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International Law in the
United States Court of Military Appeals

by Burrus M. Carnahan*

I. INTRODUCTION

Domestic courts have a special role in the development of international law. While executive agencies deal with international law more frequently than the courts, the decisions of the former are more often tainted by political, rather than purely legal, considerations.1 Especially in the American system of government, the judiciary is said to have done far more for the interpretation, application and growth of international law than either of the other two branches of government.2

This article examines the international law decisions of a particular American court, the United States Court of Military Appeals (Court). Created by Congress in 1950 as a civilian 'supreme court' for the military justice system, the Court of Military Appeals is an 'Article I' court consisting of three judges appointed from civilian life for staggered 15-year terms.3

In general, the Court reviews, for errors of law, court-martial convictions in which the accused has received a sentence including a punitive discharge from the service or confinement for more than one year. Most cases reach the Court either through petition of the accused or, on certification by the Judge Ad-

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1. See 1 G. Schwarzenberger, INTERNATIONAL LAW 34 (3d ed. 1957) [hereinafter cited as Schwarzenberger].
vocate General of the service concerned, though a few cases are disposed of through mandatory review or extraordinary writs.¹

First sitting in October, 1951, the Court has been active during two major armed conflicts as well as the post-World War II expansion of American bases overseas. It is not surprising, then, that the Court has decided a number of cases raising issues of international law. Although its decisions have appeared in collections of international law source materials,² so far no attempt has been made to collect and analyze the various opinions of the court dealing with this subject. The primary purpose of this article is to systematically present the international law jurisprudence of the Court, and thereby to bring attention to a previously ignored body of U.S. practice in international law. A subsidiary purpose will be to critique these decisions. After examining the common ancestry of international law and military law, the article will consider the Court’s positions on several international legal issues, proceeding from such general issues as the nature and sources of international law to specific questions such as the customary status of visiting foreign forces and the interpretation of particular language in status of forces agreements. The principal focus of the article will be on the ‘law of peace’ rather than the ‘law of war.’

II. THE COMMON ORIGINS OF INTERNATIONAL AND MILITARY LAW

Until the seventeenth century, both military law and international law were regarded as aspects of a greater common law of Europe whose origin was the civil law of ancient Rome. Rediscovered in the 1100’s, for centuries Roman law was the only law taught in European universities.⁶ Universally known and universally respected, it was applied to those international political and commercial relations which were not felt to be appropriately subject to a local law such as the common law of England. Thus the Law Merchant, maritime law and the law of international relations were all governed by the civil law.⁷

Civil law jurists also dominated the field of British military law, at least up

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until the end of the English Civil War. In large part this may have been due to the esteem which Elizabethans accorded to the ancient Romans in all things military. The military law of ancient Rome was felt to be more than adequate for turning modern Europeans into disciplined and effective soldiers.

International law and military law also share a common origin in the medieval Law of Arms, which applied to all nobles, knights and other men-at-arms. Enforced by royal heralds and constables, it covered such matters as the rights and duties of prisoners of war, the division of ransoms, treason, and any other matter touching the 'honor' of a member of the military classes. It thus combined elements of both military law and the international law of war. In England the Law of Arms was enforced by the Court of the Constable and Marshal. These high officers of state had military disciplinary powers, and many authorities believe their Court was an ancestor of the modern court-martial. Proceedings in this Court, too, were governed by the civil law.

A. The Court and Modern Sources of International Law

1. Treaties

Today, of course, Roman law is not an independent source of authority for either American military law or the law of nations. As stated in the Statute of the International Court of Justice, the primary sources of modern international law are:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;


9. See H. WEBB, ELIZABETHAN MILITARY SCIENCE 25-26, 37 (1965); C. BRAND, ROMAN MILITARY LAW 143-44, 183 (1968). John Adams expressed similar sentiments while a member of a committee of the Continental Congress to revise the Articles of War as late as 1776.

There was extant one System of Articles of War, which had carried two Empires to the head of Mankind, the Roman And the British: for the British Articles of War were only a literal Translation of the Roman: it would be in vain for US to seek . . . for a more compleat System of military discipline . . . .


b. international custom, as evidence of a general practice accepted
as law;

c. the general principles of law recognized by civilized na-
tions. . . .12

Conventions, or treaties, are of course part of the "supreme Law of the
Land" under the federal constitution, and the Court of Military Appeals (the
Court) has expressly acknowledged that treaties are part of the law which it
will apply.13 It has, for example, held that treaties and international agree-
ments can give powers to American military commanders which they might
not otherwise possess.14 The Court has also taken judicial notice, on appeal, of
international agreements which were not included in the record of trial.15

2. Custom and General Principles

Customary international law also "is part of our law, and must be ascer-
tained and administered by the courts of justice . . . as often as questions of
right depending upon it are duly presented. . . ."16 The third major source of
international law — general principles recognized by civilian nations — has
not, however, received the same attention from federal courts as the first two.

12. STATUTE OF THE I.C.J., art. 38, para. 1(d) establishes that "judicial decisions and the
 teachings of the most highly qualified publicists of the various nations, as subsidiary means for
the determination of rules of law." Id. para. 1(d). The actual law-creating processes are, how-
ever, limited to those described in subparagraphs (a) through (c). Id. paras. 1(a), (b), (c). Sub-
paragraph (d) merely states "some of the means for the determination of alleged rules of interna-
tional law." SCHWARZENBERGER, supra note 1, at 26.

treaties from executive agreements. For cases in which the Court has used executive agreements
as a source of law, see United States v. Wilmot, 11 C.M.A. 698, 29 C.M.R. 514 (1960); United
States v. Robertson, 5 C.M.A. 806, 19 C.M.R. 102 (1955). In 1956, an intermediate military
appeal court, the Air Force Board of Review, held that an executive agreement could not limit
the jurisdiction which American courts-martial had been given by an Act of Congress. United

v. Chasels, 9 C.M.A. 424, 26 C.M.R. 204 (1958) (international agreement supports the charge
that a "regulation" was violated by the accused); United States v. Smith, 9 C.M.A. 240, 26
C.M.R. 20 (1958) ("regulation" is a valid implementation of a treaty obligation); See generally
Alley, The Overseas Commander's Power to Regulate the Private Life, 37 MIL. L. REV. 57, 115-20
(1967).


16. The Paquete Habana, 175 U.S. 677, 700 (1900). For early federal cases applying
customary international law, see, e.g., The Marianna Flora, 24 U.S. 1 (1 Pet.) (1826); Brown v.
United States, 12 U.S. 110 (6 Cranch) (1814). See also Dickinson, The Law of Nations as Part of the
"duly presented" may be an indirect reference to the "political questions" doctrine. See L.
HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 210-16 (1972). While the exact limits of this
discipline are far from clear, at a minimum it apparently means that the courts will not rule on
whether the United States is lawfully participating in a particular armed conflict. See, e.g., United
The comprehensive research in comparative law which this technique requires has perhaps discouraged its use by litigants and judges in the United States. Nevertheless, the Court of Military Appeals attempted, with some success, to apply this source in the case of United States v. Schultz.

In 1950 John G. Schultz was the driver of a car which struck and killed two pedestrians in Nagoya, Japan. At the time of the accident Schultz was an American civilian accompanying the U.S. armed forces in Japan; he was thus, as the law was then understood, amenable to trial by court-martial. Found guilty of negligent homicide, he was sentenced to one year's confinement and a $1,000 fine.

Between the time of the accident and the time of his arrest, however, his employment with the U.S. occupation forces had terminated and he had reverted to the status of an ordinary 'commercial entrant' in Japan. After intermediate appellate proceedings had run their course, the Judge Advocate General of the Air Force brought the case to the Court of Military Appeals by certifying three questions to the Court, including "[w]hether the court-martial had jurisdiction of the accused and of the offenses charged." Though the Court of Military Appeals held that Schultz was no longer "accompanying the armed forces" at the time of trial, it still upheld military jurisdiction based on Article of War 12, which provided that:

General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals. . .

Speaking through Chief Judge Quinn, the Court held that as the occupying power in post-World War II Japan, the United States had the right under "judicially recognized concepts of international law" to establish tribunals in

17. Cf. SCHLESINGER, supra note 6, at 32.
19. The Uniform Code of Military Justice, art. 2(11), 10 U.S.C. § 802(11) (1976), authorizes court-martial jurisdiction over civilians "serving with, employed by, or accompanying the armed forces" outside the United States. In McElroy v. Guagliardo, 361 U.S. 281 (1960), and Grisham v. Hagan, 361 U.S. 278 (1960), the Supreme Court held that this provision could not constitutionally be applied to civilian employees in peacetime. At the time of Schultz's trial the Uniform Code was not yet in force. Therefore, he was tried under its predecessor statute, the Articles of War, 10 U.S.C. § 1471 (repealed 1950), article 2(d) of which also authorized trial of "persons accompanying or serving with" the Army outside the United States. Schultz, 1 C.M.A. at 516, 4 C.M.R. at 108.
20. Id.
Japan with jurisdiction over American civilians in that country. The court-martial therefore had jurisdiction over Schultz "as a person subject to the law of war — not as a person subject to military law."22

The Court then considered whether the offense of which the accused had been convicted — negligent homicide — was one of which a court operating under the law of war could take cognizance. It found that such tribunals could punish two general categories of offenses: (1) crimes against the civilian population under the 'common law of war,' and (2) crimes punishable under the 'law in effect' in the occupied territory.23 While the Court eventually found that negligent homicide was part of the 'law in effect' in occupied Japan, it chose to first consider whether this offense was generally cognizable under the 'common law of war.'

The term 'common law of war' originated with the Instructions for the Government of Armies of the United States in the Field (Instructions) issued by the U.S. Army as General Order #100 in April, 1863.24 These Instructions, drafted by Dr. Francis Lieber, were the first modern codification of the law of war and exercised great influence over the later Hague Conventions on Land Warfare of 1899 and 1907.25 The term was later used by the Supreme Court in Ex Parte Vallandigham,26 and in the government argument in Ex Parte Quirin.27 The opinion in the Schultz case remains, however, the most complete discussion of this concept.

Chief Judge Quinn began by noting that the common law of war "finds its basis in the customs and usages of civilized nations," and is, therefore, a largely unwritten law.

In deciding whether a given offense constitutes a crime under the common law of war, we have no single source which will provide a ready answer. This law is nowhere precisely codified. We note, however, that certain crimes are universally recognized as properly punishable under the law of war. These include murder, manslaughter, robbery, rape, larceny, arson, maiming, assaults, burglary, and forgery. [citations omitted] The test bringing these offenses within the common law of war has been their almost universal acceptance as crimes by the nations of the world.28

22. Schultz, 1 C.M.A. at 521, 4 C.M.R. at 113. On the right of an occupying power to establish tribunals in occupied territory, see generally G. Von Glahn, The Occupation of Enemy Territory 110-12 (1957).
25. See Nussbaum, supra note 7, at 227, 345.
27. 317 U.S. 1, 13 (1942).
28. Schultz, 1 C.M.A. at 522, 4 C.M.R. at 114. The list of offenses was taken from U.S. War
The Court then concluded that "all of the crimes which, historically, have been treated as violations of the law of war include an element of animus criminalis," i.e., a criminal intent. The military offense of negligent homicide, however, requires no more than simple or ordinary negligence on the part of the accused. The inquiry then turned to whether the historical list of offenses had now become out of date.

