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Walter F. Brown

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CRIMINAL JURISDICTION OVER
VISITING NAVAL FORCES
UNDER INTERNATIONAL LAW*

WALTER F. BROWN†

We have here two sovereignties, deriving power from different sources, and capable of dealing with the same subject matter [a crime committed in Canada by a member of the United States armed forces] within the same territory. . . . Assuming for the moment that there was but one act done by the accused, international law has long recognized the possibility of the existence of two concurrent jurisdictions. . . . In this case, jurisdiction in the United States springs from its personal supremacy over the individual, while Canadian jurisdiction is founded upon its sovereignty in the place where the offense occurred.¹

JUDGE GEORGE W. LATIMER
United States Court of Military Appeals

I. INTRODUCTION

Saigon's *Affaire Der*² of 1867 provides a practical case by which to introduce this interesting area of international law.³ France's Imperial Solicitor General set forth these key facts in his petition to the Criminal Chamber of the French Court of Cassation:

Last January 20, in the evening, a considerable gathering which had formed on the Napoleon Quay, facing the *Café de Paris*, called

*This article is based upon a thesis presented to The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia, in April 1965, while the author was a member of the Thirteenth Career Class. The opinions and conclusions expressed herein are the author's and do not necessarily represent the views of either The Judge Advocate General's School or any other governmental agency.

†Commander, U. S. Navy. Assistant Director, Appellate Government Division, U. S. Navy Appellate Review Activity, Office of the Judge Advocate General, Department of the Navy, Washington, D.C. Instructor, U. S. Naval Justice School, Newport, Rhode Island, 1958-61. Senior Legal Officer, U. S. Naval Station, Subic Bay, Republic of the Philippines, 1961-64. A.B. 1949, J.D. 1952, University of Southern California; special student 1957, Harvard Law School; A.M. (international relations) 1961, Boston University.

¹United States v. Sinigar, 6 U.S.C.M.A. 330, 336-37, 20 C.M.R. 46, 52-53 (1955).

²Cour de Cassation (Ch. Crim.), Feb. 29, 1868, [1868] Sirey Recueil Général I. at 351 (Fr.) (The Pearl).

³See generally, STANGER, CRIMINAL JURISDICTION OVER VISITING ARMED FORCES 55-78 (U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 1957-1958, vol. 52, 1965) [hereinafter cited as STANGER].

over the policeman Mesmer. He learned that this gathering was caused by an English sailor from the corvette [of war] *The Pearl*, then tied up in Saigon, who had just violently struck a resident of the city. To the order of the policeman to follow him, this sailor, named Machel Der, responded with a formal refusal and at the same time punched the member of the police force. The latter prepared to repel this aggression when he was surrounded by five other English sailors and thrown to the ground. It was then that Machel Der, rushing on him again, tore all his clothing and inflicted a wound on his forehead.⁴

Der was promptly prosecuted in the Correctional Police Court of Saigon for assault and battery of a policeman, convicted, and sentenced to nine months imprisonment. On appeal, the Superior Court of Saigon held that the trial court lacked jurisdiction, reasoning, in part, that

although art. 3, Code Napoleon, establishes territorial sovereignty for the punishment of felonies and misdemeanors committed on French territory, even by foreigners, there exists at the same time a principle of international law, referred to in the decree of February 21, 1808, under which soldiers under the flag and sailors serving aboard vessels of the State are considered as being within their own country and coming under the jurisdiction of their flag for crimes they commit, *even on land*, in a neutral or friendly country.⁵

The Court of Cassation upheld the trial court's jurisdiction, reasoning, in part, that since Der's offense was committed after he "*came onto land*," it did *not* come within

either . . . the decree of Feb. 21, 1808, which governs jurisdiction for all military forces marching with their corps, under the flag, or . . . the exceptions established in the law of nations and international law for acts committed on board foreign ships, navigating, under their nation's flag, on the high seas as well as in that area in the neighborhood of the coasts of another nation that by general agreement is called the territorial sea, or within one of its roads or ports.⁶

⁴Cour de Cassation (Ch. Crim.), Feb. 29, 1868, [1868] Sirey Recueil Général I. at 351, as translated by LT Bernard H. Oxman, USNR, International Law Division, Office of the Judge Advocate General, Department of the Navy, Washington, D.C.

⁵*Ibid.* (Emphasis added.)

⁶*Id.* at 352. (Emphasis added.)

The rules of criminal jurisdiction over naval forces visiting in most Western European nations have now been specifically delineated by treaty. Thus in 1951, all of the North Atlantic Treaty Organization's member-States but one signed the NATO Status of Forces Agreement,⁷ an article of which specifically defines the rules of jurisdiction over crimes committed by a member of a NATO-member State's armed forces while visiting within the territory of another NATO-member State.⁸

Generally speaking, however, "treaties seldom govern the exercise of jurisdiction over visiting naval vessels and their personnel."⁹ In Southeast Asia, for example, the United States has no such treaty with Vietnam, Thailand, Indonesia, Singapore, Malaysia, Burma, Ceylon, and India. And, as is clearly evidenced by the United States' experience under its longstanding military bases agreement with the Philippines,¹⁰ even the existence of such an agreement does not always resolve the many problems that may arise when a serious offense is allegedly committed by a member of a visiting naval force. For example, on December 14, 1964, the Associated Press briefly reported from Manila:

Marine Guard Kills Filipino

MANILA, Dec. 14 (AP)—A United States marine shot and killed a Filipino, Conzalo [sic] Villedo, last night near a store of bombs at the United States Naval Base on Subic Bay, the Navy announced today. It was the second Filipino trespasser killed by an American military guard in three weeks.¹¹

⁷Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67, 109, 48 AM. J. INT'L L. SUPP. 83 (1954) [hereinafter cited as the NATO Status of Forces Agreement], signed by Belgium, Canada, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, United Kingdom, and the United States, but not by Iceland. See generally Re, *The NATO Status of Forces Agreement and International Law*, 50 NW. U.L. REV. 349 (1955); Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 COLUM. L. REV. 1091 (1953).

⁸See generally SNEE & PYE, *STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION* (1957); Rouse & Baldwin, *The Exercise of Criminal Jurisdiction under the N.A.T.O. Status of Forces Agreement*, 51 AM. J. INT'L L. 29 (1957).

⁹RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 49, note 1 (1965) [hereinafter cited as RESTATEMENT].

¹⁰Agreement With the Republic of the Philippines Concerning Military Bases, March 14, 1947, 61 Stat. (4) 4019, T.I.A.S. No. 1775, amended by an exchange of notes signed at Manila on Aug. 10, 1965, 16 U.S.T. & O.I.A. 1090, T.I.A.S. No. 5851.

¹¹N.Y. Times, Dec. 15, 1964, p. 14, col. 4. The earlier incident occurred at Clark Air Base. "Clark Field, a 300-square-mile base on which 50,000 people live and work, provides the principal logistical support for the Air Force in Vietnam.

Within a few days, however, there was a serious reaction in several Filipino communities to these shootings, the first of which took place at Clark Air Base.¹² In addition, the national press gave these incidents

The naval base at Subic Bay is the chief supply and repair depot for the Seventh Fleet." N.Y. Times, Nov. 21, 1965, p. 8, col. 1. The two American marines involved in the Subic incident were at the time on guard duty at the U.S. Naval Magazine, Subic Bay. They were later tried and acquitted by a Navy general court-martial on charges of negligent homicide and willfully discharging a firearm under circumstances endangering human life. N.Y. Times, March 9, 1965, p. 11, col. 4. The earlier incident, which occurred on Nov. 25, 1964, at the Clark Air Base's Crow Valley Guntery Range, involved the shooting of a 14-year old Filipino trespasser who was scavenging for metal. Trumbull, *U.S. Army's Information Lag Angers Filipinos*, N.Y. Times, Jan. 15, 1965, p. 3, col. 2; N.Y. Times, Feb. 27, 1965, p. 7, col. 3. The American airman involved, an off-duty guard, was bird hunting with a 22-caliber rifle at the time of the incident. N.Y. Times, Feb. 26, 1965, p. 2, col. 4. He was later tried and convicted by an Air Force general court-martial on charges of unpremeditated murder and sentenced to dishonorable discharge, confinement at hard labor for 3 years, forfeiture of all pay and allowances, and reduction to the grade of airman basic. N.Y. Times, Feb. 27, 1965, p. 7, col. 3. Except for a reduction of the dishonorable discharge to a bad conduct discharge, the findings and sentence were approved upon review. *United States v. Cole*, ACM 19272, 35 C.M.R. 878, *petition for review denied*, 15 U.S.C.M.A. 689, 35 C.M.R. 478 (1965). For some years the theft of bombs and other munitions from Subic and Clark has been a serious problem. For example, the Associated Press reported from Manila on Aug. 10, 1964:

The Philippine police have seized 37 100-pound bombs that were being transported in a truck in the vicinity of Clark Field, a United States air base, and charged a policeman with illegal possession of explosives. They said the bombs had apparently been stolen from the base. Charges were filed against 14 men. N.Y. Times, Aug. 11, 1964, p. 29, col. 4.

A United States Embassy source in Manila reported on Dec. 18, 1964, that "564 bombs were stolen at Clark Base" during 1964. N.Y. Times, Dec. 19, 1964, p. 7, col. 2.

¹²E.g., the Manila Chronicle, Dec. 21, 1964, p. 15, col. 3, reported: BALANGA. Bataan, Dec. 20—(PNS)—Additional PC [Philippine Constabulary] troops with radio equipment have been dispatched to barrio Mabayo [the nearest Filipino community to the site of the Subic Bay incident], Morong, to watch the restless residents of the barrio following the gun-slaying of [Mabayo] fisherman Gonzalo Villedo allegedly by two United States Marines.

Major Mamerto Manahan, provincial PC commander, said that the reinforcement of the PC detachment in barrio Mabayo was to prevent the barriofolk from taking the law in their own hands.

The Mornig [sic] municipal council already has reacted sharply to the slaying of Villedo.

The N.Y. Times, Dec. 28, 1964, p. 13, col. 6, reported:

ANGELES, [Pampanga] the Philippines, Dec. 27. (AP)—A caricature showing the United States Ambassador, William McCormick Blair Jr., straddling a bomb was burned today at a rally demanding Mr. Blair's recall and the removal of American military bases from the Philippines.

About 2,000 persons attended the rally, prompted by the recent fatal shooting of two young Filipinos on United States military bases and a controversy over a bomb hurled into an elementary school's yard at Clark Air Force Base.

extensive coverage. For example, almost two weeks after the Subic Bay incident, a leading Manila daily devoted the first two pages of a Saturday "Christmas weekend" issue *entirely* to the Subic-Clark affair.¹³

Where there is no status of forces-type agreement, however, such incidents are potentially even *more* explosive because of the lack of clearly defined jurisdictional rules under international law. As to ship-board crimes, for example, Mr. Justice Stone's observation concerning the jurisdictional rules governing visiting merchant ships is equally true with regard to visiting warships, "There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both."¹⁴ And of the jurisdictional rules governing visiting naval forces ashore, Mr. Colombos states, with typical British restraint, "The position of officers and crew when ashore is not quite free from doubt."¹⁵

Having in mind the possible international conflicts of criminal jurisdiction which may arise in the absence of an applicable status of forces-type agreement, the purpose of this article is to briefly develop, define, and illustrate the current rules of jurisdiction prescribed by interna-

The N.Y. Times, Jan. 26, 1965, p. 1, col. 1, reported:

MANILA, Jan. 25—About 5,000 workers, students and representatives of peasant groups staged a demonstration in front of the United States Embassy tonight. A cardboard "Uncle Sam" was burned at the embassy gate.

There has been widespread irritation in the Philippines over the shooting of trespassers at United States bases. The protests have grown into a demand that President Diosdado Macapagal seek a treaty revision that would give Philippine courts jurisdiction over Americans involved in incidents with Filipinos on and off the bases.

