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Criminal Jurisdiction Over Visiting Armed Forces

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CHAPTER IX

INTER SE OFFENSES

Certain status of forces treaties, including the NATO Agreement,¹ in allocating jurisdiction, take into account not only the status of the accused but also of the victim, by giving the sending state exclusive or primary jurisdiction over *inter se* offenses. The concept of an *inter se* offense is necessarily dual. The attitude is reflected that if the relationship of both the accused and the victim to the sending state is sufficiently close and to the receiving state sufficiently remote, it is appropriate to give the sending state exclusive or primary jurisdiction.

The place given the concept of the *inter se* offense is not the same in all the agreements. In part, this is because other concepts, such as that of the on-base offense, cut across the field. This may also be because in some agreements the fact that an offense is *inter se* gives the sending state exclusive jurisdiction, rather than only primary jurisdiction. In addition, however, it seems that in different circumstances, different judgments have been made regarding what relationships of the accused and of the victim to the sending and receiving states justify invoking the concept.

The basic issue is whether the relationship of the victim to either state is relevant at all in allocating jurisdiction over an offense. The passive personality principle, according to which jurisdiction may be predicated on the nationality of the victim, never won wide acceptance in international law.² There is, however, a wide difference between asserting jurisdiction solely on the

¹ Article VII 3(a) provides "The military authorities of the sending state shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent."

² *Supra*, page 13.

ground that the victim is a national of the state and taking the nationality of the victim into account as one factor among many in allocating jurisdiction.

The interest of a state in whose territory an offense occurs is in fact influenced by the nationality of the victim. This has not led to any general limitation of the territorial principle. It has, however, been reflected in the accepted rules or in the practice in resolving some jurisdictional conflicts where a state other than the territorial state has a legitimate basis for claiming concurrent jurisdiction. Some states have limited their assertion of jurisdiction under the nationality principle to cases in which the victim was also a national.³ The clearest case, however, of weighing the relative closeness of the victim to the sending and receiving state has been where an offense was committed on a merchant vessel in a foreign port. If the peace of the port is not disturbed and the victim is a fellow member of the crew, then, even though he may be a national of the littoral state, the flag state is, in practice, given primary jurisdiction. Where, however, the victim is a stranger to the vessel (which normally means he is a national of the littoral state) jurisdiction is exercised by the littoral state.⁴ It has been suggested that the same distinction should be made where an offense is committed on a warship in a foreign port.⁵ No such rule has been urged with respect to offenses on shore—all offenses are subject to the jurisdiction of the littoral state, regardless of the relationship of the victim to either state, except, perhaps, on-duty offenses by a member of a warship's crew. But the littoral state has in practice often drawn the same line, waiving its prior claim to jurisdiction where the victim was a fellow member of the crew.⁶ Where both the accused and the victim were members of the crews of warships, the littoral state has waived its jurisdiction, even where the offense was murder.⁷ Where visiting land forces were concerned, the United Kingdom, although it claimed concurrent jurisdiction, normally did not exercise jurisdiction where the victim was also a member of the

³ *Supra*, page 11.

⁴ *Supra*, page 51.

⁵ *Supra*, page 68.

⁶ *Supra*, page 75.

⁷ See the incident cited by Colombos, *op. cit. supra*, p. 74, note 30, at 203-204.

visiting force. There is evidence that this attitude has general support.⁸

This is not to say that the territorial state is interested in exercising jurisdiction only when the victim is its national. There are many policy reasons which prompt states to assert jurisdiction on the territorial principle. One, but only one, is to protect its own nationals by punishing those who injure them or their property. In balancing those reasons against the considerations which support giving at least primary jurisdiction to the sending state over visiting forces, the fact the victim is a member of the visiting force, rather than a national of the receiving state, may, however, tip the scale.

It has been said that to grant exclusive or primary jurisdiction to the sending state over *inter se* offenses constitutes a

⁸ During the debate on the United States of America (Visiting Forces) Act, 1942, Mr. Henderson said: "I can understand the desire of the American Government for exclusive jurisdiction, and of course no question arises so far as that is concerned with their own subjects and with crimes against the person and property of other Americans. But when we come to deal with crimes against British subjects, then at once we enter into a very difficult field, where it is very necessary that we should think out how friction can be avoided and how any feeling that there has been partiality or unfairness can be prevented. * * *" 382 H.C. Deb., (5th ser.) 909 (1942).

