

Office of the Secretary of Defense

§ 151.4

Errors and Argument

[Set forth each error alleged in upper case letters, followed by separate arguments for each error. Arguments shall discuss briefly the question presented, citing and quoting such authorities as are deemed pertinent. Each argument shall include a statement of the applicable standard of review, and shall be followed by a specific prayer for the relief requested.]

Appendix

[The brief of either party may include an appendix containing copies of unpublished opinions cited in the brief, and extracts of statutes, rules or regulations pertinent to the assigned errors.]

(Signature of counsel)

Name (and rank) of counsel, address and telephone number

Certificate of Filing and Service

I certify that a copy of the foregoing was mailed or delivered to the Court and opposing counsel on (date).

Name (rank) (and signature)

Address and telephone number
(Date)

PART 151—STATUS OF FORCES POLICIES AND INFORMATION

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AUTHORITY: 1 U.S.C. 133, 75 Stat. 517.

SOURCE: 45 FR 20465, Mar. 28, 1980, unless otherwise noted.

§ 151.1 Reissuance and purpose.

This part is reissued to update established DoD policy and procedures on trial by foreign courts and treatment in foreign prisons of U.S. military personnel, nationals of the U.S. serving with, employed by, or accompanying the Armed Forces of the United States, and the dependents of both (hereafter referred to as U.S. personnel); and pro-

vides uniform reporting on the exercise of foreign criminal jurisdiction.

§ 151.2 Applicability.

The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, and the Unified and Specified Commands. As used herein, the term "Military Services" refers to the Army, Navy, Air Force, and Marine Corps.

§ 151.3 Policy.

It is the policy of the Department of Defense to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.

§ 151.4 Procedures and responsibilities.

(a) *Application of Senate resolution on status of forces.* This directive implements the Senate Resolution accompanying the Senate's consent to ratification of the North Atlantic Treaty (NATO) Status of Forces Agreement (§151.6). Although the Senate Resolution applies only to countries where the NATO Status of Forces Agreement is in effect, the same procedures for safeguarding the interests of U.S. personnel subject to foreign jurisdiction shall be applied insofar as practicable in overseas areas where U.S. forces are regularly stationed.

(b) *Orientation of personnel.* The Military Services shall issue uniform regulations establishing an information and education policy on the laws and customs of the host country for personnel assigned to foreign areas.

(c) *Designated commanding officer.* Formal invocation of the Senate Resolution procedure shall be the responsibility of a single military commander in each foreign country where United States forces are stationed. Attache personnel and other military personnel serving under a chief of a diplomatic mission shall not be considered U.S. forces in this part.

(1) In the geographical areas for which a unified command exists, the commander shall designate within each country the "Commanding Officer" referred to in the Senate Resolution (§151.6).

(2) In areas where a unified command does not exist, a commanding officer in each country shall be nominated by the Military Departments. These recommendations shall be forwarded by the Judge Advocate General of the Army to the Secretary of Defense, for implementation through the Office of the Assistant Secretary of Defense (International Security Affairs). In designating the commanding officer to act for all the Military Departments, consideration must be given to the availability of legal officers and readiness of access to the seat of the foreign government. Such an officer may also be appointed by the Military Departments for countries where no U.S. forces are regularly stationed.

(d) *Country law studies.* (1) For each foreign country where U.S. forces are subject to the criminal jurisdiction of foreign authorities, the designated commanding officer for such country shall make and maintain a current study of the laws and legal procedures in effect. Studies of the laws of other countries shall be made when directed. This study shall be a general examination of the substantive and procedural criminal law of the foreign country, and shall contain a comparison thereof with the procedural safeguards of a fair trial in the State courts of the United States.

(2) Copies of these studies shall be forwarded by the designated commanding officer to each of the Judge Advocates General of the Military Services. Principal emphasis is to be placed on those safeguards that are of such a fundamental nature as to be guaranteed by the Constitution of the United States in all criminal trials in State courts of the United States. See § 151.7 for enumeration of safeguards considered important. These country law studies shall be subject to a continuing review. Whenever there is a significant change in any country's criminal law, the change shall be forwarded by the designated commanding officer to each of the Military Service's Judge Advocates General.

