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# Jurisdiction of the Receiving State over Forces of the Sending State under the NATO Status of Forces Agreement

## I. International Law Applicable to a Visiting Force and its Members in the Absence of Specific Agreements

The narrow question whether, in the absence of international agreements, such as the NATO Status of Forces Agreement (NATO SOFA) and similar treaties, the host (receiving) State or the visiting force (sending State) has the right to exercise criminal jurisdiction over members of the visiting force has been discussed in numerous law review articles.[1] However, the broader question of what the international law is on the entire relationship between the host nation and a visiting force in the absence of such agreements or, stated differently, on subjects not covered by provisions of such agreements as NATO SOFA, has received little attention. In

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[1]Rouse & Baldwin, *The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement*, 51 AM. J. INT'L L. 29-62 (1957); Baxter, *Jurisdiction over Visiting Forces and the Development of International Law*, AM. J. INT'L L. Proceedings, 1958, 174-180, 181-199; Baxter, *Criminal Jurisdiction in the NATO Status of Forces Agreement*, 7 INT'L COMP. L.Q. 72 (1958); Orfield, *Jurisdiction of Foreign Courts over Crimes Committed Abroad by American Military Personnel*, 8 S.C.L.Q. 346 (1956); *Re, 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); Barton, *Foreign Armed Forces: Immunity From Supervisory Jurisdiction*, 26 BRIT. YB. INT'L L. 380 (1949); Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction*, 27 BRIT. YB. INT'L L. 186 (1950); Schwelb, *Status of U.S. Forces in English Law*, 38 AM. J. INT'L L. 50 (1944); Note, 70 HARV. L. REV. 1043 (1957).

more specific terms, the question arises whether in the absence of such provisions the visiting force as well as its members are subject to the "jurisdiction" of the host nation.

Thus, for example, the host nation may claim, by virtue of its police power, the authority to enjoin the visiting force from polluting air or water, or from the continued use of training areas on the ground that they are unsafe, because of alleged lack of safety, or from maintaining its own schools for dependents or from practising medicine without a license of the host country, etc. The term "jurisdiction" is one of the most ambiguous terms in Anglo-American law.[2]

*a. The Status of the Visiting Force*

1. Whether or not, in the absence of provisions of international agreements covering the subject, the *visiting force* is subject to the civil jurisdiction of the courts of the host nation depends on whether the Government of the sending State, of which the force is an integral part, may successfully assert the defense of sovereign immunity from suit. Even though the question of immunity from suit is a matter of international law and the answer should, therefore, be uniform, the fact remains that States such as Great Britain[3] and Turkey[4] still adhere to the absolute theory of sovereign immunity, whereas numerous other States have adopted the so-called restrictive theory.[5]

Therefore, the question whether the sending State may successfully resort to the defense of sovereign immunity from suit, depends on whether the host nation's courts adhere to the absolute or restrictive theory of immunity and, in the latter case, how the courts of the host nation distinguish between acts "jure imperii" and acts "jure gestionis."[6] In some countries the question of the defense of sovereign immunity has been eliminated by special agreements, *e.g.*, in connection with offshore procurement.[7]

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[2]EHRENZWEIG & LOUISELL, JURISDICTION IN A NUTSHELL (1964), p. 7: "The student already must clearly perceive that the word 'jurisdiction' covers a multitude of ideas. It is indeed a chameleonic word, a cloak of many colors."

[3]Compania Naviera Vascongada v. Christina (1938) A.C. 458; Dollfus Meig et Cie v. Bank of England (1950) 1 Ch. 333; Duff Development Co. v. Government of Kelantan (1924) A.C. 797; Kahan v. Federation of Pakistan (1951) 2 K.B. 1003.

[4]TEKS Insaat ve Sanayi Ltd. and Byrne International Inc. v. United States, No. 68/921 (High Court of Cassation, Commercial Division, 16 Feb. 1968).

[5]Schwenk, *Immunity of the United States from Suits Abroad*, 45 MIL. L. REV. 30 (1969).

[6]*Supra* note 5, at 31.

[7]Robert S. Pasley, *Offshore Procurement*, MIL. L. REV., October 1962 (DA Pam 27-100-18, 1 October 1962) (page 55).

