

THE INTERNATIONAL LAW OF THE ARMED FORCES ABROAD

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My function, as I understand it, is to further your study of international law by supplying specific examples of how it helps, and perhaps hinders, your work. Your interests are practical and immediate while mine, as a teacher, are academic and more remote. So I run the risk of confirming Mark Twain's remark—"To do good is noble—to teach good is nobler, and no trouble."

Indeed, to practice international law is far more difficult than to teach it. You must respond to the demands of new situations, and the automatic application of old rules doesn't always work. Ancient history (which we find in some of our international law texts—Colombos' volume on the International Law of the Sea for example) may be uplifting, but history lacks relevance without knowing how it applies to your problems today. So, we all face a challenge—we, to teach something meaningful, and you, to learn something useful. This works the other way around too—you teach us, and we learn. Indeed, even after six years experience with the International Law Study, I always come to Newport like the empty coal car coming to Newcastle—hauling away more than I bring in. Your questions, your misgivings, and your commitment to our nation enlighten us and enrich our teaching at home.

I am going to speak to you of the legal problems of U.S. armed forces abroad as they relate to international law generally. If you're like your predecessors here at the War College, your immediate reaction to the phrase "international law" is "There's no such thing." Just three years ago, Mr. Katzenbach, now the Attorney General, remarked during this international law study that he didn't see much point in debating the subject of whether international law existed, but that if he did, he'd be happy to debate either side. It all depends, he said, on how one defines law. If Mr. Katzenbach had argued that international law does not exist (and indeed he did not) he would be likely to lose, assuming we define international law in terms of what lawyers do, and if we define international law in terms of the tasks we commonly ask law to perform. In terms of what law does, international law relating to your operations in a foreign country is as real as constitutional law, as criminal law, or as our traffic laws. What jobs does law do? Law, I suggest, fulfills four major functions. Law creates rules for allocating rights to achieve scarce satisfactions. Law, secondly, establishes working presumptions. Third, law offers us a process for minimizing violence by placing in identified hands a legitimate monopoly of violence. It does this by

allocating competence to make authoritative decisions and the right to exercise criminal jurisdiction. Fourth, law contributes a sense of legitimacy to those who follow the rules and the presumptions, and also to those who exercise authority. Those who are victims of that authority are more likely to accept it. Let's start by discussing the rules.

A great law teacher and constitutional lawyer, Paul A. Freund, points out that one of the most successful legal inventions we have is the white line drawn down the middle of a highway. Generally motorists keep to the right of that line whether or not there's a policeman and whether or not they encounter traffic. It's the rare motorist who deliberately straddles the line.

International agreements, such as the NATO Status of Forces Agreement, serve much like the white line down the highway. There are no policemen, but the NATO partners follow the rules in the treaty—for the most part avoiding head-on collisions. It has been a remarkably successful agreement, and its form is much imitated—even by the Soviet Union which has Status of Forces Agreements with East Germany and Poland.

In the NATO agreement we have some very precise rules pertaining to passport and visa regulations, driving licenses, uniform regulations, matters of claims, of taxation and of criminal jurisdiction. In the two-year-old Status of Forces Agreement with Germany, additional rules relate to aerial photography, hunting and fishing rights, use of the roads, port facilities, etc.

We don't *teach* international law, or any other type of law for that matter, by asking you to learn a set of rules. There are too many of them, and reciting them doesn't give a systematic picture. You can have lawyers find them, or you can read the NATO Status of Forces Agreement, the German Supplemental Agreement, the Japanese Administrative Agreement, various base

rights agreements, with such countries as Spain, or one of our several naval visits agreements. These answer such questions as:

1. Who commands a jointly used installation?

2. What rights of entry to the base area do personnel of the receiving state enjoy?

3. Who can arrest infractors of criminal law? Who can punish their criminal behavior? Does it make any difference if your men were on liberty or on leave when the offense occurred?

4. Can the U.S. forces arrest or detain local inhabitants who in some manner interfere with the visiting force? What happens when one of your sentries shoots a native of the host country? Can we insist that he only be tried for any alleged offense by a court martial?

5. Can the U.S. send anyone it pleases into the host country—or may the host country exclude Jews or Negroes? Can the host country impose curfew regulations, and prevent your men from fraternizing with local girls?

6. What, if any local taxes should the members of the U.S. forces pay? Income taxes? Inheritance taxes? Taxes imposed to build roads? Radio and TV? Water services?

