[HIGH COURT OF AUSTRALIA.]

CHOW HUNG CHING AND ANOTHER . APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF PAPUA-NEW GUINEA.

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MELBOURNE, *Oct.* 7, 8, 11-13.

SYDNEY, *Dec.* 6.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

High Court—Jurisdiction—Appeal from Supreme Court of Territory of Papua-New Guinea—Appeal as of right—Papua-New Guinea Provisional Administration Act 1945-1946 (*No.* 20 *of* 1945—*No.* 77 *of* 1946), *s.* 16—*New Guinea Act* 1920 (*No.* 25 *of* 1920), *s.* 14—*Judiciary Ordinance* 1921-1938 (*No.* 3 *of* 1921—*No.* 2 *of* 1938) (*N.G.*), *s.* 24.

Public International Law—Immunity from local criminal jurisdiction of foreign armed forces present, with consent of Commonwealth, within its territory—Members of labour corps, subject to military discipline, but not part of armed forces.

In 1948 there were present on Manus Island (in the mandated Territory of New Guinea) some 300 Chinese nationals, sent there to collect surplus war supplies sold to the Republic of China by the United States of America. The body included Army personnel and labourers. There was evidence that they were subject to military discipline, exercised by officers of the Chinese Army, and that they were subject to Chinese military law. They did not carry arms. The Army personnel acted as guards and the labourers as workmen. Two labourers, members of this body, were charged in the Supreme Court of the Territory of Papua-New Guinea with having assaulted a native of the island and were convicted. They sought to appeal to the High Court.

Held:—

(1) Under s. 16 (9) of the *Papua-New Guinea Provisional Administration Act* 1945-1946, there being no ordinance providing otherwise, the appeal lay as of right.

(2) It did not appear that the accused were members of a military force of the Republic of China and, therefore, they had no such immunity from the jurisdiction of the Supreme Court of the Territory as might have been possessed by a member of such a force.

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The nature and extent—according to the rules of international law as recognized by the common law—of the immunity from local jurisdiction of members of military forces of a friendly Power entering the Commonwealth by agreement, discussed.

The Schooner Exchange v. *M'Faddon*, (1812) 11 U.S. 116, at p. 146 [3 Law. Ed. 287, at p. 297], *Chung Chi Cheung* v. *The King*, (1939) A.C. 160, and *Wright* v. *Cantrell*, (1943) 44 S.R. (N.S.W.) 45, discussed.

Decision of the Supreme Court of the Territory of Papua-New Guinea (*Phillips* J.) affirmed.

APPLICATIONS for leave to appeal and APPEALS from the Supreme Court of the Territory of Papua-New Guinea.

Chow Hung Ching and Si Pao Kung (hereinafter called the appellants) were members of a body of Chinese nationals, recruited in China and subject to Chinese military law, who were sent to Manus Island, in the Territory of New Guinea, to collect surplus war supplies which had been sold by the United States of America to the Republic of China by an agreement made in 1946. The constitution of this body is described in greater detail in the judgments hereunder.

The appellants were convicted in the Supreme Court of the Territory of Papua-New Guinea on charges that, on or about 25th January 1948, at Manus, (1) they unlawfully assaulted one Pondranei and thereby did him bodily harm, and (2) they unlawfully detained Pondranei in a hut against his will. Each of them was sentenced to three-months' imprisonment on the first charge and six-months' imprisonment on the second charge, the sentences to be concurrent.

They applied for leave to appeal, and, alternatively, sought to appeal as of right, to the High Court.

T. W. Smith K.C. (with him *C. A. Sweeney*), for the appellants. The offences charged against the appellants are offences under ss. 339 and 355 of *The Criminal Code* (Q.), which was adopted, pursuant to the *New Guinea Act* 1920, s. 14, by the *Laws Repeal and Adopting Ordinance* 1921 (N.G.), s. 13. The *Judiciary Ordinance* 1921-1938 (N.G.), s. 24, provided that appeals from the Supreme Court of New Guinea to the High Court should be by leave of the High Court. In 1945, however, the Territories of New Guinea and Papua were amalgamated under the *Papua-New Guinea Provisional Administration Act* 1945. By s. 16 of that Act a new court, the Supreme Court of the Territory of Papua-New Guinea, was established, and s. 16 (9) provides for appeals to the High Court in terms

the effect of which, it is submitted, is that the appeal is of right. [He referred to *Mainka* v. *Custodian of Expropriated Property* (1); *Porter* v. *The King* (2); *Jolley* v. *Mainka* (3).]

THE COURT intimated that counsel for the appellants should proceed as if the appeal lay as of right and that counsel for the Crown would be heard thereafter.

T. W. Smith K.C. The appellants challenge the jurisdiction of the Supreme Court of the Territory. The appellants were members of a military force of a friendly foreign Power, which force was in the Territory with the consent of the Commonwealth Government, and, by reason thereof, the appellants were not subject to the jurisdiction of the Supreme Court. The law applicable to such a case is correctly stated, it is submitted, in the following propositions:— (1) It may be conceded that the Commonwealth has full power, if it chooses, to subject all persons within the Territory to the ordinary criminal law in force there. As a matter of power it is in the same position there as any sovereign State in respect of the territory of that State. (2) But it is a rule of our law that, when forces of a friendly State are within the area of our territorial jurisdiction with the consent of the Commonwealth, they are entitled to certain immunities from the jurisdiction of our courts. (3) The basis of the immunity is that, in the absence of an express stipulation that they are to be subject to the ordinary jurisdiction of our courts, the consent to the presence of such forces implies a waiver of jurisdiction over them. The extent of the waiver depends on the nature of the permission. (4) In the absence of an express stipulation, the foreign sovereign cannot be supposed to have intended to subject his forces to the ordinary jurisdiction of our courts, and the Commonwealth is not to be supposed to have intended to subject them to it. (5) As between nations it would be a breach of faith to exercise jurisdiction so waived. It would derogate from the grant of permission. (6) The investing of jurisdiction in the courts by statutes expressed in general terms is not to be construed as authorizing the exercise of jurisdiction in cases where the Commonwealth has in this manner waived jurisdiction (*The Schooner Exchange* v. *M'Faddon* (4); *Maxwell* on *Statutes*, 8th ed. (1937), p. 130; *Polites* v. *The Commonwealth* (5); *Wildman's International Law* (1849), vol. 1, p. 46; *Hyde* on *International Law*,

(1) (1924) 34 C.L.R. 297.
(2) (1926) 37 C.L.R. 432.
(3) (1933) 49 C.L.R. 242.
(4) (1812) 11 U.S., at p. 146 [3 Law. Ed., at p. 297].
(5) (1945) 70 C.L.R. 60, at pp. 68, 69, 77, 79, 81.

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2nd ed. (1947), vol. 2, p. 826). (7) Because the extent of the immunity depends upon the nature of the permission, visiting ships of war and visiting land forces have quite different immunities. (8) Every State is presumed to consent to the ships of war of all friendly States entering its ports unless it has given warning that entry will not be allowed. This general permission does not extend to authorizing the landing of the crew, and consequently the immunity of the crew applies only while they are on the ship or in its boats or tenders. If they go ashore, they submit themselves to the jurisdiction, and they have no immunity unless they have been granted permission to go ashore; and in that event the extent of their immunity depends on this specific permission; that is to say, permission given by or on behalf of the State in whose territory they are. (9) There is some authority for saying that the general permission to enter ports includes a permission to go ashore to transact necessary ship's business. If this is so, the immunity will, no doubt, cover members of the crew while on shore for this purpose; but those on shore for other purposes will have no immunity unless they have a specific permission to land; that is, the permission of the territorial sovereign. (10) In the case of visiting land forces there is no presumed general permission to enter the territory of another State. If they are there with consent, they are entitled to immunities, but the extent thereof depends upon the permission expressly or impliedly granted in the particular case. Hence, there is no justification for attempting to deduce from the rules applicable to ships' crews the extent of the immunities to which visiting land forces are entitled. (11) If the permission is limited as to locality, the immunity will be similarly limited. For example, if the permission is to pass through the territory by a defined route, members of the foreign force who depart from that route will be outside the permission and the immunity. (12) On the other hand, the immunity must be as extensive in time and area as the permission, for otherwise the grant of permission would be defeated. Thus, if permission is given to maintain a force on a particular island for the purpose of collecting and guarding war material which is scattered over different parts of the island, the immunity cannot be limited to those personnel who are from time to time on duty or to the area of the camp. (13) It may be that the immunity of visiting land forces does not extend to the exercise of civil jurisdiction in which imprisonment cannot be ordered. But the immunity must extend to all jurisdiction to order imprisonment, in respect of acts done within the scope of the permission, because the assertion of such a jurisdiction is an assertion of a right to defeat

the permission. (14) Whether the jurisdiction is excluded cannot depend upon whether the exercise of it in the particular case would defeat the permission in relation to the force as a whole. It must depend on whether the jurisdiction is of such a kind that to assert its existence would be to assert the right to defeat the permission. If the effect of the particular exercise were the test, then the court would have to enter upon an inquiry as to the organization of the visiting forces, the operations intended to be carried out by them, the part to be played therein by the accused persons and the practicability of carrying on without them. It cannot be supposed that visiting forces are intended to be exposed to this sort of inquiry, which might well defeat the purpose of the permission. The evidence as to the position of the force of which the appellants were members is a little complicated ; but it is submitted that they were in the same position as Army Service Corps personnel. They were not expected to fight, but they were members of the military forces : They were not civilians outside the Army. Accordingly, they were within the principle of immunity already submitted. It is not to the point that they were not on duty, but engaged on an enterprise of their own, at the relevant time. [He referred to *Chung Chi Cheung* v. *The King* (1) ; *Foster* v. *Globe Venture Syndicate Ltd.* (2) ; *Republic of Spain* v. *Arantzazu Mendi* (3) ; *Engelke* v. *Musmann* (4) ; *Wildman's International Law* (1849), vol. 1, p. 66 ; *Phillimore, Commentaries upon International Law* (1854), vol. 1, pp. 364, 366, 369 ; *Oppenheim, Law of Nations*, 2nd ed., p. 271 ; *Walker's Manual of Public Law* (1895), p. 83 ; *Halleck's International Law*, 3rd ed., vol. 1, pp. 215, 217, 222 ; *Lawrence, Principles of International Law*, 3rd ed. (1907), pp. 222, 229. *Hall* on *International Law*, 8th ed. (1924), pp. 241, 249, 250 ; *Wheaton, International Law*, 6th ed. (1929), vol. 1, pp. 231, 234 ; *Hyde* on *International Law* (1947), vol. 1, pp. 819, 820 ; vol. 2, pp. 826, 830 ; *Pitt Cobbett, International Law*, 5th ed. (1931), vol. 1, pp. 270, 273, 274 ; *Oppenheim, International Law*, 6th ed. (revised), (1948), vol. 1, pp. 759, 760, 766 ; *Wright* v. *Cantrell* (5) ; *Re Reference as to whether Members of the Military and Naval Forces of the U.S.A. are exempt from Criminal Proceedings in Canadian Criminal Courts* (6).] If the convictions are upheld, it is desired to appeal against the sentences, on the ground that they are excessive. It is submitted that the trial judge took a much more serious view of the offences than is warranted by the evidence.

