



Introduction

When States deploy elements of their armed force abroad, the service members concerned – be they soldiers, sailors, marines or airmen/airwomen – remain subject to that State’s criminal law. One may say, paraphrasing President *emeritus* Aharon Barak of the Israeli Supreme Court, that service members carry the criminal law of their respective States in their backpacks.¹

Most military lawyers regard such a broad ambit of a State’s law as self-evident. As G. P. Barton put it in a seminal paper on the law applicable to foreign armed forces, ‘[i]t is an axiom of military law that the members of the armed forces of a state are subject to that law wherever they may be.’² Indeed, if service member stationed in a foreign country go ‘absent without leave’ (AWOL), what State, if not the State to whose armed forces they belong, should have the possibility to reprimand them? International lawyers either tend to overlook this type of extraterritorial regulation altogether or, at best, relegate it to a footnote in discussions about the State’s authority to enact legislation binding on nationals abroad.³ This is quite unlike the issue of immunity of the members of visiting armed forces from the law of the ‘host State’ which has been the subject of numerous detailed studies.⁴

¹ HCJ 393/82 *Jam’iat Iscan v. IDF Commander in Judea and Samaria* (1982) 37(4) PD 785 (Supreme Court, Israel), ¶ 33: ‘every Israeli soldier carries with him, in his backpack, the rules of customary international public law concerning the laws of war and the fundamental principles of Israeli administrative law’.

² G. P. Barton, ‘Foreign Armed Forces: Immunity from Supervisory Jurisdiction’ (1949) 26 *BYBIL* 380–413, 380.

³ But see Roland J. Stanger, *Criminal Jurisdiction over Visiting Armed Forces* (US Government Printing Office, 1965), and Aurel Sari, ‘The Status of Armed Forces in Public International Law: Jurisdiction and Immunity’ in Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar, 2015) 319–371.

⁴ See, e.g., Serge Lazareff, *Status of Military Forces under Current International Law* (Sijthoff, 1971); Joop Voetelink, *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (Asser, 2015).

This book aims to fill the gap in the doctrine by examining in some detail the extraterritorial extension of the national criminal law (which in this context can be taken to include military disciplinary law) of the ‘sending State’ on the basis of a person’s link to the armed forces. But is there involved here some practical concern or is this ‘just another academic question for some student’s doctoral thesis’?⁵ The problem is that when the extension of national criminal law to members of the armed forces is treated as a given, its nature and basis remain hidden in mist. As a result, it becomes difficult to assess the appropriate extent of such extraterritorial regulation. Should a State’s criminal law be applicable to the conduct of a service member abroad only when on duty or also when ‘going on a frolic of his own’?⁶ Should this law be equally applicable to the conduct of civilians accompanying the armed forces, such as private contractors? This book considers how these questions are answered in a number of national legal systems and, ultimately, how these answers fit in the framework of international law.

The preceding paragraphs studiously avoided the term ‘jurisdiction’, which appears in the title of this book and throughout its pages, and which permeates much of the jurisprudence and academic commentary relevant to this study. Unfortunately, ‘jurisdiction’ is, as US Supreme Court Justice Felix Frankfurter once observed, ‘a verbal coat of too many colours’,⁷ or, as Sir Ian Brownlie put it, an ‘omnibus’ term, having different meanings depending on the context.⁸ In an international law context, the jurisdiction of a State is broadly regarded as a certain ‘power’,⁹ ‘authority’¹⁰ or ‘competence’¹¹ of the State. In particular, jurisdiction is defined as ‘the power of the state under international law to regulate or otherwise impact upon people, property and circumstances’.¹²

⁵ Alwyn V. Freeman, ‘Responsibility of States for Unlawful Acts of Their Armed Forces’ (II 1955) 88 *RdC* 263–416, 287.

⁶ This wonderful phrase comes from *Joel v. Morison* (1834) 6 Car & P 503, 172 ER 1338, 1339 (Parke J).

⁷ *US v. LA Tucker Truck Lines Inc.*, 344 US 33 (1952), 39.

⁸ Ian Brownlie, *Principles of Public International Law*, 7th edn (Oxford University Press, 2008), 106.

⁹ Joseph H. Beale, ‘The Jurisdiction of a Sovereign State’ (1923) 36 *Harvard Law Review* 241–262, 241.