¹³The Philippine Free Press of Dec. 26, 1964, devoted its front page to a half-page editorial cartoon picturing an American soldier holding a smoking machine gun and surrounded by dead Filipinos and to a half-page editorial entitled "SPECIAL RELATIONS" which stated, in part:

Forty-one Filipinos have been killed by American soldiers, according to a Filipino official. Have the killers been tried? We do not know. Were the Filipinos killed guilty of a capital offense that they should be killed? If a Filipino picked empty shells, should he be shot down like a dog by an American soldier?

Page two contained a full-page article headlined, "KILLINGS AT U.S. MILITARY BASES—Two Filipino 'Intruders' Were Shot Dead by U.S. Military Guards. American Authorities Have No Duty To Give Special Protection To Those Who Do Their Country A Disservice." Pictures of visiting Navy ships and of the American Ambassador were captioned, respectively, "U.S. WARSHIPS AT SUBIC BAY—Extraterritorial rights" and "AMBASSADOR BLAIR—Could be overruled."

¹⁴United States v. Flores, 289 U.S. 137, 158 (1933).

¹⁵COLOMBOS, INTERNATIONAL LAW OF THE SEA 251 (5th ed. 1962) [hereinafter cited as COLOMBOS].

tional law for the disposition of crimes committed aboard a visiting warship¹⁶ and ashore by the ship's crew.

II. FUNDAMENTALS OF CRIMINAL JURISDICTION

A. CRIMINAL JURISDICTION OF STATE COURTS UNDER DOMESTIC LAW.

Each State in the international community generally establishes a number of different courts "to handle a part of . . . [its] judicial business."¹⁷ At least one such court is legally invested under domestic law with the power to try accused persons and criminal charges. When a State court can try *both* the accused person and the criminal charge brought before it in a particular case, it is said to have criminal jurisdiction under domestic law.

*In re Gilbert*¹⁸ illustrates an unsuccessful attempt to prosecute an American marine in both civil and military courts wherein each court ruled it lacked the requisite criminal jurisdiction under domestic law. In 1944 Gilbert, while on guard duty at the entrance to Admiral Ingram Camp, part of an American military base temporarily established

¹⁶The term "warship" is used but not defined in the Convention on the Territorial Sea and the Contiguous Zone, Geneva, 1958. The term, however, is defined as follows in the Convention on the High Seas, Geneva, 1958, art. 8, para. 2:

For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

In the *Lone Star*, a criminal case involving crewmen of a World War II armed American merchant ship, the 10th Criminal District Court of Rio de Janeiro held that as the vessel was armed she was an auxiliary warship. The Brazilian Federal Supreme Court reversed, reasoning:

We have to determine the essential nature of the status of the *Lone Star*, which, though possibly commanded by an officer on active service or a member of the reserve of the American Navy, carried a cosmopolitan crew composed of Dutch, Estonians, English, Turks, Spaniards, Greeks and nationals of Honduras. . . . Though she is armed for urgent defense and sailing in convoy under the official control of the United States, yet she is not in fact anything more than an armed freighter operated by a State marine corporation. However, for a ship to be classified as public and—a subdivision of this category—to be characterized as military, the classical rules have established that not only the command but also the crew and the war flag must be those of the country concerned (Hague Conventions of 1898 and Brussels Convention of 1928 . . .).

[1947] Ann. Dig. 84, 88 (No. 31).

¹⁷JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 135 (1927).

¹⁸Supreme Federal Court, Nov. 22, 1944, DIARIO DA JUSTICA, Aug. 21, 1945, § Jurisprudencia 2969 (No. 190), [1946] Ann. Dig. 86 (No. 37) (Braz.).

in northern Brazil during World War II, shot and killed a local national. The United States and Brazil had not entered into a status of forces-type agreement. The local police first sought to prosecute Gilbert in the Third Criminal District Court of Recife but the court "declared itself to be without jurisdiction owing to the military nature of the crime."¹⁹ Gilbert was then brought before the Military Judge of the Seventh Military Region but he

declined jurisdiction on the ground that under Brazilian law both offender and victim were civilians and that the crime occurred without the camp although "within the sphere of supervision and guardianship of the marine Gilbert."²⁰

In view of this "negative conflict of jurisdiction,"²¹ the military court submitted the question of its jurisdiction to the Brazilian Supreme Federal Court. Speaking for a unanimous court, Mr. Justice Falcão ruled:

[I]t is my duty to judge correct the present refusal of the Brazilian authorities to acknowledge jurisdiction and to declare competent the military courts of the United States to try and judge the American sailor in question.²²

He reasoned that under international law the Brazilian courts had no right to exercise Brazil's territorial jurisdiction over Gilbert's crime and that under domestic law "there is no way in which he can be made subject to Brazilian military penal law."²³

B. CRIMINAL JURISDICTION OF STATES UNDER INTERNATIONAL LAW.

1. *Jurisdiction Over Crimes Generally.* A State has jurisdiction under international law over a crime when it is competent under international law to prosecute and punish for an act or omission made an offense by its domestic law.²⁴ Thus assuming *arguendo* that in *In re*

¹⁹*Ibid.*

²⁰*Ibid.*

²¹*Ibid.*

²²DIÁRIO DA JUSTIÇA, Aug. 21, 1945, § Jurisprudência 2969 (No. 190), as translated in King, *Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces*, 40 AM. J. INT'L L. 257, 263, (1946).

²³DIÁRIO DA JUSTIÇA, Aug. 21, 1945, § Jurisprudência 2969 (No. 190), [1946] Ann. Dig. at 88-89.

²⁴Harvard Research in International Law, *Jurisdiction With Respect to Crime*, arts. 1(b), 1(c), 29 AM. J. INT'L L. SUPP. 435, 439 (1935) [hereinafter cited as *Jurisdiction With Respect to Crime*].

Gilbert the Brazilian *civil* court had had jurisdiction under domestic law over both *Gilbert's* person and alleged crime, there would still have been the further requirement that the court also have jurisdiction *under international law*. For "it is clear . . . that the sovereign cannot confer legal jurisdiction on his courts . . . when he has no such jurisdiction according to the principles of international law."²⁵ While a sovereign "has such power so far as his own territory is concerned . . . such extension will not be recognized by other sovereigns."²⁶

Each State under the principles of international law has jurisdiction over the following:

- a. Any crime "committed within its own territory,"²⁷ whether commenced and consummated within, commenced within but consummated without,²⁸ or commenced without but consummated within its own territory.²⁹
- b. Any crime "committed in whole or part upon a public or private ship . . . which has its national character,"³⁰ whether on the high seas or in foreign waters.³¹
- c. Any crime "committed outside its territory . . . [by a] person who was a national of that State when the crimes was committed or who is a national of that State when prosecuted or punished . . ."³²
- d. Any crime committed by a member of its armed forces.

²⁵Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 243 (1923).

²⁶*Id.* at 244.

²⁷*Kinsella v. Krueger*, 351 U.S. 470, 479 (1956).

²⁸This is "the so-called subjective territorial principle." *Jurisdiction With Respect to Crime*, art. 3, comment, 29 AM. J. INT'L L. SUPP. at 484. See, e.g., *The Tennyson* where Brazil asserted "jurisdiction over an explosion on a British vessel on the high seas, the explosive instrumentalities having been placed on board in Brazilian waters." *Id.* at 487.

²⁹This is "the so-called objective territorial principle." *Jurisdiction With Respect to Crime*, art. 3, comment, 29 AM. J. INT'L L. SUPP. at 487. "The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain." 1 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 798 (2d ed. 1945) [hereinafter cited as HYDE]. See, e.g., *Ford v. United States*, 273 U.S. 593, 624 (1927).

³⁰*Jurisdiction With Respect to Crime*, art. 4, 29 AM. J. INT'L L. SUPP. at 439.

³¹See, e.g., *United States v. Bevens*, 16 U.S. (3 Wheat.) 336 (1818), which involved the murder of a Navy cook's mate on board *The Independence*. Mr. Chief Justice Marshall stated that the proposition that the "government . . . has power to punish an offence committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be questioned in this court." *Id.* at 390. (Emphasis added.)

³²*Jurisdiction With Respect to Crime*, art. 5, 29 AM. J. INT'L L. SUPP. at 440.

Regarding a State's jurisdiction over crimes committed by its armed forces, it should be noted that the United States Congress, when enacting the Uniform Code of Military Justice³³ in 1950, specifically provided that this "code shall be applicable in all places."³⁴ This provision for extraterritorial applicability, however, was not necessary. As the United States Supreme Court said in *Kinsella v. Krueger*,³⁵ the UCMJ is "applicable beyond any constitutional question to all servicemen stationed abroad."³⁶

Where a national has committed a crime while serving abroad in his State's armed forces, that State's exercise of jurisdiction over his crime is merely an example of jurisdiction based upon the nationality principle.³⁷ Aliens, however, frequently also serve in a State's armed forces.³⁸ Nevertheless, "the relationship established when an alien becomes a member of the military services of a state gives the state jurisdiction to prescribe rules governing the conduct of the alien, notwithstanding the fact that such membership does not make him a national of the state."³⁹ Thus in *Chung Chi Cheung v. The King*,⁴⁰ where a cabin boy (a British national) had murdered the ship's captain (also a British national) aboard an armed Chinese customs cruiser while in

³³Uniform Code of Military Justice arts. 1-140, ch. 169, 64 Stat. 107 (1950) (now 10 U.S.C. §§ 801-940 (1964)) [hereinafter cited as UCMJ].

³⁴UCMJ, art. 5, ch. 169, 64 Stat. 110 (1950) (now 10 U.S.C. § 805 (1956)).

³⁵351 U.S. 470 (1956).

³⁶*Id.* at 478.

³⁷*E.g.*, *United States v. Sinigar*, 6 U.S.C.M.A. 330, 336, 20 C.M.R. 46, 52 (1955).

³⁸*E.g.*, BLOOMFIELD, INTERNATIONAL MILITARY FORCES 4-5 (1964).

Admiral Nelson's own flagship at the Battle of Trafalgar—H.M.S. *Victory*—was crewed by Englishmen, Scotsmen, Irishmen, Welshmen and various islanders, and the following: twenty-two Americans, seven Dutchmen, six Swedes, three Frenchmen, two Danes, three Norwegians, one Russian, three Germans, two Swiss, two Portuguese, four Italians, two Indians, one African, nine West Indians, and four Maltese.

³⁹RESTATEMENT § 31, comment *b* (1965). "X, a national of State A, is a member of the military service of state B. While stationed in A, X assaults a fellow-member of the service. B has jurisdiction to prescribe a rule of law making such action criminal." *Id.* illustration 3. In *Puhl v. Commandant*, No. 4062 H.C., D. Kan., Sept. 14, 1966, the accused, a member of the United States armed forces but a citizen and legal resident of West Germany, had been convicted by general court-martial for an offense committed in West Germany. In ruling on his petition for habeas corpus, the Federal District Court said:

Petitioner being a member of a regular component of the armed forces at the time in question, it follows that he was at that time amenable to the jurisdiction of a military court-martial convened under the Uniform Code without regard to what his citizenship may have been.

⁴⁰[1939] A.C. 160 (P.C. 1938) (Hong Kong). For a discussion of this case see Note, 53 HARV. L. REV. 497 (1940), Note, 51 JURID. REV. 177 (1939), Note, 2 RES JUDICATA 75 (1939), Note, 6 SOL. 28 (1939) [hereinafter cited as *Chung Chi Cheung*].

British territorial waters, the Privy Council held that "the Chinese Government could clearly have had jurisdiction over the offence."⁴¹

2. *Exclusive and Concurrent Jurisdiction.* When a member of a visiting naval force commits a crime punishable only by the domestic law of the visiting State or of the territorial State, such State has *exclusive* criminal jurisdiction under international law. This rule is recognized, for example, in the following two NATO Status of Forces Agreement provisions:

The military authorities of the sending State shall have the right to exercise *exclusive* jurisdiction over persons subject to the military law of that State with respect to offences . . . punishable by the law of the sending State, but not by the law of the receiving State.⁴²

The authorities of the receiving State shall have the right to exercise *exclusive* jurisdiction over members of a force . . . with respect to offences . . . punishable by its law but not by the law of the sending State.⁴³

However, when the visiting and territorial States each has jurisdiction over the crime under its own domestic laws, such States are said to have *concurrent* criminal jurisdiction under international law.