Conceding that the law of war is not static, the Court assumed that "a crime may become a violation of the law of war if universally recognized as an offense even though it contains no element of specific criminal intent." But after a "careful perusal of the penal codes of most civilized nations," the Court concluded that imposing criminal liability for causing death through ordinary negligence is a "relatively new concept" which had not yet attained universal acceptance by the world's nations. Negligent homicide was not, therefore, a crime under the 'common law of war.'

In comparing this treatment of the 'common law of war' with the concept of 'general principles of law recognized by civilized nations,' several things should be noted. The latter concept is itself a primary source of international law, along with treaties and custom. In Schultz, on the other hand, the Court apparently asked whether negligent homicide was "universally recognized as an offense" only because this standard had been previously established by customary international law. In a sense, of course, all international law can be traced back to custom; even treaties are based on the customary principle of *pacta sunt servanda*.

Another distinction between the Court's approach and the 'general prin-

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32. *Id.*
33. *Id.*
ciples of law' concept is that the Court was searching not for universally recognized principles, but rather for universally punished crimes. In the context of the Schultz case, however, this distinction was more apparent than real. While the opinion claimed to be comparing specific 'crimes' and 'offenses' in the world's legal systems, in fact the Court was seeking a general principle — the principle of criminal liability for simple negligence.

Finally, it should be pointed out that the Court was fortunate that its search had negative results. It is relatively easy to prove that a certain principle is not 'recognized by civilized nations;' all one need do is find a significant number of legal systems which do not employ the concept in question. To conclude that a principle of law is 'recognized by civilized nations' is a far more demanding task since at a minimum it requires an examination of all the principal legal systems of the world. The examination would have to be more than merely a superficial reading of national codes, too, since the gloss placed on these by judicial decisions and scholarly writing often leads to practical results quite different from those which a literal reading would suggest.35

Indeed, the Schultz opinion itself was rather ambivalent on exactly how widely recognized an offense must be in order to be accepted as part of the 'common law of war.' In some places the Court referred to crimes punishable by the penal codes of "all civilized nations," and to "universally recognized" offenses.36 Elsewhere, however, it was satisfied with "almost universal" acceptance,37 and finally revealed that its own research involved merely the penal law of "most" civilized nations.38

Whatever difficulties may exist with the Schultz opinion, however, it clearly demonstrates the willingness of the Court of Military Appeals to apply customary international law and 'general principles of law recognized by civilized nations' in appropriate cases.

III. THE NATURE OF INTERNATIONAL LAW

In the Case of the S.S. Lotus, the Permanent Court of International Justice was presented with conflicting theories on the nature of international law.39 The main issue in this case, which arose from a collision at sea between a French vessel and a Turkish vessel, was whether Turkey had violated international law by subjecting an officer on the French vessel to penal liability. The French government contended that in order to have jurisdiction over this of-

35. See SCHLESINGER, supra note 6, at 32-33; cf. THE LAW OF THE NEAR AND MIDDLE EAST 81-84 (H. Liebesny ed. 1975).
36. Schultz, 1 C.M.A. at 522, 4 C.M.R. at 114.
37. Id.
38. Id. at 523, 4 C.M.R. at 115.
fense the Turkish government would have to point to some recognized rule of international law allowing it to extend its law to this type of situation.\textsuperscript{40} Turkey, on the other hand, argued that it should be allowed to take any action it wished so long as that action did not "come into conflict with a principle of international law."\textsuperscript{41} The Court adopted the latter view, saying that it was "dictated by the very nature and existing conditions of international law."\textsuperscript{42} Since international law governs relations between independent, sovereign states, "[r]estrictions upon the independence of states cannot therefore be presumed."\textsuperscript{43} In other words, international law is \textit{prohibitive} law; anything not forbidden by it is permitted.

The opinion of the World Court on any question of international law is, of course, highly authoritative. In \textit{S.S. Lotus} the Court was evenly divided, however, and the decision in favor of Turkey was the result of the extra tie-breaking vote of the President.\textsuperscript{44} Therefore, some doubt may remain on this matter.

Though it never cited the \textit{S.S. Lotus} opinion, the Court of Military Appeals took a very similar view of international law in \textit{United States v. Weiman}.\textsuperscript{45} The accused, Weiman and Czertok, were Polish nationals employed by the U.S. Army in France. Convicted of larceny by a court-martial, on appeal they asserted lack of jurisdiction. Resolution of this issue required the Court of Military Appeals to apply Article 2(11) of the Code, which gave the courts-martial jurisdiction over "all persons serving with, employed by, or accompanying the armed forces" outside the United States, "[s]ubject to the provisions of any treaty . . . or to any accepted rule of international law."\textsuperscript{46}

In applying the phrase "subject to . . . any accepted rule of international law," the Court could either have attempted to find a rule authorizing jurisdiction over persons in the situation of the accused, or it could have sought to determine whether any rule prohibited jurisdiction. The Court chose the latter course, asking "whether any accepted principle of international law precludes such jurisdiction."\textsuperscript{47} After reviewing scholarly articles and American judicial precedents, the Court concluded that no such principle existed, and affirmed the convictions.\textsuperscript{48}

While the Court has often adhered to the prohibitive view of international law, at other times it has seemingly rejected this approach. In the \textit{Schultz} case,

\textsuperscript{40} \textit{Id.} at 18.
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.} at 32.
\textsuperscript{45} 3 C.M.A. 216, 11 C.M.R. 216 (1953).
\textsuperscript{46} Uniform Code of Military Justice, art. 2(11), 10 U.S.C. § 802(11) (1976). \textit{See also} note 19 \textit{supra}.
\textsuperscript{47} United States v. Weiman, 3 C.M.A. at 219, 11 C.M.R. at 219.
\textsuperscript{48} \textit{Id.} at 219-20, 11 C.M.R. at 219-20.
discussed supra, the Court did not ask whether the 'common law of war' prohibited the punishment of negligent homicide, but rather whether this offense was widely enough recognized to be accepted as part of that law. Schultz may actually represent an example of the prohibitive approach, however. The universally recognized crimes which the Court lists as being part of the 'common law of war' (murder, manslaughter, rape, etc.) were originally offenses which an occupying power was forbidden to permit in occupied territory; the occupying power was not merely 'allowed' to punish these offenses, it was required to suppress them.

In Schultz, the Court of Military Appeals reversed this principle. The crimes which the law of war required the United States to punish in occupied Japan came to form part of the outer limits of court-martial jurisdiction under the law of war. Thus, in standing the original concept of the common law of war on its head, the Court was doubtless influenced by the suspicion with which the American courts have traditionally viewed attempts to subject civilians to military jurisdiction. To the extent that international law required it, but no further, the Court was willing to allow an American civilian to be tried by court-martial.

As a practical matter, the Court may also have been influenced by the difficulties inherent in the prohibitive approach to international legal problems. Just as it is difficult to prove that a certain legal principle is 'universally recognized,' so it is difficult to prove that there is no legal rule forbidding a certain action, especially when many rules of international law are matters of custom, usage and 'general principles of law.' In this legal environment it is often easier to look for what has been accepted as lawful in the past, and use such precedents as a guide to the legality of future actions.

A. National Jurisdiction: Territorial

When discussing state jurisdiction, jurisdiction to prescribe rules of law must be distinguished from jurisdiction to enforce such rules. A state's power to prescribe is much broader than its jurisdiction to enforce, since the latter power is normally limited to territory under its sovereignty or control. As

49. Schultz, 1 C.M.A. 512, 4 C.M.R. 104 (1952).
stated by the International Court in *S.S. Lotus*, "the first and foremost restriction imposed by international law upon a state is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another state." The Court of Military Appeals had the opportunity to apply this principle in *United States v. Murphy*.

Sergeant Murphy had participated in a conspiracy with three other soldiers and a Korean, to steal and black-market U.S. government property. At his court-martial in Japan, the three Americans all refused to testify, claiming the privilege against self-incrimination set out in Article 31, Uniform Code of Military Justice. The Korean, Kim Hangi, also claimed the privilege, but the law officer refused to allow the claim and directed him to testify against Murphy, who was convicted of wrongfully disposing of government property.

The Court of Military Appeals granted review to determine whether the law officer's ruling, that a prosecution witness could not refuse to answer incriminating questions, was erroneous. In upholding this decision, the Court noted that:

The law officer based his ruling on the principle that Hangi was a Korean national resident and employed in Japan; that he was not subject to the territorial jurisdiction of any American court; that he was not subject to prosecution by the United States; and, therefore, he could not claim the privilege.

Though the Court's language is quite condensed, there is a logical progression here. Hangi was physically within the sovereign territory of Japan; due to his nationality and the location of his residence and place of employment, he was unlikely to go to the United States. He was therefore outside the enforcement jurisdiction of the United States (and likely to remain so). Since he need not fear American enforcement he need not fear self-incrimination, and therefore the privilege was denied to him.

54. "No person subject to this chapter shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." Uniform Code of Military Justice, art. 31(a), 10 U.S.C. § 831(a) (1976).
55. Under the Uniform Code of Military Justice, as passed in 1950, the "law officer" functioned much as a federal judge, ruling on admissibility of evidence and other interlocutory matters. See U.S. DEPT. OF DEFENSE, MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 39 (1951) [hereinafter cited as 1951 COURTS-MARTIAL MANUAL]. These functions are now performed by the military judge. See 1969 COURTS-MARTIAL MANUAL, supra note 30, at para. 39(b).
56. United States v. Murphy, 7 C.M.A. at 33, 21 C.M.R. at 159.
57. *Id.* Since the witness complied with the law officer's direction to testify, the question of what authority the law officer had to give such an order was left unanswered. Other cases have noted the unavailability of U.S. process to compel foreign witnesses to testify. See United States v. Burrow, 16 C.M.A. 94, 36 C.M.R. 250 (1966); United States v. Stringer, 5 C.M.A. 122, 17 C.M.R. 122 (1954). *But see J. SNEE & A. PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION* 94-97 (1957), describing arrangements which several nations have made to procure witnesses for foreign courts-martial sitting in their territory.
The bulk of the Murphy opinion dealt with other issues. Nevertheless, the Court's unique position as a United States court exercising appellate jurisdiction over U.S. tribunals sitting outside the United States gave it an unusual opportunity to reaffirm the principle of territorial sovereignty as a limit on the enforcement jurisdiction of states, even if only briefly.

The Court has also had a similar opportunity to consider the international legal status of a particular category of enforcement action — the search for, and the seizure of, evidence of crime. That there is a close connection between the power of search and seizure and territorial sovereignty was suggested in United States v. Wilmot. In Wilmot the key issue was whether a federal narcotics statute applied to a U.S. military base in Japan. By its terms the statute applied to "territory under the control or jurisdiction" of the United States. Finding the statute applicable, the Court relied in part on the cession to the United States by Japan of exclusive power to conduct searches and make seizures within the base area. "The right to make searches and to effect seizures," observed the Court, "is the right of the sovereign."

