SERVICE JURISDICTION UNDER INTERNATIONAL LAW

RAIN LIIVOJA*

The extraterritorial criminal jurisdiction that a state exercises over members of its armed forces and various civilians associated with the forces cannot be easily explained in terms of the traditional principles of state jurisdiction under international law. Contrary to popular belief, such jurisdiction has little, if anything, to do with the nationality of the defendant. Concerns for the security of the state also fail to justify the often very expansive service jurisdiction. This article argues that such jurisdiction is designed to maintain the discipline of the armed forces. Furthermore, the exercise of service jurisdiction aims at reducing the chances of the state itself being held internationally liable for the conduct of its forces. Also, service jurisdiction should ensure that the possible immunities granted to foreign service members and associated civilians do not lead to an accountability gap.

CONTENTS

I INTRODUCTION

The criminal law of a state usually applies to members of its armed forces even outside the national territory. G P Barton once even described it as 'an axiom of military law that the members of the armed forces of a state are subject to that law wherever they may be'.[1] The legislation of common law countries, which is generally reluctant to claim extraterritorial reach, is perhaps the most

* BA (Law) (Tartu); LLM, LLLic (Helsinki). Research Fellow, Centre of Excellence in Global Governance Research, University of Helsinki; Visiting Lecturer, Estonian National Defence College; Visiting Scholar, Asia Pacific Centre for Military Law, Melbourne Law School. I am grateful to Sarah Finnin, Anna Hood, Jan Klabbers, Tim McCormack and Sasha Radin for insightful comments on an earlier draft and to Kevin Jon Heller and Tobias Thienel for stimulating discussion on some of the points involved. I would also like to thank the anonymous referees and the editorial team of the *Melbourne Journal of International Law* for their helpful suggestions. Naturally, the responsibility for the present text lies solely with me.

1 G P Barton, 'Foreign Armed Forces: Immunity from Supervisory Jurisdiction' (1949) 26 *British Year Book of International Law* 380, 380.

explicit on this point. The United States *Uniform Code of Military Justice*,[2] having first listed the persons who come within its reach,[3] declares with unsurpassable conciseness that it applies to such persons 'in all places'.[4] The Australian *Defence Force Discipline Act 1985* (Cth) stipulates that its provisions 'apply, according to their tenor, both in and outside Australia'.[5] The British *Armed Forces Act 2006* (UK) takes a textually slightly different approach: 'Every member of the regular forces is subject to service law *at all times*.'[6]

States that follow other legal traditions recognise the same principle. For example, the Danish *Military Penal Code* states in no uncertain terms that it 'shall apply to crimes committed within and outside the Danish state'.[7] Similarly, according to the German *Military Penal Code*, German penal law applies to offences committed by members of the armed forces abroad.[8] The same principle operates in states that do not have a separate military penal code but apply civilian criminal law to service members. Thus, for instance, the Russian *Criminal Code* applies to members of Russian military units located abroad with respect to offences committed there unless a treaty provides otherwise.[9] In sum, one can paraphrase President Emeritus Aharon Barack of the Israeli Supreme Court and say that members of the armed forces always carry the criminal law of their respective states in their backpacks.[10]

Many states apply the same principle, to a lesser or greater extent, to civilians who have some connection to the armed forces. The *UCMJ* purports to apply, '[i]n time of declared war or a contingency operation, [to] persons serving with or accompanying an armed force in the field'[11] and at all times to 'persons serving with, employed by, or accompanying the armed forces outside the United States'.[12] Admittedly, the second of these clauses collapsed when the US Supreme Court held that civilians cannot be subjected to trial by court-martial in times of peace.[13] At the time of writing, the constitutionality of court-martialling civilians engaged in contingency operations remains to be judicially tested. In any event, the *Military Extraterritorial Jurisdiction Act*[14] circumvents this constitutional problem by subjecting to US federal law — and to the jurisdiction

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2 *Uniform Code of Military Justice*, 10 USC §§ 801–946 (2010) ('*UCMJ*').

3 Ibid art 2(a).

4 Ibid art 5.

5 *Defence Force Discipline Act 1982* (Cth) s 8 ('*DFDA*').

6 *Armed Forces Act 2006* (UK) c 52, s 367(1) ('*AFA*') (emphasis added).

7 *Militær straffelov* [Military Penal Code] (Denmark) s 3 [Danish Military Prosecution Service trans].

8 *Wehrstrafgesetz* [Military Penal Code] (Germany) § 1a.

9 *Уголовный кодекс* [Criminal Code] (Russia) § 12(2).

10 HCJ 393/82 *Jami'at Ascan v Commander of IDF Forces in Judea and Samaria* (1982) 37(4) PD 785 [33] (Supreme Court of Israel) ('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').

11 *UCMJ* art 2(a)(10).

12 Ibid art 2(a)(11).

13 *Toth v Quarles*, 350 US 11 (1955) (person discharged from the military); *Reid v Covert*, 354 US 1 (1957) (dependant in a capital case); *Kinsella v Singleton*, 361 US 234 (1960) (dependant in a non-capital case); *Grisham v Hagan*, 361 US 278 (1960) (civilian employee in a capital case); *McElroy v US ex rel Guagliardo*, 361 US 281 (1960) (civilian employee in non-capital case).

14 18 USC §§ 3261–3267 (2010) ('*MEJA*').

of federal district courts — all persons employed by, or accompanying, the US Armed Forces abroad, and all persons employed by other federal agencies 'to the extent such employment relates to supporting the mission of the Department of Defense overseas'.[15] As far as the United Kingdom is concerned, the *AFA* applies to a motley group of civilians specified in a schedule to the *Act*, ranging from persons on board Her Majesty's ships and aircraft to persons working for 'specified organisations' in 'designated areas'.[16] The *DFDA* applies to civilians who, by due authorisation, accompany a part of the defence forces outside Australia (or on operations against the enemy in Australia) and have consented, in writing, to subject themselves to the discipline of the defence forces for such time.[17] The Danish *Military Penal Code* covers, '[i]n an armed conflict … [a]nybody serving in the armed forces or accompanying a unit thereof'.[18] The German *Military Penal Code* applies to acts of 'military superiors who are not service members'.[19]

For an international lawyer, these provisions, to the extent that they give extraterritorial effect to national law, should raise the question of the proper limits of the criminal jurisdiction of the state. But two preliminary issues are worth considering that might mitigate this problem.