In the debate on the Bill to implement the NATO Agreement, several members expressed the same attitude. Thus, Mr. Fletcher said: "I can see a considerable amount of force in the argument that where an offence is committed against a member of a foreign force, in this country, or against the property of a foreign force, it may be well that in those cases the foreign service court should have jurisdiction. But the case is totally different where the offense is committed not against a foreigner or his country but against a British subject. It is that class of case which is really causing the greatest concern among those who are troubled about this Bill. Therefore, I would like to exclude from Clause 3 any offense committed against a British subject, even though it is committed in the course of duty by a member of a foreign force." 505 H.C. Deb. (5th ser.) 1158, (1952). See also the comments of Mr. Stewart, *id.*, at 1161, and of Mr. Strachey, *id.*, at 578 (1952), and the instances cited, *infra*, p. 223, where immunity for offenses committed in performance of duty was objected to because it would apply where the victim was a national of the receiving state.

See, however, *Rex v. Nauratil*, England, High Court, Warwick Assizes, March 11, 1942, [1919-1942] Ann. Dig. (Supp. Vol.) 161 (No. 85), in which Cassels, J. said: "It is said I ought to take into consideration the fact that only Czechoslovak soldiers and citizens are concerned in that matter, which, in fact, arose within the lines of the camp. I cannot say that there is a tremendous force in that argument. * * *"

modern form of extraterritoriality, granted to protect the individual offender rather than his state.⁹ It is submitted that this comes too near to saying that the territorial principle is rooted in, or itself embodies, a single rather than a complex of policy considerations, opposed, where armed forces are concerned, by a single functional basis for overriding the territorial principle and granting immunity. Allocating jurisdiction over visiting forces involves balancing a whole complex of interests of both states. Specifically, it can be said that there is always some basis for according immunity to a member of a visiting force, even for a private act against a stranger to the force. The basis may, in some situations, be compelling; in others, particularly when it is in itself relatively weak, it may be outweighed by conflicting interests of the receiving state. The fact that immunity is denied when the victim is a national of the receiving state does not imply that there is no basis for the immunity, but merely that it is not sufficiently compelling. By the same token, the fact the immunity is granted only when the victim is a member of the military community does not mean the immunity lacks a functional basis. No one would deny that the desire to protect the individuals in its armed forces from the jurisdiction of foreign courts has added vigor to the demands of sending states for immunity. This does not mean it has alone motivated those demands.

⁹ "The other category of offenses as to which the receiving state is denied primary jurisdiction consists of crimes committed by a member of the armed forces against persons forming part of the military community. It is difficult to associate this qualified immunity with the need of protecting the sending state in its sovereign functions. It is true that jurisdiction over these offenses may assist the military authorities of the sending state to maintain discipline, but why should the dividing line between the jurisdiction to maintain discipline be drawn on the basis of the nationality of the victim and the calling he pursues? Candor compels one to admit that this primary jurisdiction over offenses committed against other members of the military community is a modern form of extraterritoriality. * * *

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"The concession to the sending state of primary jurisdiction over offenses committed within the military community and, to a much more limited extent, over offenses committed while the individual is in the performance of official duties thus appears to be grounded in a desire to protect the individual, rather than the state." R.R. Baxter, "Jurisdiction Over Visiting Forces and the Development of International Law," 52 Proceedings Am. Soc'y Int'l L. 174, 175-176 (1958).

The NATO Agreement gives a measure of immunity to members of the visiting force and to the civilian component but not to dependents. An offense can be *inter se* only if committed by a member of the force or the civilian component. An offense by a member of either group is, however, *inter se* if it is committed against a member of the force or of the civilian component or a dependent. The record is not clear as to why the distinction was made. Possibly there is reflected the desire to protect a member of the visiting force or civilian component but not a dependent. More probably, there was thought to be a persuasive reason for giving primary jurisdiction to the sending state over members of its military forces and civilian components. That reason was thought to be sufficiently compelling when the victim was a dependent, as well as when he was a member of the visiting force or the civilian component, but not strong enough to prevail when he was a stranger to the force. At the same time it was felt—as it consistently could be—that there was never a sufficient basis for giving treaty status to a dependent, regardless of the status of the victim.¹⁰

The revised Leased Bases Agreement and Bahama Islands Agreement are particularly interesting because the phrase used to describe *inter se* offenses is “United States interest offences.”¹¹

¹⁰ It may be urged that if this was the approach of the NATO negotiators, they should, to be consistent, have defined the civilian component in two different ways, eliminating the limitation excluding nationals of the receiving state in defining those members of the civilian component an offense against whom would be within the community, since the limitation does not appear in the definition of dependents, which is relevant only for this purpose. Two answers suggest themselves: (1) The failure to make the distinction may be an accident of draftsmanship of the type that is inevitable in a tightly drafted series of interlocking clauses; (2) A dependent, even though a national of the receiving state, is much more a member of the military community than a member of the civilian component, e.g., an employee of the PX or Naval Exchange, who is a national of the receiving state.

