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Criminal Jurisdiction Over Visiting Armed Forces

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## CHAPTER VI

### THE PRACTICE OF STATES UP TO 1945

England, the Canal Zone, Saudi Arabia, Formosa, Germany, Morocco, Iceland, Iran, Australia, India, Greece, France, Spain, Turkey, Italy, Korea, Bermuda, Brazil, Liberia are only some of the places where American forces have been stationed during the twentieth century. This list alone suggests the remarkably diverse situations in which American troops abroad have found themselves—and each situation has differed not only in the simple terms of war and peace. Even in war, they have been in combat zones, zones of communication and zones of the interior, far from the arena of actual fighting. They have occupied sectors of a front, served as garrisons, been in training or in passage, or manned naval or air bases. They have lived among the local inhabitants or have been quartered in geographically separate areas, at times have drawn heavily upon the local economy and at other times have been supplied largely from the United States. Similarities or differences in language and culture have led to much or little intermingling with the local inhabitants. These and other factors have appeared in entirely different combinations.

If the circumstances in which troops may be stationed in a friendly foreign country can vary over such a wide range, presumptively the demands of military exigency, as applied to them, can vary over a like range. There is no reason to assume that the implications of this are less significant with regard to problems of jurisdiction than with regard to other problems. Moreover, "jurisdiction" and "immunity" are also relative terms, and there is need to distinguish between jurisdiction to prescribe, jurisdiction to enforce, and supervisory jurisdiction; between concurrent and exclusive jurisdiction; between immunities for official and for private acts; and so on. Finally, problems of jurisdiction and of immunities cannot be decided by considering only the interests of the sending state, even when those interests center around security and military exigency. These must be weighed against those of the receiving state, and a balance struck.

Governments, perhaps more than text writers, have been aware of these differences. That awareness has militated against the acceptance by governments of a rule of international law according complete immunity from the local criminal law to visiting foreign forces in every situation. Rather they have preferred, by legislation or treaty, to grant, limit, or deny immunity, depending on the particular situation.

Marshall's observation in *The Schooner Exchange* referred specifically to troops in passage. It was only in later dicta of the Supreme Court<sup>1</sup> and in the comments of writers that the asserted immunity was extended to troops stationed in a foreign country. The distinction is too significant to be ignored.<sup>2</sup> Marshall himself

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<sup>1</sup> *Coleman v. Tennessee*, 97 U.S. 509, 516 (1878). *Dow v. Johnson*, 100 U.S. 158, 165 (1879).

<sup>2</sup> "Finally, the Chief Justice expressly limited his remarks about the exemption of the foreign forces to troops in passage. Completely different considerations determine the immunity which must necessarily attend passing troops on, as the Chief Justice evidently envisioned it, a mission of urgency and immediacy, perhaps never to return via that country, and troops stationed in a friendly state in time of peace for an indeterminate period. The path of troops en route was, in Marshall's day, a narrow, clearly defined avenue. Presumably, the path of the march was completely within the control of the troop commander. It might very well have been considered that such troops, in transit, were constantly on duty. On the other hand, today's troop locations are dispersed throughout the receiving state and place the individual soldier in necessary daily contact with the local residents. The control which the commanding officer has over every individual action of the troops is naturally far less than that exercised over troops on the march, or quartered in a temporary camp for the night. Completely different problems pertaining to criminal jurisdiction over the members of the forces necessarily arise out of these different circumstances." Statement of Attorney General Brownell, 99 Cong. Rec., 8767 (1953). See also the statement of Assistant Attorney General Rankin, Hearings on H.J. Res. 309, Before the House Committee on Foreign Affairs, 84th Cong., 1st Sess. 264 (1955).

Senator Ferguson observed that Marshall "spoke of 'the free passage' of troops and the 'waiver of all jurisdiction over the troops, during their passage.' This has to do with the movement of troops, somewhat analogous to the shipment of goods in bond from one country to another through the territory of a third. Marshall could not, in 1812, have conceived of a situation in which large numbers of troops would be stationed for long periods of time in the territory of friendly foreign powers under a multilateral agreement for mutual defense." 99 Cong. Rec. 8759 (1953). See also *id.*, 8733, remarks by Senator Knowland.

The Restatement, *Foreign Relations Law*, makes the distinction, stating in

said: "It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed."<sup>3</sup> The danger referred to may be as much to the constituted government as to the inhabitants. The inconvenience and injury is presumably that borne principally by the inhabitants. The risks thus implicit in the passage of troops are clearly less than those involved when troops are stationed in a country. If troops are in passage they may well follow a clearly defined route, be under the more immediate control of their officers and mingle less with the inhabitants than when they are spread through the country. Again, the time they will be in the country may be limited, a factor which bears both on the risk to the local inhabitants and the inconvenience to the commander if one of his men is arrested by the local authorities.<sup>4</sup> The analogy which suggests itself is that to a warship in a foreign port.

The line between troops in passage and those stationed in a country is not easy to draw, much less easy today than in Marshall's time. All the American ground troops in England (and the same was true in some other areas) in both World War

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Section 61, p. 192, that: "Except as otherwise expressly indicated by the territorial state, its consenting to the passage of a foreign force through its territory implies that it waives its right to exercise enforcement jurisdiction over the members of the force for violations of the criminal law of the territorial state during the passage, and the passage implies that the sending state agrees to take punitive action." Presumably, the term "passage," as used in this Section, is to be narrowly defined. See Comment a, at 193, which states in part that "In the case of a force in passage \* \* \* the purposes of both the sending and territorial states are *to expedite and facilitate a rapid transit* in order that the force may proceed on its mission." (Emphasis added.)

<sup>3</sup> *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 140 (1812).

<sup>4</sup> It was suggested that if individuals stray from the main body they should no longer enjoy immunity. See Taylor, *Inter. Public Law* 230 (1901). Woolsey said: "If we are not deceived, crimes committed along the line of march, away from the body of the army, as pilfering and marauding, authorize arrest by the magistrates of the country, and a demand at least, that the commanding officers shall bring such crimes to a speedy trial." *Inter. Law* 102 (4th ed., 1875). In 1 *Pitt-Corbett's Cases on International Law* 274 (5th ed., 1931), the editor remarked that "in the case of offences committed outside the line of march or away from the main body, the punishment of the offender may, and perhaps should, be left to the local authorities."

I and World War II were, in a sense, in passage. They were nevertheless there for long periods and a part of their training was received there. This is a far cry from the situation when the United States allowed Britain to move troops over the Grand Trunk Railway to Canada,<sup>5</sup> or when Mexican troops were permitted to pass through American territory to lower California to quell a rebellion.<sup>6</sup> It was presumably the latter kind of passage of troops which Marshall had in mind, and he might well not have taken the same view of the situation of American forces "in passage" through England. This is another way of saying that even troops in passage raise many problems that cannot be solved by a single simple rule.

A friendly army may also enter an area by force of arms in order to liberate, as the allied armies entered Western Europe and other territories in World War II. The necessity that the commander of the liberating army exercise complete control over the forces under his command, and perhaps over the civilian population as well, may be as compelling as if the occupation were of hostile territory. Furthermore, in this situation the "receiving" state has jurisdiction only in a theoretical sense. In fact, its power to exercise jurisdiction may have ceased to exist and been superseded by that of its conqueror. Practically, that power cannot be restored until the territory has been liberated and the civil government reconstituted. The agreements made with governments-in-exile in World War II, giving the commander of the liberating armies such jurisdiction as in his discretion he believed it necessary to exercise and contemplating only a gradual shift of jurisdiction to the civil authorities, recognized the practical necessities of the situation.<sup>7</sup> If such agreements had not been made, the commander would have had to exercise the same power, and where they were not, he did so.<sup>8</sup>

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<sup>5</sup> Fiore, *Nouveau Droit International Public* 468 (2d. ed. Antoine transl. 1885).

<sup>6</sup> 99 Cong. Rec., 8733 (1953) (remarks by Senator Knowland).

<sup>7</sup> See Agreement between the United States and Norway of May 16, 1944, 67 U.N.T.S. 254 (1950).

Similar agreements were made on the same day between the United Kingdom and Belgium, 90 U.N.T.S. 284 (1951) and on August 25, 1944 between the United States and France, 138 U.N.T.S. 248 (1952). All the agreements related to the Allied forces, not simply to those of the United States or Great Britain.