(1) (1939) A.C. 160.
(2) (1900) 1 Ch. 811, at p. 813.
(3) (1939) A.C. 256 ; particularly at pp. 263, 264.
(4) (1928) A.C. 433, at pp. 455, 457.
(5) (1943) 44 S.R. (N.S.W.), at p. 48.
(6) (1943) S.C.R. (Can.) 483 ; (1943) 4 D.L.R. 11.

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M. McInerney, for the Crown. On the question whether the appellants require leave or have an appeal as of right, these propositions are submitted:—(1) The "sovereignty" or power of the Commonwealth in relation to the Territory of New Guinea has always rested on a basis other than that of the sovereignty or power of the Commonwealth in relation to the Territory of Papua. (2) The difference between the two territories is that Papua has at all times since the foundation of the Commonwealth been part of his Majesty's Dominions and natives of Papua are British subjects. (3) New Guinea, on the other hand, has been held on a mandate, and natives of New Guinea are not British subjects: see *R.* v. *Ketter* (1); *Ffrost* v. *Stevenson* (2). (4) Consistently with this, prior to the outbreak of war with Japan, the two territories were administered separately and separate courts with separate jurisdiction existed in the two territories. (5) The *National Security* (*External Territories*) *Regulations* suspended from office the judges of the Supreme Courts of New Guinea and Papua, respectively (reg. 6), but did not abolish these courts. (6) Instead, by reg. 22 of those regulations, the jurisdiction, powers and functions (*in and in relation to civil matters*) of each of the two courts were transferred to the Supreme Court of the Capital Territory. (Possibly reg. 22 (4) transferred the criminal jurisdiction also: see the definition of "cause" in the *Judiciary Ordinance* 1921-1938 (N.G.)). (7) The *Papua-New Guinea Provisional Administration Act* 1945 was passed as a temporary Act to provide for the gradual transition to peace-time conditions from the war-time conditions in the two territories: see ss. 3 and 17. (8) This Act did not abolish the former Supreme Court of New Guinea: it merely established a new court to act during the transitional period: see s. 16 (1) and (5). (9) This new court was given in relation to the Territory of New Guinea a jurisdiction commensurate with that of the Supreme Court of New Guinea (s. 16 (5) (*a*)). Further jurisdiction may be conferred in the future (s. 16 (5) (*b*)). (10) The general purpose of the 1945 Act is to create a new "engine" of justice. That "engine" is, however, to use the former "rails" during the period while the old "engine" is "in reserve." (11) Amplifying this, the new court cannot (subject, of course, to the requirements of private international law) exercise in New Guinea a jurisdiction which formerly appertained only to the Supreme Court of Papua. (12) There is thus a constant "reference back" to the ordinances of New Guinea enacted prior to 1942. (13) The

(1) (1940) 1 K.B. 787.

(2) (1937) 58 C.L.R. 528, at pp. 549-552, 566, 581, 582, 585.

Judiciary Ordinance 1921-1938 (N.G.) is still in force in New Guinea. It is not one of the ordinances repealed by the *Ordinances Reprint and Revision Ordinance* 1947 (No. 16 of 1947): see s. 14 and 5th schedule of that ordinance. (14) A "reference back" occurs in s. 16 (9). The words "as are prescribed" mean "as have already been prescribed or may in the future be prescribed." In other words, s. 16 (9) confers the jurisdiction on the High Court—the procedure according to which that jurisdiction shall be exercised is not laid down by that section: according to the rival interpretation here contended for, one has to look to either (*a*) present ordinances as from time to time modified by future ordinances; or (*b*) future ordinances only. (15) The first view derives support from the analogy in s. 16 (5) (*a*) and (*b*), and the history and object of the legislation support that interpretation. (16) It may be of some significance—as against the second view—that three years have elapsed since the 1945 Act without any ordinance being passed. (17) On the first view, an appeal is conferred and the procedure is readily ascertainable: on the second view, the parties are left in doubt as to what the procedure is. (18) Even s. 16 (10) does not tend against this view, one interpretation of that section is that it enables an ordinance to be passed whereby a right to have an appeal by case stated is at the discretion of the High Court. (19) The "reference back" interpretation is made effective by s. 6 (2) of the *Ordinances Interpretation Ordinance* 1945 (No. 4 of 1945). Accordingly, the present question still depends on the *Judiciary Ordinance* 1921-1938 (N.G.), s. 24, and the leave of this Court is required. On the substance of the matter, the following propositions are submitted:—(1) The Supreme Court of Papua-New Guinea sits as a court administering municipal law. (2) In English law "international law" has no validity save in so far as its principles are accepted and adopted by our own domestic law (*Chung Chi Cheung* v. *The King* (1)). (3) While English municipal law will act on the view that a rule which has received the common assent of civilized nations must therefore have received the assent of our country, and will therefore adopt that rule as part of the municipal law of England, it must be shown that the particular rule has been recognized and acted on by our own country or that it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilized State would repudiate it (*West Rand Central Gold Mining Co.* v. *The King* (2)). (4) The immunity here in question does not fulfil either of the conditions laid down in the case last mentioned. (5) It is only in

(1) (1939) A.C., at pp. 167, 168. (2) (1905) 2 K.B. 391, at p. 407.

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relation to a rule of international law having the cogency described in proposition (3) above that the principle of interpretation referred to in Mr. *Smith's* sixth proposition becomes applicable. (6) Mr. *Smith's* first proposition requires these additions: (*a*) a member of the armed forces of our own country is not by virtue of his membership of those forces exempted from the jurisdiction of the ordinary courts of the land—the " civil courts " as distinct from the " courts martial " ; (*b*) a member of the armed forces of another country is not by virtue of his membership of those forces exempted from the jurisdiction of our civil courts. (7) As a matter of international law, in the case of visiting forces, a sovereign State (the host nation) may (*a*) exercise its full jurisdiction ; (*b*) agree not to exercise its jurisdiction, either (i) at all, or (ii) in certain circumstances ; or (*c*) while maintaining the right to exercise jurisdiction, as a matter of practice—but not of agreement—voluntarily refrain from exercising jurisdiction. (8) The granting of consent by a host nation to the presence of visiting forces involves two considerations: (*a*) friendship towards the visiting nation requires that the effectiveness of the public instruments of the visiting nation shall remain unimpaired ; (*b*) the host nation's duty to its own subjects requires that public order and good government within the host State remain unimpaired. (9) Any agreements by the host nation to waive jurisdiction over the armed forces or public vessels of another nation must balance these two considerations. The former consideration is stressed in the judgment of *Marshall* C.J. in *The Schooner Exchange* v. *M'Faddon* (1). See also *Wright* v. *Cantrell* (2), per *Jordan* C.J. The second consideration is that adverted to in *The Santissima Trinidad* (3), per *Story* J., and is the basis of the doctrine laid down in the minority opinion in *Tucker* v. *Alexandroff* (4). (10) For this reason Mr. *Smith's* fourth proposition states the position too widely in favour of the visiting nation : it ignores the interests of the host nation, and basically it is for the host nation to say whether or not a " visiting force " shall visit and, if so, on what conditions. (11) In the light of these considerations, the difference between the permission accorded to visiting ships of war and visiting land forces is resolved. The final sentence of Mr. *Smith's* tenth proposition is erroneous in law. (12) In the case of visiting ships, the first consideration mentioned in proposition 8 (*a*) above tends to predominate, resulting in an immunity universally

(1) (1812) 11 U.S., at p. 146 [3 Law. Ed., at p. 297].
(2) (1943) 44 S.R. (N.S.W.), at p. 49.
(3) (1822) 20 U.S. 283, at pp. 352-354 [5 Law. Ed. 454, at pp. 471, 472].
(4) (1901) 183 U.S. 424, at pp. 457, 459 [46 Law. Ed. 264, at pp. 278, 279].

recognized—and therefore adopted by English law—towards the ship as a complete instrument made up of ship and crew: see *Hall, International Law*, 8th ed. (1924), p. 249. (13) So also the exercise by the visiting nation of jurisdiction over members of the crew in relation to (*a*) acts done by a member of the crew to another in the ship; (*b*) matters affecting solely internal discipline or administration of the ship, is consistent with the first consideration and in no way inconsistent with the interests of the host nation. (14) In the case of members of a crew going ashore, (*a*) if they go on duty, the first consideration will, no doubt, lead the host nation to waive or refrain from exercising jurisdiction over them in respect of acts necessarily done in the performance of that duty; (*b*) if they go ashore on recreation, the second consideration will become the predominant one (*Hall, International Law*, 8th ed. (1924), p. 250, note; *Wheaton, International Law*, 6th ed. (1929), p. 248, note *b*; *Oppenheim, International Law*, 6th ed. (revised) (1948), vol. 1, pp. 760, 766). (15) In the case of visiting land forces, their presence must be either by permission (expressed or implied) of the host nation or as an act of war by the "visiting" nation. (16) If such forces are present by agreement, the host nation must necessarily have agreed to waive jurisdiction in respect of matters expressly permitted—e.g., carriage of arms, &c. (*Wright* v. *Cantrell* (1), per *Jordan* C.J.), or matters necessarily involved in the performance of duties of the visiting forces. (17) Furthermore, the host nation—for the reasons adverted to in proposition (13)—would consent to the exercise by the foreign nation of jurisdiction over the members of the visiting force in relation to (*a*) acts done by one member of the force towards another within their own quarters; (*b*) matters of solely internal discipline or administration of that force. To this extent the host nation would waive or voluntarily refrain from exercising its own jurisdiction (if any) in respect of (*b*). (18) The views expressed in the last two propositions are the traditional views of English law and are expressed in the *Allied Forces Act* 1940 (3 & 4 Geo. VI. c. 51). (19) Except to that extent, English law has not accepted the view that a foreign force has any immunity from the jurisdiction of the civil courts. (20) The question of what is involved in the performance of duty by the visiting forces must vary according to the circumstances—whether the force is there in time of war, on a combat basis, or is there in peace, merely "showing the flag" or fulfilling a semi-commercial duty (as in the present case). It must vary according to whether the troops are confined in close quarters or are billeted at large. (21) In

(1) (1943) 44 S.R. (N.S.W.), at p. 52.

