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Criminal Jurisdiction Over Visiting Armed Forces

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CHAPTER V

LAND FORCES

One can speak with some assurance regarding many of the problems of jurisdiction over warships and their crews, on the basis of the opinion of writers, court decisions and the practice of states. As to land forces, however, in the absence of an agreement as to their status there is a paucity of precedent upon which firm conclusions regarding jurisdiction over such forces can be based.

The United States Government in 1943 formally took the position that a rule of international law "recognizes the immunity from local jurisdiction in criminal matters of members of the armed forces of a foreign sovereign on the territory by permission or with the consent of the local sovereign."¹ The same position was taken by Colonel Archibald King in an article which did much to shape American attitudes toward the status of forces problem.² The Department of Justice, the Department of State and the Department of Defense have since taken the reverse position.³ The latter position has the support of other commentators,

¹ Memorandum submitted by the United States to the Canadian Government in the "Reference Re Exemption of United States Forces from Canadian Criminal Law" [1943], 4 D.L.R. 11, at 405 of the Memorandum. The Memorandum, and the "Factum of the Attorney General of Canada" submitted to the Supreme Court of Canada in the Reference, are both reprinted in Hearings on H.J. Res. 309 Before the House Committee on Foreign Affairs, 84th Cong., 1st Sess. 404 (July 13, 14, 19-21, 26, 1955).

² King, "Jurisdiction over Friendly Foreign Armed Forces," 36 *A.J.I.L.* 539 (1942).

³ See the statement of the Attorney General, submitted to the Senate Foreign Relations Committee in the hearing on the NATO Status of Forces Agreement and reprinted in 99 Cong. Rec. 8762 (1953). Assistant Attorney General Rankin said of this statement: "We examined every authority we could find. We examined the original text, the French, the Italian, and all of the various law, body of law, of the countries involved in the NATO agreements, and I then reviewed it all and we came to the conclusion * * * that Colonel King's position could not be maintained, either under the

notably Dr. G. P. Barton in an outstanding series of articles.⁴ It is worthwhile to inquire into the basis for the stand taken in 1943, and for the reversal of that position.

All discussion of the issue begins with the opinion of Chief Justice Marshall in *The Schooner Exchange*.⁵ The opinion, it should be noted, is first and foremost an affirmation of the primacy of territorial jurisdiction. Its major premise is that "the jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute * * *", and that all exceptions to its "full and complete power * * * must be traced up to the consent of the nation itself."⁶ However, in view of the "perfect equality and absolute independence of sovereigns," territorial jurisdiction "would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its object." Hence sovereigns and ambassadors are accorded immunity, and

"A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions.

decisions or under the practice * * *." Hearings, H.J. Res. 309, *supra*, note 1, at 343.

A memorandum of the State Department stated: "NATO military personnel are not immune from the criminal jurisdiction of the United States or of the several states. It is the position of the United States that there is no such immunity under international law." Hearings on Status of the North Atlantic Treaty Organization, Armed Forces and Military Headquarters before the Senate Foreign Relations Committee, 83rd Cong., 1st Sess. (1953).

⁴ Barton, "Foreign Armed Forces: Immunity from Supervisory Jurisdiction," 1949 *Brit. Yb. Int'l L.* 380; Barton, "Foreign Armed Forces: Immunity from Criminal Jurisdiction," 1950 *Brit. Yb. Int'l L.* 186; Barton, "Foreign Armed Forces: Qualified Jurisdictional Immunity," 1954 *Brit. Yb. Int'l L.* 341.

⁵ 11 U.S. (7 Cranch) 116 (1812).

⁶ "It is clear from the language of that decision that the governing, basic, principle is not the immunity of the foreign state but the full jurisdiction of the territorial state and that any immunity of the foreign state must be traced to a waiver—express or implied—of its jurisdiction on the part of the territorial state. Any derogation from that jurisdiction is an impairment of the sovereignty of the territorial state and must not readily be assumed." Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 1951 *Brit. Yb. Int'l L.* 220, 229. The Supreme Court, in *Wilson v. Girard*, 354 U.S. 524, 529 (1957), cited *The Schooner Exchange* as authority for the statement that "A sovereign nation has exclusive jurisdiction to punish offenses against its law committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."

“In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it, would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require.”⁷

Marshall cited neither authority nor precedent for his observation regarding jurisdiction over foreign armed forces; there was little he could have cited.⁸ Text writers in the intervening years prior to World War II based their comments largely on Marshall’s opinion;⁹ for other than treaty arrangements in World War I,¹⁰ there was little else on which they could have been based.

⁷ 11 U.S. (7 Cranch) 116, 135 (1812).

⁸ Hall states that “Either from oversight, or, as perhaps is more probable, because the exercise of exclusive control by military and naval officers not only over the internal economy of the forces under their command, but over them as against external jurisdiction, was formerly too much taken for granted to be worth mentioning, the older writers on international law rarely give any attention to the matter.” Hall, 1 *International Law* 237–38 (8th ed. 1934). He cites Casaregis and Lampridi as having taken opposing positions on the matter.

⁹ Wheaton’s comment (1 *Inter. Law* 234 (6th ed. 1929).) is virtually a quotation from Marshall’s opinion, as is that of Wildman, 1 *Institutes of Inter. Law* 66 (1849).

¹⁰ *United States v. Thierichens*, 243 Fed. 419 (D.C., E.D., Pa., 1917) held subject to American jurisdiction the commander of the German cruiser Prinz Eitel Friedrich, interned in Philadelphia, for smuggling and violation of the Mann Act.

The Military Court of Rome held, in *In re Polimeni* [1935–1937] Ann. Dig. 248 (No. 101), that Italy had jurisdiction where a member of the Italian armed forces in the Saar Territory, in connection with the plebiscite there, assaulted a British corporal. The court said: “International law recognizes the so-called fiction of extraterritoriality, which applies to troops passing

THEORETICAL BASES FOR IMMUNITY

A. The Interests of the Sending State

Chief Justice Marshall's reference to the "perfect equality and absolute independence of sovereigns" and to a sovereign's "dignity and the dignity of his nation" can hardly be read to mean that every instrumentality and every representative of a sovereign is, when abroad, necessarily completely immune from local jurisdiction. Marshall himself stated that:

"The preceding reasoning has maintained the proposition that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, *its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it, must be supposed to act.*" ¹¹

Moreover, there are simply too many cases of public instrumentalities, e.g., public vessels engaged in commerce, and of representatives of a sovereign, e.g., the lesser personnel of an embassy, consuls, representatives to international organizations, who admittedly do not enjoy complete immunity, to assert that either the equality and independence of states or the respect due to a sovereign requires complete immunity for every instrumentality or representative. An argument along these lines could, with respect to visiting forces, be made on behalf of a commander

through or stationed in the territory of another State. This fiction is based upon the undisputed principle that armies, the supreme expression of the force upon which the sovereignty of a State is founded, carry their laws and their judges with them. From this follows another principle, namely that the members of the army which passes through or is stationed in foreign territory cannot be subject to the criminal jurisdiction of the territory, but only to Italian military criminal jurisdiction, regardless of whether the crime is one of military or of common law." This is, of course, dictum; Italy undoubtedly had at least concurrent jurisdiction over the accused.

Compare *In re Besednjak*, Court of Assize, Trieste, Italy, Jan. 16, 1948, [1948] Ann. Dig. 106 (No. 33), in which the court rejected a plea that the accused were members of the Yugoslav armed forces. The court held that Yugoslavia was not allied or associated with Italy in 1945, although it was a co-belligerent, so Article 26 of the Italian Military Code in Time of War, which provided that if an expeditionary force of an allied state was stationed in Italian territory, only authorities of the force could try members of the force, was not applicable.

¹¹ U.S. (7 Cranch) 116, 143 (1812). (Emphasis added.)

but loses much of its force if advanced on behalf of every soldier, sailor, marine, and airman.¹²

The fundamental reason advanced by Marshall for his position was that of military exigency; that, in brief, the immunity of visiting forces rests on a functional basis. There is nothing in his language suggesting the fiction of extraterritoriality and, given the present standing of that fiction, one must discount the comments of those writers who invoke it as the basis for their claim that the immunity exists.¹³

¹² "It would appear from the reasoning of the Court, [in *The Exchange*], that the basis of immunity in all cases was the same fundamental principle that the absolute jurisdiction of one state does not envisage the sovereign right of another state as its object. However satisfactory this principle may be as a basis for sovereign and diplomatic immunity, there are strong reasons of theory and practice for seeking a more solid principle on which to base the jurisdictional immunity of visiting forces." Barton, 1949 Brit. Yb. Int'l L. 280, 411-12.