When a serious crime is committed aboard a visiting warship or ashore by a member of its crew, and when *both* the visiting and territorial States have jurisdiction over the crime, an international conflict of jurisdiction may arise. If it does, the key question to be answered is: Which State has the *primary* right to exercise its *concurrent* jurisdiction? Although this question has not infrequently been framed, "Which State has jurisdiction?", this wording tends to confuse the real issue. In *Ministere Public v. Korakis*,⁴⁴ the Egyptian Mixed Court of Cassation, being careful to distinguish between a State's *concurrent* jurisdiction and a State's *primary* right to exercise such jurisdiction, "pointed out that it was not a question of the existence of jurisdiction,

⁴¹*Id.* at 176. 2 GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER 292 (1934) [hereinafter cited as GIDEL] states:

If the author of the unlawful 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.

⁴²Art. VII, para. 2(a). (Emphasis added.)

⁴³Art. VII, para. 2(b). (Emphasis added.)

⁴⁴Dec. 11, 1944, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 66 (1944-45), [1943-45] Ann. Dig. 120 (No. 34).

for each sovereign State possessed and preserved its own jurisdiction, but of the exercise of jurisdiction . . . ”⁴⁵

When one of two States with concurrent jurisdiction extends to the other State what has been called “international courtesy,” the answer to this key question, of course, is moot. For example, “where the offence is a minor one, it is usual as a matter of comity to hand the offender over to the commanding officer for disciplinary action.”⁴⁶ Thus Smith writes:

[I]t is the usual practice to return to the ship members of the crew who may have committed minor offenses, such as drunkenness or disorderly conduct, since it is more convenient that such cases should be dealt with by naval discipline.⁴⁷

On the other hand, where the offense is more serious, the extending of “international courtesy” usually depends upon the circumstances of the case. As Smith notes:

In the event of a member of the crew committing a more serious offence, such as killing or seriously injuring an inhabitant, it is for the shore authorities to decide what to do with the offender. In many cases they will be content to accept the assurance of the captain that the accused man will be tried by naval court martial and that he will be adequately punished, if convicted. But it should be made quite clear that they are under no obligation to take this course, and there may well be special reasons, such as the question of bringing witnesses, which may make it desirable that the case should be tried on shore.⁴⁸

⁴⁵*Id.* at 67, [1943-45] Ann. Dig. at 121.

⁴⁶BRIERLY, *THE LAW OF NATIONS* 269 n.2 (6th ed. Waldock 1963) [hereinafter cited as BRIERLY]. 2 MOORE, *A DIGEST OF INTERNATIONAL LAW* 587 (1906) [hereinafter cited as MOORE], quotes as follows from a letter of the Brazilian Minister of Foreign Affairs dated May 31, 1847:

A young officer of the French navy committed an act of disorder in the house of a public woman, which he entered forcibly, against her will; and, having been arrested by the police, his commander, through the medium of the chargé d'affaires of France, before the prosecution was begun, solicited his delivery, with the assurance that he would be corrected on board of his ship. He was immediately given up, and the chargé d'affaires himself thanked the Imperial Government for this act of kindness.

⁴⁷SMITH, *THE LAW AND CUSTOM OF THE SEA* 30 (2d ed. 1950) [hereinafter cited as SMITH]. “The practice in Great Britain appears to be that . . . 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.” HALL, *INTERNATIONAL LAW* 249-50 n.1 (8th ed. Higgins 1924) [hereinafter cited as HALL].

⁴⁸SMITH 30-31; *accord*, BRIERLY, *THE LAW OF NATIONS* 177 (4th ed. 1949); 1 OPPENHEIM, *INTERNATIONAL LAW* 855 n.3 (8th ed. Lauterpacht 1955) [herein-

It is not unusual, however, to find instances where "international courtesy" has been extended by the territorial State in cases involving very serious offenses. Thus Colombos reports:

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.'⁴⁹

Likewise, if one of the two States waives its right to exercise its jurisdiction, no international conflict of criminal jurisdiction arises. Similarly, if one of these States—for any one of a number of reasons—is unable to exercise its jurisdiction, no conflict of criminal jurisdiction arises. Thus Lord Atkin stated in *Chung Chi Cheung*:

[I]f 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, would the local Courts 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 wit-

after cited as OPPENHEIM]. 2 MOORE 587 quotes as follows from a letter of the Brazilian Minister of Foreign Affairs dated May 31, 1847:

In 1842, two midshipmen of the squadron of Admiral Hugon fought a duel at Naples, in a room of a hotel, and were seized and tried. The French ambassador requested their discharge; the King refused, and the admiral weighed anchor and prepared to go to sea. The King, however, still refused to deliver them up, and they were tried and condemned; after which he pardoned them, and ordered them given up to the admiral.

⁴⁹COLOMBOS 251-52. "[B]ut it is unlikely that the request would have been granted if the man killed had been a local inhabitant." SMITH 31.

nesses, or to compel their testimony in advance, or otherwise. He naturally would leave the case to the local Courts.⁵⁰

However, if *both* States seek to exercise their concurrent jurisdiction over a particular crime, an international conflict of jurisdiction arises.⁵¹ To resolve each such conflict there is a rule of international law providing that one State is deemed to have waived *not* its *concurrent* jurisdiction over the particular crime but its *primary right* to exercise such jurisdiction. Thus the Egyptian Mixed Court of Cassation observed in *Anne v. Ministere Public*:⁵²

Without doubt the jurisdiction of the territorial power arising in accordance with its own laws is subject to the recognized rights of the foreign military authorities in question, but only in accordance with the limits imposed by international law regarding the *exercise* of that jurisdiction.⁵³

The fact that a State is deemed to have waived its *primary* right to exercise its *concurrent* jurisdiction does not mean, however, that at a later date it cannot properly exercise its *secondary* right to do so. As the Restatement on the *Foreign Relations Law of the United States* notes:

Waiver of the right to exercise enforcement jurisdiction by the territorial state is for the convenience and efficiency of the foreign force and is predicated on the assumption that the military au-

⁵⁰[1939] A.C. at 174.

⁵¹The problem here concerns conflicts not in "prescriptive jurisdiction" (*i.e.*, "the capacity of a state under international law to make a rule of law") but in "enforcement jurisdiction" (*i.e.*, "the capacity of a state under international law to enforce a rule of law"). RESTATEMENT § 6, comment *a*. Indeed, the problem here considered can arise only when both the visiting and territorial States have the "prescriptive jurisdiction" to make the act in question an offense and have exercised that jurisdiction. In this article the term "criminal jurisdiction" rather than the term "enforcement jurisdiction" has been used since the former is the term generally used by courts in deciding cases wherein the exercise of *enforcement* jurisdiction has been challenged. Thus in *Japan v. Smith* High Court of Osaka (6th Criminal Division), Nov. 5, 1952, [1952] Int'l L. Rep. 221, 222 (No. 47), the court said:

[I]t is in principle agreed that if a sailor belonging to a foreign warship goes ashore on official business and, while on that business, commits a crime, his home State has jurisdiction over him. In no other case is there a limitation on Japanese criminal jurisdiction.

⁵²Dec. 13, 1943, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 52 (1944-45); [1943-45] Ann. Dig. 115 (No. 33).

⁵³*Id.* at 54; [1943-45] Ann. Dig. at 118. (Emphasis added.)

thorities will exercise jurisdiction. If they fail to do so, the territorial state has a right to exercise jurisdiction. If the military courts of the sending state exercise its enforcement jurisdiction in a reasonable and responsible manner . . . , the courts of the territorial state do not normally exercise *secondary* jurisdiction. However, the exercise of such jurisdiction, in the absence of an agreement precluding it, is not a violation of international law.⁵⁴

III. EVOLUTION OF THE RULES OF CRIMINAL JURISDICTION OVER VISITING NAVAL FORCES UNDER INTERNATIONAL LAW

A. THE DOCTRINE OF EXTERRITORIALITY.

Space does not permit more than a brief discussion of the evolution of the rules of criminal jurisdiction over visiting naval forces under international law. It suffices to say that between about 1400⁵⁵ and 1850 the evolution of these rules was influenced primarily by the doctrine of exterritoriality. In 1845, Ortolan—a French publicist and former naval officer—gave perhaps the classic statement of that doctrine as regards visiting warships. Such a ship, said Ortolan, is but

a movable fortress, bearing on its breast a portion of the public power of the state [A]s to these ships the international custom is constant. The laws, the authorities, and the jurisdictions of the state in whose waters they are anchored, remain foreign to them. They have with that state but international relations, by the voice of the functionaries of that locality competent for such relation.⁵⁶

Ortolan, citing Wheaton⁵⁷ and Vattel,⁵⁸ concluded

⁵⁴RESTATEMENT § 59, comment *e*. (Emphasis added.)

⁵⁵See, e.g., HALL 237 n.1.

⁵⁶ORTOLAN, *REGLES INTERNATIONALES ET DIPLOMATIE DE LA MER* 214 (3d ed. 1856), as translated in Gregory, *Jurisdiction Over Foreign Ships in Territorial Waters*, 2 MICH. L. REV. 333, 341 (1904) [hereinafter cited as ORTOLAN].

⁵⁷WHEATON, *INTERNATIONAL LAW* (8th ed. Dana 1866) (Carnegie Endowment for International Peace "The Classics of International Law" No. 19, 1936). Citing Casaregis, the Italian publicist, Wheaton stated at 128, "A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign sovereign to whom they belong is in amity, are . . . exempt from the civil and criminal jurisdiction of the place." Casaregis, in his *DISCURSUS DE COMMERCIO* (1740), "concedes exclusive jurisdiction to a sovereign over the persons composing his naval and military forces and over his ships, wherever they may be, on the ground that the exercise of such jurisdiction is necessary to the existence of a fleet or army." HALL 237.

⁵⁸VATTEL, *LAW OF NATIONS* (1758) (Carnegie Institute of Washington, "The Classics of International Law" No. 4, 1916).

that crimes . . . committed on board a vessel of war in a foreign port, or territorial waters, by members of the crew, or any one else, fall solely under the jurisdiction of the tribunal of the nation to which the war ship belongs, and are tried according to the laws of that nation.⁵⁹

Thus, according to this view, a visiting warship was a temporary enclave of the flag-State, surrounded by but yet completely without the littoral State's territorial waters. While the flag-State had *exclusive* jurisdiction over *all* crimes committed on board its warship, the littoral State had neither territorial jurisdiction with respect to any such crime nor the right to serve its process on board.

This doctrine—sometimes referred to as the “French rule,”⁶⁰ the “high doctrine of extritoriality,”⁶¹ the “extreme doctrine of extritoriality,”⁶² and the fiction of “extra-territoriality”⁶³—had a substantial number of adherents until just before World War II, especially on the Continent and in countries deriving their jurisprudence from the Civil Law. It was this doctrine, for example, which was adopted in 1898 at The Hague by the influential Institute of International Law.⁶⁴

B. SCHOONER EXCHANGE AND THE DOCTRINE OF IMPLIED IMMUNITIES.

In 1880 Lord Justice Brett, speaking of the exemption accorded visiting warships and other public ships, said that “the first case to be carefully considered is, and always will be, *The Exchange*.”⁶⁵ The preeminence of Marshall's opinion in *The Schooner Exchange v. M'Faddon*⁶⁶ resulted not because of a lack of earlier precedents⁶⁷ but

⁵⁹1 ORTOLAN 298, as translated in Gregory, *Jurisdiction Over Foreign Ships in Territorial Waters*, 2 MICH. L. REV. 333, 344 (1904).

⁶⁰Gregory, *Jurisdiction Over Foreign Ships in Territorial Waters*, 2 MICH. L. REV. 333, 341 (1904).

⁶¹Chung Chi Cheung, [1939] A.C. at 172.

⁶²*Id.* at 170.

⁶³1 HALLACK, INTERNATIONAL LAW 232 (4th ed. Baker 1908).

⁶⁴*Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports*, art. 16, para. 1 (Aug. 23, 1898), 17 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 277 (1898); RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 147 (Scott ed. 1916) [hereinafter cited as *Regulations* (1898)]. Those apparently responsible for the draft of these regulations were all from the Continent. RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 143-44 (Scott ed. 1916).