First, the *Lotus* case could be read to mean that, absent a specific prohibition, any state can make its law cover the world over.[20] In light of the enormous amount of material contradicting this proposition, it will suffice to cite F A Mann, a preeminent authority on the doctrine of jurisdiction. In his Hague lectures, Mann denounced the approach taken in *Lotus* as 'a most unfortunate and retrograde theory' and found the relevant paragraphs of the judgment to 'have been condemned by the majority of the immense number of writers who have discussed them, and today they probably cannot claim to be good law'.[21] Indeed, the prevailing contemporary view is that a state can regulate conduct outside its territory only when it is able to show a valid basis under international law.[22]

Second, a person enlisting in the armed forces implicitly consents to the laws and regulations applicable in the military of that particular state. Civilians

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15 18 USC § 3261(a) (2010).

16 *AFA* s 370, in conjunction with sch 15.

17 *DFDA* s 3(1): definition of 'defence civilian'.

18 *Militær straffelov* [Military Penal Code] (Denmark) s 2(1) [Danish Military Prosecution Service trans].

19 *Wehrstrafgesetz* [Military Penal Code] (Germany) § 1(2) [author's trans].

20 *SS Lotus (France v Turkey)* (*Judgment*) [1927] PCIJ (ser A) No 10 ('*Lotus*').

21 Frederick A Mann, 'The Doctrine of Jurisdiction in International Law' (1964-I) 111 *Recueil des Cours* 9, 35.

22 See, eg, Vaughan Lowe, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2006) 334, 340–2; Sir Franklin Berman: 'Jurisdiction: The State' in Patrick Capps, Malcolm Evans and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart, 2003) 3, 3 ('simply by virtue of the fact that "jurisdiction" … refers to claims by one State to exercise powers which are likely to impinge on the rights and interests of other States, the fundamental presupposition is that all jurisdictional claims require a basis in international law'); Paul Arnell, 'Criminal Jurisdiction in International Law' [2000] (3) *Juridical Review* 179, 184 ('It is beyond doubt that international law generally prohibits the assumption of extraterritorial jurisdiction, only allowing it in limited and defined situations. Authority for this is found in the long standing practice of States as well as the opinion of jurists.')

accompanying the armed forces may be required to give such consent expressly and in writing. Would that not resolve the jurisdictional problem? Not really. For constitutional law purposes, individual consent may constitute acceptance of certain disadvantages resulting from being subject to military law enforcement as compared to the civilian justice system. But the criminal jurisdiction of a state is a different matter altogether. Limitations under international law concerning the exercise of criminal jurisdiction are obligations of states, owed to other states. The consent (or the lack thereof) of the individual in question is inconsequential.

This article considers the international law basis for extending national criminal law extraterritorially on the basis of military affiliation. I will review the commonly accepted bases for criminal jurisdiction in international law, with a view to determining the extent to which these account for jurisdiction claimed over members of the armed forces ('service members') and civilians employed by, serving with or accompanying the forces ('associated civilians'). I will argue that such 'service jurisdiction' cannot be fully explained by the commonly accepted jurisdictional bases and must therefore be regarded a discrete category.

Before proceeding, I should note that I will use the word 'jurisdiction' for what might more properly be called the 'scope', 'ambit' or 'sphere of validity' of the penal law of a state. I am not concerned here with the competence of a particular type of tribunal (court-martial versus civilian court). Nor am I concerned with the competence of the law enforcement authorities of one state to operate on the territory of another (say, for the military police of one state to detain, or the courts-martial to try, service members while in a foreign county). These are separate enquiries altogether. In short: in what follows, I will look at how the personal and spatial ambit of the substantive prohibitions of national criminal law in a military context chimes together with international law.

II PRINCIPLES OF CRIMINAL JURISDICTION UNDER INTERNATIONAL LAW

The catalogue of acceptable bases of criminal jurisdiction is reasonably well accepted as a matter of customary international law, even though their precise scope may occasionally be difficult to ascertain with certainty. Most international law textbooks will inform the reader of roughly half a dozen relevant principles (different writers have different systems of classification and sensibilities to national idiosyncrasies).[23]

In brief, the bases are the following:

1 *Territoriality principle*. The criminal law of a state applies to behaviour taking place on its territory. Where the conduct has a cross-border element, there are a few variations:
   (a) *subjective territoriality* covers acts where the act or omission of the perpetrator (the conduct element) takes place in the territory;
   (b) *objective territoriality* covers instances where an individual acts outside the territory but the consequence element of the offence occurs within the territory; and

[23] See, eg, *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 659 (Toohey J) ('There is no exhaustive list of bases upon which a state may exert authority over an individual in international law nor is there precise agreement between commentators as to categorization.').

(c) *the 'effects doctrine'*, which is basically a loose version of objective territoriality, requiring that detrimental effects of the act be felt in the territory.

2 *Flag principle*. Ships used to be considered floating pieces of the territory of their flag state, thus falling under the territoriality principle. This approach has become an antiquated piece of legal fiction.[24] But contemporary international law does accept that a state can make its criminal law applicable to acts perpetrated on board of ships, aircraft and spacecraft that 'fly its flag' or, more accurately, are entered into its appropriate national register.