(e) *Waivers of local jurisdiction—military personnel.* (1) In cases where it appears probable that release of jurisdiction over U.S. military personnel will not be obtained and the accused may

not obtain a fair trial, the commander exercising general court-martial jurisdiction over the accused shall communicate directly with the designated commanding officer, report the full facts of the case, and supply a recommendation.

(2) The designated commanding officer shall determine, in the light of legal procedures in effect in that country, whether there is danger that the accused will not receive a fair trial. A trial shall not be considered unfair merely because it is not identical with trials held in the United States. Due regard, however, should be given to those United States trial rights listed in § 151.7 that are relevant to the facts and circumstances of the trial in question.

(3) If the designated commanding officer determines there is risk of an unfair trial, the commanding officer shall decide, after consultation with the chief of the diplomatic mission, whether to press a request for waiver of jurisdiction through diplomatic channels. If the commanding officer so decides, the recommendation shall be submitted through the unified commander, if any, and The Judge Advocate General of the accused's service, to the Office of the Secretary of Defense. The objective in each case is to see that U.S. military personnel obtain a fair trial in the receiving state under all circumstances.

(f) *Request to foreign authorities not to exercise their criminal jurisdiction over civilians and dependents.* The following procedures shall be followed when it appears that foreign authorities may assume criminal jurisdiction over dependents of U.S. military personnel, civilian personnel, and their dependents:

(1) When the designated commanding officer determines, after a careful consideration of all the circumstances, that suitable corrective action can be taken under existing administrative regulations, the commanding officer may request the local foreign authorities to refrain from exercising their criminal jurisdiction.

(2) When it appears possible that release of jurisdiction will not be obtained and that the accused may not obtain a fair trial, the commander exercising general court-martial jurisdiction over the command in which such

personnel are located shall communicate directly with the designated commanding officer, reporting the full facts of the case and supplying a recommendation.

(3) The designated commanding officer shall then determine, in the light of legal procedures in effect in that country, whether there is danger that the accused will not receive a fair trial.

(4) If it is determined that there is such danger, the designated commanding officer shall decide, after consultation with the chief of the diplomatic mission, whether a request should be submitted through diplomatic channels to foreign authorities seeking their assurances of a fair trial for the accused or, in appropriate circumstances, that they forego their right to exercise jurisdiction over the accused. If the designated commanding officer so decides, a recommendation shall be submitted through the unified commander, if any, and The Judge Advocate General of the Military Service concerned, to the Office of the Secretary of Defense.

(g) *Trial observers and trial observer report.* (1) The designated commanding officer shall submit to the chief of the diplomatic mission a list of persons qualified to serve as U.S. observers at trials before courts of the receiving state. Nominees shall be lawyers, and shall be selected for maturity of judgment. The list shall include, where possible, representatives of all Military Services whose personnel are stationed in that country to enable the chief of the diplomatic mission to appoint an observer from the same Military Service as the accused. The requirement that nominees shall be lawyers may be waived in cases of minor offenses. Incidents that result in serious personal injury or that would normally result in sentences to confinement, whether or not suspended, shall not be considered minor offenses.

(2) Trial observers shall attend and prepare formal reports in all cases of trials of U.S. personnel by foreign courts or tribunals, except for minor offenses. In cases of minor offenses, the observer shall attend the trial at the discretion of the designated commanding officer, but shall not be required to make a formal report. These

reports need not be classified, but shall be treated as For Official Use Only documents. They shall be forwarded intact to the designated commanding officer through such agencies as the designated commanding officer may prescribe for transmission to the Judge Advocate General of the accused's service, with any comments of the appropriate Military Service commander. These reports shall be forwarded immediately upon the completion of the trial in the lower court, and shall not be delayed because of the possibility of a new trial, rehearing or appeal, reports of which shall be forwarded in the same manner. Copies shall also be forwarded to the unified commander, if any, and to the chief of the diplomatic mission.

(3) The trial observer report shall contain a factual description or summary of the trial proceedings. It should enable an informed judgment to be made regarding: (i) Whether there was any failure to comply with the procedural safeguards secured by a pertinent status of forces agreement, and (ii) whether the accused received a fair trial under all the circumstances. The report shall specify the conclusions of the trial observer with respect to paragraph (g)(3)(i) of this section, and shall state in detail the basis for the conclusions. Unless the designated commanding officer directs otherwise, the report shall not contain conclusions with respect to paragraph (g)(3)(ii) of this section.

