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Criminal Jurisdiction Over Visiting Armed Forces

Roland J. Stanger (Editor)

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CHAPTER IV

WARSHIPS AND THEIR CREWS

THE BASES OF IMMUNITY

In a sense it is artificial to discuss the status of the crews of warships separately from that of land forces. Visits of warships to foreign ports have, however, been common in time of peace as well as war; on the other hand, visits of land forces on foreign territory have been relatively rare. Hence jurisdictional problems involving seamen have arisen much more frequently and judgments regarding appropriate solutions can be predicated on the extensive comments of text writers, judicial decisions and the practice of states. Again, the rules of international law governing the status of the crews of warships have developed quite independently, without much reference to the problems of land forces. This development has, moreover, been influenced, to a degree not easily measured, by concepts and analogies (e.g., the fiction of extraterritoriality and the status of merchant seamen) which have played a lesser or no discernible role in the formulation of the rules with respect to land forces. This independent development may on the whole have been unfortunate since a higher degree of cross-pollination perhaps could have contributed to more satisfactory solutions in both areas. There are nevertheless marked differences between the situation of the crews of warships in foreign waters and ports and that of land forces on foreign territory. These differences suggest that variations in the rules governing status may be desirable. It seems on the whole better to deal first with the status of the crews of warships, but to postpone extended discussion of some of the issues raised to later chapters.

In foreign territorial waters and ports, warships and their crews enjoy more extensive exemptions from the jurisdiction of the littoral state than do merchantmen and their crews—exemptions that are properly described as immunities. Both the bases for and the range of these immunities are, however, disputed.

The fiction of extraterritoriality enjoyed as great a vogue with

respect to warships as with respect to embassies and was influential in shaping the law. The fiction has been vigorously attacked, and was expressly repudiated by the Privy Council with respect to a public vessel.[1]

Rejection of the fiction of extraterritoriality by no means implies there are no sound bases for the immunities of warships and of their crews. It does, however, require a more searching inquiry into the factors which may support those immunities.

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[1] The fiction is supported by Oppenheim, 1 Lauterpacht-Oppenheim, *International Law* 853 (8th ed. 1957), but the editor notes the decision of the Privy Council in *Chung Chi Cheung* v. *The King*, [1939] A.C. 160 (Pr. Council), 108 L.J.R. 17, a prosecution in a Hong Kong court for the murder of the captain of the Chinese Maritime Customs cruiser Cheung Keng, an armed public vessel, by a cabin boy when the vessel was in Hong Kong territorial waters. Both the captain and cabin boy were British nationals. In dismissing the cabin boy's appeal and holding that the Hong Kong court had jurisdiction on the ground that China had waived its jurisdiction, after noting the opposing views, that the immunity of warships is based on extraterritoriality or that "the immunities do not depend on an objective exterritoriality, but on implication of the domestic law," it was said at 167:

> "There Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries."

After reviewing the authorities bearing on the point, the opinion continued:

> "Their Lordships have no hesitation in rejecting the doctrine of exterritoriality * * * which regards the public ship 'as a floating portion of the flag-State.' However the doctrine of exterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating-island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore." Id. at 174.

More than a century before, in *Forbes* v. *Cochrane* [1824] 2 B & C 448 at 467 Best, J., in discussing the liability of certain British naval officers for refusing to restore slaves who had escaped to their ships from Florida, said:

> "I am decidedly of opinion that they were then no longer slaves. The moment they put their feet on board of a British man of war, not lying within the waters of East Florida (where, undoubtedly, the laws of that country would prevail), those persons who before had been slaves, were free." Cited, 2 Moore, *International Law Digest*, 578 (1906).

It has been said that "The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the state for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction." [2] This can be read to mean that a warship and its crew are so much an entity that their immunities necessarily have the same origin, nature, and scope. On the other hand, it can be read to mean that a warship and its crew serve functions so interdependent that there can be no adequate basis for an immunity for either if the situation does not involve some connection between vessel and crew. The latter, it is submitted, is the only acceptable sense in which the statement quoted may be read.

A warship is a physical instrumentality of the state, designed, as a plane, tank or gun is designed, to make the use of force available in international disputes. The crew is an organized body of men, brought together, trained, and subjected to a common command and discipline to perform an assigned mission, sailing and fighting the ship. The warship gives form and substance, in terms of function, to the concept of a crew, as planes, guns and tanks do to the concept of an air force or an army. The crew's function is nevertheless separate and distinct from that of the warship, however interdependent those functions may be. Further, the immunities of a warship and of its crew can hardly be of the same nature and scope. A warship is incapable of committing a crime, though it may be the scene of a crime or the instrument with which a crime is committed, e.g., a violation of the navigation laws. The only question of immunity which can arise with respect to a warship is by whom enforcement action may be exercised aboard her. Members of the crew may, however, commit crimes, on board or ashore, in the performance of duty or as private acts. Those acts may concern the flag state, the littoral state, or even the state of which the accused or the victim is a national. One should not limit in advance the analysis and appraisal of the possible reasons for according immunities to a warship and to its crew by the assumption they must have the same origin, nature and scope.

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[2] Hall, *International Law*, 249 (8th ed., 1924). See also 2 Gidel, *Droit International Public de la Mer*, 267 (1934).

Three reasons, or groups of reasons, have been assigned for the immunities commonly claimed for warships and their crews. These are in essence the same as those advanced for the immunity of land forces. They will be discussed at greater length later, but need to be mentioned here. The first reason stems from the ideas of the representative character of a warship, the independence of states and the mutual respect of sovereigns.[3] Although there is force in these ideas, it varies depending on whether one is speaking of the warship or of its crew. A warship is a public vessel, the property of a state, and as such may be said in a sense to have a representative character.[4] If this alone is not persuasive—and there is much recent authority that it is not—there are other factors. It is also an instrumentality designed for and devoted to one of the highest interests of the state, its security. If the independence of states, not as an abstract principle but in substantial terms, requires that any instrumentality of a state must be free from foreign interference, it is a warship. Reference to the mutual respect of sovereigns is less convincing with regard to a warship, though one can look upon it as a symbol, as the flag it flies is a symbol, of the state, to which respect is required.

The same ideas have a quite different impact with respect to the crew. The captain and, in lesser degree, the other officers and the seamen are representatives of the flag state, exercising delegated powers. It cannot be said, however, that the independence of states or the mutual respect of sovereigns requires that every representative of a state, regardless of his capacity and activity, is entitled to immunity. Perhaps it could be argued that the captain should be considered as entitled to immunity in terms of these concepts, but as to the other officers and the seamen this seems much more doubtful.

The second reason given for the immunities of warships and their crews is military exigency, which is said to require that the flag state retain complete control over the vessel and its crew.[5] The compelling character of this argument, applied to the war-

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[3] See 2 Gidel, *op. cit. supra*, note 2, at 265.