But compare Senator Dirksen, 99th Cong. Rec., 8773 (1953): "Every American citizen and every American soldier is a symbol of American sovereignty when we send him abroad; and, unless we protect him, we demean and degrade the very sovereignty he represents." See also Hall, *op. cit. supra*, note 9, at 219: "The head of the state, its armed forces, and its diplomatic agents are regarded as embodying or representing its sovereignty, or in other words, its character of an equal and independent being. They symbolize something to which deference and respect are due, and they are consequently treated with deference and respect themselves." The Canadian Attorney General referred to "that fundamental principle which requires * * * that the dignity and independence of the foreign government concerned be preserved entirely in this field of international relations." Canadian Factum, Hearings, H.J. Res. 309, *supra*, note 1, at 431. See also Heyking, *L'Exterritorialité*, 156 (1889).

¹³ It is not always possible to determine whether a writer who refers to extraterritoriality as the basis for the immunity of visiting forces is in fact invoking the fiction or merely using the term as a summary of other ideas or to describe a result.

Apparently Oppenheim should be included among the former (1 Lauterpacht-Oppenheim, *International Law* 853 (8th Ed. 1957) [cited at n. 1, ch. IV]), as should Foelix, who wrote: "After having explained how vessels navigating on the high seas form the continuation of the nation's territory, we must concern ourselves with another fiction of the *droit des gens*, relating to the person of the individual accused of a crime or offense. The soldier under the flag or on active duty who finds himself in a foreign country is considered as being in his country: in consequence, even though he is in a friendly or neutral country, the crimes or offenses of which he is culpable are punished as though they had been committed in his country." 2 *Droit International Privé* 263 (1866)

Military exigency has been accepted by most writers as the controlling factor in the situation. It has been the primary basis for those who have reached the conclusion that the jurisdiction of the sending state over visiting forces passing through or stationed in a foreign state is exclusive ¹⁴—which may or may not have been Marshall's view. Only a few writers have analyzed the situation in depth and explained precisely what the factors of military exigency are which require recognizing so extensive an immunity.

It should be beyond dispute that a military commander must be able to maintain discipline over the forces under his command, wherever they may be. If he lacked that power, taking an army into foreign territory would be in effect to disband it. Stated

Twiss, who discussed the immunity of foreign forces and warships under the heading: "Extra-Territoriality of certain Foreign Persons and Things," said in part: "A ship of war has been termed an expansion of the territory of the Nation to which it belongs, not only when it is on the wide ocean but when it is in a foreign port. In this respect the ship of war resembles an army marching by consent through a neutral territory. Neither ships of war nor army so licensed fall under the jurisdiction of a Foreign State." *Law of Nations*, 271-272 (1884).

See also 1 Phillimore, *Inter. Law* 474 (3d ed. 1879); 1 Wharton, *Inter. Law Digest* 43 (2d ed. 1887); Holland, *Lectures on International Law*, 148-149 (1933); 1 De Martens, *Traite de Droit International*, 449 (1883).

Taylor sets forth the fiction but attributes it to necessity and convenience, and in a subsequent comment says: "It may be stated as a general rule that a foreign army passing over the territory of a friendly state, whether as an ally in a common cause or not, is entirely exempt from its civil and criminal jurisdiction, for the reason that any other rule would be destructive of discipline. * * * If an exception to this general rule exists it is in favor of the local jurisdiction over an offending member of the force found entirely outside its line." *International Public Law* 230 (1901).

¹⁴ Among the writers who assert that the sending state has exclusive jurisdiction over its forces, some support their conclusion only by reference to the necessity that the commander of the visiting forces be able to maintain discipline, apparently assuming it to be self-evident that the maintenance of discipline requires not only the right to exercise jurisdiction but that it be exclusive. Others either expressly assert this to be true, or take the position that military exigency requires the commander be able to maintain control, as distinguished from discipline, and that the maintenance of control demands that the sending state's jurisdiction be exclusive. Some refer to neither factor, but simply assert that military exigency requires that the sending state have exclusive jurisdiction.

Hyde states that: "Strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign organized military force which,

another way, the sending state must have jurisdiction to prescribe rules with respect to the members of its armed forces abroad. For the great majority of the members of an armed force such jurisdiction could be based on nationality; however, this is not the

with the consent of the territorial sovereign, enters its domain. Members of the force who there commit offenses are dealt with by the military or other authorities of the State to whose service they belong, unless the offenders are voluntarily given up." 1 Hyde, *International Law* 819 (2d ed. rev. 1945).

Hall states that: "There can be no question that the concession of jurisdiction over passing troops to the local authorities would be extremely inconvenient; and it is believed that the commanders, not only of forces in transit through a friendly country with which no convention exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offenses committed by persons under their command, though they may be willing as a matter of concession to hand over culprits to the civil power when they have confidence in the courts, and when their stay is likely to be long enough to allow the case being watched. The existence of a double jurisdiction in a foreign country being scarcely compatible with the discipline of an army, it is evidence that there would be some difficulty in carrying out any other arrangement." Hall, *op. cit. supra*, note 8, at 250-51.

Adinolfi states: "Exemption in the case of the army and that in the case of warships have a single basis.

"Both the army and warships are autonomous entities having, within each State, their own laws, their own judge, their own executive powers; this establishes the force of discipline. The soldier of the land and of the sea must obey his hierarchical superior alone.

"If other powers had the competence to intervene, this bond would be severed. Now whatever the unit is, the bond must be kept unbroken." *Diritto Internazionale Penale*, Hearings, H.S. Res. 309, *supra*, note 1, at 411.

Travers states: "The members of a foreign army, taken in this quality, that is to say, considered as an integral part of the public force of a foreign State, can not be subjected to the local repressive jurisdiction without there being a conflict with the sovereignty of the foreign State, and interfering with its right of free disposition of its armed forces.

"Again a government which accepts the presence of foreign troops on its territory consents implicitly that the foreign authorities retain over such troops the exclusive jurisdiction which is necessary for the perfect maintenance of discipline." 2 *Le Droit Penal International*, 346-47 (1921).

Calvo, although he says that "When an independent state accords to a foreign army permission to pass or to sojourn on its territory, the persons who compose that army, or find themselves in its ranks, have a right to the prerogatives of extraterritoriality," says also that: "One understands without difficulty the dangers and the inconveniences of all sorts to which troops in passage would be exposed if their direction and their police were taken from their own officers to be exercised by foreign authorities." 1 *Le Droit International*, 616 (3d ed. 1880).

most compelling basis. Rather, it is the relationship between an individual and the sending state resulting from his status as a member of its armed forces and not nationality which compels recognition of the sending state's jurisdiction.¹⁵

Merchant seamen are subject to the flag state's jurisdiction to prescribe rules even though they may not be its nationals. Certainly there is a much stronger reason for recognizing such jurisdiction over members of a state's armed forces. The jurisdiction of a state to prescribe rules with respect to its nationals abroad is recognized; however, there are considerations of policy both for and against its exercise, and most states have found the considerations against it to be more persuasive. But where troops are involved there is no need to give as a reason for recognizing the jurisdiction of the sending state that their conduct abroad may disturb the public order of the sending state. There is nothing shocking in the idea of subjecting military personnel to the court-martial jurisdiction of the state they serve and of making them liable to its operation in whatever part of the world they may be. On the contrary, the idea is startling that a soldier abroad should be free of all restraints except those which the receiving state chooses to impose. In other words, those considerations of policy which bear upon the wisdom of asserting jurisdiction over nationals with respect to their conduct abroad are largely irrelevant in the case of troops. The relevant considerations are rather those which underlie the exercise of jurisdiction on the protective principle, that is, those which concern the security of the state.¹⁶

Military discipline is a broad term. One can differentiate be-

¹⁵ "The relationship established when an alien becomes a member of the national forces of a state gives the state jurisdiction to prescribe rules governing the conduct of the alien, notwithstanding the fact that the service in the national forces does not make him a national of the state." Restatement, *Foreign Relations Law*, Section 31, Comment c, p. 92.

¹⁶ "A state has jurisdiction to prescribe rules attaching legal consequences to * * * (b) conduct of any person who is a member of its national forces." Restatement, *Foreign Relations Law*, Section 31. "Whatever may be the rule of international law as regards the ordinary citizen, we have not been referred to any rule of international law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits." Spenz, C. J., in *Mohammad Mohy-ud-Din v. The King Emperor*, Federal Court, India, May 9, 1946, [1946] Ann. Dig. 94 (No. 40). The accused was not a British subject. See also *Rex v. Page*, Courts-Martial Appeal Court, England, Nov. 10, 1953, [1953] Int'l L. Rep. 188;

tween violations of military discipline which relate directly to, and those only remotely related to, the performance of military duty. One would expect most violations of local criminal law to fall into the latter category. It can be said, of course, that the maintenance of discipline requires holding troops to a standard of conduct at all times whether they are on or off duty.¹⁷

The relationship between a visiting armed force and the receiving state is of paramount importance, for violations of local law may affect not only its ability to maintain itself as an effective force but its right to remain in the foreign country. The fact cannot be ignored that troops in uniform are less likely to be considered as individuals and more likely simply to be identified with the sending state, than even the most obviously British, French or American tourist or businessman. It is understandable, therefore, that a sending state should make violations of the local criminal law a breach of its military regulations, and its right to do so can hardly be challenged.