¹⁰ John Westlake, *International Law*, 1st edn (Cambridge University Press, 1904), vol. i, 175.

¹¹ Brownlie, *Principles*, 7th edn, 299; Patrick Capps, Malcolm Evans and Stratos Konstantinidis, ‘Introduction’, in Patrick Capps, Malcolm Evans and Stratos Konstantinidis (eds.), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart, 2003) xvii–xxix, xix.

¹² Malcolm N. Shaw, *International Law*, 7th edn (Cambridge University Press, 2014), 469.

Attempting to define ‘power’ or ‘authority’ in order to clarify the meaning of jurisdiction does not appear to provide much of a way forward. It seems to be more fruitful to take William Bishop’s advice and, when talking about the jurisdiction of States in an international law context, to

think about that part of international law which distinguishes situations where the state may lawfully take action with respect to persons, things and events, from those situations in which taking such action is unlawful. Sometimes we are concerned with whether a state may lawfully take physical action, exercise its authority; and at other times with whether the particular state may properly ascribe the character of legality or illegality to particular action of events.¹³

This book is concerned specifically with State jurisdiction in the latter sense – the proscription by a State of certain conduct, in particular the conduct of members of its armed forces and certain civilians along with them. But even when used in this fairly narrow way, jurisdiction has two dimensions – a national and an international one.

From a national perspective, States claim certain jurisdiction. They do so by determining the ‘scope of application’, ‘sphere of validity’, ‘ambit’ or ‘incidence’ of national criminal law. Legal philosopher Joseph Raz has helpfully pointed out that every legal system contains not only norms in the sense of rules that provide direct guidance for behaviour – for example, by prohibiting murder – but also other types of ‘laws’.¹⁴ In particular, Raz had in mind ‘laws which govern a vast area of law: that is, those which are logically related to a great number of other laws, qualifying them and modifying their application’.¹⁵ A prime example is ‘the law determining the territorial sphere of validity [i.e. ambit] of most of a country’s law (which is clearly not itself a norm)’.¹⁶ By adopting such ‘laws’ in the context of criminal law – often called ‘principles of criminal jurisdiction’ – States make a determination as to what conduct should be governed by their criminal law.

From an international perspective, a completely unilateral determination by States of the ambit of their criminal law can lead to conflicts with

¹³ William W. Bishop, ‘General Course of Public International Law’ (II 1965) 115 *RdC* 147–470, 318.

¹⁴ See Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Clarendon, 1980), 168–186.

¹⁵ Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 *Yale Law Journal* 823–854, 835.

¹⁶ *ibid.*

the interests and the law of other States. Thus, international law has a coordinating role to play. International law fulfils that role by establishing the maximum permitted extent of the jurisdiction of States. Given that the relevant international law rules have a predominantly customary character, the jurisdictional principles that are in practice adopted by States, along with the reactions of other States, shape the development of the international law rules.

The foregoing conceptualisation of jurisdiction also sheds some light on what this study does *not* address. The exclusion of one particular issue should, perhaps, be made explicit. The armed forces often have the necessary tools for carrying out law enforcement – investigations, prosecutions, trials, and even punishments – outside the sending State’s territory. The possibility of undertaking such extraterritorial enforcement measures raises additional legal issues, for example, the degree to which those measures have to take into consideration the host State’s constitutional law or obligations under international human rights law.

An interesting example of this problem was a case from the early 1990s, which involved a US service member who killed his wife while stationed in the Netherlands. Under the NATO Status of Forces Agreement, the Dutch authorities who arrested the soldier were under an obligation to hand him over to the US military authorities for trial under US law.¹⁷ Yet the Netherlands also had an obligation under the European Convention on Human Rights not to relinquish control of a person if this would lead to that person being treated inconsistently with the Convention.¹⁸ The rub was the death penalty, which would have been possible under US law. The Dutch Supreme Court agreed with the soldier that he could not be handed over to the US authorities.¹⁹ He was surrendered only after the United States gave assurances that the prosecution would not seek the death penalty.

Since the focus of this book is on the reach of the substantive criminal law, such issues relating to extraterritorial law enforcement are beyond its scope. I should note, however, that in the incident just mentioned, at no

¹⁷ Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces (19 June 1951) 199 UNTS 67 (‘NATO SOFA’), Article VII(3)(a)(i) and (5)(a). See also Section 5.2.1.

¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; *Söring v. UK*, App. no. 14038/88, ECtHR Plenary, Judgment (7 July 1989).

¹⁹ *Short v. The Netherlands* (De Hoge Raad, The Netherlands, 30 March 1990), reprinted in 29 ILM 1378.

point did the Netherlands question the (primary) jurisdiction of the United States over its service member. The problem effectively boiled down to a conflict of equally valid obligations that the Netherlands had under international law.

The first three chapters of the book provide a general international law backdrop for the remainder of the volume. Chapter 1 contains a comparative analysis of the jurisdictional principles most commonly adopted by States when determining the sphere of validity of their criminal law. Chapter 2 examines the nature of the limitations that international law seeks to place on the sphere of validity of national criminal law in terms of restrictions on the jurisdictional principles that States may adopt. Chapter 3 provides an overview of immunities from jurisdiction, that is the limitations on the exercise of jurisdiction with respect to certain persons on the basis of otherwise valid jurisdictional principles.

Building on these foundations, the book will go on to argue that bringing service members and associated civilians who are despatched abroad within the sphere of validity of the criminal law of a State is achieved by a distinct jurisdictional principle – the principle of service jurisdiction. This argument proceeds in several steps. As a preliminary matter, Chapter 4 discusses the circumstances in which elements of the armed forces of one State may be present in the territory of another State and the range of persons that may be associated with that presence. Chapter 5 addresses the extent to which such armed forces benefit from immunities from the jurisdiction of the territorial States, noting in particular how this special status used to be expressed in terms of ‘extraterritoriality’ and, in some circumstances, continues to be expressed in terms of the ‘exclusive jurisdiction’ of the sending State. Chapter 6 undertakes an exercise in comparative (military) criminal law and shows the scope of the principle of service jurisdiction in a number of States. Chapter 7 then demonstrates how the principle of service jurisdiction does not coincide with the ‘traditional’ principles of criminal jurisdiction adopted by States and recognised by international law. This chapter advances the argument that, far from being contrary to international law, the principle of service jurisdiction can be grounded in a number of rules of international law, especially those of State responsibility, and seen as the necessary corollary of the immunities discussed in Chapter 6.

I hesitate to say anything very specific about the methodology of this study. I must admit to having a rather uneasy relationship with the notion of legal method. I have little qualm with the idea that there are methods, or at least distinguishable canons, for accomplishing specific

tasks within the legal discourse: interpreting legal instruments, say. Moreover, the social and ‘hard’ sciences that often put their knowledge at the disposal of lawyers doubtless have methods of their own. But when it comes to the study of law more generally, or to the construction of legal arguments, to talk about methods sounds very much like a retroactive rationalisation of one’s thinking. Perhaps it is best, as Martti Koskenniemi has done, to speak of styles of legal writing rather than methods.²⁰ However, even those should not be regarded as ‘brands of detergent that can be put on display alongside one another to be picked up by the customer in accordance with his/her idiosyncratic preferences’.²¹

That said, I readily concede that this study has a fairly ‘positivistic’ bent – something that the reference to Raz has perhaps already foreshadowed. Legal positivists, to the extent that they can be lumped into a coherent group, regard the binding force or validity of legal rules as determined by systemic formal criteria rather than the goodness, morality or desirability of the rules.²² Principles of jurisdiction can be regarded as part of those formal criteria.²³ It would make very little sense to talk about jurisdiction as a formal limit to the applicability of national law without accepting the existence of such formal limits.

At the same time, much of this work is underpinned by a subscription to, and a presumption of, a minimum conception of the rule of law. While there is a great deal of debate as to what the ‘rule of law’ precisely entails, I have in mind something reasonably specific – a ‘thin’ conception of the rule of law that focuses on formal legality, and demands that laws be prospective, reasonably clear and stable, accessible to their addressees and implemented by an independent judiciary.²⁴ Fundamentally, it presumes that people must be able to look up the law and see what it tells them to do or abstain from doing. As Raz has noted, ‘in the final analysis the doctrine [of the rule of law] rests on its basic idea that

²⁰ Martti Koskenniemi, ‘Letter to the Editors of the Symposium’ (1999) 93 *AJIL* 351–361, 352.

