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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 XI

### DUTY-CONNECTED OFFENSES

Duty-connected offenses are commonly classified into two general categories, those committed in the performance of duty and those committed while on duty but not in the performance of duty. The line between the two categories is more than a little blurred, and classifying a particular case as falling within one category or the other can be very difficult. Broadly speaking the distinction is, however, real enough, and the policy considerations relevant to the allocation of jurisdiction between sending and receiving states are quite different for the two categories of cases.

Immunity for offenses committed in the performance of duty is the most soundly based of all immunities claimed for visiting forces.<sup>1</sup> Its recognition has none the less met with vigorous resistance and, in individual cases, provoked controversies disruptive of orderly international relations.

The Act of State doctrine does not, it is submitted, justify an

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<sup>1</sup> “[T]he only immunity which a member of the United States forces abroad could reasonably expect to obtain in the absence of agreement is for offenses which he might have committed in the line of duty \* \* \*.” Attorney General Brownell, Supp. Hearings Before Senate Committee on Foreign Relations On Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty, 83d Cong., 1st Sess., 73 (1953).

Section 62 of the Restatement, *Foreign Relations Law*, p. 194, states: “(1) Except as otherwise expressly indicated by the territorial state, its consenting to the presence of a foreign force within its territory \* \* \* implies that it agrees that the sending state shall have the prior right to exercise enforcement jurisdiction within the territory over members of the force with respect to

(a) An offense committed by a member of the force in the performance of duty \* \* \*.”

It should be noted that the Section speaks in terms of primary and secondary jurisdiction, and not of complete immunity. Comment b on Subsection (1) sets forth at 194–195, the reason of policy supporting the position taken: “The exercise of primary jurisdiction by the territorial state over members of a force in such cases would interfere with the mission of the force and the effective maintenance of its discipline.”

absolute immunity since the act is done in the territory of the receiving state. That doctrine, since it derives from an abstract principle, is equally applicable to any representative of a state, however trivial his duties. Invoking so sweeping an immunity cannot be justified in every instance where the representative performs his duties in another state.<sup>2</sup> There may nevertheless be a sound functional basis for the immunity of members of the armed forces for acts in the performance of duty.<sup>3</sup> Exercising criminal jurisdiction over one who acts for a foreign state is intended to and can prevent him from acting. There is, then, a direct interference with the conduct of the affairs and the advancement of the interests of a foreign state. If, in the specific instance, those interests are of sufficient moment—and where its armed forces are involved there is much reason to say this is always true—there is a strong case for according the immunity. Moreover, the member of the armed forces is placed in a dilemma: to act is to violate the law of the receiving state, not to act is to violate the military law of the state he serves. Superior orders may not be a defense when the act ordered is a violation of international law, but fairness suggests that it should be a defense where only the law of the receiving state is violated. This last argument loses some of its force, however, from the fact that superior orders is

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<sup>2</sup> *Supra*, pp. 32–41.

<sup>3</sup> “If we were to examine the immunity of visiting forces in light of the general course taken by the law of immunities, we would be compelled to conclude that the immunity which is accorded to members of the armed forces as to offenses arising out of conduct in performance of official duty is likewise based, in part at least, upon the functional principle. The concession of primary jurisdiction to the sending state is, in this aspect, a derivative of the sovereign immunity enjoyed by the state itself and has as its purpose the protection of the state against possible interference with its activities through the exercise of jurisdiction over those persons who serve it. The other function of the granting of primary jurisdiction to the sending state is to permit it to maintain discipline amongst those who are performing duties in its behalf. In these two respects, the immunity accorded by the Agreement is not for the protection of the individual but for the protection of his government. This explanation is not, however, wholly satisfactory in that a further reason for this right of jurisdiction in the sending state is that it would be unfair to the individual to expose him to criminal prosecution by the receiving state for an act he had been ordered to perform by one acting on behalf of his own Government.” R.R. Baxter, “Jurisdiction over Visiting Forces and the Development of International Law,” 52 *Am. Soc’y. Int. L. Proc.* 174, 175 (1958).

not generally a defense when pleaded by a member of the American<sup>4</sup> or British<sup>5</sup> armed forces accused of violating American or British law, respectively.

Cases relating to the immunity of members of a visiting armed force for acts done in the performance of official duty are sparse and inconclusive. The famous case of *People v. McLeod*<sup>6</sup> denies immunity. McLeod was tried in New York for murder for his participation in the invasion of the United States by Canadian forces and their attack upon the *Caroline*, a vessel belonging to insurgents against the Canadian government. The decision was disavowed by the United States<sup>7</sup> and has been much criticized on the ground that what the defendant did, since it was in the course of actual military operations, was legal under the laws of war. Other American cases upholding immunity have relied on

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<sup>4</sup> See Ehrenzweig, *Soldiers' Liability for Wrongs Committed on Duty*, 30 Cornell Law Quarterly 179, 201 (1944). The writer's conclusion is:—

“The common law of military liability is applicable to members of the armed forces of the United States and to those militiamen whose states have not enacted immunity statutes. Older authorities rarely deviated from the stringent principle of full liability for illegal acts, with regard to either civil or criminal liability, whether such acts were committed under order or voluntarily, under ordinary conditions, or in emergencies. A more recent tendency seems to develop a rule of immunity for acts committed in good faith \* \* \*. In derogation of the common law rule the militia statutes of most states have completely or partly immunized members of the militia for acts performed on duty.”

See also Roberts, *Some Observations on the Case of Private Wadsworth*, 51 Am. L. Reg. 63, 161 (1903).

<sup>5</sup> *Kenny's Outlines of Criminal Law* 54 (Turner's ed., 1952).

<sup>6</sup> 1 Hill 377, 25 Wend 483 (1841).

<sup>7</sup> The British minister asked McLeod's release on the ground the destruction of the *Caroline* was a “public act of persons in Her Majesty's service, obeying the order of their superior authorities” which could “only be the subject of discussion between the two national Governments” and “could not justly be made the ground of legal proceedings in the United States against the persons concerned.” Webster said in this case “That an individual, forming part of a public force, and acting under the authority of his Government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law \* \* \*.” Webster, Secretary of State, to Mr. Crittenden, Attorney General, March 15, 1841, 2 Moore, *International Law Digest* 24, et seq. (1906). For comment on the *McLeod* case, see 1 Hyde, *International Law* 821 (1922); Jennings, *The Caroline and McLeod Cases*, 32 A.J.I.L. 82 (1939); Moore, *Act of State in English Law*, 126, et seq. Compare *In re B.P.Z.S. and others*, Court of Justice, Netherlands New Guinea, March 9, 1955, [1955] Int'l. L. Rep. 208.

this ground,<sup>8</sup> and *Horn v. Mitchell* can be read as meaning that this is the proper dividing line.<sup>9</sup> British text-writers have accepted the limitation on the Act of State doctrine of *Regina v. Lesley*<sup>10</sup> and suggested that, with respect to members of the

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<sup>8</sup> In *Arce v. State*, 83 Tex. Cr. R. 292, 202 S.W. 951 (1918), after General Pershing invaded Mexico, a force organized at Monterey by direction of the Carranza *de facto* government invaded Texas and fought a battle with two companies of American cavalry. Several were killed on both sides. Four Mexicans were captured and tried and convicted of murder. On appeal the court held that a state of war existed; that if any authority to punish the defendants existed, it was in the federal, not the state government; and that if the state court had jurisdiction, the conviction was erroneous because the command was organized under the authority of the *de facto* government and the troops were required to obey the orders of their superior officers.