In a long line of cases the Court has wrestled with the admissibility of evidence seized by foreign police under circumstances which depart from the standards of the fourth amendment. A recurrent theme running through these decisions is an awareness of the limits on U.S. enforcement jurisdiction in other countries.

In the first of these cases, United States v. DeLeo, French police searched the accused's apartment, leased in a French city, in the presence of an observer from the U.S. Army Criminal Investigation Division (CID). During the search, the American agent noticed and seized a piece of evidence connected with a separate incident. That evidence was later admitted at Corporal DeLeo's court-martial. In holding that the evidence had been properly admitted, the Court emphasized, along with other factors, the difficulties which would have faced the CID agent, Mr. Shumock, had he attempted to comply with American standards of search and seizure:

The letters rogatory in the possession of the French inspector of police would not have justified the seizure under Federal law, and there is no showing that the French courts would have been willing

58. Murphy, 7 C.M.A. at 34-37, 21 C.M.R. at 160-63.
61. Id. at 701, 29 C.M.R. at 517. In the end, however, the Court merely held that the base was under "the control of the United States for a special purpose," and that the United States did not have "full and exclusive sovereignty" over it. Id. at 702, 29 C.M.R. at 518. Even this conclusion may have gone too far. See note 105 infra.
to issue other letters in connection with a purely intramural crime of the American Armed Forces. Should the French authorities have declined to aid him, when he returned thereafter to attempt a seizure of the papers, Mr. Shumock might well have run into serious difficulty. He would then have been proceeding to accomplish a search on French soil without the aid of local process. Doubtless his status would have been that of a trespasser — perhaps not as to the accused, but certainly as to French Nationals owning property through which he might necessarily have sought ingress.

In later cases the Court criticized, and eventually overruled, the holding in DeLeo. However, the Court has never failed to recognize the limits which territorial sovereignty place on the U.S. armed forces overseas. In United States v. Schnell, for example, it was recognized that, even though it was "virtually certain" that charges investigated by West German police would eventually be tried before a United States court-martial, "it would still be necessary for American officials to obtain German assistance for a search of premises in the civilian community." The majority opinion in United States v. Jordan, which finally overruled DeLeo, disavowed any attempt "to infringe upon sovereignty of another nation by attempting to impose American constitutional standards on their legitimate methods of securing evidence." Any right which American officials may have to search off-base must be based on international agreement with the territorial sovereign.

While the Court of Military Appeals has recognized the limits which international law places on enforcement action in the territory of another state, it has not always been willing to accord the individual accused standing to raise such issues. In United States v. Rubenstein, the accused, a civilian employee accompanying the U.S. Air Force in Japan, fled that country while under military investigation for blackmarketing. After returning to the United States, he went to Korea as a 'commercial entrant.' There he was arrested by U.S. military authorities and sent to Japan for trial by court-martial. Following the weight of American authority, the court held that, "even if it is assumed that the accused was unlawfully seized in Korea and transported to Japan, he would have no grounds to complain of a lack of jurisdiction in the court-martial, for the power of a court to try a person for a crime is not im-

63. Id. at 161-62, 17 C.M.R. at 161-62. Query whether the French would have been obligated to assist. See notes 122-33 infra.
64. 23 C.M.A. 464, 50 C.M.R. 483 (1975).
65. Id. at 467 n.13, 50 C.M.R. at 486 n.13.
67. 23 C.M.A. at 527, 50 C.M.R. at 666.
69. 7 C.M.A. 523, 22 C.M.R. 313 (1957).
paired by the fact that he has been brought within the court’s jurisdiction by reason of a ‘forcible abduction.”  

B. National Jurisdiction: Extraterritorial

While a nation’s jurisdiction to enforce is, “failing a permissive rule to the contrary,” limited to its own territory, jurisdiction to prescribe may be extraterritorial. The Uniform Code of Military Justice is a primary example of an extraterritorial statute; Article 5 states that the Code “applies in all places.” Under the prohibitive theory of international law, a state may prescribe rules applicable anywhere and to any person, so long as there is no conflict with international law. In United States v. Newvine, the Court of Military Appeals considered whether Article 5 of the Uniform Code created any such conflict.

Newvine, an enlisted member of the Air Force, had murdered a woman in Mexico while off-duty. Convicted by a general court-martial sitting in Texas, on appeal the Court of Military Appeals considered, inter alia, whether the Uniform Code of Military Justice could be applied to this type of offense consistently in accordance with international law. The Court cited United States v. Bowman for the proposition that “prosecution of a person subject to American sovereignty in an American court for an act in violation of a statute of the United States which was committed by him within the jurisdiction of a foreign country ‘is no offense to the dignity of or right of the sovereignty’ of that country.” Therefore, the Court found no impediment in international law to the exercise of jurisdiction in this case.

In several cases the Court has been faced with determining the extraterritoriality of federal criminal statutes other than the Uniform Code of Military Justice. The principles of jurisdiction applied in these cases include the nationality principle (a state may prescribe conduct for its own nationals wherever they are), the objective territorial principle (a state may prescribe rules governing conduct that has an effect in its territory), and the protective principle (a state may prohibit conduct which threatens its security or the

74. 260 U.S. 94 (1922).
77. Id. § 18.
operation of its governmental functions). Perhaps because of its ‘prohibitive’
approach to international law, it has not, however, used these terms. The issue
has come before the Court in several forms.

Article 134 of the Uniform Code of Military Justice authorizes courts-
martial to “take cognizance of,” among other offenses, “crimes and offenses
not capital, of which persons subject to this [Code] may be guilty. . . .” This
phrase operates as an assimilative crimes act, incorporating by reference all
civilian federal criminal statutes into the Uniform Code. In United States v.
Wilmot, for example, an Air Force member was tried by court-martial for
violating the Narcotic Drugs Import and Export Act by introducing drugs
into an American base in Japan.

The Court of Military Appeals addressed the extraterritoriality issue in
Wilmot by quoting extensively from the staff judge advocate’s post-trial
review, which the Court approved as a “thorough analysis of the issue:”

[T]here is no Constitutional or international prohibition against
United States criminal law extending to regulate American
citizens’ conduct on United States Forces, Japan, installations,
else the Uniform Code of Military justice [sic] itself would be ineffectivethere; the United States has a vital interest in regulating
narcotics traffic on these installations for it strikes at the heart of
military prowess and proficiency; having that interest and being
unimpeded by other prohibitions against the exercise of such juris-
diction, it would be flouting reality to say that Congress did not
intend to extend the proscription against importation to protect
military installations in Japan as well as other executive, i.e.,
diplomatic, compounds there and in other foreign countries.

Acting under the principle that statutes should be construed to avoid conflict
with international legal obligations, the staff judge advocate concluded that

78. See, e.g., United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), cert. denied, 392 U.S. 936
(1968); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 10
(1965). Even if one adopts a “prohibitive” approach to international law, accepted principles of
jurisdiction may still be useful due to the difficulty of conclusively proving that a particular asser-
tion of jurisdiction is not prohibited. See text accompanying notes 44, 45 supra. Baxter has noted
that, when examining U.S. cases on jurisdiction, “one is often hard put to determine whether the
courts are applying a prohibitory rule of international law or, on the other hand, exercising a rule
of national self-restraint or a presumption about congressional intention regarding the territorial
application of a statute.” Baxter, Forward, in 1 AM. INT’L L. CASES viii (F. Deak ed. 1971)
[hereinafter cited as Baxter].

80. 11 C.M.A. 698, 29 C.M.R. 514 (1960).
82. 11 C.M.A. at 700, 29 C.M.R. at 516. The staff judge advocate, the commander’s legal
advisor, is required to submit a written opinion on the records of all general courts-martial con-
vened by the commander. See Uniform Code of Military Justice, arts. 6, 61, 10 U.S.C. §§ 806,
861 (1976).
the exercise of jurisdiction in *Wilmot* was consistent with international law.\(^{83}\) Note that he initially adopted a prohibitive approach, stressing that "there is no . . . international prohibition" against the suggested interpretation.\(^ {84}\) However, he also asserted the importance of factors strongly connecting the case with the United States, including the citizenship of the accused (the nationality principle) and the impact on military efficiency of drugs on an American base (the protective principle). The opinion goes too far in asserting that if these connecting factors were not sufficient, then the Uniform Code of Military Justice would, itself, lack extraterritorial effect, since membership in a nation's armed forces is itself a principle of jurisdiction.\(^ {85}\)

Constitutional limits on court-martial jurisdiction may also require an assessment of the extraterritorial effect of statutes. In *O'Callahan v. Parker*,\(^{86}\) the United States Supreme Court held that in order to protect a serviceman's right to jury trial the jurisdiction of courts-martial must be limited to offenses which are "service connected."\(^ {87}\) Since the right of jury trial in an Article III court was the chief rationale for *O'Callahan*, the Court of Military Appeals held that the decision does not limit military jurisdiction if an Article III court could not try the offense charged.\(^ {88}\) In *Newvine*, for example, no federal civilian court could try the accused for murder committed in Mexico; the offense was, therefore, properly triable by court-martial, even though not "service connected."\(^ {89}\) In *United States v. Black*,\(^ {90}\) the accused was charged with having entered into a conspiracy, while stationed in Vietnam, to buy heroin after his return to the United States. The government argued that, since the conspiracy had been formed outside the United States, *O'Callahan* did not apply.\(^ {91}\) Rejecting this argument, the Court held that the offense of conspiracy had occurred in the United States, since that is where the overt act charged (mailing a letter) had taken place.\(^ {92}\) Here the court apparently applied the objective territorial theory of jurisdiction. Even though the conspiracy itself had been entered into outside the United States, the United States could claim territorial jurisdiction over this event since the overt act had an effect within American territory.

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83. See, e.g., Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); The Over The Top, 5 F.2d 838 (D. Conn. 1925).

84. United States v. Wilmot, 11 C.M.A. at 700, 29 C.M.R. at 516.


87. Id. at 274.


90. 1 M.J. 340 (C.M.A. 1976).

91. Id. at 342.

92. Id. at 343.
While in this case the effect was not itself criminal, it was, as an overt act, an essential element of the crime of conspiracy. In another sense, then, Black is based on subjective territorial jurisdiction, since part of the criminal act itself was committed in U.S. territory.

As an alternative basis for applying O'Callahan, the Court held that even if the conspiracy had been completed outside U.S. territory, the offense would still have been cognizable in a U.S. civilian court.93 The essence of Black's offense, in the Court's view, was conspiracy to import heroin into the United States, an act denounced by civilian criminal statutes. In concluding that these statutes were intended to apply to extraterritorial conspiracies, the Court relied on the Supreme Court opinion in United States v. Bowman.94 There the Supreme Court held that whether a statute was to be applied extraterritorially depended upon the intent of Congress, "as evinced by the description and nature of the crime, and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations."95 In the case of ordinary crimes against private individuals, the assumption is that jurisdiction is limited to U.S. territory. If Congress intended otherwise, it is natural to assume that they would expressly so indicate in the statute.

But the same rule of interpretation should not be applied to criminal statutes which are, as a class, ... enacted because of the right of the government to defend itself against obstruction or fraud, wherever perpetrated, especially if committed by its own citizens, officers or agents. ... In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.96

In international legal terminology, these statutes are based on the protective principle of jurisdiction.