[4] "We must observe here, with Wharton's commentator, Mr. Dana, that the immunities enjoyed by warships depend more on their public character than on their military character. They are accorded not to a warship but to a national ship, vested as such with a certain character of sovereignty." 1 Calvo, *Le Droit International* 613 (3d ed., 1880).

[5] See 2 Gidel, *op. cit. supra*, note 2, at 266, and the authorities there cited.

ship, is evident. The threat to the security of the flag state would be real and substantial if the authorities of a foreign state could come on the vessel at will and exercise authority, necessarily in derogation of the commander's. Their mere presence on the warship could, because of the classified character of much of what is found on a warship, endanger the flag state's security. What is less clear is that military exigency requires the flag state to retain exclusive control over the crew, both in their official and unofficial activities. While it is true that the flag state must retain the power to enforce discipline, free of the interference of the littoral state, it is far from obvious that subjecting the crew to the criminal jurisdiction of the littoral state, at least with respect to their unofficial activities ashore, necessarily involves an intolerable interference with the flag state's control.

A third reason sometimes relied on for the immunities commonly claimed is the implied consent of the littoral state, but, as Gidel remarks, this can hardly serve as an independent reason since, unless a reason of substance exists, there can be no reason for implying consent to any immunity.[6]

Against these factors, which argue for the immunity of warships and their crews, are to be weighed the reasons—in other circumstances generally recognized as compelling—for acknowledging the jurisdiction of the territorial state—"the paramount necessity," as the court said in the *Chung Chi Cheung* case, "for each nation to protect itself from internal disorder by trying and punishing offenders within its borders." [7]

IMMUNITY OF THE SHIP

A warship on the high seas is completely immune from the jurisdiction of any state other than the flag state,[8] and much the same appears to be true of a warship passing through territorial waters. A warship, as a physical object, is likewise completely immune from the enforcement jurisdiction of the littoral state when in a foreign port, insofar as ordinary proceedings are concerned.[9] "No legal proceedings can be taken against her either for

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[6] *Ibid.*

[7] *Supra*, note 1, at 167.

[8] Colombos, *International Law of the Sea*, 221 (4th ed., 1959); Hall, *op. cit. supra*, note 2, at 307. See Article 8, Convention on the High Seas, 13 UST 2312, TIAS 5200.

[9] This was the specific point involved in *The Schooner Exchange*, 11 U.S. (7 Cranch) 116 (1812), although there the vessel entered in distress. Chief

recovery of possession, or for damages for collision or for a salvage reward, or for any other cause.[10] More important for present purposes, the littoral state may not exercise enforcement jurisdiction in any form on the vessel without the consent of the commanding officer.[11] This is true whether the act which occa-

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Justice Marshall, in holding the warship immune, said (p. 143):

> "But in all respects different, is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference can not take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality."

[10] 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 1, at 853. See also 2 Hackworth, *Digest of International Law* 409 (1940–4); Colombos, *op. cit. supra*, note 8, at 194–5; Art. 15, "Resolutions, Institute of International Law," 34 *Annuaire* 475. Hall points out that the doubt raised regarding the English rule by remarks of Lord Stowell in *The Prins Frederik* (1820), 2 Dodson 484 and by Sir R. Phillimore in *The Chariek*, L.R. 4 Admiralty and Ecclesiastical Cases 93, were set at rest by the decision in *The Constitution* (1879), L.R. 4 P.D. 39, refusing an application for a warrant for the arrest of that American frigate and her cargo for a salvage claim, after the American government objected to the exercise of jurisdiction and the objection was supported by counsel for the crown. Hall, *op. cit. supra*, note 2, at 248. See also 2 Moore, *op. cit. supra*, note 1, at 579; 1 McNair, *International Law Opinions* 92 (1956) opinion of 1871. Oppenheim remarks at p. 853 (footnote) that "this rule became universally recognized only during the nineteenth century."

The Restatement, *Foreign Relations Law*, Sec. 67, affirms the rule but notes that the littoral state may assert a diplomatic claim.

[11] Surprisingly enough, this rule, which may now be regarded as firmly established, was at one time seriously questioned, particularly by the United States. The Attorney General ruled in 1794 that a writ of *habeas corpus* could be awarded where it was alleged an American subject was unlawfully detained on a British warship in an American harbor. Bradford, Attorney General, 1794, 1 Op. 47, 2 Moore, *op. cit. supra*, note 1, at 574. Moore's account cites Hall, for whose report of the same incident see Hall, *op. cit. supra*, note 2, at 238–9. Again in 1799, the then Attorney General ruled that civil or criminal process might be served upon a person on board a British warship lying in New York harbor. Lee, Attorney General, 1799, 1 Op. 87, 2 Moore, pp. 574–5. Lawrence notes that: "These views were by no means confined to American lawyers. They seem to have been held by authorities of the highest repute in England. * * * Such doctrine as these

sions the assertion of jurisdiction took place on the vessel or ashore, and whether it was committed by an officer or member of the crew or a stranger to the vessel.[12] The right of a warship to

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[Lord Stowell's] would reduce the immunities of a public vessel almost to vanishing point. They would never probably have been acquiesced in on the continent of Europe. * * *" Lawrence, *Principles of International Law*, 226–7 (7th ed. 1923). See also Hall, pp. 240–1.

Chief Justice Marshall's opinion in *The Schooner Exchange* resulted, however, in a reversal of the American position, and was undoubtedly largely responsible for the now seemingly general recognition of the view that enforcement jurisdiction may not be exercised on a foreign warship. See 2 Moore, *op. cit. supra*, note 1, at 578–79.

Hyde states that "At the present time a foreign vessel of war and the occupants thereof are acknowledged to be exempt from local process." 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 826 (1945). The Restatement, *Foreign Relations Law*, Section 52, states the rule with a minor qualification. "Except as otherwise expressly indicated by the coastal state, its consenting to the visit of a foreign naval vessel * * * implies that it (a) waives the right to exercise aboard the vessel its enforcement jurisdiction * * * except to the extent necessary to prevent imminent injury to persons or property not involved in the operation of the vessel * * *."

The British authorities are reviewed by Hall, *op. cit. supra*, note 2, pp. 243–44. His conclusions are somewhat more guarded, since the British position has not been entirely uniform. He notes that the French, German and Italian authorities support the complete immunity of warships from enforcement jurisdiction. Oppenheim states flatly that "No official of the littoral state is allowed to board the vessel without special permission of the commander." 1 Lauterpacht-Oppenheim, pp. 853–54. See also Colombos, *op. cit. supra*, note 8, at 227. And see 1 McNair, *op. cit. supra*, note 10, at 90, opinion of April 24, 1860, and at 91, opinion of March 7, 1862, both of which support the immunity but rely on the fiction of extraterritoriality, as do some of the early American authorities cited. See also Article 15 of the "Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports," Institute of International Law, 1898, 17 *Annuaire* 277, and Art. 16 of the "Resolutions of the Institute, 1928," 34 *Annuaire* 214.