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general, therefore, it is true to say that the *United States of America (Visiting Forces) Act* 1942 not only represented a considerable departure from the traditional English view, but also went beyond "the accepted rule of international law in the matter" (*Oppenheim*, 6th ed. (revised) (1948), vol. 1, p. 760). (22) The closest parallel to the present case is the case of the Leased Bases (see 31 *American Journal of International Law*, p. 554). The views expressed in Mr. *Smith's* twelfth proposition do not accord with the actualities of the situation in Manus as known to the trial judge. It was for the appellants to establish the plea of immunity, and on the evidence before the Supreme Court they failed to do so. That evidence, if it did not positively establish that they were merely labourers (although subject to some military discipline), certainly did not make it clear that they were members of a military force. Moreover, whatever the position of their "force," they were not engaged on any of its duties (alternatively, it was not established that they were so engaged) at the time of the offences charged. On the question of the severity of the sentences, if leave to appeal is required, there is nothing in the circumstances of the case to warrant the granting of leave to appeal against the sentences. In any event, the circumstances themselves are sufficient to show that the sentences were not unduly severe.

T. W. Smith K.C., in reply.

Cur. adv. vult.

Dec. 6.

The following written judgments were delivered :—

LATHAM C.J. The appellants are two Chinese who were convicted in the Supreme Court of the Territory of Papua-New Guinea, upon charges of assaulting on 25th January 1948 a native named Pondranei, and doing bodily harm to him and unlawfully detaining him in a hut against his will. The offences were alleged to have been committed at Manus in the Admiralty Islands in the Territory of New Guinea. The appeal is against the convictions on the ground that the Supreme Court of Papua-New Guinea did not have jurisdiction to try the charges, inasmuch as the offences, if committed, were committed by members of an armed force of a friendly foreign power admitted with the consent of the Government of the Commonwealth into territory under the government of the Commonwealth. Alternatively, the appellants appealed against the sentences of three months' imprisonment upon the charge of assault and of six months' imprisonment upon the charge of detention, as being too severe.

Under the *New Guinea Act* 1920, s. 14, the *Laws Repeal and Adopting Ordinance* 1921 was enacted, and s. 13 of that ordinance made applicable to the Territory of New Guinea *The Criminal Code Act* 1899 *of* Queensland. Subsequent legislation has not made any relevant alteration. The offences charged were offences against ss. 339 and 355 of *The Criminal Code*.

These appeals are brought before this Court as appeals as of right, and the question was raised whether it was not necessary to obtain the leave of this Court before an appeal could be heard and determined.

Under the *Judiciary Ordinance* 1921-1938 (N.G.), s. 24, it was provided that appeals from the Supreme Court of New Guinea to the High Court should be by leave of the High Court. The jurisdiction of the High Court to entertain such appeals was established in *Mainka* v. *Custodian of Expropriated Property* (1); *Porter* v. *The King*; *Ex parte Yee* (2); and see *Jolley* v. *Mainka* (3).

When the Japanese forces were in occupation of New Guinea the judges of the courts of New Guinea and of Papua were suspended from their functions and, as the islands were reconquered, a form of emergency government was established: see *National Security* (*External Territories*) *Regulations*, regs. 6 and 21.

By the *Papua-New Guinea Provisional Administration Act* 1945, s. 16, a single new court was established for both Papua and New Guinea—the Supreme Court of the Territory of Papua-New Guinea. It is from this court that this appeal is brought. Section 16 (9) of the last-mentioned Act is in the following terms:—"The High Court shall have jurisdiction, with such exceptions and subject to such conditions as are prescribed by Ordinance, to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Court of the Territory of Papua-New Guinea, and the decision of the High Court on any such appeal shall be final and conclusive." These provisions in terms give a right to appeal to the High Court without imposing any condition as to obtaining leave. But it will be observed that the jurisdiction of the High Court to entertain appeals is given "with such exceptions and subject to such conditions as are prescribed by Ordinance." No ordinance has been made since the Act was passed, but it was suggested that s. 16 (8) continued the operation of the provision in the *Judiciary Ordinance* to which reference has already been made. Section 16 (8) provides that:—"Any reference in any law in force in any part of the Territory at the date of the commence-

(1) (1924) 34 C.L.R. 297.
(2) (1926) 37 C.L.R. 432.
(3) (1933) 49 C.L.R. 242.

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ment of this Act, to the Supreme Court of the Territory of Papua or the Supreme Court of the Territory of New Guinea, or to a Judge, the Registrar or any other officer of either of those Courts shall, in relation to anything done or to be done after the commencement of this Act, be read as a reference to the Supreme Court of the Territory of Papua-New Guinea, Judge, Registrar or other officer, as the case requires, exercising the jurisdiction, power or authority conferred by or under this Act". This provision, however, refers to the exercise of jurisdiction by the new Supreme Court or its judges, registrar or other officer, and not to the High Court. Accordingly, s. 16 (8) does not in my opinion continue the operation in relation to the High Court of the provision of the *Judiciary Ordinance* requiring leave to be obtained before this Court can entertain an appeal from the present court. Further, s. 16 (10) repeats a provision as to presenting an appeal in writing without oral argument which is contained in the *Judiciary Ordinance*, s. 24 (4). Such repetition would be unnecessary if the *Judiciary Ordinance* still applied. Finally, the word " ordinance " is defined in s. 3 of the *Papua-New Guinea Provisional Administration Act* to mean " ordinance made under this Act". This interpretation must be applied to the word " ordinance " where it occurs in s. 16 (9) of the Act. No exceptions or conditions have been prescribed under any ordinance made under that Act. Accordingly the High Court has jurisdiction to hear and determine appeals from any judgment &c. of the Supreme Court of the Territory of Papua-New Guinea. Thus the appeals are properly brought before this Court as appeals as of right.

The evidence which was accepted by his Honour Mr. Justice *Phillips* showed that four Chinese, believing that cigarettes belonging to them had been stolen by some native, seized the native, Pondranei, tied his hands behind his back with wire, and conducted or drove him along a road for some distance. They went into a hut and there they suspended him by electric wire cable attached to his hands behind his back, and tied to the roof in such a way that his toes just touched the ground. They left him there and he fainted. He was released at some time later. The two accused were identified as being among the four Chinese who dealt with Pondranei in the manner stated and when, after conviction, they made statements, they admitted their complicity in the affair.

It is contended for the accused that there is a principle of international law which gives immunity from all local jurisdiction, or at least from local criminal jurisdiction, to members of any armed

force which is present in a State with the consent of the Government of the State.

His Honour Mr. Justice *Phillips* held that the principle of immunity did not apply because the accused were outside of their camp and engaged upon their own affairs when the assault and detention of Pondranei took place and because the arrest and imprisonment of the two accused would not interfere with the performance of the duties of the Chinese force of which they were members.

When an armed foreign force is in a country in pursuance of an actual agreement between Governments, the terms of the agreement will govern all questions of jurisdiction which are the subject matter of agreement. Reference is made to such agreements in *Hyde, International Law, chiefly as interpreted and applied by the United States*, 2nd ed. (1947), vol. 1, pp. 819, 820.

But in the absence of express agreement the permitted presence of an armed force necessarily implies some degree of exemption from local jurisdiction, because it would be impracticable to have the armed force of a friendly power subject in respect of such matters as discipline and internal administration to the control of the local authorities. I agree that as the representatives of the Commonwealth Government in Manus were aware of the presence of the Chinese, it must be assumed that they were so present with the consent of the Government.

The principle applying to such armed forces is stated in *Wheaton, International Law*, 6th ed. (1929), vol. 1, at p. 234, in the following terms :—" A third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, was 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." This is an application in the case of

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land forces of a rule which has been applied to visiting vessels of war and public vessels. There is a well established rule, internationally recognized and adopted into our municipal law, that the control of persons and things on such ships while in a foreign port is reserved to the authorities of the ship: see *Pitt Cobbett, Leading Cases in International Law*, 5th ed. (1931), vol. 1, pp. 260-274. The basis of the rule with respect to land forces is to be found, as far as judicial decisions are concerned, in the case of *The Schooner Exchange* v. *M'Faddon* (1); and see *Coleman* v. *Tennessee* (2)).

International law is not as such part of the law of Australia (*Chung Chi Cheung* v. *The King* (3), and see *Polites* v. *The Commonwealth* (4)), but a universally recognized principle of international law would be applied by our courts: *West Rand Central Gold Mining Co.* v. *The King* (5).

Where the rule with respect to armed forces applies as part of the municipal law it would give some degree of immunity from local jurisdiction. But there is a considerable conflict of opinion between authorities on international law as to the extent of the immunity given. Some writers limit it in respect of area, and to acts done while the members of the force are on duty and not engaged upon their own affairs, such as recreation or pleasure: see *Oppenheim, International Law*, 4th ed. (1928), par. 445; *Lawrence, Principles of International Law*, 6th ed. (1915), p. 246, and references to continental authorities in *American Journal of International Law*, vol. 36 (1942) 539, at p. 546—article by Colonel A. King on Jurisdiction over Friendly Foreign Armed Forces. The dictum of *Marshall* C.J. in *The Exchange Case* (6) would give exemption from all jurisdiction, both civil and criminal, but the reason of the rule does not justify so wide an exemption: *Wright* v. *Cantrell* (7).