<sup>8</sup> "Everywhere else in Europe, on the Continent, and in Africa, we en-

In World War I a comparable, though not identical, situation obtained when the respective Allied armies each occupied an assigned sector or sectors in the combat zone. These were not only areas of actual military operations, but in varying degrees the civil population had been evacuated and the civil authorities had ceased to function. The combat zone never, it is true, extended to large areas of France (or Italy) nor had the civil authorities ceased to function outside the combat zone, but France, apart from the combat zone was, in military terms, a zone of communications. The Allied forces were largely in the combat zone in the early stages of the war but this became less true, particularly of the American forces when they arrived in large numbers.

A series of agreements between France, Belgium and their allies regulated the status of the Allied forces in World War I. There has been much debate<sup>9</sup> regarding the implication of these agreements with respect to whether international law recognizes the immunity of visiting forces from the local criminal jurisdiction.

The first of these agreements, the Franco-Belgian Agreement, of August 14, 1914<sup>10</sup> was patently designed, at least primarily,

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tered by force of arms, either as liberators or as conquerors, or as a combination of the two, depending on how you would interpret it and we interpreted it as we saw fit.

“\* \* \* So we established civil law during the time we were there by force of arms, either as unwelcome or welcome guests; we maintained extra-territoriality or we had it granted without argument.” General Walter B. Smith, Under Secretary of State, Hearings before the Senate Foreign Relations Committee, 83rd Cong., 1st Sess. 23 (1953).

S. Exec. Rpt. No. 1, (Senate Foreign Relations Committee) 83d Cong., 1st Sess., 1 Amer. For. Policy 1950-1955, 1561 at 1562 on the NATO treaties said that: “Everywhere on the Continent of Europe, however, United States forces entered during World War II by force, either as liberators or conquerors, and made their own laws.”

<sup>9</sup> King, “Jurisdiction Over Friendly Foreign Armed Forces,” 36 A.J.I.L. 549, 551 (1942); Barton “Immunity From Supervisory Jurisdiction,” 1949 *Brit. Yb. Int'l. L.* 380, 387, 390.

<sup>10</sup> Journal Officiel de la République Française, Dec. 4, 1914, Barton, *id.*, 388. The agreement, entered into “the better to assure the prosecution of acts prejudicial to the armies of the two nations,” provided that:

“The French and Belgian governments are in accord to apply, each in that which concerns it, the principle according to which each army retains its jurisdiction with respect to acts capable of prejudicing it, whatever the territory where it is found or the nationality of the

to deal with offenses against the troops by civilians rather than by troops against the civilian population and thus accents the similarity between the Allied armies and an army of occupation by consent, responsible for the administration of a particular area. More than a year later, on December 15, 1915, when the British forces had been in France for nearly two years, an Anglo-French treaty was concluded.<sup>11</sup> This Anglo-French Declaration, unlike the prior Franco-Belgian agreement, specifically provided for the exclusive jurisdiction of the sending state over its armed forces but also—and practically this was the important provision—negated the jurisdiction of the sending state over all persons not members of that force. The Anglo-French agreement was the model for agreements between France and Belgium, Serbia, Italy and Siam<sup>12</sup> and for the Franco-American Agreement of January 1918.<sup>13</sup> The latter agreement, although some-

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culprit. In derogation of this principle it is understood that Belgian nationals guilty of acts prejudicial to the French army will be delivered to the Belgian authorities to be tried by them according to the laws of Belgium: in French territory, the Belgian army will apply as occasion requires this same rule."

<sup>11</sup> The agreement took the form of a joint Declaration (London Gazette, Dec. 15, 1915), Foreign Rel. U.S. (Supp. 2) 735 (1918). The Declaration read in part:

"His Britanic Majesty's government and the Government of the French Republic agree to recognize during the present war the exclusive competence of the tribunals of their respective Armies with regard to persons belonging to those Armies in whatever territory and of whatever nationality the accused may be.

"\* \* \* The two Governments further agree to recognize during the present war the exclusive competence in French territory of French justice with regard to (persons not belonging to) the British Army who may commit acts prejudicial to that Army and the exclusive competence in British territory of British justice with regard to (persons not belonging to) the French Army who may commit acts prejudicial to the said Army."

The translation quoted reads, where parentheses appear above, "foreign persons in" but this is an obvious mistranslation of the French original "des personnes étrangères a." The phrase "persons not belonging to" appears in the Franco-American Agreement, Foreign Rel. U.S. (Supp. 2) 737 (1918).

<sup>12</sup> Chalufour, *Le Statut Juridique des Troupes Alliées pendant la Guerre 1914-1918*, 51 (1927).

<sup>13</sup> Exchange of Notes of Jan. 3 and Jan. 14, 18, Foreign Rel., U.S. (Supp. 2), 737 (1918).

what more precisely phrased, was in substance the same as the Anglo-French agreement.<sup>14</sup>

The agreements were made well after the allied armies arrived in France. It appears that immunity had nevertheless been accorded these troops before the agreements were made.<sup>15</sup> This is said to have been prompted by French recognition that they were entitled to that status under international law.<sup>16</sup> The agreements were consistently respected by the French authorities.<sup>17</sup> They were later cited in the British Parliament as evidence of the rule of international law and as justifying the grant of comparable

<sup>14</sup> See also the Belgian American Exchange of Notes of July 5, 1918 and September 6, 1918, *id.*, at 747 and 751.

<sup>15</sup> Miss Chalufour states that the substance of the Anglo-French declaration had been agreed upon at a conference held March 19–23, 1915; “[I]t seems surprising that six months and a half of continued presence of the British troops on French soil should have preceded the appearance of an official declaration on the matter, but inquiry \* \* \* revealed that the practice for the first months coincided with the principle published in the Declaration of December 15, 1915.” Chalufour, *op. cit. supra*, note 12, at 50.

<sup>16</sup> Colonel King quotes (36 A.J.I.L. 549 at 550) the final report of August 19, 1919, of the Judge Advocate of the A.E.F., General Bethel:

“There had been received from France a bare invitation to send our armies to cooperate with hers without any agreement whatsoever as to the legal relations of the forces and as to the status of an American Army on French soil. On inquiry, however, at the French War Office, upon our arrival in France, it was found that the French view was precisely the same as our own; that under the general principles of international law members of the American Expeditionary Forces were answerable only to American tribunals for such offenses as they might commit in France. As the principle needed a somewhat broader scope, however, than its mere application to our Army in France, it was later agreed between the diplomatic departments of the governments that each should possess exclusive criminal jurisdiction over its land and sea forces whether in the territory of either nation or on the high seas.”

<sup>17</sup> In *Ministère Public c. Bomans* the Tribunal Correctionnel de la Seine (10<sup>e</sup> Chambre) held that a deserter from the Belgian army was not subject to the jurisdiction of the French court. Chalufour, *op. cit. supra*, note 12, at 63, Barton, 1950 Brit. Yb. Int'l. L. 186, 188. In *Ministère Public c. Pratt*, [1919–1922] Ann. Dig. 332 (No. 240), the lower courts had held they had no jurisdiction to try an American army captain charged with fraudulent misappropriation of goods to the prejudice of the French State although the defendant had been demobilized before the date of his arrest. However, the American authorities had intimated that the American military court had no jurisdiction and the Court of Cassation, reversing the lower court, held that since both governments had recognized that the agreement was not applicable, there was jurisdiction in the French Court.



status to allied troops in Britain.<sup>18</sup> But even though these agreements recognized the exclusive jurisdiction of the sending state over its forces and may in this regard have been, at least in the American and French views, declaratory of international law, these attitudes were taken in the circumstances then existing in France and at least arguably in the light of those circumstances.<sup>19</sup> Clunet, in commenting on these arrangements, compares, though he does not assimilate, the allied armies to armies of occupation <sup>20</sup>

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<sup>18</sup> During the debate on The United States of America (Visiting Forces) Bill, the Home Secretary, Mr. Morrison, said: "Moreover, even if we were disposed on the merits of the case to resist the claim of the Government of the United States, we should be in a rather poor debating position because we ourselves successfully made precisely the same claim in the case of British forces in France in the last war. \* \* \*" But Mr. Garro Jones remarked that: "\* \* \* I think it is rather misleading to suggest that this Bill follows the analogy of what was done in France in the last war. There the British troops were engaged in active combat service in zones which, with certain exceptions, were forbidden to civilian access, and although there was a certain number of British troops mingling with the French population, the degree of contact with the French civil population \* \* \* was nothing like the degree of contact which the American Forces must inevitably have with the British population here." 381 H.C. Deb., (5th ser.) 877, 883 (1942). See also the comments of Mr. Davis and Dr. Thomas, *id.*, at 894 and 900.