Whether the sending state must be able to exercise enforcement jurisdiction over its troops in the territory of the receiving state is a different issue. It is not quite true that the right to prescribe with respect to conduct abroad is valueless unless there is a correlative right to enforce. Theoretically, it is possible to postpone the exercise of the right to enforce until the offender is again on the territory of the sending state, and practically this is the procedure followed in cases involving an ordinary citizen. States that

Lahis v. Minister of Defence, Israel, Supreme Court, Feb. 1, 1949, [1949] Ann. Dig. 96 (No. 34).

¹⁷ "It is elementary that in order to carry out a military purpose it is necessary that the commander be able to maintain discipline. This requires that he have complete control over members of his forces at all times and in all places. If a foreign force is permitted to intervene and break this relationship, the military commander loses control over his forces and not only is his power to maintain discipline removed in the instances where this actually occurs but it is weakened in all instances by the knowledge that such interference is possible. If the soldier is subject to the civil authorities for acts committed when 'off duty' it is evident that the power of the military authorities to prevent such occurrences is practically nullified." U.S. Memorandum, Hearings, H.J. Res. 309, *supra*, note 1, at 417.

"It is not, of course, a matter of the Defense Department not wishing to have exclusive jurisdiction over its own people abroad. Every military commander would, of course, prefer for disciplinary reasons to have such exclusive jurisdiction." Mr. Brucker, Gen. Counsel, Dept. of Defense (later Sec. of the Army), *id.*, at 238.

exercise jurisdiction over their nationals for acts done abroad, or over aliens with respect to conduct abroad, do not presume to exercise enforcement jurisdiction in the territory of the state where the offense occurred. While undefined but narrowly limited jurisdiction may be exercised on board a merchant vessel in a foreign harbor by the flag state, a more extensive jurisdiction may be exercised on board a warship in a foreign harbor. Such jurisdiction may not, however, be exercised on shore, even with respect to the crew of a warship, without the express consent of the territorial state, except, perhaps, through a limited power to police.

Does military exigency require the recognition of a more extensive jurisdiction to enforce in the case of armed forces passing through or stationed on the territory of a foreign state than is needed in the case of a visiting warship? It seems clear that it does.¹⁸ Such forces perform their duties, often for long periods, in the territory of the foreign state, rather than primarily on a warship which is only temporarily in its harbor. Returning them to the sending state for trial for every infraction of discipline would be not only prejudicial to the effective administration of justice—as well as prohibitively expensive—but disruptive of the efficiency of the force.¹⁹

¹⁸ "Except as otherwise expressly indicated by the territorial state, its consenting to the presence of a foreign force within its territory implies that it consents to the exercise of the sending state's jurisdiction to enforce, with respect to the members of the force, rules reasonably necessary for the internal administration and discipline of the force." Restatement, *Foreign Relations Law*, Section 59, p. 188.

¹⁹ "[I]f you are to have visiting forces in a country at all they must be able to operate their own disciplinary system. That would be a reasonable exception to the rule that they are not governed by their own law but by the laws of the countries which they visit. If they visit countries as a military force under military regulation and military discipline it is in every way reasonable that they should be allowed to operate their own military law so far as the members of their forces are concerned." Mr. Sidney Silverman, 505 H.C. Deb. (5th ser.) 594 (1952).

But Italy "felt obliged under Italian law to maintain that United States courts-martial could not constitutionally operate on Italian soil. We do not believe that the Italian view * * * can be written off as one of their national idiosyncrasies." Secretary of Defense Wilson, Hearings on H.R. 8704 Before the House Committee on Foreign Affairs, 85th Cong., 1st Sess. 3447 (1957). It should be noted that the Italian position was based on Italian constitutional law, not on international law.

The conclusion that the military authorities of the sending state must be able to exercise enforcement jurisdiction in the receiving state should not, however, blind one to the fact that even in this area military exigency is a relative term. Military exigency is also the principal argument for recognizing the right of the military authorities of the sending state to exercise jurisdiction over civilian employees and dependents accompanying the visiting force. As will be pointed out below, the negotiators of the NATO Agreement recognized the primary jurisdiction of the sending state over civilian employees as a concession to the United States, not from conviction, and denied it with respect to dependents. Moreover, the Supreme Court has denied the jurisdiction of American courts-martial over both civilian employees and de-

The Czechoslovak Military Court of Appeal in London held in the Allied Forces (Czechoslovakia) case, July 15, 1942, [1941-1942] Ann. Dig. 123 (No. 31), that a Czechoslovak Military Court could sit in Great Britain only if authorized to do so by British law, and therefore could not try a Czechoslovak officer for an offence committed prior to the effective date of the Allied Forces Act, 1940.

The comments of Mr. Justice Clark in his dissenting opinion in *Reid v. Covert*, 354 U.S. 1 (1957), although they relate to the alternatives to trial of dependents by courts-martial, are pertinent. He said, at 88:

"Likewise, trial of offenders by an Article III court in this country, perhaps workable in some cases, is equally impracticable as a general solution to the problem. The hundreds of petty cases involving blackmarket operations, narcotics, immorality, and the like, could hardly be brought here for prosecution even if the Congress and the foreign nation involved authorized such a procedure. Aside from the tremendous waste of the time of military personnel and the resultant disruptions as well as the large expenditure of money necessary to bring witnesses and evidence to the United States, the deterrent effect of the prosecution would be *nil* because of the delay and distance at which it would be held. Furthermore, compulsory process is an essential to any system of justice. The attendance of foreign nationals as witnesses at a judicial proceeding in this country could rest only on a voluntary basis and depositions could not be required. As a matter of international law such attendance could never be compelled and the court in such a proceeding would be powerless to control this vital element in its procedure. In short, this solution could only result in the practical abdication of American judicial authority over most of the offenses committed by American civilians in foreign countries."

See also Mr. Justice Clark's comment along the same lines in his opinion for the majority in the companion case, reversed on rehearing, of *Kinsella v. Krueger*, 351 U.S. 470 (1956), note 12, at 479, and that of Mr. Justice Harlan in his concurring opinion in *Reid v. Covert*, 354 U.S. 1 (1957), note 12, at 76.

pendents.²⁰ The issue in these cases is not, of course, quite the same, but the principal argument was that military exigency—the need to maintain discipline—required recognition of the jurisdiction.²¹

The other side of this coin concerns the right of the receiving

²⁰ *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagen*, 361 U.S. 278 (1960); *McElroy v. Guagliardo* and *Wilson v. Bohlender*, 361 U.S. 281 (1960).

²¹ Mr. Justice Harlan, in his concurring opinion in *Reid v. Covert*, 354 U.S. 1, 71 (1957), said:

“The Government, it seems to me, has made a strong showing that the court-martial of civilian dependents abroad has a close connection to the proper and effective functioning of our overseas military contingents. * * * Suffice it to say that to all intents and purposes these civilian dependents are part of the military community overseas, are so regarded by the host country, and must be subjected to the same discipline if the military commander is to have the power to prevent activities which would jeopardize the security and effectiveness of his command.”

In a footnote, the Justice added: “This necessity is particularly acute with regard to peculiarly ‘military’ and ‘local’ offenses which must be dealt with swiftly and effectively. Thus security regulations at these military installations must be enforced against civilian dependents as well as servicemen; the same is true of base traffic violations, black marketeering, misuse of military customs and post-exchange privileges.”

Mr. Justice Clark, in his dissenting opinion, said, at 83: “It cannot be denied that disciplinary problems have been multiplied and complicated by this influx of civilians onto military bases, and Congress has provided that military personnel and civilians alike shall be governed by the same law administered by the same courts.”

He then quoted the following from Judge Latimer’s opinion in *United States v. Burney*, 7 U.S.C.M.A. 776; 21 C.M.R. 98 (1956):

“[It] is readily ascertainable that black market transactions, trafficking in habit-forming drugs, unlawful currency circulation, promotion of illicit sex relations, and a myriad of other crimes which may be perpetrated by persons closely connected with one of the services, could have a direct and forceful impact on the efficiency and discipline of the command. One need only view the volume of business transacted by military courts involving, for instance, the sale and use of narcotics in the Far East, to be shocked into a realization of the truth of the previous statements. If the Services have no power within their own systems to punish that type of offender, then indeed overseas crimes between civilians and military personnel will flourish and that amongst civilians will thrive unabated and untouched. A few civilians plying an unlawful trade in military communities can, without fail, impair the discipline and combat readiness of a unit * * *.”