In Black the Court of Military Appeals found the offense of conspiracy to import illegal drugs to be within this latter category of federal offenses. Such conspiracies were said to "constitute not only threats to the integrity of our national borders but also obstructions to this Government's regulation of commerce with foreign nations."97 Since Black's crime was cognizable in a federal civilian court, the O'Callahan decision applied and a court-martial could not properly try him for this conspiracy.

Finally, Article 3(a) of the Uniform Code of Military Justice may require

93. Id.
94. 260 U.S. 94 (1922).
95. Id. at 97-98.
96. Id. at 98.
the Court to assess the territorial application of statutes. 98 Article 3(a) provides that if a person commits an offense while subject to the Uniform Code, he is not “relieved from amenability to trial by court-martial by reason of the termination of that status,” if the offense is punishable by more than five years confinement, and if “the person cannot be tried in the courts of the United States or of a State, a territory or the District of Columbia.” 99 This Article has been held to overrule an old principle of military law that a serviceman cannot be tried during his present enlistment for an offense committed in an earlier enlistment. 100

While in Japan, Electronic Technician Chief George Steidley, U.S. Navy, allegedly stole numerous items of government property ranging from shoes and bedsheets to padlocks and forceps. After many, but not all, of the thefts had occurred he reenlisted in the Navy. On appeal the Court of Military Appeals, in United States v. Steidley, 101 reversed his conviction for the pre-reenlistment offenses, holding that, under United States v. Bowman, 102 theft of U.S. government property is an extraterritorial offense, and that Steidley’s crime was therefore punishable in a United States District Court. 103 Article 3(a) therefore was not applicable, and the court-martial lacked jurisdiction over those offenses. 104

None of these decisions are very surprising. Other American courts have, after all, applied the nationality, objective territorial and protective principles. 105 These decisions of the Court of Military Appeals may, however, have more significance than would appear superficially. Whenever, as in the Black and Steidley cases, the Court decides an extraterritoriality issue for O’Callahan or Article 3(a) purposes, a ruling in favor of extraterritorial application ironically serves to defeat U.S. military jurisdiction in the case at hand. In these situations the government will argue that the statute should be limited to application within U.S. territory. The accused argues to the contrary, exactly the opposite of the usual positions of the government and the defense whenever similar issues are raised in civilian courts.

In most civilian cases upholding extraterritorial jurisdiction, the court rules in favor of the position of its own government. The persuasiveness of such decisions as evidence of international law is naturally weakened by the suspi-

99. Id.
102. 260 U.S. 94 (1922).
104. Id. at 111, 33 C.M.R. at 323.
105. See, e.g., Blackmer v. United States, 284 U.S. 421 (1932) (nationality); United States v. Pizzarussu, 388 F.2d 8 (2d Cir.), cert. denied, 392 U.S. 936 (1968) (protective); Latham v. United States, 2 F.2d 208 (4th Cir. 1924) (objective territorial).
cion that the court has merely gone along with the national policies of its executive branch. This is not, however, true of decisions of the Court of Military Appeals on O’Callahan and Article 3(a) issues. In those cases a finding of extraterritorial jurisdiction is a finding opposed by the government; such cases may, therefore, have unusual persuasiveness as statements on the international law of jurisdiction. When national courts “intentionally or unintentionally express views which run counter to the practice of their own governments,” then “they offer an extreme instance of judicial independence which gives to such pronouncements an exceptionally high... value,” as evidence of international law.106

C. The Customary Law of Visiting Forces

In S.S. Lotus the World Court held that, unless limited by a prohibitive rule, a state may generally exercise jurisdiction in its own territory;107 conversely, no state may exercise jurisdiction in the territory of another, “failing the existence of a permissive rule to the contrary.”108 For many years there has been controversy over whether any prohibitive or permissive rules limiting the rights and powers of the territorial state exist in favor of friendly foreign armed forces stationed there.

According to one view, the foreign force is completely immune from local jurisdiction and has exclusive criminal jurisdiction over its members.109 At the other extreme is the view that the territorial sovereign has exclusive enforcement jurisdiction over all persons in its territory, including members of visiting forces, unless that jurisdiction has been expressly waived.110 The basic problem facing adherents of both views is that there is almost no state practice on the subject prior to World War II. Further, since World War II the issue has generally been resolved by status of forces agreements between the sending and receiving states. Scholarly writing on the subject tends to become an endless debate on the implications of the same cases, all, with the exception of The Schooner Exchange v. McFadden,111 decided between 1914 and 1945.112

In this state of the law, any new court decisions on the status of visiting
forces would assume importance. The Court of Military Appeals has decided several such cases in situations where for some reason no status of forces agreement was applicable. The cases suggest answers to the following questions:

(1) Are foreign military courts permitted to exercise jurisdiction in the territory of another power?
(2) Are foreign friendly armed forces subject to the enforcement jurisdiction of the territorial state?
(3) Who may properly be considered a member of the foreign armed force?

The Court faced the first and third issues in *United States v. Weiman*.113 There the issue was whether U.S. military jurisdiction extended to a Polish national civilian employee of the U.S. Army in France, or, more precisely, whether such jurisdiction conflicted with ""any accepted rule of international law.""114 At the time of trial the NATO Status of Forces Agreement was not in force. The Court found that the ""decided weight of international law"" supported ""the right of a nation to exercise authority over its forces while in a friendly foreign nation,""115 and held that no conflict with international law existed. The opinion quoted extensively from Chief Justice Marshall’s opinion in *The Schooner Exchange*, which concluded that ""[t]he grant of free passage [to a foreign force] 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.""116

*Weiman* clearly answers the first question in the affirmative: foreign armed forces may exercise enforcement jurisdiction in the territory of another state. Though not essential to the holding, quotations from *The Schooner Exchange* and *Coleman v. Tennessee*117 suggest that, if posed, the answer to the second question would have been that the territorial state had no jurisdiction over Weiman and his accomplice.118

As to the third question, the Court had no difficulty assuming that Weiman,
a civilian employee of the U.S. Army, though not an American national, should be considered a member of the U.S. forces in France. The Court was, however, careful to note that they were "not here concerned with nationals of a host nation, employed by our forces within the borders of such a nation." This caveat suggests that an attempt to bring the host nation's nationals under the military jurisdiction of the foreign force would be inconsistent with an "accepted rule of international law."

The Court next faced these issues in United States v. Robertson. Robertson was a merchant seaman aboard a U.S. Department of Commerce vessel operated for the government by a private contractor under a General Agency Agreement. In 1953 the vessel carried cargo to Japan for the U.S. Armed Forces, and while docked in Yokohama harbor Robertson killed a fellow seaman in a waterfront brawl. Though he was not a civil service employee, Robertson was tried by a Navy court-martial and convicted of unpremeditated murder.

On appeal he contested the court-martial's jurisdiction arguing that while the Administrative Agreement between Japan and the United States granted the latter exclusive jurisdiction over members of the 'civilian component' accompanying U.S. forces in that country, he was not part of the 'civilian component.' After a careful consideration of both American and Japanese administrative practice under the Agreement, the Court agreed that Robertson was not part of the 'civilian component' as that term was used in the Agreement.

Another factor leading the Court to limit the meaning of the term 'civilian component' was that the United States had exclusive jurisdiction over persons in this category. Characterizing this as a type of 'extraterritoriality,' similar to

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119. Weiman, 3 C.M.A. at 218, 11 C.M.R. at 218.
120. Uniform Code of Military Justice, art. 2 (11), 10 U.S.C. § 802 (11) (1976). During the negotiation of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, done June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter cited as NATO SOFA], France objected to the inclusion of stateless persons and nationals of third countries in the civilian component of the sending state's forces. The compromise eventually adopted in Article I of the Agreement excludes employees of the visiting force who are stateless, nationals of the receiving state, or nationals of a state not part to the NATO alliance. See Snee, NATO Agreements on Status: Traavaux Préparatoires, 54 U.S. NAVAL WAR COLLEGE INT'L LAW STUDIES 165 (1961) [hereinafter cited as Snee]. If the NATO SOFA had been in force at the time of Weiman, 3 C.M.A. 216, 11 C.M.R. 216 (1953), the United States would not have had jurisdiction over the accused, who were Polish nationals. But see United States v. Robertson, 5 C.M.A. 806, 19 C.M.R. 102 (1955).
121. 5 C.M.A. 806, 19 C.M.R. 102 (1955).
122. Id. at 808, 19 C.M.R. at 104.
123. Id. at 815, 19 C.M.R. at 111.
124. Id. at 818, 19 C.M.R. at 114.
that once exercised by consular courts in 'uncivilized' countries, the Court went on to observe:

A type of extraterritoriality was embodied in the doctrine of the famous Schooner Exchange case. ... There, Chief Justice Marshall stated that a visiting Army is immune from the jurisdiction of a friendly sovereign through whose realm its troops pass. ... However, some international lawyers — both in this country and abroad — have expressed grave doubt that this pronouncement constitutes a correct statement of international law. Consequently not a few of the countries in which American Forces have been stationed have asserted jurisdiction over these troops, retainers and employees. ... In light of the history of extraterritoriality, it may well be deemed more nearly suitable to the intendment of the contracting parties that the Administrative Agreement between the United States and Japan be construed narrowly — particularly insofar as the grant of exclusive jurisdiction is concerned. This, in turn, would imply a narrow construction of the phrase "civilian component." 125

This highly critical attitude towards immunity for foreign armed forces marked a break with prior American authority, including the Court's own dicta in Weiman. 126

Although the Court accepted Robertson's argument that he was not covered by the Administrative Agreement, it nevertheless found that he was properly subject to U.S. military jurisdiction. 127 Under Article 2(11) of the Uniform Code of Military Justice, Robertson was still a civilian 'accompanying' the armed forces overseas, and the Court held that the United States and Japan had concurrent jurisdiction over him. 128 Since no treaty applied to Robertson's case, this jurisdiction was necessarily founded on customary international law.

Robertson thus reaffirms the holding in Weiman that foreign armed forces may exercise jurisdiction in the territory of another state. The Court went be-

125. Id. at 819, 19 C.M.R. at 115. The extraterritorial regime which followed the occupation of Japan was of only brief duration. The agreement involved in United States v. Robertson, 5 C.M.A. 806, 19 C.M.R. 102 (1955), was the Administrative Agreement under Article III of the Security Treaty with Japan, Feb. 8, 1952, 3 U.S.T. 3341, T.I.A.S. No. 2492 [hereinafter cited as Japan Administrative Agreement], which entered into force on April 28, 1952. On October 29, 1953, it was superseded by the Protocol to Amend Article XVII of the Administrative Agreement under Article III of the Security Treaty with Japan, Sept. 19, 1953, 4 U.S.T. 1846, T.I.A.S. No. 2848, which adopted the NATO SOFA jurisdictional formula. See text accompanying notes 112-115 infra. At the time of the court's decision on May 27, 1955, the extraterritorial aspects of the Administrative Agreement had already lapsed.

126. See, e.g., 1951 COURTS-MARTIAL MANUAL, supra note 48, para. 12; 1 C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 819 (2d ed. 1945); King, Jurisdiction, supra note 109.