3 *Active personality (or nationality) principle*. A state may make its criminal law applicable to acts of its nationals committed abroad. The principle is used in a general manner primarily by European and Latin American states; it is well recognised, although rather selectively used, in common law countries.[25]

4 *Protective (or security) principle*. A state can make its law applicable to acts abroad that are directed against its national security or otherwise threaten the life or vital interests of the nation.[26]

5 *Passive personality principle*. Despite the highly problematic nature of this principle, international law appears to permit a state to criminalise acts committed against its nationals.[27]

6 *Universality principle*. This principle allows a state to extend its laws to cover acts that are deemed to offend against the entire international community, such as genocide, crimes against humanity, war crimes, torture, piracy, slave trade and perhaps some forms of terrorism.[28]

7 *Representational principle (or the principle of vicarious administration of justice)*. The principle suggests that a state may apply its laws to crimes to which it has no connection, other than the fact that it has the suspect in custody and for some reason he or she cannot or will not be handed over to the state that does have jurisdiction under principles 1–5 above.[29] This principle is a beast that does not live in the wild outside Europe. However,

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24 *Lotus* [1927] PCIJ (ser A) No 10, 53 (Lord Finlay) (forcefully rejecting the fiction); *Chung Chi Cheung v R* [1939] AC 160, 167, 174 (rejecting the fiction with respect to warships).

25 William W Bishop, 'General Course of Public International Law' (1965–II) 115 *Recueil des Cours* 147, 320; Ilias Bantekas and Susan Nash, *International Criminal Law* (Routledge-Cavendish, 3rd ed, 2007) 79; *Blackmer v US*, 284 US 421, 436–7 (1932); *US v Columba-Colella*, 604 F2d 356, 358 (5th Cir 1979).

26 See, eg, Manuel R García-Mora, 'Criminal Jurisdiction over Foreigners for Treason and Offenses against the Safety of the State Committed upon Foreign Territory' (1958) 19 *University of Pittsburgh Law Review* 567; Iain Cameron, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth, 1994).

27 See, eg, Geoffrey R Watson, 'The Passive Personality Principle' (1993) 28 *Texas International Law Journal* 1.

28 See, eg, Luis Benavides, 'The Universal Jurisdiction Principle: Nature and Scope' (2001) 1 *Anuario Mexicano de Derecho Internacional* 19; Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspective* (Oxford University Press, 2003); Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735.

29 See, eg, Jürgen Meyer, 'The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction' (1990) 31 *Harvard International Law Journal* 108; see also Bishop, above n 25, 324 (claiming this to be 'Austrian practice since 1802').

> it has been domesticated in some treaties dealing with international offences, obliging a State that captures a person suspected of committing an offence defined in the treaty to prosecute or extradite.[30]

Some of these principles are clearly less appropriate for grounding the ambit of national criminal law over service members and associated civilians. While the objective territoriality principle and the passive personality principle may be applicable in a small group of instances, service jurisdiction extends beyond acts that target nationals of the sending state or some interests in the national territory. Almost the same could be said for the universality principle. While it may be occasionally applicable, it covers only international offences, hence not addressing, for instance, ordinary murder, not to mention mere disciplinary violations. Furthermore, universal jurisdiction is the ultimate jurisdictional contingency plan: it applies to offences to which the state has no direct connection. In case of an offence by a service member, there exists such a link, and a fairly strong one at that. The flag principle seems marginally more promising, for it can be used to ground the jurisdiction over naval personnel to a very significant extent. But then again, on-shore conduct would not be covered by flag jurisdiction.

This leaves three principles that need more careful consideration. First, service members and associated civilians might come within the reach of the active personality principle as nationals. Second, their conduct might fall under the protective principle as being detrimental to the security of the state. Third, the sending state may be seen as stepping into the shoes of the territorial state, making use of the representational principle.

A *Excursus: Quasi-Territoriality*

Before looking at those three principles in more detail, it may be beneficial to have a short interlude to consider a few situations where a state might be seen, bizarrely, as having territorial jurisdiction outside its territory.[31] This may occur where a state exercises control by its military forces over a piece of land outside its territory proper. While this possible quasi-territorial jurisdiction is hardly ever seen as the basis for jurisdiction over one's own service members, the issue has come up with respect to associated civilians.

The classic scenario of quasi-territoriality is military occupation — a situation where, in an armed conflict, territory is 'actually placed under the authority of the hostile army'.[32] Under contemporary international law, occupation does not create title to such territory. Yet, the occupying power has therein some legislative authority. The extent of this authority is specifically addressed in, and limited by, the law of armed conflict. The *Hague Regulations* codify the general rule that the occupying power, while fulfilling its obligation to restore public

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[30] See, eg, *European Convention on the Suppression of Terrorism*, opened for signature 27 January 1977, 1137 UNTS 93 (entered into force 4 August 1978) art 6(1).

[31] On the malleability of the notion of 'territory', see Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford University Press, 2009).

[32] *Hague Convention (IV) respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, [1910] UKTS 9 ('*Hague Convention*') annex ('*Regulations respecting the Laws and Customs of War on Land*') art 42(1) ('*Hague Regulations*').

order and safety in the occupied territory, must respect 'unless absolutely prevented, the laws in force in the country'.[33] The *Geneva Convention IV* adds that the penal laws of the occupied territory 'shall remain in force' and may be repealed or suspended only to the extent that they threaten the security of the occupying power or hamper the application of the Convention.[34]

As concerns enacting new legislation, the *Geneva Convention IV* provides as follows:

> The Occupying Power may … subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the … Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[35]

Thus, the occupying power does obtain at least limited territorial jurisdiction over the occupied area. If the occupying power can subject the local population to legislation enacted on a territorial basis, there is little reason to believe that it cannot subject its own service members — or, as is more likely, associated civilians — to such legislation. However, the criminal law of the occupying power does not automatically extend to the occupied territory. The occupying power must specifically legislate for that territory.

Military bases[36] set up on the territory of another state in time of peace and thus without *occupatio bellica* pose a more complicated problem. Such bases have become quite common since World War II — there is currently foreign (mostly US) military presence in some 100 countries.[37] Military bases on foreign soil are established with the consent of the territorial sovereign which ordinarily manifests itself in an agreement, concluded between the host state and the sending state. The host state grants the sending state the right to use a piece of its territory and agrees to certain limitations on its own authority over that territory.