⁶⁵The Parlement Belge, 5 P.D. 197, 208 (1880). In *The Prins Frederik*, however, when the King's Advocate cited *The Schooner Exchange* to Lord Stowell, he asked, “Where do you find that case?” and upon being given the source did not follow the precedent. 2 Dodson's Adm. Rep. 451, 462 (1820).

⁶⁶11 U.S. (7 Cranch) 116 (1812) [hereinafter cited as *The Schooner Exchange*].

⁶⁷See, e.g., *United States v. Peters*, 3 U.S. (3 Dallas) 121 (1795); *Ketland v.*

because "Marshall for the first time gave the rule its definite expression and modern legal form, so that from it we obtain today the acknowledged international law on the subject."⁶⁸

Schooner Exchange arose out of an attempt to libel the French warship *Le Balaou No. 5*—formerly *The Exchange*, an American merchant schooner—while she was in Philadelphia for repairs. Mr. Chief Justice Marshall's famous decision that a visiting warship "should be exempt from the jurisdiction of the [territorial] country"⁶⁹ was based *not* on the doctrine of extritoriality⁷⁰ but on what might be called "the doctrine of implied immunities." Marshall reasoned that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute," that "all exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself," that "this consent may be either express or implied," that "all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their territories which sovereignty confers," and that "this consent may, in some instances, be tested by common usage, and by popular opinion, growing out of that usage."⁷¹ Marshall stated that there is "a class of cases in which every sovereign is understood to waive [*sic*] the exercise of part of that complete exclusive territorial jurisdiction . . ."⁷² In discussing his third example of this "class of cases," the case of a foreign army passing with consent across the territory of a host State, Marshall reasoned:

The grant of a free passage therefore [1] implies a waiver of all jurisdiction over the troops during their passage, and [2] permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.⁷³

The *Cassius*, 2 U.S. (2 Dallas) 365 (1796) (same case). In these decisions the United States Supreme Court held that a visiting warship "could not be libeled in our courts on the theory that the property of a sovereign and independent nation must be held sacred from judicial seizure." ZIEGLER, *INTERNATIONAL LAW OF JOHN MARSHALL* 85 (1939).

⁶⁸ZIEGLER, *INTERNATIONAL LAW OF JOHN MARSHALL* 86-87 (1939).

⁶⁹11 U.S. (7 Cranch) at 147.

⁷⁰See, e.g., *Chung Chi Cheung*, [1939] A.C. 160, 170.

⁷¹11 U.S. (7 Cranch) at 136.

⁷²*Id.* at 137.

⁷³*Id.* at 140. Vattel earlier stated Marshall's "third case" as follows in 3 VATTTEL bk. III, ch. VII, § 130, 276 (1758):

The grant of a right of passage includes the grant of whatever is naturally connected with the passage of troops, and of those things without which it could not take place; this includes . . . the right to exercise military discipline over soldiers and officers . . .

It is clear that Marshall was here speaking of the territorial State impliedly waiving its *right* to exercise its jurisdiction over the visiting State's armed forces, *not* of divesting itself of a portion of its territorial jurisdiction and temporarily ceding it to the visiting State. As Mr. Justice Story stated in *The Santissima Trinidad*:⁷⁴

In the case of the *Exchange*, . . . the exemption of public ships . . . was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction.⁷⁵

Marshall therefore concluded that a public armed ship

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.⁷⁶

Schooner Exchange made a major contribution to the development of the rules of jurisdiction over visiting naval forces. Nowhere was its effect more profound, however, than in the United States. The change regarding the right to serve process aboard a visiting warship provides a striking illustration. In 1794, *The Nautilus*, a British warship, visited Newport, Rhode Island, to take on provisions. The Rhode Island General Assembly, being advised that several Americans were unwillingly detained on board, sent a delegation to investigate. Finding the ship's captain ashore unsuccessfully seeking provisions, the delegation ob-

⁷⁴20 U.S. (7 Wheat.) 283 (1822).

⁷⁵*Id.* at 352-53.

⁷⁶11 U.S. (7 Cranch) at 143.

tained from him—while he was apparently acting under some personal constraint—a letter directing the senior officer aboard to afford the delegation every assistance. Six Americans were found. After the ship's captain discharged them, he was able to obtain his needed supplies. The British minister in Washington complained that "the insult" was "unparalleled, since the measures pursued were directly contrary to the principles which in all civilised states regulate cases of this nature."⁷⁷ These "principles" were colorfully stated in 1637 in *The Victory*:⁷⁸

That, as well by the lawe of nations and the seas, as by the use and custome observed and kept, time beyond the memory of man, the ship or shippes of any King or royal fleete lying or arriving within the jurisdiction of any other prince or potentate in league and amity with the King, owner of such shippes or ship royall, ought not to be visited, molested, searched, or questioned, criminally or civilly, by the officers of that prince within whose jurisdiction the said shippes or ship are . . . and by the said lawes and customes, and by the right and power of the imperiall crowne of England his Majesty, and his noble progenitors, Kings of England for times immemoriall, have had the said preminory [sic, qy. pre-eminence] and freedome acknowledged and yeilded in all ports and havens of princes, their allies, that their royall shippes and ship of any of their royall natives [sic, qy. majesties] have . . . bin held free, and so acknowledged, from any such arresting, entry, visitation, and search, in as full a manner as if they had bin within the ports and havens of their owne dominions.⁷⁹

Attorney General Bradford, in an opinion to the Secretary of State, wrote that "the laws of nations invest the commander of a foreign ship-of-war with no exemption from the jurisdiction of the country into which he comes" and therefore he "cannot claim that extraterritoriality which is annexed to a foreign minister and to his domicile; but is conceived to be fully within the reach of, and amenable to, the usual jurisdiction of the State where he happens to be."⁸⁰ Mr. Bradford

⁷⁷HALL 239.

⁷⁸Adm. Ct. Libels 92 (No. 258), reprinted in 1 MARSDEN, DOCUMENTS RELATING TO LAW AND CUSTOMS OF THE SEA 496 (No. 1637) (Publications of the Navy Records Society No. 49, 1915).

⁷⁹*Ibid.*

⁸⁰1 OPS. ATT'Y GEN. 47, 47-48 (1794). Compare *The Favorite*, 1 OPS. ATT'Y GEN. 87 (1799). In 1795, federal officers of the New York Customs House searched *The Favorite*, a French warship, "and seized arms and ammunition on board of her belonging to the French republic, suspected to be intended for exportation." In reply to the French minister's complaint that this search and seizure was "an infraction of the law of nations, which nothing could justify," the

further opined "that a *writ of habeas corpus* might be legally awarded in such case, although the respect due to the foreign sovereign may require that a clear case be made out before the writ be directed to issue."⁸¹

In 1799, this rule was also applied to *The Chesterfield*, a British warship visiting New York. When an effort was made to serve process on board, the ship's captain "assaulted the ministerial officer of justice as he was leaving the ship, by attempting to remove the plank and throw him into the water." In reply to a Presidential inquiry, Attorney General Lee, having considered "the general laws of nations, the treaty of London between the United States and Great Britain, and the laws and usages of the United States," opined "that it is lawful to serve civil or criminal process upon a person aboard a British ship-of-war lying in the harbor of New York" ⁸²

After *Schooner Exchange*, however, the Attorney General applied a wholly different rule. In 1854, for example, *The Sitka*, a prize captured from Russia by Great Britain during the Crimean War, sailed into San Francisco with a British Navy prize crew and a group of Russian prisoners on board. A California State court issued a writ of habeas corpus to produce the Russians in court but when the writ was served upon the British captain, he set sail without obeying the writ's order. When this matter was referred to Attorney General Cushing, he stated:

Our courts have . . . adopted unequivocally the doctrine that a public ship of war of a foreign sovereign, at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. She remains a part of the territory of her sovereign. . . . So long as they [the Russian prisoners] remained on board that ship, they were in the territory and jurisdiction of her sovereign. . . . [T]he courts of the State of California had no jurisdiction whatever as to these prisoners on board the *Sitka*. . . . The ship which he [the British captain] commanded was a part of the territory of his country; it was threatened with invasion by the local courts; and, perhaps,

President said "that he highly disapproved that a public vessel of war, belonging to a foreign nation, should be searched by officers of the customs upon a suspicion of illicit commerce; that the ground of suspicion should have been represented to the consul of that nation, or the commander of the vessel." *Id.* at 90.

⁸¹1 OPS. ATT'Y GEN. 47, 48 (1794).

⁸²1 OPS. ATT'Y GEN. 87 (1799).

it was not only lawful, but highly discreet in him to depart, and so avoid unprofitable controversy.⁸³

It should be noted that while the first portion of Mr. Cushing's opinion was based upon Marshall's ruling in *Schooner Exchange*, the last portion was based upon the high doctrine of extritoriality. Marshall's ruling, however, was based *not* upon the high doctrine of extritoriality but upon the doctrine of implied immunities. As Lord Atkin stated in *Chung Chi Cheung*:

The extreme doctrine of extritoriality was not in issue in *Schooner Exchange* . . . , and neither the principles enunciated by Marshall . . . , nor his application of them, appears to support it.⁸⁴

Mr. Cushing's 1855 statement of the doctrine of extritoriality stands relatively alone in American law.⁸⁵ Occasionally jurists⁸⁶ and writers⁸⁷ have stated what superficially appears to be the doctrine. Thus, Mr. Justice Gray, in his dissent in *Tucker v. Alexandroff*,⁸⁸ quoted with approval the following statement by Judge Phillimore of the British High Court of Admiralty:

Long usage and universal custom entitle every ship to be considered as a part of the State to which she belongs, and to be exempt from any other jurisdiction⁸⁹

Generally, however, jurists and writers do *not* intend by such language to expound the doctrine of extritoriality but rather to point out that *for jurisdictional purposes only* an American vessel is being assimilated to American territory. As Barton points out:

The expression [*i.e.*, "the traditional language of extritoriality"] is now used sometimes as a convenient legal abbreviation for jurisdictional immunity, and, if properly understood, no objection can be taken to it.⁹⁰

⁸³7 Ops. ATT'Y GEN. 122, 130-32 (1855).

⁸⁴[1939] A.C. at 170.

⁸⁵For two other opinions which rely on the fiction of extritoriality see generally 1 McNAIR, INTERNATIONAL LAW OPINIONS 90-91 (1956).

⁸⁶See, *e.g.*, Mr. Justice Stone in *United States v. Flores*, 289 U.S. 137, 155-56 (1933).

⁸⁷See, *e.g.*, SOULE & McCAULEY, INTERNATIONAL LAW FOR NAVAL OFFICERS 19 (3d ed. Bright) (1928); Neese, *U.S. Navy Ships in Foreign Ports*, JAG J. 7, 8 (March-April 1960).

⁸⁸183 U.S. 424 (1901).

⁸⁹*Id.* at 457, citing 1 PHILLIMORE, INTERNATIONAL LAW 476 (3d ed. 1889).

⁹⁰Barton, *Foreign Armed Forces: Qualified Jurisdictional Immunity*, 31 BRIT. YB. INT'L L. 341, 349 n.4 (1954).

C. CHUNG CHI CHEUNG V. THE KING.

In this landmark pre-World War II case, the British Privy Council applied Marshall's doctrine of implied immunities to a very serious crime committed aboard a visiting armed public vessel. Cheung, a cabin boy serving on *The Cheung Keng*, an armed Chinese maritime customs cruiser then in British territorial waters off Hong Kong, shot and killed the ship's captain and then attempted suicide. Both Cheung and his captain were British nationals. After Cheung's release from a local hospital, he was tried for and convicted of murder at the Ordinary Criminal Sessions of the Supreme Court of Hong Kong despite his counsel's argument that this court, under the doctrine of extritoriality, lacked jurisdiction.

