ARE FORCES INVITED FROM A FOREIGN STATE LIABLE TO THE LAWS OF THE HOST STATE?

I
AN INTRODUCTION

As early as 1826 Great Britain despatched her forces at the request of the Portuguese government to put down a rebellion caused by the Portuguese nationalist - Don Migul.[1] Since then, on a number of occasions,[2] countries have gone to the aid of others, at their request, to suppress or prevent the occurrence of a state of civil disorder. The most recent occurrence of such a response to a call for help was the movement of the Indian forces on the 30th July, 1987 to Sri Lanka. In that instance, the Indian forces were sent under the provisions of an Accord agreed by the two countries. There has been some debate[3] as to the legality of one nation going to the aid of another, at its request. *Sir Arnold McNair* in a well known address to the Oxford University Law Society in 1937 said:

> "So far from there being any active duty to assist a government in suppressing an insurrection, there is some authority for the view that the government of other states ought to abstain from any such action on the ground that it is an intervention in the domestic affairs of another state. But the law on this point is not well settled."[4]

[1]Wheaton (H), *Elements, The Classics of International Law*, (1866), at pp., 83 -95.
[2]Russia sent troops into Hungary to suppress a revolt in Hungary, at the request of Hungary in 1856 and at the request of Austria in 1849 (*Ibid.*, pp. 38-40); the U.S.A. sent military and economic aid to the Kuo-Min-Tang forces of China between 1946-1949, for use in the war against the communist forces, and to France to fight the Viet-Minh forces in Indo-China; the U.S.A. sent her forces to Lebanon in 1958 to aid the Chamoun government and more recently to aid the Gamayal government (1985) and the British forces were sent to Jordan to protect King Hussein of Jordan from civil strife in 1957.
[3]Brownlie (I.), *International Law and the use of force by states*, the Clarendon Press, Oxford, 1963, pp., 321-327.
[4]"The law relating to the Civil War in Spain" in (1957) 53 *Law Quarterly Review*, 471 at p. 474.

Apart from this expression of doubt there is clear authority[5] to support the view that nations may under International Law provide each other with aid in the form of armed forces (including materials of war) for the purposes of suppressing civil disorder. Provided that it was done with the consent and invitation of the government in power in the host state, Garner wrote,[6] it would not amount to an interference of the internal governance of that state.

> "There is no rule of international law which forbids the government of one state from rendering assistance to the established legitimate government of another state with a view of enabling it to suppress an insurrection against its authority. Whether it shall render such aid is entirely a matter of policy of expediency and raises no question of right or duty under international law. If assistance is rendered to the legitimate government it is not a case of unlawful intervention as is the giving of assistance to rebels who are swayed against its authority."[7]

However, the rendering of military or other assistance to a force that is opposing the government in power, may not generally be justified under international law.[8] That would constitute an intervention in the internal governance of that state. Armed forces of one nation may be found upon the soil of another under a number of different conditions. First, they may be there as an army of occupation in belligerent occupation of the foreign territory. In such a situation, the foreign forces are not subject to the local law.[9] Second, the armed forces of a foreign nation may be present on another sovereign's territory under an international agreement. In an event such as the armies of the NATO powers or the American forces participating as members of the U.N. peace keeping forces in South Korea, the question whether they are subject to the local law may be answered from a perusal of the agreement under which those forces were first sent to the

[5]In 3 above, particularly Brownlie *Loc. Cit.* p. 322 at Fn. 1.
[6](1937) 31 American Journal of International Law, 66.
[7]*Ibid.*
[8]Brownlie (I.), *Principles of Public International Law*, 3rd Edn., 1973, Chap. XX11; Schwarzenberger, (G.), *A Manual of International Law*, 5th Edn., 1967, pp. 173-180.
[9]*Taczanowska* v. *Taczanowski* [1957] Probate 301, [1957] 2 All. E.R. 563 (C.A. Eng.).

foreign territory. The NATO treaty provided for the exclusion of the foreign forces from local jurisdiction and so does the Agreement under which the U.S.A. has permitted its forces to participate in the U.N. action in South Korea. In each of these cases the Treaty and the Agreement excluded the forces from local jurisdiction. Third, the armed forces of a foreign nation may be permitted by a treaty or by an agreement to pass through another soverign's state. Unless the agreement or the treaty otherwise says, those foreign troops are not subject to the local laws. This is too settled[10] now to give rise to any doubt. Fourth, where foreign troops are invited by one state to help suppress a state of civil disorder and the invitation fails to indicate whether the guest-troops are subject to the local laws of the host state, the question appears to be vexed as to whether they are, by international law, subject to the local jurisdiction. This paper is concerned exclusively with this fourth category. The fourth category might overlap with the second where the treaty or agreement fails to state whether or not the guest-troops do fall under the local jurisdiction of the host country. However, the fourth category differs from the third in that the concern in the fourth category is not with troops that are invited (or allowed) to pass through or remain billeted in the host state, but where they are invited for the specific purpose of suppressing a rebellion or some civil disorder. The inquiry here is therefore of a narrower conspectus and raises two separate issues:

(1) Troops of a foreign country are invited to suppress a rebellion or civil disorder in the host-state;

(2) They are invited under a treaty, Agreement or Accord which does not specify whether or not they are subject to the local jurisdiction. In such a situation, the question is, are the foreign troops amenable to the local jurisdiction; could they be sued or be prosecuted under the local law. That is the scope of this paper.

[10] *The Schooner Exchange* v. *McFaddon*, Per Marshall C.J., of the U.S. Supreme Court. 7 Cranch 116 and the cases that have followed that decision.

II

VIEWS FROM THE UNITED STATES OF AMERICA

A view expressed by Colonel Archibald King[11] of the Judge-Advocate-General's department of the U.S. Army stands out as the leading academic view from the United States of America in support of the exclusive jurisdiction of the sending state. King relying on Marshall C.J.'s judgment in *The Schooner Exchange* v. *McFaddon* argued that *the Schooner* was of authority for the general proposition concerning all armed forces. *King*, concluded:

> "It is true that the case before the Supreme Court concerned a ship, and our present problem relates to the personnel of the Army or Navy, but it does not follow that Marshall's statements about troops are mere *dicta*. Those statements are an indispensable part of the reasoning which led him to his conclusion and cannot be rejected without rejecting the conclusion as well. The essence of the decision is not that an armed public vessel, but that any public armed force, whether on land or sea, which enters the territory of another nation with the latter's permission enjoys an extra-territorial status."[12]

If King's assertions could be maintained then he appears to have extended the original decision from a man-of-war to armed forces and from armed forces permitted merely to pass through a territory to armed forces present on the territory for any and all purposes. Marshall's judgment concerned an armed vessel belonging to (or plundered by) Emperor Napoleon. Marshall declared that immunity from local jurisdiction applied not only to armed vessels but to "the troops of a foreign prince [permitted] to pass through his dominions". King having elevated this *obiter dicta* to the status of a ratio has further extended Marshall's judgment into a general proposition of law applicable to all armed forces present upon another's territory for any purpose and under any conditions whatsoever. King's writing, however, has been the focal point for an assertion of immunity from local jurisdiction

[11]King, (A), "Jurisdiction over Friendly Foreign Armed Forces" in Vol. 36 of The American Journal of International Law, 1942, p. 539.
[12]*Ibid.*, at p. 541.

and other subsequent decisions that have followed it. It is, therefore, important to examine each of these decisions with care before accepting the conclusions reached by King.