United States Navy Regulations 1948, Article 0730, (GPO 1948), provide: "The Commanding Officer shall not permit his command to be searched by any person representing a foreign state nor permit any of the personnel under his command to be removed from the command by such person, so long as he has the power to resist." Cf. Article 0764, relating to examinations by foreign customs and immigration officials.

[12] "No occupant while remaining on board is subject to the local jurisdiction, notwithstanding his infraction of the local criminal code by an act committed on shore or taking effect there. * * * When a fugitive from justice is once received on board of a foreign vessel of war within the territorial waters of a State he is believed to be withdrawn from the local jurisdiction."

give asylum to a fugitive has been much debated, but even if there is no such right, the local authorities are still barred from entering the vessel and taking the fugitive.[13]

The wide recognition of these immunities of a warship suggests that states generally regard the reasons supporting them, summarized above, as conclusive. It is misleading, however, to regard them as immunities from criminal jurisdiction—to which only the last has any relevance in the usual sense. These immunities are better summarized as together making the warship inviolable.

IMMUNITY—ACTS ON BOARD

A. The Crew

Whether the littoral state can extend its criminal law to apply to acts which occur on the warship—granted it may take no steps to enforce its law there—is a more difficult question. Rejection of the fiction of extraterritoriality implies that there is no disability of the littoral state merely because the act takes place on a warship, just as there is no such disability merely because an act occurs in an embassy. Nor does the inviolability of the vessel appear to be a basic factor. Effective enforcement by the

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2 Hyde, *op. cit. supra*, note 11, at 826–29. "Even individuals who do not belong to the crew but who, after having committed a crime on the territory of the littoral State, have taken refuge on board, cannot be forcibly taken off the vessel * * *." 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 1, at 854. See also, *Orfanidis* v. *Ministère Public*, Mixed Court of Cassation, Egypt, May 31, 1943, [1943–1945] Ann. Dig. 141 (No. 38); *Anne and others* v. *Ministère Public*, Court of Cassation, Egypt, Dec. 13, 1943, [1943–1945] Ann. Dig. 115 (No. 33); *Ministère Public* v. *Korkoris*, Court of Cassation, Egypt, Dec. 11, 1944, [1943–1945] Ann. Dig. 120 (No. 34). And see *Ex parte Sulman*, Supreme Court of South Africa, Cape of Good Hope Provincial Division, July 15, 1942, [1941–1942] Ann. Dig. 247 (No. 64), applying the doctrine to a merchant vessel requisitioned by the Netherlands government in wartime.

[13] "[I]t is wrong for a ship to harbour a criminal or a person charged with non-political crimes. If, however, such a person succeeds in getting on board, and is afforded refuge, he cannot be taken out of the vessel. No entry can be made upon her for any purpose whatever." Hall, *op. cit. supra*, note 2, at 246.

Article 21, "Resolutions, Institute of International Law," 1898, 17 *Annuaire* 278, reads: "Whatever shall be the status of persons on board a war-ship, even when they have been wrongly received, if the commander refuses to give them up, force may not be resorted to to ensure their recapture, or visit and search exercised to that end."

littoral state may require on-the-spot investigation and the right to summon witnesses, both of which may be prevented or made more difficult by the vessel's inviolability. This is at best, however, an argument of a secondary order. Fundamentally the disability, if it exists, must stem from the character of the actors, the nature of their actions, and the relationship of both to the warship, the flag state and the littoral state.

In the sense that the captain and crew of a warship are in general required to obey the local law, there is no general disability of the littoral state to prescribe its application. Specifically, there is no disability, or correlative immunity, with respect to acts which take effect externally to the ship, at least those in the normal range of laws and regulations relating to navigation, anchorage, quarantine, sanitation and the like.[14] When such laws or regulations are violated, the littoral state may apply for redress to the government of the flag state, or, in extreme cases, order the ship out of its territory, or forcibly expel it, but ordinary remedies are not available.[15] Such violations are, of

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[14] 2 Hyde, *op. cit. supra*, note 10, at 827, 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 1, at 855; Colombos, *op. cit. supra*, note 8, at 227; 2 Gidel, *op. cit. supra*, note 2, at 255. Mr. Hill, Acting Secretary of State, to Secretary of the Navy, Oct. 6, 1899, M.S. Dom. Let. 399, 2 Moore, *op. cit. supra*, note 1, at 514; Memo of Mr. S.C. Lemly, Judge Advocate General, U.S.N., communicated to Mr. Moore, Third Assistant Secretary of State, July 6, 1891, id., p. 584. Hall, *op. cit. supra*, note 2, at 246, affirms the duty to obey such laws and regulations, subject "to the exception, it is probable, of instances only in which there is a special custom to the contrary."

[15] See 1 McNair, *International Law Opinions* 93, 94 (1956), regarding the case of the *Enterprise*, an armed vessel of the United States used as a training ship, which entered a Bermuda harbor and, owing to a misunderstanding, committed a breach of the quarantine regulations. The commanding officer was fined £10 and costs but he protested and the fine was not enforced. The Law Officers to whom the matter was referred expressed the opinion (December 17, 1897) that the vessel and her officers could not claim exemption from the regulations, but "It does not, however, follow that the vessel and her officers are subject to the jurisdiction of the local courts. * * * [I]n our opinion the officer commanding such man-of-war is not liable to proceedings in the local Courts, in respect of any act done by him in the management of the vessel.

"The duty of observing the regulations of the port is one of international obligation. The vessel is admitted on the implied terms of observing such regulations. If they are broken she may be expelled—if such an extreme step be necessary for the safety of the port. Diplomatic representation may be made to the Government of the country to which the vessel belongs, and

course, the acts of individuals rather than of vessels, and the basis of the individuals' immunity is not clear, assuming that any attempt to take enforcement action against them is made on shore. A persuasive argument can be made in terms of military exigency.[16] The same reason, fortified because there is at least no physical disturbance of the peace of the port, supports an immunity with respect to acts done on board in the performance of duty.

Even as to private acts, military exigency may well provide an adequate basis for immunity of the crew. The members of the crew, so long as they are on board, can be said to be so much a part of an organized body of men charged with handling the ship that it would interfere with performance of the ship's mission if the littoral state asserted jurisdiction over their conduct, even

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if anything like a right to disregard such regulations were asserted, the foreign Government might be informed that its vessels could not be admitted."

See, generally, Colombos, *op. cit. supra*, note 8, at 227.

[16] The statement made in Comment c, Sec. 35 of Tentative Draft No. 2 of the Restatement, *Foreign Relations Law:* "For the performance of official duties aboard a vessel it is possible that a doctrine of non-liability might develop to prevent the exercise of territorial jurisdiction against certain naval personnel while ashore" is not repeated in the final version. "[C]ourts will not assume jurisdiction over such vessel or its officers, while acting as such, but leave controversies arising out of the acts of the vessel, and its officers, while acting in their official character, for settlement through diplomatic channels." *United States* v. *Thierichens*, 243 Fed. 419, 420 (D.C.E.D. Pa., 1917).