2. The defense of immunity from suit is a matter of *adjective* law. However, the question remains whether, in carrying out its activities, the visiting force is subject to the *substantive* law of the host nation. As mentioned above, the visiting force constitutes an integral part of the Government of the sending State. The activities of the Government in a foreign country are immune from the substantive law of the receiving State only to the extent provided by customary international law or treaty.[8]

*b. The Status of Members of the Visiting Force*

The question whether *members of the force* are subject to the court jurisdiction of the host nation must be divided into two parts: civil court jurisdiction and criminal court jurisdiction.

1. As far as the *civil court jurisdiction* of the host nation is concerned, there appears to be little doubt that a member of the force may sue or be sued in the courts of the host nation, depending on their jurisdiction over the subject matter and person under local law.

2. A more serious question arises with regard to the *criminal court jurisdiction* of the host nation over members of the visiting force. At the time when NATO SOFA was considered by the Committee on Foreign Relations of the US Senate, 83d Congress, 1st Session, Senator Bricker expressed the view that the members of the visiting force were not subject

[8]Article 23, Vienna Convention on Diplomatic Relations, provides:

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Article 28 provides:

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 34 provides:

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purpose of the mission;

(c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

to the criminal court jurisdiction of the receiving State.[9] He relied on Colonel Archibald King's two famous law review articles.[10] Colonel King in turn invoked primarily the case of the *Schooner Exchange v. McFaddon*.[11]

Contrary to the position taken by Senator Bricker, the State Department endeavored to prove that the members of the visiting force were subject to the criminal jurisdiction of the host nation. A memorandum prepared by the U.S. Department of Justice and entitled "International Law and the Status of Forces Agreement"[12] reached the conclusion that the receiving State had jurisdiction over offenses committed by members of the forces of the sending State. The Department of Justice pointed out that the *Schooner Exchange* case did not involve a question of criminal jurisdiction, and relied on a number of "cases in the tribunals of the world."[13] Senator Bricker's[14] reply to the Department of Justice's memorandum was that paragraph 12 of the US Courts Martial Manual, 1951, provided:

> Under international law, jurisdiction over members of the Armed Forces of the United States or other sovereign who commit offenses in the territory of a friendly foreign state in which the visiting armed force is by consent quartered or in passage remains in the visiting sovereign.

The dispute between Senator Bricker and the Department of Justice ended when the Senate gave its advice and consent to the NATO SOFA and the President of the United States ratified NATO SOFA. However, upon ratification of NATO SOFA, the question arose whether NATO SOFA could provide for jurisdiction of the receiving State over offenses committed within its borders by members of the sending State. This question was settled by the Supreme Court of the United States in the case of *Wilson v. Girard*,[15] and by the U.S. District Court of the District of Columbia in the case of *Smallwood v. Clifford*.[16]

The thrust of the two decisions is that, as a matter of international law, the host nation is vested with jurisdiction over members of the visiting

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[9]Congressional Record—Senate—July 14, 1953, p. 9036.

[10]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 (1946).

[11]Schooner Exchange v. McFaddon, 11 U.S. (Cranch) 116, 32 Ed. 287 (1812).

[12]Supplementary Hearing Before the Comm. on Foreign Relations, U.S. Senate, June 24, 1953, at p. 49.

[13]*Id.*, at p. 51.

[14]*Id.*, at p. 56.

[15]Wilson v. Girard, 354 U.S. 524 (1957), noted 51 AM. J. INT'L L. 794 (1957), 71 HARV. L. REV. 140 (1957), 18 LA. L. REV. 173 (1957), 42 MINN. L. REV. 825 (1958), 19 OHIO ST. L.J. 143 (1958), 32 ST. JOHN'S L.R. 117 (1957), 43 VA. L. REV. 939 (1957). *See also, Re, Status of Forces Agreement: The American Experience*, 35 ST. JOHN'S L. REV. 306, 316 (1961).

[16]Smallwood v. Clifford, 286 F. Supp. 97 (1968).

force, unless it expressly or impliedly agreed to surrender its jurisdiction. In the *Girard* case the U.S. Supreme Court failed to take issue with the dictum of the *Schooner Exchange* case, to the effect that "the grant of free passage 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."