7. What civil liability does the U.S. force or its members have? Are there any immunities? Who pays for the damage?

8. What flag or flags can be flown?

9. If inhabitants are hired, what provisions, if any, of local labor law must the U.S. follow?

10. Who has authority to negotiate supplementary agreements and what powers are delegated to these persons?

11. Who finances the construction in base areas? Who bears the cost of maintenance and of furnishing utility services?

12. May post exchanges, post offices, commissaries operate? What privileges and duties are applicable to them?

13. Who is responsible for the internal and external security of the area?

14. What are the regulations respecting the use of railroads, roads, dock facilities and airports?

15. Who holds title to fixtures, buildings and other structures constructed for the use of the visiting force?

16. What goods can be imported, in what amounts, and what duties, if any, are payable?

17. How and where can aircraft navigate?

These are only a few of the routine questions answered in some arrangements we have with a receiving state.

Good lawyers know that drafting to meet every contingency is difficult, and they find that to make day-to-day relationships work satisfactorily, detailed drafting isn't a solution. What is more important is to establish procedures and indicate the objectives of settlements that ought to be made. Lawyers on your staff ought to be able to do this.

But lawyers can be troublesome. General Eisenhower thought lawyers were troublesome when, in 1943, he rejected a long, technical draft of an Italian surrender agreement submitted by his staff. He preferred a short, terse surrender agreement leaving many issues between Italy and the allied forces undecided. Some think he was mistaken. However, we have ample evidence that lawyers' documents can be awfully complicated.

So many problems were anticipated in Germany, for example, that the agreements effective there in July 1963 comprise over 200 pages of text. Negotiating lasted nearly 10 years, what with one delay or another, and the result (like the fine print on the back of an insurance policy) is a formidable document, complicated, turgid and legalistic. I suspect it's treated much like the standard clauses in some contracts. Lawyers draft them and the businessmen ignore them. Reading the German

Supplemental Agreement reminds me of one of the punishments inflicted by Gilbert and Sullivan's *Mikado*: of the man sentenced to "listen to sermons by mystical Germans who preach from 10 to 4." Perhaps it is too detailed. On the other hand, it's possible also to be too brief. The Japanese Peace Treaty confirming United States presence in Okinawa, for example, states that pending the establishment of some kind of United Nations trusteeship there, the United States has "all and any powers of administration, legislation and jurisdiction." This is pretty sweeping, but when Secretary of State Dulles remarked thereafter that, of course, Japan retains "residual sovereignty" over those islands, we authorize Japan's flag to be flown there and refrain from mounting a raid on Viet Nam from there. This only adds confusion. Admittedly another treaty clarifying United States' rights in the Ryukyu Islands would be difficult to negotiate. Maybe it's too late. However, the existing situation permits the Japanese to complain that their residual sovereignty is violated when occasionally we find it necessary to use Okinawa as a base for B-52 raids over Viet Nam. My point is that more detail and less sweeping language in the Peace Treaty might have been in United States national interests.

Now let's note a second function of law, one more difficult to grasp, but more important; namely, its use to establish working presumptions. Law in any form and in every society performs a major service by establishing presumptions which shift the burden of persuasion by suggesting that some values ought to be preferred. We have many examples: it's presumed a crime to intentionally kill another unless you can establish some justification; the oceans are presumed free for all users, unless one of the users can establish very good grounds for excluding others. In our topic today the basic presumption seems to be that: the military or naval

force entering a foreign country is presumed subject to local law and is subject to the exercise of local enforcement authority unless it can establish some good grounds for exemption.

Law also supplies the machinery by which presumptions can change, and indeed it has changed here. In the 18th and 19th centuries visiting military forces in foreign countries were probably presumed exempt from the host country's authority. They were treated almost like diplomats. We have a famous old Supreme Court case articulating this presumption—the *Schooner Exchange*. But a lot has happened since 1812 when Justice Marshall rendered that decision. Foreign armies are no longer sporadic guests (our forces have been in Europe for over 20 years). Nationalism generates resentment against granting vast immunities to the visitors. The trend in international law is to inhibit anything that might be characterized as aggression and to encourage accountability for all official acts. Moreover, persistent Communist propaganda would have the world believe our forces are engaged in a military occupation of Japan, Western Europe, and the Philippines. All these conditions have contributed to developing a different presumption. When the NATO Alliance was being organized, both we and our allies wanted to make it absolutely clear that United States armed forces in friendly foreign countries were there as allies, not occupiers; that we were partners with the host country in a joint enterprise, namely, the defense of Europe. Hence the presumption of immunity from the exercise of local authority, which we claimed during World Wars I and II, was changed by international legislation, the NATO Status of Forces Agreement. The Supreme Court of the United States in the 1957 *Girard* case confirmed the new doctrine in holding that members of United States forces in foreign lands are subject to the enforcement procedures of local territorial

law, unless some specific international agreement or some specific rule of international law holds otherwise.