<sup>19</sup> The fact that it was deemed necessary to negative, partially in the Franco-Belgian Agreement and completely in the Anglo-French Agreement, the jurisdiction of the Allied military forces over those not in their armies, is significant. No one ever suggested the Allied military authorities had such jurisdiction in the United Kingdom and the problem is not touched in any of the agreements or statutes relating to allied forces in the United Kingdom. There is here seemingly a tacit assumption that the situation in France was distinguishable. See generally, the Reporter's Note to Sec. 62, Restatement, *Foreign Relations Law*, p. 197, relating to the effect of hostilities on criminal jurisdiction over forces.

<sup>20</sup> 45 *Journal du Droit International*, 1918. Barton states, 1950 *Brit. Yb. Int'l. L.* 186, 193, that in the north of Italy, where the British occupied a sector in the combat zone, the Italian government recognized the exclusive jurisdiction of the British service courts over the British armed forces; that it also recognized the right of the British service court to exercise jurisdiction outside the combat zone but strenuously maintained that offenders against Italian law were liable to be tried in Italian courts. He states the British government did not dissent but proposed an agreement comparable to the agreement that both Britain and Italy had with France but the war ended before it was signed.

The Supreme Court of the United States has drawn a like distinction with respect to the jurisdiction of courts-martial over civilian employees of

and there was reluctance on the part of the British to consider these agreements applicable in the United Kingdom in spite of their reciprocal provisions.<sup>21</sup>

Americans were the only foreign forces stationed in the United Kingdom in significant numbers in World War I. The British Government was reluctantly prepared to grant by treaty exclusive jurisdiction over the American troops to the American military authorities—it made it clear that it did not believe there was an obligation to do so under international law. It did indicate, nevertheless, that in its view the American troops were, under international law, entitled to immunity from the local criminal law for offenses committed within their quarters or camps.

Negotiations were initiated by a note of the Foreign Office dated September 5, 1917.<sup>22</sup> The note conceded both American jurisdiction over its troops and their immunity from British jurisdiction “within the limit of the quarters occupied by them,” but expressly affirmed the jurisdiction of the British courts over offenses against British law committed elsewhere. Moreover, it not only denied the right of the British authorities, without

the armed forces and dependents. Thus, in Mr. Justice Black’s opinion in *Reid v. Covert*, 354 U.S. 1 (1957) at 34 he said: “While we recognize that the ‘war powers’ of the Congress and the Executive are broad, we reject the Government’s argument that present threats to peace permit military trial of civilians accompanying the armed forces in an area where no actual hostilities are under way. The exigencies which have required military rule on the battle front are not present in areas where no conflict exists.”

In a footnote, the Justice said: “*Madsden v. Kinsella*, 343 U.S. 341, is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the Army or not.”

<sup>21</sup> See Barton’s discussion, *id.*, at 189–91, of *Rex v. Aughet*, Court of Criminal Appeals, 34 L.T.R. (N.S.) 3021 (Cr. App. 1917–1918), the one litigated case regarding the status in the United Kingdom of a member of a foreign army of a country with which Britain had such an agreement.

Perhaps as significant is the remark of the Lord Chancellor in moving the second reading of The United States of America (Visiting Forces) Bill, when, referring to the Anglo-French Declaration, he said: “Apart from this legislation, there can be no doubt that in any such case [of an offense in the United Kingdom against the criminal law] there would be jurisdiction in the British Courts.” 124 H.L. Deb., (5th ser.) 61 (1942).

<sup>22</sup> Foreign Rel. U.S., (Supp. 2) 733 (1918).

enabling legislation, to assist the Americans in enforcing military discipline<sup>23</sup> but also denied the right of the American authorities to exercise such jurisdiction outside the limit of their quarters<sup>24</sup> and proposed the issuing of an enabling regulation under the Defense of the Realm Act.<sup>25</sup>

The American reply<sup>26</sup> did not challenge the assertion of the Foreign Office that "outside the limit of their quarters, however, they are liable to be dealt with by the English criminal courts for any offenses against the English law \* \* \*." Rather, it suggested the desirability of a comprehensive reciprocal agreement, such as that between Britain and France, giving the sending state exclusive jurisdiction. This seems to imply that such an agreement was necessary to give exclusive jurisdiction. Furthermore, the reply stated: "It is doubtful, however, what effect the courts in the United States would give such an informal agreement," again implying that exclusive jurisdiction would not exist without an agreement.

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<sup>23</sup> The right of the British authorities to arrest American troops for violations of military discipline was denied. This position was consistent with the rule that a state will not undertake to enforce the penal laws of another state. The note also denied that the British authorities could turn over to the American authorities those arrested for violations of British criminal law, although the practice in the case of the crews of warships was to the contrary.

<sup>24</sup> Specifically, to arrest for a military offense.

<sup>25</sup> "\* \* \* [G]iving power to the British military authorities in general terms to make and revoke or vary orders from time to time for subjecting United States and other Allied troops in this country to their own system of military discipline and for arresting them and handing them over to their own military authorities \* \* \* in case of any alleged military or criminal offense whether such offense was contrary to English law or not." The last phrase can be read as meaning it was contemplated the American authorities would, in practice, be given exclusive jurisdiction.

<sup>26</sup> Feb. 5, 1918, Foreign Rel., U.S. (Supp. 2) 739 (1918). The reply was directly to a second Foreign Office note—the first having gone unanswered—which indicated that the situation had become more urgent and suggested the need for legislation "which would at all events enable them [the American authorities] to compel witnesses to attend American courts-martial in this country." It also referred to the need for "empowering American Judge Advocates to administer oaths outside the precincts of camps or buildings specially allotted for the use of American troops. \* \* \*" Jan. 18, 1918, Foreign Rel., U.S. (Supp. 2) 737 (1918).

The Regulation later issued makes it clear the reference was to compelling the attendance of and administering oaths to witnesses other than members of the American forces.

The Foreign Office reply to the United States forwarded a draft copy of a proposed regulation which with minor modifications became Regulation 45F of the Defense of the Realm Regulations,<sup>27</sup> and a draft Order of the Army Council. The regulation and order related only to the exercise of enforcement jurisdiction by the American authorities and to assistance to them by the British authorities, expressly excluding the exercise of supervisory jurisdiction by the British courts except on the issue of membership in a foreign force.

Thereafter the Foreign Office put forward a proposal that "in order to complete the arrangements \* \* \* and to dispose of certain questions as to jurisdiction," a convention should be concluded similar to that between Britain and France, but that Great Britain—not the United States—should have exclusive jurisdiction over certain offenses.<sup>28</sup>

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<sup>27</sup> [1918] 1 Stat. Rules & Orders 332 (No. 367). The heart of the draft was in the first paragraph: "It is hereby declared that the naval and military authorities and courts of an Ally may exercise in relation to the members of any naval or military force of that Ally who may for the time being be in the United Kingdom all such powers as are conferred on them by the law of that Ally."

Paragraph 2 contemplated the issuance of orders authorizing the arrest of members of a foreign force "alleged to have been guilty of offenses" and handing them over to their military authorities to be dealt with "by the naval or military authorities or courts of the Ally according to the law of the Ally"; paragraph 3 authorized the competent British naval or military authority to issue orders requiring "any person not being a member of any naval or military force of that Ally" to appear as a witness or produce documents before a naval or military court of the Ally and made failure to comply an offense against the Regulations; paragraphs 4 and 5 made contempt or perjury by such a person an offense against the Regulation; paragraph 6 stated "It shall be lawful for a member of a naval or military [court of] an Ally \* \* \* to administer oaths to witnesses."

Paragraph 9 is perhaps the most important of all the provisions, since it expressly negated supervisory jurisdiction of the British courts and left only the issue of membership in the visiting force for their possible adjudication.

<sup>28</sup> The offenses were: (a) Treason; (b) An offense against Official Secrets Act, 1911; (c) An offense against Defense of the Realm Regulations Nos. 18, 18A, 19A, 22A, or 27A, except where the offense is solely prejudicial to the armed forces of the United States of America; (d) An offense against Defense of the Realm Regulation No. 48 in relation to any offense above included.

This was not the equivalent of saying that the British should have jurisdic-

The reaction of the State Department was, for the first time in the negotiations, vigorous. "The note \* \* \* is regarded by this Government as containing conditions which would create a very dangerous situation as regards the forces of this Government in British territory. The competent authorities of this Government are of the opinion that the result of entering into an agreement such as that proposed \* \* \* would be a partial surrender by the American forces to the British Government of jurisdiction over the military forces of the United States located within British territorial limits *for offenses committed on American warships or in American camps*, and would involve the lack of proper recognition of the character and competency of the existing American military tribunals."<sup>29</sup> The reply concluded by suggesting an agreement modeled on that between the United States and France.