The uncertainty of the extent of immunity in the case of visiting armed forces is illustrated by the varying language used by authorities upon international law: for example in *Hall, International Law*, 8th ed. (1924), p. 251, the learned author says:—"and it is believed that the commanders, not only of forces in transit through a friendly country with which no convention exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offences committed by persons under their command, though they may be willing as a matter of concession

(1) (1812) 11 U.S. 116, at pp. 139, 140 [3 Law. Ed. 287, at pp. 294, 295].
(2) (1878) 97 U.S. 509 [24 Law. Ed. 1118].
(3) (1939) A.C. 160.
(4) (1945) 70 C.L.R. 60.
(5) (1905) 2 K.B. 391, at pp. 406, 407.
(6) (1812) 11 U.S. 116 [3 Law. Ed. 287].
(7) (1943) 44 S.R. (N.S.W.) 45.

to hand over culprits to the civil power when they have confidence in the courts, and when their stay is likely to be long enough to allow of the case being watched." I call attention to the words "it is believed". See *Pitt Cobbett* to the same effect—*Leading Cases on International Law*, 5th ed. (1931), vol. 1, p. 274. *Woolsey*, *Introduction to the Study of International Law*, English edition reprinted from the fourth American edition, (1875), p. 67, quotes *Vattell* (iii. 8, s. 130)—"the grant of passage includes that of every particular thing connected with the passage of troops, and of things without which it would not be practicable—such as the liberty of carrying whatever may be necessary to an army; that of exercising military discipline on the officers and soldiers; and that of buying at a reasonable rate anything an army may want, unless a fear of scarcity renders an exception necessary, when the army must carry with them their provisions." The learned author continues—"If we are not deceived, crimes committed along the line of march, away from the body of the army, as pilfering and marauding, authorise arrest by the magistrates of the country, and a demand at least that the commanding officers shall bring such crimes to a speedy trial. When the transit of troops is allowed, it is apt to be specially guarded by treaties." Here again the words "If we are not deceived" show an absence of certainty in the statement of the rule. See also *Travers Twiss*, *The Law of Nations*, 2nd ed. (1884), Rights and Duties in Time of Peace, p. 271, where the following statement is made:—"if an Independent Power permit the armed forces of another Nation to pass through its territory, this permission implies a waiver on its part of all jurisdiction over the troops during their passage through its territory, and a licence to the commander to maintain that discipline, and to inflict those punishments, which the government of his troops may require." It will be observed that the extent of the licence does not correspond with the extent of the waiver. Such a rule would either make no provision, or at least would leave doubtful what authority could act, in the case of wrongful interference by a member of the armed forces with civilian inhabitants. There might be interference with civilian inhabitants which was wrongful according to local law, but which would not affect the discipline or government of the troops as troops. Accordingly, the licence to the commander to which reference is made would not authorize action by the commander in such a case, and yet it is said that there is a waiver of all jurisdiction by the civil power over the troops.

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In *Tucker* v. *Alexandroff* (1) the court had to consider a case arising from the dispatch to the United States of America of a number of Russian naval personnel intended to provide a crew for a ship then under construction. The question which arose was whether a deserter could be apprehended and held for the purpose of being returned to the commander of the ship, which had by that time been launched. In the reasons for judgment of the majority of the court reference was made to the case of foreign troops being permitted to enter or cross a territory and to the contention that such troops were still subject to the control of their officers and exempt from local jurisdiction. It was said (2) that *The Exchange Case* (3) was not authority for the proposition that if the " members of such military force, actually desert and scatter themselves through the country, their officers are, in the absence of treaty stipulation, authorized to call upon the local authorities for their reclamation." (In the present case the group of Chinese who attacked Pondranei had not deserted, but they were three miles away from their camp and at a native village. If local law did not apply to them it would appear to follow that the local police could not lawfully have arrested them even if they were found in the act of committing an assault.) The minority of the court, consisting of four justices, limited the rule of immunity by saying that it applied only " to an armed force, segregated from the general population of the country, and lawfully passing through or stopping in the country for some definite purpose connected with military operations " (4).

In Australia legislation passed during the recent war provided that the authorities of visiting forces should have jurisdiction over their members in respect of matters of discipline and internal administration, but nevertheless preserved the jurisdiction of local civil (as distinct from military) courts: see *National Security* (*Allied Forces*) *Regulations*, regs. 3 and 4. This latter provision (reg. 4) cannot in my opinion properly be construed as preserving such jurisdiction subject to an exemption of members of visiting forces from that jurisdiction in all criminal cases. So to construe reg. 4 would imply an exemption wider than that expressly granted by reg. 3. Regulation 6 contained a special provision that, under certain conditions, members of the United States Forces should " cease to be subject to the jurisdiction of the Criminal Courts in Australia "—a provision which assumes that such jurisdiction

(1) (1901) 183 U.S. 424 [46 Law. Ed. 264].
(2) (1901) 183 U.S. 424, at p. 433 [46 Law. Ed. 264, at p. 269].
(3) (1812) 11 U.S. 116 [3 Law. Ed. 287].
(4) (1901) 183 U.S. 424, at p. 459 [46 Law. Ed. 264, at p. 278].

would exist apart from this special law. In Great Britain the *Allied Forces Act* 1940, s. 1, similarly permitted the exercise of powers to secure discipline and internal administration of foreign forces, but s. 2 preserved the jurisdiction of civil courts. In 1942 the *United States of America (Visiting Forces) Act*, 5 & 6 Geo. VI., c. 31, gave exclusive criminal jurisdiction to United States authorities over members of their forces in the United Kingdom. The schedule to the Act shows that the Government of Great Britain did not recognize any general immunity from local jurisdiction in the case of members of visiting forces : see par. 3 of Note of 27th July 1942 set out in schedule. In Canada it has been held by the Supreme Court that there is no rule of international law in force as part of the law of Canada which deprives the Canadian courts of jurisdiction in respect of offences against the laws of Canada committed on land in Canada by the members of visiting armed forces—*Re Reference as to Exemption of U.S. Forces from Canadian Criminal Law* (1). In this case opinions were expressed that no such rule had been recognized in Great Britain. But a minority was of a contrary opinion.

The result is that it has not been satisfactorily demonstrated that a general exemption from the application of local criminal law is implied in the permitted presence of foreign armed forces within Australia, though there is an implied exemption from such provisions of our law as are inconsistent with the existence of the force as an armed organized force : e.g., as *Jordan* C.J. said in *Wright* v. *Cantrell* (2), if a foreign force is admitted to the country there must be an implication that any restrictions which would otherwise be applicable under immigration laws are waived, and that the members of the forces will not be subject to prosecution for carrying arms in breach of local law. So much may be implied from the mere fact that the force is present with consent. In a particular case the circumstances may warrant further implications varying with the circumstances, for example, taking part in a ceremonial procession is a very different thing from actual fighting. There is general agreement that in matters of discipline and internal administration the foreign force is exempt from the jurisdiction of local courts. There is no general agreement that the exemption extends any further, and the weight of authority in Australia, Great Britain and Canada is that no wider principle has been clearly established as part of the municipal law to be recognized and enforced by the courts. In my opinion it is not the law that members of visiting

(1) (1943) S.C.R. (Can.) 483 ; (1943) 4 D.L.R. 11.

(2) (1943) 44 S.R. (N.S.W.) 45.

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forces in a country with the consent of the sovereign are exempt from local jurisdiction in respect of offences committed against the inhabitants of the country, and more especially this is not the case if those offences have no relation to the military activities of the armed forces. Accordingly, in my opinion, the principle which is relied upon for the purpose of excluding the jurisdiction of the Supreme Court of Papua-New Guinea has not been shown to exist as part of the municipal law of the Territory. Upon this ground, therefore, the appeals should in my opinion be dismissed in so far as they depend upon an objection to jurisdiction.

There is a further ground upon which, in my opinion, the appeals should be held to fail. All statements of the principle with respect to visiting forces which is relied upon are limited to visiting armed forces. The only persons in respect of whom an exemption from local jurisdiction can be claimed must be members of the armed forces of a friendly power. No such claim has been made on behalf of the Republic of China, but I can see no reason why the objection should not be taken by accused persons themselves. If, however, the accused are not members of any armed force no question of the application or of the extent of any principle of international law arises.

Any persons who rely upon the principle must show that they are in fact members of an armed force. The Executive Government of the Commonwealth cannot, by undertaking to treat as part of the military forces of a foreign country a body of men who are not in fact members of such forces, exclude the jurisdiction of Australian courts in relation either to foreigners or to members of the community of Australia. The Executive Government has, in my opinion, no authority to determine conclusively that certain persons are members of a foreign army and by such a determination to deprive the Australian people of resort to their own tribunals for the purpose of enforcing their claims or protecting their rights. If persons are members of such forces and if they are in Australia by governmental consent, then some principle of immunity applies, but the question of whether they *are* part of the military forces of another State is a question of fact which must be determined by the court before the question of jurisdiction arises. This, in my opinion, is not a question in relation to which a court will be bound by any statement of the Executive Government of the Commonwealth, even, indeed, if such a statement is admissible as evidence. It is obvious that an Australian court cannot take judicial notice of the laws of a foreign country with respect to the establishment and the constitution of its armed forces. No authority has been

cited to show that upon such a question a court is bound to accept a statement made by the Executive Government of the country in which the question arises. There are certain matters in respect of which a statement by a Minister is accepted by a court as conclusive, e.g., the question as to whether a person is a foreign sovereign, or whether a foreign State exists, or whether territory belongs to a foreign State, or whether a person has been recognized as a foreign ambassador or as a member of a diplomatic staff, or whether a ship is a warship or a public vessel of a State. There is authority that the answer of the appropriate minister will be accepted by a court as conclusive on these matters, but, as already stated, there is no authority that such a statement is to be accepted by a court when the question is whether a particular individual belongs to a foreign navy or army or air force. Whether he so belongs or not is a matter of law and fact which does not depend upon any recognition of his position by the Government of any other country.

I proceed to consider whether the accused were members of the armed forces of the Republic of China.

The evidence shows that the United States of America, on 30th August 1946, made an agreement with the Government of the Republic of China for the transfer to China of surplus United States property in the Western Pacific area stated to be of an estimated procurement cost of approximately $584,000,000.00. The agreement applied (article 1) to property in Manus, and provided that China should be responsible for the guard, custody, protection and maintenance of the property. It was also provided that China should take the necessary steps to ensure that its personnel engaged in the custody or handling of the property should comply with all orders &c. of the owning agency of the United States having jurisdiction of the territory. Such an agreement between the United States and China could not have any effect upon the jurisdiction of Australian courts. Reference is made in the agreement to the Board of Supplies as being the Chinese authority which would deal with the operations of packing, outloading property, shipping to China &c. Other provisions of the agreement showed that it was contemplated that the property might be resold, because there was a provision that United States distributors established in China should have equal opportunity to bid for and obtain the property.

In pursuance of the agreement China sent some 300 men to collect and despatch goods from Manus. These men were controlled by persons who had military rank. Evidence was given that they were " recruited " in Shanghai, that they signed some unspecified papers, that they had military uniform and some discipline, and

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a Chinese officer gave evidence that they were subject to military law. One witness said that the Chinese in Manus were " of the same status as military personnel."

The force, however, was not an armed force. It was argued that this fact was immaterial because every army had units, such as medical and nursing services, which were not armed, and yet they must be and were in fact recognized as part of the force to which they were attached. In the present case, however, the Chinese in Manus were not attached to any army. An army doubtless includes auxiliary units, but the body of men in Manus was not auxiliary to any army. They were referred to in the evidence as " workmen " and " labourers." They were employed by and under the Board of Supplies. There was no evidence that the Board was a branch of the military services of China. The men were kept in order and controlled by persons holding military rank. But, as one of the witnesses said, they were not actually soldiers. In my opinion the evidence shows that the Chinese in Manus were simply a body of labourers, necessarily subject to some discipline which was exercised by officers, who in fact had military rank, but the men themselves were not part of any military force. Accordingly, in my opinion, the objections to the jurisdiction of the court should be held not to have been sustained.