It seems to me that many of us have mistaken the presumption, expressed in several other treaties, for an absolute rule. Indeed, when the NATO Status of Forces Agreement was submitted to the U.S. Senate for its advice and consent, the Secretary of Defense and the Secretary of State solemnly declared that the agreement merely recited general international law in that the host country always retains territorial jurisdiction over the visiting United States force. More recently, I read a statement by an Army lawyer that the marines landing in Thailand a few years ago to help defend that country's border with Laos were subject to the enforcement jurisdiction of Thailand. This is a little hard to believe as it just doesn't make sense for a combat force, hastily admitted in an emergency, to have to submit to the risk that a local law enforcement agency will arrest members of the force for alleged criminal behavior. The suggestion of amenability to local law that we find in the NATO agreement, and in many others, is just that: a presumption which may be, and has been, rebutted on several occasions.

Underlying each international agreement establishing a legal basis for our forces abroad is one of four different conditions, and to meet it the working assumptions articulated in law must, and do, vary. Let's look at the four:

I. The Peacetime Garrison situation, typical in Europe, Japan, and Australia: Here the supremacy of local law reflects reality. The visiting force is amenable to local civil and criminal law and to its enforcement unless the treaty indicates exceptions which usually relate to activities done in the course of *official duty*—not always an easy question to determine. In a peacetime or garrison situation, the visiting force does not require absolute immunity. They do require some assurance of what

procedures and rules should be followed in the event of disputes, tax claims, criminal behavior, etc. And the host country can rightly insist that even if the visiting force is immune from certain enforcement jurisdiction that the force should nevertheless obey local law.

II. Where the visiting force functions as if they were diplomats: The agreement of Viet Nam, negotiated in 1950-51, for example, provides for U.S. military assistance, largely in the form of supplies and equipment, but it also covers people who might come to Viet Nam to help. These people "operate as part of the Diplomatic Mission" of the United States, and they are therefore entitled to one of three categories of diplomatic immunity. The agreement, between the U.S., France, Cambodia, Laos and Viet Nam, negotiated in 1950, hardly seems relevant today particularly in view of our undertaking that the number of persons receiving these privileges "will be kept as low as possible."

Diplomatic immunity is a valuable privilege intended to enhance international communication. Its nature is well established by treaty and custom, but it can be waived, as it was in the recent unhappy Kimball episode in Viet Nam. Moreover, diplomatic immunity does not give its holders a license to flout local law. In fact, the modern trend is to require diplomats, like anyone else, to obey local law. Although they are exempt from local enforcement procedures, they run the risks of expulsion or being inconvenienced. New Jersey claims the right to escort speeding diplomats off its toll roads, and I understand that the State Department is insisting that diplomats should follow traffic and parking regulations.

Obviously the draftsmen of the Viet Nam agreement did not contemplate our sending 100,000 armed-to-the-teeth diplomats. Nevertheless, so far as I can determine, this is the only agreement published covering any of our forces

there. To presume that they are not only subject to local law, but also the exercise of local enforcement jurisdiction, is absurd. The facts are that our forces are engaged in combat. What presumptions apply then?

III. The combat situation: A few weeks after the North Korean invasion of 1950, we negotiated a one-page agreement with South Korea stating that the United Nations forces there were exempt from arrest and trial by Korean authorities. Surely this agreement merely articulated a preexisting presumption of immunity. The agreement goes further, however—there's a curious provision stating that "unless required by the nonexistence of local courts, courts of the United States forces will not try nationals of the Republic of Korea." Does this mean that the United States might claim the right, in the absence of a functioning host country judiciary, to subject local inhabitants to trial by court-martial or military commission? This raises some interesting questions involving the interplay of the laws of war, the Geneva conventions and of the United States Constitution. We can make a case for that power, but I personally doubt whether that argument would be sustained by the Supreme Court today, the *Yamashita*¹ Case, *Madsen v. Kinsella*,² to the contrary notwithstanding. Perhaps my colleagues could grapple with that problem. It may be a real one in view of the fourth situation.