In *Straughan's Case*, 1 Ct. of Claims Reports 324 (1863-1865), *The Chesapeake*, upon leaving Hampton Roads, was intercepted by a British squadron, which demanded permission to search *The Chesapeake* for deserters. The demand was refused and the British squadron opened fire. *The Chesapeake* struck its colors and the British removed from *The Chesapeake* several seamen, including the husband of the claimant. The claim was for wages during the period of detention by the British under a statute the crucial clause of which referred to those "taken by an enemy." The British government had disavowed the act of the admiral commanding the squadron and offered payment for the injury to the seized seamen.

A dictum of the court stated, at 328: "The acts of a naval commander, so far as other nations are concerned, are the acts of his government. His government is responsible for them, must answer for them, and must atone for them. There is no book or decision which calls such acts a private wrong, and the officer a wrongdoer. \* \* \* Neither the United States nor the injured seaman could have prosecuted the captain and crew of the *Leopard* in criminal tribunals, nor have recovered damages from them in courts of law."

<sup>9</sup> 232 Fed. 819 (CCA 1, 1916). The rationale of the court's holding appears, however, to be that there was insufficient evidence that petitioner's acts were authorized by the German government; that a commission as first lieutenant of the Landwehr (second reserve) Pioneers, dated August 18, 1908, was inadequate in this regard. There is a suggestion also that for immunity to exist the act must be "specifically authorized or avowed" by the government.

<sup>10</sup> 26 *Halsbury's Laws of England* 253 (2nd ed. 1937), states that "The official acts of every state or potentate \* \* \* and of their authorized agents, are acts of State. No action can be brought in respect of such acts, even when the agent is a British subject, and, in carrying out the act of State, is committing an offence against English law." A footnote states, however: "It is doubtful whether this rule applies to acts committed in British territory by order of a foreign sovereign. There appears to be no direct English

armed forces, immunity for acts in the performance of duty extends only to the "public and open employment of force" recognized by international law as "lawful in case of actual war."<sup>11</sup>

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authority on the point (see, however, 1 Hale, P.C. 99), but in *The People v. McLeod* (1841), 1 Hill 377, the Supreme Court of New York held that the plea of 'act of State' afforded no defense to a British subject who committed a criminal act in American territory. This decision was the subject of much comment, chiefly extra-judicial; Lord Lyndhurst, L. C., is said to have agreed with it \* \* \* but the Governments of this country, and the United States expressed a contrary view \* \* \*. *R. v. Lesley*, *supra*, to some extent supports it \* \* \*."

Dicey's *Conflict of Laws*, 164 (7th ed. 1958), states that "As regards acts of State authorized by foreign Governments \* \* \* the courts in England would doubtless apply the same principle, at least in respect of acts committed outside England." A footnote states that "The position with regard to acts within the jurisdiction is uncertain; the Supreme Court of New York has held that in such circumstances a plea of act of State will not lie: *The People v. McLeod* (1841) 1 Hill 377. See *R. v. Lesley* (1860) 8 Cox C.C. 269, which appears to be in the same sense."

<sup>11</sup> "The case for immunity has never been put higher than the public and open employment of force, and there the legitimate limits of act of States in this connection may lie. Perhaps a further limitation must be added—that the acts themselves must be of a kind which international law recognizes as lawful in case of actual war. It has been pointed out that English Courts certainly do not 'admit to its full extent the principle that we cannot subject to our municipal laws aliens who violate such laws under the direction of their sovereign.'" Moore, *Act of State in English Law* 131 (1906).

The same author, in reviewing the factors to be taken into account in determining what is "matter of State," says "Secondly, there is the *authority* under which the acts are done, and the *nature of the acts themselves*—whether the authority of the sovereign is the one thing needed, or whether that authority confers immunity only upon such acts as are of an obviously public character, and are lawful as between independent states; and whether, apart from authority given by a lawful sovereign, some acts are so essentially public in themselves as to be outside municipal jurisdiction. Thirdly, *the place* in which the acts are done may be material—whether in our own territory, or on the high seas, or in the territory of some foreign sovereign."

Compare the statement of the Attorney-General, Sir Hartley Shawcross, in the House of Commons, March 10, 1948, quoted in 1 McNair, *International Law Opinions* 115 (1956), with reference to the status of British forces in Palestine after the termination of the mandate: "It is the existing law that, where an action is brought by a foreign subject in respect of acts done by British soldiers or officials on foreign territory, which were done on behalf of the Government, or adopted by the Government after they were done, the defence of Act of State is a complete bar to any claim for damages that may be made. It also is the existing law, as a matter of in-

A general immunity for acts in the performance of duty, rather than one so limited, has, on the other hand, been recognized by the Supreme Court of Panama in *Republic of Panama v. Schwartzfiger*<sup>12</sup> and the Supreme Federal Court of Brazil in *In*

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ternational law, that, where we have Forces in occupation of foreign territory, it is recognized that they are entitled to do that which is necessary for their own safety and protection, and that what they do in the course of these duties on foreign territory is not justiciable in the courts of this country or of any other country."

See also *Amrane v. John*, Civil Tribunal of Alexandria, Egypt, Jan. 14, 1932, [1931-1932], Ann. Dig. 174 (No. 90).

<sup>12</sup> 24 Panama, Registro Judicial 772 (1926), 21 A.J.I.L. 182 (1927). A workman at France Field, in the Zone, was severely injured. Schwartzfiger was ordered to rush the injured man to Colon Hospital in an ambulance. The ambulance, while being driven across Colon at a speed in excess of the legal limit, struck a business establishment and killed a man. The Supreme Court concluded the Panama courts had no jurisdiction.

The case has been cited as holding that under international law visiting forces enjoy complete immunity from the jurisdiction of a country in which they are stationed. It seems clear, however, that the Supreme Court (1) considered that Panama was obligated by treaty to accord immunity to the accused, (2) viewed the case as involving troops in passage rather than stationed in the country and (3) adopted the view of the Procurador General that the fact that the accused was acting in discharge of his duty in driving the ambulance was crucial. Only in the opinion of the Procurador General is a general immunity of troops stationed in a country mentioned, and then only in a general discussion of the authorities.

Assistant Attorney General Rankin commented regarding the wider interpretation sometimes given the *Schwartzfiger* and *Gilbert* cases:

"The cases thus stand for the proposition that the only defense of immunity which has received sufficient recognition to be accorded any weight is where the offense occurred in the line of duty. They accord with the opinions of two of the most eminent international law authorities, Lawrence and Oppenheim who expressly limit the immunity to offenses committed in the line of duty or within the lines of the visiting forces (Lawrence, *Principles of International Law* (6th ed.) Sec. 107, p. 246; Oppenheim, 1 *International Law* (4th ed.) Sec. 445)." Hearings Before the House Committee on Foreign Affairs, On H.J. Res. 309, Part 1, 84th Cong., 1st Sess. 266-67 (1955).

The *Schwartzfiger* case has not led in practice to the grant of a general immunity for American forces in Panama.

"Pursuant to an informal agreement in 1943 between our military authorities and the commandant of the Panamanian National Police, military personnel who commit offenses within the Republic and who are apprehended by the Panamanian authorities are frequently turned over to the United States authorities for disciplinary action. Local authorities, our authorities there, state that Panamanian authorities rarely refuse to re-

*re Gilbert*.<sup>13</sup>

linquish their primary jurisdiction when requested to do so." General Hickman, Hearings Before the Subcommittee of the Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 84th Cong., 1st Sess., 38 (1955). But in the period from Dec. 1, 1958 to Nov. 30, 1959 Panama waived its jurisdiction in only 20 of 167 cases. Hearings Before the Subcommittee of the Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 86th Cong., 2d Sess., (1960) 24.

<sup>13</sup> Brazil, Supreme Federal Court, November 22, 1944, *Diario da Justice*, August 21, 1945, section *Jurisprudencia* (appended to No. 190, pp. 2969-2972); [1946] *Ann. Dig.* 86 (No. 37). On February 18, 1944, a Brazilian citizen, Jose Domingues Ramos, tried to enter the Admiral Ingram Camp in Recife (Pernambuco) in order to obtain payment of a bill from an American marine stationed there. This camp was a part of the American military bases temporarily established in Northern Brazil during the Second World War. The United States marine, Arthur James Gilbert, who was on guard at the entrance to the camp, sought to prevent Ramos from entering. Ramos persisted in his attempt and was shot by Gilbert; he died four days later.