Thereafter the negotiations dragged on for a year and a half until, in January 1920, it was agreed that, the American forces having been withdrawn from Great Britain, no agreement was necessary. For a time it had appeared that an agreement giving the American authorities exclusive jurisdiction would be reached but there were also indications to the contrary.<sup>30</sup>

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tion where the offense violated British but not American law, since an act which constituted one of the enumerated offenses could be a violation of American law as well.

<sup>29</sup> July 17, 1918, Foreign Rel. U.S. (Supp. 2) 748 (1918). (Emphasis added.)

<sup>30</sup> There was no reply to the American communication of July 17, 1918, until December 9, 1918, when the Chargé advised the Secretary of State: "[The] Foreign Office inform[ed] me that British military authorities are prepared in deference to [the] wishes of the United States Government to agree to [the] omission," of the reservation of exclusive British jurisdiction in certain instances, as noted above, and inquired whether an agreement similar to that between France and the United States was desired. The same day the State Department replied in the affirmative, but nothing further transpired until June 5, 1919, when the British Government put forward a draft of a proposed agreement. The important paragraph stated that the two Governments agreed "to recognize during the present war the exclusive jurisdiction of the tribunals of their respective Armies with regard to persons subject to the military law of those Armies whatever be the territory in which they operate or the nationality of the accused." The proposal covered only those subject to military law, not to naval or air force law, as to which it would be necessary "to consult the Admiralty and the Air Ministry." The United States countered on August 13, 1919, with a draft which provided for "the exclusive jurisdiction of the tribunals of

With respect to these negotiations, it can be said: (1) Both the American and British negotiators assumed that the American military authorities had jurisdiction to enforce American military regulations within the quarters occupied by the American forces; (2) municipal legislation was, however, required to enable them to exercise police power outside those limits and to make available the assistance of the British authorities to arrest for violations of such military regulations, or to turn over members of the American forces arrested for offenses against British law, or to summon, swear, and punish for contempt or perjury, witnesses other than American troops, e.g., British subjects; (3) the provision of Regulation 45F barring supervisory jurisdiction of the British courts may or may not have been deemed necessary to preclude the exercise of such jurisdiction.<sup>31</sup>

There is no doubt that, as Barton suggests,<sup>32</sup> the primary purpose of the negotiations was to ensure that the American authorities could exercise military discipline over American troops. Moreover, the desultory character of the negotiations after this had

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their respective land and sea forces with regard to persons subject to the jurisdiction of forces whatever be the territory in which they operate or the nationality of the accused." "Persons" was defined to include "together with the persons enrolled in the Army, Navy and Marine Corps, any other person who under the American or British law is subject to military or naval jurisdiction, especially members of the Red Cross regularly accepted by the Government of the United States or the Government of Great Britain in so far as the American or British law and the customs of war place them under military or naval jurisdiction."

Four months later the Ambassador advised the State Department that he had learned "informally that upon the Foreign Office's referring the military convention proposal to the departments concerned, the latter have delayed replying upon the assumption that with the conclusion of peace the matter would lapse. The Foreign Office has conveyed to them its decision to reply to my representation no later than the 28th instant, but this answer will probably be unfavorable to the proposed convention." Thereafter, on January 30, 1920, the State Department acquiesced in the abandonment of the project.

Foreign Rel. U.S. (Supp. 2) 751, 752, 753, 755, 759, 760 (1918).

<sup>31</sup> "Not only is that the recognized rule of International Law, but, in order that there should be no question raised at all when the American Forces did come over here in very large numbers in the period of the Great War, there was a regulation passed under the Defence of the Realm Act which stated in terms what their position was \* \* \*." Viscount Hailsham, 86 H.L. Deb., (5th ser.) 482 (1932).

<sup>32</sup> Barton, "Foreign Armed Forces: Qualified Jurisdictional Immunity," 1954 *Brit. Yb. Int'l. L.* 341, 343.

been achieved by the issue of Regulation 45F suggests that it was the only matter which either Government considered of compelling importance. The issue of exclusive jurisdiction in the sending state did, however, come into the negotiations and the positions taken are significant regarding the then attitudes of the two Governments. The American Government did not press the issue, perhaps because "so far as is recalled by officers of our Army who were in a position to know the facts, no trial of a soldier of the American Expeditionary Forces by a British court actually occurred." <sup>33</sup>

Between the wars, the enactment of the Statute of Westminster, changing the relationship between the United Kingdom and the Dominions, prompted the passage of The Visiting Forces (British Commonwealth) Act, 1933.<sup>34</sup> The legislation was recommended by a committee established at the Imperial Conference of 1926,<sup>35</sup> and the Act was intended as a model for comparable legislation in the Dominions.

Much has been made of the reference in the committee's report to "provision for the customary extra-territorial immunity." It has been said that since the Act did not grant immunity from the jurisdiction of the British criminal courts, Parliament must have believed no rule of international law required recognition of the latter immunity. The debate reflects, however, a sense of the

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<sup>33</sup> King, *op. cit. supra*, note 9, at 553. But the Attorney General, in the debate on The United States of America (Visiting Forces) Act, 1940, stated that "We had American troops in the last war, and the Americans made exactly the same request that they are making today; it was only because the time was shorter, and that agreement was not come to, that Parliament was not asked to legislate on these lines. *But in fact American soldiers were dealt with by our courts, and they made exactly the same request.*" 382 H.C. Deb. (5th ser.) 929-30 (1942). (Emphasis added.)

<sup>34</sup> 23 & 24 Geo. 5, c. 6.

<sup>35</sup> "In connection with the exercise of extra-territorial powers, we consider that provision should be made for the customary extra-territorial immunity with regard to internal discipline enjoyed by the armed forces of one Government when present in the territory of another Government with the consent of the latter. \* \* \* We recommend that provision should be made by each member of the Commonwealth to give effect to such customary extra-territorial immunities within its territory as regards other members of the Commonwealth." Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, par. 44 (Cmd. 3479, 1930), Schwelb, "The Status of the United States Forces in English Law," 38 A.J.I.L. 50, 51 (1944).

distinction between the then relationship of the United Kingdom and the Dominions and that between independent sovereign states, which deprives the argument of much of its force.<sup>36</sup>

The Bill, which drew heavily on Regulation 45F of the Defence of the Realm Regulations, contained two important provisions. Section 1(1) authorized the exercise of jurisdiction by the military authorities of visiting Commonwealth forces and Section 1(3) negated the supervisory jurisdiction of the British courts, except on the issue of membership in the Dominion force. The debate related only to the necessity of the authorization,<sup>37</sup> and to the scope of the supervisory jurisdiction which the British courts should retain.<sup>38</sup> The Solicitor General alone, in supporting

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<sup>36</sup> Sir Stafford Cripps, 275 H.C. Deb. (5th ser.) 1483, 1487 (1933); Lord Buckmaster, 86 H.L. Deb. (5th ser.) 486 (1932); Lord Atkin, 86 H.L. Deb. (5th ser.) 350 (1932). See also the letter of Lord Atkin in *The Times*, Feb. 8, 1933, in which he said: "It would surprise me to find that our Dominion fellow-subjects desire to be treated as foreign forces; or that any international lawyer would seek to apply the doctrines of extraterritoriality and diplomatic immunity to the relations of this country with the forces and representatives of the Dominions who owe a common allegiance to one Sovereign." See also *Wright v. Cantrell*. [1943-1945] Ann. Dig. 133 (No. 37); [1943] U.L.R. 185; [1943] A.L.R. 427, in which it was said: "No light is supplied by the Visiting Forces (British Commonwealth) Act, 1933 (23 Geo. V, cap. 6), as this is concerned with domestic arrangements within the British Empire."

<sup>37</sup> It was common ground that Parliamentary authorization was necessary before Dominion military authorities could exercise jurisdiction. Viscount Hailsham, Secretary of State for War, 86 H.L. Deb., (5th ser.) 354, 355 (1932).

Earl Stanhope, Under Secretary of State for War, 85 H.L. Deb. (5th ser.) 808 (1932).