IV. The "Quasi-combat" or "peace-keeping" situation.

I don't know how else to characterize the legal status of our forces in the Dominican Republic. Heretofore, foreign armed forces legally entered a country with either the consent of the host country, or at the behest of an international organization such as the UN. The United Nations in the Congo and in the near East have actually negotiated status of forces agreements. Quite aside from the issue of whether or

not any of these forces entered lawfully or not, the presumption favoring local jurisdiction is not applicable. There is no local jurisdiction by definition—the local order has collapsed—lives are in danger, and in the Dominican crisis the commander in chief made a political decision requiring you to prevent an intolerable Communist take-over.

In this situation, we actually have a pair of complementary presumptions. One, to ensure that the host country must not interfere with the force's mission, we presume an immunity from the exercise of authority by anyone else. The second operating assumption is that the United States remains internationally responsible for the acts of its agents. *Principles of state responsibility persist*. If property is taken, it should be paid for; if inhabitants are hired, they must be compensated; if men are imprisoned, it must be through a process of law; and if force is asserted, it should be exercised responsibly and reasonably.

Running deep in international relations is the theme that national power is accountable—that if unilateral action is taken, it must still conform to the demands of international law. This is certainly the United States position, restated regularly by the President, confirmed for you also in Navy Regulations. Furthermore, it is a demand that we make of others.

How do we operate with these pairs of presumptions in a military operation directed at "peace-keeping"? If you are planning one, you would be wise to include provisions for the settlement of claims. You have ample authority in United States law to do this under the Foreign Claims Act. You may recall that the Foreign Claims Act was passed by Congress in April 1918 to pay inhabitants of France for damages caused to them by members of our forces. It was amended in 1943 and 1956 to permit payments up to \$15,000 to foreign inhabitants. It is the authority for the payment for damages to real or

personal property, to life and limb caused by, or incident to, noncombat activities of the armed forces. Damages are determined by local law, and naturally will differ considerably from comparable damages in the United States. Careful and consistent use of the Foreign Claims Act's provision may very well improve your relations with local inhabitants and counteract Communist propaganda. For example, I understand that in the Lebanon operation, olive groves were damaged by bivouacing marines: Olive trees grow slowly and may supply the owner's entire income. The Foreign Claims Act was used to compensate the owner for destroyed olive groves, with damages calculated according to local law.

If you can distinguish between the presumptions of law and the rules of law, you may find international law a little easier to grasp. You must recognize that applying presumptions to concrete problems can nevertheless be difficult; but it is also difficult to deal with problems without generalizations. We express the conviction in our legal order that decisions based solely on the appealing uniqueness of a human situation cannot supply the values or the continuity needed to give meaning and satisfaction. When we decide single problems, we look for general principles and for guides with some universal application. It is also true that we distrust large generalities as guides to our conduct, and put our faith in wisdom and techniques learned by doing. Law, therefore, supplies a means for maintaining a creative tension between propositions and particular instances.

The third function of law in my analysis is that law supplies a process for minimizing violence by placing in identified hands a legitimate monopoly of power. It does this by allocating competence to make decisions.

The risk of confusion and the threat of violence is substantial when the U.S.

sends into the territory of another nation a pretty much self-sufficient body of men, capable of asserting enormous power, subject to their own internal discipline, and carrying with them their own culture in the form of movies, post exchanges, and clubs. The host country is independent, with pride in its own culture, and its inhabitants may resent the strangers and their curious ways.

We have in our own history several illustrations of these tensions. The "Boston Massacre" of 1770, for example. You may recall that the offending soldiers were tried in a colonial court, defended by John Adams, the colony's leading lawyer, and they were acquitted.

A second illustrative incident is the *Thierchens* case. Shortly before the United States entered World War I, we prosecuted, convicted, and imprisoned the captain of a German Navy cruiser for smuggling, and also for a curious violation of the Mann Act. The Federal Court rejected the officer's pleas that he was immune from the enforcement jurisdiction of the United States. It's hard to reconcile the claim the United States made in this case with the comparable and contemporaneous *Tampico* incident involving the arrest by Mexican police of Admiral Mayo's barge crew in Tampico, Mexico. The men were eventually released, but Admiral Mayo demanded an apology and a salute to the United States flag. When the Mexicans refused, he seized the port.

These unpleasant incidents could not be prevented by an international agreement, but the disputes which followed could have been eased if some sort of status of forces agreement or a naval visits agreement existed. Accommodation and compromise can be achieved in advance when you have a general idea of the risks, and you know what law can do. International agreements can confirm the right of a United States court-martial to act in the host country, and

can make that court's authority exclusive. The competence of the host country's police, judiciary, and tax authorities can be outlined. The method for settling day-to-day tensions can be specified by claims provisions, liaison procedures, and other rules outlining mutual expectations.