Mr. Justice Clark added: “In addition, it is reasonable to provide that the military commander who bears full responsibility for the care and safety of those civilians attached to his command should also have authority to

state to exercise jurisdiction with respect to action taken against a member of the armed forces of the sending state by its military authorities. If an individual arrested, tried, and punished by such authorities has a cause of action in the court of the receiving state for assault, false arrest, or false imprisonment, or if a writ of *habeas corpus* may be issued, then the sending state has no effective power to exercise enforcement jurisdiction in the receiving state. Alternatively, if the accused's remedy in a court of the receiving state is limited to obtaining a review in the nature of a proceeding in error, or is even more limited, to a proceeding testing whether the military authorities of the sending state acted within their jurisdiction, then the military authorities have a right, limited but significant, to exercise enforcement jurisdiction. If the accused has no recourse to the courts of the receiving state, the enforcement jurisdiction of the sending state is complete. Extensive though perhaps not necessarily complete immunity from the supervisory jurisdiction of the receiving state is seemingly a necessary corollary of the right of the sending state to exercise enforcement jurisdiction in the receiving state.²²

It has been asserted that Chief Justice Marshall, in referring to the immunity of foreign armed forces from local jurisdiction, had in mind only this immunity from the supervisory jurisdiction of the local courts, not that of the troops from local criminal jurisdiction. His language can be so read and the view that it should be has elicited impressive support,²³ but the argument for the traditional reading seems persuasive.²⁴

regulate their conduct. Moreover, all members of an overseas contingent should receive equal treatment before the law. In their actual day-to-day living they are a part of the same unique communities, and the same legal considerations should apply to all. There is no reason for according to one class a different treatment than is accorded to another. The effect of such a double standard on discipline, efficiency, and morale can easily be seen." (at 85).

²² "Under the rule stated in this Section, the territorial state may not treat the actions of the military authorities of the sending state in their exercise of its jurisdiction as though they were illegal acts under the law of the territorial state." Restatement, *Foreign Relations Law*, Comment a to Section 59, p. 189.

²³ Barton, 1949 Brit. Yb. Int'l L., *op. cit. supra*, note 4, at 384. See the statement of the Attorney General, 99 Cong. Rec. 8767 (1953) and the statement of Senator Ferguson entitled "Immunity of Friendly Foreign Forces under International Law," 99 Cong. Rec. 8759 (1953).

²⁴ *Wright v. Cantrell*, [1943] 44 S.R.N.S.W. 45; [1943-1945] Ann. Dig.

The right to exercise enforcement jurisdiction referred to is, however, a jurisdiction over the armed forces of the sending state, not over the citizens or residents of the receiving state who have no connection with those forces. The effective administration of justice requires the power to compel the attendance of witnesses and the production of documents and to punish for contempt and perjury. It will be recalled that the lack of such power over others than its own nationals was a major weakness when the United States exercised extraterritorial jurisdiction in China. It seems most unlikely, nevertheless, that military exigency would ever be viewed as sufficiently compelling to justify the exercise of jurisdiction by the sending state over other than its armed forces, unless the authority of the territorial state was no longer operative in the area.²⁵

The effective exercise of enforcement jurisdiction likewise requires, if not police power in the visiting forces,²⁶ at least the sympathetic cooperation of the local police. For the local police to arrest for a violation of the sending state's military regulations is, however, for them to undertake to enforce foreign penal law, and to turn the offender over to the authorities of the sending

(No. 37), cited by Dr. Barton, reflects the view that the approach to the immunity of armed forces should be in functional terms, but does not, it is submitted, indicate the belief that only immunity from supervisory jurisdiction is, in those terms, necessary.

²⁵ In *Ministère Public v. Saelens*, Court Martial of Ypres, Belgium, Oct. 25, 1945, [1946] Ann. Dig. 85 (No. 35), the accused was charged with offences against the safety of the Allied armies in Belgium. He contended that a domiciliary search had been carried out by British MPs without a regular warrant. In dismissing the charges the court said: "The military police of an allied occupying Power is not competent to resort to domiciliary search for the purpose of investigating and repressing offences subject to Belgian law. No Belgian law grants British Military Police such rights. On the contrary, the Convention concluded on May 16, 1944 in London between the Belgian Government and allied Governments provided that Belgians who have committed crimes or delicts against allied armies shall be summoned before Belgian Courts Martial and that the crimes and delicts shall be investigated and punished in accordance with Belgian law."

²⁶ The British Government, in the World War I negotiations with the United States, indicated its belief that police power could not be exercised by the American military authorities outside the limits of their camps without the express consent of the British government. See p. 120, *infra*. See also Barton, 1954 *Brit. Yb. Int'l L.* 341. The United States Congress apparently assumed the contrary, in enacting the Service Courts of Friendly Foreign Forces Act. See p. 132, *infra*.

state is equivalent to extradition.²⁷ It is evident that the existence of such power in the local police might be successfully challenged and that the officer who exercised it might incur civil liability.²⁸

The issues thus raised are quite distinct from the issue whether the jurisdiction of the sending state both to prescribe and to enforce as to its forces in the receiving state is exclusive or the receiving state has concurrent jurisdiction. The argument that the sending state must have jurisdiction over its forces is compelling. That military exigency demands that such jurisdiction be exclusive is much more debatable and is indeed the crucial question.

Exercise of jurisdiction by the receiving state does not, in a direct sense, preclude the sending state from maintaining discipline. Even if an act is a much more serious offense under the military law of the sending state than under the criminal law of the receiving state, as may well be true, it does not necessarily follow that the sending state should have exclusive jurisdiction, though common sense would suggest that the receiving state should recognize a prior claim in the sending state.²⁹ More is, however, involved. Maintaining discipline, like maintaining respect for any system of criminal law, requires prompt prosecution. Concurrent jurisdiction, or rules for determining priority of jurisdiction which are less than clear cut, can occasion delay—which can be disruptive of discipline. A rule allocating exclusive or primary jurisdiction to the sending state could have the large advantage of eliminating such delays.

It has been said that a commander must be able not only to

²⁷ It was, however, held in *Katzu* Officer Commanding the Polish Military Prison, Jerusalem, Supreme Court, Palestine, July 7, 1944, [1943–1945] Ann. Dig. 165 (No. 45), that the fact a member of a foreign force was irregularly handed over to the military police of that force after apprehension by the local civil police did not deprive the foreign court martial of jurisdiction.

²⁸ “To justify his detention on British soil, authority must be found in the law of this country. * * *” Viscount Caldecote, C.J., *In Re Amand* [1941], 2 K.B. 239, a habeas corpus proceeding brought by a Dutch citizen arrested pursuant to the Allied Forces Act for desertion from the Netherlands forces.

²⁹ “[T]here may well be cases in which an offense may be a trifling matter from the point of view of our domestic law but a serious breach of discipline from the point of view of the military authorities. In such cases common sense would require the offender to be handed over to the military authorities to be dealt with, just as the British soldier is handed over in similar circumstances.” Sir David Maxwell Fyfe, Home Secretary, 505 H.C. Deb. (5th ser.) 566–67 (1952).

maintain discipline but to maintain control over his command. It is true that the exercise of jurisdiction by the receiving state removes the accused from the control of the sending state, and his unavailability may reduce the effectiveness of the force.³⁰ The "for want of a nail" approach can, however, be pushed too far. The alternative to the exercise of jurisdiction by the receiving state is not complete immunity, but trial by a court-martial of the visiting forces, and the availability for duty of the offender, at least in an emergency, can be as much affected by his court-martial and imprisonment in a military prison as by his detention, trial and imprisonment by the receiving state. The argument that if one soldier may be imprisoned a thousand may be³¹ is

³⁰ The Canadian Factum refers to the "* * * fundamental principle which requires that the commander of the visiting troops be not interfered with in the control and disposition of his forces * * *," and continues: "It is difficult to see how a visiting allied force could fully and efficiently function as an organization of the State to which it belongs if its members who remain component parts thereof and subject to be called to action at any time as long as they retain their connection therewith, were liable to be arrested, prosecuted and detained by the local authorities for offenses committed by them while on leave." Hearings, H.J. Res. 309, *supra*, note 1, at 431.

It was said in the British Parliament that: "Clearly, if a body of foreign troops is serving in this country it is far better that they should serve under their own code of discipline than be amenable to the courts of this country. * * * Under our own code, for a British soldier to fight a citizen of a foreign country in which he happens to serve is a much more serious offence under the military code than under the civil code. Obviously an American commander, just like a British commander who has British troops serving in America, is very concerned about the reputation of the troops under his command and the maintenance of discipline. It would not be much use unless he had effective control, and * * * it is of paramount importance that American commanders should have control of their forces here. * * * The point which we are really discussing is who is to control the forces * * * are they to be effectively controlled by the American commander or by the chairman of the bench of magistrates in the area in which they are serving. I prefer that effective control shall rest in the hands of the American commander." Mr. George Wigg, 505 H.C. Deb. (5th ser.) 1073-76 (1952).

