

CRIMINAL JURISDICTION OVER ARMED FORCES ABROAD

Rain Liivoja explores why, and to what extent, armed forces personnel who commit offences abroad are prosecuted under their own country's laws. After clarifying several conceptual uncertainties in the doctrine of jurisdiction and immunities, he applies the doctrine to the extraterritorial deployment of service personnel. Comparing the law and practice of different states, the author shows the sheer breadth of criminal jurisdiction that countries claim over their service personnel. He argues that such claims disclose a discrete category of jurisdiction, with its own scope and rationale, which can be justified as a matter of international law. By distinguishing service jurisdiction as a distinct category, the analysis explains some of the peculiarities of military criminal law and also provides a basis for extending national criminal law to private military contractors serving the state. The book will be essential for scholars and practitioners in international and criminal law, especially in military contexts.

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CRIMINAL JURISDICTION
OVER ARMED
FORCES ABROAD

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With a Foreword by
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FOREWORD

International law regulates the competences of states to prescribe and enforce their criminal laws to acts and omissions that take place outside their boundaries. The doctrine has recognized several grounds for the lawful extension of national criminal law beyond the state's jurisdiction (the nationality principle, the protective principle, etc.). But as Rain Liivoja points out in this important book, the doctrine has thus far failed to identify and to devise rules addressing the authority of a state to extend its laws to those whom it sends as peacekeeping forces, as occupiers or as operators of military bases under agreements with the host state. Those actors would include military personnel and civilians who accompany them, including private military contractors. Rain Liivoja's comprehensive study identifies and fills this gap in the literature. The book begins with a general study of the evolution of the law on the allocation of the jurisdiction to prescribe and enforce criminal law. The scope of his inquiry covers international law, different national legal systems as well as agreements concerning the status of foreign forces. The author addresses the tension that exists between the position that states, as sovereigns, have the freedom to extend their laws to extraterritorial conduct as they please (a position that draws on the famous *Lotus* case), and the developments in international legal practice and doctrine over the years. Liivoja advances a convincing claim that challenges the initial, *Lotus* based position, arguing that instead of states' freedom to extend their laws subject to recognized limitations, a more accurate approach must recognize that states are actually subject to a general *limitation* to extend their laws extraterritorially, unless they can invoke a recognized exception to this limitation. The author presents six arguments – historical, empirical, ideological, functional, doctrinal and systemic – in support of his general thesis.

This general proposition leads Liivoja to explore the limits imposed by international law on states that wish to extend their criminal laws to the activities of their forces operating abroad. Based on a meticulous and

critical study of state practice, Liivoja concludes that states have the freedom under international law to extend their criminal law to the armed forces and associated civilians that operate abroad on the state's behalf. The author commends this practice because it prevents impunity of members of the forces or the civilians associated with them (who are immune to the host state's law) and because it increases the ability of the sending state to reign its soldiers and comply with its obligations toward the host state and its nationals. Liivoja therefore identifies a distinct ground for the extension of national criminal law abroad, which he terms 'service jurisdiction,' a unique ground that cannot be subsumed under either of the currently recognized bases for state jurisdiction.

The recognition of this independent ground of jurisdiction has important immediate consequences under contemporary conditions, where foreign armies are assisted by private companies and employees who may not have the same nationality as that of the sending state. The proposal to carve up a new and independent basis for extraterritorial application of national criminal law is innovative and liberating, as it opens up the discourse on extraterritorial application of national law to fresh thinking that is not moored to the already recognized doctrines for applying national law. Indeed, there is no need to try to squeeze situations where national law should be applicable extraterritorially to the confines of the five recognized bases of jurisdiction. In this sense, the dissertation paves the way for further studies about whether other types of extraterritorial activities should (or should not) be regulated by foreign states.

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This study did not quite turn out as intended. I set out to write a fairly theoretical analysis of the notion of State jurisdiction under international law but ended up with a study of a very specific point of jurisdiction

under international law and (military) criminal law. Looking back, this ‘diversion’ probably resulted from teaching international law at the Estonian National Defence College for a number of years. The military officers in my class were not prepared to accept a standard, textbook account of criminal jurisdiction and quizzed me to no end about Status of Forces Agreements and immunities of warships. I am grateful for their prodding.

Some more impersonal acknowledgements are also due. I first made some of the arguments of Chapter 2 in a book review in the *Finnish Yearbook of International Law*.¹ Parts of Chapters 1 and 2 appeared in *No Foundations*² and an earlier version of Chapter 7 was published in the *Melbourne Journal of International Law*.³ The relevant passages are reproduced here with the kind permission of the respective publishers.

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¹ ‘Jurisdiction in International Law by Cedric Ryngaert’ [2008] (2010) 18 *Finnish Yearbook of International Law* 397–401.

² ‘The Criminal Jurisdiction of States: A Theoretical Primer’ (2010) 7 *No Foundations: Journal of Extreme Legal Positivism* 25–58.

³ ‘Service Jurisdiction under International Law’ (2010) 11 *Melbourne Journal of International Law* 309–337.