The sets of compromises which we might call international law are worked out because participants think that the cost of continued disagreement is too great, and that the price paid in the form of some deference to the views and interests of others is acceptable. The gains realized are less confusion, a diminished risk of violence, and the reasonable expectation that the other fellow may, to gain similar advantage, behave similarly. We make international law because we hope to create conditions in which the behavior of others is more predictable.

Where international law does not serve mutual advantage, it becomes weak—even meaningless. Our status of forces agreement of 1950 with South Korea, for example, does not seem pertinent to the conditions there today (at least so the Koreans believe), so we have negotiated a new agreement. Quite rightly I think. Perhaps we have other international agreements affecting your privileges overseas which are also obsolete in that they appear to be one-sided. It's impossible to avoid renegotiation indefinitely. Therefore, treaties with perpetual provisions are probably not realistic.

From all this you may quickly conclude that international law is merely a front in that "nations really do what they want to do." To this I reply, "Yes, but what nations want to do, that is what actions and policies they in fact follow, are very likely to be influenced by law, and by what lawyers say is law." This is particularly true among the United States and its friends in the western world, but even the Soviet Union and Red China use legal language

in supporting their own views and interests, and what those views and interests are, may well be conditioned by "law." Russia, for example, has negotiated status of forces agreements with Poland and with East Germany. I don't think Red China has any, but if they do place major units in Viet Nam, it would not be surprising if they did negotiate some sort of "status of forces" agreement with Ho-Chi-Minh.

The law of visiting armed forces is largely treaty law today. Its rules, procedures and legitimizing force is found in dozens of international agreements negotiated in the last 15 years. It is treaty law rather than customary law because of the fourth function of law, namely; that law "legitimizes." Law is valued not as an end in itself, but as a means to serve human life. Community consensus holds nations, and their officials, accountable for their use of power—however powerful the nation, and however high or insignificant the official, and however important the declared objective. When force is used so as not to serve human life, it is considered improper—illegitimate. A legal basis for the presence of the visiting force and legal grounds for its assertion of power, far from its national home, helps supply this sense of acceptance—this sense of legitimacy.

Without a legal basis for the presence of forces, their activity would create more tension, more resentment and more confusion, both in the host country and in the United States. Aliens everywhere can be mistrusted; if they are armed, occupy valuable land, and occasionally exhibit the exuberance of youth, their presence can be divisive to an alliance.

Without an international agreement—without the consent of the host country—it is hard to justify a foreign base. When Zanzibar demanded that NASA dismantle the tracking station—we did so; when Morocco demanded that we

leave our bases there—we agreed; and we apparently will also leave Libya. On occasion, we utilize overseas bases without confirming international agreement, as in the Azores, for example, but nevertheless it is clear that we enjoy the consent of the Portuguese.

A legal basis for the presence of visiting forces also helps here at home. For example, our decision to send troops into the Dominican Republic was unilateral. I am not concerned here whether that decision was wise or foolish. It is clear, however, that the firmer that decision rests in international law, the more likely that decision will be accepted by the U.S. public, that elusive thing "world opinion," and by the Dominicans. It would make a neater legal case, for example, if the marines landed at the invitation of the host government. We could then persuasively claim with some justification that the Dominican situation was similar to the Lebanon crisis of 1958. Unfortunately, I gather that no one in the Dominican Republic with any color of authority wanted publicly to invite U.S. forces. So the United States' legal case must rest on more controversial grounds, and the legal basis is harder to define.

If I have raised questions of the philosophy of law, I must apologize because about all I can remember of that subject is the definition of a philosopher—a philosopher is a blind man in a dark cellar at midnight looking for a black cat that isn't there. He is distinguished from a theologian in that the theologian finds the cat. He is also distinguished from a lawyer. The lawyer smuggles in a cat under his overcoat and emerges to produce it in triumph.

So if I have given you a philosophy of law, this definition makes me a theologian. You could call me a lawyer, but if I were the type to smuggle something in, surely the War College would not invite me here.

NOTES

1. *In Re Yamashita*, 327 U.S. 1 (1946), involved the war crimes trial of Gen. Yamashita for certain massacres and atrocities committed by Japanese forces under his command during World War II. The Supreme Court of the United States held that the United States Military Commission in Manila had jurisdiction to try Gen. Yamashita for those war crimes.

2. *Madsen v. Kinsella*, 343 U.S. 341 (1952), concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by U.S. military forces. The U.S. Supreme Court held that in such areas the U.S. Army commander could establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they were connected with the Army or not.

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