International Lawyer

Volume 3 | Number 3 Article 8

1969

Developments in Status of Forces Agreements

Edward W. Haughney

EDWARD W. HAUGHNEY*

Developments in Status of Forces Agreements

During the period December 1, 1966, to November 30, 1967, 33,401 United States military and civilian personnel and their dependents were charged with offenses subject to the primary or exclusive jurisdiction of foreign tribunals. 31,466 or 94% were charges against military personnel. United States military authorities obtained a waiver of primary foreign jurisdiction in 84.4% of the cases involving concurrent jurisdiction offenses charged against military personnel. This is a significant improvement over last year's waiver rate of 82.7%. The NATO waiver rate was up to 93.4% from last year's 90.9%.

It was encouraging to note that the Department of Defense considers present status of forces arrangements so far workable and satisfactory and that no United States commander has reported that jurisdictional arrangements have had a significant adverse impact on the accomplishment of his mission.

Application of NATO SOFA Within the United States

Military and civilian members of foreign forces and their dependents, while in the United States, are subject to the jurisdiction of the US courts, both state and Federal, unless they are expressly exempted by treaty or have diplomatic immunity. Currently the NATO SOFA is the only agreement which limits the jurisdiction of US courts over members of foreign forces and their dependents in the United States.

The only other authority for the exercise of jurisdiction by a foreign country over its personnel in the United States is contained in a US statute (22 USC 701-706) which provides that the service courts of friendly foreign forces within the United States may exercise a limited

* EDWARD W. HAUGHNEY, Colonel, United States Army, Chief, International Affairs Division Office, JAG, Department of the Army, graduate of Brooklyn College (B.A.), St. John's University School of Law (LL.B.), and George Washington University (M.S.), Chairman of Status of Forces Agreements Committee, Section of International and Comparative Law.

jurisdiction over their personnel when its provisions are made operative by Presidential Proclamation. At present Australia is the only foreign country to which the statute has been made operative by Presidential Proclamation. (No. 3681 Oct 14, 1965, 30 F.R. 13049)

Recent SOFA Developments

Negotiations for a SOFA with the Kingdom of Thailand, and with the Commonwealth of Australia for a reciprocal SOFA, which were initiated several years ago, continued during the reporting period and are still in progress.

Three law suits of interest to this committee were as follows:

1. In May of this year, SP4 H. K. Smallwood, Jr., who was indicted in April by the Korean authorities for the alleged murder of a female Korean national and for arson, filed a petition for a writ of habeas corpus in the US District Court of the District of Columbia. He also sought an order enjoining the Secretary of Defense, and all subordinate commanders, from releasing him to the Korean authorities for trial. In essence, Specialist Smallwood contended that the US-Korea SOFA is unconstitutional and that a trial by the Korean authorities would deny him due process of law. On June 25th, the District Court denied the petition, 286 F. Supp. 97 (D.C. DC 1968) and Specialist Smallwood appealed this decision to the US Court of Appeals for the District of Columbia. Decision in that court is still pending. On July 2, 1968, Specialist Smallwood was convicted of murder and arson by the Korean authorities and sentenced to 15 years confinement. He has filed an appeal in the Korean courts and remains in US custody pending disposition of that appeal.

2. The issue of the constitutionality of Article 2(10) of the Uniform Code of Military Justice (subjecting persons, who in time of war are serving with or accompanying an armed force in the field, to the jurisdiction of the Uniform Code of Military Justice) is being litigated by Mr. James H. Latney. Mr. Latney, a merchant seaman on the SS AMTANK which delivered military petroleum products to the US armed forces at DaNang, was charged with the premeditated murder of a fellow crew member in a bar in DaNang. In an effort to prevent his trial by court-martial in Vietnam Mr. Latney petitioned the US District Court for the District of Columbia for a writ of habeas corpus. That Court denied the writ on January 16, 1968, holding that Article 2(10) is constitutional, that a "time of war" existed in Vietnam and its offshore waters, and that Mr. Latney was a person serving with or

accompanying the forces within the meaning of Article 2(10). (*James Henry Latney v. Dean Rusk et al.* Habeas Corpus No. 539-07). He was then tried by court-martial and sentenced to 15 years confinement. Mr. Latney appealed the decision to the US Court of Appeals for the District of Columbia, which heard argument on June 14, 1968. That appeal is still under advisement.

3. On 14 October 1968 the US Supreme Court granted a writ of certiorari (202 Misc, Oct Term 1968) in the case of *O'Callahan* v. *Parker* (390 F.2d 36. C.A. 3rd Cir 1968). This grant of certiorari will bring squarely before the court the question:

> Does a court-martial, held under the Articles of War Tit 10, U.S.C. § 801 *et seq.* have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional right to indictment by a grand jury and trial by a petit jury in a civilian court?

The case arises from a habeas corpus proceeding commenced by petitioner in the United States District Court for the Middle District of Pennsylvania in April, 1966, in which he attacked the jurisdiction of the court-martial and other alleged deficiencies in his trial.

After a trial by court-martial in the then Territory of Hawaii, petitioner, a sergeant in the Army, was convicted on all charges against him: assault with intent to rape, attempted rape, and housebreaking with intent to commit rape (10 USC 934, 880, 930, respectively). On 11 October 1956, he was sentenced to confinement at hard labor for ten years, forfeiture of all pay and allowances, and a dishonorable discharge. The Army Board of Review affirmed, and in March, 1957, the United States Court of Military Appeals declined review.

On 5 March 1958, the Army authorities transferred the petitioner to the United States Penitentiary at Lewisburg, Pennsylvania. On 6 May 1960, the petitioner was released from confinement and placed on parole pursuant to an order of the United States Board of Parole issued under the provisions of 18 USC 4203 (1964 ed.), with 2,348 days remaining to be served on his sentence.

In February, 1962, while still on parole, the petitioner departed from Massachusetts and traveled to Arkansas without the permission of his parole officer. At the time he absconded from Massachusetts, he was wanted by the Boston, Massachusetts, authorities for allegedly committing the offense of rape.

On 5 April 1962, while still on parole, the petitioner was convicted by the Middlesex Superior Court, Commonwealth of Massachusetts, on his plea of guilty to the offense of rape. The court then sentenced him to a term of five to eight years. The petitioner was released by the Massachusetts authorities on 21 February 1966, after serving his sentence on the rape conviction. He was immediately arrested by the United States Marshal under the authority of the parole violator warrant and the provisions of 18 USC 4206.

After consideration of the petitioner's case, the United States Board of Parole, on 3 March 1966, ordered the petitioner transferred to a Federal penitentiary to await his parole revocation hearing. On 1 June 1966, the petitioner's parole was formally revoked by the United States Board of Parole.

The petitioner's full term, less 180 days, now expires on 28 January 1972; and, with credit for statutory good time, his mandatory release date is 16 June 1970.

A decision in favor of the petitioner in this case would not only have a profound effect upon court-martial jurisdiction within the United States but would, if applied in overseas areas, result in the abdication to foreign authorities of jurisdiction over nearly all serious crimes committed by United States servicemen overseas. The United States military authorities would not then be able to accept waivers of jurisdiction by foreign authorities and, based on last year's statistics, approximately 18,000 servicemen per year would be left solely to the jurisdiction of foreign courts.