¹¹ Article IV(9) (f) of the revised Leased Bases Agreement reads:

“(f) ‘United States interest offense’ means an offense which (excluding the general interest of the Government of the Territory in the maintenance of law and order therein) is solely against the interests of the Government of the United States of America or against any person (not being a British subject or local alien) or property (not being property of a British subject or local alien) present in the Territory by reason only of service or employment in connexion with the

The phrase is apt in suggesting the motives for the use of the concept. The concept is, however, given a relatively limited place in these agreements, perhaps because jurisdiction is allocated largely with reference to whether an offense was committed on or off a Leased Area or Site and because the agreements do not provide for a primary right to exercise jurisdiction where there is concurrent jurisdiction. It is, however, the basis for according the United States exclusive jurisdiction in two situations. If a state of war does not exist, the United States has exclusive jurisdiction over security offenses and over United States interest offenses committed inside a Leased Area or Site by a member of its forces.¹² This is the only situation in which, in peacetime, the fact that the offense is *inter se* is relevant. If an offense is committed outside a Leased Area or Site by a member of the American forces or anywhere by a member of the civilian component, the allegiance of the victim is irrelevant. If, on the other hand, a state of war exists, the United States has exclusive jurisdiction over members of the American forces for any offense and also is given exclusive jurisdiction over security offenses and United States interest offenses committed within a Leased Area or Site if 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."¹³

These agreements parallel the NATO Agreement in delineating the classes to which an accused must belong before jurisdiction may be claimed by the sending state on the ground the offense was *inter se*, even to excluding members of the civilian component who are nationals of the receiving state. They differ in fixing the classes to which the victim must belong before an offense can be classified as *inter se*, excluding dependents.¹⁴

construction, maintenance, operation or defense of the Bases."

The phrase "British subject" is defined in (a) of the same paragraph to exclude a member of the United States force, but not of the civilian component. See Article V(9)(c) and Article I(6) of the Bahama Islands Agreement.

¹² Article IV(1)(a)(ii) of the Leased Bases Agreement and Article V(1)(a)(ii) of the Bahama Islands Agreement. The Agreement with the Federation of the West Indies is, however, substantially the same as the NATO Agreement. See Article IX(3), and Article I.

¹³ Article IV(1)(c)(i) of the Leased Bases Agreement and Article V(1)(c)(i) of the Bahama Islands Agreement.

¹⁴ Articles cited note 11, *supra*.

One may speculate regarding the reasons for setting the particular limits which define a United States interest offense and prescribe the relevance of the concept in these Agreements. The fact that the United States is given exclusive jurisdiction over on-base offenses by a member of the civilian component if committed against a member of its forces or the civilian component in time of war, but not in time of peace, strongly supports the view that the basis for the immunity is functional, that is, stems from military exigency. A state may be interested in protecting the individuals in its service from the jurisdiction of foreign courts, but it is not likely to be more interested in doing so in time of war than in time of peace. There is, however, a greater functional basis for claiming immunity in time of war.

The Philippines Agreement, to an even greater degree than the revised Leased Bases Agreement, allocates jurisdiction according to whether the offense was committed within or outside a base. The United States has virtually exclusive jurisdiction over all on-base offenses; hence there is no room for the concept of the *inter se* offense. (It is worth reminding oneself at this point, however, that the on-base concept is closely related to the concept of the *inter se* offense.) The Philippines Agreement, nevertheless, exempts from this grant of exclusive jurisdiction to the United States offenses "where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty)."¹⁵ This clause recognizes partially the interest of the receiving state in punishing those who offend against its citizens—an interest which is more completely recognized in other agreements. The Philippines object to their Agreement precisely because the recognition of this interest is partial, and jurisdiction is not accorded to the Philippines in all cases of private acts against Philippine nationals. It may be the Philippines would not object to an agreement which gave the same recognition to the concept of an *inter se* offense as does the NATO Agreement.