The court held the Brazilian courts had no jurisdiction. The opinions, like those in the *Schwartzfiger* case, ranged over a wide area, and it is not easy to pinpoint the basis for the decision. Again, however, on the facts the defense that the defendant's act was done in the performance of official duty was available, both opinions emphasize that aspect, and the decision is most clearly supportable on that ground.

The Court, by Falcao, J., said in part, at pp. 87-88:

"But in those cases the offences were common penal offences committed by members of foreign armed forces who were present on Brazilian soil but were not on duty at the time. These circumstances necessarily led to the correct solution announced by the Government of the United States in response to the vigorous protest of the Brazilian representative. The present case, however, as appears from the proceedings, is quite different: the offender is a member of the armed forces of a foreign country which are stationed within a limited zone of the Brazilian coast with the express consent of the Government of Brazil and for the purpose of taking part in war operations in which our country also is engaged. Furthermore, the said marine committed the offense in the exercise of his specific duty as sentry at the camp." Azevedo, J., in a separate opinion, observed that:

"No question would arise if both the offender and the victim were members of the armed forces. As, however, the victim was a civilian, a distinction must be made: if the crime were devoid of any military aspect, the case would undoubtedly fall under the local jurisdiction. However, the case before the Court is of a typically military character. The act of the sentry who was guarding the camp was directed against a person who resisted the order not to enter it. In my view, the fact of the victim being a Brazilian civilian does not efface the pre-



The position that visiting forces are immune for offenses committed in the performance of official duty is to be distinguished from the position that such forces are immune for offenses committed while on duty. The latter concept predicates immunity on the time when an act is done, rather than the nature of the act. This is not to say there is no basis for immunity for acts committed while on duty. Subjecting a member of a visiting force to criminal liability for a private act committed when he was on duty does not interfere directly with the conduct of the affairs of the sending state, nor call into question the propriety of an act of that state. It does, however, involve claiming jurisdiction over an individual when he is acting as an integral part of an organized body of men serving the foreign state. Indirectly, there is interference with the performance of his duty. The functional basis for immunity for private acts committed while on duty can be viewed as more substantial than for acts committed on leave, but much less compelling than for acts committed in the performance of duty.

Discussions of immunity for duty-connected offenses often fail to distinguish between offenses in the performance of duty and offenses on duty. This is understandable. There is, unhappily, no

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dominantly military character of the immediate defence of the camp's security." *Id.*, at 90.

Both opinions also appear to recognize the on-base concept, and there is language in each which suggests recognition of a wider immunity.

A note to the report of the case in the Annual Digest reads:

"For criticism of this decision see Accioly, "Conflito de jurisdicao em materia penal internacional," in *Boletim da Sociedade Brasileira de Direito Internacional*, I (1945), No. 2, pp. 96 ff. The author maintains that the crime was not military under international law; that it was not committed within the perimeter of the camp; that it represented an offence against a Brazilian citizen; that it took place in circumstances which would appear to have been a disturbance of the local public order; and that for these reasons the Supreme Federal Court was wrong in denying that Brazil had jurisdiction."

General Hickman, in the Hearings Before the Subcommittee of the Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 84th Cong., 1st Sess., 39 (1955), after stating that in Brazil jurisdiction over American troops is concurrent except for two special groups which enjoy diplomatic immunity, referred to the decision in *In re Gilbert* and said: "It is understood that Brazilian authorities have agreed, as a matter of policy, that United States military personnel who commit offenses in Brazil will be turned over to United States authorities for trial, and none of our people have been tried during the reporting period."

sharp line which distinguishes one from the other. Even if attention is centered on the concept of offenses in the performance of duty, it is quite impossible to chart an acceptable perimeter. Limiting the concept to offenses expressly ordered will not suffice since there are acts the performance of which is inherent or implicit in every assigned duty. Nor can one easily draw a line between the normally acceptable way in which a duty should be performed and an abnormal, unacceptable way. An extreme deviation from the norm may readily be labeled a private act, but the middle ground presents real problems. Again, the decision regarding where the line should be drawn is inevitably influenced by the attitude taken toward how compelling a basis is necessary to justify giving immunity. Also, it is difficult to separate the issue from the related question of who is to determine whether an act was done in the performance of duty. Finally, the draftsmen of agreements are handicapped by the inadequacy of language to draw a sharp line.

The view that visiting forces should enjoy immunity for acts committed while on duty was expressed by Oppenheim<sup>14</sup> and Lawrence.<sup>15</sup> It was developed primarily in the decisions of the

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<sup>14</sup> "This rule, however, applies only in case the crime is committed either within the place where the force is stationed or in some place where the criminal was on duty." 1 Oppenheim, *International Law* 847-48 (8th ed., Lauterpacht, 1955).

The U.S. Memorandum, Hearings, H.J. Res. 309, *op. cit. supra*, note 12, at 416, in arguing for general immunity for visiting forces, commented:

"Oppenheim also suggests that if a crime is committed outside of the place where the force is stationed, the right of extritoriality or immunity from the local jurisdiction applies only in case the crime is committed 'in some place where the criminal was on duty'. Again there is no definition of 'on duty' although the example given suggests that a member of the armed forces while engaging in recreation or pleasure is 'not on duty'. A soldier is never off duty in the sense in which that term is usually understood by civilians. Even though temporarily permitted to absent himself from strictly military tasks for recreation and pleasure, he is still under the orders of his commanding officers and responsible to them for his acts. Common law crimes as well as ordinary breaches of discipline are military offenses for which he is responsible whether they are committed when he is under immediate command or not."

With respect to the statement that "A soldier is never off duty \* \* \*," see *Manuel v. Ministère Public*, note 16 *infra*, in which the argument was expressly rejected.

<sup>15</sup> "The troops \* \* \* would be under the jurisdiction and control of their

Mixed Courts of Egypt, in terms of the concept of *service commandé*.<sup>16</sup> The Mixed Courts came in time to doubt that the simple

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commanders as long as they remained within their own lines or were away on duty but not otherwise." *The Principles of International Law* 246 (6th ed. 1915).

<sup>16</sup> In the *Triandafilou* case, *supra*, involving a member of the crew of a warship, the court said:

"Whereas, the sole question which presents itself \* \* \* is that of knowing whether Triandafilou was or was not carrying out a mission under instructions at the moment when he committed the aggression \* \* \*.

"Whereas the judgment \* \* \* held that if Triandafilou came on shore to discharge a duty (purchase of food for the needs of the ship), and only with permission to return on board by midnight, he was no longer on duty when, coming out of a bar on the Place Mohammed Ali in a state of intoxication some minutes before midnight, he struck with a knife an agent of the local police \* \* \*.

"Whereas if the members of the crew of a warship enjoy the immunity from jurisdiction of the vessel itself when they are on shore this is only true in so far as they can be construed as agents for executing orders which are given them in the interests of the vessel; whereas it is in short the immunity of the vessel which projects itself beyond the vessel for the realization of its own ends; whereas such is the basis of the principle which withdraws them from the local jurisdiction when they are on duty; whereas it follows that these words should be interpreted not with reference to the activities of him who has received the order but with reference to him who has given the order and must take cognizance of its execution; and whereas in the instant case Triandafilou did not return on board to give an account of his commission, and whereas he was therefore still on duty when he committed the aggression with which he was charged; whereas it results from these considerations that the first ground for the appeal is well granted \* \* \*."

