DOCUMENTS

HOLMAN CONTEMPT CASE ORDER

THE PEOPLE OF THE PHILIPPINES,

Plaintiff,

versus Crim. Case No. A-65

RONALD MCDANIEL, et al.,

Accused.

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O R D E R

The records show that, together with two others (defendants Ronald McDaniel and Cecil Moore), defendants Bernard Williams and Hiawatha R. Lane were charged in this Court with forcible abduction with attempted rape; that on August 22, 1969, Lt. Col. Raymond L. Hodges, admittedly on behalf of Col. Averill Holman, Commander, 6200 Air Base Wing, Clark Air Base, issued and sent to the Court two receipts one for defendant Williams and the other for Lane, in which it was undertaken that in the interest of justice and in accordance with Article XIII of the Military Bases Agreement defendants Lane and Williams will be held ready to appear before a competent court of the Republic of the Philippines *at such times and places as required by legal processes;* that the criminal case was tried only with respect to defendants McDaniel, Williams, and Lane, defendant Moore having managed to leave the Philippines before the order of arrest could be served on him; that on December 15, 1969, the Court issued a subpoena *duces tecum* to Lt. Colonel Hodges requiring him to bring the persons of the three defendants, McDaniel, Lane, and Williams, before this Court on January 16, 1970, at 8:30 a.m. for trial; that, in view of the failure of Lt. Colonel Hodges to present the person of defendant Williams, the Court cancelled the trial and ordered the arrest of defendant Williams and his delivery to the Court for further orders; that on February 2, 1970, another subpoena *duces tecum* was issued to Lt. Colonel Hodges commanding him to bring the persons of the three defendants before the Court for trial which was set for February 6, 1970, at 8:30 a.m., but, on this date, only defendant McDaniel was brought by Lt. Colonel Hodges, defendants Lane and Williams

having failed to appear; that, informed by base counsel Atty. Flores that the order of arrest with respect to defendant Williams could not be served because the said defendant had already departed for the United States thru oversight, and, in view of the non-appearance of defendant Lane, the Fiscal announced in open court that he would take steps to remedy the "supposed oversight committed by the base authorities with respect to servicemen departing for abroad before the termination of their pending criminal cases," and the Court again cancelled the trial and ordered the immediate arrest of defendant Lane; that defendant Lane submitted an explanation on February 6, 1970, which the Court set for hearing on February 23, 1970; that on February 13, 1970, City Fiscal Eller Dula Torres and Asst. City Fiscal Rodolfo S. Uyengco filed a motion for contempt asking that the Base Commander, Col. Averill Holman, and Lt. Col. Raymond Hodges (hereafter to be mentioned as respondents) be declared in contempt for their failure to present the persons of defendants Lane and Williams at the hearing on February 6, 1970, and for having unduly caused the interruption and delay in the trial and for obstruction in the speedy administration of justice; that the Court set this motion for contempt for hearing on February 16, 1970, and, on that date, respondents were required to show cause why they should not be cited for contempt for their failure to produce in Court the person of defendant Bernard Williams in hearing of February 6, 1970; that when the City Fiscal's motion for contempt was called for hearing on February 16, 1970, respondents did not appear either in person or thru counsel in spite of due notice, but Fiscal Torres and Asst. Fiscal Uyengco appeared and both argued their motion for contempt and moved for the issuance of an order of arrest of respondents for their failure to appear in court; that although respondents failed to appear, the Court deferred resolution on the motions for contempt and for the arrest of respondents, and, as may be noted from the order issued dated February 20, 1970, the Court re-set the said motion for contempt on March 5, 1970, if only to give them another chance to present their side regarding the contempt charges; that due to the failure of defendant Lane to appear on February 23, 1970, the Court, on motion of the Fiscal, ordered his arrest and the appearance of his custodians, herein respondents, before the Court on February 25, 1970, at 8:30 a.m. to explain why they should not be cited for contempt for the non-appearance of defendant Lane in the hearing of February 23, 1970; that although respondents were required by the orders of this Court dated February 20 and February 23, 1970, to appear on March 5, 1970, they again ignored the Court's orders and failed to appear either in person or thru counsel on that date.

No factual questions are involved in this incident. The only issue is whether or not respondents are guilty of contempt and can be so punished.

It is incontrovertible that this Court has jurisdiction over the above-entitled criminal case. Indeed, after the Fiscal had filed the information with the Court, custody receipts in behalf of defendants McDaniel, Williams and Lane were submitted by Clark Air Base authorities and the defendants had been undergoing trial in which respondent Hodges attended religiously as a base observer.

Likewise indisputable are the failure of respondents to appear and present defendants Williams and Lane in the trial of February 6, 1970, as required by a subpoena *duces tecum* by the Court; the failure of respondents to appear before this Court on February 16, 1970, either in person or thru counsel in spite of due notice of an order requiring them to do so; the failure of respondents to appear before this Court on February 25, 1970, in spite of due notice for the purpose of explaining why they should not be cited for contempt for the non-appearance of defendant Lane in the hearing of February 23, 1970; and their failure to appear before this Court on March 5, 1970, in spite of due notice requiring them to be before the Court.

It is a matter of record that respondents could not present defendant Williams to the Court, because this defendant was allowed to leave Clark Air Base and go to the United States on November 17, 1969.

Needless to state, the non-presentation by respondents of defendants Williams and Lane on the dates required by the Court and their repeated non-appearance to answer the contempt charges filed against them by the Fiscal have caused considerable delay in the termination of the above-entitled criminal case.

Under the Rules of Court, a person may be punished for contempt for misbehaviour in the performance of his duties or official transactions with the court (Section 3, paragraph (a), Rule 71, Rules of Court); for disobedience of or resistance to a lawful order or command of a court (Section 3, paragraph (b), ibid); and for improper conduct tending directly or indirectly to impede, obstruct or degrade the administration of justice (Section 3, paragraph (d), ibid). "Officers appointed by the Court to act with reference to matters committed to the Court for administration are concerned with the judicial conduct of the Court and should, it has been held, be subject to contempt proceedings for violating their duties, even though their duties are not true judicial functions." (17 Am. Jur.

2nd, 16).

The Rules of Court likewise provide that processes issued from a superior court in which a case is pending to bring in a defendant or for the arrest of any accused person or to issue any order or judgment of the Court *may be enforced in any part of the Philippines* (Section 3, Rule 135). Indeed, every court is inherently empowered to compel obedience to its orders and processes in a case pending before it; to control the conduct of ministerial officers and all other persons in any manner connected with a case before it; to compel the attendance of persons to testify in a case before it in every manner appertaining thereto (Section 5, Rule 135, Rules of Court). Although the Rules of Court require that before a person could be adjudged guilty of indirect contempt, he should be given an opportunity to be heard by himself or thru counsel (Section 3, Rule 71), this right to a hearing is not absolute but waivable, and it is settled in this jurisdiction that the refusal of a person cited for contempt to appear or show cause within the time fixed in the order is a waiver of this right (Villacorta v. Muñoz Palma, C.A. G. R. No. 20208-R, Nov. 15, 1961; *In re* Quirino, 76 Phil. 630, 632-633)

Considered in the light of the aforecited prevailing law and judicial powers, the deportment of respondents involved herein clearly constitutes contempt of court, for they did not only fail to produce the defendants whose custody they undertook to guarantee and whose appearance they promised upon being required by the Court; they did not only disobey the Court order for them to appear and answer the contempt charges, but had also caused delay in the termination of the above-entitled criminal case by their non-presentation of the defendants and by their repeated and deliberate failure to appear before this Court upon being duly summoned to do so.

It cannot be validly contended that this Court is devoid of jurisdiction to cite and punish respondents for contempt simply because they are members of the Armed Forces of the United States stationed in Philippine territory. To begin with, it is a principle of international law that "a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." (Wilson v. Girard, 354 U.S. 524, 529, 1 L ed 2d. 1544, 1548, citing the Exchange v. M'Faddon (U.S.) 7 Cranch 116, 136, 3 L ed 287; Foreign Jurisdiction and the American Soldier by Baldwin, 17 Wisconsin Law Review (1958) 89). The principle of absolute and exclusive jurisdiction within the national territory applies to

foreigners as well as to citizens or the inhabitants of the country, and the foreigner can claim no exemption from the exercise of such jurisdiction, except insofar as he may be able to show either that he is, by reason of some special immunity, not subject to the operation of the local law or that the local law is not in conformity with international law, and no presumption of immunity arises from the fact that the person accused is a foreigner (2 Hackworth, Digest of International Law, p. 2). Although a citizen of a State remains under its power when abroad, such State is restricted in the exercise of this power with regard to all those matters in which the foreign State on whose territory this citizen resides is competent in consequence of its territorial supremacy. The duty to respect the territorial supremacy of the foreign State must prevent a State from performing acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign State. A State must not perform acts of sovereignty in the territory of another State (I Oppenheim International Law, 8th ed., pp. 294-295).