On the other hand, the Philippines Agreement does give a role, though a very limited role, to the concept in allocating jurisdiction over off-base offenses. The United States is given exclusive jurisdiction over "any offense committed outside the bases by any member of the armed forces of the United States in which the

¹⁵ Article XIII, 1 (c).

offended party is also a member of the armed forces of the United States.”¹⁶ The fact that an off-base offense by a member of the armed forces is against a member of the civilian component or a dependent does not give the United States jurisdiction. Neither does the United States have jurisdiction over an off-base offense committed by a member of the civilian component or a dependent against a member of the armed forces or of the civilian component or a dependent.¹⁷

The Agreement with Libya in this respect contrasts markedly with the Philippine Agreement. The United States has exclusive jurisdiction over “members of the United States forces” for “offenses committed solely within the agreed areas” and for “offenses solely against the property of the Government of the United States of America, or against the person or property of another member of the United States forces.”¹⁸ The phrase “United States forces” is, however, defined in such broad terms¹⁹ that an offense by a member of the armed forces or of the civilian component or a dependent against a person in any of these groups (excluding Libyan nationals), wherever committed, falls under American jurisdiction. The situation with respect to on-base offenses, on the other hand, parallels that in the Philippines.²⁰

Reid v. Covert and its companion cases²¹ have not changed the

¹⁶ Article XIII, 1 (b).

¹⁷ The Agreement contemplates that the local fiscal (prosecuting attorney) may waive jurisdiction in these and other cases, in which event the United States is free to exercise jurisdiction. See Article XIII, 4.

¹⁸ Article XX (1) (b) and (a).

¹⁹ “‘United States forces’ includes personnel belonging to the armed services of the United States of America and accompanying civilian personnel who are employed by or serving with such services (including the dependents of such military and civilian personnel), who are not nationals of, nor ordinarily resident in Libya; and who are in the territory of Libya in connection with operations under the present Agreement.” Article XXVIII.

²⁰ The allocation of jurisdiction under the Agreement with the Dominican Republic resembled that under the Libyan Agreement. The United States had exclusive jurisdiction over all offenses committed in the Republic by members of the United States forces and others subject to United States military law, except Dominican nationals or local aliens. The one exception was with respect to offenses committed outside the sites against a Dominican national or local alien; in such cases, the Mixed Military Commission decided who should exercise jurisdiction. Article XV (1) (a) and (b).

²¹ *Supra*, p. 157, note 2.

reach of the concept of the *inter se* offense. It is true that if the accused is not a member of the armed forces, an American court-martial cannot exercise jurisdiction, even though the offense is *inter se*, e.g., by a member of the civilian component against a dependent. If the accused is a member of the armed forces, however, and the victim is either a member of the civilian component or a dependent, the offense is still *inter se* under the NATO Agreement.²² The same is true under the other agreements in which the concept is used. An offense by a member of the armed forces is still *inter se*, even though the victim is of a class over which a United States court-martial can no longer exercise jurisdiction.

The agreements discussed suggest that, while the role assigned the concept of the *inter se* offense has varied, there is general agreement that it has a place in allocating jurisdiction.²³ One should not, however, overestimate the reach of any of the provisions incorporating the concept. A series of acts, or even a single act, against a member of the military community may also offend against a distinct and discernible, if not vital, interest of the receiving state.²⁴ The suggestion has been made²⁵ that, under the NATO Agreement, where the offenses are of roughly equal

²² If the United States had, in the NATO negotiations, succeeded in its effort to have used the combined term, "contingent," defined as those subject to the military laws of the United States, the result of *Reid v. Covert* would have been to narrow the scope of the treaty language.

²³ Some of the agreements, including the NATO Agreement, include in the concept offenses against the property or security of the sending state or against the property as well as the person of a member of the military community. It seems unnecessary to discuss these provisions in detail. If the concept is valid where an offense is against a person, *a fortiori* it is valid where an offense is against the property or the security of the sending state, since the interest of the receiving state in punishing offenses of this nature is presumably less than in punishing offenses against a person.

²⁴ Snee and Pye, *Status of Forces Agreement: Criminal Jurisdiction* 55-7 (1957). The authors cite the *Buxton* case, ACM 8708, 16 CMR 732, in which the accused, a member of the United States forces, stole pistols belonging to the United States and sold them to Moroccans. The French agreed that under the French Moroccan Agreement (classified) the United States had primary jurisdiction with respect to the larceny, but claimed primary jurisdiction over the offense of illegal trafficking in arms. The authors note also that an assault may be considered as a breach of the peace and therefore not solely against the victim, and a sexual offense one against public decency as well as against the person.

²⁵ Snee and Pye, *op. cit. supra*, note 24, at 57.

gravity, each state should exercise jurisdiction over the offense regarding which it has the primary right, but that where one is of distinctly greater gravity, only the state having the primary right with respect to that offense should exercise jurisdiction.