The basis for the broad exception recognized in the *Triandafilou* case is better expressed in the opinion of the Court of Cassation in *Ministère Public v. Tsoukharis*, Feb. 8, 1943, [1943-1945] Ann. Dig. 150 (No. 40), a case involving a Greek soldier who had been ordered to go from Alamein to Amrich, instead went to Alexandria, and was involved with three other Greek soldiers in an affray in which a British corporal was killed. The court, after referring to its decision in *Triandafilou*, said:

"The question arises whether the same rule applies to soldiers who leave their military quarters. The exception in favour of a sailor on shore on duty flows from the general principle of the jurisdictional immunity of armed forces. This principle is based on the tacit understanding to respect the sovereignty of a foreign Power, and should therefore, logically, be extended to apply to soldiers who, though outside their military quarters, are regarded as forming an integral part of the corps to which they belong. They would be so regarded where

they are on duty under orders to carry out a mission for the needs of the corps.”

Shortly afterward, in *Manuel v. Ministère Public*, Court of Cassation, Mixed Court, March 8, 1943, 39 A.J.I.L. 349 (1945), the court said that “\* \* \* there do not exist, in short, any serious divergences in the literature except as concerns violations of common law disturbing the public peace and security committed by a soldier outside of the military premises, either against an inhabitant or against other soldiers, on condition, moreover, that the offender is not on duty, for, in the latter case, he is considered as an integral part of the forces to which he belongs \* \* \*.”

An armed force is, in other words, an instrumentality of a foreign state such that there is a functional basis for immunity for the individual soldier or sailor so long as he is a part of the force. He is a part of it when he is within a camp or on a warship, or when he is physically separated from the main body but still on duty. He is not when he is separated from the main body on leave.

The Mixed Courts soon began to question whether this rationalization could support an immunity so broad in scope as that recognized in the *Triandafilou* case. They also began to doubt whether the certificate of the accused's commanding officer as to his on-duty status—counsel for the accused had relied on such a certificate in the *Triandafilou* case—should be considered as conclusive.

The retreat began with the *Tsoukharis* case, *supra*, in which the accused Greek soldier, ordered to go from Alamein to Amrich, went to Alexandria instead. The *Chambre du Conseil* allowed the plea the accused was immune on the ground it had to accept the certificate of his commanding officer that *Tsoukharis* was on duty at the time of the offense. On appeal, counsel for the state argued that the decision involved an abdication of the court's function to control the scope of jurisdictional immunities. (See Barton, 1954 *Brit. Yb. Int'l L.* 340, 353). The Court of Cassation, in reversing and sending the case back on the ground the judgment appealed from did not state sufficiently the reason on which it was based, said:

“The decision of the *Chambre du Conseil* has held that Constantin *Tsoukharis* was on duty, but has not specified this duty in a manner which would enable the Court to decide whether the *Chambre du Conseil* has properly applied the rules of public international law. ‘Mission under orders’ means a mission dictated by military requirements. It does not appear from the reasons given for the decision of the Court below that such a duty existed in the present case. Furthermore, the order has to be looked at (as this Court has already held on June 29, 1942) from the point of view of the person who gives it and not from that of him who receives it. Applying this principle it seems clear that the person giving the order is interested in the report of the person sent, whereas the latter is interested in prolonging the duration of the mission. *If therefore there is no report to make there is no order in question, and a soldier who abuses his mission to prolong his leave will cease to be covered by immunity from jurisdiction.* In

fact that a soldier *en service commandé* was “an integral part of the forces to which he belongs” furnished an adequate basis for immunity. They moved toward a more restricted view, but never wholly abandoned the idea that an offense “*en service commandé*” was subject to the exclusive jurisdiction of the sending State.<sup>17</sup>

The rule developed by the Mixed Courts, according immunity for on-duty offenses, never enjoyed general acceptance,<sup>18</sup> nor has it found favor among treaty negotiators. It is not incorporated in the NATO Agreement. It was not rejected by the negotiators of that Agreement—an immunity for duty-connected offenses so broadly conceived was never proposed or discussed.

More important, the NATO Agreement accords immunity even for offenses committed in the performance of duty only in limited degree. The sending state has primary, but not exclusive, jurisdiction over “offenses arising out of any act or omission done in the performance of official duty.”<sup>19</sup> Moreover, the receiving state may even have exclusive jurisdiction over such an offense in the event, probably unlikely, that it is “punishable by its law but not by the law of the sending state.”<sup>20</sup> The limited immunity granted does, however, extend to the civilian component as well as to members of a force.

There was vigorous opposition among the NATO negotiators to according even this limited immunity for offenses committed in the performance of duty. They were, of course, free to recognize an immunity for such acts in such degree as they chose, or deny it altogether, regardless of any rule of international law on the subject.

Several representatives would have preferred to deny immunity

order that the Court of Cassation should be able to exercise its power of judicial review it is essential that the alleged mission should be defined with due regard to the facts.” (Emphasis added.)

<sup>17</sup> See the cases of Camboures, Cour d’Assises, Journal des Tribunaux Mixtes, 26/27 January 1944, p. 2; Gougoulis, Cour de Cassation, J.T.M. 28–29 January 1944, p. 3; Scordalos, Cour de Cassation, J.T.M. 19/20 May 1944, p. 2; Mijoucetal, Chambre du Conseil, J.T.M. 24/25 August 1945, p. 3.

<sup>18</sup> In the immediate post-World War II period, there were instances of American troops being tried by foreign courts for on-duty offenses. Statement of the Department of State, Hearings Before the House Committee on Foreign Affairs on H.J. Res. 309, Part 2, 84th Cong., 2d Sess., 556 (1955).

<sup>19</sup> Article VII, para. 3(a) (ii).

<sup>20</sup> Article VII, para. 2(b).

for official acts altogether,<sup>21</sup> as did the Brussels Treaty.<sup>22</sup> Under that Treaty the receiving state was not even enjoined to give "greatest sympathy" to a request for "transfer," i.e., waiver, in such cases, as they were where an offense was *inter se*. This suggests the basis for opposition to the immunity. The argument that to exercise jurisdiction over visiting forces for offenses committed in the performance of duty is to interfere with the conduct of the affairs of a foreign state may be logically compelling. For some, this consideration is outweighed by their grave concern that the receiving state have jurisdiction in all cases in which the victim is a national of the receiving state. The point was not emphasized in this context in the NATO negotiations,<sup>23</sup> but was repeatedly made in relation to other issues. It was most vigorously pressed in the debates in the British Parliament.<sup>24</sup> The

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<sup>21</sup> "The first point discussed was whether subparagraph [3(a)] (ii) should include offences committed in the performance of official duty. Several Representatives were of the opinion that they should be excluded." MS-R (51)14. The Portuguese representative had earlier put forward a redraft of the criminal jurisdiction articles which made no reference to an immunity for offenses committed in the performance of duty (MS-D(51)13) and thereafter proposed that paragraph 3(a) (ii) be omitted (MS-D(51)16).

<sup>22</sup> Page 145, *supra*.

<sup>23</sup> The Belgian representative "wished to reserve judgment [on the United States Draft] only with respect to cases where the victim of the offence was a national of the receiving State, even if the offence was committed by a member of an armed force on duty." MS-(J)-R(51)2.

<sup>24</sup> The statements made are to be read in the light of the fact that the Bill to implement the NATO Agreement, as introduced, apparently used the phrase "in the course of duty" rather than "in the performance of duty." The Home Secretary questioned that the difference in language was material, but agreed it should be changed. In the course of the debate Mr. Michael Stewart said:

"I cannot understand on what principle anyone defends the proposition that a foreign soldier who does some damage \* \* \* to the citizens of the country which he is visiting should be exempt from answering for those offences in the courts of the country which he is visiting merely because it is alleged that what he did was done in the course of his duty." 505 H.C. Deb. (5th ser.) 599 (1952). See also the comment of Mr. John Strachey, *id.*, at 578, comparing an immunity for *inter se* offenses to that for offenses in the course of duty.