There are, however, also appeals against the sentences on the ground that they were too severe. I see no reason for reviewing the exercise of discretion by the Supreme Court with respect to the length of sentences. The judge of the Supreme Court was in a much better position than this Court to determine what sentences were appropriate. The maltreatment of the native Pondranei continued over a considerable period : there was an unjustifiable assault as well as a grave interference with his personal liberty.

In my opinion the appeals should be dismissed.

STARKE J. The appellants are Chinese nationals and were charged before the Supreme Court of the Territory of Papua-New Guinea on two counts : one that on or about 25th January 1948 in the Territory of New Guinea that they unlawfully assaulted one Pondranei—a native—and thereby did him bodily harm ; the other that they on or about 25th January 1948 unlawfully detained Pondranei in a hut against his will. Both were convicted and sentenced to three months' imprisonment upon the first count and to twenty-four months' imprisonment on the second count with hard labour, the sentences to run concurrently.

The unlawful acts were committed on Manus Island in the Admiralty Group. Manus Island was a German possession, but by the Treaty of Peace signed at Versailles in 1919 Germany renounced all her rights and titles over the island and other possessions in the Pacific in favour of the Allied and Associated Powers. Those powers conferred in effect a Mandate upon the Government of the Commonwealth of Australia to administer the territory mentioned in the Mandate (which included Manus Island) in accordance with the terms of the Mandate. The Mandate was accepted by Australia. It declared that the mandatory should have free power of administration and legislation over the territory subject to the Mandate as an integral portion of the Territory of the Commonwealth of Australia. A copy of the Mandate may be found in vol. 1, *Laws of the Territory of New Guinea*, p. 1, and its terms are referred to in *Jolley* v. *Mainka* (1).

Pursuant to the Mandate the Commonwealth passed the *New Guinea Act* 1920-1935 for the civil government of the territory comprised in the Mandate. An ordinance, *Laws Repeal and Adopting Ordinance, Laws of New Guinea*, vol. 8, p. 359, passed pursuant to this Act brought *The Criminal Code* (Q.), including ss. 339, 355, under which the charges were laid into force in the territory comprised in the Mandate. British New Guinea was not a German, but a British, possession. It was not administered under the Mandate. In 1902 the British Government placed the possession under the authority of the Commonwealth and the Commonwealth accepted it as a Territory under the authority of the Commonwealth by the name of the Territory of Papua: see *Papua Act* 1905-1940. The civil government of this territory by the Commonwealth was authorized by s. 122 of the Constitution.

But by the *Papua-New Guinea Provisional Administration Act* 1945, No. 20, provision was made for the provisional administration of the Territory of Papua and that portion of the Territory of New Guinea no longer in enemy occupation. The Act was to continue in operation until a date to be fixed by proclamation, but in any event not longer than six months after His Majesty ceases to be engaged in war. No proclamation has been issued and though hostilities have ceased His Majesty has not ceased to be engaged in war, for peace has not yet been declared with Germany or Japan.

By the Act the Governor-General of the Commonwealth was authorized to make Ordinances for the peace, order and good government of the Territory of Papua-New Guinea, and also to appoint an Administrator of the Territory who was charged with

(1) (1933) 49 C.L.R. 242.

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the duty of administering the government of the Territory on behalf of the Commonwealth. The operation of laws enacted under the earlier legislation is not affected but power is taken to amend or repeal them. Under the Act a Supreme Court of the Territory of Papua-New Guinea is established with jurisdiction both civil and criminal. This jurisdiction empowered this Court to hear and determine the matter charged against the appellants. And by this Act it is also provided that the High Court shall have jurisdiction with such exceptions and subject to such conditions as are prescribed by ordinance to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Court of the Territory of Papua-New Guinea and the decision of the High Court on any such appeal is final and conclusive.

"Ordinance" means ordinances made under the Act. No exceptions or conditions, we are informed, have been made by any ordinance under the Act, and therefore the appeal is of right and does not require the leave or special leave of this Court.

The constitutional position of this Act rests upon the Constitution, s. 122, the Mandate and the various Acts whereby it was granted and accepted, the Order in Council of 1902 placing British New Guinea under the authority of the Commonwealth and the *Papua Act*. I should add that we have been informed that the Scheme of Trusteeship in the Charter of Nations in respect of Manus Island has not yet become effective. See *R.* v. *Bernasconi* (1); *Porter* v. *The King*; *Ex parte Yee* (2); *Jolley* v. *Mainka* (3); *Ffrost* v. *Stevenson* (4).

International and municipal law recognize that "a state possesses jurisdiction . . . in virtue of its territorial sovereignty over the person and property of foreigners found upon its land and waters". See *Hall, International Law*, 7th ed. (1917), par. 47, p. 176; *Oppenheim, International Law*, 6th ed. (1947), vol. 1 (Peace), par. 144, pp. 293, 294. But to this broad statement there exist some special limitations or exceptions.

The appellants in this case claim that the personnel of armed and military forces of a foreign state in amity with the territorial sovereign possess immunities from local jurisdiction in respect of their persons when in the territory of the territorial sovereign with its permission. And it was said that these immunities attach to these forces when passing through the territory or stationed in it for garrison duty or using the territory as a base for operations or other purposes. "It must always be remembered," observed the

(1) (1915) 19 C.L.R. 629.
(2) (1926) 37 C.L.R. 432.
(3) (1933) 49 C.L.R. 242.
(4) (1937) 58 C.L.R. 528.

Judicial Committee in *Chung Chi Cheung* v. *The King* (1), "that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals." What then are the immunities of armed and military forces of other nations accepted by our courts? It is by no means easy to answer that question, for in modern times those immunities are settled by conventions between the nations: cf. *Visiting Forces* (*British Commonwealth*) *Act* 1933, 23 & 24 Geo. V. c. 6; *Allied Forces Act* 1940, 3 & 4 Geo. VI. c. 51; *United States of America* (*Visiting Forces*) *Act*, 5 & 6 Geo. VI. c. 31; Commonwealth *National Security* (*Allied Forces*) *Regulations*.

But admittedly the provisions of the last-mentioned Acts and regulations do not resolve this case and the appellants rely upon the substantive law of Australia unaffected by any statutory provisions. The principal authorities referred to in support of the appellants' claim were *Chung Chi Cheung* v. *The King* (2); *The Schooner Exchange* v. *M'Faddon* (3); *Tucker* v. *Alexandroff* (4); *Re Reference as to Exemption of U.S. forces from Canadian Criminal Law* (5); *Wright* v. *Cantrell* (6), and numerous text books upon international law.

The immunities allowed to ships of war and to other public vessels of foreign States in amity with the territorial sovereign were referred to but rather for the purpose of establishing that, from the nature of the case the immunities allowed to armed and military forces necessarily differed from those allowed to visiting ships of war and other public vessels, their crews and personnel. The immunities allowed to ships of war and public vessels have indeed been carried a long way in English courts: *The Parlement Belge* (7); *The Porto Alexandre* (8); *The Broadmayne* (9); *British Year Book of International Law* (1921-1922), pp. 68 et seq., Essay on the Judicial Recognition of States and Governments, and the

(1) (1939) A.C. 160, at pp. 167, 168.
(2) (1939) A.C. 160.
(3) (1812) 11 U.S. 116 [3 Law. Ed. 287].
(4) (1901) 183 U.S. 424 [46 Law. Ed. 264].
(5) (1943) S.C.R. (Can.) 483; (1943) 4 D.L.R. 11).
(6) (1943) 44 S.R. (N.S.W.) 45.
(7) (1880) L.R. 5 P.D. 197.
(8) (1920) P. 30.
(9) (1916) P. 64.

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Immunity of Public Ships. And even now the precise limits of those immunities as regards the crew and personnel are by no means settled: *Hall, International Law*, 7th ed. (1917), par. 55, p. 204; *Chung Chi Cheung* v. *The King* (1).

I do not propose to pursue the topic further and return to the question of the immunities of armed and military forces of foreign States within Australia.

In my opinion it is generally recognized, both in the authorities already cited, and in the text books, that the armed and military forces of foreign States in amity with the government of Australia possess certain immunities from local jurisdiction when in Australia with the permission of the Commonwealth Government, express or implied. But these immunities "must be traced up to the consent" of the Commonwealth. The immunities flow from a waiver by the Commonwealth Government of its full territorial jurisdiction and can themselves be waived: *Chung Chi Cheung* v. *The King* (2). Apparently in the case of armed troops the waiver must be express and will not be implied (3).

It rather surprises one that the Executive Government of countries, having responsible government, may without Parliamentary sanction waive territorial jurisdiction which belongs to the State, but in my opinion the law is so according to the authorities. Apparently *Duff* C.J. and *Hudson* J. in the *Canadian Reference Case* (4) do not so regard the authorities. And cf. *Allied Forces Act*, 3 & 4 Geo. VI. c. 51, s. 2.

The extent of these immunities is by no means settled. According to *Oppenheim, International Law*, 6th ed. (1947), vol. 1 (Peace), par. 445, pp. 759, 760, immunity does not exist in the case of soldiers belonging to a foreign garrison of a fortress leaving the rayon of the fortress, not on duty but for recreation and pleasure and then and there committing a crime. The local authorities are in that case in *Oppenheim's* opinion competent to punish them.

And some text books take the view, not unreasonably, that the immunity exists only in respect of acts done by members of the forces in the course of duty or within their own lines.

Again, the Supreme Court of New South Wales, *Wright* v. *Cantrell* (5), held that the immunity does not extend to members of the forces in respect of debts contracted to local civilians or in respect of civil wrongs. But I suppose that all jurisdiction might expressly be waived: cf. *The Schooner Exchange* v. *M'Faddon* (6).

(1) (1939) A.C., at pp. 175, 176.
(2) (1939) A.C., at p. 176.
(3) (1939) A.C., at p. 169.
(4) (1943) S.C.R. (Can.) 483; (1943) 4 D.L.R. 11.
(5) (1943) 44 S.R. (N.S.W.) 45.
(6) (1812) 11 U.S. 116, at p. 140 [3 Law. Ed. 287, at p. 295].

It is not, I think, necessary, or even advisable, in this case to express any opinion upon these debatable matters, for in my opinion the appellants did not belong to any force entitled to any immunity whatever from local territorial jurisdiction. The Government of China has not claimed any immunity for the appellants from local jurisdiction, but I take it that the appellants can claim immunity from local jurisdiction if the necessary facts be established.