However, the conclusion reached in the *Girard* and *Smallwood* cases appears to be in accord with general principles of international law under which, as a matter of principle, the host State normally has exclusive jurisdiction over all things and persons within its own territory.[17] In the past there existed only one exception to this principle: a number of Western Powers developed a system of "extraterritorial jurisdiction" which entitled the resident citizens of those Western Powers to be subject to the laws of their own governments and to be tried, if accused of offenses, by diplomatic or consular courts operated by, and under the laws of the Western States in question.[18] This system was based in part on custom and in part on special bilateral treaties, so-called "capitulations." In time, each of the States affected managed either to abrogate unilaterally or by agreement, these encroachments on its territorial sovereignty.

## II. Article II, NATO SOFA (Respect for Local Law)

The NATO Status of Forces Agreement[19] appears to dispose of the problem of over-all jurisdiction of the receiving State by virtue of Article II. The English text of the first sentence of Article II provides:

> It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State. . . .

The French text of Article II, NATO SOFA,—which according to the concluding paragraph of NATO SOFA is equally authoritative,—reads:

> Les membres d'une force ou d'un élément civil, ainsi que les personnes à leur charge sont tenus de respecter les lois en vigueur dans l'Etat de séjour. . . .

The two texts are not identical. Whereas the English text provides for a duty of "a *force and* the members thereof as well as their dependents" to respect the law of the receiving State, the French text limits the duty to "*members* of a force or of a civilian component and their dependents." The question then arises which version is correct.

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[17]Prugh, *The Soviet Status of Forces Agreements: Legal Limitations or Political Devices?* MIL. L. REV., April 1963 (D.A. Pam. 27-100-20, 1 April 1963).

[18]Hyde, International Law, Vol. II, pp. 849–871; Hackworth, Digest of International Law, Vol. II, pp. 493–621; Moore, A Digest of International Law, Vol. II, pp. 593–755.

[19]Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Force, June 19, 1951 (T.I.A.S. 2846; 4 U.S.T. 1792; 199 U.N.T.S. 67).

Unfortunately, the available background material on Article II does not shed any light on the reason for this discrepancy. Assuming the English version of Article II, NATO SOFA, prevails over the French it is questionable what is meant by the term "respect." It appears at least arguable that this term requires substantial rather than literal compliance with the law of the receiving State. If this interpretation is correct, the visiting force will have to pay in substance, and in substance only, due respect to local traffic law, water law, building regulations, health and sanitation law, etc., unless there are special provisions in either NATO SOFA[20] or implementing agreements[21] to the contrary.

### III. Article VII, Paragraphs 1 to 9, NATO SOFA (Criminal Jurisdiction)

Paragraphs 1 to 9 of Article VII, NATO SOFA, contain the criminal jurisdiction provisions. In order to alleviate the hardship resulting from the fact under the provisions of Article VII, NATO SOFA, American soldiers may be tried in foreign courts and under foreign law, the Senate adopted, by way of resolution, certain "reservations"[22] in giving its advice and consent to the NATO Status of Forces Agreements.

The impact of "reservations" to multilateral agreements has been a

[20]*E.g.*, Art. III, NATO SOFA, exempting members of the force from local passport and visa regulations and immigration inspection on entering or leaving the territory of a receiving State, as well as from the regulations of the receiving State on the registration and control of aliens; Article X exempting members of a force, or civilian component, from taxation in the receiving State on the salary and emoluments paid to them as such members by the sending State, or on any tangible movable property the presence of which in the receiving State is due solely to their temporary presence there.

[21]*E.g.*, in the Federal Republic of Germany: the Supplementary Agreement to the NATO Status of Forces Agreement with the Protocol of Signature to the Supplementary Agreement (T.I.A.S. 5351 14 U.S.T. 531; 481 U.N.T.S. 5262), and numerous special agreements on subjects such as "the Agreement between the Federal Republic of Germany and the United States of America, on the Settlement of Disputes Arising out of Direct Procurement" (T.I.A.S. 5352; 14 U.S.T. 689; 490 U.N.T.S. 30), Agreement on the Status of Persons on Leave (T.I.A.S. 5352; 14 U.S.T. 689; 490 U.N.T.S. 36), etc.

