Chapter 2
The Ground Rule

Abstract  In 1812 the US Supreme court addressed the status of armed forces passing through the territory of a foreign friendly State and concluded that consent of that State implied its waiver of all jurisdiction over the visiting forces. Based on this court case and subsequent case law a general ground rule on the exercise of jurisdiction can be framed: A host State refrains from exercising criminal jurisdiction over armed forces of a sending State, in case it has given consent to their entry and presence on its territory, thus allowing the sending State to exercise criminal jurisdiction over its forces abroad. Case law and the literature limit the scope of the ground rule somewhat, indicating that it applies to visiting forces as an organised military unit and while the members of the forces are present at the designated military bases and installations or are on duty outside the bases and installations.

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2.1 Introduction

Throughout the centuries States have deployed their armed forces abroad in order to protect or further their national interests, which could generally be defined in terms of the law of armed conflict as international armed conflicts and occupation. In the past, armed forces largely consisted of soldiers recruited by private entrepreneurs that later in history were partly replaced by regiments hired from other States. During the first part of the nineteenth century, the introduction
of, *inter alia*, mandatory military service put an end to this practice in Continental Europe and the armed forces developed into an instrument of the sovereign State in its relations with other States. In the same period the legal status of armed forces stationed in other States started to find a place in both case law and the literature.

This chapter examines in what ways ideas on criminal jurisdiction over military forces based abroad took shape during the nineteenth century and have further evolved since then. It starts with a discussion of the first court case in which the status of visiting forces was addressed: *The Exchange v. McFaddon*-case (Sect. 2.2).\(^1\) Considerations of the decision are confirmed by later American court decisions (Sect. 2.3). In this chapter, these decisions serve as a reference for the formulation of the ground rule on criminal jurisdiction over armed forces of sending States on foreign territory (Sect. 2.4). This rule appears to be absolute in nature. However, case law and the literature will clarify that the status of armed forces can be interpreted in a more balanced way (Sect. 2.5). In this approach the application of the ground rule is subject to specific conditions that affect the scope of the exercise of criminal jurisdiction (Sect. 2.6).

### 2.2 The Exchange v. McFaddon

In 1812, a case concerning a vessel called *The Exchange* was brought before the US Supreme Court. The vessel, property of two American citizens, was seized on the high seas in 1810 on orders of the French Emperor Napoleon who had commissioned it under the name of *Balaou* as a French naval vessel. During a voyage to the Caribbean *The Exchange* sustained damage forcing its crew to dock at the port of Philadelphia for repairs. When the US owners, including McFaddon, learned about this, they had the vessel put under embargo on 24 August 1811 and claimed its restitution to them. In 1812, the case was brought before the US Supreme Court, which rejected the claim.

The key question of the case was whether an American citizen could claim ownership of another State’s warship that was within the US territorial waters. Although this was a civil court case, the considerations of Chief Justice Marshall had broader implications. He noted that the jurisdiction of a State within its own territory is exclusive and absolute. Any external restrictions upon it would result in an abatement of sovereignty. Therefore, all exceptions to the jurisdiction must be traced to the express or implied consent of the State itself, which had already become customary practice between equal States.

According to Marshall, this full and absolute territorial jurisdiction did not confer any extraterritorial power. A sovereign can enter foreign territory only under the express license, or in the confidence that the immunities belonging to his

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independent sovereign position implicitly extend to him. In State practice, this led to situations in which a State was supposed to have partly refrained from its full territorial jurisdiction.

One of the situations to which Marshall refers was the presence of foreign armed forces. When the sovereign explicitly allowed foreign forces free passage through his territory, his action implied a waiver of all jurisdiction over the forces and the recognition that they were subject to the criminal jurisdiction of their commander:

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.

Marshall reasoned that if the host State were to exercise its jurisdiction over the foreign armed forces:

…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.

In this consideration, Marshall emphasises that by allowing the passage of foreign forces, the host State acknowledges the purpose for which the foreign forces are present on its territory. He also confirms the nexus of a State and its armed forces, even in case the forces are deployed abroad for the protection of the State’s interests.

Host State consent to the free passage of foreign armed forces was considered by Marshall to be a key element. If forces of one State entered the territory of another State without its consent, the latter could consider this act as hostile and the ‘visiting’ armed forces would by no means be entitled to any privileges.