It appears that the United States of America had in the Western Pacific at the conclusion of hostilities with Japan a quantity of property surplus to the needs of the United States. It sold to China all that property (with certain exceptions) owned by the United States in the Western Pacific, including Manus Island, upon terms set out in an agreement in writing dated 30th August 1946.

China agreed that all storage, crating, conditioning, handling, loading and transportation of the property sold should be arranged and paid for by it and that all such property should be removed within a certain period.

China had a war-time body called the Board of Supplies. It was under what was called the " Executive Yuan," a branch of the Executive Government of China. And the head " Executive Yuan " was directly responsible to the Chinese President. It also appears that the Board of Supplies recruited the appellants and others as employees. About 300 of them, including the appellants, were sent to Manus Island to collect the supplies purchased by China from the United States. They bore no arms and were employed solely in or in connection with the collection and removal of the purchased supplies. The appellants, it is said in evidence, were employees of the Chinese army but were not soldiers : they were workmen : one did carpentering work and the other shoemaking for the Board of Supplies. But it is stated in evidence that the appellants had military training before they left China, that they had the same status as Chinese military personnel and were subject to military discipline on Manus Island.

It may be assumed, I think, that the remaining 300 workmen on Manus Island were in a similar position. But they were not an armed force nor an organized military force in any sense. They belonged to an organized body of workmen employed and used for the purpose of removing purchased supplies and for nothing else. They were no doubt subject to military discipline, but they were not attached to an army or a military force as labourers connected with military operations or duties in any way whatever.

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In my opinion the members of such a body are not entitled to any immunity from local territorial jurisdiction.

Moreover there is no evidence that the Commonwealth of Australia expressly waived its territorial jurisdiction in respect of this body of labourers on Manus Island, but it was argued that a waiver should be inferred because those labourers were present on the Island without any protest or objection on the part of the Commonwealth Government. It is possible that the Executive Government of the Commonwealth had no knowledge of their presence on the Island at any time material to this case, for it was an allied base of operations against Japan, established in the main by the United States and at the time being dismantled by it or the naval and military establishment reduced.

On the scanty evidence adduced in this case I should not be prepared to infer that the Government of the Commonwealth waived its territorial jurisdiction in respect of the appellants or any of the other Chinese subjects on Manus Island. And though not by any means conclusive, it is somewhat against the appellants that the responsible officers of the Commonwealth in launching this prosecution did not consider that the Commonwealth had waived its jurisdiction in respect of the appellant or any of the other Chinese subjects on Manus Island.

Finally it was suggested that the sentences upon the Chinese were excessive.

Upon the evidence adduced I am unable to accede to the argument and in any case the sentences were plainly within the discretion of the trial judge.

These appeals should be dismissed.

DIXON J. The appellants were convicted upon two charges before the Supreme Court of the Territory of Papua-New Guinea. The Court is established by s. 16 of the *Papua-New Guinea Provisional Administration Act* 1945. The convictions were for assaulting a native and for detaining him in a hut against his will. Upon the first charge the appellants were each sentenced to three months' imprisonment and upon the second to six months' imprisonment. They now appeal to this Court against both the convictions and the sentences. They claim that they were not subject to the jurisdiction of the Supreme Court of the Territory and they complain that the sentences are excessive and ill founded. Section 16 (9) of the Act purports to give this Court jurisdiction with such exceptions and subject to such conditions as are prescribed by ordinance to hear and determine appeals from all judgments,

decrees, orders and sentences of the Supreme Court of the Territory. This provision is framed by analogy to s. 73 (ii) of the Constitution and upon the assumption that the Supreme Court of the Territory is not a Federal Court. A reference to *Jolley* v. *Mainka* (1) and *Ffrost* v. *Stevenson* (2) will show that on any view our jurisdiction to entertain the appeals cannot now be denied. Unless an ordinance has been made imposing a condition that leave shall first be obtained the appellants are entitled to appeal as of right. An attempt was made to show that s. 16 (8) operated to make applicable to appeals from the new Supreme Court of the Territory of Papua-New Guinea the respective ordinances governing appeals from the old Supreme Courts of the two Territories. But it is not aptly expressed to carry over references to appeals to this Court and in any case nothing but an ordinance under the new Act (see definition in s. 4) would suffice to make an exception or condition under s. 16 (9). I do not think that Ordinance No. 4 of 1945 satisfies the requirements. We are therefore bound to entertain the appeals. The distinction between an appeal by leave and an appeal as of right might be important with reference to the sentences, a matter upon which the Court would probably not readily grant leave.

The objection to the jurisdiction of the Supreme Court of the Territory is based upon a claim by the appellants that they are members of a Chinese military force detachment or party which was present in the Territory with the permission of the Crown.

A principle of immunity from local jurisdiction is asserted in favour of the members of a foreign naval or military force. This principle is said to apply when the sovereign permits a disciplined body of foreign troops under a commander to come into or remain in his territory. They bring with them their own military law and are under the jurisdiction and control of their own commanders who are responsible not only for their behaviour to one another but to the people of the country through which they pass or in which they are stationed. This principle is said to form part of the law of nations. No doubt it has long been recognized in international law that when one country invites or admits into its territory the armed forces of another friendly power the sovereign of the former country must concede to the latter full disciplinary authority over the forces exercisable by the officers in command and that this necessarily implies some corresponding exclusion of the jurisdiction of the municipal courts. This however is less a recognition of the rights and obligations arising out of a situation

(1) (1933) 49 C.L.R. 242, at pp. 249, 250, 256, 270-289.

(2) (1937) 58 C.L.R. 528, at pp. 554-556, 566, 578-596.

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between two nations than of the almost necessary incidents of a description of international transaction of a consensual character. For clearly enough the peaceful entry into one country of the armed forces of another friendly country must have a consensual basis.

It would be a violation of the first country's sovereignty if the armed forces of the second entered or remained without the express or implied permission of the first. Just as a ship of war is considered as the manifestation of the sovereign power of a nation, so with an organized military force under command. Further, from the nature of the case the ship of war and the armed force must bring with them their own naval and military discipline and that involves as a consequence not only the administration of their own naval and military law but also some freedom from interference by the courts and other authorities administering the municipal law of the territory that is visited or entered. Internationally it is sufficiently apparent that the limits of this immunity may, and usually will, be settled by agreement. It is therefore not surprising that when internationally it is left to implication, no more than a bare permission for the entry of troops being given, the rules of public international law remain uncertain or unclear as to the precise implication to be made. In the case of ships of war and perhaps of public ships generally it is otherwise. The visit of a ship of war of a friendly foreign power is so commonplace and ordinary an event that there has come into existence a clearer understanding of the limits within which the commander exercises exclusive jurisdiction over his officers and ratings. In respect of all matters occurring aboard, the jurisdiction and law of the flag prevails and is exclusive. Nevertheless as to offences committed by officers or men while ashore there is a doubt. It is agreed that, unless surrendered by the civil power, they should be considered amenable to the local jurisdiction in respect of offences committed while ashore on leave or for any purpose that is not official. But writers do not agree as to whether the jurisdiction of their commander over them which is conceded even in respect of offences committed ashore ought not to be treated as exclusive if the officer or rating concerned was ashore upon official duty. See *Oppenheim, International Law*, 5th ed. (1937), vol. 1, par. 451, p. 668. Be this as it may, the visit of a foreign ship of war or other public ship is such an ordinary transaction of international life that it is assumed to be permitted upon necessary or proper occasions and is subject to customary rules and procedures which for the most part are well ascertained and at all events cause little or no difficulty in practice.

The presence of a military force of a friendly foreign power is an exceptional thing. Apart from the visits of small bodies of troops by way of courtesy or to take part in ceremonies, celebrations or the like, it is unlikely to occur except in circumstances in which a full antecedent discussion between the two governments might be expected. Even if no more is involved than the movement in times of profound peace by one country of its troops through another country by a more convenient route to an outlying part of its own territory, it is not likely to be done except under an express arrangement. What therefore the principles of international law may be expected to deal with is the necessity of the permission, the terms on which it may be legitimately sought, the terms that are implied if the permission is granted and the obligations of neutrality, if a belligerent desires the passage of his troops through a neutral country.

It is obvious that the whole question involves in the case of the British Commonwealth the authority of the Crown in the conduct of foreign relations. It is a mistake to treat the question of the extent of the immunity as one depending upon the recognition by Great Britain of a rule of international law. In the first place the theory of *Blackstone* (*Commentaries*, (1809), vol. 4, p. 67) that " the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land " is now regarded as without foundation. The true view, it is held, is " that international law is not a part, but is one of the sources, of English law " (Article by Prof. *J. L. Brierly* on International Law in England, (1935), 51 *Law Quarterly Review*, p. 31.). " In each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of, English law " (Sir *William Holdsworth*, *Relation of English Law to International Law*; Essays in Law and History, p. 267.). In the second place, in as much as the immunity claimed arises from the permission given by the Crown to another power to send troops into territory under the jurisdiction of the Crown, the question whether that immunity exists must depend upon two matters governing the legal effect of the Crown's act. The first is the authority of the Crown under our form of government to bind the nation in the conduct of affairs with other nations. The second is the extent to which the common law recognizes and gives effect to the immunity or privilege from local jurisdictions and laws which under that head the Crown accords to the sovereigns of friendly foreign nations and those who

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come under their authority representing either the civil power of the state diplomatically or its armed strength in the form of bodies of troops or of ships of war. "With regard to foreign concerns," wrote *Blackstone* (*Commentaries*, (1809) vol. 1, p. 252), "the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendour, and power, that make him feared and respected by foreign potentates; who would scruple to enter any engagement, that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men."

It has remained true that what is done by the royal authority with regard to foreign powers is the act of the whole nation. But the consequences which an exercise by the Crown of this authority produces upon the rights duties and immunities of persons under the common law vary according to the nature of the thing done. A declaration of peace or war produces definite consequences because the rules of the common law govern the conduct of the king's subjects with reference to a state of war. But a treaty, at all events one which does not terminate a state of war, has no legal effect upon the rights and duties of the subjects of the Crown and speaking generally no power resides in the Crown to compel them to obey the provisions of a treaty: *Walker* v. *Baird* (1). On the other hand the recognition by the Crown of the sovereignty of a foreign State or government does produce under the common law immediate effects municipally. If the Crown receives a foreign sovereign the law immediately attaches to him an immunity and he is not amenable to the local jurisdiction. It may be assumed that, without the statute 7 Anne c. 12, English law would have attached to ambassadors and ministers plenipotentiary received by the sovereign a full, or at all events a wide, immunity from local jurisdiction. We have seen that at common law foreign public ships enjoy an immunity when with express or tacit consent they visit British ports. These are the results of the establishment of domestic rules of law calculated to give effect to the action of the Crown with regard to foreign nations. Thus the question here is not so much the existence and extent of a binding rule of the law

(1) (1892) A.C. 491, at p. 497.

of nations but rather whether a rule of the common law exists which will give effect to the act of the Crown in permitting the entry of foreign troops under command, the permission being accompanied by an express or implied concession to the foreign sovereign of exclusive disciplinary powers and jurisdiction over the members of the force while in the territory to which they are admitted.