In other words, jurisdiction to try and decide a case is an attribute of sovereignty and pertains exclusively to the territorial sovereign; the Republic of the Philippines has and retains jurisdiction over any kind of offense punishable under its laws committed by any class of persons, including members of foreign armed forces, inside or outside any military or naval base; and the exercise of that exclusive jurisdiction is determined and governed solely by local law. This exclusive jurisdiction is not confined to criminal offenses alone but embraces all classes of civil actions, including contempt proceedings. Exercise of territorial jurisdiction is absolute, unless diminished by consent or by agreement. That this concept is recognized by the United States Government cannot be denied. That Government has entered into agreements with different countries all over the world, *including the Philippines,* where its armed forces are found. Examination of these agreements will reveal that the host states merely consent to the exercise by the United States, or the guest state, of jurisdiction over its armed forces to the extent necessary for disciplinary purposes, and this is purely a privilege or concession accorded to the guest state as a matter of comity or courtesy, subject to conditions as may be imposed. It does not flow from any settled rule in international law recognizing the absolute immunity of such visiting armed forces from the civil and criminal jurisdiction of the territorial sovereign, *for, indeed, there is no such absolute immunity under international law.* (See Conclusion, NATO Status of Forces Agreement and International Law by Edward D. Re, 50 N.W.U.L. Review, 349, 390-392, *infra.*)

Under the U.S.-P.I. Bases Agreement of 1947 defining jurisdiction over criminal offenses committed by and against members of the U.S. Military and Naval Forces on and off base, the Philippines has not abdicated its sovereignty over offenses or legal transgressions committed by Armed Forces of the United States or by American citizens, although the U.S. has priority or preferential, but not exclusive, jurisdiction over such offenses, and the Philippines retains not only the jurisdictional rights not granted but also all such rights as the U.S. Military Authorities, for reasons of their own, decline to make use of (People vs. Acierto, 92 Phil. 542). The Philippine Government merely consented to the exercise by the U.S. Government of its jurisdiction over certain criminal cases without waiving or ceding or surrendering Philippine jurisdiction over the same cases, only as a matter of comity, courtesy, and expediency but never abdicated its sovereignty over the bases as part of the Philippine territory (Molina v. Panaligan, G.R. No. L-10842, May 27, 1957). Under the said treaty, laws of the Philippines continue to be in force in said bases with the exception only of those otherwise agreed upon in the agreement (Liwanag vs. Hammill, 98 Phil. 439). Indeed, that Philippine sovereignty and jurisdiction over such cases is absolute and unimpaired unless otherwise indicated in the treaty is implicit from the very provision of the Bases Agreement(Article XIII, Section 5), making the Base Commander the custodian of military personnel accused before Philippine courts, and no less than President Nixon, in a joint statement in 1956 with President Magsaysay, acknowledged the sovereignty of the Philippines over such bases and expressly reaffirmed full recognition of such Philippine sovereignty over such bases (52 Official Gazette 3550).

> "The onerous terms of this agreement were criticized as a surrender of sovereignty and independence, and several negotiations were undertaken to revise or amend the terms of the treaty. The exchange of notes between President Eisenhower of the United States and Philippine President Quirino on July 15, 1953 formed the basis for the creation of a special mission of February 1954, led by American Ambassador Raymond Spruance. The Philippine side was represented by then Vice President Carlos Garcia, Secretary of Foreign Affairs, who was designated by newly-elected President Ramon Magsaysay. However, during the negotiations, another issue arose, the issue of ownership over the lands covered by the military bases, which caused the suspension of the negotiations. This issue, which saw the American cause championed by United

States Attorney General Herbert Brownell and the Philippine side defended by Senator Claro Recto, was however, resolved on July 4, 1956 *when the United States, through Vice-President Richard Nixon, acknowledged and recognized the sovereignty of the Philippines over such bases since the independence of the Philippines, and formally delivered the muniments of title to the lands covered by the military bases.*" (Criminal Jurisdiction Under the Revised Bases Agreement, 41 Phil. Law Journal, 728, 731)

The extent to which the Philippine Government consented to have the United States exercise criminal jurisdiction under the U.S.-P.I. Military Bases Agreement of 1947 is circumscribed in Article XIII of the said Agreement which provides in full as follows —

"ARTICLE XIII — *Jurisdiction*

"1. The Philippines consents that the United States shall have the right to exercise jurisdiction over the following offenses:

"(a) Any offense committed by any person within any base except where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty) or the offense is against the security of the Philippines;

"(b) Any offense committed outside the bases by any members of the armed forces of the United States in which the offended party is also a member of the armed forces of the United States; and

"(c) Any offense committed outside the bases by any member of the armed forces of the United States against the security of the United States.

"2. The Philippines shall have the right to exercise jurisdiction over all other offenses committed outside the bases by any member of the armed forces of the United States.

"3. Whenever for special reasons the United States may desire not to exercise the jurisdiction reserved to it in paragraphs 1 and 6 of this Article, the officer holding the offender in custody shall so notify the fiscal (prosecuting attorney) of the city or province in which the offense has been committed within ten days after his arrest, and in such a case the Philippines shall exercise jurisdiction.

"4. Whenever for special reasons the Philippines may desire not to exercise the jurisdiction reserved to it in paragraph 2 of this Article, the fiscal (prosecuting attorney) of the city or province where the offense has been committed shall so notify the officer holding the offender in custody within ten days after his arrest, and in such a case the United States shall be free to exercise jurisdiction. If any offense falling under paragraph 2 of this Article is committed by any member of the armed forces of the United States:

"(a) while engaged in the actual performance of a specific military duty, or

"(b) during a period of national emergency declared by either Government and the fiscal (prosecuting attorney) so finds from the evidence, he shall immediately notify the officer holding the offender in custody that the United States is free to exercise jurisdiction. In the event the fiscal (prosecuting attorney) finds that the offense was not committed in the actual performance of a specific military duty, the offender's commanding officer shall have the right to appeal from such finding to the Secretary of Justice within ten days from the receipt of the decision of the fiscal and the decision of the Secretary of Justice shall be final.

"5. In all cases over which the Philippines exercise jurisdiction the custody of the accused, pending trial and final judgment, shall be entrusted without delay to the commanding officer of the nearest base, who shall acknowledge in writing that such accused has been delivered to him for custody pending trial in a competent court of the Philippines and that he will be held ready to appear and will be produced before said court when required by it. The commanding officer shall be furnished by the fiscal (prosecuting attorney) with a copy of the information against the accused upon the filing of the original in the competent court.

"6. Notwithstanding the foregoing provisions, it is mutually agreed that in time of war the United States shall have the right to exercise exclusive jurisdiction over any offenses which may be committed by members of the armed forces of the United States in the Philippines.

"7. The United States agrees that it will not grant asylum in any of the bases to any person fleeing from the

lawful jurisdiction of the Philippines. Should any such person be found in any base, he will be surrendered on demand to the competent authorities of the Philippines.

"8. In every case in which jurisdiction over an offense is exercised by the United States, the offended party may institute a separate civil action against the offender in the proper court of the Philippines to enforce the civil liability which under the laws of the Philippines may arise from the offense."

Do the acts of respondents involved in this contempt incident fall under any of the cases in which the Philippines has consented that U.S. exercise jurisdiction? *The answer is obviously in the negative.* They do not fall under paragraphs 1(a) and 1(b), since the non-production of defendant Williams and the repeated non-appearances of respondents were consummated outside the base and in the premises of this Court and the offended party was the Court itself, not a member of the U.S. Armed Forces. They do not fall under paragraph 1(c) and paragraph 6 because even if committed outside the base by members of the Armed Forces of the United States, the acts are not against the security of the United States and were not committed during a period of national emergency or in war time. *Whether or not respondents committed the contemptuous acts in question while engaged in the performance of their official duty is clearly beside the point, since the acts were consummated off base.*

Undeniably, there is no express or implied provision in the Bases Agreement which impairs or deprives Philippine courts of their inherent powers to punish contempt and to enforce their orders against members of the United States Armed Forces stationed in this country. Verily, no such agreement could have validly been entered into, since any agreement of this nature would be subversive of the very foundation of the democratic judicial system that the United States implanted in this country. What the Philippine Government consented to have the U.S. Government exercise was merely jurisdiction over certain kinds of criminal cases, nothing more. Section 8 of Article XIII of the Bases Agreement furnishes the most eloquent testimonial to the retention of unimpaired Philippine jurisdiction over all civil cases under the said treaty. Under this section, even civil actions arising from offenses in which the United States is allowed to exercise jurisdiction are authorized to be instituted in the proper Philippine courts against the offending members of the U.S. Armed Forces over whom jurisdiction is exercised by the United States.

