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Criminal Jurisdiction Over Visiting Armed Forces

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CHAPTER X

ON-BASE OFFENSES

The concept of the "base," [1] although it finds no place in the NATO Agreement, has been widely used in other status of forces agreements. It has a longer history than the *inter se* concept.

Oppenheim [2] was the most influential among a significant minority of text writers [3] who took the position that visiting

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[1] The word "base" seems more appropriate under modern conditions than the word "camp," commonly used in earlier discussions. As used here, it is intended to cover areas of all kinds set apart for the exclusive or primary use of the visiting forces.

[2] His much quoted statement was:

"Whenever armed forces are on foreign territory in the service of their home State, they are considered exterritorial and remain, therefore, under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the force or by other authorities of their own State. This rule, however, applies only in case the crime is committed either within the place where the force is stationed or in some place where the criminal was on duty; it does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress not on duty but for recreation and pleasure and then and there commit a crime. The local authorities are in that case competent to punish them." 1 Oppenheim, *International Law* 759 (7th ed., Lauterpacht, 1948).

However, in the latest, eighth edition, the editor notes that this is the view of some only; and that "* * * the view which has the support of the bulk of practice is that in principle members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle require specific agreement of the local State by treaty or otherwise." 1 Oppenheim, *International Law* 848 (8th ed., Lauterpacht, 1955).

Oppenheim's view was expressly rejected by Cassels, J. in *Rex* v. *Nauratil*, England, High Court, Warwick Assizes, March 11, 1942, upholding British jurisdiction where the defendant was a Czech sergeant, the victim a Czech subject, and the offence occurred in the barrack-room. [1919–1942] Ann. Dig. (Supp. Vol.) 161 (No. 85).

[3] "Such a concession should always be considered as an act of comity, and ought to be harmonized with the security and tranquility of the state, in

forces were immune from local criminal jurisdiction with respect to offenses committed within but not outside their quarters or camps. A related position was taken in the Bustamante Code.[4]

In so far as the immunity of visiting forces for on-base offenses was explained through the fiction of extraterritoriality—and with some, including Oppenheim, the fiction appears to have been a

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such fashion, always, that the organization of the army and military discipline are not imperiled.

"It is clear that the territorial sovereign implicitly renounces jurisdiction over the places occupied by the army during the time it is quartered there, and that also, in that which concerns military offenses and offenses *de droit commun* committed within the perimeter of the camp, the jurisdiction of the state to which the army belongs should prevail. The reason is that the state exists morally where the military power which represents it is found, and that the concession on the part of the other state implies in fact the temporary suspension of the exercise of jurisdiction over the territory occupied by the army.

"It ought, on the other hand, to be true that persons who belong to the army fall under the jurisdiction of the territorial sovereign, if they committed in isolation, and outside the perimeter where the army is quartered, acts which concern laws of police and territorial security. It is beyond doubt that in this case the territorial sovereign has the right to judge such persons, because it has not abandoned its rights of jurisdiction in that which concerns the individuals who compose the army, *uti singuli*, but in that which concerns the army, *uti universitas*." 1 Fiore, *Nouveau Droit International Public* 468–469 (Antoine trans., 2d ed., 1885). See also Fiore, *International Law Codified* 220–221 (5th ed., Borchard trans., 1918).

"In the absence of special agreement the troops would not be amenable to the local law, but would be under the jurisdiction of their own commanders, as long as they remained within their own lines or were away on duty, but not otherwise." Lawrence, *The Principles of International Law* 225 (7th ed. 1925).

[4] Article 299 of the Bustamante Code, annexed to the Convention on Private International Law, Final Act of the Sixth International Conference of American States, 1928, at 16, provided: "Nor are the penal laws of a State applicable to offenses committed *en el perimetro de las operaciones militares*, when it authorizes the passage through its territory of an army of another contracting State, save when they have no legal relation with that army." Barton states, 1954 *Brit. Yb. Int'l L.* 344, that the article was based on Article 140 of a prior draft Code, the work of Pessôa, and approved by a subcommittee of the Committee of Jurists of the Pan-American Union at Rio de Janeiro in 1912, which used the phrase "*en el recinto del campamento*," rather than "*en el perimetro de las operaciones militares*," and would have accorded immunity from local jurisdiction with respect to all offenses committed in that area except those committed by one local citizen against another.

factor—it has lost its footing.[5] Rejection of that fiction in the case of embassies has led to the conclusion that there is no immunity for offenses committed there.[6] If one accepts the suggestion that embassies and bases are entirely analogous, the conclusion would follow that there was no immunity for on-base offenses. It can be said, however, that military exigency requires granting immunity to an armed force, if not to the individuals who compose it, when it has the character of an organized body of men, and it has that character on a base. The analogy, it can be argued, is much closer to that of the crew of a warship while on board than to the staff of an embassy.[7] The base may, moreover, constitute a community apart, at least to a degree, from the community of the receiving state.