128. Id.
yond Weiman in holding that a foreign armed force includes, for jurisdictional purposes, anyone ‘accompanying’ it, even though not employed by it. By way of dicta, the Court did mention one exception to this rule: “the exception suggested has to do with persons who are citizens of, or ordinarily resident in, Japan,” or who “enjoyed some special bond” with that nation.

Together, Weiman and Robertson established the proposition that visiting forces have the right to conduct courts-martial in the territory of other nations, and that this right extends to the trial of civilians accompanying the force, but not to local nationals in that position. The Court had not yet, however, squarely faced the issue of whether visiting forces are immune from local jurisdiction. This issue was reached in United States v. Sinigar.

Sinigar, a Private in the U.S. Army stationed in Canada, was called to testify before a Canadian coroner’s inquest. Since he did not ‘see the point’ of certain questions he refused to answer them and temporarily was committed to jail for contempt. Thereafter, he was tried by an American court-martial for conduct discreditable to the armed forces, i.e., refusing to answer the coroner’s questions.

Before the Court of Military Appeals, Sinigar’s counsel argued that he should not be “punished by both Canada and the United States for what he insisted was essentially one act.” The accused argued that the NATO Status of Forces Agreement prohibited a second trial, but the Court held this treaty to be inapplicable. Since no treaty applied to Sinigar’s case, the Court then considered whether customary international law prevented his trial by both sovereigns. Holding that it did not, the opinion noted that “international law has long recognized the possibility of two concurrent jurisdictions,” and that in this case “jurisdiction in the United States springs from its

129. Cf. Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 4A(4), 6 U.S.T. 3316, T.I.A.S. No. 3364, which grants prisoner of war status to civilian persons “who accompany the armed forces without actually being members thereof.” But cf. Chow Hung Ching v. The King, 15 Ann. Dig. 147 (No. 47) (High Court, Australia 1948) (Civilian laborers not a foreign armed force entitled to immunity although under military discipline).


132. Id. at 333, 20 C.M.R. at 49.

133. Id. The charge was laid under Article 134, the ‘general article,’ of the Uniform Code of Military Justice:

Though not specifically mentioned in this chapter, 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 chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.


135. NATO SOFA, supra note 120.

personal supremacy over the individual, while Canadian jurisdiction is found upon its sovereignty in the place where the offense occurred."\(^{137}\)

Up to this point, the Court followed the course it had hinted at in *Robertson*, affirming the jurisdiction of the territorial state over members of visiting forces, and rejecting any claim of immunity from local law. Then, however, the Court observed that "it is the general rule, in the absence of an international agreement, that whenever armed forces are on foreign territory in the service of their home state they are considered extraterritorial...."\(^{138}\) This return to the *Weiman* opinion was, however, soon qualified by the statement that this "proposition has no application here," because whenever a foreign soldier "leaves his camp, post, or station, not on duty but for recreation and pleasure, and commits an offense, the local authorities are competent to punish him."\(^{139}\)

The first thing to be observed about this apparent retreat to an earlier position is that the whole discussion is, strictly speaking, *dicta*, since the Court eventually disposed of the charge against Sinigar by finding insufficient

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139. *Id.* at 337, 20 C.M.R. at 53. In support of this conclusion the Court cited 1 L. OPFENHEIM, INTERNATIONAL LAW § 445 (7th ed. H. Lauterpacht 1948). However, in the eighth edition, published in 1955, Lauterpacht retreated from the "in camp/on leave" distinction, concluding that "the view which has the support of the bulk of practice is that in principle members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle require specific agreement of the local State by treaty or otherwise." L. OPFENHEIM, INTERNATIONAL LAW § 445 (8th ed. H. Lauterpacht 1955). Other authorities on the immunity of foreign forces "in camp" are collected in Stanger, *Criminal Jurisdiction Over Visiting Armed Forces*, 52 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 197-209, (1957-58) [hereinafter cited as Stanger], and Barton, * supra* note 110, at 342-50. The status of forces agreements negotiated by the United States since World War II generally do not give the foreign force exclusive or primary jurisdiction over offenses committed in the camp or base. Much the same result is achieved in practice by giving the foreign force the primary right to exercise jurisdiction over offenses against other members of that force. *See*, e.g., Agreement in Implementation of Chapter VIII of the Agreement of Friendship and Cooperation Between the United States of America and Spain, September 25, 1970, United States - Spain, art. CV, 21 U.S.T. 2259, T.I.A.S. No. 6977 [hereinafter cited as Chapter VIII Implementation Agreement]; Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, January 19, 1960, United States - Japan, art. XVII, 11 U.S.T. 1652, T.I.A.S. No. 4510 [hereinafter cited as Agreement Under Article VI]; Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, art. VII, 4 U.S.T. 1792, T.I.A.S. No. 2846. The failure of these agreements to expressly recognize the right of the United States to exclusive or primary jurisdiction over "in camp" offenses by its forces is understandable, since there are now very few 'American' bases overseas. Almost all U.S. forces stationed outside the United States are located on military bases of the host nation, which U.S. forces have been given permission to use. Obviously, a foreign force has much less claim to exclusive jurisdiction over an offense committed by one of its members on a base or camp of the host nation than it would if the offense had been committed in a base leased or owned by the foreign force, and possessed exclusively by it. *Cf.* Barton, * supra* note 110, at 350 (principles of the law of leases are preferable to the fiction of extraterritoriality in explaining exclusive jurisdiction).
evidence to support it. Nevertheless, the Court evidently intended its discussion of the jurisdictional issues in Sinigar to be taken seriously, and used for guidance in other cases, since the bulk of the opinion is taken up with discussing these matters in detail. If this charge had not ultimately been dismissed, the issue of Canadian jurisdiction would have been of importance, since presumably it would not have been discreditable to the service for Private Sinigar to have refused to testify before an official who lacked jurisdiction over him.

Secondly, it should be observed that this retreat is more apparent than real. Offenses in the 'camp, post or station' are intimately related to the maintenance of discipline in the force, but generally are of little interest to the local authorities. Even if the host nation retains a theoretical jurisdiction over such offenses, as a practical matter this jurisdiction is not likely to be exercised very often.

As a postscript to the Sinigar case, United States v. Cadenhead should be mentioned. The issue, again, was whether both the United States and Japan, where the offense took place, could try the accused. The issue of Japanese jurisdiction over American forces was dismissed with the statement that "American military personnel stationed in Japan on a permanent basis may be tried by Japan for offenses committed within its territory and punishable by its laws." This broad recognition of local jurisdiction over foreign forces formally repudiated any blanket claim of immunity. As authority for this statement the Court relied on Girard v. Wilson, in which the U.S. Supreme Court had similarly recognized foreign jurisdiction over American forces abroad. Since Wilson, American authorities have generally abandoned the position that members of foreign forces are, in principle, immune from local jurisdiction.

United States v. Wilmot, 11 C.M.A. 698, 29 C.M.R. 514 (1960), the Court seemed to have confused leased bases, such as Guantanamo, with the bases in Japan which the United States is merely allowed to use under an international agreement. Id. at 700-02. A similar confusion seems to underlie Chief Judge Fletcher's opinion in United States v. Rivera, 4 M.J. 215 (C.M.A. 1978), where he analogized searches conducted by U.S. Air Force personnel at the entrance to a Royal Thai Air Force Base to customs searches at an international border. Id. at 216. Alternatively, both these cases may reflect the "sociological fact" that, regardless of legal status, a foreign base is a community apart from the host nation, and must be able to police itself to some degree. See Stanger, supra, at 207-08.

140. During World War II, two justices of the Canadian Supreme Court thus concluded that visiting forces were generally subject to local jurisdiction, but that in practice this jurisdiction was little exercised "within the lines" of the visiting force's camps. In re Exemption of United States Forces from Canadian Criminal Law, 12 Ann. Dig. 124 (No. 36) (1942) (per Duff, C.J.C. and Hudson, J.).

142. Id. at 272-73, 34 C.M.R. at 52-53.
The Court's decisions on the status of visiting forces under customary international law may, then, be summarized as follows:

1. Foreign military courts are permitted to exercise jurisdiction over members of the force in the territory of another state.

2. Taken together, Robertson, Sinigar, and Cadhead establish that the local authorities may also exercise jurisdiction over members of the foreign force, at least for offenses committed off-duty and outside of the camp.

3. Foreign military courts may treat civilians accompanying their force as members of that force, so long as those civilians are not nationals of the state where the trial is held.

IV. VISITING FORCES: THE INTERPRETATION OF STATUS OF FORCES AGREEMENTS

Since 1945, the status of visiting forces has generally been determined by international agreement between the state sending the force abroad and the host, or receiving, state. For the United States, Article VII of the 1951 North Atlantic Treaty Organization (NATO) Status of Forces Agreement has formed a model for all later negotiations concerning local jurisdiction over U.S. Forces. Article VII recognizes that the sending state and the receiving state have concurrent jurisdiction over members of visiting armed forces. The receiving state, however, has the primary right to exercise this jurisdiction in most cases. The primary right to exercise jurisdiction is in the sending state only if the offense "arises out" of the performance of official duty or is committed against another member of the visiting force, its civilian component, or a dependent of either of these. Each state promises to give "sympathetic consideration" to a request from the other for a waiver of its primary right to exercise jurisdiction. This formula is so widely accepted that some authorities believe it reflects customary international law.

The Court of Military Appeals has had several opportunities to construe

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146. Compare NATO SOFA, supra note 120, art. VII with Chapter VIII Implementation Agreement, supra note 139, art. XV [and] Agreement Under Article VI, supra note 139, art. XVII. See Jordan, supra note 111.

147. NATO SOFA, supra note 120, art. VII, para. 3. Hansen v. Hobbs, 22 C.M.A. 181, 46 C.M.R. 181 (1973), suggests that the sending state's determination that an offense arose out of the accused's official duty may be subject to review in the receiving state's courts. Id. at 182.

148. NATO SOFA, supra note 120, art. VII, para. 3(c). Such a waiver need not be a formal act; any action evidencing a determination to end interest in and control over the case will suffice. United States v. Cadenhead, 14 C.M.A. 271, 276, 34 C.M.R. 51, 56 (1963). But see Whitley v. Aitchison, 26 I.L.R. 196 (France, Court of Cassation, March 25, 1958).

149. See Jordan, supra note 145; Wijewardane, Criminal Jurisdiction Over Visiting Forces with
both the NATO Status of Forces Agreement and the parallel agreement with Japan.\textsuperscript{150} Since these cases involved the interpretation of provisions common to most of the post-World War II agreements, their importance goes beyond the immediate issue in each case. This section will discuss the Court's interpretation of several of these provisions.