Respondents cannot correctly argue that they are beyond this Court's jurisdiction because the violations they committed against the authority of the Court are acts of the U.S. Government. Respondents' failure to produce the persons of defendants Williams and Lane when required by the Court and their non-appearance before this Court when summoned to do so are not acts of state. While it is true that respondents were in the service of the U.S. Armed Forces at the time they committed the violations in question, mere membership therein does not give license to commit a crime in another country or jurisdiction in disobeying lawful orders of the territorial courts. When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to the modes of trial and to such punishment as the law of that country may prescribe for its own people, unless a different mode be provided by the treaty stipulation between that country and the United States (See Neely vs. Henkle, 180, U.S. 109). Unlike foreign sovereigns, ambassadors or consuls, who are exempt under international law from local jurisdiction, members of the armed forces are not so immune for acts committed in violation of the law of the forum.

> "x x x *The once advocated doctrine of the immunity of the visiting military force from local criminal jurisdiction is no longer realistic nor is it now the law.*" (Baldwin, Foreign Jurisdiction and the American Soldier, 17 Wis. Law Review, p. 59, underline supplied).

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> "Wilson v. Girard, 354 U.S. 524 (1957). *Recent commentators on the status of visiting military forces under international law uniformly find that there is no general immunity of the visiting forces from the criminal jurisdiction of the friendly foreign state*: Barton, Foreign Armed Forces: Qualified Jurisdictional Immunity, 31 Brit. Y.B. INT'L L. 341 (1954), *wherein one of the leading scholars on the subject concludes that international law does not even require any qualified immunity;* Re, The NATO Status of Forces Agreement and International Law, 50 N.W.U.L. REV. 349 (1955); Schwartz, International Law and the NATO Status of Forces Agreement, 53 COLUM. L. REV. 1091 (1953); contra, King, Jurisdiction over Friendly Foreign Armed Forces, 36 AM. J. INT'L L. 539 (1942); King, Further Developments Concerning Jurisdiction over Friendly Foreign Armed Forces, 40 AM. J. INT'L L. 257 (1946). For earlier consideration of these problems see: Schwelb, The Status of the United States Forces in English

Law, 38 AM. J. INT'L L. (1944); Schwelb, The Status of Soviet Forces in British Law, 39 AM. J. INT'L L. 330 (1945); Goodhart, The Legal Aspect of the Armed Forces in Great Britain, 28 A.B.A.J. 762 (1942); Schwelb, The Jurisdiction Over Members of the Allied Forces in Great Britain, CZECHOSLOVAK YEARBOOK OF INTERNATIONAL LAW, 147 (1942); Kuratowski, International Law and the Naval, Military and Air Force Courts of Foreign Governments in the United Kingdom, 28, TRANS. GROTIUS SOC. 1 (1943)." (Footnote 24, *ibid*, pp. 59-60, underline supplied).

"It cannot be seriously questioned or disputed that all authors recognize and agree that the scope and extent of the immunity is really a matter of agreement between the interested States. This view is fully justified by a survey of the practice of States. The various bilateral conventions, agreements and arrangements actually entered into reflect the particular needs of the parties with regard to a specific situation to be dealt with. Some granted complete immunity whereas others granted none. Not only was no single type of agreement used, but those agreements granting a complete exemption from the local jurisdiction were wartime agreements, considered to be "temporary and exceptional" and "dictated by the conditions of war." The only existing multilateral treaties on the subject do not recognize any unqualified immunity. Moreover, those who insist that there exists a principle of complete exemption in the absence of agreement can find no support in the decided cases apart from the dictum in the Schooner Exchange case which, again in dicta, was expanded in the Coleman and Dow cases. The oft-cited Cheng Chi Cheung case involved the commission of a crime committed on board a naval vessel and the other cases were decided pursuant to a specific agreement.

"Sound legal analysis, therefore, would require the conclusion that although a certain immunity exists for foreign friendly visiting forces, the extent of the immunity is strictly a matter of agreement. It is for the territorial sovereign to determine the extent to which he wishes to waive the exercise of his jurisdiction. The agreements actually entered into by the nations of the world, as well as the decided cases, clearly demonstrate that the problem

has always involved reconciling 'the practical necessities of the situation with a proper respect for national sovereignty.'" (50 Northwestern University Law Review, p. 392, underline supplied.)

G. P. Barton, the international law writer mentioned in the foregoing quotation from 17 Wisconsin Law Review, concluded in his article (Foreign Armed Forces: Immunity from Criminal Jurisdiction) *"that there exists a rule of International law according to which members of visiting forces are, in principle, subject to the exercise of criminal jurisdiction by the local courts and that any exception to that general and far-reaching principle must be traced to express privilege or concession."*

"It only remains to consider whether the rule of international law which declares that members of a visiting force are in all cases liable to criminal prosecution in the local courts can be sustained when subjected to the test of 'the reason of the thing,' a test which has been for many writers the final arbiter between two apparently conflicting jurisdictions. It has been frequently argued that the exercise of jurisdiction over members of a visiting force would constitute such an interference in the command and discipline of that force, that its efficiency as a fighting unit would be gravely impaired. On examination it is evident that there is little substance in this contention. In the first instance, it ignores the fact that the service courts of the visiting force itself will, and are frequently under an obligation to exercise jurisdiction over the offender and to commit him for trial at which officers will be required to devote themselves, often for several days, to the exacting task of establishing guilt or innocence. Secondly, it presupposes that the proportion of convictions in the local courts will be higher than in the service courts of the visiting force. Thirdly, it assumes that an offender who is either fined, or sentenced to a term of imprisonment or to death by a local civil court is of less value to a visiting force than an offender who may suffer these penalties at the hands of a service court. Fourthly, it disregards the fact that persons of criminal tendencies are the least likely to make any real contribution to the efficiency of a visiting force. Finally, it fails to take into account the fact that it has never been seriously suggested that the exercise of jurisdiction by the local courts over members of the local forces, as has been the practice for centuries in the

United Kingdom, has in any way marred the efficiency of those forces or interfered with the maintenance of discipline.

"That the service courts of a friendly foreign force on local territory are entitled as of right to exercise jurisdiction over members of those forces is undoubted. This includes the right to try a member of those forces for offenses against the local law. But it has not yet been established that this right carries with it the right to exercise exclusive jurisdiction over members of those forces who commit offenses against the local law. On the contrary, it has been shown that there exists a rule of international law according to which members of visiting forces are, in principle, subject to the exercise of criminal jurisdiction by the local courts and that any exceptions to that general and far-reaching principle must be traced to express privilege or concession." (British Textbook of International Law, 1950, pp. 186, 234; underline supplied).

No less than then Atty. General Brownell, speaking officially for the U.S. Department of Justice, asserted and concluded that agreements among nations in time of peace conclusively show that the nations of the world recognize no rule of absolute immunity in peacetime for friendly forces on foreign soil; that there is no foundation for the claim that under international law friendly foreign forces are immune from criminal jurisdiction of the host state for crimes committed therein; and that even the Congress of the United States has refused to grant exclusive jurisdiction to foreign service courts over offenses committed by foreign forces in the United States.

"The agreements which were concluded among the nations in times of peace are most directly relevant to the provisions of the instant agreement. *They show conclusively that the nations of the world recognize no rule of absolute immunity in peacetime for friendly forces on foreign soil.* (p. 43)

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"The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent

of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, there, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.
(footnote 73, p. 48)

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"There is convincing evidence that in actual practice the nations of Europe recognize no principle that United States troops stationed therein are immune from their local criminal jurisdiction. Statistics furnished by the Department of the Defense show that a substantial number of American servicemen have been tried for local offenses in local courts. At least France, England, Italy, Bermuda, and Turkey have reported trials of such a nature. It is significant, however, for comparative purposes, that the sentences imposed upon the servicemen were almost uniformly lighter than those they would have received from a court-martial for the same offense, that the vast majority of sentences of confinement were suspended and that in only two instances were sentences of 3 year confinements — the maximum imposed — reported, 1 for rape and the other for black marketing.