The base areas in question do not become part of the territory of the sending state, despite being under its effective control.[38] They resemble the position of embassies: they are simply areas where the territorial state has relinquished actual authority. But the fact that base areas do not, strictly speaking, form part of the territory of the sending state does not resolve the problem of jurisdiction from the sending state's perspective. Could it constructively regard the land areas forming military bases as its territory for the purposes of criminal jurisdiction? In more practical terms, could the sending state regard its law as applicable to

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33 *Hague Regulations* art 43. See also Edmund H Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1945) 54 *Yale Law Journal* 393.

34 *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 64(1) ('*Geneva Convention IV*').

35 Ibid art 64(3).

36 I use the word 'base' to cover all sorts of stationary military installations.

37 The US has around 1000 bases abroad and other NATO countries, principally the UK and France, maintain another 200 or so. See Wilbert van der Zeijden, *Foreign Military Bases and the Global Campaign to Close Them: A Beginner's Guide* (July 2009) <www.tni.org/primer/foreign-military-bases-and-global-campaign-close-them>.

38 See generally John Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law* (Martinus Nijhoff, 1992) 113–32; Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2006) 93.

anyone on such a base, just as its criminal law binds everyone who visits the national territory?

Agreements on the lease of military base areas tend to answer this question by implication. Such treaties stipulate the totality of rights and privileges of the foreign troops in the host state. As far as criminal law is concerned, that typically involves an exemption of service members and associated civilians from the local state's judicial process.[39] In case of occupation, the right of the occupying power to legislate territorially flows from the law of armed conflict. In the case of a military base, such a right would have to arise from the relevant agreement. If it does not, the sending state will have to make do with principles of jurisdiction under general international law.

Treaties that establish some quasi-territorial legislative authority over military base areas are not unheard of. Historical precedents include the agreements concluded by the US with Panama concerning the Canal Zone,[40] with Nicaragua over the Corn Islands[41] as well as with the Philippines in relation to certain areas.[42] A more topical example would be the Guantánamo Bay Naval Base, the status of which has come to the fore in the so-called 'global war on terror'. The 1903 treaty between the US and Cuba recognises 'the ultimate sovereignty' of Cuba over the Guantánamo Bay area but grants the US 'complete jurisdiction and control'.[43] For criminal law purposes, this arrangement seems to grant the US the right to enact penal legislation in the area as if it were US territory.[44]

It appears, moreover, that the US has (somewhat abortively) exercised that right. Specifically, the *UCMJ* contains a provision making it applicable

> [s]ubject to any treaty or agreement to which the United States is or may be a party to any accepted rule of international law, [to] persons within an area leased by or otherwise reserved or acquired for use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.[45]

The US Supreme Court has noted in passing that the Guantánamo Bay Naval Base qualifies as an 'area leased by … the United States' for the purposes of this

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39 See, eg, *Agreement under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, regarding Facilities and Areas and the Status of US Armed Forces in Japan*, US–Japan, signed 19 January 1960, 373 UNTS 186 (entered into force 23 June 1960) art XVII.

40 *Convention for the Construction of a Ship Canal*, US–Panama, TS No 431 (signed and entered into force 18 November 1903) art III.

41 *Convention regarding the Nicaraguan Canal Route and a Naval Base on the Gulf of Fonseca*, Nicaragua–US, signed 5 August 1914, TS No 642 (entered into force 22 June 1916) art II.

42 *Agreement concerning Military Bases*, Philippines–US, signed 14 March 1947, 43 UNTS 272 (entered into force 26 March 1947) art XII(1)(a).

43 *Agreement for the Lease of Lands for Coaling and Naval Stations*, US–Cuba, signed 16 and 23 February 1903, TS No 418 (entered into force 23 February 1903) art III.

44 Roland J Stanger, *Criminal Jurisdiction over Visiting Armed Forces* (Government Printing Office, 1965) 202 (noting that the agreements just mentioned grant the US 'exclusive jurisdiction not only over offences committed by its forces, but over all offences committed in the designated areas').

45 *UCMJ* art 2(a)(12).

provision.[46] This would mean that a crime committed in Guantánamo would be covered by the *UCMJ* and subject to trial by court-martial. However, the provision has apparently never been used to bring charges.[47] That is no surprise, either. Service members are, after all, covered by *UCMJ* as such, without any reference to their location.[48] And, as noted earlier, attempts to try civilians by court-martial (though under a different jurisdictional provision of the *UCMJ*) have failed on constitutional grounds.[49]

There is a certain amount of confusion over the applicability of ordinary federal law on US bases abroad. US federal criminal law extends to certain places that are collectively called the 'special maritime and territorial jurisdiction' ('SMTJ').[50] Among such places are:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.[51]

The main purpose of this clause is to cover 'federal enclaves' within the US, ranging from lone buildings used by the federal government to vast land areas such as national parks and military bases. However, there is some uncertainty as to whether the provision — by referring to 'lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof' — also purports to cover military bases outside US territory. In 2000, one federal appellate court found it did[52] and another one found that it did not.[53] The latter position seems, at least partly, to have been motivated by concerns over whether international law would permit the US law to be made applicable quasi-territorially on premises controlled by the US in foreign countries.[54] Yet, civilians both with US nationality[55] and foreign nationality[56] have been indicted

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46 *Hamdan v Rumsfeld*, 548 US 557, 548 n 47 (2006) ('Guantanamo Bay is such a leased area.'), citing *Rasul v Bush*, 542 US 466, 471 (2004).

47 Susan S Gibson, 'Lack of Exterritorial Jurisdiction over Civilians: A New Look at an Old Problem' (1995) 148 *Military Law Review* 114.

48 *UCMJ* arts 2(a)(1)–(8), 5.

49 See above n 13.

50 As defined in 18 USC § 7 (2010). This provides the basis for the extraterritorial application of various criminal laws contained in 18 USC pt I. See, eg, 18 USC §§ 81 (arson), 114 (assault), 1111 (murder).