(4) The designated commanding officer, upon receipt of a trial observer report, shall be responsible for determining: (i) Whether there was any failure to comply with the procedural safeguards secured by the pertinent status of forces agreement, and (ii) whether the accused received a fair trial under all the circumstances. Due regard should be given to those fair trial rights listed in §151.7 that are relevant to the particular facts and circumstances of the trial. However, a trial shall not be found unfair merely because it is not identical with trials held in the United States. If the designated commanding officer is of the opinion that the procedural safeguards specified in pertinent agreements were denied or that the trial was otherwise

unjust, the commanding officer shall submit to the Office of the Secretary of Defense, through the unified commander and the Judge Advocate General of the Military Service concerned, a recommendation as to appropriate action to rectify the trial deficiencies and otherwise to protect the rights or interests of the accused. This shall include a statement of efforts taken or to be taken at the local level to protect the right of the accused. An information copy of the recommendation of the designated commanding officer shall be forwarded to the diplomatic or consular mission in the country concerned.

(h) *Counsel fees and related assistance.* When the Secretary of the Military Department concerned or designee considers such action to be in the best interests of the United States, representation by civilian counsel and other assistance described under 10 U.S.C. 1037 may be furnished at Government expense to U.S. personnel tried in foreign countries.

(i) *Treatment of U.S. personnel confined in foreign penal institutions.* (1) Insofar as practicable and subject to the laws and regulations of the country concerned and the provisions of any agreement therewith, the Department of Defense seeks to ensure that U.S. military personnel: (i) When in the custody of foreign authorities are fairly treated at all times and (ii) when confined (pre-trial and post-trial) in foreign penal institutions are accorded the treatment and are entitled to all the rights, privileges, and protections of personnel confined in U.S. military facilities. Such rights, privileges, and protections are enunciated in present Military Service directives and regulations, and include, but are not limited to, legal assistance, visitation, medical attention, food, bedding, clothing, and other health and comfort supplies.

(2) In consonance with this policy, U.S. military personnel confined in foreign penal institutions shall be visited at least every 30 days, at which time the conditions of confinement and other matters relating to their health and welfare shall be observed. The Military Services shall maintain, on a current basis, records of these visits as reports by their respective commands.

Records of each visit should contain the following information:

(i) Names of personnel conducting visit and date of visit.

(ii) Name of each prisoner visited, serial number, and sentence.

(iii) Name and location of prison.

(iv) Treatment of the individual prisoner by prison warden and other personnel (include a short description of the rehabilitation program, if any, as applied to the prisoner).

(v) Conditions existing in the prison, such as light, heat, sanitation, food, recreation, and religious activities.

(vi) Change in status of prisoner, conditions of confinement or transfer to another institution.

(vii) Condition of prisoner, physical and mental.

(viii) Assistance given to prisoner, such as legal, medical, food, bedding, clothing, and health and comfort supplies.

(ix) Action taken to have any deficiencies corrected, either by the local commander or through diplomatic or consular mission.

(x) Designation of command responsible for prisoner's welfare and reporting of visits.

(xi) Information as to discharge of a prisoner from the Military Service or termination of confinement.

(3) When it is impracticable for the individual's commanding officer or representative to make visits, the designated commanding officer should be requested to arrange that another unit be responsible for such visits or to request that the appropriate diplomatic or consular mission assume responsibility therefor. When necessary, a medical officer should participate in the visits and record the results of medical examinations. If reasonable requests for permission to visit U.S. military personnel are arbitrarily denied, or it is ascertained that the individual is being mistreated or that the conditions of custody or confinement are substandard, the case should be referred to the diplomatic or consular mission concerned for appropriate action.

(4) To the extent possible, military commanders should seek to conclude local arrangements whereby U.S. military authorities may be permitted to

accord U.S. military personnel confined in foreign institutions the treatment, rights, privileges, and protection similar to those accorded such personnel confined in U.S. military facilities. The details of such arrangements should be submitted to the Judge Advocates General of the Military Services.