The facts of *The Schooner Exchange* v. *McFaddon*[13] are not in dispute. The Schooner Exchange while on a transatlantic voyage to Spain, was captured by unknown persons, who appear to have handed her over to Napoleon, the Emperor of France. Fitted as a man-of-war, "The Exchange" entered the Port of Philadelphia for repairs. While the vessel lay in port, the respondents, two U.S. citizens, who were the previous owners of the vessel, served a writ-in-rem upon a libel on the Captain. The defence of sovereign immunity was first raised by the American government before the Federal District Court of Philadelphia. That court dismissed the libel, and the respondents, the previous owners of the vessel, successfully appealed to the Circuit Court. The U.S. government then appealed to the Supreme Court, arguing that, because Napoleon was a friendly sovereign and France was at peace with the United States, the Emperor was entitled to claim immunity from process in the U.S. courts. Marshall C.J. allowed the appeal and restored the decision of the District Court of Philadelphia. It must be emphasized that the court considered the vessel as a "public armed ship" and made its decision on that basis. As Marshall C.J. said:

> "Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the law of the place, but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a sovereign entering a port open for their reception."[14]

This passage is clear that the law was founded on the premise that the *res litigiosa* was a man-of-war. The *Ratio decidendi* of the decision is therefore applicable to armed vessels belonging to foreign sovereigns which enter ports of friendly sovereigns as a sequel to implied or express invitations extended to them. In the course of his judgment, Marshall

[13] *The Schooner Exchange* v. *McFaddon*, 9-17 U.S. (7 Cranch) 114, L. Ed. 287 (1812).
[14] *Ibid.*, 9-17 U.S. p. 144 and L. Ed. at p. 296.

C.J. went on to recognise the "exemption of the person of the sovereign from arrest or detention within a foreign territory", and "the immunity which all civilized nations allow to foreign ministers of other states." Thereafter, he proceeded to state:

> "A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he *allows the troops of a foreign prince to pass through his dominions.* In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. *The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.*"[15]

The emphasis is clearly placed on the importance of excluding local jurisdiction to a foreign army that is permitted to pass through sovereign territory. At no point in the judgment has there been a suggestion that the principle of excluding local jurisdiction was appropriate to all foreign armies. The dicta limit this immunity to the armed forces of foreign sovereigns who have been invited to pass through sovereign territory.

The point is further clarified by the explanation Marshall C.J. provides, in that, the movement of the army across a friendly sovereign territory is for a purpose connected with the interest of the sovereign whose army it was. Therefore it is necessary that such an army is not diverted unnecessarily from its goals for that might frustrate the reasons for which passage across the territory was in the first place sought and allowed. Therefore, there appears to be no justification for King to suggest that those words of Marshall C.J. were indeed applicable to all armies irrespective of the reasons and the character of their presence on foreign soil.

[15] *Ibid.*, p. 137.

As was mentioned earlier, later decisions that followed *The Schooner*[16] were considered to be laying down the wider proposition which King had canvassed in his writing. Therefore, it is necessary to examine those decisions so as to determine whether they in fact do support such a wide proposition.

In 1868, *The Schooner*[17] was followed in *Coleman* v. *The State of Tennessee*[18]. Coleman was a member of the U.S. Army which was in belligerent occupation of the Eastern part of the State of Tennessee. The U.S. army was occupying that part of Tennessee as a result of the victory it had scored over the forces of the Confederate States during the American Civil War. During that time Coleman shot and killed one Mourning Ann Bell with malice aforethought. Coleman was first charged with murder before a U.S. Army court-martial and was convicted. He was by that court-martial sentenced to be hanged. While that sentence was pending Coleman was charged before the local courts of the State of Tennessee because the allegation of murder was also a breach of the penal laws of that State. Before those courts too, Coleman was convicted and sentenced to death. The question was of some importance because there was a possible pardon or a commutation of the sentence of death by The President of the United States. If the military authorities were to pardon or commute Coleman's sentence of death, the second sentence of death passed upon him by the courts of the State of Tennessee would remain unaffected. Therefore, despite any show of compassion by The President of the United States of America who is also the commander-in-chief of the U.S. Armed Forces, Coleman could still hang under the Tennessee law. That was the issue in the proceedings here in question. Coleman challenged the jurisdiction of the Tennessee Courts to hear and determine the issue of killing Bell, an issue that had already been determined by the court-martial.

The Supreme Court of the U.S. held, that Coleman was not subject to the local jurisdiction of the courts in the State

[16]See footnote 13 above.
[17]*Ibid.*
[18](1878) 97 U.S. 1118.

of Tennessee. At the time he committed this offence, he was in enemy country engaged in a war with the enemy State of Tennessee. In such a situation, the U.S. Supreme Court held that the members of an army in belligerent occupation was not subject to the laws and the tribunals of the enemy. The court in addition expressed the view that although Tennessee was a part of the United States, it was at the time in question an enemy state having effectively ceded from the Union and therefore the present armed conflict was a war waged to conquer and bring back into the union the ceded territory. *Mr. Justice Field* wrote for the majority:

> "If an army marching through a friendly country would thus be exempt from its civil and criminal jurisdiction, *a fortiori* would an army invading an enemy's country be exempt. The fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other for offenses committed while in such service. Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded.
>
> The fact that when the offense was committed, for which the defendant was indicted, the State of Tennessee was in the military occupation of the United States, with a Military Governor at its head, appointed by the President, cannot alter this conclusion. Tennessee was one of the insurgent States, forming the organization known as the Confederate States, against which the war was waged. Her territory was enemy country, and its character in this respect was not changed until long afterwards.
>
> The doctrine of international law on the effect of military occupation of enemy's territory upon its former laws is well established. Though the late war was not between independent Nations, but between different portions of the same Nation, yet having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the same doctrine must be held to apply. The right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition: and the character and form of the government to be established depend entirely upon the laws of the conquering State or the order of its military commander. By such occupation, the political relations between the People of the hostile country and their former government or sovereign are for the time severed; but the municipal laws, that is, the laws which regulate private rights, enforce contracts, punish crime and regulate the transfer of property, remain in full force, so far as they affect

> the inhabitants of the country among themselves, unless suspended or superseded by the conqueror. And the tribunals by which the laws are enforced continue as before, unless thus changed. In other words, the municipal laws of the State and their administration remain in full force so far as the inhabitants of the country are concerned, unless changed by the occupying belligerent."[19]

It is important to note that the exclusive jurisdiction was recognised in the U.S. Army on the grounds that Coleman's presence in Tennessee was as a member of an invading force and not as a member of a foreign army invited by a legitimate government in power to help quell a rebellion. The U.S. Supreme Court equated an army in a state of belligerent occupation with "a foreign army permitted to march through a friendly country or to be stationed in it, by permission of its government or sovereign."[20] In either case they would be exempt from the civil and criminal jurisdiction and would be answerable "only to their own government, and only by its laws, as enforced by its armies, could they be punished."[21] *Coleman* v. *Tennessee*[22] concerned a criminal matter in which the U.S. Supreme Court followed *The Schooner*.[23] The next authority which was used by *King*[24] in support of his wider proposition was a civil matter, in *Dow* v. *Johnson*,[25] 1879.