There was debate, however, as to whether such authorization was necessary before jurisdiction could be exercised when the forces of one independent sovereign were in the territory of another, the Government taking the view it was not. Sir Stafford Cripps, in opposition, said: "No Dominion has any right to send a court to this country and to administer justice here, unless it gets authority from the Crown, any more than any foreign state would have the right to do the same thing. The question to which objection is raised is not one of Dominion law, as I understand it; it is a question of English law, namely, whether a man is rightly imprisoned in this country." 270 H.C. Deb., (5th ser.) 1088 (1932).

But the Solicitor General, Sir Boyd Merriman, disagreed. See, however, Lord Croft, Joint Parliamentary Under-Secretary of State for War, 117 H.L. Deb. (5th ser.) 195 (1940).

<sup>38</sup> Opposition to the Act centered on the provision which deprived the



the Bill, ranged beyond the immediate issues and expressed the view that visiting armed forces were immune from the jurisdiction of the local criminal courts, while within their own quarters or lines.<sup>39</sup>

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British court of virtually all supervisory jurisdiction over the service courts and authorities of visiting Dominion forces. It was contended that the writ of *habeas corpus* should be available to one imprisoned by order of a service court, so that he might raise in a civil court the issue of whether the service court had jurisdiction and acted within its jurisdiction. The opposition wished to ensure that no one physically in the United Kingdom could be imprisoned without the right to appeal to a British civil court. The issue was of civil liberty, specifically the civil liberty of the members of the Dominion forces. Sir Stafford Cripps, 275 H.C. Deb. (5th ser.) 1112 (1933) and 275 H.C. Deb. (5th ser.) 1483 (1933); Sir Walter Greaves-Lord, 270 H.C. Deb. (5th ser.) 1083 (1932); Lord Atkin, 86 H.L. Deb. (5th ser.) 351 (1932); Viscount Hailsham, Secretary of State for War, 86 H.L. Deb. (5th ser.) 481-84 (1932). Lord Wright, in a dictum in *Amand v. Home Secretary* [1943] A.C. 147, 159, a *habeas corpus* proceeding brought where a Dutch subject was charged by the Dutch authorities with desertion from the Dutch forces said, however: "It is clear that the statutory provisions here in question (The Allied Forces Act, 1940) involve a peculiar interference with the freedom of a person resident in this country. He may under them be subjected to a special jurisdiction, no doubt similar to that to which a person subject to British military law is subject, but vitally different in that he is subjected to a foreign jurisdiction and code of law, that of the Dutch government enforcing its military law. There is, therefore, introduced a species of extraterritorial jurisdiction however limited, and the Dutch service courts are given jurisdiction to enforce their sentences. But *this jurisdiction is only possible so far as it is authorized by the British legislature* and can only be exercised in accordance with the statutory provisions referred to and subject to the conditions and safeguards specified by statute. In particular, the British court must be satisfied that *the person in question is subject to Dutch military law and is, prima facie at least, an offender against that law. In these matters the British court has jurisdiction* and the person concerned is entitled to exercise all the rights which the British law affords to safeguard his liberty." [Emphasis added.]

<sup>39</sup> The Solicitor General, Sir Boyd Merriman, in several instances seemed to recognize the existence of a broader immunity but when pressed, said: "With regard to the American troops, it was a considerable time after they came to this country that the Defence of the Realm regulations were passed, and for this reason \* \* \* that the principle of international law applies, as I understand it, to an organised body so long as it remains an organised body and if they are here by our invitation, they are exempted from our sovereignty while they are in their own quarters or lines. Manifestly, there are difficulties of defining exactly what these limits may be; and manifestly when you had hundreds of thousands of American troops in this country, it was necessary to have something more definite than the international prin-

On the whole, the enactment of The Visiting Forces (British Commonwealth) Act and the debate which preceded its passage indicate the British view was that visiting foreign forces (though not Dominion forces) were entitled to exercise jurisdiction over their troops free from the supervisory jurisdiction of the British courts. It cannot be said, however, that any indication was given that the British Government considered foreign forces entitled to immunity from the local criminal jurisdiction.<sup>40</sup> Even the remarks of the Solicitor General go no further than to suggest such an immunity for acts committed within their quarters or lines by foreign forces.

The Visiting Forces (British Commonwealth) Act served as more than a model for the Allied Forces Act, 1940,<sup>41</sup> passed, after the fall of France, when the forces of the Allies<sup>42</sup> had withdrawn to the United Kingdom. The Allied Forces Act authorized the ap-

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ciple to which I am referring, and for that reason the Defence of the Realm regulations were passed, though some time after the American troops had begun to arrive in this country." 274 H.C. Deb., (5th ser.) 748 (1933).

At a later stage, when asked specifically whether "any visiting soldier or sailor, from whatever place he came, who had committed an offense would not be triable," the Solicitor General said:

"If the hon. Gentleman means that if one soldier or one sailor, staying away from the force of which he is a member, committed an offense against our laws, he would be triable, certainly; yes; but as long as he is here as a member of a visiting force and remains a part of that force, that force has exclusive jurisdiction over him." 275 H.C. Deb., (5th ser.) 1121-22 (1933).

<sup>40</sup> In a later debate the Home Secretary, Sir David Maxwell Fyfe, referred to the Visiting Forces (British Commonwealth) Act and the Allied Forces Act, 1940 and said: "These Acts did not make any specific provision for what was to happen when a member of a visiting force committed an offence which was an offence both against United Kingdom law and his own service law, and the question of which court was to exercise jurisdiction then was left to be settled by arrangement, much in the same way as in the case of offences by members of our own forces in this country which are offenses both against military law and against civil law." 505 H.C. Deb. (5th ser.) 563 (1952).

<sup>41</sup> 3 & 4 Geo. 6, c. 51.

<sup>42</sup> That they "arrived not as fully equipped and perfectly organized units ready at once to move into and take control of a zone of operations in which they would continue the fighting, but rather as the broken and disorganized remnants of armies and air forces which had been seriously defeated," may, as Barton suggests, explain the status accorded them by the Allied Forces Act, 1940. Barton, *op. cit. supra*, note 9, at 401.

plication, by Order in Council, of much of the earlier Act to the forces of the Allies, including the provision granting service courts immunity from supervisory jurisdiction. The Act spelled out expressly the rights of the service courts and authorities of the Allied forces to exercise jurisdiction "in the United Kingdom or on board any of his Majesty's ships or aircraft" with respect to "matters concerning discipline and internal administration." Of more importance, it expressly negated immunity from the jurisdiction of the British civil courts for offenses against United Kingdom law and went even further to provide that if a person tried by a service court was afterwards tried by a civil court, the latter court should in according punishment take into account the punishment already imposed by the service court. This excluded any notion that the principle of *non bis in idem* was applicable.<sup>43</sup>

The treaty with Czechoslovakia<sup>44</sup> provided: "Article 2. The offenses of murder, manslaughter, and rape shall be tried only by the criminal courts of the United Kingdom." The suggestion has been made that this provision was ineffective,<sup>45</sup> but for

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<sup>43</sup> The Attorney General, Sir Donald Somerville, pointed out that this was true in the United Kingdom under the Army Act, and served to emphasize "the supremacy of the civil jurisdiction over the military." 364 H.C. Deb. (5th ser.) 1380-81 (1940). The issue is, however, certainly different where both a national and a court of another country are involved. In *Rex v. Aughet*, note 21 *supra*, the defense of *autrefois acquit* was in the same circumstances recognized. The Court there stated: "The provisions of our Army Act with regard to Courts-martial are based upon principles of high policy which have in our opinion no application to decisions of Belgian Courts-martial held pursuant to the Convention existing between the Allies."

The Act also provided, in Section 2(3): "A (service) court shall not have jurisdiction by virtue of the foregoing section to try any person for any act or omission constituting an offense for which he has been acquitted or convicted by any such civil Court as aforesaid." As Schwelb points out, this is British municipal law only, not binding on an Allied service court as such, except in the United Kingdom. Schwelb, "The Jurisdiction over the Members of the Allied Forces in Great Britain," *Czechoslovak Year Book of International Law*, 147, 168 (March, 1942).

<sup>44</sup> Annex III, British-Czechoslovak Military Treaty of October 25, 1940, quoted in Schwelb, *id.*, at 156. Barton states (*op. cit. supra*, note 20, at 197) that the Anglo-Polish Protocol of November 22, 1940; the Agreement with the Free French Authority of January 15, 1941; the Anglo-Norwegian Agreement of May 28, 1941; the Anglo-Netherlands Agreement of May 5, 1942, and the Anglo-Belgian Agreement of June 4, 1942 were similar.