(5) The military commanders shall make appropriate arrangements with foreign authorities whereby custody of individuals who are members of the Armed Forces of the United States shall, when they are released from confinement by foreign authorities, be turned over to U.S. military authorities. In appropriate cases, diplomatic or consular officers should be requested to keep the military authorities advised as to the anticipated date of the release of such persons by the foreign authorities.

(6) In cooperation with the appropriate diplomatic or consular mission, military commanders shall, insofar as possible, ensure that dependents of U.S. military personnel, nationals of the United States serving with, employed by or accompanying the armed forces, and dependents of such nationals when in the custody of foreign authorities, or when confined (pretrial and post-trial) in foreign penal institutions receive the same treatment, rights, and support as would be extended to U.S. military personnel in comparable situations pursuant to the provisions of §151.4(i).

(j) *Discharge.* U.S. military personnel confined in foreign prisons shall not be discharged from military service until the completion of the term of imprisonment and the return of the accused to the United States, except that in unusual cases such discharges may be accomplished upon prior authorization of the Secretary of the Military Department concerned.

(k) *Information policy.* It is the basic policy of the Department of Defense that the general public and the Congress must be provided promptly with the maximum information concerning status of forces matters that are consistent with the national interest. Information shall be coordinated and furnished to the public and the Congress in accordance with established proce-

dures, including DoD Directive 5122.5,¹ "Assistant Secretary of Defense (Public Affairs)," July 10, 1961, and parts 286 and 286a of this title.

§ 151.5 Reports on the exercise of foreign criminal jurisdiction.

The following reporting system, which has been implemented by the Military Departments, shall be continued after revision in accordance with the provisions herein. The Department of the Army is designated as executive agent within the Department of Defense for maintaining and collating information received on the basis of the reports submitted.

(a) *Annual reports.* Annual reports, based on information furnished by the Military Departments covering the period December 1 through November 30 shall be prepared by the Department of the Army and submitted within such time as may be required but not later than 120 days after the close of the reporting period. The reports shall be submitted in one reproducible copy to the Office of the General Counsel, DoD, in accordance with departmental implementation of this part. The reporting content of this requirement shall be as follows:

(1) A statistical summary (DD Form 838) by country and type of offense of all cases involving U.S. personnel.

(2) A report signed by the appropriate Military Service commander in each country for which DD Form 838 is prepared, concerning the commander's personal evaluation of the impact, if any, the local jurisdictional arrangements have had upon accomplishment of the mission and upon the discipline and morale of the forces, together with specific facts or other information, where appropriate, substantiating the commanders' opinion.

(3) A report of the results of visits made and particular actions taken by appropriate military commanders under §151.4(i).

(4) A report of the implementation of 10 U.S.C. 1037 showing by country and Military Service:

¹Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120, Attention: Code 301.

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(i) The total number of cases in which funds were expended and

(ii) Total expenditures in each of the following categories:

- (A) Payment of counsel fees,
- (B) Provision of bail,
- (C) Court costs and other expenses.

(b) *Quarterly reports.* (1) Quarterly reports for the periods ending November 30, February 28, May 31, and August 31, consisting of lists of U.S. personnel imprisoned and released, shall be submitted, in accordance with departmental implementation of this part to the Department of the Army and by the Department of the Army, as executive agent, to the Director, Washington Headquarters Services, in four copies, on or before the 15th day following the report quarter as follows:

(i) An alphabetical list of U.S. personnel who were imprisoned during the reporting period under sentence of confinement imposed by a foreign country, indicating the individual's home address, grade, and serial number (where applicable), offense of which found guilty, date and place of confinement, length of sentence to confinement imposed, and estimated date of release from confinement.

(ii) A similar list of the names of prisoners released during the reporting period.

(2) An information copy of these lists shall be furnished by the appropriate Military Service commander to the diplomatic or consular mission in the country concerned.

(c) *Other reports.* (1) Each Military Department shall maintain, on a current basis, and submit monthly to the Director, Washington Headquarters Service, in four copies, a list of the most important cases pending, with a brief summary of the salient facts in each case. Selection of the cases to be included shall be left to the judgment of the appropriate officials of each Military Department. Instances of deficiency in the treatment or conditions of confinement in foreign penal institutions or arbitrary denial of permission to visit such personnel shall be considered important cases. Lists covering the previous month shall be submitted on the 6th day of the month following.