Admitting warships into its ports was less dangerous and problematic for a State than granting a foreign army free passage through its territory. If a State had not closed its ports for warships, they were considered to be open to the public ships of other States. Marshall reasoned that warships were part of the military force of a State under direct command of the sovereign, who commissioned the vessels for national tasks. If other States prevented warships from executing their tasks, it would prejudice the State’s dignity. On these grounds, Marshall considered that visiting warships were implicitly exempted from foreign jurisdiction. In applying the above-mentioned principles to the Balaou, Marshall concluded that at the time the ship docked at the port of Philadelphia, it was exempted from the jurisdiction of the US, as it was classified as a French warship.

2.3 Coleman v. Tennessee and Dow v. Johnson

The US Supreme Court built on The Exchange v. McFaddon in two later cases relating to the American Civil War. Although this book does not address the status of armed forces under the law of armed conflict, both judgments contain relevant
considerations that refer back to *The Exchange v. McFaddon*. In both cases, the
judge decided in general terms on the jurisdiction of a host State over foreign
military forces. Consequently, the validity of the decisions extends to situations
beyond those of armed conflicts.

The case of *Coleman v. Tennessee*\(^2\) concerned an American soldier who mur-
dered a woman in Tennessee. A court martial had sentenced the soldier to death
for this offence, but for reasons unknown, the sentence had not been carried out.
After the war had come to an end, a local court in the state of Tennessee convicted
the soldier once more for the same offence. The Supreme Court considered that at
the time of the offence, the Southern Confederate States were regarded as hostile
territory. This also applied to the part of Tennessee where the murder had taken
place and which was occupied by the US Army. On the basis of the rules of war,
courts-martial of the US had the exclusive jurisdiction to prosecute their own ser-
vicemen for crimes committed. Consequently, members of the armed forces were
only accountable to their own government and were not subject to the jurisdiction
of local laws and courts.

In his considerations the judge referred to the Supreme Court’s decision in
*The Exchange v. McFaddon*. He noted that it was generally accepted that an army
having the approval to enter, or be stationed on, the territory of a friendly State
would be exempted from the State’s civil and criminal jurisdiction. Consequently,
if this were the case, it would be evident that an army having invaded an enemy
State would not fall under the State’s jurisdiction.

One year later, the case *Dow v. Johnson* was brought before the Supreme
Court.\(^3\) In 1863, Bradish Johnson had taken his case against US Army General
Neil Dow before the court of New Orleans. Johnson claimed that on General
Dow’s orders US forces had confiscated sugar from his plantation and plundered
the Johnson residence. The Supreme Court had to decide whether a local court in
an enemy State had civil jurisdiction over an officer of the US Army. The judge
referred to the above mentioned consideration in the *Coleman v. Tennessee* case
and its reference to *Exchange v. McFaddon*, concluding that servicemen in times
of war were only accountable to their own government and were not subject to the
criminal jurisdiction of local laws and courts. The judge concluded that the same
reasoning would apply here with respect to civil jurisdiction.\(^4\)

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\(^3\) U.S. Supreme Court October 1879, *Dow v. Johnson*, 100 U.S. 158 (1879). supreme.justia.com/

\(^4\) Ibid.
2.4 The Ground Rule

Case law, as in Coleman v. Tennessee and Dow v. Johnson,\(^5\) confirms what had already been decided in The Exchange v. McFadden on the jurisdiction over armed forces abroad and even widens the scope of that case from the free passage of forces to the stationing of forces. The judge noted that this practice was “well-settled”. So, in his opinion it was a generally accepted practice that host State consent to the entry and presence of foreign armed forces implied its waiver of jurisdiction over the sending States’ forces.

It is hard to establish to what extent this practice reflects international customary law. In The Exchange v. McFadden the judge interpreted the facts on the basis of general principles and indicated that he was not led by precedents or by lex scripta. The fundamental nature of his interpretation, based on the absolute jurisdiction of a State, indicates that he was led by what he presumed to be the law. The judge thus referred to a rule that applied to armies present on the territory of friendly States and not just to practice or custom. Likewise, the judge classified the right of warships to visit a port as a principle of public law. Furthermore, it has to be taken into account that the considerations in The Exchange v. McFadden were accepted by other judges as a matter of course for more than a century.