A third reason why it is a mistake to treat the existence or otherwise of a definite rule of the law of nations as determinative of the claim to immunity is that the immunity is to be traced to the grant of the sovereign in the country admitting the troops. No obligation is placed by international law upon that country to permit the entry of troops. If a consent is given it rests with the country consenting to define the conditions it attaches to the permission. The function in such a case of international law is rather to interpret the permission in the light of experience and by reference to the necessities of the case. Its rules show what the two nations are entitled to expect in the absence of express stipulation.

How far then has English law gone in giving effect to an immunity which the Crown has either expressly agreed to or which it should be understood as conceding in admitting to the territory of the Crown a body of foreign troops under command? Upon this there is but little authority. In the United States however *Marshall* C.J. referred to the matter in the course of a celebrated judgment dealing with the immunity of a foreign ship of war which having encountered great stress of weather upon the high seas was compelled to enter the port of Philadelphia for refreshment and repairs: *The Schooner Exchange* v. *M'Faddon* (1). In giving instances of "a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation", the Chief Justice examines the effect of a permission for the entry of foreign troops. He does so in a passage which should be read in full (2). He says that a third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows troops of a foreign prince to pass through his dominions. The doctrine which he enunciates is that the grant of free passage 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. This broad principle has formed the foundation of the

(1) (1812) 11 U.S. 116, at p. 137 [3 Law. Ed. 287, at p. 294].

(2) (1812) 11 U.S., at pp. 139-141 [3 Law. Ed., at pp. 294, 295].

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American view. Thus *Field* J. in *Coleman* v. *Tennessee* (1) said that it is well settled that a foreign army permitted to march through a friendly country or to be stationed in it by permission of its government or sovereign is exempt from the civil and criminal jurisdiction of the place: see further *Dow* v. *Johnson* (2) and *Tucker* v. *Alexandroff* (3).

Great weight has been given to the judgment of *Marshall* C.J. by English writers upon the law of nations and more than once it has been cited judicially. For example it was used by Lord *Esher* in the judgment he delivered for the Court of Appeal in *The Parlement Belge* (4). His Lordship's compendious statement of the reasoning of the Chief Justice includes among the instances of the personal jurisdiction which nations have abjured "all jurisdiction over a foreign army passing through the territory."

But of great importance is the reliance placed upon the judgment of *Marshall* C.J. by Lord *Atkin* speaking for the Privy Council in *Chung Chi Cheung* v. *The King* (5). Their Lordships were dealing with the jurisdiction of a British court in respect of a charge of murder committed within British territorial waters aboard a foreign armed public ship by a member of the ship's company. It was decided that for a crime so committed there was a conditional immunity from the jurisdiction of the territorial courts, not because such a ship was considered as a floating part of the territory of her flag, but because our municipal law accorded a conditional immunity from the jurisdiction of our courts in conformity with the doctrine of the law of nations. The condition is that the foreign country to which the public ship belongs does not waive the immunity and consent to the exercise of the local jurisdiction. The immunity flows from a waiver by the territorial sovereign of jurisdiction in favour of the foreign sovereign to whom the ship belongs and accordingly may be exercised if the foreign sovereign waives the immunity. In the particular case their Lordships were of opinion that the immunity had been waived. In his reasons Lord *Atkin* (6) propounded the question "What, then, are the immunities of public ships of other nations accepted by our Courts, and on what principle are they based?" By way of answer his Lordship proceeded: "The principle was expounded by that great jurist Chief Justice *Marshall* in *Schooner Exchange* v. *M'Faddon* (7)

(1) (1878) 97 U.S. 509 [24 Law. Ed. 1118, 1122].
(2) (1879) 100 U.S. 158 [25 Law. Ed. 632, 635].
(3) (1901) 183 U.S. 424 [46 Law. Ed. 264].
(4) (1880) L.R. 5 P.D. 197, at pp. 208, 209.
(5) (1939) A.C. 160.
(6) (1939) A.C., at p. 168.
(7) (1812) 11 U.S. 116 [3 Law. Ed. 287].

a judgment which has illumined the jurisprudence of the world." Lord *Atkin* quoted freely from the passages in which *Marshall* C.J. showed how the existence of nations with independent sovereignties and the intercourse among such nations gave rise to situations in which the exclusive territorial jurisdiction of one must be understood as waived in favour of an agency of another. In the course of enumerating the instances given by the Chief Justice his Lordship gives the example with which we are presently concerned. Lord *Atkin* says (1): "The judgment then proceeds to the third case 'in which a sovereign is understood to cede a portion of his territorial jurisdiction,' namely, 'where he allows the troops of a foreign prince to pass through his dominions.' The Chief Justice lays down that '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.' He points out that, differing from the case of armed troops, where an express licence to enter foreign territory would not be presumed, the private and public vessels of a friendly power have an implied permission to enter the ports of their neighbours unless and until permission is expressly withdrawn."

The treatment by Lord *Atkin* of the subject appears to me to show that their Lordships accepted the doctrine of the implied waiver of jurisdiction not only in relation to foreign public ships but to bodies of troops under command, and held it to be part of our municipal law.

The existence of the immunity ought in my opinion to be no longer denied. All that should remain in question is the limits of the field it covers and the description of the bodies to whom it applies.

The reasoning pursued by *Duff* C.J. and *Hudson* J. in *Re Reference as to Exemption of U.S. forces from Canadian Criminal Law* (2) does not appear to me to be sound. A very different view was expressed by *Jordan* C.J. in *Wright* v. *Cantrell* (3). No doubt that reasoning represents what might be described as an instinctive British view springing both from the prevalence of the rule of law and from the preference for legislative authority to the exclusion of executive authority as the basis of any special immunity. But I do not think it gives due effect to the traditional place of the Crown in the conduct of foreign affairs and to the principles of

(1) (1939) A.C., at p. 169.
(2) (1943) S.C.R. (Can.) 483; (1943) 4 D.L.R. 11.
(3) (1943) 44 S.R. (N.S.W.) 45, at p. 48.

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the common law which recognize immunities accorded by the Crown to foreign public ships, foreign sovereigns and, as it seems, to ambassadors received by the Crown. The rationale of these principles gives them a scope wide enough to cover the permission of the Crown for the entry of foreign troops.

The realities of modern war make it almost necessary that the authority of the Crown should suffice, without invoking the processes of legislation, to arrange effectively with foreign countries the conditions upon which their troops shall pass through or be stationed in places under the jurisdiction of the Crown. It is not a claim that the Crown may exclude the jurisdiction of the courts over foreigners if it thinks fit. It is merely that by admitting a very special description of men, viz. an organized body of the armed forces of a foreign nation and by imposing no condition subjecting the force to local law either altogether or in any particular respect, the Crown impliedly undertakes that the force shall be governed by its own discipline and military tribunals to the exclusion of the local jurisdiction and that the common law gives effect to the implication.

I do not think that the legislative history of the manner in which during the late war the question of jurisdiction over troops of other countries present in Britain and Australia was dealt with should lead to any other conclusion as to the position at common law. That history will be seen from the *Allied Forces Act* 1940, the *Allied Powers (Maritime Courts) Act* 1941 and the *United States of America (Visiting Forces) Act* 1942 and the *National Security (Allied Forces) Regulations*. Cf. *Defence (Visiting Forces) Act* 1939 and the *Allied Forces Order* No. 5. It is easy to understand why in all the uncertainties that existed it was thought better to have legislation, particularly as so great a degree of immunity was desired. No doubt some of the views expressed at the time about the place and operation of that legislation should shake one's confidence in the correctness of the foregoing conclusions; but as against that consideration are to be set the judicial pronouncements to which I have referred.

This case cannot in my opinion be decided upon the absence of a rule of jurisdictional immunity in favour of visiting friendly foreign troops; for I think that such a rule of immunity does form part of our law. The case depends upon the area covered by the immunity and upon the descriptions of bodies to which the immunity applies.

The charges in the present case were based on the conduct of the two accused while off duty and some distance away from the place where the alleged force was camped or stationed. Does the

immunity extend to such an occurrence ? Again, the two accused are said to be no part of the Chinese army but to be employed by the army, though subject to military discipline. To what personnel does the immunity attach ?

The first of these questions involves a difficulty the solution of which depends upon competing considerations.

Writers upon international law adopt different opinions about the scope of the rule as between nations. *Oppenheim* takes the view that the immunity is confined to crimes committed either within the place where the force is stationed or while the offender was on duty though elsewhere (*Oppenheim, International Law*, 5th ed. (1937), vol. 1, pp. 662, 663, par. 445). The language of *Marshall* C.J. however is universal " a waiver of *all* jurisdiction over the troops during their passage " and it is thus quoted by Lord *Atkin* (1). It is reflected in the statements of the rule by *Wheaton* (*International Law*, 6th ed. (1929), p. 234), by *T. A. Walker* (*Manual of International Law*, p. 83) and by *Lawrence* (*International Law*, 3rd ed., p. 223). Sir *Arnold Duncan McNair* in his *Legal Effects of War*, 2nd ed. (1944), p. 356, after speaking of the allowance of the jurisdiction of the flag over the crews of foreign public ships says " and a similar jurisdiction is allowed over the members of foreign armed forces, at any rate in respect of offences committed while on duty or within their own lines. In both cases the exercise of this jurisdiction is implied from the permission given by the local sovereign for the entry of the foreign public ships or the armed forces." Presumably the learned author regards the exclusion of local jurisdiction as co-extensive with the grant of liberty to exercise foreign naval or military jurisdiction. See further *An Introduction to International Law* by *J. G. Starke* (1947), pp. 150, 151. Conflicting considerations of expediency may be urged in favour of one or other of the rival solutions of this problem. On the one hand it may be said that the citizen's right to invoke the courts of his own country to redress wrongs done to him within their territorial jurisdiction while moving about as a civilian ought not to be abrogated ; that he has this right against members of the armed forces of his own country ; and that he might not be able to obtain or even seek redress from the foreign command. It may be remarked that the analogy of the situation of servicemen of the citizen's own country is misleading. For there the question is only between the civil and military power of the same nation.