In *Dow* v. *Johnson*, the defendant Johnson was a Brigadier-General commanding the U.S. troops in the break-away confederate state of Louisiana. During the war, it was alleged that the defendant had ordered his troops to seize and carry off as supplies for the army certain personal property of the plaintiff. The plaintiff further claimed that such an order and the resulting tort, was not authorised by any superior officer or justified by the laws of war or necessitated by the exigencies of the war. The defendant was charged before the civil tribunals of the State of Louisiana and judgment was given against him for a sum of $1,611.29 plus costs in

[19] *Ibid*, p. 1122.
[20] *Ibid.*
[21] *Ibid.*
[22] See Footnote 18 above.
[23] See Footnote 13 above.
[24] See Footnote 11 above.
[25] (1879) 100 U.S. 632.

favour of the plaintiff.[26] The question which the U.S. Supreme Court was required to decide was this:

> "The important question thus presented for our determination is, whether an officer of the army of the United States is liable to a civil action in the local tribunal for injuries resulting from acts ordered by him in his military character, whilst in the service of the United States, in the enemy's country, upon an allegation of the injured party that the acts were not justified by the necessities of war."[27]

Yet again the U.S. Supreme Court, relying on *The Schooner*, held that members of an army in belligerent occupation were not subject to the local laws or local courts of the enemy territory. *Mr. Justice Field* yet again provided the majority opinion of the U.S. Supreme Court. He wrote:

> "This brings us to the consideration of the main question involved, which we do not regard as at all difficult of solution, when reference is had to the character of the late war. That war, though not between independent nations, but between different portions of the same nation, was accompanied by the general incidents of an international war. It was waged, between people occupying different territories, separated from each other by well defined lines. It attained proportions seldom reached in the wars of modern nations. Armies of greater magnitude and more formidable in their equipment than any known in the present century were put in to the field by the contending parties. The insurgent States united in an organization known as the Confederate States, by which they acted through a central authority guiding their military movements; and to them belligerent rights were accorded by the Federal Government. This was shown in: the treatment of captives as prisoners of war, the exchange of prisoners, the release of officers on parole, and in numerous arrangements to mitigate as far as possible the inevitable suffering and miseries attending the conflict. The people of the loyal States on the one hand, and the people of the Confederate States on the other, thus became enemies to each other, and were liable to be dealt with as such without reference to their individual opinions or dispositions. Commercial intercourse and correspondence between them were prohibited, as well by express enactments of Congress as by the accepted doctrines of public law. The enforcement of contracts previously made between them was suspended, partnerships were dissolved,

[26] *Ibid.*
[27] *Ibid.*, p. 634.

and the courts of each belligerent were closed to the citizens of the other, and its territory was to the other, enemy's country. When, therefore, our armies marched into the country which acknowledged the authority of the Confederate Government, that is, into the enemy's country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account. As was observed in the recent case of *Coleman* v. *Tenn.*, 97 U.S., 509, 24 L. ed., 1118, it is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and criminal jurisdiction. The law was so stated in the celebrated case of The Exchange, reported in the 7th of Cranch, 116. Much more must this exemption prevail where a hostile army invades an enemy's country. There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity, and as little likelihood of freedom from the irritations of the war, in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war, *the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army*. It is difficult to reason upon a proposition so manifest: its correctness is evident upon its bare announcement, and no additional force can be given to it by any amount of statement as to the proper conduct of war."[28]

In recent times, the U.S. Supreme Court appears to have limited Marshall C.J.'s dictum to its own singular facts. Having done so, the court appears to have moved forward towards embracing a doctrine of limited sovereign immunity or better stated as a doctrine of restrictive sovereign immunity as a principle of international law for the U.S. courts.

The starting point of the *law of sovereign immunity* in the United States is also Marshall C.J.'s judgment in *The Schooner Exchange*.[29] A careful reading of his judgment indicates that the doctrine was considered applicable only in four situations:

(1) men-of-war;[30]

[28]*Ibid*, pp. 634-635.
[29]*Supra* note 13.
[30]*Ibid.* at 145-56, 3 L. Ed. at 296-97.

(2) the arrest or detention of the sovereign while he is upon a foreign territory;[31]

(3) the immunity of foreign ministers of the sovereign (including presumably, ambassadors, plenipotentiaries and other special agents);[32]

(4) troops of a sovereign that may pass through friendly foreign territory.[33]

In each case, Marshall C.J. thought that all civilized nations would grant immunity to the sovereign, since not to do so would derogate from his dignity.

Subsequent decisions, however, have extracted an absolute view from the ratio of *The Exchange*, extending the sovereign's immunity to include even his trading vessels. In *The Pesaro*,[34] for example, the United States Supreme Court, after quoting extensively from *The Exchange*, commented:

> "It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omission is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners, and there was little thought of governments engaging in such operations. That came much later. The decision in *The Exchange* v. *McFaddon* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United States evincing a different purpose."[35]

In subsequent decisions[36] the Supreme Court applied a rule of absolute immunity, drawn from *The Exchange* and *The Parlement Belge*. Van Devanter J. had in The Pesaro[37]

[31] *Ibid.* at 137, 3 L. Ed. at 294.
[32] *Ibid.* at 138, 3 L. Ed. at 294.
[33] *Ibid.* at 139, 3 L. Ed. at 294.
[34] *Berizzi Bros.* v. *The Pesaro*, 271 U.S. 562, 40 S. Ct. 611 (1926).
[35] *Ibid.* at 573-74, 40 S. Ct. at 612 (Van Devanter J.).
[36] *Campania Espanola de Navegacion Maritime, S.A.* v. *The Navemar* 303 U.S. 68, 58 S. Ct. 432 (1938), and the cases cited to the court in *Republic of Mexico* v. *Hoffman (The Baja California)*, 324 U.S. 30, 65 S. Ct. 530 (1945), as well as *Ex parte Republic of Peru* (The Ucayali), 318 U.S. 578, 63 S. Ct. 793 (1943).
[37] *Supra* note 34.

given reasons for expanding the ratio in *The Exchange;* but even before that, the Court, relying largely on *The Parlement Belge,* had extended Marshall C.J.'s formulation to include trading vessels.[38]

This line of cases was fortunately interrupted in 1944 by Frankfurter J. in *The Baja California*[39] case, which marked the beginning of the modern law of sovereign immunity in the United States.[40] The ship "Baja California" was owned by the Mexican government, but operated under contract by a private company incorporated in Mexico. The contract provided that the Mexican government would receive fifty per cent of the net profits, but the losses were to be wholly borne by the private corporation. On one of its voyages, the ship collided with the "Lottie Carson", which was owned by a citizen of the United States. Under a libel *in rem,* the "Baja California" was arrested for the damage it had done to the "Lottie Carson". The Mexican government applied to have the writ set aside, claiming sovereign immunity.

