decided that the defendant had been convicted by error as the American authorities did not have the primary right of jurisdiction.[127] Thus, the defendant had not been tried in accordance with the provisions of NATO-SOFA and could not invoke paragraph 8, which specifically provides for the condition of a trial being held in accordance with the terms of Article VII.[128] This decision has been well received in the legal community.[129] It avoids a race for the contracting parties to conduct trials and therefore, in some cases, uses paragraph 8 to avoid the jurisdictional provisions.

This double jeopardy clause of NATO-SOFA does not prevent a sending state from prosecuting an accused, who has been tried under the courts of the receiving state.[130] It merely pre-

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[122] LAZAREFF, *supra*, note 6 at 231.

[123] Jensen Case, Cass. Crim. June 15, 1962, *reprinted in* LAZAREFF, *supra* note 6, at 231.

[124] LAZAREFF, *supra* note 6, at 231.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] NATO-SOFA, *supra* note 2, at art.VII, para.8.

This was not the intent of the drafters:

> [P]aragraph 8 provides that the prohibition of double prosecution for the same offense applies only to trial on the same territory. Therefore a serviceman, American for example, tried in France for a particular offence, could be tried again in the United States by the American authorities. Such a result certainly would not

vents an individual from being tried again for the same offense, within the same territory, by the authorities of another contracting party. This provision prevents the receiving state from committing double jeopardy against the accused while allowing the sending state to prosecute him upon his arrival to his home.[131]

The due process protection of American servicemen is provided for in Article VII, paragraph 9.[132] It would appear that this provision provides sufficient safeguards to protect United States servicemen from an unjust trial at the hands of a receiving state. Yet, there was much debate in the United States Senate, as to whether American servicemen's rights were adequately safeguarded.[133] Prior to the ratification of NATO-SOFA, the Senate adopted a statement or reservation proposed by its Committee on Foreign Relations.[134] This statement declared that the Senate had decided the agreement neither diminished nor otherwise altered the right of the United States to safeguard its security by excluding from the United States such persons whose presence is a danger to the United States.[135]

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be in accord with the goals of the drafters of SOFA but the language of the text does not allow any other interpretation.

LAZAREFF, *supra* note 6, at 232.

[131] NATO-SOFA, *supra* note 2, at art. VII, para. 8.

[132] NATO-SOFA, *supra* note 2, at art. VII, para. 9. This states:

9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;

(e) 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;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

[133] *See* 99 CONG. REC. 9081 (daily ed. July 14, 1953), *reprinted in* Re, *supra* note 4, at 360.

[134] Re, *supra* note 4, at 359.

[135] *Id.* This statement was amended to include additional matters:

(1) The criminal jurisdiction provisions of Article VII do not constitute a prece-

Although these safeguards are, in principle, common to all NATO countries, ordinary citizens of the sending state, including tourists of the State, may not avail themselves of these provisions. The objectives of NATO-SOFA are to define the status of persons who are on duty in a foreign country and to provide protection to members of the military forces, civilian components, and dependents.[136]

Sub-paragraph (a) provides for a prompt and speedy trial. In its first draft, there appeared in this section the right to a public and speedy trial.[137] In the versions that followed, and even in the final version, only the right to a speedy trial was retained. The requirement for a public hearing was abandoned.[138] The main reason for such a change was that states could not be required to modify their rules of procedure which may contemplate closed hearings under certain circumstances, such as cases involving State secrets and cases in which publicity

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dent 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 Service Committees of the Senate and House of Representatives.

See, NATO-SOFA, *supra* note 2, at 1828.

[136] LAZAREFF, *supra* note 6, at 210.

[137] *Id.*

[138] *Id.* at 211.

would present a danger for public order or morals.[139]

There is strong motivation by all parties to command a speedy trial. The United States does not want its servicemen confined to prison for long periods of time, as is the case sometimes in France, Italy and Turkey.[140] The receiving state does not want to see highly mobile servicemen evade its jurisdiction by being transferred out of it.