[22]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

controversial matter in international law.[23] It formed the subject of an opinion of the International Court of Justice.[24] Since it appears that the Senate's Reservations to the NATO SOFA were not intended to alter its provisions, they are purely of a municipal nature and, therefore, not distinguishable from the Reservations to the "Treaty between the United States and Canada Concerning Uses of the Waters of the Niagara River" of February 27, 1950[25] involved in the case of *Power Authority of New York v. Federal Power Commission*.[26] The Department of Defense implemented the Senate's Reservations by DOD Directive 5525.1, dated 20 February 1966 (Status of Force Policies and Information) and AR 27-50, dated 27 May 1966.[27]

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jurisdiction, the commanding officer shall 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.

[23]5 Hackworth, Digest of International Law 101-53 (1943); MILLER, RESERVATIONS TO TREATIES (1919); Anderson, *Ratification of Treaties with Reservations*, 13 AM. J. INT'L L. 526 (1919); Bishop, Reservations to Treaties, Hague Academy of International Law, 103 Recueil des Cours 243-321 (1962); Fitzmaurice, *Reservations to Multilateral Conventions*, 2 INT'L & COMP. L.Q. 1 (1953); *Harvard Research in International Law, Treaties*, 29 AM. J. INT'L L. 843-912 (Supp. 1935); Lauterpacht, *Some Possible Solutions to the Problems of Reservations to Treaties*, 39 TRANSACT. GROT. SOC'Y 97 (1954); Malkin, *Reservations to Multilateral Conventions*, 7 BRIT. YB. INT'L L. 141 (1926); Meek, *International Law: Reservations to Multilateral Treaties*, 38 YALE L.J. 1086 (1929); Sanders, *Reservations to Multilateral Treaties, Made in the Act of Ratification or Adherence*, 33 AM. J. INT'L L. 488 (1939).

[24]Advisory Opinion on Reservations, (1951) I.C.J. Rep. 15 (1951); 45 AM. J. INT'L L. 579 (1951): The General Assembly of the United Nations had sought an opinion as to ratification of the Genocide Convention. *See also* Yuen-li Liang, *The Third Session of the International Law Commission: Review of its Work by the General Assembly*-I, 46 AM. J. INT'L L. 483-503 (1952) for a detailed analysis of the opinion.

[25]Treaty Relating to Uses of Waters of the Niagara River (T.I.A.S. 2130; 1 U.S.T. 694; 132 U.N.T.S. 223).

[26]Power Authority of the State of New York v. Federal Power Commission, 101 U.S. App. D.C. 132, 247 F.2d 538 (1957) (D.C. Cir.), remanded with direction to dismiss as moot, 355 U.S. 64 (1957).

[27]Part IV A (Procedures) of the Directive and part 3 of AR 27-50 provide:

It is intended to provide herein, *inter alia*, for the implementation of the Senate Resolution accompanying the Senate's consent to ratification of the Status of Forces Agreement (Appendix Y). Although the Senate Resolution applies only in countries where the NATO Status of Forces Agreement is currently in effect, the same procedures for safeguarding the interests of United States personnel subject to foreign jurisdiction will be applied insofar as practicable in all overseas areas where United States forces are regularly stationed.

It should be noted that the Senate provided in the First Reservation that the criminal jurisdiction provisions of Article VII did not constitute a precedent for future agreements. It should be further noted that under the Second Reservation 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, *i.e.*, that the Commander in Chief, through his Judge Advocate, must prepare what is known as a "country study."

In such a "country study," he must compare the constitutional rights the accused would enjoy in the United States with equivalent rights the accused will enjoy in the receiving State, in order to determine whether there is a danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States. It is generally assumed that the constitutional rights referred to in the Senate Reservations are those granted in *State* courts. However, those rights have been under a constant flux. Thus, in recent years the U.S. Supreme Court extended the rights of the accused in State trials by virtue of the Fourteenth Amendment to: (1) Rights to speedy trial;[28] (2) Effective representation by counsel;[29] (3) Privilege against self-incrimination;[30] (4) Exclusionary rule of evidence;[31] (5) Right to confrontation with witnesses;[32] (6) Right to trial by jury;[33] (7) Prohibition of double jeopardy.[34]

Also, in determining the procedural safeguards of an accused under the local law of foreign NATO countries, due attention must be given to the European Human Rights Convention,[35] which contains a number of procedural safeguards of an accused in Articles 5,[36] 6,[37] and 7.[38] The European

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[28]Klopfer v. North Carolina, 386 U.S. 213 (1967); Smith v. Hooey, 393 U.S. 374 (1969).