51 18 USC § 7(3).

52 *US v Corey*, 232 F 3d 1166 (9th Cir, 2000) (civilian employee of the US Air Force abusing his stepdaughter both while they were living in Japan on Yokota Air Force Base and in the Philippines in a private apartment building rented by the US embassy for use by embassy staff), following *US v Erdos*, 474 F 2d 157 (4th Cir, 1973) (one US national killing another US national within the US embassy in Equatorial Guinea). For a recent case following *US v Corey*, see *US v Holmes*, 618 F Supp 2d 529 (ED Va, 2009) ('*Holmes*') (member of US armed forces on Yokota Air Force Base in Japan sexually molesting his stepdaughter; proceeding under UCMJ barred by a statute of limitations). The court later vacated the order for reasons unrelated to SMTJ: *Holmes*, 672 F Supp 2d 739 (ED Va, 2009) (finding that that the Eastern District of Virginia was not the proper venue for the trial).

53 *US v Gatlin*, 216 F 3d 207 (2nd Cir, 2000) ('*Gatlin*') (civilian husband of a service member abusing a minor on a property leased by the US military in Germany).

54 In *Gatlin*, the court followed the argument of *US v Bin Laden*, 92 F Supp 2d 189 (SD NY, 2000), where the question of international law was entertained.

55 *US v Rogers*, 388 F Supp 298 (ED Va, 1975).

in the past for crimes committed at Guantánamo Bay, suggesting that federal criminal law does indeed apply there.

This controversy received an interesting resolution in 2001 when the Congress extended federal criminal law to cover:

> [w]ith respect to offenses committed by or against a national of the United States … —
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> (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States … and
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> (B) residences in foreign States … used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.[57]

Presumably in order to be on the safe side of international law, this extension of the ambit of US law only deals with 'offenses committed by or against a national'. The result is a mongrel. On the one hand, the provision seems to establish limited territorial jurisdiction over certain premises, particularly as it extends the 'special maritime and *territorial* jurisdiction'[58] of the US. At the same time, one might as well approach the provision as stipulating a territorially restricted active personality and passive personality principle.

B *Active Personality*

As mentioned earlier, the active personality principle provides the basis for extending the law of the state to all its nationals abroad. This is personal jurisdiction, free of all the locality problems inherent in any (quasi-)territorial approach. Moreover, it has no immediately discernable limitations under international law.

However, an attempt to justify service jurisdiction by reference to nationality meets with two problems. The first is the simple fact that the armed forces are by no means solely composed of nationals (to say nothing of the accompanying civilians). The second problem is that the reasons for extending the ambit of the law to cover the acts of service members and the acts of nationals abroad are not necessarily the same.

1 *Non-Nationals in the Armed Forces*

The employment of foreigners in the military is, and has been, fairly common. In the 18th and early 19th centuries, the share of foreign nationals in the armed forces of major military powers such as Prussia, Britain, France and Spain hovered between a quarter and a half.[59] This number began to drop in the middle of the 19th century, with an international 'anti-mercenarism' campaign and the adoption of national laws against recruitment by, and enlistment in, foreign

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56 *US v Lee*, 906 F 2d 117 (4th Cir, 1990).

57 See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub L No 107-56, 115 Stat 272, § 804, codified at 18 USC § 7(9) (2010).

58 18 USC § 7 (2010) (emphasis added).

59 Janice E Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press, 1994) 26–32.

forces.[60] However, international law by no means prohibits the enlistment of foreign nationals provided that they are incorporated into the armed forces.[61] International law takes issue with the use of mercenaries.[62] However, a person who is a member of the armed forces of a party to the conflict is by definition not a mercenary.[63]

Probably the best known military unit in the world today that is made up of foreign nationals is the French Foreign Legion. Established in 1831 as a unit of the French Army, it is currently composed of some 7700 men,[64] all nominally foreigners.[65] The Foreign Legion is far from being a relic — it is a superbly trained military outfit and its units are presently deployed on numerous operations outside French territory.

The British Army has two notable units composed of foreign nationals. One is the Brigade of Gurkhas,[66] made up of some 3700 soldiers of Nepalese origin.[67] The other, the Royal Irish Regiment, has, as the name suggests, recruited personnel particularly from the Republic of Ireland, but also from South Africa, Zimbabwe, Fiji and the Caribbean. In 2009, in addition to the Gurkhas, some 7670 members of the UK armed forces were nationals of other countries.[68]

There are further instances of 'foreign legionnaires' in Europe. A peculiar example comes from Iceland, which does not have a standing army, but whose nationals may be accepted to serve in the Norwegian forces.[69] More significantly, several European countries have begun recruiting foreigners into their armed forces in the last decade. In 2000, Irish officials approved the plan to allow more non-nationals to serve in the defence forces.[70] In 2002, Spain made it

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60 Ibid 77–90.

61 Rowe, *Impact of Human Rights Law*, above n 38, 23.

62 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 12 July 1978) ('*Additional Protocol I*') art 47(1) (denying mercenaries combatant privilege and prisoner of war protection); *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, opened for signature 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001) ('*Mercenary Convention*') (putting in place a comprehensive ban on the use of mercenaries).

63 *Additional Protocol I* art 47(2)(e); *Mercenary Convention* art 1(1)(d).

64 International Institute for Strategic Studies, *The Military Balance 2010* (Routledge, 2010) 129. The foreign legionnaires make up about 2 per cent of the entire force.

65 I say nominally because roughly a quarter of the legionnaires are, in fact, Frenchmen, who have joined up by declaring a fictitious nationality, usually that of another Francophone country. As a result, there is no way of knowing the precise national composition of the Legion.

66 For a discussion of the legal status of Gurkhas within the British forces, see *R (Purja) v Ministry of Defence* [2003] EWCA Civ 1345 (9 October 2003).