The next provision of the paragraph which has raised some questions is the accused's right to compel witnesses. This is provided for in sub-paragraph (d).[141] The problem was recognized early at the Working Sessions, and the first draft provided that the accused would "have the right of compulsory process for obtaining witnesses in his favor".[142] This very broad and absolute formula would have permitted members of a military force, civilian components and dependents to obtain witnesses in their behalf, even where citizens of the receiving state do not enjoy a similar right and where there is no procedure in the receiving state to compel such witnesses to attend.[143] This draft was modified to add "if within the jurisdiction of the receiving State".[144]

This addition may result in an individual receiving more rights than he would have under his own nation's laws. Under the agreement one can still obtain witnesses and compel their appearance even if the receiving state's procedural laws do not allow. This question was raised during the Working Sessions. The conclusion that appears to have been reached by the Judicial Sub Committee was that legislation would have to be adopted by each of the receiving states in order to compel witnesses to appear before the military tribunals of the sending

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[139] *Id.* For example, in Belgium, Article 96 of the Constitution provides that hearings shall be public unless it is dangerous for public order or morals in which event the court may declare a closed hearing by an order rendered in a public hearing. A closed hearing may likewise be ordered in the case of a political crime. Identical principles apply in Canada, Denmark, France, Greece, Italy, Luxembourg, The Netherlands, Norway, Portugal, Turkey and the United Kingdom. In Iceland, it is the law that all hearings before criminal courts are not public except those before the Supreme Court where the public is admitted. *Id.*

[140] LAZAREFF, *supra* note 6, at 212.

[141] NATO-SOFA, *supra* note 2, at art. IX, para.(d).

[142] LAZAREFF, *supra* note 6, at 216.

[143] *Id.*

[144] *Id.*

state.

Among all the NATO states, only the United Kingdom and Canada have passed legislation permitting the military forces to request the civil authorities of the receiving state to issue subpoenas for witnesses who are nationals of that state.[145] British legislation provides that any civil or military person may be summoned to appear before the British courts.[146] Similar procedures do not exist in France, and thus the sending state must request cooperation in order to compel witnesses to appear before its tribunal.[147] Therefore, obtaining witnesses is not difficult in the civil courts of the receiving state since all NATO countries have procedural provisions for compelling witnesses. Difficulty results when the sending state conducts military tribunals in the receiving state and seeks local citizens as witnesses.

Sub-paragraph (g) of paragraph 9 gives the right to an accused member of the NATO forces, civilian components, or dependents, "to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial."[148] The development of this section involved several modifications.[149] In the earlier drafts of the Working Sessions, a representative was provided at all stages of the accused's confinement and judicial process.[150] This was eliminated because it was believed to be too burdensome.[151] The third and final draft was far more restrictive. In this version, an observer is permitted only if the rules of the court allow.[152] Thus, the instrument which is designed to ensure that the rights of servicemen are respected, may be used to suppress those very rights. An observer is needed to evaluate objectively the court procedures. The Senate remembered this concern when it added its sense of the agreement to its

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[145] LAZAREFF, *supra* note 6, at 217.

[146] Visiting Forces Law, Application of Law (S.I. 1954, No. 635.), *construed in* LAZAREFF, *supra* note 23, at 217.

[147] Circular no. 53-38 of September 3, 1953, *reprinted in* Lazareff, *supra* note 23, at 217.

[148] NATO-SOFA, *supra* note 2, at art. VII, para. 9(g).

[149] LAZAREFF, *supra* note 6, at 222.

[150] *Id.*

[151] *Id.*

[152] NATO-SOFA, *supra* note 2, at art. VII, para. 9(g).

ratification.[153]

Paragraph 9 is an important provision of NATO-SOFA. Without this provision, the ratification of the Treaty by the Senate would have been doubtful. Many opposed the ratification because they felt that the rights of United States servicemen were not adequately protected. The late Senator McCarran was opposed to the ratification of the agreement, chiefly because it was "violative of the rights of American nationals."[154] He indicated that, although Paragraph 9 of Article VII "looks like a pretty good list," upon analysis "it becomes apparent that some of the most important guaranties under our own Bill of Rights have been omitted from this list."[155]

McCarran observed, among other things, that there were no provisions guaranteeing a public trial, the privilege against self-incrimination, freedom from cruel and unusual punishment, the right to appeal or review a decision, freedom of religion, freedom of speech and of the press, right of free assembly and petition, freedom from unreasonable searches and seizures, and the right to trial by jury.[156] Apart from the wisdom of inserting a Bill of Rights in an international treaty of this nature, it should be noted that some of the rights referred to, such as trial by jury, would have no application to a serviceman who would ordinarily be tried by a military court-martial.