In *The Owner of the Junk "Tung On Tai" etc.* v. *Gove; The Alexander*, 1 Hong Kong L.R. (1906) 122, 2 Hackworth, *op. cit. supra*, note 10, at 419–20, the United States naval collier *Alexander* was in collision with a Chinese junk in Hong Kong waters. A civil suit against the commander of the *Alexander* was dismissed, upon motion of the Attorney General, on the ground the ship was immune and the immunity extended to the commander. The court said: "* * * I therefore think that the Plaintiff's contention cannot be maintained, and that the principles enunciated in *The Parlement Belge* as applicable to foreign public ships, certainly cover the case of the officers and crew on board, because they are under the control and in the employ of a foreign Sovereign in national objects, and because the jurisdiction of the court, if exercised, must divert their public service from its destined public use * * * This * * * immunity * * * exists only so long as he [the naval officer] forms part of the machine known as a vessel of war, and commits the act of negligence with or by means of such vessel, and when it is either in whole, or in part, under his control. But whether such immunity can be claimed by the officer himself I very much doubt." See also the case of *The Enterprise, supra*, note 15.

though at the moment they are not technically on duty, in the four hours on, eight hours off sense, or acting in performance of duty. The fact that an act occurs on board is, in other words, relevant in terms of the military exigency which supports the crew's immunity, even though the crew do not share the warship's immunity. Moreover, the crew while on the vessel are under the direct and immediate command and disciplinary authority of the commander. If any weight is to be given to the argument that the assertion of jurisdiction by the littoral state would interfere with the maintenance of discipline and the exercise of needed control by the commander, it should be in these circumstances. Merchant seamen are, at least on the basis of comity, accorded an exemption in similar circumstances, subject only to the qualification that the peace of the port is not disturbed, no stranger is involved, and the local authorities are not asked to intervene. Cumulatively all of the factors which distinguish members of the crew of a warship from merchant seamen would seem to justify saying that they should be accorded immunity for acts on board the vessel. Presumptively the littoral state has jurisdiction over acts that occur on a warship, as it does over those that occur on a merchant vessel, when the vessels are in its waters. But the same balancing of interests of the flag state and the littoral state which justifies only the according of a qualified exemption for merchant seamen can be said to require the recognition of complete immunity for the crew of a warship.[17]

Several writers state categorically that the flag state has exclusive jurisdiction over acts which occur on the vessel,[18] and in

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[17] Cf. 2 Gidel, *op. cit. supra*, note 2, at 290–1.

[18] Oppenheim states, 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 1, at 854, that "Crimes committed on board by persons in the service of the vessel are under the exclusive jurisdiction of the commander and the other home authorities." But it should be remembered that he accepted the fiction of extraterritoriality of warships. Colombos, *op. cit. supra*, note 8, at 234, says that "The commander of a man of war or public ship in a foreign port or waters retains complete jurisdiction over the ship and her crew, thus excluding entirely the jurisdiction of the territorial sovereign. The local jurisdiction is equally excluded in the case of disturbances on board her, these having to be dealt with by her commander alone." Hall, *op. cit. supra*, note 2, is more guarded, saying at 245: "Exceptions to this obligation [to obey the local law] exist, in the case of acts beginning and ending on board the ship and taking no effect externally to her, firstly in all matters in which the economy of the ship or the relations of persons on board to each other are exclusively touched, and secondly to the extent that

Chung Chi Cheung v. *King*,[19] the court took the same line, though it should be noted that there the crime took place while the vessel

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any special custom derogating from the territorial law may have been established,—perhaps also in so far as the territorial law is contrary to what may be called the public policy of the civilized world." See also 2 Gidel, *op. cit. supra*, note 2, at 292.

Article 16 of the "Resolution of the Institute of International Law, 1898," 17 *Annuaire* 277, reads: "Crimes and offenses committed on board these ships or on the boats belonging to them, whether by members of the crew, or by any others on board, shall come under the jurisdiction of the courts of the nation to which the ship belongs and shall be judged according to the laws of that nation, whatever be the nationality of the perpetrators or the victims.

"Whenever the commander shall deliver the delinquent over to the local authorities, the latter shall regain the jurisdiction which under ordinary circumstances would belong to them."

Article 18 of the "Resolutions of 1928," 34 *Annuaire* 742, reflects, however, a shift in emphasis from jurisdiction to prescribe to jurisdiction to enforce. "Crimes and offenses committed on board warships, whether by members of the crew or by any other persons on board, are withdrawn from the exercise of the competence of the courts of the State of the port, as long as the ship is there, whatever be the nationality of the perpetrators or the victims. Nevertheless, if the commander delivers the delinquent to the territorial authority, the latter shall regain the exercise of its normal competence." 1 McNair, *op. cit. supra*, note 15, at 94, refers to an 1881 opinion which "advised that a local Italian *pretore* had no right to hold an inquest upon the cause of the death of a British seaman occurring on board a British ship of war while in the port of Naples, though it was his duty, once the body was transferred from the ship to the land, to satisfy himself before permitting burial that the death had not resulted from a crime committed within his jurisdiction on land."

Tentative Draft No. 2 of the Restatement, *Foreign Relations Law*, states that "The question whether officers and crewmen are subject to enforcement jurisdiction while on shore with respect to conduct aboard a vessel is one not answered by authoritative decisions or precedents from state practice." Sec. 35, Comment c, at 107. This is not a statement that the jurisdiction exists, and the officers and crew are not immune, but it does suggest that the question is open and the absence of such jurisdiction in the littoral state cannot be assumed. The statement is not repeated in the final version of the Restatement.

[19] *Supra*, note 1. The court said at 174, 176: "Immunities may well be given in respect of the conduct of members of the crew to one another on board ship. If one member of the crew assaults another on board, it would be universally agreed that the local courts would not seek to exercise jurisdiction, and would decline it unless, indeed, they were invited to exercise it by competent authority of the flag-nation. * * * In the present case the question arises as to the murder of one officer and the attempted murder

was in the territorial waters of Hong Kong, not in port. The issue has been debated whether the littoral state can claim at least concurrent jurisdiction where the accused or the victim or both are, though members of the crew, nationals of the littoral state. The weight of authority on this issue supports the view that nationality is not a relevant factor.[20]

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of another by a member of the crew. If nothing more arose the Chinese Government could clearly have had jurisdiction over the offense * * *." See also *The Lone Star*, Supreme Federal Court, Brazil, Nov. 22, 1944, [1947] Ann. Dig. 84 (No. 31).

[20] Hall appended a footnote to the comment quoted, note 18, reading: "The case which, however, would be extremely rare on board a ship of war, of a crime committed by a subject of the state within which the vessel is lying against a fellow subject, would no doubt be an exception to this. It would be the duty of the captain to surrender the criminal." Literally, the qualification suggested is applicable to members of the crew as well as strangers to the vessel.