(2) Important new cases or important developments in pending cases shall be

reported informally and immediately to the Office of the General Counsel, DoD.

§ 151.6 Resolution of ratification, with reservations, as agreed to by the Senate on July 15, 1953.

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive T, Eighty-second Congress, second session, an agreement between the parties to the North Atlantic Treaty Regarding the Status of their Forces, signed at London on June 19, 1951. It is the understanding of the Senate, which understanding inheres in its advise and consent to the ratification of the Agreement, that nothing in the Agreement diminishes, abridges, or alters the right of the United States of America to safeguard its own security by excluding or removing persons whose presence in the United States is deemed prejudicial to its safety or security, and that no person whose presence in the United States is deemed prejudicial to its safety or security shall be permitted to enter or remain in the United States. In giving its advise and consent to ratification, it is the sense of the Senate that:

(a) The criminal jurisdiction provisions of Article VII do not constitute a precedent for future agreements;

(b) Where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state, under the treaty the Commanding Officer of the armed forces of the United States in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States;

(c) If, in the opinion of such Commanding Officer, under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights the accused would enjoy in the United States, the Commanding Officer shall request the authorities of the receiving State to waive jurisdiction in accordance with the provisions of paragraph 3(c) of Article VII (which requires the receiving

State to give “sympathetic consideration” to such request) and if such authorities refuse to waive jurisdiction, the commanding officer shall request the Department of State to press such request through diplomatic channels and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives;

(d) A representative of the United States to be appointed by the Chief of Diplomatic Mission with the advice of the senior U.S. military representative in the receiving State will attend the trial of any such person by the authorities of a receiving State under the agreement, and any failure to comply with the provisions of paragraph 9 of Article VII of the Agreement shall be reported to the commanding officer of the Armed Forces of the United States in such State who shall then request the Department of State to take appropriate action to protect the rights of the accused, and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives.

§ 151.7 Fair trial guarantees.

The following is a listing of “fair trial” safeguards or guarantees that are considered to be applicable to U.S. State court criminal proceedings, by virtue of the 14th Amendment as interpreted by the Supreme Court of the United States. The list is intended as a guide for the preparation of country law studies prescribed by § 151.4 and for the determinations made by the designated commanding officer under § 151.4(e) through § 151.4(g). Designated commanding officers should also consider other factors that could result in a violation of due process of law in State court proceedings in the United States.

(a) Criminal statute alleged to be violated must set forth specific and definite standards of guilt.

(b) Accused shall not be prosecuted under an *ex post facto* law.

(c) Accused shall not be punished by bills of attainder.

(d) Accused must be informed of the nature and cause of the accusation and have a reasonable time to prepare a defense.

(e) Accused is entitled to have the assistance of defense counsel.

(f) Accused is entitled to be present at the trial.

(g) Accused is entitled to be confronted with hostile witnesses.

(h) Accused is entitled to have compulsory process for obtaining favorable witnesses.

(i) Use of evidence against the accused obtained through unreasonable search or seizure or other illegal means is prohibited.

(j) Burden of proof is on the Government in all criminal trials.

(k) Accused is entitled to be tried by an impartial court.

(l) Accused may not be compelled to be a witness against him or herself; and shall be protected from the use of a confession obtained by torture, threats, violence, or the exertion of any improper influence.

(m) Accused shall not be subjected to cruel and unusual punishment.

(n) Accused is entitled to be tried without unreasonable (prejudicial) delay.

(o) Accused is entitled to a competent interpreter when the accused does not understand the language in which the trial is conducted and does not have counsel proficient in the language both of the court and of the accused.

(p) Accused is entitled to a public trial.

(q) Accused may not be subjected to consecutive trials for the same offense that are so vexatious as to indicate fundamental unfairness.

PART 152—REVIEW OF THE MANUAL FOR COURTS-MARTIAL

Sec.

152.1 Purpose.

152.2 Applicability and scope.

152.3 Policy.

152.4 Procedures.

152.5 Responsibilities.

152.6 Information requirements.

AUTHORITY: E.O. 12473; 10 U.S.C. 836; 10 U.S.C. 867(g).

SOURCE: 50 FR 6167, Feb. 14, 1985, unless otherwise noted.