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Criminal Jurisdiction Over Visiting Armed Forces

Roland J. Stanger (Editor)

The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. government, the U.S. Department of the Navy or the Naval War College.

CHAPTER XIV

CONCLUSION

States have not in the past been willing, and are not now prepared, to accord visiting armed forces blanket immunity from their criminal jurisdiction, at least in time of peace, except in special circumstances. A receiving state violates no rule of international law in taking this position.

Since a state can deny to any other state the right to station armed forces in its territory, it can couple a grant of the right with the requirement that mutually satisfactory arrangements be made with respect to jurisdiction over the visiting forces. Controversy can arise, however, on the understanding to be implied when foreign troops are permitted to enter a state without an explicit agreement governing their status having been made. The sending state is, it seems clear, entitled to enforce its law through courts-martial sitting in the receiving state. To this end, the military authorities of the sending state may exercise a limited police power over the visiting forces and may summon members of the force as witnesses. Comparable powers may perhaps be exercised over civilians accompanying the visiting force and over dependents. The sending state has no such power with respect to others, except perhaps in extreme cases, e.g., in a combat zone in time of war. The receiving state has no, or at most a limited, supervisory jurisdiction over the visiting forces. The receiving state may, for example, have jurisdiction to decide whether the accused is in fact a member of the visiting force.

The receiving state, it seems equally clear, has concurrent jurisdiction over the visiting forces except perhaps in special circumstances. Put another way, no blanket immunity is to be implied from the grant of permission to station troops in the receiving state. The immunity may exist with respect to troops in passage, or in time of war in a combat zone. The immunity appears also to be recognized with respect to the crews of warships for acts which occur on board the warship, but not with respect

to armed forces on a base. Whether the immunity will be implied where the act was done in the performance of duty is unsettled. Where there is concurrent jurisdiction, international law provides no rule for resolving the conflict.

That there is so much doubt in this whole area is understandable. The sending state has an obvious interest in seeking to keep complete control over its armed forces at all times. The receiving state has an equally obvious interest in claiming concurrent jurisdiction. All of the considerations which support the territorial principle bolster the receiving state's claim. These considerations center around two basic ideas. One is the interest of the receiving state in protecting both the state and the lives and property of its citizens and residents. The other is that justice can be administered most effectively at the place of the crime. The weight to be given these conflicting interests can, of course, vary with the circumstances, and the circumstances in which armed forces are stationed abroad can and do differ over a very wide range.

All of this explains and justifies the recent practice of allocating jurisdiction over visiting forces by formal agreements. An agreement can both resolve the doubts which exist in the absence of agreement, and also take into account the particular circumstances.

The status of forces agreements which have been entered into since World War II are illuminating with respect to the consensus of states as to the proper allocation of jurisdiction. They suggest that in special circumstances complete immunity for the visiting force may be appropriate. They also suggest that in other circumstances, as where a large force is to be stationed in a receiving state for an indefinite period, the situation is relatively stable, and a common language or cultural background make likely much intermingling of the troops and the local population, only a limited immunity will normally be accorded the visiting forces.

The most interesting development reflected in the status of forces agreements, in the light of much that has been written on the subject of jurisdiction, is the readiness of receiving states to accord immunity (or priority of jurisdiction in the sending state) with respect to *inter se* offenses. Receiving states have also shown a perhaps less marked willingness to recognize the on-base concept, either as alone justifying according exclusive or prior

jurisdiction to the sending state, or at least as an added factor supporting according such jurisdiction to the sending state over *inter se* offenses committed on a base. These attitudes are in marked contrast to the reluctance of receiving states to recognize such jurisdiction in the sending state over duty-connected offenses. Much of the reluctance arises from a state's interest in protecting its citizens from the criminal acts of the visiting forces, even though the acts were done in performance of duty. A part of the reluctance stems, however, from the difficulties encountered in defining the concept, determining which acts fall within it, and deciding who is empowered to make the decision on whether a particular act was or was not duty-connected. Many misunderstandings could be avoided if these matters could be clarified.

The large number of waivers that receiving states have granted suggests they are prepared to yield jurisdiction to a sending state in many cases which fall outside the *inter se*, on-base, and duty-connected categories. The wide use of waivers as a substitute for an agreed allocation of jurisdiction is undesirable, since it sometimes permits irrelevant or improper considerations to influence the decision. Several recent agreements mark the beginning of an effort to deal with this problem. Neither these first attempts nor any of several alternative approaches suggest, however, that establishing new categories or guidelines for the allocation of jurisdiction will be easy. It may be that more experience is needed before these efforts are likely to be successful. In the meantime, the practice initiated in Italy of exercising discretion in asking for waivers, rather than asking waivers in all cases involving American troops, is a step in the right direction.

It should be kept in mind always that the status of forces problem concerns the issue of jurisdiction, not that of the guilt or innocence of the accused. All the evidence shows that visiting forces are characteristically treated as fairly—and at least as leniently—when they are tried in a civil court of an ally as when they are tried by their own courts-martial. Moreover, relations among the nations of the Free World are a crucial factor in the cold war which makes it necessary that troops be stationed abroad. Insisting that the members of these forces can be tried only by courts-martial of the sending states, if the insistence is based on any ground other than demonstrable military exigency, can trouble those relations. Also, making a major incident of case after case in which a member of a visiting force is held for

trial in a receiving state's court is destructive of discipline. The threat of nuclear war requires a higher rather than lower level of discipline in the Free World's armed forces. Obviously, the ultimate solution to many of the status of forces problems would be the attainment of a standard of discipline which reduces to an absolute minimum the cases in which a member of an armed force violates the law of any state. In the meantime, it is suggested that two lines of approach will be most helpful. One is to try to identify additional classes of cases which both sending and receiving states may be prepared to agree should come under the exclusive or primary jurisdiction of one or the other. The second is to improve the administrative and enforcement provisions of status of forces agreements. Much can be done in this area to eliminate friction without the sacrifice of any significant interest of any state.