As so read, the qualification was rejected in the *Chung Chi Cheung* case, *supra*, note 1, at 176, where both the murderer and the victim were British subjects: "It is difficult to see why the fact that either the victim or the offender, or both, are local nationals should make a difference if both are members of the crew."

The court quoted at 172 from the memorandum of Sir Alexander Cockburn, Lord Chief Justice, included in the "Report of the Royal Commission on Fugitive Slaves," 1876, Command 1516, p. xiii:

"The rule which reason and good sense would, as it strikes me, prescribe, would be that, as regards the discipline of a foreign ship and offences committed on board as between members of her crew towards one another, matters should be left entirely to the law of the ship, and that should the offender escape to the shore, he should, if taken, be given up to the commander of the ship on demand, and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject * * * the criminal * * * should be given up to the local authorities."

The court commented that "[T]he Lord Chief Justice assumed that even if a crime be committed on board by one member of the crew on another, should the offender escape to shore and no demand be made for his return, the territorial court would have jurisdiction. Their Lordships doubt whether, when he was dealing with the case of a crime committed on board of a local subject, he had present to his mind the possibility of the local subject being a member of the crew."

Hall's comment posited the case where both the criminal and the victim were subjects of the littoral state, and that was the actual situation in *Chung Chi Cheung*. The case in which the criminal only is a subject is, of course, weaker, and that in which the victim only is a subject is weaker still.

See also 2 Gidel, *op. cit. supra*, note 2, at 292: "If the author of the un-

B. Strangers

No reason suggests itself why a stranger to the vessel who commits an offense aboard a warship in a foreign port should enjoy any immunity from the jurisdiction of the littoral state. Fundamentally, the littoral state has jurisdiction on the territorial principle, and an affirmative reason must exist to deprive it of its competence. The fact the place of the offense was a foreign warship hardly seems adequate, unless one reverts to the fiction of extraterritoriality. No such immunity is recognized with respect to visitors to a merchant vessel or an embassy, and no interest of the flag state is apparent which would justify giving strangers to a warship a superior status. Recognition of an obligation of the commander to deliver such an offender to the local authorities seems desirable,[21] although the flag state should be recognized as having a secondary competence.

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lawful act is a member of the crew, the flag state has exclusive jurisdiction. The quality of member of the crew predominates over all other circumstances, even if the individual author of the offense is a national of the riparian state."

[21] Writers have on occasion either drawn no distinction between the crew and others on board, or considered both entitled to the same immunity. De Martens, however, argued long ago that:

> "No juridical reason exists for declaring that in all cases crimes committed on warships are excluded from the jurisdiction of the local authorities. One can admit that the commander of the ship and the crew should not be subject to such authorities. But for what reason should this privilege be extended to individuals who, forming no part of the crew, have committed a crime on board a warship? The exterritoriality of such ships, thus understood, would become up to a certain point contrary to their own security and would be in opposition to the rights and the dignity of States in whose water they sailed." 2 De Martens, *Traite de Droit International* 337 (1886).

He notes that the opinion expressed was not that of the majority of writers on international law, but it has the support of Gidel, *op. cit. supra*, note 2, at 293–4, although Gidel would recognize the concurrent jurisdiction of the flag state where the victim was a member of the crew.

Colombos takes the position, *op. cit. supra*, note 8, at 234, that: "If a crime is committed on board a warship by a person not a member of the ship's crew and not belonging to her, the commanding officer may with propriety hand the accused over to the local authorities, but he cannot be compelled to do so. The only exception appears to be in the case of a crime committed on board the warship by a national of the territorial State against a fellow-subject. In such a case, which must be extremely rare, it would be the duty of the commander to surrender the criminal to the local authorities," citing Article 18 of the Stockholm resolutions, see footnote 18,

IMMUNITY OF THE CREW—ACTS ON SHORE

Any blanket of immunity that the officers and crew of a warship may enjoy on board does not cover them on shore. All of the crew of a warship, including, seemingly, the commander, are subject to the jurisdiction of the littoral state while ashore in pursuit of their private interests.[22] The only dispute is over

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supra. It is submitted that the obligation of the commander to deliver the offender to the local authorities should be recognized in all cases, on the territorial principle alone, without requiring reinforcement either from the nationality or the passive personality principle. So long as it is recognized that the littoral state can not exercise enforcement jurisdiction on the vessel—breach of the commander's obligation to deliver the accused could be sanctioned only through diplomatic channels—the interests of the flag state would appear to be adequately safeguarded.

The court in *Chung Chi Cheung* v. *King, supra,* note 1, at 174, recognized the jurisdiction of the territorial state, but did not comment on the duty of the commander to deliver the offender to the local authorities, saying:

> "But if a resident in the receiving State visited the public ship and committed theft, and returned to shore, is it conceivable that when he was arrested on shore, and shore witnesses were necessary to prove dealings with the stolen goods, and identify the offender, the local courts would have no jurisdiction? What is the captain of the public ship to do? Can he claim to have the local national surrendered to him? He would have no claim to the witnesses, or to compel their testimony in advance or otherwise. He naturally would leave the case to the local courts. * * * The result of any such doctrine [extraterritoriality] would be not to promote the power and dignity of the foreign sovereign, but to lower them by allowing injuries committed in his public ships or embassies to go unpunished."

Article 9 of the *Montevideo Treaty on International Penal Law* of March 19, 1940 provides: "If only individuals who are not members of the crew of the war vessel or aircraft participate in the commission, on board, of such acts, the trial and punishment shall proceed in accordance with the laws of the State in whose territorial waters the vessel or aircraft is found." See *The Lone Star, supra,* note 19.

United States Navy Regulations 1948 provide in Article 0732:

"1. The commanding officer shall keep under restraint or surveillance, as necessary, any person not in the armed services of the United States who is found under incriminating or irregular circumstances within the command, and shall immediately initiate an investigation.

* * * * * * *

"3. If the investigation indicates that such person has committed or attempted to commit an offense punishable under the authority of the commanding officer, the latter shall take such action as he deems necessary."

[22] "The officers of a vessel of war belonging to a friendly foreign nation can not set up extraterritoriality when unofficially on shore in a port in

whether they are subject to such jurisdiction while ashore in a duty status.

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whose harbor their vessel is temporarily moored." 2 Moore, *op. cit. supra*, note 1, at 585, citing Mr. Randolph, Secretary of State, to Mr. Hammond, July 23, 1794, 7, M.S. Dom. Let. 55; Mr. Buchanan, Secretary of State, to Mr. Leal, Brazilian chargé, August 30, 1847, S. Ex. Doc. 35, 30 Cong. 1 sess. 29, *id.*, at 586, concerning the arrest in Rio de Janeiro of a lieutenant and three sailors of the U.S.S. Saratoga, when one man "drew his knife on his fellow sailor whilst on shore." "* * * any person * * * attached to such man of war, charged with an offence on shore, is liable to arrest therefor, in the country where the offence may have been committed." Mr. Fish, Secretary of State, to Commodore Case, January 27, 1872, 92 M.S. Dom. Let. 322, 2 Moore, p. 588; the *Forte*, 5 Moore, *International Arbitrations* 4925–28 (1898), 2 Moore, *op. cit., supra*, note 1, at 587, in which Leopold of Belgium, as arbitrator, held for Brazil in a dispute with Great Britain over the arrest of a chaplain, lieutenant and midshipmen of the *Forte* ashore in Brazil. See also *Japan* v. *Smith and Stinner*, High Court of Osaka (Sixth Criminal Division), Nov. 5, 1952, [1952] Int'l L. Rep. 22 (No. 47), in which Japan asserted jurisdiction over British sailors from the warship *Belfast* for an offence committed ashore, although the warship had been engaged in action in Korean waters until just before her visit to Kobe.