<sup>45</sup> Barton states that "It has long been the custom in the United Kingdom for the civil courts to have exclusive jurisdiction over these grave offenses,"

present purposes it is significant that the United Kingdom, in entering into the treaty, felt justified in reserving not only concurrent jurisdiction with respect to crimes generally but also exclusive jurisdiction with respect to the three named offenses. The same attitude was taken in the House of Commons. An amendment to the Allied Forces Act was moved, for which a precedent existed in the Australian and New Zealand counterparts of The Visiting Forces (British Commonwealth) Act,<sup>46</sup> which would have denied the Allied service courts "the power to pass sentence of death, except for offenses for which a sentence of death could be passed upon a British subject."<sup>47</sup> In the debate on this amendment, ultimately defeated, the Attorney General made certain statements which have been said to show that the British recognized that international law accorded immunity from local jurisdiction to visiting armed forces. It seems, however, that at most the Attorney General conceded such immunity for offenses committed within the camps of the visiting forces.<sup>48</sup>

The status of forces of the British Allies, other than the United States, continued to be governed through World War II by the Allied Forces Act. The United States was, however, unwilling to accept that status for its forces. Parliament on August 6, 1942 accordingly enacted the United States of America (Visiting Forces) Act, 1942,<sup>49</sup> in implementation of an agreement evidenced by an Exchange of Notes of July 27, 1942.

The crucial provision of the Act stated: "(1) Subject as hereinafter provided no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America." The Foreign Minister's Note and the debate in Parliament make it abundantly clear that His Majesty's Government believed it was going well beyond the dictates of

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but that the restriction in the treaty has no counterpart in the municipal law of England and hence "there would appear to be no legal procedure for resisting the exercise of jurisdiction by an Allied service court over these crimes." 1950 *Brit. Yb. Int'l. Law* 186, 198; and 1949 *Brit. Yb. Int'l. Law* 380, 405.

<sup>46</sup> Section 12 of the Defence (Visiting Forces) Act, 1939 (Aus.) and Section 9 of the Visiting Forces Act, 1939 (N.Z.).

<sup>47</sup> 364 H.C. Deb. (5th ser.) 1403 (1940).

<sup>48</sup> 364 H.C. Deb. (5th ser.) 1404-06 (1940).

<sup>49</sup> 5 & 6 Geo. 6, c. 31. The Exchange of Notes is appended as a Schedule to the Act.

international law in granting immunity from the exercise of jurisdiction by the British Court.<sup>50</sup> The Note stated the British Government "was prepared \* \* \* to give effect to the desire of the Government of the United States" that its service courts and authorities have exclusive jurisdiction. It went on to state that: "In view of the very considerable departure which the above arrangement will involve from the traditional system and practice of the United Kingdom there are certain points upon which His Majesty's Government consider it indispensable first to reach an understanding with the United States Government."<sup>51</sup>

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<sup>50</sup> The Lord Chancellor in moving the second reading of the Bill in the Lords stated that: "Apart from this legislation there can be no doubt that in any such case [of an offense against the criminal law] there would be jurisdiction in the British Courts." He also remarked that "I think your Lordships will see that this is a very interesting and, I admit, a most unusual proposal: One which would never be justified or tolerated except under conditions of war and except under conditions of the closest feeling of comradeship and of common legal traditions. \* \* \*" 124 H.L. Deb. (5th ser.) 61, 66 (1942).

"It is a proposal unique in the constitutional history of this country, but the Government of the United States have been so ungrudging in the aid given to this country that if they express a desire for such legislation no one would hesitate to grant it." Lord Atkin in *The Times*, Aug. 3, 1942.

"In World War II, in England, we had complete extraterritoriality granted by the British Parliament under a very strong urge by the Prime Minister, under conditions where Britain, fighting for its life, wanted all the troops she could get on the British Isles, and would make almost any sacrifice to get them." Gen. Walter Bedell Smith, Under Secretary of State, *supra*, note 8, at 23.

<sup>51</sup> (Emphasis added). The points were (1) that the American authorities would assume responsibility for trying and on conviction punishing those who were alleged on sufficient evidence to have committed criminal offenses in the United Kingdom; (2) that a trial for an offense against a civilian would be in open court (subject to security considerations) and would be held promptly in the United Kingdom and "within a reasonable distance from the spot where the offense was alleged to have been committed" for the convenience of witnesses; (3) that no one should be tried for a pre-Pearl Harbor offense; (4) that "satisfactory machinery" would be devised for mutual assistance in criminal investigations; (5) that the arrangement should operate during the war and for six months thereafter and (6) the agreement was "subject to the necessary Parliamentary authority." Quite apart from the overtone of such phrases as "the very considerable departure \* \* \* from the traditional system and practice," the conditions imposed with respect to the time, place and the manner of conducting trials and the statement that Parliamentary authority was necessary, implied that in the British Government's eyes the grant of immunity was not required by international law.

The Bill was first introduced in the House of Lords—the practice with non-controversial Bills—and the House of Commons was asked to pass it in a single day. Some Members nevertheless found opportunity to voice their misgivings, most interestingly in terms of the inconsistency between granting the immunity and the traditional subordination of the military to the civil authorities in the United Kingdom.

The Note of the Foreign Minister, although it expressly disclaimed any wish to make the grant of immunity from British jurisdiction “dependent upon a formal grant of reciprocity” expressed the hope that if British forces were stationed in American territory, the United States would be “ready to take all steps in their power to ensure to the British forces concerned a position corresponding to that of the American forces in the United Kingdom. \* \* \*” Almost two years later, on June 30, 1944, the Service Courts of Friendly Foreign Forces Act was passed.<sup>52</sup>

The guarded opinion had been expressed that both the Federal and State courts of the United States would recognize the immunity of British forces in the United States from the jurisdiction of the local criminal courts.<sup>53</sup> The Senate Committee on the Judiciary and individual Senators in debate on the floor, dis-

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<sup>52</sup> Chap. 326, 58 Stat. 643, 22 U.S.C., 701-06.

<sup>53</sup> “Unless the [Federal] court should disregard those opinions [in *The Schooner Exchange*, *Coleman v. Tennessee* and *Dow v. Johnson*], it would be obliged to hold without regard to the exchange of notes, that British military personnel forming part of an organized force entering the United States with the consent of our Government are exempt from the jurisdiction of the courts of the United States.

“A case arising in a State court ought to be decided the same way and probably would be if the above decisions were brought to the attention of the Court. It is, however, possible that one or more judges of inferior courts \* \* \* unskilled in matters of international law might \* \* \* assert their jurisdiction \* \* \* and might even convict and sentence \* \* \*. If the Department of State should make public announcement that, in its view the personnel of British armed forces \* \* \* are subject to the jurisdiction of their own courts-martials only and exempt from that of the courts of the United States and the several States; and the Department of Justice should \* \* \* direct the appropriate United States attorney to file a suggestion \* \* \* that the case \* \* \* is within the exclusive competence of a British court-martial, the likelihood of such a conviction would be still further diminished even if such a conviction should take place. \* \* \* It should be reversed and the sentence set aside by the proper appellate court upon such a suggestion \* \* \* and upon the three cases above mentioned being cited.” King, *op. cit. supra*, note 9, at 566.

tinguishing nicely between the several issues raised, indicated that (1) they believed the British authorities were entitled under international law to exercise jurisdiction over their forces in the United States, without implementing American legislation,<sup>54</sup> (2)

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<sup>54</sup> Senator Revercomb offered an amendment (90 Cong. Rec. 6496 (1944)) reading: "The Service Court of any friendly foreign force \* \* \* is hereby authorized to exercise its jurisdiction within the territorial limits of the United States during the continuance of the present hostilities, and six months thereafter." The debate in the Senate centered around this proposed amendment.

It is not easy to follow Senator Revercomb's argument. He apparently felt that, if the British forces in the United States had constituted an army—an organized body of troops—they would have been immune from American jurisdiction, at least if they had been in passage, and that the amendment authorizing the exercise of jurisdiction would then have been unnecessary. Since neither condition existed, the amendment was necessary or, in any event, desirable, to avoid uncertainty. (*Id.*, at 6497). Senator Revercomb's argument based on the obligation to pass legislation reciprocal to that passed by Great Britain was weakened because he could point to no comparable provision in The United States of America (Visiting Forces) Act, 1942. He apparently was not informed that the status of the American forces in the United Kingdom was governed directly not only by that Act but by The Allied Forces Act, 1940, which contained a provision analogous to the amendment he proposed and, indirectly, by The Visiting Forces (British Commonwealth) Act.