³¹ "But more important even than the weakening of discipline by the exercise of divided authority is the fact that it gives to the local authorities the power to remove a nation's troops from its control, for if one soldier can be arrested and imprisoned by the local authorities so can a thousand. If enlisted men can be arrested and imprisoned, so can their officers, including even the commander of the forces himself. Thus also the purpose for which the forces were admitted can be defeated and the local sovereign be placed in the contradictory position of permitting the foreign forces to

not entirely persuasive. A thousand may be imprisoned only if there is a reasonable basis for saying they have committed a thousand crimes. The alternative is to assume that a receiving state would deliberately undertake to arrest innocent men, presumably with the deliberate intent of crippling the foreign force. Power may be abused, but abuse of power on such a scale seems unlikely—even though there may be degrees of friendship between friendly allies.

The argument that a commander must have exclusive control over his forces at all times has not proved compelling with respect to the crews of warships on shore leave. Its weight with respect to land forces has been challenged on pragmatic grounds by an American judge of the Egyptian Mixed Courts³² and questioned by the Departments of State and Defense.³³

The advent of nuclear weapons, especially those married to missiles, suggests, however, a need to reappraise the issues of discipline and control. Now that the reaction time available to respond to a nuclear onslaught is measured in minutes, the need for strict discipline and complete control within a command can be imperative. Moreover, to distinguish between those troops

come on his territory to accomplish a purpose and then preventing them from accomplishing it." U.S. Memorandum, Hearings, H.J. Res. 309, *supra*, note 1, at 417.

³² "Certainly the fears expressed by Colonel King find no support in the acid test of practical experience, as exhibited in the score or more of cases in which the principle was applied in Egypt. In no quarter was the suggestion seriously made that the trial before the courts of the land of offenders against the public peace had in any manner obstructed military discipline." Brinton, "The Egyptian Mixed Courts and Foreign Armed Forces," 40 A.J.I.L. 737, 739 (1946).

³³ General Walter Bedell Smith, Under Secretary of State, in a letter to Senator Wiley, Chairman of the Senate Foreign Relations Committee, said: "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. * * *

After quoting the opinions of Generals Bradley and Ridgway, he continued:

"It would therefore appear clearly to be established that exclusive jurisdiction of our forces, civilian components, or dependents abroad, is not necessary from the military point of view. I wish to add my personal endorsement, based upon my own military experience, to that conclusion." 99 Cong. Rec., pp. 8776-77 (1953).

armed with nuclear weapons and others could well involve a too great security risk.

B. The Interests of Individuals

Debate in the United States regarding immunity for our troops abroad has centered not on military exigency but on the interests of the accused. It is the thought of a seaman or soldier unjustly accused and unfairly tried, confined in a foreign prison, rather than of a warship or army rendered less effective, which has troubled many. The legalistic answer is that immunities are accorded to protect the interests of the state, not the individual. With that answer the ordinary citizen,³⁴ accused of a crime abroad, must be content. The same is true for the majority of government employees stationed abroad. This does not mean, of course, that the individual or his government must acquiesce in any treatment he may receive at the hands of a foreign government. He is protected by the ordinary rules of international law concerning the denial of justice, and a member of the armed forces is entitled to the same protection.

The case of a member of the armed forces can be distinguished from that of the ordinary citizen only if it can be related to military exigency. It has been said that immunity for our forces has a bearing upon morale, but the evidence suggests that at least in practice the argument lacks factual support.³⁵ Again, it has

³⁴ See 2 Hackworth *Digest of International Law* 84 (1940-41). That a person is an American citizen does not "give him an immunity to commit crimes in other countries, nor entitle him to demand, of right, a trial in any mode other than that allowed to its own people by the country whose law he has violated * * *." *Neely v. Henkel* (No. 1), 180 U.S. 109, 123 (1901).

³⁵ General Hickman, Ass't. Judge Advocate General, Department of the Army (later Judge Advocate General) testified in the Hearings before a Subcommittee of the Committee on Armed Service, United States Senate, 84th Congress, 1st Sess., 40, March 29, 31 and June 21, 1955, that "The comments which have been received from field commanders and from Judge Advocates in the field, our legal officers, indicate that in all but a very few countries the operation whereby military jurisdiction is shared with foreign courts has not had an unhealthy effect upon the accomplishment of our military missions or upon the morale and discipline of our forces."

"The significant exceptions are French Morocco and Turkey where extended delays in investigations and trials have, to a certain extent, impaired morale and discipline."

For General Hickman's comments on individual countries, see *id.*, at 16. Among the more interesting are:

"The service commanders concerned have reported that arrangements and

legal procedures relative to the exercise of jurisdiction in Canada are entirely satisfactory and have resulted in no different effect on the station mission, morale, and discipline than if this station were located in the United States." *Id.*, at 34. "The Air Force commanders state that the jurisdictional arrangements in French Morocco have had a negligible impact on the accomplishment of their mission, but that the slowness of the local judicial process of the local courts has adversely affected morale and discipline, while the possibility of trial by local courts has had a positive effect on discipline." *Id.*, at 36. "The Navy commander states that an amicable relationship exists between the military and Philippine authorities under existing arrangements, and that the exercise of jurisdiction by Philippine authorities over our personnel has favorably affected the morale and discipline of our forces." *Id.*, at 37.

General Hickman testified in the hearing before the same subcommittee on February 9, 1956 that: "The comments which have been received from commanders in the field indicate that although some are adverse to the jurisdictional arrangements, nevertheless in all but one of the countries in which by agreement military jurisdiction is shared with foreign courts they consider that these arrangements have not had a detrimental effect upon the accomplishment of our military missions or upon the morale and discipline of the members of the forces. The exception is French Morocco where extended delays in investigations and trial have, to a certain extent, impaired morale and discipline." p. 32. "The Air Force commander (in French Morocco) states that the jurisdictional arrangements have had no direct effect upon the accomplishment of the mission of the command. He reports, however, that morale of personnel involved in minor offenses is affected by long delays between the date of the offense and the date of final adjudication, and that the amount of time spent by other personnel in assisting the accused and in monitoring proceedings is disproportionate to the offense in the majority of cases." p. 29. "The Army and Air Force commanders (in the Philippines) report that, except for minor inconvenience in some cases, jurisdictional arrangements have had no adverse effect upon the accomplishment of the mission or upon the morale and efficiency of the forces. The Navy commander reports that 'the impact upon morale had been quite favorable and at the same time the posed threat of arrest and conviction by Philippine courts with possible imprisonment in a Philippine jail contribute to good discipline.'" p. 29. "The Army and Navy commanders (in Canada) have reported that jurisdictional arrangements have had no adverse effects upon the morale and efficiency of their forces. The Air Force commander has stated that 'local jurisdictional arrangements have been of such a highly satisfactory nature as to assist this command in the performance of its mission.'" p. 25.

In the April 9, 1957 Hearing before the Subcommittee General Hickman again testified regarding the situation in various countries. "The Army commander in France has reported that the jurisdictional arrangements have had no significant effect upon the accomplishment of his mission. He stated that * * * the personnel of his command are tending more and more to accept as normal the right of French authorities to exercise jurisdiction in

been urged that, unlike ordinary citizens, members of the armed forces go abroad involuntarily. They nevertheless go at the order of the sending, not the receiving state.³⁶ This suggests that the sending state shall do all it can to ensure that members of its armed forces receive every protection which the law of the receiving state affords an accused. This duty the United States has recognized in full measure. It may suggest also that the sending state should do all it can to secure immunity from the receiving state's jurisdiction for its forces. It is much less clear that the receiving state has any obligation to accord immunity to the members of a visiting force because they are, in a personal sense, within its territory involuntarily. The belief that there is no convincing basis for distinguishing the case of a member of the armed forces from that of an ordinary citizen has led some to conclude they should be equally subject to the jurisdiction of the receiving state.³⁷

matters of a nonmilitary nature. However, he stated that the French procedure permitting the combined trial of criminal and civil actions is still a source of irritation and dissatisfaction.

* * * * *

"He (the Air Force Commander) stated also that time delays between the occurrence of an incident within the primary jurisdiction of France and the decision by French authorities whether to retain their jurisdiction have adversely affected his disciplinary control and the prompt administration of military justice. That would be because he would have to hold up disciplinary action in a case while waiting to learn whether he could try it by court-martial." p. 17.

³⁶ [A]s to the implied preferential treatment which might or should be given to a soldier because he is drafted and sent abroad, of course, I am extremely sympathetic to that thought: I have been at this for a long time. But technically, the fact remains that a soldier who is sent abroad, regardless of whether he is drafted or whether he volunteers, goes abroad at the will of the United States and at the will of the United States Congress, so technically, I believe, as far as civil offenses are concerned, and subject always to the safeguards of denial of justice which the United States always holds, and subject always to the fact that the United States will not itself in similar cases and under identical conditions relinquish its sovereignty, there should not be preferential treatment." General Smith, Under Secretary of State, Hearings, Before the Senate Foreign Relations Committee on Status of Forces, 83d Cong., 1st Sess. 56 (1953).