Of particular interest is the incident reported in 2 Hackworth, *op. cit. supra*, note 10, at 422, citing Ambassador O'Brien to Secretary Knox, telegram of June 5, 1911, and Mr. Knox to Mr. O'Brien, telegram of June 7, 1911, M.S. Department of State, file 394.112 At S/–, 3. Hackworth's report states:

> "On June 5, 1911, the Ambassador in Japan reported to the Department of State the murder of one United States naval enlisted man by another in a United States naval hospital ashore. The Ambassador stated that he informally requested of the Japanese Foreign Office that American naval officials be allowed to take jurisdiction, but that the request had been refused. The Department, on June 7, 1911, instructed the Ambassador that 'Unless the practice of other nations is contrary, you should concede jurisdiction to Japan, at the same time indicating that this Government would prefer by courtesy to try the prisoner.' The man was later tried and convicted by a Japanese court."

It should be noted that both the murderer and his victim were Americans and enlisted men in the Navy; it does not appear from the report, but the murderer may have been on duty; and, finally, the murder occurred in a United States naval hospital. See also Colombos, *op. cit. supra*, note 8, at 236; 2 Gidel, *op. cit. supra*, note 2, at 297.

See the discussion regarding the status of the commander, 2 Gidel, pp. 299–300, citing the comments of other writers. It is Gidel's conclusion that one can not demonstrate the existence of a custom giving special status to the commander, and his judgment that the commander should, in principle, be equally subject to the local jurisdiction. See *United States* v. *Thierichens*,

Such respected authorities as Hyde [23] and Hall [24] would deny the immunity even in this case, but other writers—perhaps the

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243 Fed. 419 (D.C.E.D. Pa., 1917), in which the defendant was the commanding officer of the German cruiser *Prinz Eitel Friedrich.*

The Restatement, *Foreign Relations Law,* Comment c to Sec. 52, p. 177, states that "The rule stated in this Section has no application to the personnel of a vessel while they are ashore," and Illustration 3, following the Comment, states that the captain of a naval vessel is subject to the enforcement jurisdiction of the littoral state if he "negligently kills Z while driving a car on shore in the course of making an official call."

[23] "The exemption enjoyed by persons officially connected with and on board of a foreign public vessel does not accompany them after they have left the ship or its tenders and are on shore. * * *.

"Officers and crews of foreign vessels of war, who commit offenses while ashore, are generally subject to local prosecution. * * *."

"Possibly the commander of a vessel of war who goes ashore in order to accomplish an end directly connected with or incidental to the public business which brought his vessel into the port, ought not, while so engaged, to be amenable to local process, provided he does not, in the course of his errand, violate the local law. It is believed he should not, for example, be arrested for an offense committed during a previous visit, or be served with process in a civil suit charging him with tortious conduct at any prior time. It is not known, however, that such an exemption within the limits stated has been claimed or granted by the United States." 2 Hyde, *op. cit. supra,* note 10, at 830. No reason is advanced for the suggested distinction between past and present offenses.

See also the Restatement, *Foreign Relations Law,* Comment c to Sec. 52, and Illustration 3, p. 177.

[24] Hall, *op. cit. supra,* note 2, at 249. But an editor's footnote says: "Opinion on this point is divided. Some writers adopt the rule stated in the text unqualifiedly. (J.B. Moore, Dig. II Sec. 256; Hannis Taylor, Sec. 261; Hyde, *International Law,* i, Sec. 255). Others modify it by requiring notification of the arrest of a member of the crew to the ship's commander and giving him the power of demanding that local jurisdiction shall be so exercised as to meet the requirements of moral justice, e.g., through consular intervention (Ortolan, Dip. de la Mer, i, 268; Phillimore, i, Sec. 346). Others draw a distinction between the purposes for which the landing took place; if it were for an object connected with naval duty, the members of the crew should be immune; if for some other object, such as recreation, he should not be (Perels, 121–5; Bonfils, Sec. 620). This appears to be the view of most writers (Oppenheim, i, Sec. 451). The case of the *Forte* is inconclusive. * * * The practice in Great Britain appears to be that in case of serious offences the offender is dealt with by the local authorities, but in case of minor offences, such as drunkenness, the offender is simply detained until he can be handed over to a superior officer of the ship to which he belongs, but this is done as a matter of courtesy."

majority—would recognize it.[25] The former have the support of a majority of the Supreme Court of Canada,[26] the latter of the Mixed Court of Cassation of Egypt, though these decisions can be distinguished because they arose in wartime.[27]

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[25] "The position of officers and crew when ashore is not quite free from doubt. The practice generally followed is to apply the principle of exterritoriality to them when they are on land in uniform and in an official capacity connected with the service of their ship. But if they are ashore not in uniform or on official business, they are subject to the territorial jurisdiction of the littoral State, which is entitled to prosecute them for any crimes against the local laws. In the case of minor offences, it is usual to hand over, on grounds of international comity, the wrongdoers to the commanding officer for him to deal with, but there is no obligation to do so." Colombos, *op. cit. supra*, note 8, at 236. Oppenheim notes that "the position of the commander and crew of a man-of-war in a foreign port when they are on land is controversial. The majority of writers distinguish between a stay on land in the service of the man-of-war and a stay for other purposes." 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 1, at 855.

[26] Sir Lyman P. Duft, C.J.C., with whom Hudson, J., concurred, concluded: "The members of a crew of an armed ship of the United States are exempt from the jurisdiction of the criminal courts of Canada in respect of an offence committed on board ship by one member of the crew against another member of the crew and generally in respect of acts which exclusively concern the internal discipline of the ship. As regards offences committed on shore by members of the crew, they are not exempt from the jurisdiction of the criminal courts of Canada, but the criminal courts of Canada do not exercise jurisdiction in respect of such offences where the offence is one committed by one member of the crew against another member of the crew, except at the request of the commander of the ship." *Reference Re Exemption of U.S. Forces from Canadian Criminal Law* [1943], 4 D.L.R. 11, 25. Rand, J., concurred on this point. *Ibid.*, p. 51.