[29]Gideon v. Wainwright, 372 U.S. 335 (1963); White v. Maryland, 373 U.S. 59 (1963); Massiah v. U.S., 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964); Burgett v. Texas, 38 U.S. 109 (1967).

[30]Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964). As to the scope of the privilege against self-incrimination, *see* Boyd v. U.S., 116 U.S. 616 (1885); Griffin v. California, 380 U.S. 609 (1965); Miranda v. Arizona, 384 U.S. 436 (1966).

[31]Mapp v. Ohio, 367 U.S. 643 (1961); Linkletter v. Walker. 381 U.S. 618 (1965). *See also* 30 A.L.R., 3d 128 (Annotation).

[32]Pointer v. Texas, 380 U.S. 400 (1965). For subsequent cases, see *Right to Confront Witnesses* in 23 L. ED. 2d 861.

[33]Duncan v. Louisiana, 391 U.S. 145 (1968); Bloom v. Illinois, 391 U.S. 194 (1968).

[34]Benton v. Maryland, 395 U.S. 784 (1969) overruling Palko v. Connecticut, 302 U.S. 319 (1937).

[35]Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, amended by Five Protocols. For the text of the Convention, *see* 45 AM. J. INT'L L. 24-39 (Supp. 1951). For a discussion, *see* Coblentz and Warshaw, *European Convention for the Protection of Human Rights and Fundamental Freedom*, 44 CAL. L. REV. 94 (1956); Schindler, *The European Convention on Human Rights in Practice*, 1962 WASH. U.L.Q. 152; Triska, *Individual and His Rights in the European Community*, 31 TUL. L. REV.

283 (1957); Waldock, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 54 BRIT. YB. INT'L L. 356 (1958).

[36]Article 5 of the European Human Rights Convention provides:

(1) Everyone has right to liberty and security of person. No one shall be deprived of this liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

[37]Article 6 of the European Human Rights Convention provides:

(1) In the determination of his civil rights and obligations or for any criminal charge against him, everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[38]Article 7 of the European Human Rights Convention provides:

Human Rights Convention has been ratified by all members of the European Council, except France and Switzerland, namely by the following 16 countries: Austria, Belgium (NATO), Denmark (NATO), Federal Republic of Germany (NATO), Great Britain (NATO), Cyprus (except as to individual complaint and Human Rights Court), Greece (NATO), Iceland (NATO), Ireland, Italy (NATO), Luxembourg (NATO), Malta, The Netherlands (NATO), Norway (NATO), Sweden, Turkey (NATO).

In comparing two different systems of law, one should not jump to conclusions, but remember what two distinguished lawyers said in an enlightening law review article:[39]

> One further observation should be made. The student should not hasten to the conclusion that, because differences are found to exist between the procedures of two nations, that necessarily means—or even probably means—a different result will be reached in a criminal prosecution by one sovereign rather than by the other.

The Third Reservation imposes on the Commanding Officer the duty to request the authorities of the receiving States to waive jurisdiction in accordance with paragraph 3(a) of Article VII, NATO SOFA, only if, in his opinion, "under all 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.

Thus, the absence or denial of constitutional rights the accused would enjoy in the United States by itself is not the decisive factor. Instead, it is only such absence or denial of constitutional rights which would bring about the danger that the accused will not be protected. In other words, the fact that a constitutional right prescribed by the Fourteenth Amendment, as interpreted by the U.S. Supreme Court, does not or not fully exist under the system of foreign law must be weighed against other circumstances which might outbalance this shortcoming. Thus, for example, a constitutional right which under the adversary system of the common law may be absolutely essential to a fair trial may not be absolutely vital to the investigatory system of the civil law.

Finally, it should be noted from the Fourth Reservation of the Senate Resolution, that a trial observer must be appointed to attend the trial of a

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(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

[39]Joseph M. Snee & A. Kenneth Pye, *Due Process in Criminal Procedure: A Comparison of Two Systems*, 21 OHIO L.J. 467, 473 (1960).

member of the force, civilian component, or dependent in a foreign court, in order to ascertain whether a local court, when trying a member of the force, civilian component, or dependent, fails to comply with paragraph 9 of Article VII, NATO SOFA, which prescribes a number of safeguards[40] a foreign court must observe in trying a member of a force, civilian component, or dependent.