"These statistics make it quite clear that the nations of Europe in practice assume and exercise criminal jurisdiction over our forces. (p. 53)

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V. CONCLUSION

"*It has been claimed that under international law friendly foreign forces are immune from the criminal jurdiction of the host state for crimes committed therein. This contention is without foundation.* Even where there is no express agreement among the nations, claims of immunity have been generally rejected except in a few cases where the offenses occurred in the line of duty. As the instant agreement makes provision for such offenses, as well as for others, it is clear that under that agreement the sending state acquires more jurisdiction over its forces than it would have without an agreement.

"No principle of international law can be deduced from the provisions of the various international agree-

ments upon the subject. Such agreements, which have obtained in both peace and war, contain widely different jurisdictional provisions and no uniform practice appears from their terms. There is, of course, no restriction in international law upon the terms of any agreement upon the subject, as the receiving state need not permit the ingress of the forces, and the sending state need not send them, if the conditions are not respectively satisfactory. In point of comparison, however, the instant agreement measures very favorably — from the standpoint of the sending state — with the immediately parallel agreements.

"The adoption of the proposed reservation would deprive both the Federal Government and the States of their jurisdiction over criminal offenses committed by the foreign forces stationed in this country, no matter what the nature, location, or victim of the offense might be. Such a deprivation is inconsistent with the constitutional amendment proposed by Senator Bricker himself. *In considering a similar problem in* 1944, *Congress clearly refused to grant exclusive jurisdiction to foreign service courts over offenses committed by foreign forces in this country.*

"There is no basis for the contention that the proposed agreement violates any rule of international law." (p. 54) (Brownell's Memorandum submitted to the U.S. Senate Foreign Affairs Committee on 6/24/53, re hearings on SOFA, underline supplied).

It cannot be denied that respondents' failure to produce the two defendants and to appear before this Court is violative of their commitment to do something for this Court as custodians of the said defendants and, therefore, unlawful. Hence, they cannot invoke state immunity.

"The government or its lawful officials as state agents are the party that may legally invoke the right of the state to be exempted from suit. These are the constitutional instrumentalities for state action. It is thus essential that the government or the official must be able to show that the *act complained of is duly authorized by the constitution or the statutes.*

"*When those limits are transcended, state immunity may not be availed of.* The United States Supreme Court expresses this idea in this manner: 'The State itself is

> an ideal person, intangible, invisible, immutable. The Government is an agent, and within the sphere of the a agency, a perfect representative; *but outside of that, it is a lawless usurpation.*" The government or its officials may not validly claim state immunity for acts they committed *against a private party in violation of an existing law.*
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> "They should be held responsible, for as the state 'can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful x x x *is not the word or deed of the state but is the mere wrong and trespass of those persons who falsely speak and act in its name.*'" (Poindexter v. Greenhow, 114 U.S. 270; Sinco, Phil. Political Law, 11th ed., pp. 32-33, underline supplied).

Respondents' failure to present defendants Williams and Lane in Court cannot be deemed a violation of the U.S.-P.I. Military Bases Agreement. Obviously, no provision of the treaty was violated by respondents. The Bases Agreement in this respect provides:

> "5. In all cases over which the Philippines exercise jurisdiction the custody of the accused, pending trial and final judgment, shall be entrusted without delay to the commanding officer of the nearest base, who shall acknowledge in writing that such accused has been delivered to him for custody pending trial in a competent court of the Philippines and that he will be held ready to appear and will be produced before said court when required by it. The commanding officer shall be furnished by the fiscal (prosecuting attorney) with a copy of information against the accused upon the filing of the original in the competent court." (Section 5, Article XIII)

The custody of defendants Williams and Lane was guaranteed by respondents thereunder, and therefore what was violated was their (respondents') "treaty" with the Court, their undertaking as custodians of the two defendants.

Even then, respondents' failure to present defendants Williams and Lane in Court on February 6, 1970 is not the only act for which they are liable for contempt. More serious than the non-presentation of defendants Williams and Lane is their stubborn disregard of the Court orders summoning them to appear and explain a dereliction of their duty to the Court as such custodians. The duty to obey lawful judicial summons recognizes no exception as to na-

tionality or rank. Be he a citizen or foreigner, the highest commanding general or the lowliest soldier, he is bound to obey the orders of the Court, because obedience to court orders is the law in this land and no one is above that law.

Even supposing arguendo that the acts of respondents involved in this case were acts of state, *this Court is nevertheless not deprived of jurisdiction over them upon mere assertion that they acted for the United States. The act of state doctrine is essentially a principle of judicial abstention and deference to the executive branch.* It does not deprive the Court of jurisdiction over the subject matter.

> *"It is common error to assume that the act of state doctrine deprives the court of jurisdiction over the issue.* Its alleged effect is rather to deprive the court of the possibility of inquiring into the validity of the act; the merits of the case must be decided as if the act were valid.." (Footnote 30, Zander, The Act of State Doctrine, 53 American Journal of International Law (1959) p. 830; underline supplied).
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> "x x x. Blad v. Bamfield, 3 Sevan, 604, 36 Eng. Rep. 992 (Ch. 1674), *international law does not forbid a domestic court to question the legality of an act of a foreign state in the process of resolving a controversy otherwise within the jurisdiction of that court."* (Banco National de Cuba v. Sabattino, 376 U.S. 398, 421, (1964); I Oppenheim, International Law 115; 6 Whiteman Digest of International Law, pp. 3-4; underline supplied).

> "Even if the courts of visiting forces are competent to deal with military offenders, *it by no means follows, and nothing in the Schooner Exchange vs. M'Faddon requires that it should, that the local courts may not also exercise criminal jurisdiction if the offence is at the same time a breach of the local penal law x x x."* (2 O'Connell, International Law, p. 957, underline supplied).

"The Restatement of the foreign relation law of the U.S. by the American Law Institute (1965) contains the following criteria:

> TITLE C — *Foreign forces within the territory of another state.*

x x x

Sec. 57 — *Jurisdiction over Foreign Force: Violations of Criminal Law of Territorial State.*

Except as provided in Secs. 58 & 59, *a state's consent to the presence of a foreign force within its territory does not of itself imply that the state waives its right to exercise enforcement jurisdiction over members of the force for violation of criminal law of the territorial state.*" (6 Whiteman, Digest of International Law, pp. 384-385, underline supplied).

The following excerpts from the discussion of the Act of State Doctrine during the Third Summer Conference on International Law held in 1960 at the Cornell Law School, Ithaca, New York, on June 20-22, 1960, attended by international lawyers and jurists all over the world are illuminating —

"*Mr. Cardozo:* May I just ask one question on the definition? Do you have any intention of distinguishing between the words "*Act of State*" and "*Act of Government*"?

"*Mr. Sweency:* No. I think I started from the position that the words, "Act of State" have been used quite extensively, even though you may not start originally with that precise type of wording. I don't like to get into the issue of semantics. There are many other expressions used in other places.

"*Mr. Re:* Although I agree that title isn't important, as proven by the fact that there are at least four titles given to the same principle, what is important is the fact that we must ascertain precisely in what cases this principle of abstention applies. *It is a principle of abstention. It is a principle of refusal to review.* I think that any definition ought to try to cope with the problem of what are the types of cases to which this principle of abstention applies. It need not be done, necessarily, by definition. It may be done by example.

"*Mr. Cardozo:* Let's move on to that. We will ask Mr. Stevenson to tell us what the New York City Bar Association Committee wanted to advocate.

"*Mr. Stevenson:* Talking about definitions, I don't

think it is essential that you necessarily exclude by definition broad areas of cases which I think we all agree shoud be excluded. You can define "Act of State" broadly and surely say that the Act of State Doctrine has only been applied in certaain areas. *I think it is common ground that it has only been applied only within the territory, with respect to persons or objects in the territory of the acting government.* Professor Re made that point, and I think, perhaps, that would be a guide we should have.

"Now, there are certainly other types of cases that have to be excluded: for example, *belligerent occupancy cases. It has been considered proper to review the validity, under international law, of belligerent-occupant actions within the* territory. (pp. 70-71, underline supplied).

x x x

"I think that this whole problem also lies in, to a certain extent, with our discussion yesterday of sovereign immunity, in that the principal objection that has been raised to a review under international law of the validity in our courts is the question of embarrassment of the executive in the conduct of foreign relations. I would like to say, with respect to that — and this general principle, I think, reflects my feeling also on the sovereign immunity question — that I think we have been too concerned in many aspects of this question with the extent to which judicial decisions could embarrass the executive. I think that in many of these areas and again, I don't by any means say this is always true — if you can find that what has previously been called a political question is a judicial question, and let the courts handle it, that, far from increasing international tension and embarrassing the executive, it will actually reduce international tension.