CONCLUSION

NATO-SOFA suffers from many ambiguities. Most of these ambiguities are the result of conflicts over jurisdiction which were never resolved. Despite these differences, this treaty still represents an enlightened effort to bridge the differences that may come about because of the deployment of foreign troops on friendly soil.

A very difficult problem that has arisen in interpreting NATO-SOFA arises under the concurrent jurisdiction section. What is the definition of official duty for Article VII[157] pur-

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[153] Re, *supra* note 4, at 359.

[154] 99 CONG. REC. 9081 (daily ed. July 14, 1953).

[155] *Id.*

[156] *Id.*

[157] NATO-SOFA, *supra* note 2, at art. VII, 3(A)(ii).

poses? The inherent conflict of the two opposing interests of the contracting parties leads to differences over how broad an interpretation may be given to official duty. The agreement should create an official mechanism to make the official duty determination. *Ad hoc* agreements should not be over relied upon. These *Ad hoc* agreements will only endure as long as good relations between the various NATO allies continue. A uniform approach will ensure that all contracting parties are treated equally and prevent retaliatory actions regarding the various definitions of official duty.

NATO-SOFA suffers from other ambiguities as well. The use of Article 134 by the American military could lead to destruction of receiving state exclusive jurisdiction over members of the sending state forces. This question needs to be answered in the definitive. The intent of the drafters of NATO-SOFA could never have been to allow so easy a circumvention of their design for exclusive jurisdiction. Although it is in the American national interest to obtain jurisdiction in as many cases as possible, this agreement was created for the benefit of all and not just for one contracting member.

The omission of civilian components and dependents from the jurisdiction of military law brings into question whether it was the intent of the drafters to exclude these two groups from the possibility of sending state exclusive jurisdiction. The intent of the agreement is to define the status of all members of a military force, civilian employees and dependents. To treat the various groups so differently is not the intent of this agreement. Most believed that the civilian employees and dependents would be answerable to United States law. The United States needs to change its opinion as to the amenability of civilian employees and dependents to military law. Perhaps these two groups should be sent back to the United States for trial for crimes committed in Europe, rather than simply being forgotten as in some cases under NATO-SOFA.

The protection of servicemen's rights needs to be better assured under NATO-SOFA. The current system only works because of the common good will currently enjoyed between the various contracting parties. Paragraph 9 of Article VII is a good start as Senator McCarran remarked, but many important protections are not enumerated and thus could be ignored if the

receiving state were to so decide. A better incorporation of the United States Bill of Rights is called for in NATO-SOFA.

The question of waiver, as provided for in Article VII, is an important one. This agreement was in part created to serve justice. The victim of crimes should not be forgotten. The *Whitley* case demonstrates the possible ways waiver can be used to deny victims their day in court. The French prosecutor gave up jurisdiction fully expecting proper action would be taken by the American authorities. Major Whitley was at fault for the accident which occurred.[158] The American failure to adjudicate the case left Aitchison's widow without a forum. This result should not have been allowed. Waiver should be granted on the condition that appropriate action be taken. This leads to the question of just how appropriate action is to be defined. This can be easily delineated by requiring that some form of official action be taken before a party can simply drop a case. If a case is dropped the state which had the primary right to exercise jurisdiction should have a role in making the decision. Conversely, allowing the United States authorities to dismiss actions with such ease could lead the authorities of the receiving state to grant waivers less frequently. This could hurt our relations with our NATO allies and individuals who really need their case to be waived.

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[158] LAZAREFF, *supra* note 6, at 200.