One of the safeguards set forth in paragraph 9 of Article VII, NATO SOFA is the right to prompt and speedy trial. This provision emanates from the Constitution of the United States.[41] A similar provision is contained in the European Human Rights Convention.[42] However, it is a different question whether a violation of the right to prompt and speedy trial has the same effect under the local law of foreign NATO countries as it has in the United States, namely, dismissal of the charges.

Thus, for example, the German Supreme Court[43] held that a failure of the German courts to comply with the prompt and speedy trial provision of paragraph 9 of Article VII, NATO SOFA, does not have any legal consequences, since no sanction has been provided in Article VII, NATO SOFA, or in the corresponding provision of the European Human Rights Convention. However, a lower German court ruled recently to the contrary.[44]

In order to ascertain whether the sending State has exclusive or concurrent jurisdiction over a particular offense, it is necessary to determine whether an offense under the UCMJ constitutes also an offense under local law and vice versa. Thus, exclusive jurisdiction of local courts exists over

[40]Para. 9 of Art. VII, NATO SOFA provides:

> 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 for his defence 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 this trial.

[41]Sixth Amendment to the U.S. Constitution. It applies to state trials by virtue of the Fourteenth Amendment according to Klopfer v. North Carolina, 386 U.S. 213 (1967) and Smith v. Hooey, 393 U.S. 374 (1969).

[42]Article 6 of the European Human Rights Convention. *See* note 37, *supra*.

[43]Judgment of the German Supreme Court of 12 July 1966 in the case of PFC Earl Small (Decisions of the German Supreme Court in: Criminal Cases, Vol. 21, p. 81). Schwenk, Das Recht des Beschuldigten auf alsbaldige Hauptverhandlung, published in 79 Zeitschrift für die gesamte Strafrechtswissenschaft 722-740 (1967).

[44]Judgment of the Landgericht Frankfurt/Main of 5 Nov. 1970, published in issue no. 7 of "Juristenzeitung" 1971, pp. 234-236.

members of the civilian component and dependents in peacetime due to the fact that the U.S. Supreme Court held in the case of *Reid v. Covert*[45] that courts-martial lack peacetime jurisdiction over them.

Whether the decision of the U.S. Supreme Court in the case of *O'Callahan v. United States*[46] denying jurisdiction to courts-martial over non-service connected offenses, results in exclusive jurisdiction of local courts over such offenses in a NATO country, has not yet been determined by the U.S. Supreme Court. However, in deciding the case of *United States v. Keaton,*[47] the United States Court of Military Appeals held, by obiter dictum, that the constitutional limitation on court-martial jurisdiction laid down in *O'Callahan v. Parker* is inapplicable to court-martial held outside the territorial limits of the United States.

## IV. Article VIII, NATO SOFA (Claims)

Another provision of NATO SOFA implemented by local law is Article VIII, the provision dealing with claims against the force of the sending State. Article VIII provides for two kinds of claims, namely:

(1) Scope claims dealt with in paragraph 5 of Article VIII; and

(2) Non-scope claims (so-called *ex gratia* claims) dealt with in paragraph 6 of Article VIII, NATO SOFA.

Scope claims are divided into two kinds:

(a) Claims arising out of acts or omissions of members of a force or civilian component done in the performance of official duty; and

(b) Claims arising out of any other act, omission or occurrence for which a force or civilian component is legally responsible.

Whereas the claims under (a) refer to acts or omissions of *members* of a force or civilian component (but not dependents) done in the performance of official duty, the claims under (b) pertain to acts, omissions or occurrences of a force or civilian component as such, and such claims under (b) arise only if the force or civilian component "is legally responsible."

[45]Reid v. Covert and Kinsella v. Krueger, 354 U.S. 1 (1957) (dependents); Kinsella v. United States, 361 U.S. 234 (1960) (dependent); Grisham v. Hogan, 361 U.S. 278 (1960) (civilian employee); McElroy v. U.S. 361 U.S. 281 (1960) (civilian employee); *see* Schuck, *Trial of Civilian Personnel by Foreign Courts,* 2 MIL. L. REV. (D.A. Pam 27-100-2, September 1958) 37, and Harrison, *Court-Martial Jurisdiction of Civilians—A Glimpse at Some Constitutional Issues,* 7 MIL. L. REV. 61 (D.A. Pam 27-100-7, January 1960).