Senators Murdock and Connally were clear that the British service courts could exercise jurisdiction in the United States without authorization by the Congress and that all that was needed was, in Senator Murdock's words, "to implement whatever jurisdiction the service courts bring with them." (*Id.*, at 6497).

Senator Connally argued:

"Mr. President, is not the whole question one of permission to the foreign force to be here? We can exclude them if we desire to do so, but does not our consent to their being here carry with it \* \* \* that the force may exercise its discipline and its control, and punish infractions on the part of its members? That being the case, why is it necessary for us specifically to provide that they can exercise their jurisdiction here? \* \* \* If we permit foreign troops and foreign naval officers and naval organizations to be within the United States, the implication and the natural inference is that they can exercise their normal functions. The purpose of the Bill is simply to cooperate with those functions by permitting, with our consent, of course, the summoning of civilian witnesses to attend the session of their service court. As I understand it, that has to be done by permission." (*Id.*, at 6497).

The position taken by Senators Murdock and Connally apparently had the support of the State Department, since in a letter to the Judiciary Committee Secretary Hull stated he had advised the British Ambassador that: "\* \* \* the interested agencies of this Government were of the opinion that

implementing legislation was necessary to enable American officials to arrest and turn over to the British military authorities members of the British forces, to provide for summoning witnesses not members of those forces and for punishing such witnesses for perjury or contempt, for immunity for the members of British service courts and witnesses before them, and for imprisonment of convicted offenders in American penal institutions; (3) but they did not believe foreign armed forces were entitled to immunity from the jurisdiction of American courts under international law, doubted that Congress could constitutionally grant such immunity from the jurisdiction of State courts, and were clear that in any event it did not wish to grant such immunity.<sup>55</sup> The statute accordingly dealt only with the second

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British service courts and authorities in the United States have the right under our law to exercise jurisdiction over members of their forces. With respect to the facilities requested to make such jurisdiction effective, it was stated that in the opinion of the interested agencies of the Government additional legislation would be necessary to make some of such facilities available \* \* \*." Report of the Senate Judiciary Committee, 78th Cong., 2d Sess., 2-3 (June 8, 1944).

<sup>55</sup> Senator Murdock: "I ask the Senator whether he wants to prohibit the jurisdiction of the Federal courts and the jurisdiction of the State courts, as a parliamentary act prohibits the jurisdiction of the criminal courts in England. If he wants to go that far, I think he should tell the Senate. That is one of the questions \* \* \* which came before the Committee \* \* \*. By a majority vote it was decided, I think rather emphatically, that we did not want to prohibit jurisdiction on the part of our courts, but that all we wanted to do was to implement whatever jurisdiction the foreign service courts brought with them to this country, first, by power of arrest, second, by power of dealing with witnesses, and stop there."

\* \* \* \* \*

"By this bill we deny no jurisdiction at all to either the Federal or the State courts of this country, \* \* \*. As I understand the Senator from West Virginia, he wants to deny criminal jurisdiction to the Federal and State courts of this country. The position I take is that it is not necessary to go that far, nor did I want to go that far, nor do I think Congress has the right to prohibit jurisdiction on the part of the State courts over criminal matters." 90 Cong. Rec. 6491, 6492, (1944).

It is difficult to understand the basis for the statement that "Public Law 384, 78th Congress (Chapter 326, 2nd Session) \* \* \* assumes the existence of this exclusive jurisdiction under international law and implements it. That this is the legislative intent is clear from the debate in the Senate. \* \* \*" Bathurst, "Jurisdiction over Friendly Foreign Armed Forces: The American Law," 1946 Brit. Yb. Int'l. L. 338, 341. See the discussion of this statement in Parliament during the debate on the Visiting Forces (Ap-



category of problems and its operation was made dependent upon a Presidential Declaration which could be revoked.<sup>56</sup>

The Senate did believe, however, that the Congress could impose conditions on the exercise of jurisdiction by a foreign service court. The Report of the Senate Committee on the Judiciary expressly stated that “[T]he Committee do not concede that any foreign military court has more than conditional jurisdiction while on our soil” and the Senate adopted an amendment offered from the floor relating to the time, place and manner of trial where the offense was against a civilian.<sup>57</sup> Apparently, however, it was thought unnecessary to protect the foreign service court against the supervisory jurisdiction of American courts. There is no provision in the Act comparable to that in the British statute.

The United States had in the meantime been granted exclusive jurisdiction over its armed forces by a number of other countries.<sup>58</sup> The record, however, plainly negatives any inference that

plication of Law) Order, 1954, 526 H.C. Deb. (5th ser.) 1280, (1954), quoting a letter from Dr. Barton vigorously criticizing the statement.

See also the comment later made by General Walter Bedell Smith, Under Secretary of State, in a letter to Senator Wiley, 99 Cong. Rec. 8776 (1953):

“It is the opinion of the Departments of State and Defense, that it is neither necessary nor desirable for the United States to seek or have exclusive jurisdiction by treaty over its forces, civilian components, or their dependents in the NATO countries, *nor to grant exclusive jurisdiction over similar foreign persons with respect to offenses committed within the territory of the United States.*” (Emphasis added.)

<sup>56</sup> Service Courts of Friendly Foreign Forces Act, 22 U.S.C. 702. The required proclamation was made as to British and Canadian forces by Proc. No. 2626, 9 Fed. Reg. 12403 (1944) and revoked by Proc. No. 3107, 20 Fed. Reg. 5805 (1955).

<sup>57</sup> 78th Cong., 2d Sess., June 8, 1944. The amendment repeated almost verbatim the statement in the Note of the British Foreign Minister. The Bill had previously been amended in Committee to require that trial take place in the United States. The Committee Report stated that “It is the view of the committee that a law-breaking foreigner who has become subject to civil arrest for violation of our law should not be removed to his homeland or put out of our national jurisdiction for trial.” (at 1)

The Restatement, *Foreign Relations Law*, Comment b to Section 58, p. 186, recognizes the right of a state to impose such conditions.

<sup>58</sup> The U.S. Memorandum lists the following, *op. cit. supra*, note 2, at 415:

“Australia—Exclusive jurisdiction unilaterally without any agreement. Statutory rules 1942, No. 241—dated May 27, 1942. Notified in the *Commonwealth Gazette* on May 27, 1942.

these grants were made in recognition of any obligation under international law.

Perhaps the most interesting review of the whole question was that of the Supreme Court of Canada in *Reference Re Exemption of U.S. Forces from Canadian Criminal Law*.<sup>59</sup> The status of the United States forces in Canada then closely paralleled that of our forces in the United Kingdom prior to the passage of the United States of America (Visiting Forces) Act, 1942.<sup>60</sup> An Order in

*China*—Agreement similar to that with United Kingdom concluded by exchange of notes, on May 21, 1943.

*Egypt*—Agreement similar to United Kingdom agreement concluded by exchange of notes. *Journal Officiel*, Cairo, March 2, 1943.

*India*—Agreement similar to United Kingdom agreement concluded by exchange of notes. Implemented by Ordinance No. LVII of 1942, Allied Forces (United States of America), Ordinance, 1942. *Gazette of India Extraordinary*, October 26, 1942.

*Iraq*—Exclusive jurisdiction recognized unilaterally by Law No. 24 for 1943—Law for the Extension of the Immunities and Privileges Mentioned in the Treaty of Alliance concluded between Iraq and Great Britain to the Forces of the United Nations. Made at Baghdad, March 7, 1943. Made applicable to American forces in Iraq by regulation No. 2084, published in *Gazette* on March 15, 1943.

*Liberia*—Exclusive jurisdiction given by Article 2 of the Agreement of March 31, 1942, between the United States and Liberia. *Department of State Bulletin*, December 5, 1942.

*New Zealand*—Agreement similar to United Kingdom agreement effected by exchange of notes. Implemented by Order in Council Serial No. 1943/56, the United States Forces Emergency Regulations 1943. Dated April 7, 1943. Notified in the *Gazette*: April 8, 1943.”

To these should be added Greenland, by treaty with Denmark, April 9, 1941, EAS (1941) No. 204, and Iceland, by an agreement of July 1, 1941, [1948] 12 U.N.T.S. 405.

<sup>59</sup> [1943] 4 D.L.R. 11.