67 International Institute for Strategic Studies, above n 64, 168.

68 See UK Ministry of Defence, *Table 2.14: Strength of the Trained UK Regular Forces by Service and Nationality at 1 April Each Year* (30 September 2009) Defence Statistics 2009 <www.dasa.mod.uk/modintranet/UKDS/UKDS2009/c2/table214.html>. This brings the share of foreign nationals close to 7 per cent of the entire force.

69 Iver Gabrielsen, *Alle gode ting er tre* (11 December 2006) Forsvaret <www.mil.no/start/article.jhtml?articleID=131132>.

70 Jim Morahan, 'Regulations Will Allow Non Nationals to Enlist in Irish Defence Forces', *Irish Examiner* (Cork), 12 October 2000, 27.

possible for all residents to enlist in its armed forces.[71] Belgium followed suit in 2003[72] and Luxembourg in 2004.[73] The numbers are still quite small but with the free movement of individuals within the EU and the Spanish military's winks and nods towards South America, the figures may be expected to increase.

The recruitment of foreigners is certainly not a purely European phenomenon. The armed forces of several Middle Eastern and African states rely on non-nationals.[74] But in absolute numbers, the US military employs, by far, the largest number of foreigners — in 2006, some 30 000[75] (though only about 1% of the total troop strength). This is explained by the fact that, in addition to US nationals, two groups of individuals can serve in the US forces: (i) nationals of the three countries 'in free association' with the United States, that is, the Marshall Islands, the Federated States of Micronesia, and Palau, and, more significantly, (ii) lawful permanent residents.[76] Expanding the possibilities for foreigners to join the forces is being discussed, and even the idea of creating a foreign legion has been floated.[77]

The bottom line is that foreign nationals do serve in the armed forces, and increasingly so. Yet, the non-nationals thus serving are amenable to the same legal framework as service members having nationality.[78] For the purpose of extending the law to cover their acts, the nationality principle, at least on its face, is an insufficient basis.

The problem is even more acute when it comes to associated civilians. Whatever may be the nationality requirements for the service members, their spouses and children certainly need not be nationals of the sending state.

As concerns private military contractors, recent US practice suggests that they are actually far more likely be non-nationals than nationals of the sending state. In mid-2010, the US forces serving within the Central Command ('USCENTCOM') — which, inter alia, covers the deployments in Iraq and Afghanistan — were supported by some 250 000 contractors. About a fifth of them were US nationals; the rest were, in roughly equal parts, host state and third state nationals.[79] The large proportion of host state nationals is not surprising: in

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71 *De Régimen del Personal de las Fuerzas Armadas, al objeto de permitir el acceso de extranjeros a la condición de militar profesional de tropa y marinería* (Spain) Ley 32/2002, de 5 de julio, de modificación de la Ley 17/1999, de 18 de mayo.

72 *Wet betreffende de werving van de militairen en het statuut van de militaire muzikanten en tot wijziging van verschillende wetten van toepassing op het personeel van Landsverdediging* (Belgium) 13 Maart 2003 Belgisch Staatsblad bl 23242.

73 George E Glos, 'Luxembourg — Army Enlists Foreigners' [2004] (3) *World Law Bulletin* 12.

74 Thomson, above n 59, 90–3.

75 Bryan Bender, 'Military Considers Recruiting Foreigners', *The Boston Globe* (online), 26 December 2006 <www.boston.com/news/nation/articles/2006/12/26/military_considers_recruiting_foreigners>. This makes up 2 per cent of the entire strength of the force.

76 See 10 USC § 504(b) (2010).

77 Max Boot and Michael O'Hanlon, 'Create a US Foreign Legion' (2007) 144 (March) *Armed Forces Journal* 10.

78 American Law Institute, *Restatement, (Second) of the Foreign Relations Law of the United States* (1965) § 31 cmt (b); Serge Lazareff, *Status of Military Forces under Current International Law* (Sijthoff, 1971) 9.

79 Assistant Deputy Under Secretary of Defense (Program Support), *Contractor Support of US Operations in USCENTCOM AOR, Iraq, and Afghanistan (5A Paper)* (May 2010) <www.acq.osd.mil/log/PS/p_vault/5A_May2010.doc>.

the context of contingency operations it may be easiest to hire local staff for base support operations, which moreover would make a contribution to the local economy.

But the figures can be far more dramatic if a particular segment of the contractors is examined. In Iraq, the share of third state nationals among armed security contractors — the group of contractors whose conduct is probably most likely to give rise to legal problems — has been extreme, peaking in June 2009 at 80%.[80]

Yet states appear to claim jurisdiction over associated civilians irrespective of their nationality. A clause contained both in the *AFA* and *MEJA*, excluding from the ambit of these acts civilians who are nationals or residents of the host state,[81] leaves no room for doubt that foreign nationals would generally be covered. Interestingly, the *UCMJ* does not exclude even host state nationals and in fact the first court-martial of a civilian in time of a contingency operation[82] involved a contractor who held dual nationality of the host state and a third state.[83]

The niftiest way to address the apparent discrepancy between the active personality principle and scope of service jurisdiction would be to tinker with the active personality principle under international law to accommodate certain groups of non-nationals.[84] There is indeed some support for this approach. But in order to give that theory due scrutiny, the scope of the active personality principle and its conceptual foundation must be examined first, to see whether they could apply equally to service members and associated civilians.

2 *Scope of the Principle*

Unfortunately for this enquiry, the active personality attracts very little opposition. As Judge Moore remarked in the *Lotus* case, '[n]o one disputes the right of a State to subject its citizens abroad to the operations of its own penal laws'.[85] Consequently, not much effort has gone into explaining the normative foundations of the principle. The occasional attempts to do so tend to boil down to the bland observation that what goes on between a state and its nationals does not concern any other state.[86]

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80 Moshe Schwartz, 'The Department of Defense's Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress' (Congressional Research Service Report R40835, US Congress, 2010) 8–9.

81 *AFA* sch 15 s 11; 18 USC § 3267(1)(C), (2)(C) (2010).

82 *UCMJ* art 2(a)(10).