\section*{A. The Civilian Component}

Most status of forces agreements deal with the privileges and status of not only the sending state's military forces, but also the 'civilian component' of those forces. In \textit{Robertson},\textsuperscript{151} the prosecution argued that a merchant seaman on a vessel bringing supplies to the armed forces in Japan was subject to court-martial jurisdiction as part of the 'civilian component' under the Administrative Agreement with Japan. Under Article I(B) of that Agreement the civilian component was defined as including "civilian persons of United States nationality who are in the employ of, serving with, or accompanying the United States armed forces in Japan. . .\textsuperscript{152}\)

In a well-written opinion by Judge Brosman, the Court noted that this definition clearly paralleled Article 2(11) of the Uniform Code of Military Justice.\textsuperscript{153} While not employed by the armed forces, Robertson was, under existing precedents, 'accompanying' the armed forces within the meaning of Article 2(11).\textsuperscript{154} Parallel language alone was not, however, sufficient to convince the Court that an international agreement should be given the same meaning as a domestic statute. The Court then examined in detail both U.S. and Japanese practices in implementing the Agreement.\textsuperscript{155} Access to American post exchanges, use of military payment certificates, procedures for entry and exit from Japan and official minutes of the Joint Committee established to implement the Agreement were all considered by the Court, together with its declared intention to narrowly construe grants of extraterritorial jurisdiction, in deciding that Robertson was not part of the civilian component.\textsuperscript{156}

The definition of civilian component in the Japanese Agreement was broader than that in the NATO Status of Forces Agreement, which requires

\textit{Special Reference to International Forces}, \textit{41 Brit. Y.B. Int'l L.} 122, 146 (1965-66) \textit{[hereinafter cited as Wijewardane].}

\textsuperscript{150} Japan Administrative Agreement, \textit{supra} note 125.

\textsuperscript{151} 5 C.M.A. 806, 19 C.M.R. 102 (1955).

\textsuperscript{152} Administrative Agreement under Article III of the Security Treaty Between the United States of America and with Japan, Feb. 28, 1952, United States - Japan, art. I(b), 3 U.S.T. 3341, T.I.A.S. No. 2492. For the brief history of this agreement, see Wijewardane, \textit{supra} note 149, at 167-68. The same definition appears in Agreement Under Article VI, \textit{supra} note 139, art. I(b).

\textsuperscript{153} Robertson, 5 C.M.A. at 815, 19 C.M.R. at 111.

\textsuperscript{154} See, \textit{e.g.}, \textit{Aycock \& Wurfel}, \textit{supra} note 8, at 54-57.

\textsuperscript{155} Robertson, 5 C.M.A. at 815-18, 19 C.M.R. at 111-14.

\textsuperscript{156} \textit{Id.}
that members of the civilian component be both "accompanying the armed forces" and "in the employ of an armed service" of the sending state.\textsuperscript{157} Under the NATO formula, merchant seamen such as Robertson would even more clearly not be part of the civilian component.

\textbf{B. Mutual Assistance}

1. Searches

The NATO Status of Forces Agreement provides that the "authorities of the receiving and sending states shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence. . . ."\textsuperscript{158} Frequently, offenses in the concurrent jurisdiction of both the United States and the receiving state are initially investigated by the local authorities but eventually tried by the United States. In these situations the admissibility of certain evidence before the American court-martial will often depend on the degree of American involvement in the initial investigation.

The Court first considered this problem in \textit{United States v. DeLeo}.\textsuperscript{159} A French police inspector requested the assistance of the American military authorities in interviewing Corporal DeLeo on his involvement in illegal currency transactions. Ordered to report to his company commander's office, DeLeo found the French inspector waiting for him along with an agent of the Army's Criminal Investigation Division. The latter informed him he was under arrest and searched his person, after which his automobile was searched. After these searches, all three proceeded to Bordeaux to search DeLeo's apartment. During the course of this search the U.S. Army agent noticed, and seized, evidence of a forgery unrelated to the French investigation. DeLeo was eventually convicted of this forgery by a court-martial.\textsuperscript{160}

The search of the apartment was conducted in accordance with letters rogatory issued by a French magistrate, though it did not meet the standards of the Fourth Amendment.\textsuperscript{161} While the French authorities could not, obviously, be held to the standards of the United States Constitution, on appeal DeLeo argued that the Army agent was so intimately involved in the search that it should be considered an American enterprise.\textsuperscript{162} Rejecting this argument, the Court of Military Appeals pointed to paragraph 6(a) of Article VII.

\begin{enumerate}
\item \textsuperscript{157} NATO SOFA, \textit{supra} note 120, art. I, para. 1(b).
\item \textsuperscript{158} Id. art. VII, para. 6(a).
\item \textsuperscript{159} 5 C.M.A. 148, 17 C.M.R. 148 (1954).
\item \textsuperscript{160} Id. at 153, 17 C.M.R. at 153.
\item \textsuperscript{161} Id. at 171, 17 C.M.R. at 171 (Latimer, J., dissenting).
\item \textsuperscript{162} Id. at 155-57, 17 C.M.R. at 155-57.
\end{enumerate}
In light of the American obligation to assist the French police, a set of facts which in the United States would lead unerringly to the conclusion that a Federal investigator's presence at the search was attributable to a desire to obtain evidence . . . would in a foreign country suggest only that he was seeking to assist the local officials as required by the Status of Forces Agreement.\textsuperscript{163}

The Court thus construed paragraph 6(a) as requiring, or in any event authorizing, a broad range of activities in support of the local authorities. As the dissenting judge pointed out, in DeLeo's case the Army went far beyond merely making him available to the French police, or even observing the French investigation to ensure that no improprieties occurred.\textsuperscript{164} Instead, the U.S. investigator became actively involved in conducting searches under French authority.

In concluding that paragraph 6(a) authorized such activities, the Court, in contrast to its approach in \textit{Robertson}, made no effort to consider the negotiating history of this paragraph, or any other aspect of its context. Instead, it was simply assumed that this degree of participation in a foreign search was what paragraph 6(a) contemplated. In fact, the negotiating history of the NATO Status of Forces Agreement suggests that this paragraph was chiefly intended to counteract some of the effects of paragraph 10(a) of Article VII, which authorizes visiting forces to police their own camps, establishments or other premises.\textsuperscript{165} During the negotiations some delegations feared that this right would be used to prevent local authorities from serving process inside foreign camps.\textsuperscript{166} Paragraph 6(a) appears to have been intended to place an obligation on camp commanders to assist the local police in such situations, and not impede them. It was contemplated that the camp commander would either permit the local police to enter his command, surrender and request person to them, or see that the process was served in the camp.\textsuperscript{167} There was no suggestion that the camp authorities would themselves become actively involved in local investigations.

The incongruities latent in the \textit{DeLeo} decision became apparent in \textit{United States v. Schnell}.\textsuperscript{168} In November, 1972, an Army Criminal Investigation Division agent received information indicating that Private Schnell had illegal

\begin{itemize}
\item \textsuperscript{163} \textit{Id. at 156 n. 2, 17 C.M.R. at 156 n. 2.}
\item \textsuperscript{164} \textit{Id. at 163, 17 C.M.R. at 163 (Latimer, J., dissenting).}
\item \textsuperscript{165} Regularly constituted military units or formations of a force shall have the right to police any camps, establishments or other premises which they occupy as the result of an agreement with the receiving state. The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises. \textit{NATO SOFA, supra note 120, art. VII, para. 10(a).}
\item \textsuperscript{166} \textit{See Snee, supra note 120, at 105-06.}
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{23 C.M.A. 464, 50 C.M.R. 483 (1975).}
\end{itemize}
drugs in his off-base apartment in Germany. He gave this information to a
German police investigator, who obtained authority to search in accordance
with German law. The Army agent then apprehended the accused, handcuffed
him when he became beligerent, and brought him to the apartment at
the request of the German police. He then, again at their request, went to
the accused’s barracks to search for the keys to the apartment and gave them to
the German police. Although German police conducted the search, the
evidence found was eventually used in a court-martial for possession of illegal
drugs.169

On appeal, the government argued, on the basis of DeLeo, that the Army
agent’s activity was justified by paragraph 6(a) since possession of illegal
drugs was an offense in the primary jurisdiction of the host nation.170 Rejecting this
argument, the Court held that paragraph 6(a) did not authorize apprehending
the accused and bringing him to the scene of the search because it “relates
only to assistance in the collection of evidence” and “does not deal with the
seizure or apprehension of a person.”171 The Court reached this conclusion
despite Section 106 of the German Code of Criminal Procedure, which pro-
vided that:

The owner of the rooms or objects may be present at the search. In
the event he is absent his representative or a grown-up relative,
fellow-lodger or neighbor shall, if possible, be called in to assist.172

The Court did not regard this as sufficient authority for bringing Schnell to
the apartment, apparently because the statute did not absolutely require the
owner of the search property to be present. Since the Status of Forces Agree-
ment did not justify the agent’s activity, the Court concluded that the search
was a joint effort of the American and German police. American Constitu-
tional standards therefore applied, with the result that the evidence was im-
properly admitted, and Schnell’s conviction reversed.173

In contrast to DeLeo, in Schnell the Court gave an extremely narrow con-
struction to paragraph 6(a). It now applied only to the production of objects,
not persons, an interpretation contrary to the negotiating history discussed
above.174 Even the limited cooperation authorized by this construction was ap-
parently further limited to include only those acts absolutely required by the

169. Id. at 465, 50 C.M.R. at 484.
170. Id. at 468-69, 50 C.M.R. at 487-88.
171. Id. at 469, 50 C.M.R. at 488.
172. Id. at 468, 50 C.M.R. at 487.
173. Id. at 470, 50 C.M.R. at 489.
174. The Court found that the “seizure or apprehension of a person” was “covered” by
paragraph 5(c) of Article VII of NATO SOFA, supra note 120, which authorizes the sending state
to retain “custody” of a suspect until he is charged by the receiving state. United States v.
Schnell, 23 C.M.A. at 469, 50 C.M.R. at 488. Since Schnell had not been charged by the Ger-
man authorities at the time of the search, it was reasoned that the United States had no duty to
law of the host nation. Like the opinion in *DeLeo*, the Court in *Schnell* handed these decisions down by fiat, with little analysis of the treaty or its context. 175

The true basis for the decision appears to have been the Court’s suspicion that the entire German search was merely a subterfuge to avoid compliance with the Fourth Amendment. A 1963 supplementary agreement between the United States and the Federal Republic of Germany provided that the latter would ordinarily waive its primary right to exercise jurisdiction in cases where American and German jurisdiction was concurrent. 176 Taking judicial notice of this agreement, the Court inferred that the Army investigator must have known that the case would undoubtedly come before a court-martial rather than a German court, and that the entire transaction to ‘assist’ the German police was therefore a sham. 177 Bound by the trial court’s finding of fact that the agent’s testimony was truthful, the Court produced a strained interpretation of paragraph 6(a) as a means of redressing an evasion of the accused’s Fourth Amendment rights. The decision does not represent a proper interpretation of paragraph 6(a), and should be disregarded as a statement of international law. Indeed, as we shall see later, the Court itself has retreated somewhat from the *Schnell* interpretation of 6(a).

As a postscript to *Schnell*, it should be noted that the Court later attempted a radical solution to the problem of conflict between the Fourth Amendment and paragraph 6(a). In *United States v. Jordan* 178 the Court overruled *DeLeo* and severed the relationship between the duty of U.S. forces to cooperate in local investigations and the admissibility of evidence produced by those investigations. Hereafter, Fourth Amendment standards will apply to the admissibility of all evidence produced by searches at which any American official is present, even if merely as an observer, or in which the American authorities had aided the foreign police in any way. 179 While the Court recognized that the Status of Forces Agreement, as the ‘law of the land,’ required that such assistance be given, it held that this was irrelevant to the constitutional issue of evidence admissibility. 180 While this approach is preferable to that in *Schnell* in the limited

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furnish his person to the German investigators. *Id.* The Court completely neglected the broader language of paragraph 5(a) of Article VII:
The authorities of the receiving and sending states shall assist each other in the arrest of members of a force or civilian component ... and in handing them over to the authority which is to exercise jurisdiction in accordance with the [terms of Article VII].