"As to the cases, I don't want to go through a long review of them. *I think it is clear internationally that there has been no authority for the proposition that, if we were to review a foreign sovereign's act on the basis of its conformity with international law, we would, ourselves, be committing an international wrong.* In fact, most of the good secondary authorities you can find on it, including Professor Briggs, Professor McNair, and gentlemen of that caliber, *are agreed that it would not have been a violation of international law for our courts to review the foreign*

sovereign's act. (pp. 72-73, underline supplied).

x x x

"When may the court disclaim Jurisdiction? There is no statutory and no international law impediment to the exercise of jurisdiction. Any abstention is by virtue of a self-imposed judicial doctrine. The doctrine started very harmlessly. It started in cases which dealt with matters of sovereign immunity. A sovereign, having exercised his official powers became physically subject to our court's jurisdiction, or his property did. He made a representation to our State Department, which, in the early cases, said, 'We respect his sovereignty, and we request the court not to interfere with it.' That is the origin of the issue, and the early cases reflect that very amply.

x x x

When this Act of State doctrine was first enunciated by the courts, certain qualifications were pronounced essential and important. *Abstention was attributed to the possibility that the exercise of jurisdiction might vex the peace of nations. Abstention should not be indulged in if there were malice or personal or private motives involved.* Abstention should not be observed unless a friendly foreign power was involved in the asserted act of state. *There should be no abstention when the official acts in the foreign country claimed to justify abstention were beyond the scope of the official power of the individual who acted for the state.* These were all limitations set out expressly in the *Underhill* case and in the other early cases. Over the years, just as Judge Cardozo said, they were completely lost sight of, notably in the case which has really pointed up this whole matter, namely, the *Bernstein* case.

"I think the *Bernstein* case has been sufficiently characterized here. I dont like to use adjectives, but I think it is fair to say that the *Bernstein case is a monstrosity, legally.* The realization of the enormity of that monstrosity has grown with the years, to create an intuitive disquiet that such a decision could come from an American court. The only saving grace of the decision is the dissenting opinion of Judge Clark. I am not a Judge Learned Hand fan. I think that monstrous decision is attributable to his disrespect of counsel.

"*Mr. House*: Give me just a moment. Absent a

foreign government available, or willing to make a request to our State Department, I see no reason why the defendant can't go to our State Department and say 'I got the title through this official foreign source, rightfully, and wish you to ask the court not to exercise its jurisdiction.' What would this do? This, I think, answers your question. Instead of putting the burden on the plaintiff and on the court, the court would just pursue its normal judicial function of exercising jurisdiction and rendering a decision on the merits, unless the State Department intervened and suggested that this would vex the peace of nations, that it would interfere with the conduct of foreign affairs, or otherwise conflict with the national interest. Remember that a very limited number of cases come in this area anyway. It is a very small number. It may grow a little with the establishment of these new governments and their 'nationalizations,' but it involves really a very limited number of cases. *The courts should not fumble with whether they may or may not exercise jurisdiction and create new judicial law in each case, as Learned Hand did in the Van Heyghen case. They should exercise their judicial function until some authority asks them not to do so, and that means the State Department. Thus, you would have an infinitesimal number of applications made.* (pp. 77-78, underline supplied).

x x x

"What did the German courts do? They did a very strange thing. They said, 'We apply the Act of State Doctrine, for the following reason. *There is a trend in international law that state restrict their immunity.*' They said, and I qoute, in translation: *'A world-wide trend toward restricting state immunity has become manifest, and the development of international law trends in the direction of restraining states from using their means of power, even against an injustice.*' They applied the Act of State because they believed this was the line of development of international law. (pp. 87-88, underline supplied.)

x x x

"Second: *It is, therefore, not surprising that the courts have questioned, in many cases, foreign acts of State, when the defendant was not a foreign government, not a foreign officer and not a foreign public body, when the*

validity of the foreign act only was an incidental point. This point of view has been taken by the Supreme Courts of many Civil Law countries including the German Supreme Court, the French Supreme Court and the Dutch Supreme Court. The Austrian Supreme Court even checked the constitutionality of the American Joint Resolution of June 5th, 1933, which suppressed the Gold Clause.

"Even in common law countries, however, it seems that courts are more and more inclined to follow this thesis. I refer, in this context, to a case, Shapleigh v. Mier, where a Mexican decree was examined for consistency with the constitution of the state of Chihuahua and the Mexican constitution.

"There were two decisions of the King's Bench in *Re Amand,* a case dealing with Dutch laws, during the last war, the *Rose Mary* case of Aden court, and others.

"Third: The legal writers have adopted the liberal thesis, almost unanimously, in the civil law countries and, more recently, in the common law countries. I refer to the articles of McNair, F.A. Mann, and Lipstein. This leads to the following results:

"The courts are free to consider and pronounce an opinion upon the exercise of sovereign power by a foreign government when the consideration of those acts only constitutes a prelude to a decision on a question of private rights, which, in itself, is subject competency of the court of law. There is no generally recognized rule of public international law which prevents questioning of foreign Acts of State, as such. On the contrary, the rule gives judges this right, and the judges themselves, have made use of it. However, where the courts have been reluctant, this may have been because they have been anxious not to interfere with political relations or because the power given to the judge to question acts of his own state is not so self-evident as the jurists of this country may assume. In most countries of the world, it is never admitted, or practically never. (pp. 98-99, underline supplied.)

x x x

"Mr. Cardozo: Abstention really is not abstaining from reviewing the act of other government.

"Mr. Fisher: Including affirmative endorsement of

> any state act. The Act of State Doctrine would require a court affirmatively to enforce the decress of any foreign state." (p.) 113, underline supplied).

Furthermore, the defense of act of state must be pleaded formally and affords no license to totally ignore a court order, thus even supposing that respondents were, as they erroneosly seem to be, of the belief that they are beyond the jurisdiction of the Court, *it was nevertheless incumbent on them to appear in person or thru counsel either before or on the very day they were cited, if only to say or claim that they could not comply with the judicial commands because they considered that the Court has no such power over them and/or that the orders issued by it are illegal and void.*

In any event, the Court has jurisdiction to cite and punish respondents for contempt for the reason that *it has jurisdiction over the above-entitled case — a matter which is not disputed — and over any contempt incident arising therein. The U.S. Government is deemed to have implicitly accepted this Court's jurisdiction over the respondents in the contempt proceedings by allowing them to be custodians of the defendants in the above-entitled case.* It would be absurd to hold that, having assumed to undertake the judicial duty of jailers of individuals charged before this Court, respondents cannot be held liable for contempt for a dereliction or violation of that duty and for not obeying the orders of the Court issued in connection with that duty. Indeed, by agreeing to be custodians, respondents have precisely descended to the level and category of individual persons; submitted to the jurisdiction of the Court; and waived any semblance of immunity that can be availed of under the doctrine of act of state, and, therefore, can be punished as officers of the Court.

> "This was the situation in *Underhill vs. Hernandez,* for the Court stated that Hernandez was an officer of the state of Venezuela, and his acts were acts of the state of Venezuela. The same situation prevailed in *Waters v. Collet,* in the famous *Brunswick* v. *Hanover* case, in some British, Dutch, French, and Swedish cases. This second group of cases presents no problem. It is obvious that the principle *par in parem non habet imperium* prevents a foreign state from being subject to the jurisdiction of the courts of another state. You may call that a problem of immunity.
>
> "The recent doctrine of states acting *jure gestionis* is no exception to this principle, for it may *be presumed that*

the foreign state implicitly accepts subjection to jurisdiction of another state if it carries on business and so descends to the level of individual persons transacting legal acts on a horizontal basis between each other.

"There can't be found any reason of public international law why the court should not be entitled to question foreign Acts of State as an incidental matter in a case involving only private parties. In such cases, the sovereignty of the foreign state and the validity of its act within its own territory are not touched. There could only be presumption of the validity of acts of a foreign sovereign, but a presumption exposed to counterproof." (Third Summer Conference on International Law at Cornell Law School, Ithaca, New York, June 20-22, p. 98; underline supplied)

"Comment from the floor (unidentified):

"Regarding the custody of the sergeant, since it is only a matter of convenience that Girard is in the custody of the U.S. authorities, and since the U.S. authorities transferred jurisdiction to the Japanese authorities, *the U.S. is only acting as an agent of Japanese authorities.*

"Professor Oda: There is an understanding that whenever the Japanese courts require a prisoner to appear before a Japanese court, that this prisoner will be retained in American custody. Therefore, in my opinion, it is no legal question. But if he doesn't appear before the Japanese court, then there is another international question.

"Professor Pasley: Well, whether or not we are acting as an agent, *apparently the court feels that our possession is constructive enough to give them jurisdiction to issue a restraining order."* (First Summer Conference on International Law (1957) at Cornell Law School, Ithaca, New York, June 26-29, 1957, pp. 92-93; underline supplied).