<sup>60</sup> The status of foreign troops in Canada was governed by the Visiting Forces (British Commonwealth) Act, 1932–1933 (Can.) c. 21 and the Foreign Forces Order, 1941 (P.C. 2546, 74 Can. Gaz. 4416), the latter comparable to the Armed Forces Act, 1940 of the United Kingdom. The Foreign Forces Order, 1941 was made applicable to United States forces by an Order of July 27, 1942 (P.C. 6566, 76 Can. Gaz., 717), which was superseded by an Order of April 16, 1943 (P.C. 2813, vol. III (1943) C.W.O. & R., 30) making the Foreign Forces Order, 1941 applicable to United States forces except for its proviso denying jurisdiction to a foreign service court in cases of murder, manslaughter and rape, etc.

Council had, however, included a clause saving the claim of the United States that its forces were immune from Canadian jurisdiction.<sup>61</sup> The Governor General referred the question to the Supreme Court. The Canadian Attorney General submitted a *Factum* and the United States a Memorandum, both in favor of the claimed immunity. The attorneys general of five Canadian provinces took the contrary position. Two judges held there was no immunity, one that there was a qualified immunity, and two that there was a general immunity. Their disagreement was in large part with regard to the relative weight to be attached to the practice of states as compared to the opinions of the text writers.

The Chief Justice, in an opinion in which Judge Hudson joined, although he referred to *The Schooner Exchange*,<sup>62</sup> limited his comment to a discussion of the British constitutional principle that the military are not immune from the jurisdiction of the civil courts, and to a review of the British practice and attitudes beginning with the Visiting Forces (British Commonwealth) Act, 1937, with only passing reference to the World War I Anglo-French agreement and Anglo-American negotiations. His conclusion was (p. 21) that "[N]o such rule as that now insisted upon has ever been a part of the law of England; and this applies equally to Canada."

Judge Kerwin, in reaching the opposite conclusion, relied on the World War I arrangements,<sup>63</sup> the United States of America (Visiting Forces) Act, 1942 and the Exchange of Notes which

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<sup>61</sup> "2. The application of the Foreign Forces Order, 1941, as aforesaid, to the forces of the United States of America shall not be construed as prejudicing or curtailing in any respect whatsoever any claim to immunity from the operation of the municipal laws of Canada or from the processes of Canadian Courts exercising either criminal or civil jurisdiction by members of the forces of the United States of America founded on the consent granted by His Majesty's Government in Canada to such forces to be present in Canada." Order of April 16, 1943. C.P.C. 2813, Vol. III (1943) C.W.O. & R., 30.

<sup>62</sup> 11 U.S. (7 Cranch 116) (1812).

<sup>63</sup> Judge Kerwin said of the World War I Anglo-American negotiations that "In this exchange of notes the United States throughout took the position that members of her forces in Britain were exempt from prosecution in the British courts." [1943] 4 D.L.R. 11, 30. But see pp. —, *supra*.

preceded it,<sup>64</sup> and the opinions in *The Schooner Exchange* and *Chung Chi Chung v. The King*.<sup>65</sup>

Judge Taschereau, agreeing with Judge Kerwin, relied primarily on the opinions of text writers. *The Schooner Exchange* and *Chung Chi Chung v. The King*.<sup>66</sup> He referred only briefly to the World War I experience and dismissed the later practice with a sentence.<sup>67</sup>

Judge Rand's approach was that the rules of international law on jurisdiction and immunities "lie in practice and principles, and each depends on its special circumstances." His conclusion was that visiting forces are immune only with respect to offenses "committed in their camps and on their warships, except against persons not subject to United States service law, or their property, or for offences under local law, wherever committed, against other members of those forces, their property and the property of their Government, but the exemption is only to the extent that United States courts exercise jurisdiction over such offences." (p. 51)

All the judges were agreed, however, that the Government could accord immunity to the American troops, and it later did so.

Shortly after the decision of the Canadian Court, the Supreme Court of New South Wales had occasion to review the same question, and in *Wright v. Cantrell* expressed the conclusion that visiting forces enjoyed no general immunity from the local criminal jurisdiction under international law, although United

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<sup>64</sup> *Supra*, p. 129. Judge Kerwin quoted (p. 32) from the Foreign Minister's note: "In view of the very considerable departure which the above arrangements would involve from the traditional system and practice of the United Kingdom \* \* \*," and observed: "I take it that refers to a departure in the sense that foreign troops had not been on the soil of Great Britain for many years with the exception of the last great war." This is, it is respectfully submitted, a clear misreading of the Foreign Minister's meaning.

<sup>65</sup> [1939] A.C. 160.

<sup>66</sup> "From this judgment \* \* \* it flows clearly to my mind that some immunities exist in favour of foreign troops. \* \* \* [T]he essence of the decision does not apply only to ships in territorial waters, but applies equally to all armed forces." *Supra*, note 63, at 35.

<sup>67</sup> "I have read with care various agreements which have been entered into during the last war \* \* \*. All these agreements tend to show the existence of this universally adopted rule of international law. \* \* \*" *Id.*, at 41.

"\* \* \* I would like to point out that the United States of America (Visiting Forces) Act, 1942, enacted by the United Kingdom, differs from what I think are the settled and accepted principles of international law in relation to immunities." *Id.*, at 43.

States forces had been accorded such immunity by statutory rule.<sup>68</sup> The Mixed Court of Cassation of Egypt, in an opinion distinguished for its extensive review of the available precedents, had reached the same conclusion, although it recognized a limited immunity for offences within camps and on duty.<sup>69</sup> No court of comparable status reached the contrary result.<sup>70</sup>

The foregoing review makes it abundantly clear that no rule of international law was ever established according visiting armed

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<sup>68</sup> [1943-1945] Ann. Dig. 133 (No. 37); [1943] V.L.R. 185; [1943] A.L.R. 427. The action was for defamation against a British subject, serving in the naval forces of His Majesty. The defendant pleaded that the acts complained of were done while he was working for and under the orders of the United States armed forces. Jordan, C.J., in an extended opinion, considered immunity both from civil and criminal jurisdiction. Referring to the British Act and the Australian Regulations according exclusive jurisdiction to the United States with respect to criminal offences, he said, at 139-41:

"It is evident that these provisions do not involve the recognition by Great Britain and the Dominions of any such rule of complete immunity as has been here contended for, and do not constitute a regulation of the incidents of such an immunity conceded to be otherwise existing. They are expressly stated to be a departure from traditional system and practice. \* \* \*

"It is clear from the foregoing that the doctrine of complete immunity which has been contended for on behalf of the defendant is not only completely lacking in what has been described [as] 'the hallmarks of general assent and reciprocity', but is also inconsistent with the implication of local legislation.

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"It [international law] must also be deemed to concede to those in command of the force all authority necessary to maintain discipline over its members, and to agree to refrain from itself interfering in purely disciplinary matters, and, in some cases at any rate, in matters which are not merely disciplinary, but constitute criminal offences committed by one member of the force against another. This appears to be recognized by the decision of the Privy Council in the case of *Chung Chi Cheung v. R.*, [1939] A.C. 160 \* \* \*. It is obvious that discipline could not be maintained if, when a member of the force had been confined to barracks, a local court would entertain an action by him against his superior officer for false imprisonment. \* \* \*"

The comments of the Chief Justice regarding criminal jurisdiction are, of course, dicta.

<sup>69</sup> *Manuel v. Ministère Public*, [1943-1945] Ann. Dig., 154 (No. 42). The status of British troops in Egypt was fixed by the Anglo-Egyptian Treaty of August 26, 1936, granting immunity.

<sup>70</sup> But see *In re A.F., Tribunal Correctionnel of the Isle of Chios, Greece*, [1943-1945] Ann. Dig., 163 (No. 43). The British forces in Chios at the time may have had the status of a liberating, occupying force.

forces a general immunity from the jurisdiction of the receiving state. The situation is less clear with respect to a limited immunity, with respect to acts taking place in the camps occupied by the visiting forces. Many states were not prepared to concede even this limited immunity.

There was never, of course, any doubt that the sending state had legislative jurisdiction over its armed forces abroad. Some doubt exists, however, that its unqualified right to exercise enforcement jurisdiction was established as a rule of international law. Receiving states felt entitled, at least, to regulate and place conditions upon such exercise of enforcement jurisdiction. It is, on the other hand, abundantly clear that no sending state was ever considered as entitled to exercise any jurisdiction over any person not a member of, or associated with, its armed forces, except in a combat zone.

The frequent instances in which the allocation of jurisdiction was determined by international agreement and implementing municipal legislation not only indicates that states did not feel compelled to accord a general immunity to visiting armed forces but also suggests that the situation is inherently so complex and the conflicting interests so evident that international agreements and implementing legislation are necessary to a satisfactory arrangement.