NATO SOFA, *supra* note 120, art. VII, para. 5(a).


179. *Id.* at 527, 50 C.M.R. at 666.

180. *Id.* at 528, 50 C.M.R. at 667.
sense that it avoids a strained construction of international obligations, it
achieves this by simply ignoring those obligations. In general, jordan displays
a lack of sensitivity to transnational considerations.181

2. Interrogations

In contrast to the Court’s erratic course on the subject of foreign searches,
it's treatment of foreign interrogations has been remarkably consistent over the
years. Article 31 of the Uniform Code of Military Justice, a precursor of
Miranda v. Arizona,182 requires that a person suspected of a military crime be
advised, before interrogation, of his right to remain silent, of the possibility
that any statement made might be used against him at a court-martial and of
the nature of the accusation against him.183 At present, both Article 31 and
Miranda apply to military interrogations.184 In several cases accused persons
have argued that their statements to foreign police officials should not be ad
mitted before courts-martial for failure to comply with these statutory and
constitutional warning requirements.

The issue was first raised in United States v. Grisham.185 In Grisham, the Court
held that the mere presence of U.S. military police observers at a French inter-
rogation, coupled with the use of an American military interpreter, did not
make the interrogation a joint U.S.-French operation requiring the giving of
Article 31 warnings.186 Paragraph 6(a) of Article VII first appears in United
States v. Plante,187 where an Army investigator located the accused and
‘directed’ him to accompany him to the French police for interrogation on
blackmarketing activities. The investigator later observed the interrogation,
during which Plante made incriminatory statements. Concluding that in this
case, too, there was no joint operation, the Court ‘‘made reference to’’
paragraph 6(a) as a justification for the Army agent’s delivery of the accused
to the French authorities.188

In answer to the accused’s suggestion that the agent should have advised
him under Article 31 prior to delivering him to the French authorities, the
Court held that such a rule would have come from Congressional enactment
rather than judicial decision. The Court noted that Congress has the power, in

181. See Carnahan, United States v. Jordan: Foreign Searches, Military Courts and the Act of State Doc-
185. 4 C.M.A. 694, 16 C.M.R. 268 (1954).
186. Id. at 697, 16 C.M.R. at 271.
188. Id. at 271, 32 C.M.R. at 271. The Court also correctly concluded that paragraph 5(c),
article VII, was immaterial on the issue of assistance to the local police, a position from which it
unfortunately later retreated. Id. at 272. See note 174 supra.
U.S. internal law, to pass statutes prohibiting the implementation of a treaty.\textsuperscript{189} It was strongly implied that warning an accused of his right to remain silent before delivery to foreign authorities would be "in derogation of" the Status of Forces Agreement, presumably because the accused's silence would interfere with the local investigation rather than assisting it.\textsuperscript{190}

In \textit{United States v. Jones},\textsuperscript{191} decided in 1979, the Court reconsidered the \textit{Plante} decision in light of \textit{Jordan}. At the request of the German authorities, the Army had made Private Jones available for interrogation and had allowed the German investigator to use a U.S. military interview room for that purpose. Other than Jones, no Americans were in the room during the interview. The result was a written statement used at Jones' court-martial for larceny, assault and battery.\textsuperscript{192}

On appeal, the accused urged the Court to overrule \textit{Grisham} and \textit{Plante}. Since the supplemental agreement between the United States and Germany created a high likelihood that any case investigated by the Germans would actually be tried by a U.S. court-martial, he argued that American officials should have given him the Article 31 and \textit{Miranda} warnings before delivering him to German interrogation.\textsuperscript{193} Alternatively, he argued that the German practice of waiving jurisdiction required that the German investigator give him these warnings.\textsuperscript{194}

Rejecting these arguments, the Court reaffirmed the general approach in \textit{Grisham} and \textit{Plante}.\textsuperscript{195} Merely delivering the accused to the German authorities and providing a place for the interview did not make the interrogation an American enterprise. The Court referred several times to paragraph 6(a) of Article VII as justifying these acts.\textsuperscript{196} These references take on added significance from the fact that the \textit{Jones} opinion was written by Judge Cook, who also authored \textit{Schnell}. The Court seems, therefore, to have returned to a broader interpretation of paragraph 6(a). This interpretation, supported both by the negotiating history of the Agreement and the administrative practice of the parties, authorizes the deliverly of persons to the host nation's investigators as well as physical evidence, at least under some circumstances.\textsuperscript{197}

C. \textit{Multiple Trials for the Same Offense}

All developed legal systems recognize that a person should not be placed in

\begin{itemize}
\item \textsuperscript{189} United States v. Plante, 13 C.M.A. at 272, 32 C.M.R. at 272.
\item \textsuperscript{190} \textit{Id.} at 272-73, 32 C.M.R. at 272-73.
\item \textsuperscript{191} 6 M.J. 226 (C.M.A. 1979).
\item \textsuperscript{192} \textit{Id.} at 227.
\item \textsuperscript{193} \textit{Id.} at 227-28.
\item \textsuperscript{194} \textit{Id.} at 227.
\item \textsuperscript{195} \textit{Id.} at 228-30.
\item \textsuperscript{196} \textit{Id.} at 227.
\end{itemize}
jeopardy twice for the same offense.\footnote{198} Customary international law does not, however, prohibit two or more nations from punishing an individual for the same offense, so long as each had prescriptive jurisdiction over the offense and enforcement jurisdiction over the accused.\footnote{199} To ameliorate this situation in the visiting forces context, the NATO Status of Forces Agreement, and the agreements patterned after it, provide as follows:

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 offense within the same territory by the authorities of another Contracting Party.\footnote{200}

In Sinigar, it will be recalled, the accused was summarily judged in contempt for his refusal to answer questions during a Canadian coroner’s inquest, and later faced a court-martial for the same act.\footnote{201} On appeal, he argued that his temporary imprisonment by the coroner should, under the Status of Forces Agreement, have barred his trial by the U.S. authorities.\footnote{202} “We are met at the outset,” said the Court, “with the question of whether the accused was ‘tried’ by the Canadian court within the meaning of the word as used in the quoted paragraph.”\footnote{203} The answer to this question was said to depend on whether Canadian law viewed contempt proceedings as a ‘trial.’ Lacking evidence on this issue, the Court inferred that, since Canada was also a common-law jurisdiction, its law would be the same as U.S. federal law.\footnote{204} In the federal court system, summary contempt proceedings were found to be sui generis, and not characterized as trials.\footnote{205} The Court therefore ruled against Sinigar on this issue.

It is not clear why the Court chose to turn an international law problem into a foreign law problem. The issue in Sinigar properly should have been the meaning of the term ‘trial’ in the Agreement, in relation to the actual nature of the Canadian proceeding against the accused. Whether Canada regarded

\footnote{198. See Oehler, Recognition of Foreign Penal Judgments and Their Enforcement, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 261 (M. Bassiouni & V. Nanda eds. 1973) [hereinafter cited as Oehler].
199. \textit{Id.}; cf. United States v. Richardson, 580 F.2d 946 (9th Cir. 1978).
203. \textit{Id.}
204. \textit{Id.} at 338, 20 C.M.R. at 54.
205. \textit{Id.} See McHardy, Military Contempt Law and Procedure, 55 MIL. L. REV. 131, 144 (1972).}
such proceedings as trials might be a relevant consideration, but it should not have been treated as decisive of the issue. Perhaps the Court gave undue weight to the fact that the restriction on a second trial only applied "in the same territory" as the first trial. The Court's unspoken assumption may have been that this phrase indicated an intent to protect the sensitivities of the receiving state, so that the primary focus should be on whether it would regard the court-martial as a second trial.

The negotiating history provides no enlightenment as to the policy actually behind the "in the same territory" phrase, though it appears to have originated with the United States.\textsuperscript{206} The discussions of this paragraph as a whole indicate that it was intended to protect the individual against double jeopardy rather than the interests of either the sending or receiving state.\textsuperscript{207} At one point in the negotiations it was pointed out that the "in the same territory" phrase should permit multiple trials in different territories.\textsuperscript{208} The Juridical Subcommittee, where the issue was raised, agreed that this would be permitted, "but hoped that in practice no such cases would arise," since as a practical matter all trials would probably have to be held wherever the witnesses were.\textsuperscript{209} The purpose of this phrase remains obscure, as does the Court's technique of interpretation in \textit{Sinigar}.

Quite a different approach was taken in \textit{United States v. Cadenhead},\textsuperscript{210} where the accused had been subject to Japanese Family Court proceedings before his trial by court-martial for the same offense. The Court's opinion was written by Chief Judge Quinn, who had already expressed "a number of reservations regarding the reasoning" of the majority opinion in \textit{Sinigar}.\textsuperscript{211} Again the issue was whether host nation proceedings were to be considered a trial within the Executive Agreement between the United States and Japan; the double jeopardy language in this agreement was identical to that in the NATO Agreement.\textsuperscript{212}

The Chief Judge's opinion pointed out that the paragraph in question, as well as the rest of the article on criminal jurisdiction, consistently used words and phrases "commonly and intimately associated with proceedings under the regular penal law of the state," e.g., "acquitted," "convicted," "sentence," and "pardoned."\textsuperscript{213} Also, the official proceedings of the Joint Committee appointed to implement the Agreement pointed in the same direction, since

\textsuperscript{206} Snee, \textit{supra} note 120, at 104-05. The U.S. draft containing this language appears, however, to have been influenced by the Italian suggestion that the principle of no double jeopardy "normally applied only to jurisdiction within the territorial limits of one country." \textit{Id.} at 104.

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} \textit{Id.} at 104-06.

\textsuperscript{209} \textit{Id.} at 112.

\textsuperscript{210} 14 C.M.A. 271, 34 C.M.R. 51 (1963).

\textsuperscript{211} \textit{Sinigar}, 6 C.M.A. at 340, 20 C.M.R. at 56 (1955) (Quinn, C.J., concurring).

\textsuperscript{212} \textit{United States v. Cadenhead}, 14 C.M.A. at 273, 34 C.M.R. at 53.

\textsuperscript{213} \textit{Id.} at 274-75, 34 C.M.R. at 54-55. See Wijewardane, \textit{supra} note 149, at 175.
they referred to the requirement for an indictment in certain cases.\textsuperscript{214} The opinion therefore concluded that this paragraph of the Agreement "contemplates a proceeding directly intended to vindicate the penal law."\textsuperscript{215}

However, expert testimony at the trial indicated that Japanese Family Court proceedings were "educative, not punitive," and that the key idea behind them was "guardianship."\textsuperscript{216} The disposition of the accused's case lent support to this testimony, since the Family Court had, after several hearings, concluded that since the accused were "foreigners" it would have been impossible to have applied the 'educative' policy of the Japanese Juvenile Law to them.\textsuperscript{217} The Court of Military Appeals therefore concluded that the Family Court proceeding was not a "trial" within the meaning of the Executive Agreement, and affirmed the conviction by court-martial.