On the other side it may be urged that it would be intolerable if the members of the armed forces of an ally stationed in time of

(1) (1939) A.C., at p. 169.

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war within the confines of our civil jurisdiction were liable to be harassed by the criminal process of the local civil power. It would at all events be intolerable to him. The ally might well complain, in the language of Chief Justice *Marshall*, that by attempting to exercise such a local jurisdiction the country was violating its faith, that is by acting in a manner contrary to the implications of the invitation to send troops into the territory. Possibly it is a question which must depend upon the circumstances. It may perhaps be the case that if by clear words or necessary implication the Crown had invited or admitted foreign troops here on conditions which included complete freedom from local jurisdiction the common law would support the granted immunity. Consistently with that view it is possible that so extensive an immunity should not always be implied in the mere permission to enter. To take an extreme case on one side. Such an immunity might not be regarded as reasonably incidental to an invitation to send a small detechment of troops to some ceremonial occasion. On the other hand an invitation to send troops to a combat area in time of war might be considered to carry the wider implication.

I do not find it necessary to express any final opinion upon this question, because I think that the case must be decided independently of it. But I am inclined to the view that a complete immunity from arrest and imprisonment for offences committed against civilians by a member of the visiting forces while off duty and mixing with the ordinary inhabitants of the country is not to be implied from a bare permission to enter for their own purposes given by the Crown to the forces of a friendly foreign power in time of peace. But the question need not be decided because in the end I think that the objection to the jurisdiction in the present case fails on another ground. The ground is that the two accused do not fall within a description of persons entitled to the immunity.

A definition of the description of a body entitled under the rule to the immunity is to be found in the dissenting opinion in *Tucker* v. *Alexandroff* (1). It is an opinion entitled to great weight because it was written by *Gray* J. for himself, *Fuller* C.J. and *Harlan* and *White* JJ. " That rule," his Honour said, " waiving the jurisdiction of the United States over a body of men, and allowing them to be governed, disciplined, and punished by their own officers, applies only to an armed force, segregated from the general population of the country, and lawfully passing through or stopping in the country for some definite purpose connected with military operations." The requirement that the purpose of remaining in the

(1) (1901) 183 U.S. 424, at p. 459 [46 Law. Ed. 264, at p. 278].

country must be for military operations is probably an added condition that cannot be justified. The necessity of " segregation " too cannot be pressed far under modern conditions, and the word " armed " must receive rather a notional application. But it does seem to be necessary that the force shall come as part of what may be called the fighting forces representing the armed power of the sovereign state and that they shall be organized in a body under command and subject to military law and discipline.

The " force " with which the present case is concerned and of which the accused say they are members was despatched by the Chinese government to Manus Island pursuant to an arrangement with the American army made in the middle of 1946. The arrangement which was embodied in an agreement made between the government of the Republic of China and the government of the United States was for the sale to China by the United States of the property owned by the United States in certain islands and localities where during the war there had been American bases or establishments. All the property at those places so owned was sold subject to enumerated exceptions. Manus Island is one of the places mentioned in the agreement. A condition of the agreement placed upon China the responsibility for the care, custody and protection of the property sold and for arranging and paying for the storage, handling, loading and transporting of the property. The agreement refers to personnel of China engaged in the custody and handling of the property outside Chinese territory. It further appears that an established American firm acting under the direction of the Chinese Board of Supplies was to be employed to co-ordinate the overall operation of packing, outloading and so on in conjunction with Chinese personnel. The property was not of course confined to things of military use only and the agreement lays down conditions affecting its commercial resale and distribution. There appears to have been an agreement or understanding between the United States authorities and the Chinese authorities that the Chinese Board of Supply should send army personnel for the work of guarding the purchased supplies and labourers for the purpose of the necessary manual work, that the labourers should be placed under military discipline and that, except for military police, arms should not be carried by Chinese personnel.

The Board of Supplies is a war-time body established under the Executive Yuan. The Director General of Supplies who presumably is the Board's Chief Executive is a general of the army and under him there appears to be a chain of command going down to the army officers stationed at Manus Island. All the Chinese there

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are under military law. But though the labourers are recruited by the army, medically examined and given some form of training, it was made clear that they were only employees of the army. They were subject to Chinese military law as civilian employees of the army and not as soldiers. At the time of the offences there were 300 Chinese at Manus Island, camped about three miles from the place where the offences were committed. The accused are labourers, not soldiers. They are respectively a shoemaker and a carpenter.

But evidence was called to show that if they committed offences they would be tried by Chinese military law and for a serious crime they might be sent back to a court martial.

The situation is unusual and it is no doubt open to question upon which side of the line these men fall. It seems likely that the whole party, officers, soldiers and labourers, came by American invitation and without any antecedent permission from the Crown in right of the Commonwealth. Nevertheless the presence of the party must have been known to the Australian Administration and the consent of the government to their remaining there is to be presumed. But the point is that there has been no invitation to or acceptance of the body as a unit of the armed forces of China. The party is there as and for whatever its components are and no objection is raised to its remaining.

In the case of a large armed force coming for military purposes there might be within the command personnel who were not soldiers but were under military discipline, and in such a case the invitation to them might be taken to imply an immunity for the entire body.

But in the present case a band of labourers employed by a supply authority established for the purposes of the late war is permitted to be there in order to work at what is predominantly a civilian task. Military officers and guards are in charge and except for military police there are no arms. I think that the true view is that a party of Chinese workmen were sent in charge of a detachment of officers and men of the Chinese army. The purpose of the army units was to guard the material and maintain order and discipline in the labour force and to furnish military police. The position, therefore, of the armed force was, so to speak, incidental to the purpose of the mission. The civilian employees of the army were not incidental to the purpose of the dispatch of the military detachment.

In these circumstances I think that to the tacit permission to remain no implication should be attached which would place the Chinese labourers outside the jurisdiction of the local courts and

exclusively within the jurisdiction of the military arm of China. For this reason I am of opinion that the decision of *Phillips* J. upon the objection was right.

The appeal against the sentences imposed depends upon three suggestions. One is that the punishment for the detention cannot be reconciled with that for the assault if the facts constituting the two offences are dissected and distinguished. Another is that undue credence or significance must have been given to the evidence of a native witness named Nowan. A third is that a proper distinction was not drawn between the gravity of the offences of the respective accused.

Since the hearing of the appeal I have re-read the evidence with these points in mind but I can find nothing which would justify an interference by this Court with the discretion exercised by the learned judge in fixing the terms of imprisonment.

I think that the appeals should be dismissed. As they are appeals from convictions for indictable offences in my opinion there should be no order as to costs.

McTIERNAN J. I agree that an appeal lies without leave of this Court.

In my opinion the objection which is made on behalf of the appellants to the jurisdiction of the Supreme Court of the Territory should fail. The objection is founded on the " third case " described by *Marshall* C.J. in the case of *The Schooner Exchange* v. *M'Faddon* (1) in which a sovereign is understood to waive the exercise of territorial jurisdiction. I do not repeat the quotation of the passage. It is necessary to read the judgment of *Marshall* C.J. with the judgment of the Judicial Committee in *Chung Chi Cheung* v. *The King* (2), to ascertain to what extent the principles enunciated in the former case are recognized by the common law. In considering the authority of writings on international law it is necessary to remember the warning given by the Judicial Committee in the last-mentioned case (3); see also *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 504 and note (*s*). *Marshall* C.J. said that the sovereign is to be understood to waive territorial jurisdiction, in the case to which allusion has been made, over " the troops of a foreign prince." The Chief Justice also refers to such a body as " the army to which this right of passage has been granted " and " a military force " (4). Lord *Atkin* used the term " armed troops " (*Chung Chi Cheung*

(1) (1812) 11 U.S. 116, at p. 138 [3 Law. Ed. 287, at p. 294].
(2) (1939) A.C. 160.
(3) (1939) A.C. 160, at p. 167, 168.
(4) (1812) 11 U.S., at pp. 139, 140 [3 Law. Ed., at pp. 294, 295].

H. C. OF A. 1948.

CHOW HUNG CHING v. THE KING.

McTiernan J.

v. *The King* (1)) as an equivalent of the terms " troops," " army " and " military force " which *Marshall* C.J. used. The nature of the body which the Chief Justice had in mind can be inferred from the whole of his discussion of the " third case." I think that what is meant is an organized body armed for war. It may be a little or large body. The evidence in the present case shows that the body or party to which the appellants belonged was not of this character. They were members of a party disciplined after a military pattern; but they were essentially a party of labourers and tradesmen; they did not enter the Territory to pursue national objects of the order which a friendly foreign power would send an army or a military force to accomplish. These men wore uniform but they were not armed or engaged to do military duties; they were not an adjunct to a military force stationed in the Territory. I am unable to agree that it sufficiently appears from the materials before the Court that the appellants belonged to a detachment of troops of the Republic of China. It is therefore unnecessary to express an opinion on the question of the immunity at common law of visiting troops sent by a friendly power. The appellants were aliens temporarily resident in the Territory but were subject to its laws unless exempt. There is no statute exempting them.

In the case of *The Exchange* (2) *Marshall* C.J. said: " Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals." This statement is of interest in the present case. The Chief Justice was referring to the implication of the waiving of territorial jurisdiction. In the case of *The Exchange* (2) the proceedings were not taken by the sovereign. In the present case the appellants are prosecuted in the name of the King.

I agree that there is no legal ground which would warrant any reduction by this Court of the sentences imposed upon the appellants.

The appeals should be dismissed.

WILLIAMS J. I agree that in the absence of an ordinance made under the *Papua-New Guinea Provisional Administration Act* 1945, and there is no such ordinance, s. 16 (9) of that Act gives the appellants an appeal as of right to this Court. I also agree that the evidence does not establish that the appellants are Chinese soldiers. It establishes that they are Chinese civilians subject in many respects

(1) (1939) A.C., at p. 169.

(2) (1812) 11 U.S. 116 [3 Law. Ed. 287].

to military law but not that they are members of the armed forces of China. In these circumstances the question of the extent of the immunity of members of the armed forces of a friendly power from the jurisdiction of the Australian courts to be implied from an invitation from the executive government of the Commonwealth, express or implied, to enter territory which forms part of Australia or is controlled by the Commonwealth does not arise. In the present state of the authorities I prefer not to express an opinion upon a difficult question which would only be *obiter dictum*. In my opinion *Phillips* J. had jurisdiction to try the accused and there was ample evidence to support the conviction. I can see no reason why this Court should interfere with the sentences which his Honour passed upon the accused.

In my opinion the appeals should be dismissed.

Appeals dismissed.

Solicitor for the appellants: *J. W. Galbally.*

Solicitor for the Crown: *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.