The State Department made no representation in court as to the question of immunity,[41] leaving the way open for a judicial determination of the question. Having failed in its application at every lower level, the Republic of Mexico appealed finally to the U.S. Supreme Court. The Court dismissed the appeal on the general grounds that the "Baja California" was not within the control or possession of the Mexican Republic. Frankfurter J. sketched the development of commerce among sovereign states which had necessitated a change in the attitude of courts towards sovereign immunity.[42] Quoting Lord Maugham's judgment in The Cristina[43] in support of the need for a change in the classical doctrine of immunity, Frankfurter J. stated:

[38]See *In re Muir (The Gleneden)*, 254 U.S. 522, 41 S. Ct. 185 (1921), also a decision of Van Devanter J.
[39]*Supra* note 36.
[40]See "The Jurisdictional Immunity of Foreign Sovereigns", in 6 *Yale L.J.* 1148, at 1156-59 (1954).
[41]Under the U.S. law, the State Department may issue a type of directive conceding sovereign immunity, which the courts are bound to follow. There is no similar procedure in Canada or in the other Commonwealth countries.
[42]*Supra* note 36, at 39-42, 65 S. Ct., at 534-36.
[43][1938] A.C. 485 at p. 490, [1938] 1 All E.R. 719, at p. 721.

> "The Department of State, in acting upon views such as those expressed by Lord Maugham, should no longer be embarrassed by having the decision in *The Pesaro* remain unquestioned, and the lower courts should be relieved from the duty of drawing distinctions that are too nice to draw. It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when "the department of the government charged with the conduct of our foreign relations, or of course congress, explicitly assents that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial process."[44]

Aided by the Tate Letter[45] of May 1952, the U.S. Courts began to adopt a "legalistic"[46] as opposed to a "dogmatic" attitude towards sovereign immunity, in effect a restrictive view. In *Victory Transport* v. *Comisaria General,*[47] the U.S. Court of Appeals (Second Circuit) explained that "[t]he purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment of defending the propriety of such acts

[44]*Supra* note 36, at 41-42, 65 S. Ct. at 535-36.

[45]The letter, dated May 19, 1952, was sent from J. B. Tate, acting legal adviser to the State Department, to the acting Attorney General. It sets out the policy of the State Department regarding sovereign immunity. Adopting the restrictive approach, the Tate Letter states that in the future the Department would only grant immunity in respect of acts *jure imperii* and not acts *jure gestionis*. The Tate Letter is reproduced in *Alfred Dunhill of London* v. *Republic of Cuba*, 96 S. Ct. 1854, at 1869, Appendix 1 (1976).

[46]See fn. 47 below and fn. 40 above at pp. 1160-63.

[47]Until The Baja California, the U.S., courts, unwilling to consider the question of sovereign immunity upon any established rule of law, dogmatically allowed the defence in all cases in which a foreign sovereign was impleaded. Following the Tate Letter, the courts, in the absence of an executive directive, considered the application for foreign immunity as a mixed question of fact and law: it was a question of fact whether the sovereign was engaged in a trading venture; it was then a question of law whether he was entitled to immunity. There were some critics of the way in which the Tate Letter directives eventually developed: See The Jurisdictional Immunity of Foreign Sovereigns, 63 Yale L.J. 1148 at 1156-59 (1954), and the judgment of Smith J. in *The Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes (the Hudson)*, 336 F. 2d 354 (2n Cir. 1964).

before foreign courts".[48] This careful compromise has worked well in the U.S. and has inspired writers elsewhere to advocate a similar change in English private international law.[49]

If any doubts remained about the status of the restrictive doctrine in the United States, these have been removed by the recent decision of the Supreme Court in *Alfred Dunhill of London* v. *Republic of Cuba*[50] and the Foreign Sovereign Immunities Act, 1976.[51]

In that case, the Supreme Court discussed the various theories of sovereign immunity and concluded:

> "Although it had other views in years gone by, in 1958, as evidenced by [the Tate letters] the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our Government since that time, as the attached letter of November 25, 1975, confirms: '.... such adjudications are consistent with international law on sovereign immunity." [52]

The Foreign Sovereign Immunities Act, 1976,[53] which came into force in January 1977, carries the restrictive doctrine one stage further by defining commercial or proprietary activities which will disentitle a sovereign to immunity in the U.S. federal courts. As one commentator has noted, "The intent and purpose of the statute clearly is to force foreign sovereigns engaged in commercial activities 'having substantial contact with United States' into the U.S. Courts."[54]

The influence of this shift of opinion regarding sovereign immunity upon the U.S. armed forces may be evinced from two 1957 decisions from the U.S. Supreme Court. First, in

[48] *Ibid.* at 360.
[49] Lauterpacht, and Friedmann, "The Growth of State Control over the Individual, and its Effect Upon the Rules of International State Responsibility", 19 *Brit. Y.B. Int. L.* 11 (1938).
[50] 96 S.Ct. at p.1854
[51] 28. U.S.C.A. ss. 1330, 1332, 1391, 1441, 1602, 1602 notes, 1603-1611, Pub. L. No. 94-583, 90 Stat. 2891.
[52] Fn. 45.
[53] See, "Recent Developments in the Law of Sovereign Immunity", *Bus. L. Rep.* 209, at 212 (1977).
[54] O'Connell, (D) Vol. 2 International Law, 2nd Edition 1970 at p. 842