³⁷ "I can see no reason why the United States should feel that such a condition should attach to these persons any more than to other American citizens present overseas on their own or official business. The standard of conduct and of jurisdiction should be identical." General Smith, Under Secretary of State, letter to Senator Wiley, 99 Cong. Rec., 8777 (1953).

Those who feel that the case of a member of the armed forces is different from that of the ordinary citizen have made much of the point that American troops, if subject to the jurisdiction of the local courts, would be tried under a system of law with which they are not familiar³⁸ and, particularly, would not enjoy the rights guaranteed by the United States Constitution.³⁹ The force of the latter argument is somewhat diminished because not all constitutional guarantees apply to actions by a state or to courts martial. Apart from this, the force of the argument varies from country to country, depending on the rights which an accused enjoys in each. There is need, in this connection, to distinguish between those rights which the organic law guarantees and those which in practice are accorded. There can be an abuse of rights of the accused in any system. One should not compare systems of criminal law in terms of the theoretical protection accorded by one and the abuses which may occur, in practice, in another, unless, of course, those abuses are chronic. Again, the United States Senate included in the instrument of ratification of the NATO

"It seems to me that we should be concerned with whether or not an American citizen, whether a member of our Armed Forces, a dependent, or part of our civilian force, is accorded the same rights and privileges, and is tried under the same procedure that any citizen of that receiving state charged with a similar criminal offense would be entitled to have." Senator George, Hearings, Sen. For. Rel. Com., NATO Treaties, *supra*, note 3, at 49.

See also Congressman Fulton's statement, Hearings, H.J. Res. 309, *supra*, note 1, at 25: "The general question comes up how much protection can or should be given by the United States Government to United States nationals, military or civilian, abroad. Should the United States ask for the protection of United States courts and justice for every civilian who goes abroad as a tourist, so long as he has a visa and a passport? How far should or can the United States go in this general field? Or should the United States make a special case of United States servicemen who are stationed abroad either voluntarily or involuntarily, and extend the protection beyond the line of their duty, when servicemen are traveling as tourists or are out of uniform in civilian life in the foreign country."

³⁸ The argument can in general be made only with respect to procedure, since an offense against local law is normally an offense under the Uniform Code of Military Justice. This is recognized in Senator Bricker's statement: "The fact is that American servicemen are reasonably familiar with the Uniform Code of Military Justice and their rights thereunder. They do not know and we do not know anything about the criminal procedure of the other NATO countries and Japan." 99 Cong. Rec., 8747 (1953).

³⁹ See the remarks of Senator McCarran, 99 Cong. Rec., 8732-8734; Senator Dirksen, *id.*, at 8773.

Agreement a statement establishing a procedure for safeguarding the rights of the members of our forces.⁴⁰ The Senate directive has been vigorously implemented by the several services.

Trial by a court-martial of the sending state also means that the accused is tried by his fellow nationals. There is much evidence that this factor has been paramount in the minds of many who have felt most strongly that the United States should have exclusive jurisdiction over its forces abroad.⁴¹ The same point has been in part responsible for the refusal of some states to extradite their own nationals. The counter argument is that normally a man's appropriate judges, particularly in the common law system, are deemed to be those resident where the crime was committed.

A related point is that a court-martial conducted by the sending state has the great advantage, from the standpoint of the accused, that the prosecutor and judges speak his language.⁴² From the standpoint of the victim, the witnesses who are residents of

⁴⁰ See page 261, *infra*.

⁴¹ “* * * [I]n my humble opinion they still should be tried by Americans under the American system.” Congressman Bow, Hearings, H.J. Res. 309, *supra*, note 1, at 19.

“I don't know of anyone who would want to be tried, whether guilty or innocent, in a foreign court.” Congressman Le Compte, *id.*, at 21.

“I think the difference as to this question of trial by jury, even in Great Britain where our common law came from, is that he does not have a trial by jury of his peers, because his peers could only have been of his own country.” Congressman Richards, *id.*, at 104.

“* * * a man presumably might not get a trial by jury, if he is tried by court-martial, but * * * he would get a trial by Americans.” Congressman Adair, *id.*, at 104.

“Anglo-American criminal law is rooted in the principle that the accused may be tried only by his fellow citizens and only by those citizens who reside near the scene of the alleged crime. Here we are concerned with the rights of Americans in a military rather than a civilian community. In essence, however, the same principle is involved. Shall Americans subject to the jurisdiction of the United States be tried by other Americans who live in the vicinity of the scene of the alleged crime?” Senator Bricker, 99 Cong. Rec., 8741 (1953).

⁴² Congressman Rodino referred to “[T]he handicap of his being tried in a foreign country. First, he is not fluent in the language, even though he may have some knowledge of that in which he is being tried. He is in a land of nationals foreign to him in every sense of the word. Their customs, their laws, their attitudes are strange to him.” Hearings, H.J. Res. 309, *supra*, note 1, at 66.

the receiving state and local officials who may be involved, it has the great disadvantage that the judges and prosecutor may not speak their language.⁴³ Serious offenses against the local law normally involve some local residents; even minor offenses, e.g., traffic violations, involve at least the arresting officer. The issue is more than one of convenience, since it goes to the fairness of the trial, from the standpoint of all concerned.

A related issue is that of possible prejudice, reflected in the manner and diligence with which the investigation and prosecution are pursued, in the way in which the trial is conducted, in the verdict, and in the severity of the sentence. Fear has been expressed that prejudice against foreigners, and particularly against American troops, would be shown in trials of members of our forces in foreign courts.⁴⁴ There is, of course, a possibility of prejudice in favor of the accused if the trial is before a court-martial of the sending state.

C. The Interests of the Receiving State

The status of forces problem requires more than gauging the significance of such concepts as the equality and independence of states and weighing the demands of military exigency and of protection of the individual. These must be balanced against the legitimate interests of the receiving state.

⁴³ Judge Brinton, referring to the cases which arose in Egypt in World War II, said: "Indeed practical considerations suggest strong reasons in favor of the exercise of the civil authority. The offenses in question were, by their very definition, committed outside the military precincts and invariably involved, or were directed against, members of the civilian population. They also involved the intervention of the local police and the setting in motion of those measures of immediate record of the facts recorded in an official *procès-verbal* which forms, in general, such an admirable feature of European criminal systems. For the most part they have been brawls and shootings in the public street and in cafés, or robberies or other similar offenses affecting public peace and order, where the language used by the available witnesses has often been one with which the military authorities are unfamiliar. The difficulties presented by the trial of such cases by a court-martial remote from the scene of the offense are obvious." Brinton, "The Egyptian Mixed Courts and Foreign Armed Forces," 40 A.J.I.L. 737, 739 (1946).

⁴⁴ "Their attitudes are bound to be unsympathetic to a transgressor in their midst. Moreover, the very presence of our troops abroad causes irritations." Cong. Rodino, Hearings, H.J. Res. 309, *supra*, note 1, at 66; see also comments of Senator Long, 99 Cong. Rec., 8778 (1953); and Senator Hendrickson, *id.*, at 8738.

It will be recalled that primacy is normally accorded the territorial principle. Anglo-American law in particular is rooted in this concept. The receiving state therefore can stand upon the strongest of the recognized bases of jurisdiction in claiming jurisdiction over visiting forces. A major factor in this approach has been the idea that the maintenance of order within its borders is one of the highest functions of the modern state, and, by necessity, peculiarly its function. Any state is understandably reluctant to entrust the protection of the lives and property of its citizens to a foreign state. States have generally been prepared to show such trust unqualifiedly only in cases involving heads of states and diplomats accredited to them. Other representatives may enjoy immunity for criminal acts done in the performance of official duty, but that such immunity exists is at best debatable. All other immunities are hedged about with qualifications which, in general, reflect the recognition of the interests of the territorial state, particularly its basic right to protect the persons and property of its citizens.

Attitudes with respect to the status of land forces have been largely influenced by this fundamental consideration.⁴⁵ The misgivings of receiving states asked to concede exclusive jurisdiction over visiting forces have been met by recognition of the moral if not the legal obligation of the sending state to punish for violations of local law.⁴⁶ There is no claim that visiting forces

⁴⁵ “* * * [I]t is the protection of our own nationals which is being confided to their criminal jurisdiction.” Mr. Garro Jones, in the debate on The United States of America (Visiting Forces) Act, 382 H.C. Deb. (5th ser.) 886, (1942).

“We are reducing ourselves to the position in which certain countries were put by us under the Capitulation Treaties.” Mr. Clement Davies, *id.*, at 894.