Advocates of both complete immunity and of no immunity for visiting forces have criticized the intermediate position, granting immunity only for "on-base" offenses. They object that, although immunity for "on-base" offenses may have made sense when visiting forces garrisoned a fortress,[8] it does not under

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[5] Both Barton, 1954 Brit. Yb. Int'l L. 349, who rejects the fiction, and the U.S. Memorandum, which refers to it with seeming approval as one of the bases for complete immunity, Hearings Before the House Committee on Foreign Affairs on H.J. Res. 309, Part I, 84th Cong., 1st Sess., 417 (1955), point out that a consistent application of the fiction would not result in according immunity only for the acts of visiting forces in their camps. Barton points out that it would logically give immunity to any person who committed an offense in a camp. Both Barton and the Memorandum state it would require according immunity to a soldier wherever he was, on what Barton refers to as a "walking island" theory—a much more dubious proposition.

[6] "The ground occupied by an embassy is not the territory of the foreign State. * * * The lawfulness or unlawfulness of acts there committed is determined by the territorial sovereign. If an attaché commits an offense within the precincts of an embassy, his immunity from prosecution is not because he has not violated the local law, but rather for the reason that the individual is exempt from prosecution. If a person not so exempt, or whose immunity is waived, similarly commits a crime therein, the territorial sovereign, if it secures custody of the offender, may subject him to prosecution, even though its criminal code normally does not contemplate the punishment of one who commits an offense outside of the national domain." 2 Hyde, *International Law* 1285–86 (2d ed. 1948).

[7] *Ministère Public* v. *Tsoukharis*, Egypt, Mixed Court of Cassation, Feb. 8, 1943, [1943–1945] Ann. Dig. 150 (No. 40); *Chung Chi Cheung* v. *The King* [1939] A.C. 160 (P.C.). See Fiore, *op. cit. supra*, note 3.

[8] "This supposed rule of place * * * probably arose out of the garrisoning

modern conditions of total war [9] and is too vague and indefinite to permit practical application.[10]

There is weight to these objections, and in any event Oppenheim's position never achieved such wide acceptance as to give it the status of a rule of international law.[11] There is, however, a

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of troops in places particularly limited or defined by agreement. These garrisons were admitted for the protection of weak states, or to assure the carrying out of some treaty provisions or other obligation. Of course, in such a case, the military authorities would not have exterritorial jurisdiction over their forces outside of the area defined, since such forces would not have the consent of the local sovereign to be outside of such area." U.S. Memorandum, Hearings on H.J. Res. 309, *op. cit. supra*, note 5, at 416.

[9] Barton, 1952 Brit. Yb. Int'l L. 12; King, 36 A.J.I.L. 559 (1942); U.S. Memorandum, Hearings on H.J. Res. 309, *op. cit. supra*, note 5, at 416; Canadian Factum, *id.*, p. 431.

[10] U.S. Memorandum, Hearings on H.J. Res. 309, *op. cit. supra*, note 5, at 416; Canadian Factum, *id.*, at 431. Barton notes the argument, 1954 Brit. Yb. Int'l L. 350, that permission to occupy an area may be considered an implied grant of the exclusive right to exercise jurisdiction over offenses committed within the area by the visiting forces, and concludes "When the grant of an area * * * actually amounts to a lease or an occupation license, there may be strong arguments in favour of the view that the writ of the local sovereign does not run within that area. Agreements relating to the peaceful military occupation of territory would seem to support such arguments. But where the grant of an area for the use of the visiting forces falls short of such a disposition of territory, there would appear to be no justification for concluding that the juridical consequences of an intra-castral offence committed by a member of a visiting force differ from those of any other offence. The absence of this distinction, as a test for determining whether jurisdiction ought to be exercised, from all the jurisdictional agreements concluded during the Second World War, and, of even greater significance, from the multilateral agreements concluded within the last ten years, may, it seems, be acceptable as cogent evidence not only that the differentiation has no place in international law, but also that it has no utility in practice."