Reid v. *Covert*[55] the husband of the accused was ordered to serve in the U.S. armed forces in the United Kingdom. He was accompanied by his wife in the U.K. at the time of his murder. While they were in the U.K., it was alleged that the wife murdered her husband. In accordance with the *United States of America (Visiting Forces) Act of 1942* of the U.K. the wife was tried before a U.S. Court-martial, was convicted and was sentenced to life imprisonment. The court-martial was held in the U.K. and after her conviction she was transported to the U.S. to serve her term of imprisonment. By these proceedings the convict, the widow, challenged the validity of her conviction on the ground that the court-martial had no jurisdiction to violate a right she had under the U.S. constitution; namely her right to a trial by jury. She sought a writ of *habeas corpus* to have her released from prison. All six members of the Supreme Court agreed that dependents of members of the Armed Forces overseas could not constitutionally be tried by a court-martial for capital offences during times of peace. However Warren C.J., Black, Douglas and Brennan J.J. expressed the broad view that the military trials of civilians charged with any offence whatsoever was inconsistent with the Federal Constitution during peace time. The Supreme Court pointed out that the U.S. Congress could determine where an offence committed by an American citizen abroad may be tried. The decision indicated that the widow of the deceased U.S. Army officer could be re-tried but that trial must take place in a civil (non-military) court, presumably, as the 1942 U.K. Act required in the U.S. of America. The importance of this decision is that the Supreme Court adopted[56] with approval the English law on this subject as being consistent with the U.S. Law on this matter. The Supreme Court quoted[57] with approval Sir Mathew Hale and Sir William Blackstone for the English law, to emphasize the importance

[55](1957) IL.Ed.(2d) 1146 or 354 U.S.I.
(future footnote references are to the Lawyer's Edn)
[56]Bodin, (J.), *The Six Books of the Commonwealth* (trans. by M. Tooley), 1955 at p. 43.
[57]*Ibid*, Fn. 55 at p. 1169.

of subjecting every person irrespective of rank to the law of the land.

> "The [English] common law made no distinction between the crimes of soldiers and those of civilians in time of peace. All subjects were tried alike by the same civil courts so "if a lifeguards-man deserted, he could only be sued for breach of contract, and if he struck his officer he was only liable to an indictment or an action of battery".[58]

The Supreme Court thereafter referred[59] to the billeting in Boston of British soldiers from 1768 and until the outbreak of the revolution to lend military "support [to] unpopular royal governors and to intimidate the local populace".[60] The Court, furthermore, decribed the abhorrence with which for example Samuel Adams and other popular leaders viewed the exclusion of persons from the local law and their subjection to military law of visiting British forces.[61] What is clear from the judgment is that the U.S. Supreme Court wished to recognise the supremacy of the local law and its application to soldier and civilian alike during a time of peace.

The second decision from the Supreme Court was *Wilson* v. *Girard*[62] which was also decided in 1957. By Treaty executed between the U.S. government and the Imperial government of Japan, and proclaimed on April 28, 1952, the U.S. Armed forces commenced their presence upon Japanese territory. The Treaty was a result of a mutual concern, shared between the U.S. government and the government of Japan, that the sovereign territory of Japan faced a threat of an armed invasion from the Soviet Union, after the conclusion of World War II, in 1945. It was this fear that compelled Japan to invite the U.S. Army to defend her sovereignty. The Treaty contained a complete list of conditions under which the U.S. Armed forces entered and remained in Japan. Under that Treaty Japan agreed to render the members of the U.S. Armed forces immune from local jurisdiction. This

[58] *Ibid.*, at p. 1168.
[59] *Ibid.*, at p. 1169.
[60] *Ibid.*,
[61] *Ibid.*, at pp. 1169-1171.
[62] 354 U.S. 1544 (1957).

was necessary because it appeared at the time that according to both U.S. and Japanese Law the members of a visiting army were subject to the local law and to the local jurisdiction. In these circumstances Girard, the accused, was on duty, engaged to protect the perimeter of a military area in Japan, which was used for target practice by the U.S. army. It was known to every one that the local Japanese population often came to watch the practice and at times came to collect the spent cartridge casings from the target area. It was alleged that Girard fired a shot without any warning at a Japanese woman collecting these spent casings, and that she was thereby killed.

Under Article XXVI of the Treaty, a Joint Committee of Representatives drawn both from the U.S. and from Japan sat to consider whether Girard should be tried by a U.S. court-martial for murder, as the Treaty prescribed, or whether he should be handed over to the Japanse authorities for trial. Girard's commanding officer certified that the shooting was done in the performance of an official duty, while the Japanese government claimed its right to try Girard in the local courts contending that the shooting was not done in the performance of any official duty. The Treaty, however, applied only in such situations as when the accused officer was acting in the performance of an official duty. The president of the joint commission ordered the return of Girard for trial in Japan. This he did because the commission recognized that Japan by Treaty had ceded her right to apply the local law and thereby excluded by Treaty a right which she had to subject the members of the U.S. Armed forces to the local jurisdiction. Against that decision by the Joint Commission, Girard sought a writ of *habeas corpus* in the United States District Court for the District of Columbia. The writ was denied but the court granted Girard declaratory relief and an injunction against his delivery to the Japanese authorities. Against that order, the United States appealed ultimately to the U.S. Supreme Court. The Supreme Court allowed the appeal and affirmed that the *habeas corpus* writ sought should be denied and ordered that Girard be returned to the Japanese government for re-trial. The Court while allowing the appeal observed:

> '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. (*The Schooner Exchange* v. *McFaddon* ...). Japan's cession to the United States of jurisdiction over American military personnel for conduct constituting an offense against the laws of both countries was conditioned by the covenant ... that ...'the authorities of the state having the primary right shall give sympathetic consideration to a request from the authorities of the other state for a waiver of its rights in cases where that other state considers such waiver to be of particular importance.' The issue for our decision is therefore narrowed to the question whether, upon the record before us, the constitution or legislation subsequent to the security treaty prohibited the carrying out of this provision authorised by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the executive and legislative branches. The judgment of District Court ... is reversed."[63]

The decision clarifies important questions which merit emphasis. First, it re-states the position that sovereign states have the right to enforce the local law and subject all parties to the local jurisdiction within the territorial limits of the state. Second, it emphasizes the position that this right may be excluded only by consent of the local state. Third, the Supreme Court found the authority for both propositions in Marshall C.J.'s judgment in *The Schooner Exchange* v. *McFaddon.*

III
THE CANADIAN LAW

The Canadian law on the matter is clearer[64] than what was found in the Law of the United States. The problem that was encountered in the U.S. law was that some writers had tended to consider Marshall C.J.'s *obiter dictum* in *The Schooner*[65] not only as its *ratio decidendi* but also as providing

[63] *Ibid.*, at p. 1548.
[64] *Reference Re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences* [1943] 2 D.L.R. 481 and *Saint John* v *Fraser-Brace Overseas Corp.*, [1958] 13 D.L.R. (2d) 177, [1958] S.C.R. 263.
[65] See fn. 13 above.

a wider principle of international law applicable to all foreign forces present on local soil irrespective of the reason for which their presence was made necessary. The whole of the Canadian Law on this subject may be found in the opinions of *Sir Lyman Duff C.J.* and of *Rand J.* in the Supreme Court of Canada in *Reference Re Exemption of U.S., Forces from Canadian Criminal Law.*[66] The Reference in these proceedings was a sequel to the decision of the government of Canada to invite the United States Armed forces to occupy Canadian soil, in order to ensure the security of Canada and defend her sovereignty, during the second world war. The Governor-General-in-Council addressed the Supreme Court with a request, seeking an answer to the question as to whether the members of the military or naval forces of the United States of America, while they were in Canada, with the consent of the Canadian government, were exempt from criminal proceedings in the Canadian criminal courts. By a majority, the Supreme Court held, that there was no rule of international law which exempted the visiting forces from local jurisdiction.