[46]O'Callahan v. Parker, 395 U.S. 258 (1969). *See also* Wurtzel, *O'Callahan v. Parker: Where Are We Now?* 56 A.B.A.J. 686 (1970).

[47]U.S. v. Keaton, 19 U.S.C.M.A. 64 (1969) 64 A.J.I.L. 431 (1970); U.S. v. Easter, 19 U.S.C.M.A. 68 (1969) 64 A.J.I.L. 433 (1970); U.S. v. Stevenson, 19 U.S.C.M.A. 69 (1969); U.S. v. Higginbotham, 19 U.S.C.M.A. 73 (1969); U.S. v. Gill, 19 U.S.C.M.A. 93 (1969). *See also* Gallagher v. U.S., 423 F.2d 1371 (1970) (Court of Claims); 64 A.J.I.L. 959 (1970).

Whether the force is "legally responsible," is a question of local law. Moreover, pursuant to paragraph 5(a) of Article VIII, NATO SOFA, the filing of claims, and their consideration and settlement or adjudication must be done "in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces."

The claimant may not only file a claim under local adjective and substantive law, but he may also bring suit against the individual member of the force or civilian component in the competent local courts. In this case, NATO SOFA[48] provides that "the sending State shall not claim immunity from the jurisdiction of the courts of the receiving State, for members of a force or civilian component in respect of the civil jurisdiction of the courts of the receiving State, except to the extent provided in paragraph 5(g) of Article VIII, NATO SOFA, Paragraph 5(g) of Article VIII, NATO SOFA, prescribes that "a member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties." Consequently, a lawsuit against a member of a force or the civilian component in a matter arising from the performance of his official duties would be a futile exercise.

### V. Article IX, Paragraph 3, NATO SOFA (Rights and Obligations Arising Out of the Occupation or Use of Buildings, Grounds, Facilities, or Services

The last sentence of paragraph 3 of Article IX, NATO SOFA, prescribes:

> In the absence of a specific contract to the contrary, the laws of the receiving State shall determine the rights and obligations arising out of the occupation or use of the buildings, grounds, facilities or services.

This provision means that, unless the US Government as a sending State, has "a specific contract to the contrary," the occupation of buildings and grounds is governed by local law. The device under local law providing for the occupation or use of buildings and grounds could be normal leases, easements, hereditary rights, etc. As far as the use of "services" is concerned, procurement of utlities (water, gas, electricity, garbage collection, etc.) is likewise governed by local law. Such law may be federal, state or municipal.

Since the NATO SOFA provisions appear to be self-executing, they

[48]Para. 9 of art. VIII, NATO SOFA.

supersede prior conflicting Acts of Congress.[49] The application of local procurement law may encounter difficulties. Thus, U.S. procurement regulations[50] require the use of certain standard clauses, such as the disputes clause. Under this clause, disputes are determined by the contracting officer of the U.S. Army and, upon appeal, by the local Board of Contract Appeals and, upon further appeal, if the amount involved exceeds $50,000, by the Armed Services Board of Contract Appeals in Washington, D.C. In all these instances, one of the parties, namely the executive branch of the U.S. Government, renders the final decision unless determined by a court of competent jurisdiction to have been "fraudulent, or capricious, or arbitrary, or so grossly erroneous, as necessarily to imply bad faith." Such a concept of unilateral determination of disputes might be in violation of the local law of other NATO countries.[51] Therefore, special agreements with other NATO countries might provide for the recognition of the disputes clause.[52]

**VI. Article IX, Paragraph 4, NATO SOFA (Local Labor)**

Paragraph 4 of Article IX, NATO SOFA, provides that

> . . . The conditions of employment and work, in particular wages, supplementary payments and conditions for the protection of workers, shall be those laid down by the legislation of the receiving State. . . .

This Provision deals with the conditions of employment and work of local labor. Such local labor can be employed by the force either directly (direct hire) or indirectly (indirect hire). If local labor is directly employed by the U.S. Forces abroad, the U.S. Government is the employer;[53] if local labor is indirectly employed, a governmental agency of the receiving State is responsible for the employment of local labor and its terms and conditions. However, in both instances, conditions of employment and work are governed by local law.