On the basis of the considerations outlined above, it can be concluded that, according to the US Supreme Court, the waiver of criminal jurisdiction over visiting armed forces was based on a general rule of law. In summary, this rule, which will be referred to as the ground rule in this, reads:

> A host State refrains from exercising criminal jurisdiction over visiting armed forces of a sending State, in case it has given its consent to their entry into and presence on its territory, thus allowing the sending State to exercise criminal jurisdiction over its forces abroad.

The ground rule consists of three elements. First, the host State must have given its consent to the entry and presence of the foreign armed forces. This is obviously not the case in a situation of armed conflict or enemy occupation, which is therefore beyond the scope of the ground rule. Sometimes a State’s decision on the entry and stationing of foreign armed forces on its territory has not been made in complete freedom, but under some pressure. The continued presence of occupying forces on the basis of a Peace Agreement is an example of such a situation. As these situations formally fulfil the requirement of a given consent, they will be considered in the context of the ground rule.

Second, the ground rule includes a waiver from the host State: it refrains from exercising its criminal jurisdiction over the armed forces of a sending State from the moment the forces have received consent to be present on its territory. In practice, the waiver implies immunity of the visiting forces from the criminal

The immunity is not necessarily absolute, and may depend upon the context within which the forces operate on foreign territory (see Chaps. 3, 4 and 5).

Finally, in military practice it is not sufficient that servicemen committing crimes are not subject to the criminal jurisdiction of the host State. In order to operate efficiently, sending States must be able to freely exert their authority and power, including the exercise of criminal jurisdiction, over its deployed armed forces. The third component of the ground rule is closely related to the waiver and can be considered the flipside of the same coin. It concerns the power of sending States to exercise their criminal jurisdiction over their forces abroad. As the next chapters show, many SOFAs emphasise this component in particular and hardly address the armed forces’ immunity.

Jurisdiction over own armed forces abroad is sometimes referred to as the law of the flag.6 This terminology follows from Napoleon Bonaparte’s statement that the French army is never abroad, because it always operates under the national flag: “Il faut regarder le drapeau comme le domicile. Partout où est le drapeau, là est la France”.7 The flag symbolises the State represented by its forces. In this approach the armed forces can be considered as an extension of the State with which the State and its forces are inextricably linked. Formerly, this was discussed as part of the concept of extraterritoriality.8 This concept was based on the notion that State officials working abroad, such as diplomats, were assumed to be still within the territory of the sending State. As they were supposed to be on home territory, they would logically not fall under the jurisdiction of the host State. In this way, they would enjoy the same rights and privileges as if they were in their home State.

2.5 Nineteenth Century Practice

In the beginning of the nineteenth century passage of armed forces through the territory of friendly States (as Marshall had in mind in The Exchange v. McFaddon) occurred frequently. Many treaties mainly focused on the political and operational aspects of the passage,9 while the exercise of jurisdiction over the armed forces was

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7 Fenet 1827, pp. 46–48, addition p. 32; Thibaudeau 1827, pp. 427–428.

8 The word extra-territoriality is also used; these concepts have, however, lost their significance; see Liivoja 2011, p. 105.

9 E.g., the military agreement relating to the free passage of Dutch forces to the fortress of Maastricht, concluded by Belgium and the Netherlands on the occasion of the independence of Belgium: Convention entre les Pays-Bas et la Belgique, conclue a Zonhoven, relativement aux communications militaires de la forteresse de Maastricht; z.p. 18 November 1833 (Recueil des Traitées et conventions conclus par le Royaume des Pay-Bas, E.G. Lagemans, The Hague 1859, No 136).
rarely part of the agreements. Sometimes an agreement would mention the disciplinary powers of the commander to maintain the order and discipline of his armed forces during the free passage: “ils [the commanders] veilleront en général au maintien d’une discipline rigoureuse et du bon ordre”. Because of these often detailed agreements the burden to the host States of the passage of the foreign forces was considerably minimised. So, although they would lose jurisdiction over the foreign forces due to the application of the ground rule, the situation could not be perceived as seriously affecting host State sovereignty.

The consensual presence of significant numbers of foreign forces on host State territory was not a frequent event. For instance, Moore only mentions a handful of situations in which foreign forces had been allowed to enter or to stay on the territory of the US during a period of more than a 100 years. Moreover, the armed forces would mainly consist of small units that would stay for a short period of time at previously determined locations, which also applied to visiting warships. The temporary presence of the crews would generally be restricted to the ports. As a result, the application of the ground rule to these situations was clearly restricted in time and place and to a limited number of people and as such it would not seriously affect the host State’s legal order.