“I am not willing as a United States citizen to have foreigners in this country not subject to our laws, when they are not on official or diplomatic duties. I want them tried by United States courts for the protection of United States citizens.” Congressman Fulton, Hearings, H.J. Res. 309, *supra*, note 1, at 89.

⁴⁶ General Walter Bedell Smith, Under Secretary of State, referred to the need “to ensure that the people of the countries who receive troops are protected with respect to their lives, their property and their security from the illegal activities of foreign troops or civilians.

“It is a problem which always confronts us when we are operating in allied countries. During the war it is met by stern measures. In time of peace we have to apply all the legal safeguards which we ourselves, as a

should be free to violate the local law at will.⁴⁷ The situation sometimes met in extradition cases, where a state refuses to extradite its own national even though it is unable or unwilling to try him under its own law, is not likely to arise.

The courts-martial of a sending state cannot, of course, directly enforce the laws of the receiving state. When the United States exercised extraterritorial jurisdiction in China, this raised a major problem, for it was not clear what laws of the United States could be considered as applicable to conduct in China. Nor was there any general rule that any violation of Chinese law was a violation of American law.

Today, the situation with respect to American troops abroad is quite different. Not only are many acts made criminal if com-

nation, feel necessary for its citizens." Hearings Sen. For. Rel. Com. NATO Treaties, *supra*, note 3, at 3-4.

Colonel King commented: "It goes without saying that it is the right and duty of the government of the host country to make sure that the persons and property of its nationals are effectively protected against crimes by members of the visiting forces, and that the latter's immunity from prosecution in the local courts is not used as a cloak to enable them to commit such crimes with impunity. In the several expeditionary forces which the United States sent to friendly foreign countries in the first World War and in others, the military and naval officers in command have always been ready to prosecute before their own courts-martial any member of their own forces against whom the local authorities (or any individual national of the host country) presented *prima facie* evidence of having committed a crime or offense." *Op. cit. supra*, note 2, at 558.

The United Kingdom, in the Exchange of Notes which preceded the enactment of the United States of America (Visiting Forces) Act, 1942, stated as one of the points on which it was indispensable first to reach an understanding, 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, *infra*, page 130, n. 51.

⁴⁷ "This problem is one with which the Navy has dealt with since the Revolution, the fundamental policy being that individuals in another country must abide by the laws and customs of that country and that extradition or release from foreign jurisdiction is a matter of arbitration in each case." Admiral Carney to Secretary of Defense Wilson, quoted at 99 Cong. Rec., 8770 (1953). The statement goes further, of course, and assumes the receiving state has concurrent jurisdiction to enforce. It should be noted that the United States of America (Visiting Forces) Act, 1942, was carefully drafted to grant the American forces immunity only from the enforcement jurisdiction of the British courts, not to exempt them from the obligation to obey British laws. *Infra*, page 129.

mitted by a member of the armed forces, wherever he may be, but most though not quite all violations of the local criminal law are offenses under the Uniform Code of Military Justice. This does not resolve all difficulties, however, and neither are all the objections of a receiving state answered. The sending state exercises jurisdiction through courts-martial, which may, and normally do, sit in the receiving state. They may, indeed, be required to do so in some cases.⁴⁸ This meets one of the basic objections to the exercise by a state of jurisdiction over offenses committed abroad because the difficulty involved in the transportation of witnesses or use of written statements is reduced. The effective exercise of jurisdiction requires, however, the power to investigate, arrest, summon witnesses, punish for contempt, and the like. No state is likely to permit the military authorities of the sending state to exercise such power over local residents, and it certainly cannot be required to do so.

This difficulty can be overcome in part by arrangements for enlisting the cooperation of the local authorities, but trial by the sending state still means trial by court-martial. This is not the place for an appraisal of courts-martial, or specifically, American courts-martial, as legal institutions. It is true they are not civil courts, or constituted as civil courts are constituted, but is this relevant to the problem? For some it is, since it raises the issue of the supremacy of the civil authorities over the military. In the United Kingdom, and elsewhere in the Commonwealth, it is a fundamental constitutional principle that a member of the British armed forces is subject to the jurisdiction of the civil courts for any offense against the civil law, in war and peace. Even conviction by a court-martial and the serving of any sentence imposed by it does not preclude trial and sentence by a civil court for the same offense.⁴⁹ The rule in the United States is that

⁴⁸ Both the United States of America (Visiting Forces) Act, 1942, of Great Britain 5 & 6 Geo. 6, C. 31 and our own Service Courts of Friendly Foreign Forces Act, 22 U.S.C. 702 (1944), required trial in the vicinity if the offense was against a civilian.

⁴⁹ Professor Goodhart, in "The Legal Aspect of the American Forces in Great Britain," 28 A.B.A.J. 762, 763 (1942), wrote that: "* * * [T]he important constitutional principle * * * involved is one of the essential ones on which the English constitution is based. It is described by Dicey as 'the fixed doctrine of English law that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary

courts-martial and the civil courts have concurrent jurisdiction, although this may not be a constitutional requirement.⁵⁰ In most European countries the jurisdiction of the military authorities over the armed forces is exclusive.⁵¹

The risk against which the British constitutional principle is

citizen.' It is part—and perhaps the most important part—of 'the rule of law' which is the distinctive feature of the British system. 'It becomes, too, more and more apparent that the means by which the courts have maintained the law of the constitution have been the strict insistence upon the two principles, first, of "equality before the law," which negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary courts, and secondly, of "personal responsibility of wrongdoers," which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors.' This means that the British soldier is subject to the jurisdiction of the ordinary courts, and is responsible to them for any breaches of the law which he may commit. So long as this principle is maintained, it will be impossible for any one to establish a military dictatorship in Great Britain."

Professor Goodhart traced the history of the principle, noting a statute of 1399 (1 Henry IV, c. 14); a provision of the Petition of Right (1625); the vigorous opinion of Lord Chief Justice Hale in the Case of Captain C [(1673) 1 Ventris 251] in which he said that "It seems you are grown very headstrong: that you who ought to know, that every officer and soldier is as liable to be arrested as a tradesman. * * * You are the King's servants, and intended for his defence against his enemies, and to preserve the peace of the Kingdom, not to exempt yourself from the authority of the laws. * * * Whatever you military men think, you shall find you are under the civil jurisdiction, and you but gnaw a file, you will break your teeth ere you shall prevail against it;" and the Mutiny Act of 1689, which said that: "Provided always, That nothing in this Act contained shall extend or be construed to exempt any Officer or Soldier whatsoever from the ordinary processe of Law."

The principle, Professor Goodhart adds, has been so strictly maintained that the doctrine of "autrefois convict" does not derogate from it, although a soldier tried by a civil court cannot be tried for the same offense by a court-martial. Moreover, the principle is not affected by war or insurrection.

⁵⁰ "Courts-martial have exclusive jurisdiction of purely military offenses. But a person subject to the code is, as a rule, subject to the law applicable to persons generally, and if by an act or omission he violates the code and the local criminal law, the act or omission may be made the basis of a prosecution before a court-martial or before a proper civil tribunal, and in some cases before both. * * * The jurisdiction which first attaches in any case is, generally, entitled to proceed." Manual for Courts-Martial, United States, 1951, p. 16. See also Lt. Comd. Griffin, "Trial by Civil or Military Courts," JAG J. 11. (July 1948).

⁵¹ Goodhart, *op. cit. supra*, note 59, at 762.

directed is, as Professor Goodhart says, abuse of the civil rights of civilians and subversion of the government by the military. Giving the concept the status of a constitutional principle accents the significance attached to it. The principle was, however, formulated with reference to a state's own armed forces. It can be argued it has no relevance to the status of visiting armed forces. A majority of the Canadian Supreme Court, however, held it applicable to visiting armed forces.⁵²

⁵² "I have no doubt that this principle applies to all armies, British or foreign, except in cases in which, as by the legislation mentioned dealing with the American forces in England, it has been changed by legislative enactment, or the equivalent thereof. There can be no doubt that in Great Britain it is settled as indisputable that this is a principle of law applicable in strict law to all armies there, except in so far as it has been modified by statute.

* * * * * *

"I find it impossible to escape the conclusion that the United Kingdom has never assented to any rule of international law by which British courts are restricted in their jurisdiction in respect of visiting armies or members of them. In other words, no such rule as that now insisted upon has ever been a part of the law of England; and this applies equally to Canada. The fundamental constitutional principle with which it is inconsistent is a part of the law of every Province of Canada, the constitutional principle by which, that is to say, a soldier does not, in virtue of his military character, escape the jurisdiction of the civil courts of this country." Sir Lyman P. Duff, C.J.C., in *Reference re Exemption of U.S. Forces from Canadian Criminal Law* [1943] 4 D.L.R. 11, 16, 21.

Hudson, J., concurred in the opinion.

