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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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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<td>Australian Defence Force</td>
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<td>ADIL</td>
<td><em>Annual Digest and Reports of Public International Law Cases</em> (1919–49)</td>
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<td>AFA</td>
<td>Armed Forces Act 2006 (UK)</td>
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<td>AFLR</td>
<td><em>Air Force Law Review</em></td>
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<td>BYBIL</td>
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<td>DFDA</td>
<td>Defence Force Discipline Act 1982 (Australia)</td>
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<td>Department of Defense (US)</td>
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<td>DPP</td>
<td>Director of Public Prosecutions</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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