Cheung's appeal to the Full Court of Appellate Jurisdiction of Hong Kong was dismissed. After noting "the change in the attitude of international jurists as to the reasoning underlying this universally conceded immunity, and the trend of modern writers towards the opinion that it is a freely accorded waiver by one sovereign state of part of its complete sovereignty," this appellate court ruled:

If this opinion is the correct one it necessarily follows that the guest state and the host state have *concurrent* jurisdiction, but that, as a matter of international comity, the jurisdiction of the host state is postponed to that of the guest state. . . . [The defense counsel's] proposition that the jurisdiction of the visiting state is sole and exclusive is one to which we are unable to accede.⁹¹

Cheung's appeal to the Privy Council also failed, their Lordships agreeing that he had no valid objection to the trial court's jurisdiction. Said Lord Atkin:

⁹¹29 Hong Kong L.R. 22, 29 (1937). (Emphasis added.) There was also here a rather unique situation which made it especially difficult for the court to accede to the defense counsel's proposition. Noted the court at 30:

By the Treaty of Tientsin 1858 the Emperor of China renounced all claim to exercise jurisdiction within his territorial limits over British subjects. The requisition for the surrender of the appellant was doubtless inspired by the belief that the appellant, a person of Chinese parentage, with a Chinese name, and employed on board a Chinese vessel, was a national of China. The moment that the appellant established affirmatively . . . that he was not a national of China proceedings for his extradition failed. The Chinese authorities in effect are claiming to exercise a jurisdiction which they had surrendered in 1858. In these circumstances, if the appellant's plea to the jurisdiction of the Supreme Court of this Colony were upheld, the appellant, so long at least as he remains in Hong Kong, would not be answerable to any Court for the murder which he has committed.

On the question of jurisdiction two theories have found favour with persons professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is, or is to be treated by other nations as, part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There will therefore be no jurisdiction in fact in any Court where jurisdiction depends upon the act in question, or the party to the proceedings, being done or found or resident in the local territory. The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. . . . In this view, the immunities do not depend upon an objective extritoriality, but on implication of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs.

Their 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.⁹²

After examining the criticisms of the doctrine of extritoriality by Cockburn,⁹³ Hall,⁹⁴ and Brierly,⁹⁵ Lord Atkin concluded:

[We] have no hesitation in rejecting the doctrine of extritoriality expressed in the words of Mr. Oppenheim, which regards the public ship "as a floating portion of the flag-State." . . . 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.⁹⁶

⁹²[1939] A.C. at 167.

⁹³Lord Chief Justice Cockburn's criticism, part of the famous *Cockburn Memorandum* prepared during the Fugitive Slave Controversy of 1876, is generally discussed in Chung Chi Cheung, [1939] A.C. at 171-72.

⁹⁴HALL, *INTERNATIONAL LAW* 166 (1st ed. 1880).

⁹⁵BRIERLY, *THE LAW OF NATIONS* 110 (1st ed. 1928).

⁹⁶[1939] A.C. at 174. Oppenheim's following provision has generally been interpreted as supporting the rule that a visiting State has *exclusive* jurisdiction over *all* crimes committed aboard its warships while in foreign waters:

The position of men-of-war in foreign waters is characterised by the fact that they are called 'floating portions of the flag-State.' *For at the present time there is a customary rule of International Law, universally recognized, that the State owning the waters into which foreign men-of-war enter must treat them in every point as though they were floating portions of their flag-*

Lord Atkin then applied, although not expressly, Marshall's doctrine of implied immunities, stating:

The true view is that, in accordance with the conventions of international law, the territorial sovereign grants to foreign sovereigns and their envoys, and public ships and naval forces carried by such ships, certain immunities. Some are well settled; others are uncertain. . . . In relation to . . . the crew of a warship, it is evident that the immunities extend to internal disputes between the crew. *Over offences committed on board ship by one member of the crew upon another, the local Courts would not exercise jurisdiction.*⁹⁷

But here the local court did exercise such jurisdiction and the Privy Council affirmed its action. To reach this result Lord Atkin reasoned that "the Chinese Government could clearly have had [*i.e.*, exercised its] jurisdiction over the offence" but that the circumstances of this case "make it plain that the British Court acted with full consent of the Chinese Government."⁹⁸

The rule of *Chung Chi Cheung* was thus summed up by Lord Atkin:

Here [there] is no question [of the visiting State] saying [to the territorial State] you may treat an offence committed on my territory as committed on yours. Such a statement by a foreign sovereign would count for nothing in our jurisprudence. But a [visiting] sovereign may say [to the territorial State], you have waived your jurisdiction in certain cases, but I prefer in this case that you

State. Consequently, a man-of-war, with all persons and goods on board, remains under the jurisdiction of her flag-State even during her stay in foreign waters. . . . 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. Individuals who are subjects of the littoral State and are only temporarily on board may, although they need not, be taken to the home country of the vessel, to be punished there, if they commit a crime on board.

1 OPPENHEIM, INTERNATIONAL LAW 764-65 (7th ed. Lauterpacht 1948). (Emphasis added.) In Lauterpacht's final edition, he revised Oppenheim's above-quoted provision to *eliminate* the italicized portion and to *add* the following two italicized phrases:

The position of men-of-war in foreign waters is characterised by the fact that, *in a sense*, they are 'floating portions of the flag-State.' The State owning the waters into which foreign men-of-war enter must treat them, *in general*, as though they were floating portions of their flag-State.

1 OPPENHEIM 853. (Emphasis added.)

⁹⁷*Id.* at 175-76.

⁹⁸*Id.* at 176-77.

should exercise it. The original jurisdiction in such a case flows afresh.⁹⁹

D. THE MIXED COURTS OF EGYPT.

The Mixed Courts of Egypt, created by Great Britain just before World War II to exercise part of Britain's extraterritorial jurisdiction in Egypt, functioned throughout the war and decided a number of cases involving crimes committed ashore by crewmen of visiting Allied warships.¹⁰⁰ These courts have been aptly described as "the most fecund source of jurisprudence on the question of the exercise of criminal jurisdiction by local courts over members of a visiting force."¹⁰¹

*Gaitanos v. Ministere Public*¹⁰² presents the most common factual situation: a visiting warship's crewman arrested while ashore on liberty for an offense over which both the visiting and territorial States have criminal jurisdiction. In upholding the local court's right to exercise its *concurrent* jurisdiction, the Mixed Court of Cassation stated that this was merely "a case where an ordinary crime has been committed by a sailor ashore."¹⁰³

In *Orfanidis v. Ministere Public*,¹⁰⁴ however, the offender returned from liberty to his ship without being arrested, whereupon the local authorities requested he be surrendered for investigative purposes. His commanding officer complied but covered himself with the following letter:

⁹⁹*Id.* at 176. A similar rule was suggested by the Institute of International Law in its *Reglement sur le Regime des Navires de Mer et de leurs Equipages dans les Ports etrangers en Temps de Paix* (1928) [hereinafter cited as *Regulations* (1928)], art. 18 of which provided:

Crimes and offenses committed on board warships, whether by members of the crew or by any other persons on board, are withdrawn from the *exercice* 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 *exercice* of its normal *competence*.

³⁴ ANNUAIRE DE L'INSTITUT DE TROIT INTERNATIONAL 742 (1928), as translated in STANGER 66 n.18. (Emphasis added.)

¹⁰⁰See generally, Brinton, *Jurisdiction Over Members of Allied Forces in Egypt*, 38 AM. J. INT'L L. 375 (1944); Brinton, *The Egyptian Mixed Courts and Foreign Armed Forces*, 40 AM. J. INT'L L. 737 (1946).

¹⁰¹Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction*, 27 BRIT. YB. INT'L L. 186, 255 (1950).

¹⁰²JUNE 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 257 (1941-42), [1919-42] Ann. Dig. 169 (No. 87).

¹⁰³*Id.* at 258, [1919-42] Ann. Dig. at 170.

¹⁰⁴MAY 31, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 168 (1942-43), [1943-45] Ann. Dig. 141 (No. 38).

In accordance with your request I hand over to you, for the purpose of investigation only, the sailor Jean Orphanidis [*sic*], with the express reservation that you surrender him to me after the investigation has been completed so that he may be tried by the Greek authorities to whose jurisdiction he is subject.¹⁰⁵

Instead of being surrendered after the investigation was completed, Orfanidis was tried and convicted in a local court. The Mixed Court of Cassation, however, disapproved this exercise of jurisdiction, holding:

[I]f the sailor regained his warship, whatever the reason might be, without having been arrested by the local authority, he was already protected by the immunity from jurisdiction recognized as belonging to the warship. The surrender of the offender for the sole purpose of investigation did not imply renunciation of the benefit of this immunity.¹⁰⁶

In *Ministere Public v. Korakis*,¹⁰⁷ while Korakis *et al.* were arrested before they could return to their ship, the local police thereafter turned them over to the Greek military police without apparent reservation. When the local authorities sought to prosecute, the trial court sustained a defense objection to the court's jurisdiction. The Mixed Court of Cassation dismissed the prosecutor's appeal, ruling:

[W]here the local authority, having arrested the offenders, surrenders them to the commander of their ship without reservation, the courts of the flag State recover the exercise of their jurisdiction.¹⁰⁸

Among the most important decisions of the Mixed Courts of Egypt were two interpreting the *service commande* exception. As stated by the Institute of International Law in 1928, this rule provides:

If the members of the crew ashore on official duty (*service commande*) . . . commit . . . crimes ashore, the local authority may proceed to arrest them but should hand them over to the captain if he should demand their surrender.¹⁰⁹

¹⁰⁵*Id.* at 169, [1943-45] Ann. Dig. at 142.

¹⁰⁶*Ibid.*

¹⁰⁷Dec. 11, 1944, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 66 (1944-45), [1943-45] Ann. Dig. 120 (No. 34).

¹⁰⁸*Id.* at 68, [1943-45] Ann. Dig. at 122.

¹⁰⁹*Regulations* (1928), art. 20, para. 3, as translated in [1919-42] Ann. Dig. at 167-68.

*Ministere Public v. Triandafilou*¹¹⁰ involved a sailor arrested ashore for carrying a concealed weapon and stabbing a local policeman. His crimes took place shortly before midnight just after he had emerged in a drunken condition from a bar. During his trial by a local court the sailor produced a certificate from his captain stating he had left his warship charged with a mission ashore, to wit: the purchase of ship's provisions, with leave to report back on board by midnight. The Mixed Court of Cassation quashed his conviction, interpreting the *service commande* exception as follows:

The only reason why the members of the crew of a warship enjoy any immunity ashore is that they are carrying out orders relative to the needs of the ship. In effect it is a case of extending the immunity of the ship itself outside the ship for the purpose of meeting its needs. This is the basis of the principle which withdraws these members of the crew from the local jurisdiction when they are on a mission (*service commande*). Furthermore, these last words should be interpreted not with regard to the actions of him who has received the order but with regard to him who gave the order and who is concerned with its execution. In the present case . . . Triandafilou had not yet returned to his ship to give an account of his mission, and he was therefore still engaged on the mission when he committed the offense charged.¹¹¹

Judge Brinton, the American member of the Mixed Court of Cassation, has provided this further insight into the court's reasoning in *Triandafilou*:

As to whether the seaman was at the time of the offense engaged in a *service commande* the court . . . held that the question depended not on the intrinsic character of the offender's act or on his own state of mind but on the nature of the orders under which he was serving, a test which placed him within the scope of the exception.¹¹²

A few months later, in *Ministere Public v. Tsoukharis*,¹¹³ another

¹¹⁰June 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 259 (1941-42), [1919-42] Ann. Dig. 165 (No. 86). Another English translation appears in 39 AM. J. INT'L L. 346 (1945).

¹¹¹*Id.* at 260, [1919-42] Ann. Dig. at 169.

¹¹²Brinton, *Jurisdiction Over Members of Allied Forces in Egypt*, 38 AM. J. INT'L L. 375, 379 (1944).