[27] *Triandafilou* v. *Ministere Public*, Mixed Courts in Egypt Court of Cassation, June 29, 1942, 39 *A.J.I.L.* 345. Triandafilou, a Greek subject, was a sailor on the torpedo boat destroyer *Panther* of the Greek fleet anchored in Alexandria. He came ashore to purchase food for the needs of the ship, with permission to return on board by midnight. On coming out of a bar on the Place Mohamed Aly in a state of intoxication some minutes before midnight, he struck with a dagger an agent of the local police who, with the purpose of calming a disturbance which had broken out among other persons, was about to conduct such other persons to the station.

The court noted that it was pertinent "to distinguish between the immunity which the vessel itself enjoys, as representing the country whose flag it flies, and the personal immunity which the crew would enjoy, 'by way of an extension,' which would result in withdrawing the crew to a greater or less degree from the territorial jurisdiction even when they had gone on land * * *." After commenting on the conflict among writers, noting Art. 20 of the "Resolutions of the Institute," which "can be considered as stating

The language of the Mixed Court of Cassation that "it is in short the immunity of the vessel which projects itself beyond the vessel for the realization of its own ends" may have been unfortunate. It appears to mean simply that so long as members of the crew are on duty, even though they may be on shore, there is a functional basis for their immunity. This is a position for which support can be found. The immunities of diplomats are of even wider scope, and are said to be justified on a functional basis. The opposing view need not depend on the theory the warship and crew are one, and cannot be immune when physically separated. It can stem from the belief that compelling military need for the immunity of the crew can exist only if they are on the warship. At least it can be said that the primary functions of the crew are performed on board, and the military need for their immunity is more clearly discernible when they are on board.

Gidel makes the point that the difficulties of determining whether an act was an act "de service" may explain why immunity for such acts on shore has not had wider support.[28] Later decisions of the Mixed Courts of Egypt, limiting the doctrine of the *Triandafilou* case that "these words should be interpreted not

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the latest holding of international law on the subject" and denying that, as a member of a visiting force, the accused was protected by any general immunity, either under international law or because of the Anglo-Egyptian treaty, the court said that "the sole question which presents itself * * * is that of knowing whether Triandafilou was or was not carrying out a mission under instructions at the moment when he committed the aggression * * *." In deciding that he was, and ordering Triandafilou set at liberty, it said:

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

[28] 2 Gidel, *op. cit. supra*, note 2, at 295.

with reference to the activities of him who has received the order but with reference to him who has given the order," illustrate the difficulty.[29] There is a discernible distinction—though one not always easy to draw in a given situation—between an act done while on duty and one done in the performance of duty. The exercise of criminal jurisdiction by the receiving state in the latter situation involves a much more direct interference with the sending state's conduct of its affairs, and poses the dilemma of conflicting duties for the actor. There is need, then, for more precise analysis before the conflicting interests of the sending and receiving state can be weighed. It should not be forgotten, however, that a criminal offense on shore creates more than a moral disturbance of the peace of the port, so that the littoral state has a greater interest in asserting jurisdiction than if it takes place on the vessel.[30]

It has been pointed out that a party of sailors on duty ashore may have the status of an "organized force" of "friendly force," with whatever added claim to immunity this may entail.[31] The

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[29] *Gounaris* v. *Ministère Public*, Egypt, Mixed Court of Cassation, May 10, 1943 [1943–1945] Ann. Dig. 152 (No. 41).

[30] No distinction is apparently made on the basis of the nationality of the victim, but in practice this may be crucial. Thus: "In September 1926, when a seaman of the U.S. destroyer *Sharkey* died in England as a result of wounds received in a shooting affray with another seaman of the U.S. destroyer *Lardner* in the outskirts of Gravesend, the British Government consented, on the application of the American Ambassador in London, and as a matter of international courtesy, to hand over the culprit to the American authorities, although he had already been convicted by a coroner's jury of 'wilful murder.' In the statement issued by the Home Secretary, the opinion of the British Government was expressed that 'in the special circumstances of this case, a United States tribunal would be the more convenient Court,' particularly in view of the 'assurance given by the Ambassador' that the guilty person would be dealt with in accordance with the U.S. Navy Court-martial Regulations. 'In coming to this decision, the Secretary of State had in mind the fact that both the accused and the injured seaman belonged to the U.S. Navy and that no British subject was directly concerned'." Colombos, *op. cit. supra*, note 8, at 236.

[31] Hyde states (2 Hyde, *op. cit. supra*, note 10, at 830), that "If a body of sailors under the command of an officer is permitted to land as an organized force, as for the purpose of taking part in a local parade, the members are doubtless exempt from the local jurisdiction, not, however, on account of their connection with a public vessel, but because they constitute an organized force of a foreign State permitted to enter the national domain,"

distinction between such a party and an individual sailor ashore on duty is significant, particularly if the specific consent of the littoral state to the landing of the party, e.g., a shore patrol, is required. This should not, however, be viewed as an odd reinvocation of the doctrine of extraterritoriality. An individual sailor on shore on duty may or may not be entitled to immunity. In the appraisal of his claim, however, he should not be likened to a soldier, stationed with his unit in France, who crosses into Switzerland. The warship and the members of the crew on shore are still in the same state, and when it becomes relevant, that fact should be accepted.[32]

The flag state can certainly extend its law to conduct on board its warships, even in foreign ports.[33] Direct authority with respect to its right to exercise enforcement jurisdiction aboard such ships is hard to come by, but certainly it is no less extensive than on merchant vessels and may well be greater.[34] Enforcement jurisdiction may not, however, in any case be exercised on shore without the consent of the territorial sovereign. Such jurisdiction is in fact exercised by consent in many instances but only to curb minor excesses, and the authority of the local police is in no sense superseded.[35] The disability applies particularly to the

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citing, *inter alia*, the *Tampico Incident*, 2 Hackworth, *op. cit. supra*, note 10, at 420–21.

The Reporter's Notes to Sec. 52 of the Restatement, *Foreign Relations Law*, p. 178, take the same approach, though the conclusion is different.

[32] See Gidel's comment on the views expressed by Van Praag, 2 Gidel, *op. cit. supra*, note 2, at 296.

[33] 1 Hyde, *op. cit. supra*, note 10, at 800.

[34] Sec. 52, p. 176, of the Restatement, *Foreign Relations Law*, states that: "Except as otherwise expressly indicated by the coastal state, its consenting to the visit of a foreign naval vessel * * * implies that it * * *

(b) consents to the exercise by the foreign state of such of its enforcement jurisdiction * * * as is necessary for the internal management and discipline of the vessel."

Comment (e), p. 177, states that "The exercise by the state of the vessel, of the enforcement jurisdiction that it has * * * is limited to detention, the inflicting of minor punishment or the holding of summary courts martial. It does not include the inflicting of major punishment such as the death penalty."

United States Navy Regulations 1948, Article 0732, contemplate the exercise of limited enforcement jurisdiction on the vessel even with respect to strangers to the vessel. *Op. cit. supra*, note 21.