83 See Defendant's Writ-Appeal Petition for Review of United States Army Court of Criminal Appeals Decision on Application for Extraordinary Relief (summarily denied), *Ali v Austin* (US Court of Appeals for the Armed Forces, Misc No 09-8001/AR CCA 20080678, 18 December 2008) 67 MJ 186 ('*Ali*').

84 See Bishop, above n 25, 320 ('We might also speculate as to how far employment by the state might substitute for the tie of nationality, as a basis for jurisdiction which should be admitted by other states.'), citing Harvard Research in International Law, 'Jurisdiction with Respect to Crime' (1935) 29 *Supplement to the American Journal of International Law* 439, 539 ('Harvard Research').

85 *Lotus* (*Judgment*) [1927] PCIJ (ser A) No 10, 92 (Judge Moore).

86 See, eg, *Papers Relating to the Foreign Relations of the United States, for the Year 1887* (Government Printing Office, 1888) 751, 754; John Bassett Moore, 'Report on Extraterritorial Crime and the Cutting Case [1887]' (1906) 2 *Moore's Digest of International Law* 243, 256; James L Brierly, 'The Lotus Case' (1928) 44 *Law Quarterly Review* 154, 163; Harvard Research, above n 84, 519.

Yet things are not quite that simple. When the Harvard Research was carried out in the 1930s, there was concern about the situation where the territorial law of a state and the personal law of a visitor collide. However, the prevailing view was that '[*i*]*n the present state of international law* … it would be inappropriate for a convention on jurisdiction with respect to crime to incorporate limitations upon a State's authority over its nationals'.[87] Even though that accurately reflected the thinking of the time,[88] the draft carefully suggested that active personality should have a subsidiary status to territoriality.[89]

In light of the developments of international law, particularly over the past half century, it is increasingly difficult to accept that a state can treat its nationals as it pleases.[90] Thus, also, the view that 'jurisdiction which a country chooses to exercise over its own nationals in relation to acts performed at home or abroad is outside the sphere of international law'[91] strikes me as anachronistic. Nothing is outside the sphere of international law by its very nature. As the Permanent Court of International Justice noted in the *Nationality Decrees* opinion, '[t]he question of whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question, it depends upon the development of international relations.'[92] Hans Kelsen made a similar point when criticising the provision in the *UN Charter*, which prohibits the organisation from intervening 'in matters which are essentially within the domestic jurisdiction of any state'.[93] He explained that

> [t]he matter is within the domestic jurisdiction not by its very nature, but because at that moment no norm of international law regulates the matter … by establishing an obligation of the states to conduct themselves with respect to this matter in a certain way.[94]

All legal relations are, in principle, capable of regulation by international law: everything depends on the state of development of international law at the given time.

Thus, there is room for argument that the situation with respect to jurisdiction over nationals has changed. Despite scepticism from some commentators,[95] the

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87 Harvard Research, above n 84, 613 (emphasis added).

88 *Blackmer v US*, 284 US 421, 436–7 (1932) (upholding jurisdiction over a US national domiciled in France on grounds '[w]ith respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government'); cf W E Beckett, 'The Exercise of Criminal Jurisdiction over Foreigners' (1925) 6 *British Year Book of International Law* 44, 45, 58.

89 Harvard Research, above n 84, 531.

90 But see Georg Schwarzenberger and E D Brown, *A Manual of International Law* (6th ed, 1976) 77 (claiming that '[i]nside each State's territory, its territorial jurisdiction over its possessions, its nationals and their property is, under international customary law, unlimited').

91 Reydams, above n 28, 3; similarly Lotika Sarkar, 'The Proper Law of Crime in International Law' (1962) 11 *International and Comparative Law Quarterly* 446, 459.

92 *Nationality Decrees Issued in Tunis and Morocco (French Zone) (Advisory Opinion)* [1923] PCIJ (ser B) No 4, 24.

93 *Charter of the United Nations* art 2(7) ('*UN Charter*').

94 Hans Kelsen, *Principles of International Law* (Rinehart, 1952) 198; for a rather similar view, see Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 291.

95 See Bishop, above n 25, 320.

territorial state might well object where the state of nationality purports to criminalise an act that was not just permitted, but positively required, by territorial law. Several contemporary writers admit, along these lines, that there must be some limits to the national state's jurisdiction.[96] A large number of states that make use of the active nationality principle seem to agree: prosecution of nationals at home for acts committed abroad is routinely made contingent upon the act also being criminal under the local law.[97]

3 *Justificatory Basis of the Principle*

For the purposes of a conceptual inquiry, it is at any rate defeatist to say that jurisdiction over nationals is explained or justified by the mere fact that other states cannot intervene. Some substantive explanation should be found.

The grounds that have been cited in support of the nationality principle are quite diverse.[98] For one, every state could be said to have interest in maintaining the integrity of its law by not allowing nationals to commit crimes by making day-trips across the border.[99] The state might also be concerned about its own reputation: just like a parent may be concerned about how their children's behaviour reflects on them.[100] Also, assuming that the person will return to the state of nationality, his or her local community would be interested in deterring him or her from committing further offences once back home.[101]

In terms of more fundamental legitimising justifications, two slightly different alternatives appear to be available. One the one hand, the active personality principle can be supported with reference to the idea that the people form one element of the state. On the other hand, the active personality jurisdiction can be constructed on top of the notion of allegiance[102] (which is the more usual approach for lawyers from the common law tradition).[103] At first glance, the theories look very much alike, in so far as both emphasise a fundamental link between the individual and the state. However, allegiance adds a very important factor by looking at that link as a two-way street: what the national gains from the relationship is protection. The view that an individual is subjected to the

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96 See, eg, Robert Y Jennings, 'General Course on Principles of International Law' (1967-II) 121 *Recueil des Cours* 323, 517; Derek W Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1982) 53 *British Year Book of International Law* 1, 7–8; Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 650.

97 Cf Robert Y Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 *British Year Book of International Law* 146, 151; Sir Robert Y Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9th ed, 1992) vol 1, 406; Brownlie, above n 94, 309.