Mr. E. Fletcher moved an amendment to eliminate the clause relating to the immunity. He said, after referring with approval to the immunity for *inter se* offenses:

"But the case is totally different where the offence is committed not against a foreigner or his country but against a British subject. It is

intensity with which this view may be held is illustrated by the feeling aroused in Japan by the *Girard* case.<sup>25</sup> One may surmise that it is the peripheral situation, such as the *Girard* case, rather than the case where the act was much more clearly in the performance of duty, which prompts such concern.

The grant of immunity in the NATO Agreement for offenses committed in the performance of duty was apparently included at the insistence of the United States representative. He indicated that it would extend only to a limited range of cases.<sup>26</sup>

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that class of case which is really causing the greatest concern among those who are troubled about this Bill.

"Therefore I would like to exclude from Clause 3 any offence committed against a British subject, even though it is committed in the course of duty by a member of a foreign force." 505 H.C. Deb. (5th ser.) 1158 (1952). See also a further comment by Mr. Stewart that "This is, I think, the only part of the Bill in which the power of the British courts to deal with the offence is set aside where the person suffering from the offence is a British subject." *Id.*, at 1161.

<sup>25</sup> See p. 228, note 32, *infra*.

<sup>26</sup> The United States representative, in explaining the United States Draft, said that "The Draft provided that the Courts of the receiving State normally exercised jurisdiction." The United States draft however laid down two exceptions:

"Article 6/2(d). An offense against the laws of the receiving State arising out of an act done 'in the performance of official duty' by a member of a 'contingent' or pursuant to a lawful order issued by competent authority. Very few categories of cases of this type would arise; examples would be sentinels using unnecessary force when on duty, or automobile accidents of drivers proceeding on official duty." MS-R(51)4.

When at a later meeting, it was proposed that the clause according the immunity be eliminated (see note 21, *supra*) the United States representative "pointed out, however, that there was a possibility of offences being committed in the performance of an official duty." MS-R(51)14.

The Canadian representative, in MS-D(51)15, put forward a proposal that "for the existing words in Article VII, paragraph 3(a)(ii)" there should be substituted the clause "Acts or omissions done or omitted pursuant to an order issued by a military superior of the State and carried out according to the tenor thereof." He explained: "It would be most desirable to confer on a receiving State a primary right to exercise jurisdiction over a member of a force or civilian component who carried out his superior's order in an unlawful manner which resulted in injury or damage."

The Canadian representative returned to the point later, proposing that the clause "should be expanded to include a further definition of offences arising out of any act or omission done in the performance of official duty, which would be worded as follows in French: 'et rentrant dans l'ordre des devoirs de l'intéressé'. The Working Group came to the conclusion that it

Several other representatives nevertheless sought further to limit the scope of the immunity, without success.<sup>27</sup> Concern was also expressed that the language in which the immunity was recognized was too ambiguous, but apparently no one put forward a more aptly phrased provision.<sup>28</sup>

It is not surprising, in view of the scanty record and the admitted difficulties which the negotiators encountered in delineating the scope of the immunity they meant to confer, that disagreements have arisen regarding its application in specific cases. The Turkish authorities for a time took a most restricted view of the reach of the immunity. "It was argued that the killing of a pedestrian was not an act directly connected with the driving of a truck on official business, and that a person ordered to go to a place to perform certain duties and return was 'in line of duty' while he was performing those duties, but not on his return

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was very difficult first to find an equivalent expression in English and, secondly, to define the circumstances in which an offense could be regarded as falling within the limits of the duties of the person concerned. The point would chiefly arise in a few individual cases where special circumstances were involved: an example had already been given \* \* \* by the Italian representative (MS-R(51)14)." MS-R(51)18.

<sup>27</sup> The Belgian representative proposed that the immunity should not cover traffic accidents. MS-R(51)8.

The Italian representative proposed that "it should be specified that such act was done not only in the performance of official duty, but also but (sic) within the limits of such duty. He gave the example of a driver travelling between two towns on official business who, for personal reasons, deviated from the direct route. If an accident occurred in the course of the deviation, the driver was no longer acting within the limits of his official duty." MS-R(51)14.

<sup>28</sup> The French representative, at an early meeting of the Judicial Subcommittee, expressed approval of the United States draft, but thought "it would be necessary to define more closely the concept of a member of an armed force 'on duty.'" MS-(J)-R(51)2.

At a later meeting of the Working Group the Canadian representative proposed that in subparagraphs (1) and (11) the word "offences" should be replaced by the phrase "acts or omissions." "Several delegations also proposed further amendments [unspecified] to the definition of the offences appearing in subparagraph (11)." MS-R(51)14.

The only changes made from the language used in the United States draft were (1) changing "act" to "act or omission" and (2) at the suggestion of the United States representative [MS-D(51)20], striking out the clause "or pursuant to a lawful order issued by the competent authorities of that State." MS-R(51)14.



trip.”<sup>29</sup> The French and Italian authorities have, on the other hand, agreed that a member of the armed forces is in the performance of official duty when driving his own car between his home and his place of duty.

The clause “offences arising out of any act or omission done in the performance of official duty” describes a class of acts. The test prescribed concerns the nature of the act, not the status of the actor. It is clear, then, that the clause does not cover all offenses committed while the offender was on duty. The more difficult question is what the nature of the act must be to fall within the class. The crucial point is the meaning to be given to the words “offences arising out of.” The words could mean “offences consisting of” or the equivalent, in which event the immunity would extend only to acts or omissions done in the performance of official duty. It seems more sensible to interpret them as meaning “offences originating in,” “related to,” or, in the language of the Turkish statute, “done in connection with.” This interpretation enlarges the class, but does not clearly define its outer limits.

Those concerned with the interpretation of the clause have understandably reached into other areas of the law for assistance. The American military authorities have apparently interpreted the provision as analogous to but somewhat broader than the agency concept of “scope of employment.” Much less useful is the analogy to “line of duty” used in the Federal Tort Claims Act and in legislation conferring benefits, narrowly interpreted in

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<sup>29</sup> Snee and Pye, *Status of Forces Agreements: Criminal Jurisdiction* 49 (1957). See also the testimony of General Hickman, Hearings Before the Subcommittee of Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 84th Cong., 1st sess., 28 (1955). The Turkish position, as has been said (Snee and Pye, *ibid.*) is in line with the Italian and Canadian proposals, *supra*, notes 27 and 28, which were rejected by the Working Group.

Turkish legislation (Law No. 6816 of July 16, 1956) was enacted that the provision of the NATO Agreement was to apply to any “offense arising out of any act or omission done in the performance of duty or done in connection with the performance of duty,” and this has enabled the Turkish and American authorities more readily to reach agreement in specific cases. The added language, “done in connection with the performance of duty,” can be considered as a clarifying interpretation of the treaty provision, but not as extending its intended scope. See Snee and Pye, *ibid.*, and the testimony of General Hickman, *ibid.*

the first case, broadly in the second. The French interpretation is apparently largely shaped by the concept of "*en service commandé*"; the Italian authorities based their conclusion regarding the status of one driving between home and place of duty on the ground that he would have been considered at work under the Workmen's Compensation law.<sup>30</sup>

These analogies may be useful, but only within limits. Even with respect to the concept of "scope of employment," one can query whether the factors of policy which have shaped the limits of the vicarious liability of a principal for the acts of his agent are entirely relevant where the issue is not one of civil liability or even criminal liability but of criminal jurisdiction. The divergent interpretations of "line of duty" under the Federal Tort Claims Act and the Acts conferring benefits on members of the armed services suggest how irrelevant they are in interpreting the quite different language of the NATO Agreement, addressed to a quite different problem. There is need to remember that the problem under the Agreement is a new and unique problem, and that the language of the Agreement, "offenses arising out of any act or omission done in the performance of official duty," is new, and was a response to a particular need. That need was to ensure the commanding officer's control over members of a force in the carrying out of their duties, and hence to cast on the sending state the responsibility for the manner in which those duties are performed. If the act is not one which is or could be considered to be related to carrying out the mission of the force, it is not covered. This approach may not furnish a rule of thumb for the solution of the hard case; it is, however, likely to prove a surer guide than a concept drawn from another field, formulated to solve quite different problems.<sup>31</sup> Although this may suggest

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<sup>30</sup> See, generally, Snee and Pye, *op. cit. supra*, note 29, at 47-50.