That the form employed in making an area available for occupation by visiting forces can be described as a lease or license may not be irrelevant, but other factors more directly related to the interests of the states concerned and to the recognized bases of jurisdiction and of immunities, appear entitled to greater weight.

[11] It will be recalled that Oppenheim's position appears largely to have shaped the British attitude in the World War I Anglo-American negotiations, and again in World War II.

The Mixed Courts of Egypt were prepared to recognize an immunity so limited, seemingly influenced in part by the analogy of warships and their crews. See *Manuel* v. *Ministère Public*, Court of Cassation [1943–1945] Ann. Dig., No. 42; *Suclozav* v. *Ministère Public*, Journal des Tribunaux Mixtes,

wide gulf between saying that international law does not and should not accord exclusive jurisdiction to a sending state for on-base offenses, and saying that the concept of a base "has no utility in practice." On the contrary, there is much reason for saying that the difference between the situation on and off a base is significant enough to justify a different allocation of jurisdiction over offenses committed on and those committed off a base. The difference need not be between exclusive jurisdiction in the sending state for on-base offenses and in the receiving state for off-base offenses.

The appropriateness of utilizing the concept of a base in allocating jurisdiction has been recognized in a significant number of status of forces agreements. The United States, early in the century, by treaty acquired with respect to the Canal Zone [12]

August 24–25, 1945, No. 3504, p. 3. Judge Brinton notes that "The claim [of complete immunity] was rejected in favor of the principle which limits exemption to offenses committed within military precincts or while the members of the forces were engaged in the execution of a military duty." "The Egyptian Mixed Courts and Foreign Armed Forces," 40 A.J.I.L. 737, 739 (1946). Barton suggests, 1954 Brit. Yb. Int'l L. 346, that this seeming willingness to recognize the limited immunity may have been prompted by an "assimilation of the camps of the other foreign forces stationed in Egypt" to the British camps, covered by the Anglo-Egyptian Convention of August 26, 1936, U.K.T.S., No. 6 (1937). The Convention provided in Article 5 that "Without prejudice to the fact that British camps are Egyptian territory, the said camps shall be inviolable and shall be subject to the exclusive control and authority of the Appropriate British Authority." The Mixed Court, however, had no difficulty in distinguishing between the status of the forces of other countries and British forces with respect to offenses committed outside camps, and the immunity of the British forces with respect to such offenses stems from the same treaty.

On the other hand, several of the early cases which came before the Mixed Court involved sailors from warships in Egyptian harbors, and the analogy may well have suggested itself. Barton, *supra*, at 347.

Colonel King vigorously criticized the decisions of the Mixed Courts on the ground, among others, that they "applied to land troops a resolution relating only to naval forces." 40 A.J.I.L. 260 (1946).

[12] The Convention of February 26, 1904 with Panama, 2 Malloy, *Treaties*, etc., 1349 (1910), provided in Article III that "The Republic of Panama grants to the United States all the rights, power and authority within the zone * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and water are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

The Convention also granted the United States certain rights outside the

and sites for naval bases in Cuba (Guantanamo Bay)[13] and Nicaragua,[14] exclusive jurisdiction not only over offenses committed by its forces, but over all offenses committed in the designated areas. None of these agreements contained any express provision regarding offenses committed by American forces outside the designated areas, and it is understood that the United States does not claim exclusive jurisdiction with respect to such offenses.[15]

More important, the first of the World War II agreements on jurisdiction, the Anglo-American agreement of March 27, 1941 relating to the Leased Bases, in significant degree made jurisdiction depend on whether the offense occurred within or without a Leased Area. With respect to American troops, and the civilian component, the United States was given primary jurisdiction over security offenses, and offenses within a Leased Area; it had only concurrent jurisdiction over other offenses.[16] When the Leased

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Zone, including, in Article VII, the "right and authority * * * for the maintenance of public order in the cities of Panama and Colon and the territories and harbors adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order," and in Article XXIII the right to use its police and its land and naval forces for the safety and protection of the Canal if it should become necessary. Article XVI contemplated the making of arrangements for delivery to Panama of persons who committed offenses outside the Zone and were found in the Zone.

[13] The Agreement of February 23, 1903, 1 Malloy, Treaties, etc., 359 (1910) provided in Article III:

> "While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas * * * the United States shall exercise complete jurisdiction and control over and within said areas * * *."

The Lease of July 2, 1903, *id.*, at 360, provided in Article 4 for delivery of fugitives from justice charged with crimes or misdemeanors against Cuban law who took refuge within the areas.