Duff C.J. wrote:

> "My view can be stated very briefly. It is, I have no doubt, a fundamental constitutional principle, which is the law in all the Provinces of Canada, that the soldiers of the army of all ranks are not by reason of their military character, exempt from the criminal jurisdiction of the civil courts of this country."[67]

In general the Supreme Court expressed the view that visiting forces were subject to the local jurisdiction in criminal matters but the government of Canada had the power to exempt them by an Act of parliament suitably drafted.[68] The court referred to a similar step taken by the British Government.[69] *Duff C.J.* referred[70] to a speech in the British House of

[66][1943] 4 D.L.R. 11.
[67] *Ibid.*, p. 14.
[68] *Ibid.*, pp. 25, 34, 43.
[69] *Ibid.*, p. 18.
[70] *Ibid.* 17 and 18.

Commons by the then Attorney General of the U.K., Sir Donald Sommervell, while proposing the *United States of America (Visiting Forces) Act, 1942*. In that speech, the Attorney-General told the House of Commons that it was the high regard with which the British Government held the administration of military justice by the U.S. Army that compelled his government to legislate to transfer exclusive jurisdiction over the visiting U.S. forces to the U.S. Army.[71] Implicit in his speech was the admission that the U.K. courts had jurisdiction over visiting forces and the proposed legislation in 1942 was necessary to transfer that jurisdiction to the U.S. Army.[72] The point was quite clear that the local courts had jurisdiction over the forces invited to enter Great Britain for the defence of the Realm.[73] The Act of 1942 was necessary to exclude that jurisdiction. The present Canadian Reference concerned a similar issue and therefore the policy statement by the British Attorney-General was considered to be very relevant to the Canadian problem.

Duff C.J. concluded:

> "What the Attorney-General [of Canada] says is incompatible with any recognition of the notion that there is some rule of international law which deprives the Court of jurisdiction, in the absence of legislative enactment or its equivalent. I find it impossible to escape the conclusion that the United Kingdom has never assented to any rule of international law by which British courts are restricted in their jurisdiction in respect of visiting armies or members of them. In other words, no such rule as that now insisted upon has ever been a part of the law of England; and this applies equally to Canada. The fundamental constitutional principle with which it is inconsistent is a part of the law of every Province of Canada, the constitutional principle by which, that is to say, a soldier does not, in virtue of his military character, escape the jurisdiction of the civil courts of this country. Nothing short of legislative enactment, or its equivalent, can change this principle."[74]

[71] *Ibid.*, p. 18.
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*, p. 21.

The Supreme Court was eager to show that the Canadian law fell into line with the law of England on this point. *Sir Lyman Duff* adopted two passages from Dicey and from Professor Goodhart whom he described as "the distinguished lawyer who is the successor of Maine and Pollock in the chair of jurisprudence at Oxford University and is the editor of the Law Quarterly Review."[75] The passage quoted from *Dicey*[76] confirms the view that a member of the armed forces is subject to the local law of the land in criminal matters as would be any civilian. *Dicey* wrote and *Duff C.J.* quotes with approval:

> "A soldier is subject to the same criminal liability as a civilian. He may when in the British dominions be put on trial before any competent "civil" (i.e. non-military) court for any offence for which he would be triable if he were not subject to military law, and there are certain offences, such as murder for which he must in general be tried by a civil tribunal. Thus if a soldier murders a companion or robs a traveller whilst quartered in England or in Van Diemen's Land, his military character will not save him from standing in the dock on the charge of murder or theft."[77]

The passage cited from *Goodhart*[78] refers to *Dicey*. Goodhart says that Dicey's principle finding for the English law may be summed up in two propositions. First, "Equality before the Law" and the second "the personal responsibility of wrongdoers." The latter, Goodhart argues excludes the notion that any violations of the law by a subordinate could be blamed upon superior orders. Goodhart's concluding passage on this point was quoted with approval by *Duff*. It was this:

> "This means that the British soldier is subject to the jurisdiction of the ordinary courts, and is responsible to them for any breaches of the law which he may commit."[79]

Although Goodhart's statement may appear to be limited to the liability of an English soldier in England to the

[75] *Ibid.*, p.15.
[76] Dicey (A.V.) *An Introduction to the Study of the Law of the Constitution*, MacMillan, 1965.
[77] *Ibid.*, at pp. 300-306.
[78] Goodhart, (A.L.), "The Legal Aspect of the American Forces in Great Britain", in Vol. 28, American Bar Association Journal, 1942.
[79] *Ibid.* at p. 763.

English law, he bases his exposition on Dicey's view. In the last quoted passage from Dicey it was clear that Dicey was advocating an English soldier's liability not only in England but also on the imaginary Van Diemen's Island, representing a foreign jurisdiction. Besides, Duff C.J. used Goodhart and Dicey to justify the application of the Canadian law to members of the U.S. Armed forces who happen to be on Canadian soil, by invitation, to help defend Canadian sovereignty from Fascism during the second world war.

It may be concluded that the Canadian law falls into line with the English law. The Canadian law recognises that members of foreign armed forces while present in Canada, at the invitation of the Canadian government, remain subject to the Canadian Criminal Law.

IV
THE ENGLISH LAW

An illuminating exposition of the English Law was presented by *Barton* in his two articles[80] published in the British Year Book of International Law. *Barton* having engaged himself in an extensive survey of the International law concluded that the laws of the nations of the visiting forces are applicable, exclusively in matters of discipline and of internal administration. That was necessary as the forces that belong to a foreign nation owe their allegiance to the foreign sovereign and the foreign sovereign is considered to be in command of those forces while they are within their own military lines. The reason why exclusive jurisdiction over all matters concerning visiting armed forces were not left to be judged by the laws and in the courts of the sending nations was because that might perhaps suggest the resurrection of the "floating island theory" which once supported a theory of extra territoriality.[81] That theory was laid to rest by *Lord Atkin* in

[80](1949) 26 *British Year Book of International Law*, pp. 380-413 and (1950) 27 *British Yearbook of International Law*, pp. 186-234.