¹¹³Feb. 8, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 89 (1942-43), [1943-45] Ann. Dig. 150 (No. 40).

service commande case, the Mixed Court of Cassation made this clarifying statement regarding the *Triandafilou* principle:

Applying this principle it seems clear that the person giving the order is interested in the report of the person sent, whereas the latter is interested in prolonging the duration of the mission. If therefore there is no report to make there is no order in question, and a soldier who abuses his mission to prolong his leave will cease to be covered by immunity from jurisdiction.¹¹⁴

IV. RULES OF CRIMINAL JURISDICTION OVER VISITING NAVAL FORCES UNDER INTERNATIONAL LAW

A. RULES REGARDING CRIMINAL JURISDICTION.

1. *Exclusive Jurisdiction.* Under international law a *visiting* State has *exclusive* jurisdiction over all crimes, punishable by its laws but *not* by those of the territorial State, which are committed in whole or in part aboard one of its visiting warships¹¹⁵ or ashore by the ship's crew.¹¹⁶ On the other hand, under international law the *territorial* State has *exclusive* jurisdiction over all crimes, punishable by its laws but *not* by those of the visiting flag-State, which are committed in whole or in part aboard a visiting warship¹¹⁷ or ashore by the ship's crew.¹¹⁸ The term "warship" includes "boats, tenders, and all appurtenances of a ship of war."¹¹⁹

2. *Concurrent Jurisdiction.* Under international law the visiting and territorial States have *concurrent* jurisdiction over all crimes, punishable by the laws of *both* States, which are committed in whole or in part aboard a visiting State's warship¹²⁰ or ashore by the ship's crew.¹²¹

¹¹⁴*Id.* at 91, [1943-45] Ann. Dig. at 152.

¹¹⁵See, e.g., NATO Status of Forces Agreement, art. VII, para. 2(a); *Jurisdiction With Respect to Crime*, art. 5, 29 AM. J. INT'L L. SUPP. at 439.

¹¹⁶See, e.g., NATO Status of Forces Agreement, art. VII, para. 2(a); *cf.* *Kinsella v. Krueger*, 351 U.S. 470, 478 (1956); *United States v. Sinigar*, 6 U.S.C. M.A. 330, 336, 20 C.M.R. 46, 52 (1955).

¹¹⁷See, e.g., NATO Status of Forces Agreement, art. VII, para. 2(b).

¹¹⁸See, e.g., note 116 *supra*.

¹¹⁹PHILLIMORE, INTERNATIONAL LAW 479 (3d ed. 1889).

¹²⁰See, e.g., *Chung Chi Cheung*, [1939] A.C. 160; Reference As To Whether Members Of The Military Or Naval Forces Of The United States Of America Are Exempt From Criminal Proceedings In Canadian Criminal Courts, [1943] Can. Sup. Ct. 483, [1943] 4 D.L.R. 11 (1943) [hereinafter cited as Exemption of United States Forces]; NATO Status of Forces Agreement, art. VII, para. 1; *Jurisdiction With Respect to Crime*, art. 3, 4, 29 AM. J. INT'L L. SUPP. at 439-40.

¹²¹See, e.g., Exemption of United States Forces, [1943] Can. Sup. Ct. 483,

B. RULES REGARDING THE RIGHT TO EXERCISE CRIMINAL JURISDICTION.

1. *Visiting State's Right to Exercise Exclusive or Concurrent Jurisdiction.* Under international law a visiting State has the right to exercise within its own territory and on the high seas its exclusive or concurrent jurisdiction over all crimes committed in whole or in part aboard one of its visiting warships or ashore by the ship's crew. However, a visiting State generally has no right to exercise any criminal jurisdiction *within* the territorial State for "a state's jurisdiction to take enforcement action within its territory is normally exclusive."¹²² As the United States Supreme Court has stated, "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."¹²³

There are, however, a few exceptional situations under international law wherein the territorial State is deemed to have conferred on a visiting State a limited right to exercise criminal jurisdiction *within* the territorial State.¹²⁴ One such situation is where the territorial State gives its consent, express or implied, for another State's warship to visit within its territory. Unless it expressly indicates otherwise, international law deems that the territorial State impliedly confers on the visiting State a right to exercise criminal jurisdiction *within* its territory. This right, however, is very limited. First, it may only be exercised on board a visiting State's warship.¹²⁵ Second, it may only be exercised against members of the visiting State's armed forces.¹²⁶ And third, it may not be exercised to inflict "major punishments such as the death penalty."¹²⁷

[1943] 4 D.L.R. 11 (1943); *Ministere Public v. Korakis*, Mixed Court of Cassation, Dec. 11, 1944, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 66, 67 (1944-45), [1943-45] Ann. Dig. 120, 121 (No. 34). RESTATEMENT § 57, comment *b*, states:

An act that violates the law or disciplinary rules of the sending state as well as rules of criminal law of the territorial state subjects the actor to the jurisdiction of both states.

¹²²RESTATEMENT § 20, comment *b*.

¹²³*Wilson v. Girard*, 354 U.S. 524, 529 (1957).

¹²⁴RESTATEMENT § 20, comment *b*.

¹²⁵See, e.g., BRIERLY 268; SNOW, INTERNATIONAL LAW 24 (2d ed. Stockton 1898) [hereinafter cited as SNOW]; RESTATEMENT § 32; *cf.* *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 140 (1812) (dictum); *Exemption of United States Forces*, [1943] Can. Sup. Ct. 483, 524, [1943] 4 D.L.R. 11, 48 (1943).

¹²⁶See, e.g., RESTATEMENT § 32; *cf.* *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 140 (1812) (dictum); *Exemption of United States Forces*, [1943] Can. Sup. Ct. 483, 524, [1943] 4 D.L.R. 11, 48 (1943).

¹²⁷See, e.g., NATO Status of Forces Agreement, art. VII, para. 7(a); RESTATEMENT § 49, comment *e*. *Contra*, SNOW 24; *cf.* *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 140 (1812) (dictum).

A visiting State's right to exercise its *concurrent* jurisdiction over crimes committed *aboard a visiting warship* is subject, however to an additional limitation: the territorial State retains the *primary* right to exercise its *concurrent* jurisdiction over all such crimes except for the following three types committed by members of the visiting State's armed forces:

Crimes solely against the property or security of the visiting State.

Crimes solely against the persons or property of other members of the visiting State's armed forces.

Crimes arising out of an act or omission done in the performance of official duty.

A visiting State's right to exercise its *concurrent* jurisdiction over crimes committed *ashore by its crew* is also subject to an additional limitation: the territorial State retains the *primary* right to exercise its *concurrent* jurisdiction over all such crimes except those arising out of an act or omission done in the performance of official duty.¹²⁸

The visiting State may, of course, expressly or impliedly waive its *primary* right to exercise its *concurrent* jurisdiction over a crime falling within one of these four categories whereupon the territorial State "shall regain the exercise of its normal competence."¹²⁹ For example, Lord Chief Justice Cockburn opined that

offences committed on board as between members of her crew towards one another . . . 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.¹³⁰

2. *Territorial State's Right to Exercise Exclusive or Concurrent Jurisdiction.* Under international law the territorial State has the right to exercise within its own territory its exclusive or concurrent jurisdiction over crimes committed in whole or in part aboard a visiting war-

¹²⁸See, e.g., 2 MOORE 585 which quotes as follows from a letter of the Secretary of State dated July 23, 1794:

The officers of a vessel of war belonging to a friendly foreign nation can not set up extra-territoriality when *unofficially* on shore in a port in whose harbor their vessel is temporarily moored. (Emphasis added.)

¹²⁹Regulations (1928), art. 18.

¹³⁰Cockburn Memorandum, as quoted in Chung Chi Cheung, [1939] A.C. 170, 172.

ship or ashore by the ship's crew,¹³¹ subject to one limitation: this jurisdiction may *not* be exercised aboard a visiting warship.¹³² In fact, "no official of the territorial State is permitted to board the vessel against the wishes of her commander."¹³³

Of course, if the territorial State is able to arrest the offender while he is ashore, then it can exercise its jurisdiction over his crime. On the other hand, if the shipboard offender remains aboard or if the shore offender regains his ship and stays there, the territorial State may then have considerable difficulty in exercising its jurisdiction.¹³⁴ What might it do? First, since "immunity from the local jurisdiction may . . . be waived,"¹³⁵ the territorial State may seek the visiting naval commander's permission to arrest the offender, to serve him with criminal process, or to have him surrendered to the local authorities.¹³⁶ However, "the commander of a foreign man-of-war is not bound to

¹³¹See, e.g., 2 MOORE 588 which quotes as follows from a letter of the Secretary of State dated Jan. 27, 1872:

[A]ny person . . . attached to such a man-of-war, charged with an offence on shore, is liable to arrest therefor in the country where the offence may have been committed.

¹³²See, e.g., 2 HYDE 826 which states, "At the present time a foreign vessel of war and the occupants thereof are acknowledged to be exempt from local process." However, RESTATEMENT § 49(a) states that the territorial State does not impliedly waive its right to exercise its jurisdiction aboard a visiting warship "to the extent necessary to prevent injury to persons or property not involved in the operation of the vessel." RESTATEMENT § 49, comments *b* and *c*, set forth the following examples:

1. A naval vessel of state A comes into a port of state B after having received consent to its visit by B. X, a crewman murders a fellow crewman, Y. The authorities of B board the vessel and arrest him. . . . B's action is not a lawful exercise of its jurisdiction.

2. Same facts as in Illustration 1, except that X, while aboard, threatens to throw a grenade into a crowd of bystanders waiting on the pier to visit the vessel. The police of B go aboard and subdue X. . . . B's action is a lawful exercise of its jurisdiction.

¹³³COLOMBOS 242; *accord*, 1 OPPENHEIM 853-54.

¹³⁴See, e.g., 2 HYDE 826, 829 which states:

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 a foreign vessel of war within the territorial waters of a State he is believed to be withdrawn from the local jurisdiction.

¹³⁵2 HYDE 827.

¹³⁶*Ibid.* However, SMITH 31 states that "it is not easy to imagine a case in which the captain of a British warship would be justified in handing over to the local courts a member of his crew charged with a crime committed on board ship." In this regard, *United States Navy Regulations* (1948), art. 0730, provides:

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.

give up anyone on board"¹³⁷ Second, the territorial State may make a diplomatic request for the offender's surrender or exercise its right under an extradition treaty with the visiting State.¹³⁸

A territorial State's right to exercise its *concurrent* jurisdiction over crimes committed aboard a visiting warship and ashore by the ship's crew is subject, however, to an additional limitation: the visiting State has the *primary* right to exercise its *concurrent* jurisdiction over *all* crimes within the four previously mentioned categories.

A territorial State may, of course, expressly or impliedly waive its primary right to exercise its concurrent jurisdiction over a crime falling outside these four categories. An implied waiver results, for example, where the local authorities fail to make a timely request for the surrender of an offender being held aboard a visiting warship.¹³⁹

C. ILLUSTRATIONS OF THE RULES REGARDING THE RIGHT TO EXERCISE CONCURRENT CRIMINAL JURISDICTION OVER CRIMES COMMITTED "ABOARD" A VISITING WARSHIP.¹⁴⁰

1. A visiting warship's officer, while aboard ship, steals the ship's chronometer. The visiting State has the primary right to exercise its concurrent criminal jurisdiction.¹⁴¹

Cf. *United States Navy Regulations* (1948), art. 0764, relating to foreign customs and immigration inspections.

¹³⁷2 MOORE 588, citing a letter of the Secretary of State dated Jan. 27, 1872.

¹³⁸See, e.g., 2 MOORE 579 which cites the following case:

In 1871 Rear-Admiral Boggs, U.S. Navy, commanding the European fleet, refused to give up certain persons on board who were charged by the Italian authorities with larceny. Mr. Fish [the Secretary of State], while observing that any person attached to a foreign man-of-war was liable to arrest on shore for an offense there committed, said: 'In the event that a person on board a foreign ship should be liable to be given up, pursuant to an extradition treaty, the commander of the vessel may give him up if such proof of the charge should be produced as the treaty may require. In such case, however, it would always be advisable to consult the nearest minister of the United States. This was done in this instance, and the decision of Mr. Marsh that the persons demanded were not liable to be given up, pursuant to the treaty with Italy, is approved by the [State] Department.'

¹³⁹Cf. *United States v. Flores*, 289 U.S. 130 (1933).

¹⁴⁰It should be noted, however, that under the "high doctrine of extritoriality" (i.e., "the floating island theory") the visiting State has *exclusive* jurisdiction—not merely primary or secondary jurisdiction—over *all* crimes committed aboard a visiting warship. See note 96 *supra*.