²¹ *ibid.*

²² See generally John Gardner, ‘Legal Positivism: 5½ Myths’ (2001) 46 *American Journal of Jurisprudence* 199–227.

²³ See further Rain Liivoja, ‘The Criminal Jurisdiction of States: A Theoretical Primer’ (2010) 7 *No Foundations: Journal of Extreme Legal Positivism* 25–58.

²⁴ This may be contrasted to a substantive or ‘thick’ rule of law which may go to great lengths in requiring substantive justness or democratic legitimation from legal rules. See generally Ronald Janse, Rain Liivoja and Maria Dolores Sanchez Galera, ‘Rule of Law Inventory Report: Academic Part’, HiIL Research Report (Hague Institute for the Internationalisation of Law, 2007), 12–18.

law should be capable of providing effective guidance'.²⁵ Raz has also pointed out that that one of the most important features of law is that it is 'normative', in other words that 'it serves, and is meant to serve, as a guide for human behaviour'.²⁶ As a result, much of the discussion in this book will have little bearing on contexts where criminal 'justice' – with respect to service members or otherwise – is dispensed at the whim of a despotic leader or an authoritarian party. If a State is not concerned with making the law capable of being followed, discussion as to when it is proper for a person to be governed by a particular law loses much of its significance.

The 'thin' conception of the rule of law assumed here also goes hand in hand with a minimalist understanding of the functions of law in general and criminal law in particular. As H. L. A. Hart pointed out, it is 'quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct'.²⁷ In a similar vein, the purpose of criminal law is '[t]o announce to society that [certain] actions are not to be done and to secure that fewer of them are done'.²⁸ In the military context, the criminal law has the exact same purpose, but is preoccupied with offences that have an impact on the discipline of the armed forces.²⁹

²⁵ Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *LQR* 195–211, 202.

²⁶ Raz, *Concept of a Legal System*, 3.

²⁷ H. L. A. Hart, *The Concept of Law*, 2nd edn (Clarendon, 1994), 249.

²⁸ H. L. A. Hart, 'Prologomenon to the Principles of Punishment', *Punishment and Responsibility*, 2nd edn (Oxford University Press, 2008) 1–27, 6.

²⁹ See generally, e.g., Rain Liivoja, 'Military Justice', in Markus Dirk Dubber and Tatjana Hörnle (eds.), *Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 326–349.

Criminal Jurisdiction under National Law

This chapter looks at State jurisdiction, as it were, from inside out. It examines the jurisdictional claims that States make – the kinds of jurisdictional principles they adopt in national law. Questions of international law are put to one side – or, rather, postponed until Chapter 2. This chapter begins by arguing in more detail the point foreshadowed in the introduction that the problems addressed in this book, despite the use of the word jurisdiction, are questions about the ambit of substantive criminal law rather than purely procedural (Section 1.1). The chapter then provides a brief historical account of the early (pre-nineteenth century) development of the personal and territorial ambit of legal systems (Section 1.2) and gives an overview of how States typically determine the ambit of criminal law at present (Section 1.3).

1.1 Jurisdiction as a Problem of Substantive Criminal Law

Lawyers most commonly talk about ‘jurisdiction’ when discussing the kinds of issues a court or a tribunal could possibly have on its plate. The question whether a court may hear a case and decide a matter may thus be formulated as an inquiry into the jurisdiction of that court. Some authors distinguish between the ‘jurisdiction’ and the ‘competence’ of a court.¹ Jurisdiction would then seem to relate to the *kinds* of cases a court can address, whereas competence is concerned with the question whether a court can entertain a *particular* case. Jurisdiction would thus be a precondition for competence.

In an international context, ‘jurisdictional’ matters are often regarded as purely procedural problems, specifically questions about the competence of national courts. In this paradigm, a State, by delimiting the extraterritorial reach of its criminal law, instructs its courts to deal with

¹ See Veijo Heiskanen, ‘Jurisdiction v. Competence: Revisiting a Frequently Neglected Distinction’ (1994) 5 *Finnish Yearbook of International Law* 1–33.

a certain segment of offences occurring in the world. International law, to the extent that its influence on the matter is admitted at all, is seen as determining which State or States could prosecute the crime in their courts.