<sup>31</sup> Certain American military authorities in France have taken the position that if one of the elements of a crime is that it be done with a specific intent, the sending state cannot have primary jurisdiction, because the presence of the specific intent is inconsistent with the act being in the performance of military duty. Specifically, it was determined that, where one assigned to a Special Services unit who was to arrange tours for servicemen embezzled the money he collected instead of turning it over to the French bus company, the United States did not have primary jurisdiction because the intent to embezzle was inconsistent with his acting in line of duty. The provision of the Treaty, however, establishes a test for

that the class of cases over which the sending state has primary jurisdiction is relatively broad, one should bear in mind the issue is *which* state shall try and punish, not *whether* the offender shall be tried and punished.

The *Girard*<sup>32</sup> case provoked the greatest controversy regarding the correct interpretation of the provision. Girard was under orders to guard a machine gun on a firing range being used by the American forces. A Japanese woman was collecting cartridge cases in the area. Girard placed a cartridge case in his grenade launcher, fired, and killed the woman. Either he did so to guard the machine gun, in which event he seemingly used excessive force, or did so as the climax to a bit of horseplay which involved enticing the victim and others within range and then frightening them by launching cartridge cases in their direction.

The controversial issue was not whether Girard was guilty of a crime under Japanese or American law. Presumably he was under both, on either version of the facts. The issue was simply whether the United States or Japan had primary jurisdiction to

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allocating criminal jurisdiction, not a test of criminal liability. Moreover, it gives primary jurisdiction to the sending state of "offences arising out of acts or omissions done in the performance of official duty," and the words "arising out of" must be given due weight. Perhaps the intent with which an act was done would be relevant if the issue was whether the act was done in the performance of duty, but it seems questionable that it is relevant when the issue is whether it arose out of any act in the performance of duty. If, in the case cited, the accused had deposited the funds in a bank in his own name, this could be viewed as such a deviation as not to be in the performance of duty, but it still would seem to be an act arising out of an act done in the performance of duty, that is, collecting the money. It seems doubtful that it would be more or less so if the deposit was made with the intention of turning the money over to the bus company later, or diverting it to the accused's own use.

In any event, there are certainly cases in which an act is done with the requisite intent and is nevertheless unquestionably one arising out of, or even directly in the performance of official duty. If, in *In re Gilbert, supra*, note 13, the sentry used excessive force, it would constitute such a case, and certainly many of the war crimes qualify. Introducing the test of the specific intent with which an act was done thus not only adds an element not expressly included in the NATO provision, but one which is clearly not applicable to all cases and is of questionable application in any case. The rejection of the Italian and Canadian proposals suggests the NATO negotiators did not intend to impose such an added test. See Snee and Pye, *op. cit. supra*, note 29, at 48-49.

<sup>32</sup> *Wilson v. Girard*, 354 U.S. 524 (1957).

try him. The United States had such primary jurisdiction if what he did was an offense "arising out of any act or omission done in the performance of official duty"; Japan had such primary jurisdiction if it was not. If he launched the cartridge case to guard the machine gun, then, however mistaken his judgment as to the appropriateness of employing such drastic means—even if he fired to kill—it seems clear that his act was within the provision. The Japanese contention, supported by reference to Agreed View No. 39,<sup>33</sup> which defined "official duty" as "any duty or service required or authorized to be done by statute, regulation, the order of a superior or military usage," that the killing was not authorized, seems misconceived. As has been suggested, the issue was not whether Girard's act was done in the performance of official duty, as thus defined, but whether it was an offense "arising from" an act so done.

If, on the other hand, Girard was engaged in horseplay, then his act was a private act, not arising from, related to, or originating in the performance of his duty, and the United States did not have primary jurisdiction.

Basically, then, the issue in the *Girard* case was one of fact, which, since the United States waived jurisdiction, was not resolved.<sup>34</sup>

Our status of forces agreements vary in the recognition accorded the concept as a basis of immunity. It was pointed out

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<sup>33</sup> Agreed to by the Criminal Panel, Jurisdiction Subcommittee on October 29, 1953; FEC Pamphlet No. 27-1, *Criminal Jurisdiction in Japan*, January 1956.

The affidavit of Robert Dechert, General Counsel of the Department of Defense, offered in the *Girard* case and published in an appendix to the opinion of the Supreme Court, 354 U.S. 531, 542, states that a circular of the United States Army Forces, Far East, in January 1956, stated:

"The term 'official duty' as used in Article XVII, Official Minutes, and the Agreed Views is not meant to include all acts by members of the armed forces and civilian components during periods while they are on duty, but is meant to apply only to acts which are required to be done as a function of those duties which the individuals are performing. Thus, a substantial departure from the acts a person is required to perform in a particular duty usually will indicate an act outside of his 'official duty'."

<sup>34</sup> After extended discussions in the Joint Committee, the United States, on instructions from the Department of Defense, waived jurisdiction. See Appendix B to the Opinion of the Court in *Wilson v. Girard*, 354 U.S. 544, at 547.

above that although the NATO Agreement gives primary jurisdiction to the sending state over both *inter se* offenses and offenses in the performance of duty, the latter concession was made only with reluctance. Some, though not all, of the other status of forces agreements to which the United States is a party, reflect a similar attitude.

The early Agreement relating to the Leased Bases did not refer specifically either to *inter se* or duty-connected offenses.<sup>35</sup> Jurisdiction was in large part determined by the place of the offense. The United States had primary jurisdiction over most offenses committed by "other than a British subject," e.g., a member of the American forces or civilian component, if the offense was committed within a base, but only concurrent jurisdiction if it was committed outside a base. The issue of whether an offense was *inter se* or duty-connected was of no moment.

The revised Leased Bases Agreement and the Bahamas Agreement both take account of whether an offense is a "United States interest" offense, as well as of the place where it occurs, but neither makes any reference to whether the offense was duty-connected.<sup>36</sup> If, in other words, a duty-connected offense is committed against a British subject, the latter fact outweighs the former.

The Agreement with the Dominican Republic was particularly interesting in this respect. Article XV gave the United States exclusive jurisdiction over offenses committed by members of its forces and others subject to its military law except Dominican nationals or local aliens, except with respect to offenses committed outside the sites against a Dominican national or local alien. In the latter case, jurisdiction was concurrent, and the Mixed Military Commission was to decide which government should exercise jurisdiction "and shall give consideration to whether the offense arose out of any act or omission done in the performance of official duties." That an offense was *inter se* was, then, enough to give the United States exclusive jurisdiction, but

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<sup>35</sup> Except that some duty-connected offenses could constitute "offenses of a military nature," as to which the United States had primary jurisdiction.

<sup>36</sup> The more recent Agreement with the Federation of the West Indies, in Article IX (3), follows the NATO formula, giving the United States primary jurisdiction over "offences arising out of any act or omission done in the performance of official duty." The Agreement with Australia includes an identical provision, Article 8(3) (a) (ii).

that it was committed in the performance of duty was not quite enough. This was only a factor to be taken into account in resolving the conflict of jurisdiction and was to be weighed against the fact the victim was a Dominican national or local alien.