The dictum laid down by the Supreme Court in early liberation cases (Raquiza vs. Bradford, 75 Phil. 50; Dizon vs. Commanding General, Phil-Ryukus Command, 81 Phil. 286; Tubb v. Griess, 78 Phil. 249) to the effect that "a foreign army, permitted to march thru a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from civil and criminal jurisdiction of the place," cannot here be invoked since, as already above

pointed out, *the United States and the Philippines both subscribe to the principle of supremacy of territorial jurisdiction, and, in effect, concluded a base agreement in which the criminal jurisdiction of the Philippines over Armed Forces of the United States is precisely recognized, subject only to few instances whereby the Philippines has consented that the United States exercise jurisdiction.*

Significantly, in the Raquiza, Dizon, and Tubb cases, the U.S. Government did not raise any question on, but on the contrary, recognized the jurisdiction of Philippine courts over members of the United States Armed Forces or U.S. officers sued before our courts. Verily, in Miquiabas vs. Commanding General, 80 Phil. 262, a decision of a U.S. court martial was annulled, a Filipino convicted by it was set free, and the U.S. Government complied with the Supreme Court mandate. *If in that case a Commanding General of the Philippines-Ryukus Command, who was sued in his official capacity for the release on habeas corpus of a civilian erroneously sentenced by a U.S. court martial, submitted to the jurisdiction of Philippine court without reservation and without ever invoking the doctrine of act of state, as was also the case in Raquiza, Dizon and Tubb, it is enigmatic why officers of much much lesser category in the U.S. Armed Forces, like herein respondents, stubbornly refuse to submit to the jurisdiction of the Court and are being permitted and abetted by their Government to take a posture of defiance against the authority of the host state.*

Banco Nacional de Cuba v. Sabbatino, 84 Sup. Ct. 923 (1964) is not applicable. That very decision declares that *not every case or controversy which touches foreign relations lies beyond judicial cognizance x x x and the Constitution does not require the Act of State doctrine and that it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.*

> "Reformulation of the Act of State doctrine by the United States Supreme Court in Sabbatino has laid to rest several decades of speculation concerning the proper jurisprudential basis for the doctrine. The Doctrine's version of the rule was grounded firmly on the interstices of the United States Constitution by the following passage in the Court's opinion:
>
> > "Despite the broad statement in Oetjen that 'The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative . . . departments,' . . . *it cannot of course be thought that 'every case or controversy which*

> *touches foreign relations lies beyond judicial cognizance.'* Baker v. Carr. 396 U.S. 186, 211, 82 Sup. Ct. 691, 707, 7 L. Ed. 2d 663. *The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.*
>
> "The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationship between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts state may hinder rather than further this country's pursuit of goals both of itself and for the community of nations as a whole in the international sphere." (Foreign Seizures by Eugene F. Mooney (1967) pp. 102-103; underline supplied).

And the Sabbatino ruling has already been changed by the Hickenlooper Amendment to the Foreign Assistance Act of 1964.

> "A slightly different emphasis was given in the testimony of Professor Myres S. McDougal in support of the amendment. Professor of international law at Yale Law School, McDougal emphasized the effect of Sabbatino and the Hickenlooper Amendment in the context of the continuing development of international law. His letter to Senator J. W. Fulbright, Chairman of the Senate Committee on Foreign Relations, states his position most concisely:
>
> " 'My greatest concern in this matter is, thus, that the United States should set a good example for other countries in the development and application of an international law designed to protect a free world society. In an interdependent world, with widely dispersed resources and skills, this must of necessity include the protection both of an international economy and of some private participation in wealth activities. Similarly, in a world without centralized legislative, executive, and judicial application of international law must continue to be made, as during the past several hundred years, by officials of particular nation-states. *Any suggestion that our courts are not competent to continue to participate in the development and application of inter-*

national law, whether related to economic affairs or other affairs, is fundamentally inimical to our own long-term national interests and the comparable interests which we share with other states.'

"In the course of his testimony before the House Committee, McDougal pointed out that great bulk of international law is court-made law like our Common Law, established through a process of international claim, counterclaim, and both formal and informal decisions by national officials. *He urged that the Act of State Doctrine, properly understood, calls only for judicial abstention in cases not involving seizures in violation of international law, and that 'the doctrine of automatic, blanket abstention announced by the Court is clearly a new and bizarre creation.'* Professor McDougal took direct issue with the Court and the opposing witnesses, contending that the matter was a legal and not a political question. He set forth three points in summary: 1) all three branches of our government should participate in projecting our long-range goal of 'promoting and securing a more abundant international economy and of protecting private rights; 2) our national courts should participate in the clarification and implementation of an international law appropriate to our times 'as they have in the past by model behavior in applying international law,' and 3) 'it is scarcely credible that the continued performance by our courts of their functions in developing and applying international law could interfere, seriously or otherwise, with the Executive's conduct of foreign relations.' As proof of this final point, he pointed to the proviso embodying the reverse Bernstein power to file Executive suggestions in embarrassing cases.

"The Rule of Law Committee and Professors McDougal and Olmstead fared well under questioning by the House committee members, and apparently they were persuasive. *The Foreign Assistance Act of* 1965 *made permanent the Hickenlooper Amendment on August* 24, 1965, *thereby changing the rule of Sabbatino."* (Ibid, pp. 111-113, underline supplied).

Commanding General McNickle of the Pacific Air Force made several attempts to impress the Court, thru so-called "status certificates," that respondents are beyond the jurisdiction of this Court because their failure to present defendants Williams and Lane in Court arose out of an act or omission in the performance of an

official duty. The Court cannot, however, be bound by any officious determination by General McNickle on the status of the violations committed by respondents that are involved in a case pending before it. *A determination on these matters is clearly an exercise of judicial power and a Commanding General of a foreign army stationed in our country cannot exercise judicial power that exclusively belongs to Philippine courts under our Constitution.*

Under the provisions of the 1947 Bases Agreement, "status certificates" are sent only to prosecuting fiscals and never to a court in order only to *ascertain where the trial should take place and not to determine status at the trial itself.* The jurisdictional question of status is finally to be determined by the courts of the territorial sovereign. "The *criminal liability* of a soldier cannot be confused with the *question of whether he can be prosecuted at all.*" (17 Wisconsin Law Review, 76).

"III. WHO DETERMINES DUTY STATUS?

"Based upon the minutes of the working group which drafted the NATO Status of Forces Agreement, it still appears to be the policy of the Department of Defense to advocate the position in all agreements that the authorities of the sending state have exclusive authority to determine the duty status of the accused. This objective, however, has not been achieved in every country, and the validity of the American position is not unquestioned even in the United States. When the Senate Foreign Relations Committee considered the NATO Status of Forces Agreement in 1953 prior to its submission to the Senate for advice and consent, this question was raised and the *Legal Adviser of the Department of State testified that in his opinion the courts of the receiving state could determine the duty status of the accused, on the ground, apparently, that a jurisdictional question is finally determined only by the courts of the territorial sovereign.*

"The Mixed Courts of Egypt functioning in Egypt during World War II dealt with crimes committed by visiting foreign forces in many cases, and their experiences in this regard are pertinent. Several times they considered the defense to jurisdiction raised by an accused that he was at the time of an offense 'on duty.' The Court of Cassation, the highest court in the system, demonstrated a tendency to accept as conclusive a certificate executed by a

commanding officer to the effect that at time of the offense the accused was on duty. *Nevertheless these courts reviewed the substantive basis upon which the certificate was issued before sustaining the conclusion that the accused was on duty.* The conception of service command, applied in a sense similar to 'performance of official duty,' was usually given a wide scope and if it was determined that the accused was acting service commander the Mixed Courts held they had no jurisdiction under the terms of the applicable treaty. *But these courts did maintain that they determined their own jurisdiction.* Thus in Gongoules v. Ministere Public, the accused, charged with indecent assault, pleaded that at the time of the alleged offense he was on duty. This specious defense to an act having nothing to do with military service was dismissed by the Court of Cassation.