This approach is flawed. Speaking of jurisdiction *over a crime* presupposes that a crime has taken place. Yet a crime is not a fact – it is a legal assessment of facts. Therefore, it is impossible to say in the abstract that some behaviour amounts to a crime. For example, the physical act of one person shooting a firearm, thereby intentionally causing the death of another person, can be any number of things. It can be murder or a legitimate use of lethal force in self-defence; it can be genocide or a legitimate act of violence in war. An act can only be qualified as a crime by reference to legal rules. The core of the problem is precisely which legal system should be used as the yardstick.

To overcome this hurdle, criminal laws of various States are sometimes treated as forming a common fabric. This rests on the suggestion that, in different States, those acts which are '[c]riminalized are by and large the same acts'.² Given that murder, rape and theft are punishable according to the vast majority of criminal law systems in the world, the problem, as the argument goes, 'is *who* should punish, and not *whether* the conduct shall be punished at all'.³

This is a highly problematic premise. While criminal law systems have much in common, their convergence should not be overstated. The discrepancies between the criminal laws of various States are considerable,⁴ though some of them may be more obvious than others.

First, it is trite to say that States have wildly different views as to the proper role of the law in enforcing morality or religious dogma, resulting in radically different takes on, say, euthanasia and prostitution. This disagreement relates even more generally to upholding 'public decency': what is immoral or indecent varies from community to community, and from State to State.⁵

² Erik Nerep, *Extraterritorial Control of Competition under International Law, with special regard to US Antitrust Law* (Norstedt & Söners, 1983), 501.

³ *ibid.*

⁴ See, e.g., Markus Dirk Dubber, 'Comparative Criminal Law', in Mathias Reimann and Reinhard Zimmermann (eds.), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 1287–1325, 1322, noting 'the enormous number and variety of criminal offenses . . . found [in] various criminal law systems'.

⁵ Consider, for example, the attempts by some local and state legislatures, especially in the United States, to introduce a ban on wearing pants so low that they expose underwear.

Second, crimes against the security of the State also present a problem, though of a slightly different nature. Disagreements about what constitutes a threat to the security of the State are the obvious challenges. But even where States agree in broad terms, they apply their laws in a consciously discriminating way. Thus, a State might make acts of espionage committed against it punishable, while at the same time not only tolerating the commission of such acts against other States but actively (if clandestinely) promoting these acts in its own benefit.

Third, pronounced differences can also be found in the definitions of commonly accepted offences. Take, for instance, the widely criminalised act of ‘unlawful sexual intercourse’ (also known as ‘statutory rape’), which refers to sexual relations with a person who is ‘under age’. The age of consent, however, varies considerably.⁶ Thus, while there may be widespread agreement on the criminalisation of an act in principle, the differences in definition radically change the extent of the behaviour actually prohibited.

Finally, but potentially even more significantly, the general principles of criminal law in different legal systems are far from identical. These differences often remain hidden, only to emerge vividly in international trials. Take, for example, conspiracy, that is to say the joint planning of a criminal offence. As the lawyers involved in post-World War II war crimes tribunals discovered first-hand, the Anglo-American legal tradition applies the concept of conspiracy across the board, while in continental law systems it is treated as an anomaly to be carefully limited to some specific offences.⁷ The disagreement between common law and civil law systems over whether necessity could be a defence to murder made a prominent appearance more recently, in the *Erdemović* case before the International Criminal Tribunal for the former Yugoslavia.⁸

In sum, the argument that criminal laws are substantively similar fails to convince. Legal systems have significant disagreements with each other. State jurisdiction cannot therefore be approached solely with a view to establishing the competent court. It is essential to say what law is applicable.

See, e.g., Niko Koppel, ‘Are Your Jeans Sagging? Go Directly to Jail’, *The New York Times*, 30 August 2007, G1/G8.

⁶ See UNICEF: ‘Are you old enough?’ (undated) www.unicef.org/rightsite/433_457.htm.

⁷ See Wienczyslaw J. Wagner, ‘Conspiracy in Civil Law Countries’ (1951) 42 *Journal of Criminal Law, Criminology & Police Science* 171–183.

⁸ See *Prosecutor v. Erdemović*, Case no. IT-96-22-A, ICTY Appeals Chamber, Judgments (7 October 1997).