¹⁴¹See, e.g., NATO Status of Forces Agreement, art. VII, para. 3(a)(i); *Regulations* (1928), art. 18; *Regulations* (1898), art. 16, para. 1; cf. *United States v. Thierichens*, 243 Fed. 417 (E.D. Pa. 1917). As to offenses of this type, the 1940 Montevideo Treaty on International Penal Law provides:

Crimes perpetrated on board men-of-war . . . of one State, while these are in the territorial waters of another State, shall be tried by the tribunals, and

2. A visiting warship's crewman, while aboard ship, steals a ship's document classified "Confidential" intending to sell it to a foreign agent. The visiting State has the primary right to exercise its concurrent criminal jurisdiction.¹⁴²

3. A visiting warship's crewman, while aboard ship, either unlawfully kills the ship's commanding officer or steals the navigator's personal chronometer. The visiting State has the primary right to exercise its concurrent criminal jurisdiction.¹⁴³

4. A visiting warship's crewman, while posted as bow sentry, unlawfully shoots and kills a local national who has come alongside in a sampan and is stealing tools from a ship's small boat, the sentry believing that the use of such force is justified to protect military property.¹⁴⁴ The visiting State has the primary right to exercise its concurrent criminal jurisdiction.¹⁴⁵

5. A visiting warship's crewman, while on duty as coxswain of one of the warship's small boats,¹⁴⁶ negligently collides with a sampan and kills two local nationals. The visiting State has the primary right to exercise its concurrent criminal jurisdiction.¹⁴⁷

6. A visiting warship's crewman, while aboard ship but *not* on duty, commits an unaggravated assault and battery upon a local launderman. The territorial State has the primary right to exercise its concurrent criminal jurisdiction but will probably recognize the ship's disciplinary jurisdiction in this case.¹⁴⁸

punished according to the laws, of the State to which the said men-of-war . . . belong.

March 19, 1940, title I, art. 9, para. 1; 8 HUDSON, INTERNATIONAL LEGISLATION 482, 486 (No. 582) (1949), 37 AM. J. INT'L L. SUPP. 122, 125 (1943) [hereinafter cited as the 1940 Montevideo Treaty].

¹⁴²*Ibid.*

¹⁴³See, e.g., Chung Chi Cheung, [1939] A.C. 160; NATO Status of Forces Agreement, art. VII, para. 3(a)(i); *Regulations* (1928), art. 18; *Regulations* (1898), art. 16, para. 1.

¹⁴⁴See Peck, *The Use of Force to Protect Government Property*, 26 MIL. L. REV. 81 (1964) (DA Pam 27-100-26, 1 Oct. 1964).

¹⁴⁵See, e.g., NATO Status of Forces Agreement, art. VII, para. 3(a)(ii); *Regulations* (1928), art. 18; *Regulations* (1898), art. 16, para. 1; 1 OPPENHEIM 845. In *United States v. Thierichens*, 243 Fed. 419, 420 (E.D. Pa. 1917), the Federal District Court said:

[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.

¹⁴⁶"The rules as to ships apply to all . . . boats . . . belonging to vessels of war and detached therefrom upon any service . . ." SNOW 23.

¹⁴⁷See, e.g., note 145 *supra*.

¹⁴⁸See, e.g., *Exemption of United States Forces*, [1943] Can. Sup. Ct. 483, 499-500, 527, [1943] 4 D.L.R. 11, 23-24, 51; NATO Status of Forces Agreement, art.

7. A visiting warship's crewman, while aboard ship, assaults with intent to commit rape or actually rapes a local female ship cleaner. The territorial State has the primary right to exercise its concurrent criminal jurisdiction but will probably recognize the ship's disciplinary jurisdiction in this case.¹⁴⁹

8. A visiting warship's crewman, while aboard ship, kills a local female ship cleaner while attempting to rape her. The territorial State has the primary right to exercise its concurrent criminal jurisdiction.¹⁵⁰

9. A local launderman, while aboard a visiting warship, steals either the ship's chronometer or the navigator's personal chronometer. The territorial State has the primary right to exercise its concurrent criminal jurisdiction.¹⁵¹

VII, para. 3 (b); COLOMBOS 250. *Contra*, Japan v. Smith, High Court of Osaka (6th Criminal Division), Nov. 5, 1952, [1952] Int'l L. Rep. 221 (No. 47) (dictum); Gregory, *Jurisdiction Over Foreign Ships in Territorial Waters*, 2 MICH. L. REV. 333, 343-44 (1904); 1940 Montevideo Treaty, title I, art. 9, para. 1; *Regulations* (1928), art. 18; *Regulations* (1898), art. 16, para. 1; BRITTON & WATSON, INTERNATIONAL LAW FOR SEAGOING OFFICERS 104 (2d ed. 1960); 1 OPPENHEIM 854; SNOW 24. In this regard, the *Cockburn Memorandum*, as quoted in Chung Chi Cheung, [1939] A.C. 160, 172, states:

But if a crime be committed on board the ship upon a local subject, . . . the criminal . . . should be given up to the local authorities.

¹⁴⁹*Ibid.*

¹⁵⁰*Ibid.*

¹⁵¹See, e.g., Chung Chi Cheung, [1939] A.C. 160, 174 (dictum); NATO Status of Forces Agreement, art. VII, para. 3 (b); 1940 Montevideo Treaty, title I, art. 9, para. 2; 1889 Montevideo Treaty on International Penal Law, Jan. 23, 1889, title I, art. 9, para. 3, 18 Martens, N.R.G. (2^o sér.) 432, 434, 29 AM. J. INT'L L. SUPP. at 638-39 (1935); STANGER 68; cf. 2 GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER 293-94 (1934). *Contra*, *Regulations* (1928), art. 18; *Regulations* (1898), art. 16, para. 1; COLOMBOS 250; 1 OPPENHEIM 854. In this regard, 2 DE MARTENS, TRAITÉ DE DROIT INTERNATIONAL 337 (1886), states:

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 extritoriality 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 sail.

As to this type of offense, for example, the 1940 Montevideo Treaty, title I, art. 9, para. 2, provides:

If only persons who do not belong to the crew of the warship . . . participate in the commission, on board, of such acts, prosecution and punishment shall be conducted in accordance with the laws of the State within whose territorial waters the warship . . . is located.

In such a case, *United States Navy Regulations* (1948), art. 0732, requires:

1. The commanding officer shall keep under restraint or surveillance, as

10. A local launderman, while aboard a visiting warship, unlawfully kills a local female ship cleaner. The territorial State has the primary right to exercise its concurrent criminal jurisdiction.¹⁵²

11. A visiting warship's crewman, while enroute from ship to shore in a ship's small boat to go on liberty, unlawfully kills a fellow crewman. The visiting State has the primary right to exercise its concurrent criminal jurisdiction.¹⁵³

12. A visiting warship's crewman, while enroute from ship to shore in a ship's small boat to go on liberty, unlawfully kills a fellow crewman and battery upon a local launderman. The territorial State has the primary right to exercise its concurrent criminal jurisdiction but will probably recognize the ship's disciplinary jurisdiction in this case.¹⁵⁴

13. A visiting warship's crewman, while enroute from ship to shore in a ship's small boat to go on liberty, unlawfully kills a local launderman. The territorial State has the primary right to exercise its concurrent criminal jurisdiction.¹⁵⁵

D. ILLUSTRATIONS OF THE RULES REGARDING THE RIGHT TO EXERCISE CONCURRENT CRIMINAL JURISDICTION OVER CRIMES COMMITTED "ASHORE" BY A VISITING WARSHIP'S CREW.

1. A visiting warship's crewman, while enroute from ship to shore in a local water taxi¹⁵⁶ to go on liberty, commits an unaggravated assault and battery upon a fellow crewman or commits a petty theft

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.

....

4. If the investigation indicates that such person . . . has committed or attempted to commit an offense which requires action beyond the authority of the commanding officer, he shall at the first opportunity deliver such person, with full descriptive data, fingerprints, and a statement of the circumstances to the proper civil authorities.

¹⁵²See, e.g., NATO Status of Forces Agreement, art. VII, para. 3(b); 1940 Montevideo Treaty, title I, art. 9, para. 2; 1889 Montevideo Treaty, *supra* note 151, title I, art. 9, para. 3; COLOMBOS 250; HALL 245 n. 2; STANGER 68; *cf.* 2 GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER 293-94 (1934). *Contra, Regulations* (1928), art. 18; *Regulations* (1898), art. 16, para. 1; 1 OPPENHEIM 854.

¹⁵³See, e.g., 136 *supra*.

¹⁵⁴See, e.g., 148 *supra*.

¹⁵⁵*Ibid.*

¹⁵⁶"[W]hen the . . . men of a vessel of war are in shore boats . . . , they are under the local jurisdiction." SNOW 23. In *The Lone Star*, the offenses (disorderly conduct & failure to pay fare) were committed in a local water taxi while alongside the offenders' ship. The Brazilian Federal Supreme Court clearly approached the case as one "in which members of the crew go ashore and commit offences there." [1947] Ann. Dig. 84, 88 (No. 31).

of personal property from a fellow crewman. The crime in no way affects the person or property of a local national. The territorial State has the primary right to exercise its concurrent criminal jurisdiction but will probably recognize the ship's disciplinary jurisdiction.¹⁵⁷

2. A visiting warship's crewman, while ashore on liberty, unlawfully kills a fellow crewman in a local cafe brawl which otherwise results only in minor property damage to the cafe and minor injury to a waiter. The territorial State has the primary right to exercise its concurrent criminal jurisdiction but will probably recognize the ship's disciplinary jurisdiction since the crime did not substantially affect the person or property of a local national.¹⁵⁸

3. A visiting warship's crewman, while ashore on liberty, commits an unaggravated assault and battery upon a fellow crewman which also results in serious property damage to the cafe and/or serious injury to a waiter. The territorial State has the primary right to exercise its concurrent criminal jurisdiction.¹⁵⁹

4. A visiting warship's crewman, while ashore on liberty, commits an unaggravated assault and battery upon a local taxi driver or wrongfully appropriates a local national's bicycle. The territorial State has the primary right to exercise its concurrent criminal jurisdiction.¹⁶⁰

¹⁵⁷See, e.g., Exemption of United States Forces, [1943] Can. Sup. Ct. 383, 499, 509, 518, 527, [1943] 4 D.L.R. 11, 25, 33, 42, 51 (1943); 2 MOORE 586; SOULE & McCAULEY, INTERNATIONAL LAW FOR NAVAL OFFICERS 19 (3d ed. Bright) (1928). *Contra*, 1940 Montevideo Treaty, title I, art. 9, para 3, which provides:

The laws of the country to which the ship . . . belongs, shall also govern the trial and punishment of such punishable acts as are committed elsewhere than on board by members of the crew or by individuals charged with the exercise of some function on board, when the said acts affect only the disciplinary order of those ships . . .

¹⁵⁸See, e.g., *Anne v. Ministère Public*, Mixed Court of Cassation, Dec. 13, 1943, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 52 (1944-45), [1943-45] Ann. Dig. 115 (No. 33); *Gaitanos v. Ministère Public*, Mixed Court of Cassation, June 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 257 (1941-42), [1919-42] Ann. Dig. 169 (No. 87); *Affaire Der*, Cour de Cassation (Ch. Crim.), Feb. 29, 1868, [1868] Sirey Recueil Général I. 351 (Fr.) (The Pearl); *Regulations* (1928), art. 20, para. 1.

¹⁵⁹*Ibid.*

¹⁶⁰*Ibid.* In *Japan v. Smith*, High Court of Osaka (6th Criminal Division), Nov. 5, 1952, [1952] Int'l L. Rep. 221 (No. 47), crewmen of the visiting British warship *Belfast*, while on liberty in Kobe, assaulted a taxi driver, stole his money, and wrongfully appropriated his taxi. They were convicted of robbery in the District Court of Kobe. The High Court of Osaka upheld the trial court's jurisdiction, reasoning at 222:

There is certainly no . . . limitation [on Japan's criminal jurisdiction] in a case involving the sailors of a foreign warship who are ashore for their own purposes. . . . Most writers on international law, though a few entertain contrary views, admit the home State's jurisdiction over cases of this kind.