"A United States district court in United States v. Thierrchens rejected a plea to the jurisdiction of the court based on the contention that the defendant was acting in his official capacity. The defendant, Max Thierrchens, was the commanding officer of the German public vessel Prinz Eitel Friedrich which was interned in the port of Philadelphia prior to the United States entry into World War I. He was charged with smuggling chronometers into the United States from the ship and with a violation of the Mann Act in that he aided, assisted and induced 'a woman to come from Ithaca, New York, to the city of Philadelphia.' *The court stated that even assuming that the doctrine of the immunity of the officers of a visiting foreign warship applied, the question of his duty status at the time of the alleged smuggling should be heard at trial, but that 'even a discussion of the rule* (to the Mann Act charge) *would be lending dignity to an absurdity.' In this case quite clearly the court considered itself competent to determine the duty status of the accused.*

"Thus there is some precedent for the proposition that the courts of a receiving state may make a determination of the duty status of the accused in a criminal case, although they frequently rely for their finding on the opinion of the force to which the accused belongs. *To the extent that official duty is a substantive defense raised at trial, courts must consider the question, but insofar as the question is a preliminary one, that is, who shall determine duty status for the purpose of deciding who will act first, the*

Defense Department's position has merit. It will encourage a speedy determination of the preliminary question and enable a trial of the accused to take place without delay. Furthermore, the visiting force is in a better position than a court to evaluate the duty status of the accused. The Department seems thoroughly justified in adhering to this view. (pp. 65-68, underline supplied).

x x x

"It should be understood that 'performance of official duty' is determined initially in these agreements for the sole purpose of determining which of two countries has the right to exercise jurisdiction first. If the United States contention that this issue should be determined by the United States military authorities is accepted, it does not follow that the United States is pressing the view that this constitutes a determination of reasonability of the actor. If it were a determination of this nature then it might be argued that the United States would be estopped in attempting to convict the accused by court martial for the activity in question, particularly where the offense is alleged to have been committed pursuant to a lawful order. *The plea of the accused at trial that he is entitled to some privilege in view of an alleged duty status is a further question. It is at trial that the matter can be first adjudicated and the issue is a proper one for the trial court as a defense to the charge. The Girard case illustrates the distinction between the procedural determination of which country shall act first and the substantive question considered at the trial of whether the act was or was not one arising out of the performance of official duty. The question of who shall act first is a matter between the competing sovereigns.* It has been established as a matter of national law that this type of issue is one between the sovereigns, and there is authority for this in international practice. In permitting Japan to examine the duty status of Girard, the effect of the United States' waiver, the United States did not relinquish the contention that the offense arose from an act committed in the performance of official duty. The certificate of official duty, which could have been withdrawn, was still extant, and Girard's platoon leader testified at the trial that Girard was on duty. The waiver merely meant that a Japanese court could now examine the duty status of the accused. *It was competent*

to do this, for it is well established that 'the mere claim of a state not a party to a judicial proceeding that it has an interest in a case will not prevent the court from adjudicating the action as between the parties to it, and a court may investigate the nature of the claim to determine the merits of the defense of act of state or sovereign immunity. The soldier in a foreign criminal court remains entitled to make what use he can of the plea that his conduct was privileged in that it arose from an 'act or omission committed in the performance of official duty.' There is reason to believe that in a proper case such a defense would be sustained.

"The terminology of primary rather than exclusive jurisdiction in the status of forces agreements may seem inappropriate to describe the power to adjudicate offenses allegedly committed in the performance of official duty because the doctrine of act of state would preclude a receiving nation from exercising jurisdiction over such a defense. Nothing in the status of forces agreements indicates that the parties intended to waive the traditional application of the docrine. But the terminology does make sense so long as it refers to the power to determine whether the act was in fact one to which the doctrine is applicable. *Thus it is confirmed that in these official duty cases a distinction must be made between determining duty status to find where the case shall first be tried and determining duty status at the trial.*

"This distinction is borne out further by the observation that for the United States to assert its right to exercise jurisdiction over a soldier it must be assumed that an offense against United States law may have been committed. But if the United States asserts the primary right to exercise jurisdiction it does not mean that a criminal prosecution must follow. To require a judicial proceeding in every case where the primary right rests with the United States is not realistic. A good faith investigation should be all that is necessary. If no violation of United States law is conceivable, jurisdiction over the offense cannot be denominated 'concurrent,' and in such a case the receiving nation has the exclusive right to exercise jurisdiction. Once the place where jurisdiction is to be exercised is determined, the offending soldier can plead that he was acting lawfully within the scope of his mission. (pp. 72-

75, underline supplied).

x x x

"The court's opinion may be translated as follows: '*It is a general rule that the existence of duty status is a fact which depends upon the ultimate judgment of the judges of the merits;* and the fact of 'duty status' though recognized by the authorities who assign the duty cannot by itself be finally settled by the judgment of them alone, *for the particular circumstances of each case must be taken into account by the judges of the merits for the* precise determination of this fact of 'duty status.'" (footnote 47, pp. 66-67, underline supplied). (Foreign Jurisdiction and the American Soldier by Baldwin, 17 Wisconsin Law Review (1958).

The provision of the 1965 amendment to the U.S.-P.I. Military Bases Agreement purportedly enjoining that "status certificates" issued by the Military Commander be respected by all authorities of the Republic is inoperative, to say the least. As already discussed above, the Court cannot be bound under any circumstance by a determination of status by either the fiscal or the Commanding General. As long as the Court has jurisdiction over a criminal case. like the one at bar, any question of status to be raised in the said case *has to be tried and passed upon by this Court on the basis of evidence that must be presented before it.*

Be that as it may, the 1965 amendment still lacks Senate ratification, a matter which is precisely admitted in Note No. 70-601 of the Secretary of Foreign Affairs of the Republic of the Philippines to the United States Embassy dated March 5, 1970. Not only is the 1965 amendment lacking in Senate ratification; the clarificatory statement issued on March 25, 1970 by the very Philippine Department of Foreign Affairs on the said 1965 agreement made it crystal clear that the proposals embodied in said Note 70-601 to consider the 1965 amendment as effective during the interim period before its updating by negotiations, which was accepted by the U.S. Embassy thru its Note 133 dated March 9, 1970, *were made expressly to be without any retroactive effect before March* 5, 1970.

"It should be emphasized, however, that in the note to the American Embassy, dated March 5, 1970, the Department of Foreign Affairs said that 'in view of the mutual agreement to resume negotiations on the revision of the Military Bases Agreement . . . the Philippine Government is prepared to consider the Exchange of Notes of 10 August

> 1965 as effective during the interim period before the updating by the aforesaid negotiations of the Military Bases Agreement.' Needless to say, this should protect the position of Secretary of Justice Felix Makasiar in the case of Adolfo vs. the Court of First Instance of Zambales, since the recognition by the Department of Foreign Affairs of the effectivity of the Mendez-Blair Agreement in its note of March 5, 1970 *cannot be given retroactive effect.*" (Letter to Chronicle of Under-Secretary Ingles, dated March 25, 1970, p. 2).

Note that the above-entitled case and its incidental contempt proceedings *were docketed with the Court before March* 5, 1970 *and are therefore not to be governed by the* 1965 *amendment, even supposing* arguendo that said amendment can operate without Senate ratification.

Even if it were to be regarded as a mere executive agreement or exchange of notes not requiring Senate nod, *the* 1965 *amendment is nevertheless void insofar as it defeats the constitutional mandate vesting judicial power only in the Supreme Court and in such other courts as may be established by law.* Any executive agreement or exchange of notes which diminishes the jurisdiction of courts or judicial power over offenses committed within the Philippines amounts to a modification of existing law. Our Supreme Court has already held that an executive agreement may not repeal or amend existing law. (Gonzales v. Hechanova, G.R. No. L-21897, October 22, 1963). Undeniably, the 1965 amendment bestows upon military commanders of a foreign army judicial authority to determine facts having to do with the status of American soldiers or other persons for that matter who are charged with crimes or are facing contempt charges in Philippine courts. The Court is of opinion that, without any implementing act of Congress, an executive agreement or exchange of notes lacks validity and binding effect insofar as it affects or curtails private rights, insofar as it changes court procedure or deprives the courts of jurisdiction and inherent powers, including the power of contempt which is admittedly the most important of all. The inherent powers of courts cannot be curtailed or removed by either a treaty or an executive agreement. In Lao Ichong v. Hernandez, G.R. No. L-7995, May 31, 1957, the Supreme Court held that a treaty cannot curtail police power of the state.

> "(3) Whatever may be the true doctrine as to formally ratified treaties which conflict with the Constitution, we think that there can be no doubt that *an executive agreement, not being a transaction which is even mentioned in*

the Constitution, cannot impair Constitutional rights. Statements made in our opinion in Etlimar Societe Anonyme of Casablanca v. United States, 106 F. Supp. 191, 123 Ct. Cl. 552, which point in the other direction, are hereby overruled. The decision in the Etlimar case, *supra,* was justified by the fact that the plaintiff there sought and obtained the compensation from France to which the executive agreement there involved relegated it. In Hannevig v. United States, 84 F. Supp. 743, 114 Ct. Cl. 410, this court held that a formally ratified treaty between the United States and Norway, which relegated a Norwegian citizen who had a claim against the United States for the taking of his contract to have ships constructed in an American shipyard, to diplomatic procedures for the settlement of his claim, amounted to the withdrawal by the United States of its consent to be sued by him.