The Philippines Agreement,<sup>37</sup> on the other hand, gives the United States exclusive jurisdiction over on-base offenses, and over off-base offenses if they are either *inter se* (narrowly defined) or committed by a member of the armed forces "while engaged in the actual performance of a specific military duty." The latter immunity does not, however, cover the civilian component. The Libyan Agreement, which gives the United States exclusive jurisdiction over on-base offenses by Americans, copies the NATO Agreement provisions with respect to both *inter se* offenses and offenses in the performance of duty, and extends the latter immunity to members of the civilian component. Finally, the Saudi Arabian Agreement recognizes no immunity for offenses in the performance of duty as such; Saudi Arabia has jurisdiction over all offenses committed outside the described areas.

Broadly speaking, then, the concept of the duty-connected offense has been given only limited application in post-World War II treaties. The view that a sending state should have exclusive or primary jurisdiction over offenses committed by a member of a visiting force while on duty, i.e., predicating immunity on his on-duty status, has not been expressly recognized in any agreement. Even immunity for offenses committed in the performance of duty, i.e., predicating immunity on the official nature of the act, has been granted only with limitations or even not at all. The explanation apparently lies in the great reluctance of receiving states to surrender their jurisdiction over offenses against their nationals. They are more prepared to surrender their jurisdiction over offenses which are purely private acts but involve only mem-

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<sup>37</sup> Article XIII, par. 4 provides that "\* \* \* If any offense falling under paragraph 2 of this Article [giving the Philippines jurisdiction "over all other offenses" committed outside the bases] is committed by any member of the armed forces of the United States

(a) While engaged in the actual performance of a specific military duty \* \* \*

(b) \* \* \* the fiscal \* \* \* shall immediately notify the officer holding the offender in custody that the United States is free to exercise jurisdiction."

The word "while" suggests the test is the status of the offender, not the nature of the offense, but the words "actual performance" and "specific military duty" narrow the scope of the immunity.

bers of the sending state's military community than they are over offenses committed in the performance of duty which involve their own citizens.

### DETERMINATION THAT THE OFFENSE WAS DUTY-CONNECTED

Since whether the sending or receiving state has jurisdiction may turn on whether the offense was committed in the performance of duty, some procedure must be established for deciding whether it was so committed. The ambiguity inherent in the concept of performance of duty has made the procedural question both crucial and productive of controversy.

Where the point has not been settled by agreement, the correct view seems to be that the court which has custody of the accused, rather than the military authorities of the sending state, has jurisdiction to decide the question. The State Department took this position in the Hearings on the NATO Agreement.<sup>38</sup> The cases in which a person claims diplomatic immunity, or those where the claim is made that a vessel or a corporation or other agency is an instrumentality of a foreign government so employed as to entitle it to immunity, provide close analogies. The issue is not, however, analogous to the much debated question of whether the executive or the judiciary of the territorial state should decide such points. That is a question of the appropriate allocation of power within the government of the territorial state. Such issues are raised as whether the conduct of foreign affairs will be embarrassed if such matters are not left to the executive.

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<sup>38</sup> A memorandum submitted by the State Department stated: "As a matter of practice the court having custody of the accused has the right to determine its own jurisdiction, i.e., whether the offense was committed in the performance of official duty. It is understood that due weight will be given to the views of the appropriate authorities of the visiting force as to whether or not the offense was so committed." Hearings Before Senate Foreign Relations Committee On Agreements Relating to Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters, 83rd Cong., 1st Sess., at 68 (1953). See also the comments of Mr. Phleger, Legal Advisor of the Department, *id.* p. 71. See also the Restatement, *Foreign Relations Law*, Section 62, Comment c, p. 195: "Because the question presents a jurisdictional issue, any tribunal deciding whether or not to exercise its jurisdiction in a particular case must make its own finding. Acceptance of the certification of the commanding officer that an accused serviceman was acting in the performance of duty when the act in question was committed is one method of resolving this problem."

See also 2 (b) of the Reporters' Notes to Section 65 at 206-207.

Rather, the analogy is to the problem of the weight to be given, in the kinds of cases cited, to a communication from the ambassador or other representative of the sending state to a court or the foreign office of the territorial state on the matter of status. On this, judicial decisions and the practice of states seem in harmony that the communication is not conclusive, and that the ultimate power to decide is in the court of the territorial state, based on all the evidence.<sup>39</sup>

There are, however, persuasive arguments for permitting the decision of whether an offense by a member of a visiting force was committed in the performance of his official duty to be made by his commanding officer. More is involved than is implied in the statement that his commanding officer knows best what the duties of the accused are. Inquiry by an agency of a foreign government into the issue can involve an inquiry into the mission of the visiting force, its command structure, and comparable matters. Security considerations may suggest the inappropriate-

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<sup>39</sup> There is some early authority which looks the other way. On this whole question, see the exhaustive studies by A.B. Lyon, "The Conclusiveness of the Foreign Office Certificate," 1946 *Brit. Yb. Int'l L.* 240; and "The Conclusiveness of the 'Suggestion' and Certificate of the American State Department," 1947 *Brit. Yb. Int'l L.* 116.

In the Hearings Before the Subcommittee of the Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 84th Cong., 1st Sess. (1955) after the action of the British Parliament in providing that the certificate of the commanding officer should be sufficient evidence until the contrary was shown had been commented on, the following exchange occurred between Senator Ervin and Mr. Leigh, Ass't General Counsel of the Department of Defense at p. 30:

"Senator Ervin: I expect that position would harmonize pretty much with our own civil law, that most courts would reserve the right to pass on that question when it arises before them. So I don't know that we can complain very much about that.

"Mr. Leigh: You can argue that this was a jurisdictional fact. Take the situation for example, when an ambassador is tried in a case of the Supreme Court's original jurisdiction. I would assume that the Supreme Court would also reserve the right to determine whether it had jurisdiction in an ambassadorial case, but if the State Department gave a statement as to whether an individual was or was not an ambassador, I think our Supreme Court would probably regard it as conclusive for the determination of that jurisdictional fact. I think it is a difficult question.

"Senator Ervin: I can understand that they would be very reluctant to surrender that power. While it would be desirable for us if they would, I don't think we can complain too much if they don't."



ness of such an inquiry, particularly if the duties of the accused lie in a sensitive area or concern intelligence. Moreover, time is important where discipline is involved and the commanding officer can act more quickly than the local authorities.<sup>40</sup>

The cases decided without benefit of a treaty provision are inconclusive. In the *Schwartzfiger* case the Panamanian court considered as "established" by "the evidence of Major General William Lassiter, Commanding General of the American Army in the Canal Zone" the fact, among others, that "in crossing that city by Avenida Bolivar, in the discharge of his duty, Schwartzfiger's car struck one of the pillars \* \* \*." <sup>41</sup>

The Mixed Courts of Egypt at first took the position that the certificate of the commanding officer was determinative of the issue. They later, however, retreated from this position, as they did on the substantive issue of whether an offense "*en service commandé*" was exclusively within the jurisdiction of sending state.<sup>42</sup>

The NATO Agreement does not deal expressly with the point. The United States during the negotiations consistently took the position, without recorded dissent by any other representative, that the decision was for the military authorities of the sending state.<sup>43</sup> Several of the NATO members have, contrary to this

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<sup>40</sup> It was on this ground that the NATO negotiators rejected a proposal of the Portuguese representative that an appeal to arbitration should be provided in order to decide whether an act had been done in the performance of official duty. "It was pointed out that such arbitration was not consistent with the speed required in the repression of criminal offenses." MS-R(51)1r. The truth of this observation is illustrated by the *Girard* case.

The Reporter's Notes 2(b) to Section 65 of the Restatement, *Foreign Relations Law*, state: "Notwithstanding the procedure followed in the *Girard* case, the most satisfactory, and probably the most accurate, method of determining whether or not an act was performed in the course of duty, is to accept the certificate of the serviceman's commanding officer. This, of course, requires the territorial state to trust that the authorities of the force will act in good faith, but the agreement to admit the force must presuppose that good faith will in fact be exercised."