This local law encompasses, as a rule, the entire body of local labor law. Such local labor law might include legislation for the protection of workers and employees against termination of employment,[54] for the establishment

[49]Cook v. U.S., 288 U.S. 102 (1933).

[50]*See* ASPR 7-103.

[51]Pasley, *Offshore Procurement*, MIL. L.REV., October 1962 (D.A. Pam 27-100-18, 1 October 1962) 80-81.

[52]*E.g.*, Agreement between the Federal Republic of Germany and the United States of America on the Settlement of Disputes arising out of Direct Procurement of 3 August 1959, *op. cit.*, note 21.

[53]This is the holding of the German Supreme Labor Court (Bundesarbeitsgericht) of 20 December 1957, published in Vol. 5, page 130, of "Entscheidungen des Bundesarbeitsgerichts" (Official Decisions of the Supreme Labor Court).

[54]*E.g.*, in the Federal Republic of Germany: "Kündigungsschützgesetz" (Law for the Protection Against Termination of Employment) of 10 August 1951 (BGBl 1944).

of works councils,[55] for the protection of pregnant women,[56] for maximum working hours,[57] for annual leave,[58] etc. Furthermore, local labor law may prescribe that employees have a right to work in addition to the right to be paid.[59]

Finally, in case a local employee sues the U.S. in case of direct hire for breach of contract, the question arises whether such a suit is barred by the defense of sovereign immunity. The answer to that question depends on whether the receiving State adheres to the absolute or restrictive theory of sovereign immunity,[60] and in the latter case whether employment of local labor is considered an act "de jure imperii" (governmental) or "de jure gestionis" (proprietary).[61]

## VII. Conclusion

Even though NATO SOFA attempts to divide jurisdiction in certain fields over the visiting force between the sending and the receiving State, certain gaps exist that must be filled by general principles of international law. An order issued by the government of the receiving State against the force of the sending State would be incompatible with the sovereignty of the sending State. Moreover, it would appear that the force of the sending State retains certain jurisdiction, even though NATO SOFA does not provide for such jurisdiction.

Thus the force of the sending State may maintain its own schools for its dependents, despite the fact that compulsory school laws of the receiving State prescribe that all children must attend the schools of the receiving State. Physicians of the force may practice medicine, even though they have no license from the receiving State to do so. Moreover, orders issued by judicial or administrative agencies of the receiving State against the

[55]*E.g.*, in the Federal Republic of Germany: "Personal-vertretungsgesetz" (Personnel Representation Law) of 5 August 1955 (BGBl 1477), as modified by Re Article 56, Protocol of Signature to the Supplementary Agreement regarding the Status of Foreign Forces stationed in the Federal Republic of Germany.

[56]*E.g.*, in the Federal Republic of Germany: "Mutterschutzgesetz" (Law for the Protection of Pregnant Women) of 18 April 1968 (BGBl I 315).

[57]*E.g.*, in the Federal Republic of Germany: "Arbeitszeitordnung" (Maximum Working Hours Law) of 30 April 1938 (RGBl I 447).

[58]*E.g.*, in the Federal Republic of Germany: "Bundesurlaubsgesetz" (Federal Leave Law) of 8 January 1963 (BGBl I 2).

[59]*E.g.*, in the Federal Republic of Germany: Decision of the German Supreme Labor Court of 10 November 1955, published in Vol. 2, page 217, of "Entscheidungen des Bundesarbeitsgerichts" (Official Decisions of the Supreme Labor Court).

[60]On the distinction between *"acts jure imperii"* and *"acts jure gestionis," see* Schwenk, *Immunity of the United States from Suits Abroad,* 45 MIL. L. REV. 23, 29 (1969) (DA Pam 27-100-45, 1 July 1969).

[61]Thus, the Italian Supreme Court held, in the case of Bellotto v. United States, on 13 February 1959, that employment of local labor in Italy constitutes an act *"de jure gestionis."*

force of the sending State, enjoining alleged breaches of local law, appear to be repugnant to the sovereignty of the sending State.

Such breaches of local law may either amount to a violation of Article II, NATO SOFA, or may give rise to a claim under Article VIII, NATO SOFA. As a result, whereas many questions pertaining to the relationship between the sending and receiving State have been disposed of by the provisions of NATO SOFA, numerous questions have been left open and should be solved either by supplementary agreements or by negotiations on a case-by-case basis.