"It is probably still the law that Congress could effectively destroy a citizen's constitutional right such as, for example, the right to just compensation upon a taking of his property by the Government, by a statute withdrawing the Government's consent to be sued. But Congress have given consent to be sued for such a taking and has conferred jurisdiction upon this court to adjudicate such a suit. It would be indeed incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the Constitutional right of a citizen. In United States v. Guy W. Capps, Inc., 4 Cir., 204 F. 2d 655, *the court held that an executive agreement which conflicted with an Act of Congress was invalid."* (Seery v. United States, 127 F. Supp. 606-607, underline supplied).

"The American theory to the effect that, in the event of conflict between a *treaty* and a statute, the one which is latest in point of time shall prevail, is not applicable to the case at bar, for respondents not only admit, but, also *insist* that the contracts adverted to are *not* treaties. Said theory may be justified upon the ground that treaties to which the United States is signatory require the advice and consent of its Senate, and, hence, of a branch of the legislative department. *No such justification can be given as*

regards executive agreements not authorized by previous legislation, without completely upsetting the principle of separation of powers and the system of checks and balances which are fundamental in our constitution set up and that of the United States.

"As regards the question whether an international agreement maybe invalidated by our courts, suffice it to say that the Constitution of the Philippines has clearly settled it in the affirmative, by providing, in Section 2 of Article VIII thereof, that the Supreme Court may not be deprived 'of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in — (1) All cases in which the *constitutionality* or *validity* of any treaty, law, ordinance, or executive order or regulation is in question.' In other words, our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, *but also, when it runs counter to an act of* Congress." (Gonzales v. Hechanova, *supra*)

The manifestation filed by Colonel Moore and Atty. David dated June 5, 1970, in which, without admitting the jurisdiction of this Court, they attempted to explain the circumstances surrounding the departure of defendant Williams, cannot by itself exonerate respondents from liability for contempt. The Court cannot visualize the propriety of a contemnor attempting to explain or justify his acts before a court whose jurisdiction over him he refuses to recognize. Under such circumstance, the appropriate measure to take is simply to squarely contest the court's jurisdiction without need of explanation or justification. Nonetheless, even if it were acceptable, the said manifestation filed in behalf of respondents came too late and virtually confirms respondents' guilt. Defiance of the Court's orders has already been consummated, and the said manifestation obviously is devoid of any explanation as to why the two respondents did not appear before this Court on the dates required. Indeed, respondents' contemptuous conduct is beyond explanation and justification.

Ever mindful of the deference the judiciary owes to the executive on matters involving foreign policy, *the Court finds itself without any alternative than to resolve the matter under consideration in accordance with law without prior consultation. Obviously, the matter before the Court is not a political question and does*

not involve any foreign policy but is certainly one that affects the very honor and stability of the Court. The duty to protect and uphold the integrity and independence of the judiciary befalls primarily on the members of the bench. Political expediency is not the strongest foundation for judicial decisions, and it is undesirable to make the judiciary "a mere weathercock of foreign policy."

> "The courts should, with due regard to their constitutional position as makers of law and not makers of policy, feel confident in their power to adapt legal principle to the changing factual situations which come before them. Political expediency is not the steadiest of foundations for judicial decisions, and it is undesirable to make the judiciary 'a mere weathercock of foreign policy.' By a consistent use of the principles of private international law, a proper deference to the clearly expressed policies of the Executive, and by an intelligent use of judicial discretion, it should be possible to recognize and give effect to all such foreign acts of state which do not conflict with the fundamental concepts of justice and morality prevailing in the international community." (53 American Journal of International Law (1959) p. 852).

"Intentional disobedience of lawful court orders is a serious matter. Our system of justice — and indeed, our democracy — cannot function where laws are flouted. It is incumbent upon the judiciary not only to declare the rights of litigants fairly and impartially but also to enforce those rights where called upon to do so. Justice, the enforcement of public and private rights, is the ultimate object to be secured by our government where justice is established, peace and tranquility follow. The judiciary is that agency of government which the people have created for that purpose. *In order to make the judiciary a virile and efficient institution, which will secure justice to every member of society, the weak as well as the strong, the poor as well as the rich, the humble as well as the powerful, it is necessary that courts have the power to compel respect and obedience to their orders." If we are to succeed in the goal of maintaining a truly independent and respectable judiciary and of restoring and preserving the people's faith in its integrity, let it not be intimated that in this land judges administer justice with fear or favor; let it not be said that only the humble, the poor, and the weak are punished whereas the rich, the strong and the powerful go scot-free for committing legal transgressions or acts of disrespect and disobedience against our courts.*

In the language of Mr. Justice Ozaeta in Raquiza vs. Bradford,

supra, courts function under and by virtue of the Constitution; it is their inescapable duty to apply the law no matter on whom it falls; and it would be an astonishing manifestation of judicial timidity for the courts to hesitate to subject any person or class of persons to its mandate in a proper case for fear or lack of physical power to enforce it. In said case, he wisely admonished —

> "It is the undying glory of our democratic form of government implanted here by America herself, that no man living under it is above the law. General McArthur himself as the peerless defender of democracy, would be the first to recognize this fundamental principle, and his 'army of freemen, dedicated, with your people, to the cause of human liberty,' cannot but graciously obey the law as interpreted by the courts. We know of no law which places members of the army beyond the power and jurisdiction of the civil courts in matters affecting civil rights. In the instant case, the fact that in due time the respondents filed their returns to the order of this Court to show cause is a positive acknowledgement by them of the Court's jurisdiction over their persons." (75 Phil. 50, 71)

Having implanted in this country democratic concepts of government, the Americans should be the first to adhere to the rule of law and respect Philippine sovereignty as well as the authority of its duly constituted courts; they should be the last to flout the law, make a mockery of our Bench, and desecrate the very judicial system they established here. It smacks of highhandedness for any nation that preaches and fights for a democratic system of justice and equality among nations and men to permit its soldiers stationed in a foreign country to leave the host state while they are charged in the latter's courts with crimes or contempt. This is virtually putting them beyond the reach of the state's jurisdiction and legal processes in order to get away with trial and punishment. Under international law this is tantamount to a violation of faith since it is the duty of every guest state to abstain and to prevent its agents and, in certain cases, its subjects, from commiting any act which constitutes a violation of another state's independence or territorial or personal supremacy. (I Oppenheim, International Law, 8th ed. p. 288).

Nations and their agents are bound and expected to act in accordance with "the fundamental concepts of justice and morality prevailing in the international community." The very preamble of the United Nations Charter, to which the United States is a signatory,

enjoins reaffirmation of faith in the equality of nations large and small and the establishment of conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. Among its primordial purposes is the development of friendly relations among nations based on *respect for the principle of equal rights*, and, in the attainment of this purpose, all member nations are to act on the basis of the principle of sovereign equality and the fulfillment *in good faith* of the obligations assumed by them in accordance with the Charter.

WHEREFORE, the Court declares that respondents Col. Averill Holman and Lt. Col. Raymond Hodges' failure to produce the defendants (Williams and Lane) on February 6, 1970, and their disobedience to the Court's orders requiring them to answer the contempt charges and appear in Court on the dates hereinabove indicated, which have caused undue delay in the termination of the above-entitled criminal case, constitute indirect contempt beyond reasonable doubt, for which they are sentenced each to pay a fine of ONE THOUSAND PESOS (₱1,000.00). Pursuant to Section 7 of Rule 71, Rules of Court, the Court orders respondents Holman and Hodges to be imprisoned in the Provincial Jail of San Fernando, Pampanga, to be released only upon their compliance with their undertaking in the custody receipt, that is, *upon the surrender to this Court of defendant Bernard Williams.*

Under Section 10 of Rule 71, the execution of this order is immediate and shall not be suspended until a bond is filed by the respondents in an amount fixed by the Court, conditioned that if they appeal and the appeal be decided against them, they will abide by and perform the order.

Let copy of this order be furnished His Excellency, The President of the Philippines; The Honorable President of the Philippine Senate; The Honorable Speaker of the House of Representatives; The Honorable Chief Justice of the Supreme Court; The Honorable Secretary of Justice; and The Honorable Secretary of Foreign Affairs, for their information.

SO ORDERED.
Angeles City, June 19, 1970.

(*Sgd.*) CEFERINO S. GADDI
Judge

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