[14] See the Canal Convention of August 5, 1914, (Art. 2) 39 Stat. 1661. No base was established pursuant to the rights granted by the treaty.

[15] See the statement of General Hickman, *infra*, page 218, note 13.

[16] Article IV provided in part that in any case in which "(B) A British subject shall be charged with having committed any such [security] offence within a leased area and shall be apprehended therein; or (C) A person other than a British subject shall be charged with having committed an offence of any other nature within a leased area, the United States shall

Bases agreement was revised in 1950, whether an offense occurred within or without a leased area was again taken into account in allocating jurisdiction.[17]

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have the absolute right in the first instance to assume and exercise jurisdiction with respect to such offence."

The phrase "A person other than a British subject" included a member of the American forces, and since the agreement did not expressly state who should have jurisdiction over offenses off a leased area, the implication was clear that jurisdiction over such offenses was to be concurrent.

Another World War II agreement, that of March 31, 1942 with Liberia, 23 UNTS 302 (1948–49), gave the United States exclusive jurisdiction over offenses committed by others than Liberian nationals on the airports and other defense areas established in Liberia. It also granted exclusive jurisdiction to the United States over United States military and civilian personnel and their families for offenses outside the defense areas.

Article 2 provided:

"The Republic of Liberia retains sovereignty over all such airports, fortifications and other defense areas as may be established under the rights above granted. The Government of the United States during the life of this Agreement shall have exclusive jurisdiction over any such airports and defense areas in Liberia and over the military and civilian personnel of the Government of the United States and their families within the airports, fortifications and other defense areas, as well as over all other persons within such areas except Liberian citizens.

"It is understood, however, that the Government of the United States may turn over to the Liberian authorities for trial and punishment any person committing an offense in such defense areas. And the Liberian authorities will turn over to the United States authorities for trial and punishment any of the United States military or civilian personnel and their families who may commit offenses outside such defense areas. The Liberian authorities and the United States authorities will take adequate measures to insure the prosecution and punishment in cases of conviction of all such offenders, it being understood that the relevant evidence shall be furnished reciprocally to the two authorities."

[17] The United States is by Article IV (1) given:

"(a) Where the accused is a member of a United States force,

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(ii) if a state of war does not exist, exclusive jurisdiction over security offences wherever committed and United States interest offenses committed inside the Leased Areas; concurrent jurisdiction over all other offenses wherever committed.

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(c) Where the accused is not a member of a United States force, a British subject or a local alien, but is a person subject to United States military or naval law,

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(ii) if a state of war does not exist and there is no civil court of the

The Agreement of March 17, 1947 with the Philippines gives the United States the right to use certain bases in the Philippines. The provisions of the Agreement on jurisdiction [18] give much greater reach to the on-base concept than the revised Leased Bases Agreements. The United States has jurisdiction [19] over all offenses committed on a base, by and against whomever they may be committed "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." United States jurisdiction, in other words, reaches beyond the furthest point to which the *inter se* concept can carry—an offense by a member of the armed forces, the civilian component or a dependent against a person in any of those groups—to include both an offense by a person in any of those groups against a stranger to the American forces, including a Philippine citizen, whether committed in the

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United States sitting in the Territory, exclusive jurisdiction over security offenses which are not punishable under the law of the Territory, concurrent jurisdiction over all other offenses committed inside the Leased Areas."

Other provisions, e.g., Article IV (1)(b), (1)(c), iii, 1(d), as well as those relating to jurisdiction in time of war also distinguish between offenses committed within and without a leased area.

The Agreement relating to the Bahama Islands Long Range Proving Ground, contains almost identical provisions.

The Leased Bases Agreement was modified by an Exchange of Notes of February 13, 1952 and March 14, 1952 between the United States and Canada, 3 UST 4271 (1952), with respect to the bases in Newfoundland. Subsequently, by an Exchange of Notes of April 28, 1952 and April 30, 1952 between the United States and Canada, 5 UST 2139, TIAS 3074, 235 U.N.T.S. 270 (1956), it was agreed that the NATO Status of Forces Agreement should be made applicable to all United States forces in Canada, the United States Note stating that "Both the United States Government and the Canadian Government agree that uniform treatment of United States forces throughout Canada under the NATO Status of Forces Agreement would be in the interest of both countries and would make for simplification of administration.

[18] Article XIII. The United States personnel employed in the military assistance program in the Philippines under the Agreement of March 21, 1947 for military assistance, 45 U.N.T.S. 47 (1949–50) and 70 U.N.T.S. 280 (1950) are by an Exchange of Notes of February 24, March 11 and 13, 1950, 82 U.N.T.S. 332 (1951), given "the privileges and immunities accorded to accredited United States personnel of that Embassy."