Under the NATO Agreement the fact that an offense is within the military community gives the sending state only primary, not exclusive jurisdiction. The word "primary" presumably means priority in time. The fact that one state has the primary right to exercise jurisdiction hence suspends, rather than eliminates, the concurrent but secondary right of the other state.²⁶ Theoretically, then, recognition of a primary right in one state and its exercise may create a problem under the double jeopardy provision.²⁷ It may be that in this context the approach to the multiple offense problem should be as technically nice as that which normally characterizes the handling of double jeopardy problems. It would, however, seem more in keeping with the spirit of the NATO Agreement to interpret broadly the provision giving primary jurisdiction to the sending state over *inter se* offenses. The receiving state can, after all, later assert its secondary jurisdiction in the unlikely event that the action taken by the sending state is unsatisfactory, and in this case the double jeopardy provision may well not be a bar.

The shape of the problem is somewhat different where the sending state is granted exclusive jurisdiction over *inter se* offenses. A stricter interpretation of what constitutes such an offense may, in this context, be in order. Perhaps drawing a line in terms of the place of the offense—whether on-base or off-base, as the

²⁶ *Labelle v. Zerfoss*, No. 254/1954 (Cour de Cassation, 7 Mar. 1957), affirming *Gadois v. Zerfoss* (Cour d'Appel de Paris, 14 Dec. 1953), 81 *Journal du droit international* 737 (1954), summarized in Snee and Pye, *op. cit. supra*, note 24, at 69-70.

²⁷ In the *Whitley* case (Cour de Cassation, 25 March 1958) which arose when a car being driven by a Major in the USAF was involved in an accident which caused the death of a passenger, a Canadian officer, the court held, reversing the Cour d'Appel de Paris, that where France had waived its primary jurisdiction and the United States authorities had, after a thorough investigation, determined not to try the accused, a joint criminal-civil action by the widow of the victim was barred. It can be argued that the same rule should apply where a state has the primary right to proceed by the Agreement. A waiver is, however, an affirmative act, and the language of Art. VII 3(c) is "If the State having the primary right decides not to exercise jurisdiction," language apt for expressing the idea of final rather than temporary surrender.

Philippines Agreement in effect to a degree does—has real merit. The line need not mark a complete break, completely excluding the utilization of the concept where the offense is off-base. Where, however, the offense is both *inter se* and on-base, it can be looked upon as one within the military community, which is separate enough so that an *inter se* offense committed there does not seriously disturb the “peace of the port.”²⁸ The parenthetical clause in the definition of “United States interest offense” in the revised Leased Bases Agreement, “excluding the general interest of the Government of the Territory in the maintenance of law and order therein” suggests the added interests, other than the protection of the territorial state’s nationals, which lie behind the territorial principle. It is significant that the receiving state was prepared expressly to waive those interests in an agreement which limited the reach of the *inter se* concept to on-base offenses.

The significance accorded the *inter se* concept in status of forces agreements is perhaps surprising in view of the limited significance given to it in the traditional analysis of the bases of jurisdiction. The allocation of jurisdiction over merchant seamen with respect to offenses committed on board ship in a foreign port does, however, provide a precedent. The actual practice of states with respect to offenses by the crews of warships on shore furnishes another. Much comment suggests, moreover, that much greater importance is in fact attached to the status of the victim than to the place of the offense. It may well be that the territorial principle owes much more to the fact that the victim is usually a national of the territorial state than is commonly assumed. In any case, the *inter se* concept seems clearly to be an acceptable basis for according a limited im-

²⁸ A most interesting provision reflecting these ideas is that in Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain. Paragraph 7 reads: “Whenever a member of the United States Forces commits an offense solely against the property of the United States or solely against the property or person of another member of the United States Forces and the offense is committed on a military reservation in an area which is under the control of a United States ‘Commander,’ the offender will, if he is apprehended by Spanish military police, immediately be turned over into the custody of United States military authorities for disciplinary action. No report of the offense will be made to the Mixed Commission or Jurisdiction and the United States ‘Commander’s’ disposition of the case shall be final and binding on all concerned * * .”

munity from the jurisdiction of the receiving state to visiting armed forces.²⁹

²⁹ Section 62 of the Restatement, *Foreign Relations Law*, p. 194, states that "(1) Except as otherwise expressly indicated by the territorial state, its consenting to the presence of a foreign force within its territory * * * implies that it agrees that the sending state shall have the prior right to exercise enforcement within the territory over members of the force with respect to

* * * * *

(b) an offense committed by a member of the force that affects only the force or its members and does not involve the public order of the territorial state."

See also Comment d to Section 62 at 195.

The position taken seems eminently reasonable, but it may be doubted that there is any established rule to this effect.