[35] "For reasons of courtesy and expediency, a usage has arisen permitting foreign officers to seize and take on board their ships, without obstruction,

arrest of deserters, since, at least if they are not apprehended in the act of deserting they can be said to have broken, *de facto*, their link to the warship.[36]

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members of crews who have become intoxicated and whose offences have not been directed against persons or property ashore. * * *" 2 Hyde, *op. cit. supra*, note 10, at 831.

"In the ports of all countries where foreign men-of-war resort, when sailors go ashore, become intoxicated and violate police regulations by quarreling with brother sailors—especially where they have insulted or injured none of the citizens of the country—their officers are always permitted to seize them and take them on board without obstruction, unless they have been first apprehended by the police. This is a custom, founded on courtesy, among all nations." Mr. Buchanan, Secretary of State, to Mr. Leal, Brazilian chargé, Aug. 30, 1847, S. Ex. Doc. 35, 30 Cong. 1 Sess. 28, 32; 2 Moore, *op. cit. supra*, note 1, at 589.

The *United States Navy Regulations 1948* are strict and explicit. Article 0625 provides for shore patrols "to maintain order and suppress any unseemly conduct on the part of any member of the liberty party. The senior patrol officer shall communicate with the chief of police or other local officials and make such arrangements as may be practicable to aid the patrol in properly carrying out its work.

2. *A patrol shall not be landed in any foreign port without first obtaining the consent of the proper local authorities.* Tact must be used in requesting the permission, and unless it is willingly and cordially given, the patrol shall not be landed. If consent cannot be obtained, the size of the liberty parties shall be held to such limits as may be necessary to render disturbances unlikely. (Emphasis added.)

3. Officers and men on patrol duty in a foreign country shall be unarmed * * *."

Article 0622 provides:

"1. The senior officer present shall * * * respect the territorial authority of nations in amity with the United States.

2. Unless permission has been obtained from the local authorities:

(a) No armed force * * * shall be landed."

[36] "Should any members of the crew desert in a foreign port, the commanding officer must not attempt to arrest them ashore; to do so would be a violation of the jurisdiction of the local sovereign." Colombos, *op. cit. supra*, note 8, at 237, citing the case in 1905 in which the commander of the German gunboat *Panther* sent on shore in Brazil a search party composed of twelve petty officers and sailors in uniform, together with three officers in plain clothes, who entered several houses and forced some of the local inhabitants to help in the search for a missing seaman who had not returned from leave on shore. Brazil protested and Germany disavowed the commander's acts.

Hyde observes that "For reasons of courtesy and expediency, a usage has arisen permitting foreign officers * * * to exercise the customary authority for the maintenance of discipline over seamen, remaining ostensibly within

Writers have differed in the weight they have given precedents regarding the crews of warships in situations involving land forces. If the approach taken emphasizes the warship as an instrumentality, there is no precise analogy with land forces, though where land forces man an installation in an assigned area, the parallel is close.[37] Otherwise, though one can speak of an organized body of men performing an assigned mission on behalf of the sending state, the absence of a physical entity, like a warship, which gives form to the concept, makes the argument less convincing.

A warship in a foreign port may well present a less serious threat both to the security of the littoral state and to its inhabitants than a land force stationed on its territory. Foreign

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the foreign naval service, and subject to its *de facto* control. Such officers obviously possess no right, however, to arrest seamen who have deserted and escaped from actual control." 2 Hyde, *op. cit. supra*, note 10, at 831. Hyde cites *Tucker* v. *Alexandroff*, 183 U.S. 424, in which the court observed: "[W]e have no doubt that, under the case above cited, the foreign officer may exercise his accustomed authority for the maintenance of discipline, and perhaps arrest a deserter *dum fervit opus*, and to that extent this country waives its jurisdiction over the foreign crew or command." For criticism of this statement, see 2 Gidel, *op. cit. supra*, note 2, at 379.

In *The U.S.S. Mohecan*, a midshipman who had gone ashore in Brazil fired five shots in the streets of the city at one of his boatmen who attempted to desert. He was arrested and taken before the chief of police, who discharged him, allegedly with a reprimand. The Department of State stated that the act of the midshipman "in firing a pistol at a deserter in a street of Maranham was a breach of the peace, offensive to the dignity of Brazil, which the Government of that country may well expect the United States to disallow and censure." Mr. Seward, Secretary of State, to Mr. Webb, Jan. 23, 1867, M.S. Inst. Brazil, XVI, 162; 2 Moore, *op. cit. supra*, note 1, at 590.

The case could, however, be distinguished on the ground the midshipman displayed excessive zeal in resorting to gunfire.

The *United States Navy Regulations 1948* contemplate that men may be landed to capture deserters with the permission of the local authorities (Article 0622, note 34, *supra*) and the *Queen's Regulations and Admiralty Instructions of Great Britain* do also. Colombos, *op. cit. supra*, note 8, at 237.

[37] "The immunity of a foreign vessel of war is frequently said to apply in respect of members of the crew while on shore and 'on duty.' This undoubtedly has furnished the concept applied by Oppenheim to an army. Based on the theory of exterritoriality, the latter is a 'body' and immunity beyond its 'lines' is confined to members on duty." Rand, J. in *References Re Exemption of U.S. Forces from Candian Criminal Law*, (1943) 4 D.L.R. 11, 47.

land forces are likely to intermingle more with the inhabitants and to have more frequent contact with them, over a longer period, than the crew of a warship. Maintaining strict discipline over the crew of a warship during a short visit is easier than maintaining it over land forces during an extended stay. The distinction is recognized in the differentiation made between the entrance of a warship to a foreign port without specific permission and the requirement that a land force obtain express permission before it enters foreign territory.[38]

It is difficult on the other hand to discern any reason why troops on foreign territory are more entitled to immunity from the jurisdiction of the territorial state than the crew of visiting warships. Such distinctions as can be made point in the other direction. But even if their situations are treated as identical, precedents with respect to the crews of warships offer little comfort to those who believe visiting land forces should enjoy complete immunity from the receiving state's jurisdiction. No clear basis appears for distinguishing between crews on shore on leave and troops off duty in a neighboring town.

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[38] "But the role which is applicable to armies, does not appear to be applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers, often, indeed, generally, attending it, do not ensue from admitting a ship of war, without special license, into a foreign port." *The Schooner Exchange, op. cit. supra,* note 9, at 140.

The Restatement, *Foreign Relations Law,* recognizes the distinction. Comment a to Sec. 52, p. 176, states that "In the case of foreign naval vessels, notification of an intended visit is customary. It is not necessary that the coastal state expressly communicate in return its consent to the visit. The mere fact that it does not expressly prohibit the visit is sufficient consent." But Sec. 57, p. 183, states that "In time of peace, a force of a state has no right to be present in the territory of another state without the express consent of the territorial state," and Comment a to that section distinguishes the case of a naval vessel entering a port. Comment b, p. 184, notes that "The entry of a foreign force into the territory of a state is too important a matter to be based upon mere implication of consent by the territorial state."