The differences between the approaches in \textit{Sinigar} and \textit{Cadenhead} can be illustrated by examining how each would affect the right of a host nation to try an individual \textit{after} certain American actions were taken against him for the same offense. It is generally agreed that a decision by military authorities not to prosecute would not bar a later trial by the host nation.\textsuperscript{218} Under Article 15 of the Uniform Code of Military Justice, however, a commanding officer may impose "nonjudicial punishment" on persons under his command for minor offenses against the Code.\textsuperscript{219} The Court of Military Appeals has also held that at least for some purposes punishment by a Summary Court-Martial is not to be considered a prior conviction by a court.\textsuperscript{220} Under the theory adopted in \textit{Sinigar}, neither Article 15 punishment nor trial by a Summary Court-Martial would bar subsequent trial for the same offense by the receiving state, since in neither case would these proceedings be considered a trial under the law of the United States, the state holding the proceeding. Under the \textit{Cadenhead} approach, however, a Summary Court-Martial would certainly bar a subsequent foreign trial since Summary Courts-Martial are "directly intended to vindicate the [military] penal law" by punishing violators of that law.\textsuperscript{221}

"Nonjudicial punishment," as the name implies, is also punishment for violation of military penal law. The official Manual for Courts-Martial,

\textsuperscript{214} Cadm/Jead, 14 C.M.A. at 275, 34 C.M.R. at 55.
\textsuperscript{215} Id. at 274, 34 C.M.R. at 54.
\textsuperscript{216} Id. at 275, 34 C.M.R. at 55.
\textsuperscript{217} Id. at 272, 34 C.M.R. at 52.
\textsuperscript{218} See Whitley v. Aitchison, 23 I.L.R. 255 (France, Court of Appeal of Paris, May 16, 1956), rev'd on other grounds, 26 I.L.R. 196 (Court of Cassation, March 25, 1958); SNEE, supra note 120, at 104, para. 8; Wijewardane, supra note 149, at 175.
\textsuperscript{221} Cadm/Jead, 14 C.M.A. at 274, 34 C.M.R. at 54.
however, states that these punishments are "primarily corrective in nature," i.e., intended primarily to rehabilitate the offender rather than to 'vindicate' the law.\(^{222}\) Also, to consider such proceedings a 'trial' in the sense of the Status of Forces Agreement would do violence to both the ordinary and legal meanings of those terms. Although the accused person is given notice of the charge and an opportunity to present matter in his defense, Article 15 proceedings are conducted in quite an informal manner and lack most of the indicia of a trial.\(^{223}\) It is, therefore, doubtful whether such punishments would bar a subsequent trial under the Cadenhead standard. Chief Judge Quinn's emphasis on the implications of the terms 'sentence' and 'convicted,' terms which are not technically applicable to Article 15 any more than they are to Japanese Family Court proceedings, suggests that he would find that Article 15 punishments would not bar a subsequent foreign trial.\(^{224}\)

D. Other Rights of an Accused Person

In addition to the guarantee against multiple trials, the status of forces agreements to which the United States is a party all contain an enumeration of procedural rights to which the accused "shall be entitled."\(^{225}\) This language implies that the Agreement creates rights for individual persons affected by it, and not merely the states party to it. This conclusion is reinforced by the Cadenhead and Sinigar opinions, where the Court of Military Appeals did not

\(^{222}\) 1969 COURTS-MARTIAL MANUAL, supra note 30, para. 129(b).

\(^{223}\) There is thus no proceeding before a judicial officer or "court." Cf. Wijewardane, supra note 149, at 175. Nor does punishment under Article 15 necessarily bar later trial by court-martial. Compare 1969 COURTS-MARTIAL MANUAL, supra note 30, para. 215(c), with Whitley v. Aitchison, 23 I.L.R. 255 (France, Court of Appeal of Paris, May 16, 1956).

\(^{224}\) Cadenhead, 14 C.M.A. at 274-76, 34 C.M.R. at 54-56.

\(^{225}\) E.g., NATO SOFA, supra note 120, art. VII, para. 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 favor, 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.

Id.
hesitate to regard individuals as having standing to raise the issue of prior trial by foreign authorities.

In United States v. Carter,226 however, the Court sweepingly announced that the NATO "Status of Forces Agreement confers no individual right and most assuredly seeks only to preserve those protections presently existing."227 In a sense, the statement that a status of forces agreement does not confer individual rights is only a corollary of the Court's earlier holding that such agreements are intended to define the rights and obligations of governments, and not to place enforceable obligations on individuals.228 Further examination, however, suggests that this statement should be limited to the facts in Carter.

Carter arose out of a search executed by American military authorities in the accused's off-base housing in France. He occupied this housing under a contract between the United States and the French corporation owning the buildings, under which the United States agreed to see that the housing was fully occupied and the owner agreed to rent only to Americans. In light of this special situation, the French police had earlier agreed that the U.S. military authorities could perform searches in these buildings without making prior arrangements with the French authorities.229

The search and seizure in Carter's case had been carried out under this agreement, but without securing the permission of a French magistrate as required by French law.230 On appeal, the defense argued that this evidence should have been excluded because it had been taken in violation of various provisions of the Status of Forces Agreement, most notably Article II, which required the forces of the sending state to "respect the law of the receiving State."231 In this context, the Court correctly concluded that the military authorities had violated no individual rights of the accused. The provisions cited all seem clearly intended to protect the interests of the various states party to the Agreement, rather than those of individuals.232 The Carter opinion should not, however, be interpreted as holding that none of the Articles of the Agreement create rights for individuals.

This conclusion is supported by the Court's statement that the Agreement

227. Id. at 281, 36 C.M.R. at 437; cf. United States v. Rodriguez, 2 C.M.A. 101, 6 C.M.R. 101 (1952) (Executive agreement with Mexico on liability of its citizens to draft created rights for state, not individual; alternative holding).
230. Id. at 280, 36 C.M.R. at 436.
231. NATO SOFA, supra note 120, art. II.
232. In addition to Article II, the Carter Court cited NATO SOFA, supra note 120, art. VII, paras. 6(a) (the authorities of the sending and receiving states to assist each other in searches), 10(a) (sending state has right to police its installations), and 10(b) (military police of sending state not to be employed off their installation except in liaison with receiving state authorities). These provisions are plainly intended to protect the sovereignty of the receiving state; there is no reason
The Court listed the rights "thus preserved" as including speedy trial, notice of charges, confrontation of witnesses, compulsory process for obtaining witnesses, legal representation, a competent interpreter, communication with representatives of the sending state, and their presence at trial. These rights were 'preserved' rather than 'created' by the Agreement in the sense that an American serviceman would have enjoyed these rights if tried before an American court-martial or civilian court rather than a European tribunal.

Although the Court did not consult the negotiating history of the Agreement, this interpretation is supported by that history. The listing of specific rights was proposed by the United States delegation, and these safeguards were described as being "in conformity with the procedures followed in the United States." The other NATO powers generally acquiesced in the American proposal that specific rights be guaranteed to members of the visiting forces tried by the receiving state. Undoubtedly, this was because all parties concerned recognized that the United States would be the principal 'sending state' under the Agreement. This part of the Agreement does, therefore, seem to have been intended to 'preserve' specifically American due process rights, as those rights were understood in 1949.

CONCLUSION

Judge Baxter has noted the uneven quality of the international law opinions of most American courts. The decisions of the Court of Military Appeals fit into this pattern. The carefully written opinion in Schultz must thus be balanced against the summary treatment accorded to international legal issues in, for example, United States v. Rivera, where the Court upheld a gate search conducted at a U.S. Air Force installation in Thailand by analogizing it to a customs search at an international border. In disposing of this case, it would appear that the Court might profitably have examined such issues as the legal status of foreign bases and the right of foreign armed forces to defend themselves against introduction of contraband into their camps. Yet, the Court not

why a national of the sending state should have standing to object to a violation of them, or be able to claim rights under them. Concern with state sovereignty, rather than individual rights, is also apparent in the negotiating history of paragraphs 10(a) and (b). See Snee, supra note 120, at 112-13. Cf. United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir.), cert. denied, 421 U.S. 1001 (1975) (articles of OAS and UN Charters protecting sovereignty of members held to create no individual rights). But see United States v. Reagan, 7 M.J. 490 (C.M.A. 1979) (Fletcher, C.J.).

234. Id. at 282, 36 C.M.R. at 438.
235. Snee, supra note 120, at 65.
236. Id. at 106-08.
only chose to totally ignore international law in its opinion, but went on to base its decision on the analogy which, with its implication that the United States was somehow sovereign over its bases in Thailand, would inevitably tend to offend the Thai government. Again, the painstaking care taken in Robertson and Cadenhead to interpret properly international agreements can be contrasted with the superficial techniques used in Schnell.

As a source of international law, the Court has consistently preferred to rely on decisions of the United States Supreme Court to the exclusion of all other sources. While this preference is perhaps understandable in a lower federal court, many important sources of evidence of international law, such as the decisions of foreign courts and international tribunals, have been virtually ignored as a result. The Court’s opinions on national jurisdiction would, for example, have been considerably strengthened by references to the decision of the Permanent Court of International Justice in S.S. Lotus.

Similarly, even the Court’s best opinions on the interpretation of treaties have failed to look to the negotiating history for guidance. There may, indeed, be both legal and practical reasons for this. Even for a court sitting in Washington, D.C., negotiating history is often inaccessible to both the court and counsel. Also, the subsequent practice of states in executing the treaty may often be a better aid to interpretation than negotiating history. Still, the Court should make more than the minimal use of negotiating history which has characterized its past practice.

In recent years, the Court has, sadly, produced fewer skillfully done opinions dealing with international law. In part, this may be due to changes in the Court’s personnel, and other factors beyond its control. However, its sub-

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239 This author has not found any cases in which the Court cited an international tribunal. Only in Cadenhead did the Court cite a foreign decision on international law. 14 C.M.A. at 276, 34 C.M.R. at 56 (1963).

240 See Proving International Law in a National Forum, 70 PROCEEDINGS OF THE AM. SOC’Y OF INT’L LAW 10, 13-15 (1976). Note, however, that the negotiating history of the NATO SOFA has been published. See Snee, supra note 93.


242 In Cadenhead, 14 C.M.A. 271, 34 C.M.R. 51 (1963), the Court referred to the fact that the double jeopardy provisions of the SOFA with Japan had been derived from the NATO SOFA, and had been included in the NATO SOFA at the request of the United States. Id. at 273. No conclusions were drawn from this brief nod to negotiating history, and in no other case has the Court gone even this far.

243 The original judges on the Court had all served in World War II in capacities giving them a familiarity with the administration of military law, including, undoubtedly, its international aspects. See Willis, supra note 3, at 71 nn. 167-69. The present members of the Court, by contrast, came to the Court with distinguished backgrounds in domestic American law, but such backgrounds would give them little contact with international legal problems. See Cooke, supra note 3, at 45 n. 3, 49-50 n. 19.
ject matter jurisdiction still provides the Court of Military Appeals unique opportunities to creatively apply international law in many of its decisions, if it will only take up these opportunities and make use of this available body of law. This would result in the constructive development of international law as well as an improvement in the craftsmanship of the Court's decision and opinions.