[19] Interpreted, in *People* v. *Acierto*, Philippines, Sup. Ct., Jan. 30, 1953, Int. L. Rep. 1953, 148 as only "prior or preferential but not exclusive."

performance of duty or not and, nominally, by a stranger to the American forces, including a Philippine citizen, against a person in any of those groups.

The jurisdiction of the United States with respect to off-base offenses is, on the other hand, very limited.[20] It embraces only (1) the narrowest range of *inter se* offenses, i.e., those in which both the offender and the victim are members of the armed forces; (2) security offenses; and (3) offenses committed by a member of the armed forces (not the civilian component) "while engaged in the actual performance of a specific military duty."

There has been much objection on the Philippine side to the provisions regarding jurisdiction over on-base offenses. Negotiations for the revision of the Agreement have been going on intermittently since 1956. A resolution of the Philippine Senate in March 1959 asked for Philippine jurisdiction over all cases arising on the bases, but recognized there might be justifiable exceptions.[21] It may be assumed that the Philippines' concern is primarily due to the fact that the United States has exclusive jurisdiction over off-duty offenses by Americans against Philippine citizens, and, nominally, over offenses by others than Americans, committed on the bases. It was reported that the United States was prepared to accede to the Philippines' position on these points, but a second issue—who should determine whether an offense was committed in the performance of duty—was not resolved.[22]

The Agreement with the Dominican Republic of November 26, 1951, which related to the Long Range Proving Ground, resembled the Philippines Agreement in its allocation of jurisdic-

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[20] The Agreement contemplates that the local fiscal (prosecuting attorney) may waive the jurisdiction reserved to the Philippines "over all other offenses committed outside the bases by any member of the armed forces," and if he does so the United States is free to exercise jurisdiction. Article XIII, 4.

[21] The resolution, as published in the Manila press on March 22, 1959, asked in part for:

"2. Application of the laws of the Philippines in the military bases.

"3. Jurisdiction of Philippine courts over all cases arising in the military bases, including criminal offenses committed by military personnel in violation of Philippine laws, and if justifiable exceptions are recognized, the final determination of whether a particular case is within the exception must rest in Philippine authorities."

[22] *The New York Times*, May 10, 1959, p. 25, col. 3.

tion with respect to on-base offenses.[23] The exclusive jurisdiction granted the United States was narrower in that it extended only to those subject to United States military law, but when one subject to that law committed an offense on a Site, the nationality of the victim and whether the offense was committed in the performance of duty were irrelevant. The exclusive jurisdiction granted the United States over off-base offenses was, however, much more extensive than under the Philippines Agreement. It had such jurisdiction except where the victim was a Dominican national or local alien; in the excepted cases, the Mixed Military Commission decided who should exercise jurisdiction.

The Agreement with Libya of September 9, 1954 is like the Dominican Agreement in that exclusive American jurisdiction is limited to "members of the United States forces" but with respect to such persons extends to all offenses "committed solely within the agreed areas." With respect to jurisdiction over off-base offenses the Libyan Agreement is in form like the Philippines Agreement. The term "members of the United States forces" is, however, so broadly defined that every *inter se* offense, in the widest connotation of that term, and every offense committed by any American in the performance of duty is subject to the exclusive jurisdiction of the United States. In substance, therefore, the Libyan Agreement more nearly parallels the Dominican Agreement with respect to off-base offenses also.

The Agreement with Saudi Arabia concerning the Dhahran Airfield[24] comes nearest to allocating jurisdiction entirely in terms of the place of the offense. It grants the United States exclusive jurisdiction over offenses committed by United States military personnel (narrowly defined) within a prescribed area; Saudi Arabia has concurrent jurisdiction over offenses committed outside that area. The Agreement is unusual, however, in that the prescribed area includes not only the base but also certain described areas outside the base. It is understood that these areas comprise all those to which United States military personnel may properly go, and no American soldier has ever been tried by a Saudi Arabian court.

The Agreements cited which assign some role to the concept of a base in allocating jurisdiction by no means give it the same role.

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[23] Article XV.

[24] Par. 13, Exchange of Notes Between the United States and Saudi Arabia Concerning an Air Base at Dhahran, June 18, 1951. 2 UST 1466; TIAS 2290.

One would not expect they would, and the variations do not indicate that the concept has no proper role in allocating jurisdiction.