A completely different matter was territorial rights. States concluded treaties for the military use of areas and facilities in other States from the end of the nineteenth century onwards. An example is the establishment of logistic bases to supply warships, such as the 1903 Agreement between the US and Cuba relating to Guantanamo Bay. In contrast to the agreements mentioned above, these particular treaties contain provisions that grant rights to the visiting State over certain territories that are almost comparable to sovereign rights. For instance, Article III of the agreement between Cuba and the US states that the US “…shall exercise complete jurisdiction and control over and within said areas…”. As such

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10 E.g., one of the exceptions is Article VI Agreement Providing for the Reciprocal Crossing of the International Boundary Line by the Troops of their Respective Governments, in Pursuit of Savage Hostile Indians, under the Conditions hereafter Stated; Washington, 29 July 1882 (9 Bevans 847 1968).

11 Article VI Convention between Austria and Saxony respecting the passage of troops; Vienna, 8 April 1813 (The Consolidated Treaty Series, edited and annotated by Clive Parry, Vol. 62, 1812–1818, pp. 213 et seq.).

12 In the nineteenth century conquest and colonisation were the primary reasons for stationing forces abroad; see Harkavy 2007, pp. 72 and 73.

13 Moore’s description covers the period 1790–1906; Moore 1906, Sect. 213.

14 Agreement between the United States and Cuba for the lease of lands for coaling and naval stations; 23 February 1903 (avalon.law.yale.edu/20th_century/dip_cuba002.asp). The agreement is further developed: Lease to the United States by the Government of Cuba of certain areas of land and water for naval or coaling stations in Guantanamo and Bahia Honda; Havana, 2 July 1903. (avalon.law.yale.edu/20th_century/dip_cuba003.asp). In 1912 Cuba and the US agreed that the use of Bahia Honda would end in exchange for the extension of the area around Guantanamo Bay. This Agreement was never ratified, but overall, it was implemented. Strauss 2009, pp. 53–59.
provisions made explicit arrangements on criminal jurisdiction over foreign military personnel redundant, the ground rule does not apply here.

This approach can be regarded as indicative of the subordinate position of the host State. In the literature this form of foreign presence was sometimes referred to as occupation, which reflected the unequal relationship between the host State and the sending State. This approach became obsolete after World War II and, over time, most of the arrangements establishing territorial rights were amended or came to an end. Nevertheless, there are still military forces based in areas where sending States enjoy territorial rights.

2.6 The Scope of Criminal Jurisdiction

Nineteenth century practice seems to have been that the exercise of criminal jurisdiction over foreign armed forces was in the hands of the sending States as a matter of course. Furthermore, the exercise of that jurisdiction appears to be absolute in nature in the sense that the sending States’ forces would be in all circumstances exempted from the criminal jurisdiction of the host States’ courts. A sequence of agreements between Mexico and the US that mutually granted both States the right to pursue rebellious Indians on each other’s territory illustrates this point. The agreements mention that crimes committed by the pursuing forces would be punished by the sending State.

The nineteenth century’s literature and case law of courts other than the US Supreme Court give a more balanced view. Various court cases make clear that host States did not fully waive their criminal jurisdiction over sailors while ashore in foreign ports. An example is the Affaire Der-case of 1868. Machel Der, sailor on a British warship, got involved in a scuffle in Saigon, at that time part of the French colony Indo-China, in which he attacked a local police officer. The French Cour de Cassation decided that, as the crime had not taken place on board a warship but ashore, the principle of territoriality would prevail and the host State could exercise its jurisdiction. This view is reflected in Article 18 of the Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers of 1898 of the ‘Institut de Droit International’:

15 This inequity is regularly associated with imperialism and colonialism, emphasizing the unequal position of the relevant states; see Stambuk 1963, p. 155.
16 E.g., the American use of Guantanamo Bay in Cuba and the British use of the Sovereign Base Areas in Cyprus; Article 1 Treaty Concerning the Establishment of the Republic of Cyprus; Nicosia, 16 August 1960 (Vol. 382 UNTS 1960, No. 5476).
18 Barton 1950, p. 80.
19 Schneider 1964, p. 80.
Nineteenth-century authors, although using the considerations in *The Exchange v. McFaddan* as a starting point, did not consider the ground rule to be absolute in character either. For instance, Lawrence indicates that armed forces “…are exempt in a greater or less degree from local jurisdiction”, without further clarifying this statement, by the way. Hall restricted the immunity only to those servicemen that were under the direct command of the commander of the unit:

…it is believed that the commanders, not only of forces in transit, through a friendly country with which no convention exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offences committed by persons under their command.