Rand, J., in a separate opinion, said:

"There is no doubt that constitutional principle in England has for several centuries maintained the supremacy of the civil law over the military arm. If that principle meets the rule of immunity to foreign forces arising in the circumstances stated, then the latter must give way. The principle is intended to maintain a nation of free men through an equality before the law and a common liability to answer to the same civil tribunals. The citizen taking on the special duties of a soldier abates no jot of that accountability. The independence of that law and its courts in the armed forces would open the way to military domination and the loss of that freedom which equality secures.

"Can that principle be said to be infringed by jurisdiction in a military court of the United States over its own forces which for the purposes of both countries are temporarily on our soil? It is, of course, not foreign but domestic military usurpation against which the principle is a bastion and it might strongly be argued that the objection to conceding such a jurisdiction is not that it is military but that it is foreign. But I have come to the conclusion that that principle stands in the way of implied exemption when

Whether that judgment was correct or not, the fact that states like the United States and Great Britain give their civil courts concurrent jurisdiction over their own armed forces has some bearing on the persuasiveness with which such a state can argue that its armed forces must always be under the exclusive control of their commander. A significant distinction in terms of control exists between subjecting the members of a state's armed forces to the jurisdiction of that state's civil courts and acquiescing in the exercise of jurisdiction over them by the civil courts of a foreign state. Yet the fact remains that a state whose armed forces are subject to the jurisdiction of its civil courts cannot, as a sending state, argue with complete impunity that military necessity demands they be immune from the jurisdiction of foreign civil courts. When in the position of a receiving state, such a state is likely to be reluctant to accord immunity from its jurisdiction to visiting forces.

Courts of a sending state are not only courts-martial; they are, by definition, foreign courts operating under a foreign system of law. This runs counter to a principle, related to but broader than the British constitutional principle referred to, and widely shared. It is the belief that all those within the territory of the state—citizens or aliens, soldiers or civilians—should be answerable to and be protected by the same courts administering the same law.⁵³ Any departure, for any group, whether it gives them a

the act complained of clashes with civilian life. The question is what is the workable rule implied from the invitation, that fits into the fundamental legal and constitutional system to which it is offered. It is from the background of that system that the invitation and its acceptance must be interpreted. It cannot be said to be clear that there has been a recognition of either a usage or principle by the Parliament or the courts of this country or of Great Britain that would raise the immunity against the constitutional safeguard of accountability before a common tribunal. That safeguard, however, is concerned primarily to vindicate, not Canadian courts, but Canadian civil liberty. It does not, therefore, stand in the way of a rule limited to the relations of members of a foreign group admitted into Canada for temporary national purposes with persons other than members of the Canadian public: *Cheung case (supra)* and the memorandum of Sir Alexander Cockburn in the Report of the Royal Commission on Fugitive Slaves quoted therein." *Id.*, at 49–50. Cf p. 128, *infra*, no. 43; p. 131, *infra*.

⁵³ A guest editorial from The Times Weekly Edition, London, Aug. 5, 1942, in 28 A.B.A.J. 679, said: "For centuries it has been a fundamental principle of English law that all charges relating to crime alleged to have been committed within the realm, whatever the nationality or condition of

more or less favored position, may be met with objections.⁵⁴ The depth of conviction with which the view of the objectors can be

the person accused, are matters for the determination of the King's courts alone."

In the debate in the House of Commons on the Bill to implement the NATO Agreement, Mr. Eric Fletcher said, 505 H.C. Deb. (5th ser.) 586 (1952): "[M]embers of the visiting Forces and their civilian components will be able to commit crimes which cannot be tried in the courts of this country. That is something which, *prima facie*, shocks those who have been brought up to respect the deep-seated constitutional principle of this land.

"* * * They will only be answerable for their crimes to the exclusive jurisdiction of foreign service courts. There has not been anything like that in this country since the Middle Ages, when a certain section of the community could claim benefit of clergy, and when there was a certain Papal jurisdiction which could defeat the claims of the English common law courts.

"[It] must be somewhat humiliating for those who have always believed in the paramountcy of the British courts in trying and bringing to justice any and every crime committed in this country."

Sir Frank Soskice, in a later debate, said: "From the point of view of the ordinary person, that which is the most surprising and perhaps least pleasing is the fact that an American citizen can, while in this country, commit grave offences and, nevertheless, not be subject to the jurisdiction of our own criminal courts. We are, by long tradition—as are most other countries—used to the concept that our criminal courts have jurisdiction over all offences committed within our territory * * *.

"They [inter se and on duty offences] include a very large number of serious offences—murder, rape and that sort of thing. It shocks ordinary persons and is, *prima facie*, surprising to them that our own criminal courts should not be able to try all persons who, within the jurisdiction of those courts, commit those offences." 526 H. C. Deb. (5th ser.) 1290 (1954).

⁵⁴ "Exclusive criminal jurisdiction, amounting to extraterritoriality, itself creates difficult problems. In the eyes of the local population, it sets Americans apart as a special, privileged class, and this fact acts as a constant irritant. If American courts-martial return verdicts of acquittal, or if they impose sentences which seem lenient to the aggrieved parties, they are open to charges of favoritism. If, on the other hand—as has sometimes happened—they impose sentences substantially greater than those provided by local law for the same crime, they can be accused of flouting local customs and sensibilities. Regardless of how fair and just American courts-martial may be, the existence of exclusive criminal jurisdiction seems to the other country to be an infringement of its sovereignty." Letter of General Walter Bedell Smith, Under Secretary of State, to Senator Wiley, 99 Cong. Rec., 8777. (1953).

Two amendments to the Bill to implement the NATO Agreement were discussed in the House of Commons, one to prohibit a sentence "not permitted by the law of the United Kingdom" and the other "Provided always that no one shall be punishable within the United Kingdom for an offence

held and the vigor with which it can be expressed are shown in the *Ranollo* case.⁵⁵ Such view is the cornerstone supporting the principle of territorial jurisdiction.

The preceding discussion suggests these general conclusions: Military exigency requires that a state have jurisdiction to prescribe rules with respect to the conduct of its armed forces abroad, and also that it have enforcement jurisdiction in the receiving state. Exercise of such jurisdiction must not be subject to any or, possibly, only the most limited supervisory jurisdiction of the receiving state. All of this is essential if the commander is to maintain that discipline which is required if the force is to be effective in ensuring the security of the state. It is not, however, by any means clear that military exigency requires that the sending state have exclusive jurisdiction over its forces. There

based upon racial discrimination." Neither was adopted. 505 H.C. Deb. (5th ser.) 1122, 1126, 1145, 1146 (1952). The NATO Agreement, Art. 7(a), provides: "A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case."

⁵⁵ *Westchester County v. Ranollo*, 187 Misc. 777, 67 N.Y. Supp. 2d, 31; 41 A.J.I.L. 690 (1947). In rejecting the argument that all personnel accredited to the United Nations were immune, the court said: "To recognize the existence of a general and unrestricted immunity from suit or prosecution on the part of the personnel of the United Nations, so long as the individual be performing in his official capacity, even though the individual's function has no relation to the importance or the success of the Organization's deliberations, is carrying the principle of immunity completely out of bounds. To establish such a principle would be in effect to create a large preferred class within our borders who would be immune to punishment on identical facts for which the average American would be subject to punishment. Any such theory does violence to and is repugnant to the American sense of fairness and justice and flouts the very basic principle of the United Nations itself, which in its preamble to its Charter affirms that it is created to give substance to the principle that 'the rights of all men and women are equal.' * * * It is only by a proper distinction of the immunity to be accorded to the personnel of the United Nations and by a proper circumscription of the effect to be given the Congressional language that the American people can be assured that the hospitality accorded the United Nations on American soil will not be abused by conduct on the part of even the humblest of its personnel in a manner that is hostile to the American concept of the equal administration of justice among our people. This Court feels strongly * * * that such immunity should be available only when it is truly necessary to assure the proper deliberations of the Organization * * *."

is substance to the argument that a commander must have exclusive control over the force, particularly now that modern weapons and technology have made reaction time so short. Against these considerations must be set the very real considerations supporting the territorial principle and hence jurisdiction in the receiving state. To these must be added the fact that any exercise of jurisdiction by one state in the territory of another is inevitably less than wholly effective because of certain inevitable limitations, and account must be taken of considerations supporting civil jurisdiction over the military. A balance between opposing factors is not easy to strike, and the proper decision may well vary with circumstances. In time of peace, however, the balance appears to be on the side of concurrent jurisdiction in the receiving state.

It is quite clear, on the other hand, that the interests of members of the armed forces, as individuals, are not a relevant consideration. Immunities are accorded to protect the interests of the state, not the individual. A member of a visiting armed force is, like any citizen, entitled to the protection of the ordinary rules of international law concerning the denial of justice, but not, as an individual, to any further protection.