[81]Marasinghe (M.L.), "Reassessment of Sovereign Immunity", in vol. 9, *Ottawa Law Review*, 1977, at pp. 474-504.

the Privy Council in the case of *Chung Chi Cheung* v. *The King*.[82] While laying the "floating island theory" to rest, *Atkin* wrote:

> "However the doctrine of extra-territoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore."[83]

The 'floating island theory' of extra-territoriality lies at the bottom of any proposition which may be rendered in support of providing immunity from the local laws and jurisdiction for foreign armed forces who are invited to come upon local soil to lend military assistance to the local sovereign. The idea takes shape from the assumption that wherever the armed forces of a sovereign state are found, that territory upon which they are found, becomes a portion of the sending state, as if it were a floating island which had got detached from the original state. The debunking of the floating island theory impliedly debunks the proposition which renders support to the granting of immunity to visiting forces. *Barton*[84] concludes:

> "The consent of state to the presence in its territory of the armed forces of a friendly state implies an obligation to allow the service courts and authorities of that visiting force to exercise such jurisdiction in matters of discipline and internal administration over members of that force as are derived from their own law."[85]

Rex v. *Aughert*[86] provides a good example for the English law. There Aughert, a senior officer of the Belgium Armed forces was sent to England on a special mission by the Belgium government. During a quarrel with one de Dryver, who too was an officer of the Belgium Army, Aughert shot and wounded de Dryver. The shooting was a sequel to de

[82][1936] A.C., 160.
[83]*Ibid.*, at p. 174.
[84]Barton, (G.P.), *Loc. Cit.*, 1949.
[85]*Ibid.*, at p. 412.
[86](1918) 34 T.L.R. 302.

Dryver's use of insulting and provocative language. The British police arrested Aughert and handed him over to Belgium Military Police for court-martial at Calais. In the meantime, de Dryver commenced proceedings before an English Court under Section 20 of the Offences against the Person Act of 1861, charging Aughert with unlawful wounding. The proceedings were stopped until the court-martial proceedings were concluded. Aughert was acquitted at the court-martial. Thereafter the proceedings in England were continued and Aughert was convicted. Aughert's defence of *Autrefois acquit* was dismissed by the trial judge. Aughert appealed to the court of Criminal Appeal. The court unanimously accepted the defence of *autrefois acquit,* while considering the Belgium court-martial to be a part of the English courts, by virtue of the Anglo-Belgium agreement. The Anglo-Belgium Agreement concedes concurrent jurisdiction to Belgium courts-martial. The Agreement establishes an extension to the existing jurisdiction of the English Courts. That leaves unaffected the traditional jurisdiction of the English Courts. Therefore, once Aughert was properly tried and acquitted by the Belgium court-martial, trial in the English courts must then constitute the defence of *Autrefois acquit* and not the defence of immunity from the local laws and jurisdiction. Therefore, the issue as to whether the local courts in England had jurisdiction to implead a visiting foreign army was never considered to be relevent to the issues raised on behalf of Aughert.

V
REFLECTIONS

Marshall C.J.'s view in *The Schooner,* was symptomatic of a philosophical trend that first influenced Europe and then impacted upon the 19th century judicial thinking of both Europe and of the United States of America. As a part of that philosophical trend was the idea of an absolutist view of sovereign immunity. The view was held by judges on both sides of the Atlantic, in the 19th century, that a sovereign should be immune from local matters in an absolute sense; namely for all acts both *in jure imperii* and *in jure gestionis.* This immunity was to extend to his ships and to his armed forces.

Historically, it appears to be clear that until the dawn of the 19th century, the view of sovereign immunity was a restrictivist one. It was limited to the sovereign's acts which were a part of his sovereign or diplomatic functions -- *in jure imperii* and not to any other functions of a non-sovereign nature; namely his acts *in jure gestionis.* This distinction was vital to the issue as to whether visiting forces, who are present on local soil only by the local sovereign's invitation, are subject to an absolute immunity from local jurisdiction or are they immune from local jurisdiction only for such acts as those which are committed within the battle lines, or those which are matters of administration and of internal discipline. The latter falls squarely within the sovereign or diplomatic functions of the sending state -- for matters of internal discipline, internal administration or affairs within the battle lines are matters of sovereign functions of a sovereign state. Matters arising within the battle lines, while engaged in battle to defend the territory of the host-state are governed by the laws of war. In all other matters which are matters of a civilian nature, the forces of a foreign sovereign must indeed be subject to the local jurisdiction. Into the latter category fall all acts which a member of the armed forces may commit outside the lines of military duty. For each of those acts that member will be liable under the local law and is subject to the local jurisdiction. It is this that *Rand J.* included in the closing lines of his judgment in the Canadian government's reference to the Supreme Court of Canada in 1943.[87] There *Rand J.* wrote:

> "The members of United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their camps or on their warships, except against persons not subject to United States service law, or their property, or for offences under local law wherever committed, against other members of those forces, their property and the property of their government, but the exemption is only to the extent that United States courts exercise jurisdiction over such offences."[88]

[87] [1943] 4 D.L.R. 11.
[88] *Ibid.*, at p. 51.

The learned Chief Justice[89] and the majority[90] of the Court agreed with Rand's formulation of the law. As for Duff C.J. himself he preferred a more restrictive statement of the law. *Duff C.J.* put his conclusion in this way:

> "As to the jurisdiction of Canadian courts: First, as to land forces. There is no rule in force in Canada which deprives the Canadian civil courts (that is to say, non-military courts) of jurisdiction in respect of offences against the laws of Canada committed by the members of such forces on Canadian soil. The Canadian Criminal Courts do not in fact exercise jurisdiction in respect of acts committed within the lines of such forces or of offences against discipline generally committed by one member of such forces against another member in cases in which the act or offence does not affect the person or property of a Canadian subject." Secondly, as to naval forces. The members of a crew of an armed ship of the United States are exempt from the jurisdiction of the criminal courts of Canada in respect of an offence committed on board ship by one member of the crew against another member of the crew and generally in respect of acts which exclusively concern the internal discipline of the ship. As regards offences committed on shore by members of the crew, they are not exempt from the jurisdiction of the criminal courts of Canada, but the criminal courts of Canada do not exercise jurisdiction in respect of such offences where the offence is one committed by one member of the crew against another member of the crew, except at the request of the commander of the ship."[91]

In the English law one finds oneself limited to an analysis of *Rex* v. *Aughert*.[92] This is so because the issue of local jurisdiction had scarcely if ever, come before the local courts. The reason for this may be found in the general law of the land: that all those who come within the local jurisdiction are subject to it and must abide by the law of the land. This general rule of jurisprudence however, appears to be implicit in his speech to the British House of Common of Sir Donald Sommervell, the Attorney-General of Great Britain, (who later as Lord Sommervell assumed the rank of a Lord of Appeal), during the second reading of the *United States of*

[89] *Ibid.*, at p. 24.
[90] *Ibid.*, per *Judson & Rand* J.J.
[91] *Ibid.*, at p. 24.
[92] (1918) 34 TLR 302.