Moore added that this case concerned organised armed forces that were exercising their right of free passage and not “…individuals merely possessing a military character”. What Moore, in my view, wanted to make clear was that an individual soldier may formally be under military command, but the commander may in reality not be able to exercise his power over the soldier in case the latter is located in another State. Practically the commander may not be able to prosecute and punish him, in which case only the host State can exercise its jurisdiction over the soldier.

Oppenheim thought that the possibilities for sending States to assert jurisdiction were even more restricted and emphasised the position of the armed forces as organs of the sending States when in foreign territory. In his opinion, the sending States could only exercise jurisdiction in case a crime had been committed at the location where the forces were based. Examples he used show that he interpreted location narrowly. He described crimes committed in the garrison of a fort and referring in particular to places where the commander had direct control over his forces. According to Oppenheim, immunity applied outside the military camp only if the soldier was on duty.

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20 *Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers*; The Hague, 23 August 1898. In Article 20 of the 1928 Resolution of the ‘Institut de Droit International’, this aspect reappears.

21 Lawrence 1885, p. 47. See Sari 2008, p. 115.

22 Hall 1895, p. 206.


24 E.g., Hyde 1922, pp. 432 and 434.


26 The same approach can be found in the draft regulation adopted in Latin America in 1912. Article 96 of this predecessor of the *Bustamante code* (see next chapter) regulated immunity for “crimes committed within the precincts of the camp”; mentioned in: Barton 1954, p. 344.
The previous sections show that case law and the literature give a more balanced view of the scope of the ground rule indicating that the rule applies to military personnel who are stationed on the territory of the host State as an organised military unit. The rule applies to members of the visiting armed forces on duty or while at a military camp. When a member of the forces is not on duty and outside the camp, for example in case of leave, and he commits a crime, the host State can exercise its jurisdiction.

2.7 Conclusion

This chapter has analysed the development of ideas on criminal jurisdiction over armed forces abroad during the nineteenth century. The starting point was The Exchange v. McFaddon-case of 1812, which is doubtlessly the most cited and discussed court decision on jurisdiction over armed forces stationed abroad. This decision has helped to define a general ground rule on the exercise of jurisdiction: A host State refrains from exercising criminal jurisdiction over armed forces of a sending State, in case it has given consent to their entry and presence on its territory, thus allowing the sending State to exercise criminal jurisdiction over its forces abroad.

The consent of the host State is a pre-condition for the ground rule to apply. Armed forces of the sending State enjoy immunity from the host State’s criminal jurisdiction allowing the sending State to exercise its jurisdiction instead. In the nineteenth century the nature and scope of the extraterritorial deployment of armed forces with the consent of the host State was still rather limited in time and place. This meant that the application of the ground rule did not seriously affect the national legal order of the host State.

In my opinion it is an established rule that the consent of the host State for the entry and presence of foreign armed forces entails the waiver of its jurisdiction. State practice, case law and the literature all confirm this rule. However, the waiver of the host State does not always imply full immunity of the forces. The only situation in which host States fully refrain from exercising their jurisdiction is when the sending State is granted territorial rights over an area in another State. This implies that the scope of the ground rule must be further refined. The ground rule does not seem to apply when the link between the visiting military force and its actions as an organ of the Sending State becomes less strong. The literature suggests that the scope of the ground rule is delineated by armed forces abroad as an official organ of the sending State. Host States only waive their jurisdiction over members of visiting armed forces belonging to a military unit and under the direct command of their commander. This is the case when, for example, the forces are located at a military camp or are on duty outside that camp.

The next chapters analyse the application of the ground rule to visiting armed forces in the following situations: when allied forces are stationed on co-belligerent territory during an armed conflict, when forces participate in crisis management operations and when they are abroad partaking in international military cooperation activities.
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