The term "base" has no single meaning, and many factors are relevant to the issue of whether, in any particular instance, a different allocation of jurisdiction over on-base and off-base offenses is appropriate. The base may be a naval base, an air base, a military headquarters or a housing area. The commander of the visiting forces may be in sole command on the base, or share command with an officer of the local forces. The visiting forces alone may occupy the base, or share it with a contingent of the local forces. The base may be physically separate from the surrounding area—even remote from any other inhabited area—or a building or only a part of a building in a city. Facilities may be built and the visiting forces supplied largely with materials and supplies brought from abroad, or the base may draw heavily on the local economy. Many, few or even no local inhabitants may be employed on the base. Likenesses or differences in language, culture, race and religion, physical proximity and the availability of transportation facilities may encourage or discourage intermingling of the visiting forces and the local inhabitants. Many combinations of these factors can so set the base apart from the surrounding area as to justify a different treatment of the problem of criminal jurisdiction on and off the base.

The above suggests, therefore, that a base—particularly one of the character of a naval or air base—is an integrated unit, an instrumentality of the sending state, manned by an organized body of men, engaged in a common, coordinated effort, analogous to a warship. It can be said, then, that any exercise of jurisdiction by the local authorities within a base, or with respect to acts which occur within a base by those who man it, will in some degree interfere with the effective operation of the base. There is, then, a functional reason, more compelling than can be invoked with respect to offenses committed by a member of the armed forces when he is not on a base, for according the sending state exclusive jurisdiction over on-base offenses.

The soundness of this approach can be better judged if one bears in mind that the concept of a base is material in other contexts. Also involved are such matters as the control of land, sea and air traffic to and in the area, control over the importa-

tion, sale and taxation of goods and materials, immigration, the applicability of local labor laws and many other matters which likewise bear on the effective operation of the base.

Additionally, it can be said that those who man a base, particularly if they are also housed there, constitute a more or less separate community, and offenses within that community do not disturb the "peace of the port." It is useful in this regard to bear in mind the reasons of policy, rather than abstract principle, discussed in the first chapter, which support the territorial principle. Broadly, they relate to the responsibility of the state for the welfare of those within its borders. To the extent that a base is a community apart, the responsibility and correlative concern of the receiving state is in fact diminished and that of the sending state increased. This in no way implies that the receiving state is not "sovereign" in the base area. The reference is to a sociological and not a political fact.

It may be said that this simply restates the problem of the *inter se* offense, and there is no occasion to complicate that problem by bringing in the matter of the place of the offense. It is submitted that the two concepts are, rather, correlative. There is a difference between an altercation between two members of a visiting force on a base, and between the same two men in a local pub. There is also a difference between an altercation between a member of a visiting force and a non-member on a base, and between the same two men in a local pub. The *inter se* concept covers the first pair of these situations; if the offense is committed on base, the on-base concept reinforces the *inter se* concept.[25] This concept does not cover the second pair of situations, but it can still be argued that if the accused is a member of the visiting force and the offense is committed on base, the sending state should have jurisdiction, even though the victim is not a member of the force and, presumably, is a national of the receiving state. Nothing in *Reid* v. *Covert* [26] affects this situation, if the accused is a member of the armed forces rather than of the civilian component or a dependent. If, however, the accused is a non-member of the armed forces and particularly if he is also

[25] It is with respect to offences which are both *inter se* and on base that the United States is given exclusive jurisdiction under Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain, Paragraph 7, quoted *supra* p. 195, note 28.

[26] *Supra*, p. 157, note 2.

a national of the receiving state, the argument for allocating jurisdiction to the sending state merely because the offense occurred on base becomes very weak indeed, even if the victim was a member of the force. It also seems clear that a United States court-martial could not in any event try the accused. *Reid* v. *Covert* and its companion cases all arose under Article 2 (11) of the Uniform Code of Military Justice. Article 2 (12) makes subject to the Code "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned * * *." [27] If a United States court-martial cannot try a member of the civilian component or a dependent, it can hardly try an alien who is neither. Nor would the fact that the offense occurred on a base appear to make a material difference. Such an extension of the *Insular Cases* [28] is not to be anticipated.

The significance of the on-base concept for other purposes than those discussed here, e.g., on the right to exercise the power to police, will be taken up in a later chapter.

[27] 70A Stat. 37, 10 U.S.C.A. 802.

[28] 1 Willoughby, *The Constitutional Law of the United States*, c. xxxi (2d ed., 1929).