America (Visiting Forces) Bill on the 4th August, 1942.[93] In his speech the Attorney-General was attempting to explain to the House that the continuing hostilities during world war II had compelled His Majesty's government to invite the United States forces into the United Kingdom and as a necessary step towards accommodating the visitors, it was necessary to change the law of England so as to provide the visiting forces with immunity from local jurisdiction. The exclusion of a visiting army from the local jurisdiction while present in the U.K. solely at the invitation of His Majesty's government was described by some, during the House of Commons debate, as "odious",[94] "unjustifiable --- constitutional innovation being rushed through the House[95] and "troubling".[96] Despite these harsh epithets, the House agreed that the Bill was indeed a necessity. The speech of the Attorney-General throughout assumed that the Bill was designed to change the law of the U.K. in that it will provide the visiting forces an immunity from local jurisdiction, a right which visiting forces did not enjoy under the law of the land. The preamble of the Bill limited the immunity to "discipline and internal administration"[97] which too were subject to the local law under the general law of the land. The Attorney-General made the following remarks during his speech:

> ..."this Bill only affects dealings with the soldiers of the United States Forces who are present in this country. It is in respect of these individuals that the jurisdiction of our courts is excluded and that they will be dealt with by court-martial. It is a matter in which we are concerned, and I am not for a moment minimising the constitutional gravity and importance of the subject which this Measure, if passed, will legalise."[98]

[93] *Parliamentary Debates, House of Commons*, Vol. 382 (1941-42), Cols. 920-931.
[94] *Ibid.*, Col. 920 (Pickehorn M.P. - Cambridge University).
[95] *Ibid.*, Col. 902 (Major Lyons M.P. - Leicester East).
[96] *Ibid.*, Col. 888 (Goldie M.P. - Warrington).
[97] *Ibid.*, Col. 889. The preamble quoted there read:
"Make provision with respect to the discipline and internal administration of certain allied and associated forces, and for the application in relation to those forces of the visiting forces (British Commonwealth) Act, 1933, and other Acts.".
[98] *Ibid.*, Col. 920.

The general law prescribing the observance by visiting forces of the local law of the land has an ancient heritage in English Jurisprudence. *Dicey* in his Law of Constitution[99] linked this to the observance of the Rule of Law. In his chapter on the Rule of Law, Dicey subjected the soldier both to the criminal and to the civil law of the land.[100] He there wrote:

> "the fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen."[101]

In the event of an army in belligerent occupation, by international law, they are subject to the laws of war and to the laws of the state to which they owe their allegiance. Where an army of a foreign sovereign is permitted to pass through local territory, there is an implied promise read into the permission granted by the local sovereign that the members of the foreign army will not be subject to the local law or jurisdiction while they are passing through the local territory. The authority for this proposition is Marshall C.J. in *The Schooner*. There is no classical source of international law that supports Marshall C.J.'s assertion. As an authority such a statement of the law is either weak or is untenable. Thirdly, where a foreign army is invited by the local sovereign to help the local sovereign to maintain peace, order and the security of the local state, there is clear common law authority that members of such an armed force are subject to the local law and to the local jurisdiction as would anyone else be who may come upon the local jurisdiction including the armed forces of the local sovereign. This is so because the capacity in which they are present on local soil was to perform the same tasks as those that the local armed 'forces would perform. That is to defend the local territory. However, in the Canadian law there is evidence that the Canadian courts do recognise immunity from the local jurisdiction in matters of discipline, internal administration and acts commit-

[99]Dicey (A.V.), *Introduction to the Study of the Law of the Constitution*, MacMillan, London, 1965.
[100]*Ibid.*, p. 301.
[101]*Ibid.*, p. 300.

ted within the battle lines. There is no such limitation of jurisdiction recognised by the English common law, as became evident in the debate[102] in the British House of Commons, during the second reading of the United States of America (Visiting Forces) Bill in 1942. However, it is likely that the common law courts may be unwilling to subject acts committed during the outbreak of actual hostilities in defending the host state to the local law and to the local jurisdiction. Such acts are clearly governed by the laws of war if it is a declared war or by the laws of the sending state if the hostilities are those of an insurgency. In any event even if such acts were ever brought before the local courts administering the local law, the defence of acting in self defence, should provide an unanswerable defence to the charge.

That necessarily raises the need to distinguish between acting during hostilities in the defence of the local territory and acting outside such an ambit. The distinction is important because it will only be the latter that could subject a visiting army to the laws of the host state, which had invited the foreign army upon its local soil. Whether the act was committed during an outbreak of hostilities is of course a question of fact which could easily be determined. Breaches of the law caused when engaged in peaceful movement from one point to another upon local soil is not to be considered as a movement that was made during an outbreak of hostilities, although the movement may have taken place within a combat zone. That was the issue raised before the U.S. Supreme Court in *Wilson* v. *Girard*[103] to which reference has already been made.

The conclusion therefore, is that the common law subjects the armed forces of a foreign sovereign to the local law, when their presence upon local territory was as a result of an invitation by the local sovereign to render his nation military assistance. The extent of this subjection is limited to all matters other than matters of discipline, internal administration and activities undertaken during military engagements as a result of an actual outbreak of hostilities. Whether

[102]See fn. 87 at p. 18.
[103]354 U.S. 1148 (1957).

there is an actual outbreak of hostilities and whether the wrong complained of falls within mattters of internal discipline or of internal administration are all questions of fact that the local courts have the jurisdiction to decide.[104] Upon such an enquiry if the court were to find that the facts contained in the complaint fall within an area which is covered by immunity then the court will so hold, and will then exclude its jurisdiction and the application of the local law from those matters and dismiss the action. The procedure adopted in such a matter is no different from the process now adopted by the common law courts in the U.K.[105] and in Canada,[106] and in the courts in the U.S.A.[107] when they are faced with a defence of sovereign or state immunity. In each case the sovereign becomes temporarily impleaded in the local courts until the facts of the dispute are determined. This is always the first step in an enquiry into a claim of sovereign immunity. Which is in no way different from a claim to immunity from the local law and local jurisdiction where there is no treaty lending guidance to the local courts.

Lakshman Marasinghe*

*Professor of Law,
University of Windsor,
Ontario, Canada and
Visiting Professor of Law,
University of Colombo
Sri Lanka.

[104]Laskin J. in *The Republic of the Congo* v. *Venne* [1971] S.C.R. 997 (Canada), *Tendtrex Trading Corporation Ltd.*, v. *Central Bank of Nigeria* [1977] 1 Q.B. 529 (Denning L.J.), and *Wilson* v. *Girard* 354 U.S. 524 (1957).
[105]*The State Immunity Act*, 1972, C. 33 (U.K.).
[106]*The State Immunity Act*, 1981, C. 95 (Canada).
[107]*The Foreign Sovereign Immunities Act*, 1976 (U.S.A.).