<sup>41</sup> 21 A.J.I.L. 182, 184 (1927).

<sup>42</sup> *Supra*, pp. 220, 222, notes 16 and 17.

<sup>43</sup> "In reply to a further question raised by the Netherlands Representative, the Chairman [Brig. Gen. Snow, U.S.] pointed out that it would be for the sending State to decide whether the members of a force were on official duty or not. This was part of the normal cooperation between allies." MC(J)-R(51)5.

The United States Representative "pointed out, however, that there was

understanding, been reluctant to treat the certificate of the accused's commanding officer as controlling.

The Bill introduced in the British Parliament to implement the NATO Agreement gave controlling effect to the certificate. This prompted some protest—though nothing like that against the provision which made conclusive a certificate that the person named was a member of the visiting force—and the Home Secretary proposed an amendment, which became a part of the Act, under which the certificate is sufficient evidence unless the contrary is proved.<sup>44</sup> This departure from the position taken by the

a possibility of offences being committed in the performance of an official duty; the military authorities of the sending State, and not those of the receiving State, were alone capable of deciding whether or not an official duty was being carried out at the time." MS-R(51)14.

The United States Representative "stated that for obvious reasons of military discipline, his Government would not be likely to accept the possibility of leaving any authorities other than the military authorities free to decide whether or not an offence had been committed in the performance of official duty." MS-R(51)14.

"Although the Status of Forces Agreement does not specify who shall have the authority to make a final determination as to such matters, it is the position of the Department of Defense, based upon the minutes of the NATO working group which drafted the SOF Agreement, that such determination should properly rest with the authorities of the sending state." General Hickman, Hearings, Subcommittee of the Senate Armed Services Committee, *op. cit. supra*, note 2, at 28.

<sup>44</sup> 505 H.C. Deb. (5th Ser.) 595 (1952); 505 H.C. Deb. (5th ser.) 1183, 1187 (1952).

It is interesting that, when moving the second reading of the Bill, unamended, in the House of Lords, the Lord Chancellor, Lord Simonds, in referring to the determination of whether an offense was committed in the course of duty, said: "There is no other way to deal with such a matter except to give to one authority or the other the absolute right to say whether the act which was done was done in the course of duty." 177 H.L. Deb. (5th Ser.) 463 June 26, 1952, col. 463. In the subsequent discussion of the amendment Earl Jowitt, ex-Lord Chancellor, objected on the ground that if the certificate was not conclusive, there could be controversy, and there should be no uncertainty regarding which court has jurisdiction. 177 H.L. Deb. (5th Ser.) 466-70 (1952).

There was no reference to the Summary Record of the NATO negotiations, which was at the time still classified.

See the comments of General Hickman and Mr. Leigh, Hearings, Subcommittee of the Senate Armed Services Committee, *op. cit. supra*, note 2, at 29-30.

United States in the NATO negotiations, acquiesced in by the other members, has made no real difference in practice.<sup>45</sup>

France has agreed to accept the determination of the American military authorities that an offense was committed in the performance of duty, provided the determination is made by a staff judge advocate or other legal officer.<sup>46</sup> Earlier difficulties with Turkey have also been resolved,<sup>47</sup> as have those with Italy, though less satisfactorily.<sup>48</sup>

The situation in Japan, so much mooted in the *Girard* case, resembles that in the United Kingdom. The Agreed Minutes to the Administrative Agreement provide that a certificate of official duty issued by the commanding officer "shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved," but the certificate "shall not be interpreted to prejudice in any way Article 318 of the Japanese Code of Criminal Procedure," which reserves to the court power to determine matters of fact.<sup>49</sup> But Agreed View No. 43<sup>50</sup> provides that if the Chief Prosecutor considers that there is proof con-

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<sup>45</sup> "While such a certificate is not, under the Act, conclusive evidence, in practice no disputes have arisen on this point between the American authorities and those of the United Kingdom. The British courts have consistently accepted the determination made by the local commanders \* \* \*." Snee and Pye, *Status of Forces Agreements: Criminal Jurisdiction* 51-52 (1957).

<sup>46</sup> Gen. Hickman, Hearings Before the Subcommittee of the Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 85th Cong., 1st Sess. 17 (1957).

<sup>47</sup> The Turkish authorities initially took the position the Turkish courts would decide the issue, and in some cases they did so. On July 16, 1956 a law was passed which provided that "the basis regarding the establishment of the status of duty" would be decided by the two governments. Shortly afterward, on July 28, an agreement was reached that a certificate of the highest ranking officer of the United States forces in Turkey would be accepted by the Turkish courts. General Hickman, *id.* at 17, 35; Snee and Pye, *op. cit. supra*, note 8, at 52. The agreed procedure has occasioned difficulty because American installations are spread around the country, and the issuance and delivery of a certificate may be delayed until after trial in a Turkish court has begun. *Id.* at 52.

<sup>48</sup> No statute or decree governs the situation in Italy. The Italian authorities have informally agreed that the determination is for the American military authorities and in general the courts have acquiesced, but some prosecuting officials have demurred. *Id.* at 53.

<sup>49</sup> *Id.* at 53.

<sup>50</sup> *Supra*, p. 229, note 33.

tradicting the certificate, the matter should be referred to the Joint Committee. It was the inability of the Joint Committee to agree which prolonged the controversy in the *Girard* case.

The Agreement with West Germany is in this regard more nearly in keeping with the understanding of the NATO negotiators. The certificate of the "highest appropriate authority of such sending State" is almost, but not quite, conclusive.<sup>51</sup>

The relevant provisions of the Agreement with the Philippines is in sharp contrast with the understanding reached by the NATO negotiators. Where an offense is both off-base and not *inter se*, so that the Philippines may have jurisdiction, the decision as to whether the offense was committed while the accused was "engaged in the actual performance of a specific military duty" is for the Philippine prosecutor. The American commander may appeal from an adverse decision to the Secretary of Justice, but the Secretary's decision is final.<sup>52</sup>

The Dominican Agreement left to the Mixed Military Commission the decision of whether or not the fact that an offense arose out of any act or omission done in the performance of duty should be given weight in allocating jurisdiction. Presumably, the Commission was to determine whether the act was so done.<sup>53</sup> The Libyan Agreement is silent on the point.

In summary, it seems that where there is no treaty provision on the question, the decision is for the court which has custody of the accused—which may, of course, be a court-martial of the sending state. The agreements to which the United States is a party are in most instances silent on the point; only the Japanese, the West German, The Federation of the West Indies, and the

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<sup>51</sup> Article 18. Paragraph 2 of the Article provides that "The German Court or authority shall make its decision in conformity with the certificate. In exceptional cases, however, such certificate may, at the request of the German court or authority, be made the subject of review through discussions between the Federal Government and the diplomatic mission in the Federal Republic of the sending State."

The Agreement with the Federation of The West Indies provides, in Article IX (11) that "A certificate of the appropriate United States commanding officer that an offence arose out of an act or omission done in the performance of official duty shall be conclusive, but the commanding officer shall give consideration to any representation made by the Government of the Territory." The Agreement with Australia is silent on this point.

<sup>52</sup> Article XIII, 4.

<sup>53</sup> Article XV, (1) (b).

Philippines Agreements are explicit, and they lay down quite different rules. The NATO negotiators did reach a clear understanding, contrary to the usual rule, that the decision was for the military authorities of the sending state. They did not, however, embody their understanding in the Agreement. The Written Record was classified for such a long period that some NATO members did not comply with the understanding. Subsequent negotiations have brought the situation in some countries near that contemplated, but not even the German Agreement accepts it *in toto*. There is, then, no generally applicable rule on this crucial issue.