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ABBREVIATIONS

AC	<i>Law Reports, Appeal Cases</i> (England & Wales, 1891–)
ADF	Australian Defence Force
ADIL	<i>Annual Digest and Reports of Public International Law Cases</i> (1919–49)
AFA	Armed Forces Act 2006 (UK)
AFLR	<i>Air Force Law Review</i>
AJIL	<i>American Journal of International Law</i>
BGE	<i>Entscheidungen des schweizerischen Bundesgerichts</i> [<i>Decisions of the Swiss Federal Court of Justice</i>] (1875–)
BVerfGE	<i>Entscheidungen des Bundesverfassungsgerichts</i> [<i>Decisions of the Federal Constitutional Court</i>] (Germany, 1951–)
BGHSt	<i>Entscheidungen des Bundesgerichtshof in Strafsachen</i> [<i>Decisions of the Federal Court of Justice in Criminal Cases</i>] (Germany, 1951–)
BYBIL	<i>British Year Book of International Law</i>
CJ	Chief Justice
CLR	<i>Commonwealth Law Reports</i> (Australia, 1903–)
CMA	<i>Decisions of the United States Court of Military Appeals</i> (1951–75)
Cmd.	<i>Command Papers</i> (UK, 1919–1956)
CrimA	criminal appeal (Israel)
CrAppR	<i>Criminal Appeal Reports</i> (England & Wales, 1908–)
CTS	<i>Consolidated Treaty Series</i> (1648–1919)
DDR	Democratic Republic of Germany
DFDA	Defence Force Discipline Act 1982 (Australia)
DoD	Department of Defense (US)
DPP	Director of Public Prosecutions
ECtHR	European Court of Human Rights
ECtHR GC	European Court of Human Rights, Grand Chamber
EU	European Union
EWCA Civ	England and Wales, Court of Appeal, Civil Division (neutral citation)
ExD	<i>Law Reports, Exchequer Division</i> (England & Wales, 1875–1880)
F	<i>Federal Reporter</i> (US, 1880–1924)
F2d	<i>Federal Reporter, Second Series</i> (US, 1924–1993)

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ABBREVIATIONS

F3d	<i>Federal Reporter, Third Series</i> (US, 1993–)
FM	field manual
FRG	Federal Republic of Germany
FRUS	<i>Papers Relating to the Foreign Relations of the United States</i> (1870–)
FSupp	<i>Federal Supplement</i> (US, 1932–1988)
FSupp2d	<i>Federal Supplement, Second Series</i> (US, 1988–)
Ga	<i>Georgia Reports</i> (Georgia, US, 1846–)
GA	United Nations General Assembly
GYBIL	<i>German Yearbook of International Law</i>
HCA	High Court of Australia (neutral citation)
HCJ	High Court of Justice (Israel)
IACmHR	Inter-American Commission of Human Rights
ICJ	International Court of Justice
ICLQ	<i>International & Comparative Law Quarterly</i>
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israel Defence Force
ILC	International Law Commission
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i> (1950–)
IR	<i>Irish Reports</i> (1894–)
IsrLR	<i>Israel Law Reports</i> (Supreme Court, Israel)
J	Judge; or Justice
JCC	<i>Journals of the Continental Congress</i> (US, 1774–1789)
JICJ	<i>Journal of International Criminal Justice</i>
JJ	Judges; Justices
KB	<i>Law Reports, King's Bench</i> (England & Wales, 1901–1952)
KBD	King's Bench Division, High Court of Justice, England and Wales
LQR	<i>Law Quarterly Review</i>
MEJA	Military Extraterritorial Jurisdiction Act (US)
MJ	<i>West's Military Justice Reporter</i> (US, 1975–)
MNF	multinational force
MoD	Ministry of Defence
NATO	North Atlantic Treaty Organisation
NJL	<i>New Jersey Law Reports</i> (New Jersey, US, 1790–1948)
OR	Ontario Reports (Canada, 1882–1900; 1931–1973)
OR (3d)	Ontario Reports, 3rd series (Canada, 1991–)
PCIJ	Permanent Court of International Justice
PDZ	<i>Piskei Din Zvaiyim</i> [<i>Courts-Martial Decisions</i>] (Israel)
PD	<i>Piskei Din Shel Beit Hamishpat Haelyon</i> [<i>Decisions of the Supreme Court</i>] (Israel)
PE	<i>Pesakim Elyon</i> (Israel)
PRO FO	UK Foreign Office Archives

ABBREVIATIONS

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Pub. L.	public law
QB	<i>Law Reports, Queen's Bench Division</i> (England & Wales, 1891–1901, 1952–)
QBD	Queen's Bench Division, High Court of Justice, England and Wales;
RIAA	<i>United Nations Reports of International Arbitral Awards</i> (1948–)
RdC	<i>Recueil des Cours de l'Academie de Droit International de la Haye</i> (1923–)
SA	<i>South African Law Reports</i> (1947–)
SC	United Nations Security Council
SCC	Service Civilian Court (UK)
SCR	<i>Supreme Court Reports, Canada</i> (1876–1922); <i>Canada Law Reports, Supreme Court</i> (1923–69); <i>Canada Supreme Court Reports</i> (1970–)
SOFA	status of forces agreement
SR	Statutory Rules (Australia, 1901–)
SR (NSW)	<i>New South Wales State Reports</i> (1901–70)
Stat.	<i>United States Statutes at Large</i> (1873–)
TIAS	<i>Treaties and Other International Acts Series</i> (US)
TLR	<i>Times Law Reports</i> (England & Wales, 1884–1952)
TWC	<i>Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law no. 10</i> (15 vols, US Government Printing Office, 1949–53)
UCMJ	Uniform Code of Military Justice (US)
UK	United Kingdom
UKHL	United Kingdom, House of Lords (neutral citation, 2000–2009)
UN	United Nations
UNJYB	<i>United Nations Juridical Yearbook</i> (1962–)
UNTS	<i>United Nations Treaty Series</i> (1946–)
US	United States; <i>United States Reports</i> (US Supreme Court, 1790–)
USC	<i>United States Code</i>
USSR	Union of Soviet Socialist Republics
USTS	<i>Treaty Series</i> (US, –1945)
WL	Westlaw
YJIL	<i>Yale Journal of International Law</i>