5. A visiting warship's crewman is given an official order by the supply officer to drive the ship's truck to a farmers market, requisition 500 pounds of fresh produce for the ship, and then return immediately to the ship to hold an overdue inventory. After requisitioning the produce, the crewman starts directly back for the ship but while driving at an exercise rate of speed negligently kills a local policeman. The visiting State has the primary right to exercise its concurrent criminal jurisdiction.¹⁶¹ If, however, after requisitioning the produce, he spends several hours ashore drinking at his favorite bar and then, while driving back to the ship, negligently kills a local policeman, the territorial State, instead, has the primary right to exercise its concurrent criminal jurisdiction.¹⁶²

6. A visiting warship's crewman is given an official order by the supply officer to drive the ship's truck to a farmer's market, requisition 500 pounds of fresh produce for the ship, return to the ship by no later than midnight, and personally report to the supply officer on the result of his mission. After requisitioning the produce, he spends several hours drinking at his favorite bar. Just before midnight, while driving back to the ship, he negligently kills a local policeman. The territorial State has the primary right to exercise its concurrent criminal jurisdiction.¹⁶³

Such jurisdiction is admitted especially in the Resolutions on 'Rules on the Position of Ships and their Crew in a Foreign Port in Peace Time' of the International Law Association of 1928. It is therefore an established principle that the home State has jurisdiction, and the principle has been supported by decided cases in many countries.

¹⁶¹See, e.g., *Ministere Public v. Tsoukharis*, Mixed Court of Cassation, Feb. 8, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 89 (1942-43), [1943-45] Ann. Dig. 150 (No. 40); *Ministere Public v. Triandafilou*, Mixed Court of Cassation, June 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 259 (1941-42), [1919-42] Ann. Dig. 165 (No. 86); *Japan v. Smith*, High Court of Osaka (6th Criminal Division), Nov. 5, 1952, [1952] Int'l L. Rep. 221 (No. 47) (dictum); NATO Status of Forces Agreement, art. VII, para. 3 (a) (ii); *Regulations* (1928), art. 20, para. 3.

¹⁶²*Ibid.*

¹⁶³See, e.g., NATO Status of Forces Agreement, art. VII, para. 3 (a) (ii). Ellert, *The United States as a Receiving State*, 63 DICK. L. REV. 75, 89 (1959), states that the NATO rule requires

something more than the offense was committed during the period while the accused was *on* official duty. This additional ingredient is a causal connection between the offense committed and an act or omission [*sic*] done in the performance of official duty.

Contra, *Ministere Public v. Tsoukharis*, Mixed Court of Cassation, Feb. 8, 1943, 55 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 89 (1942-43), [1943-45] Ann. Dig. 150 (No. 40); *Ministere Public v. Triandafilou*, Mixed Court of Cassation, June 29, 1942, 54 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 259 (1941-42), [1919-42] Ann. Dig. 165 (No. 86); *Regulations*

7. A visiting warship's crewman, on official duty with the ship's shore patrol, negligently kills a local policeman while driving a shore patrol wagon to the scene of a reported serious accident involving the ship's truck. The visiting State has the primary right to exercise its concurrent criminal jurisdiction.¹⁶⁴

8. A visiting warship's commanding officer, while driving the ship's sedan in the course of making an official call, negligently kills a local policeman. The visiting State has the primary right to exercise its concurrent criminal jurisdiction.¹⁶⁵

V. CONCLUSION

Eighty years ago Great Britain's Lord Chief Justice Cockburn, in discussing a controversial rule of criminal jurisdiction over visiting naval forces, observed, "In which way the rule should be settled, so important a principle of international law ought not to be permitted to remain in its present unsettled state."¹⁶⁶ Unfortunately, as Colombos observes, some of the rules in this area are still "not quite free from doubt."¹⁶⁷

Why have these rules remained for so long in an "unsettled state"? *First*, until fairly recently¹⁶⁸ there has been little interest shown in international conflicts of criminal jurisdiction. General works on the law of the sea have necessarily given only brief consideration to this area of international law. For example, McDougal and Burke, in their monumental work on the contemporary law of the sea,¹⁶⁹ while discussing the immunities of a visiting warship and its crew, gave rela-

(1928), art. 20, para. 3. In Lauterpacht's digest of Triandafilou, he added a critical note which states, in part:

The judgment of the Court of Cassation adopts an interesting test of whether the accused is still on a mission, namely, whether he has reported to his superiors. It seems clear that Triandafilou was engaged on a "private frolic of his own" (to use a familiar common law expression)

[1919-42] Ann. Dig. at 169. In *Japan v. Smith*, High Court of Osaka (6th Criminal Division), Nov. 5, 1952, [1952] Int'l L. Rep. 221 (No. 47), the court said at 222:

[I]t is in principle agreed that if a sailor belonging to a foreign warship goes ashore on official business and, while on that business, commits a crime, his home State has jurisdiction over him.

¹⁶⁴See, e.g., note 161 *supra*.

¹⁶⁵*Ibid.*

¹⁶⁶*Cockburn Memorandum*, as quoted in Chung Chi Cheung, [1939] A.C. 160, 172.

¹⁶⁷COLOMBOS 251.

¹⁶⁸See, e.g., RESTATEMENT §§ 44-62 which cover the topic, "Conflicts Arising From Existence Of Concurrent Jurisdiction To Enforce."

¹⁶⁹McDOUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS* (1962).

tively little consideration to the very real and highly controversial conflicts of criminal jurisdiction that can and have arisen during the visits of warships in foreign ports.¹⁷⁰

Second, when attention has been given to this area, the rules of criminal jurisdiction have usually been stated in broad, imprecise terms. For example, the rules proposed in 1898 by the Institute of International Law were devoid of such needful terms as "concurrent" and "exercise."¹⁷¹ McDougal and Burke were hardly more precise as to shipboard crimes when they stated:

[S]tates are in complete agreement that the coastal state is without authority to intervene with respect to conduct aboard warships in internal waters without the consent of the flag-State. If the coastal state acquires custody of the accused, as by surrender from the flag authorities, prescription and application of coastal law is, of course, permissible.¹⁷²

What is needed, of course, is not an oversimplification based upon the Privy Council's decision in *Chung Chi Cheung* but a set of sufficiently inclusive and succinctly stated rules to substantially resolve any international conflict of criminal jurisdiction which might arise when a visiting sailor, ashore in a port like Da Nang, Bangkok, Singapore, Surabaya, Penang, or Rangoon,¹⁷³ is responsible not for a relatively obscure incident like the 1867 *Affaire Der* in Saigon but for an international incident like the 1861 *Forte* case in Brazil¹⁷⁴ and the 1957 *Girard* case in Japan.¹⁷⁵

¹⁷⁰*Id.* at 170-71.

¹⁷¹However, the Institute's *Regulations* (1928) were substantially improved in this regard. See note 99 *supra*. As STANGER 66 n.18 notes, for example, art. 18 "reflects . . . a shift in emphasis from jurisdiction to prescribe to jurisdiction to enforce."

¹⁷²McDOUGAL & BURKE 171.

¹⁷³See, e.g., *Seeing the Sights in Thailand*, All Hands, Nov. 1966, pp. 28-29, an account of the visit of the USS *Buchanan* (DDG 14), temporary flagship of the Commander, United States Seventh Fleet, in Bangkok, Thailand.

¹⁷⁴During the 1861 visit of Rear Admiral Warren's flagship, the *HMS Forte*, in the port of Rio de Janeiro, three of the ship's officers were arrested while ashore for alleged intoxication and disorderly conduct and were jailed overnight. The following morning, after the Chief of Police received an investigative report indicating that "the acts of the English officers were merely the result of the state in which they were in at the time," they were released. As a result of the *Forte* case and another case involving the *Prince of Wales*, a British merchant bark, diplomatic relations between Brazil and Great Britain were severed. The King of Belgium was chosen as an arbitrator and rendered a decision in favor of Brazil. 5 MOORE, INTERNATIONAL ARBITRATIONS 4925-28 (1898). See also 2 MOORE 587-88.

¹⁷⁵See generally *Wilson v. Girard*, 354 U. S. 524 (1957); Baldwin, *Foreign*

"When," as Lord Atkin said in *Chung Chi Cheung*, "the local Court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the Court will of its own initiative give effect to it."¹⁷⁶ On the other hand, if the status of the claimed immunity is not considered by the local court to be clear under international law, the court should be amenable to a reasonable application of a set of rules of criminal jurisdiction based upon sound precedent and currently valid concepts of international law.

Over the last 150 years, long accepted legal concepts have been utilized with increasing frequency and precision to resolve international conflicts in this general area. In *The Schooner Exchange* the concepts of implied waiver of jurisdiction and of immunity from jurisdiction were applied to international litigants. In *Chung Chi Cheung* the concepts of concurrent jurisdiction and of the waiver of an immunity from jurisdiction were approved. In *Ministere Public v. Korakis* the controversy was evaluated as a conflict of jurisdiction. In *Anne v. Ministere Public*¹⁷⁷ the inquiry was as to "the limits imposed by international law regarding the [territorial State's] exercise of that [concurrent] jurisdiction."¹⁷⁸ In the NATO Status of Forces Agreement the drafters utilized the concept of a "primary right" to exercise concurrent criminal jurisdiction. And in the American Law Institute's Restatement on *The Foreign Relations Law of the United States* the concept of "secondary jurisdiction"¹⁷⁹ (i.e., the secondary right to exercise concurrent criminal jurisdiction) is employed. All of these concepts, of course, are but legal corollaries of Marshall's doctrine of implied immunities, a basic principle which determines *not* whether a particular immunity from local jurisdiction is actually afforded to a visiting flag-State but rather *how* such an immunity comes to be granted and *what* are its legal consequences and implications.

In conclusion, an unfortunate example of the misapplication of the rules in a related area—jurisdiction over crimes committed within the camp of a visiting armed force—clearly illustrates the importance of a

Jurisdiction and the American Soldier, 1958 WIS. L. REV. 52. Life, July 1, 1957, p. 29, reported, "The international row which got started when SP3/C William Girard shot and killed a Japanese woman on an Army firing range [at Camp Weir] in Japan (Life, June 17) had nearly everyone in the act last week."

¹⁷⁶[1939] A.C. 160, 175.

¹⁷⁷Mixed Court of Cassation, Dec. 13, 1943, 57 BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES 52 (1944-45), [1943-45] Ann. Dig. 115 (No. 33).

¹⁷⁸*Id.* at 54, [1943-45] Ann. Dig. at 118.

¹⁷⁹RESTATEMENT § 59, comment e.

basic understanding of the jurisdictional rules discussed herein. In 1911, an American sailor murdered a fellow sailor while "aboard" a United States Naval Hospital temporarily established in Japan. There then being no status of forces-type agreement with Japan, as there fortunately is today,¹⁸⁰ the Japanese authorities jailed the culprit and prepared to prosecute him in a local court. Ambassador O'Brien apparently had called to his attention two 1910 cases which arose in Cherbourg, France, and Gravesend, England, respectively, wherein the local authorities had turned the offenders over to the United States Navy for disciplinary action. He, therefore, informally requested the Japanese Foreign Office to allow the United States to take jurisdiction over the case but his request was denied. He then cabled the State Department for instructions, mentioning the Cherbourg and Gravesend cases. Mr. Hackworth, former Legal Advisor for the State Department, records that Secretary of State Knox cabled Ambassador O'Brien that the United States had obtained custody of the Cherbourg and Gravesend offenders only "by courtesy of France and Great Britain"¹⁸¹ and:

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.¹⁸²

Hackworth does not record what Ambassador O'Brien determined regarding "the practice of other nations" but does record that the sailor "was later tried and convicted by the Japanese court,"¹⁸³ a result which—in view of the facts stated—appears to be based more on an erroneous concession of jurisdiction than on a correct application of the rules of criminal jurisdiction under international law.

¹⁸⁰Administrative Agreement with Japan, Jan. 19, 1960, 11 U.S.T. & O.I.A. 1652, T.I.A.S. No. 4510.

¹⁸¹2 HACKWORTH, INTERNATIONAL LAW 422 (Department of State Pub. No. 1521, 1941).

¹⁸²*ibid.*

¹⁸³*ibid.*