98 Harvard Research, above n 84, 519–20.

99 Sarkar, above n 91, 460.

100 Geoffrey R Watson, 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction' (1992) 17 *Yale Journal of International Law* 41, 68.

101 Sarkar, above n 91, 460–1.

102 Harvard Research, above n 84, 519; Sir Franklin Berman, 'Jurisdiction: The State', in Patrick Capps, Malcolm Evans and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart, 2003) 3, 5.

103 Common law used to be so fond of the notion of allegiance that it rationalised territorial jurisdiction as a corollary of a temporary or local allegiance of persons in the territory. See, eg, Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon, 1765) vol 1, 357–9.

extraterritorial jurisdiction of the state in exchange for receiving protection abroad has been adopted by an impressive line-up of commentators.[104]

Authoritative support for the proposition that protection and personal jurisdiction are related comes from the recent work of the International Law Commission ('ILC') on diplomatic protection. Generally speaking, diplomatic protection refers to the principle that one state can make representations against another state when the latter has caused injury to one of its nationals.[105] According to Mohamed Bennouna, the ILC's Special Rapporteur on Diplomatic Protection, 'diplomatic protection has been regarded from the outset as the corollary of personal jurisdiction of the state over its population when elements of that population, while in foreign territory, have suffered injury in violation of international law'.[106]

Admittedly, there are also dissenting voices. For instance, Edwin Borchard, in a somewhat dated, but still oft-cited monograph on diplomatic protection, casts doubt on the reliance on allegiance in establishing jurisdiction:

> The notion that citizens, resident abroad, by virtue of their allegiance still fall under the operation of the laws of their national state, is a fallacy often encountered in the writings of publicists. They are subject only to such national laws as the legislature expressly makes binding upon them.[107]

This must be a misunderstanding. The point that nationals abroad fall under the operation of only those laws that the legislature has made binding upon them may be true (presuming that, in the given legal system, there is a presumption towards interpreting laws territorially). However, this in no way detracts from the point that the legitimation of such extension of the scope of the law may be based on allegiance and the corresponding protection that a state accords to its nationals abroad.

4 *Equating Certain Non-Nationals with Nationals*

If active personality jurisdiction and diplomatic protection can be seen as correlates, the scope of a state's capacity to make international claims at the behest of individuals might also shed some light on the scope of the active personality principle.

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104 Sarkar, above n 91, 456–7; Stanger, above n 44, 11; Martin Dixon, *Textbook on International Law* (Oxford University Press, 6th ed, 2007) 147; Finn Seyersted, 'Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organisations' (Pt 1) (1965) 14 *International and Comparative Law Quarterly* 31, 33; but for a sceptical view, see Ludwig von Bar, *International Law: Private and Criminal* (Soule and Bugbee, 1883) 630–1.

105 ILC, *Draft Articles on Diplomatic Protection*, UN GAOR, 61st sess, Supp No 10, UN Doc A/61/10 (2006) ch IV ('*Draft Articles on Diplomatic Protection*'). Article 1 defines diplomatic protection as 'the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.'

106 Mohamed Bennouna, Special Rapporteur, *Preliminary Report on Diplomatic Protection*, UN Doc A/CN.4/484 (4 February 1998) [10].

107 But see Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad, or the Law of International Claims* (Banks, 1919) 8 n 3.

The fundamental and undisputed rule is that '[t]he State entitled to exercise diplomatic protection is the State of nationality'.[108] However, the International Court of Justice recognised in the *Reparation for Injuries* opinion that 'there are important exceptions to [this] rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality'.[109] One such exception concerns refugees and stateless persons. The rationale here is obvious: if the state of residency were not allowed to make representations on their behalf, they would be left almost completely without the protective umbrella of international law.[110]

The second notable exception, which is more relevant here, has to do with the crews of ships. Notably the US has consistently sought to exercise diplomatic protection in cases where injury has been caused to non-nationals serving as crew-members on US ships.[111] On this issue, the *Draft Articles on Diplomatic Protection* contain what is essentially a savings clause:

> The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.[112]

Commentary to this article adds that '[a]lthough this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag state of a ship and the members of a ship's crew, there is nevertheless a close resemblance between this type of protection and diplomatic protection.'[113]

Thus, there seems to be at least some evidence to suggest that alien seamen may be regarded as having, for the lack of a better expression, a 'functional nationality' of the flag state during their service on the ship.[114] Accordingly, it would not be too far-fetched to regard these persons as coming within the scope of the active personality principle precisely because of the protection granted to them. Historically, this appears to be the US position, quite clearly tying protection to the corresponding duty to follow the laws of the country. In 1881,

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108 *Draft Articles on Diplomatic Protection*, UN Doc A/61/10, art 1(1).

109 *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 181 ('*Reparation for Injuries*').

110 See *Draft Articles on Diplomatic Protection*, UN Doc A/61/10, art 8.

111 For a more thorough discussion, see John Dugard, Special Rapporteur, *Fifth Report on Diplomatic Protection*, UN Doc A/CN.4/538 (4 March 2004) [44]–[67]; Chittharanjan F Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008) 119–22.

112 *Draft Articles on Diplomatic Protection*, UN Doc A/61/10, art 18.

113 Ibid.

114 See also A D Watts, 'The Protection of Alien Seamen' (1958) 7 *International and Comparative Law Quarterly* 691.

the Secretary of State wrote to the British envoy:

> When a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation, in the exercise of an unquestioned authority, governs its vessels and seamen.[115]

English law has, for a long time, contained a similar principle. Specifically, the *Merchant Shipping Act 1894* extended British Admirality jurisdiction to cover

> [a]ll offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship …[116]

As a matter of practice, though, the relevance of this provision does not appear all that significant. Akehurst, writing in the early 1970s, knew of no prosecution based on it.[117]

In any event, the Harvard Draft confidently stipulates that a state has jurisdiction with respect to a crime committed outside its territory by an alien 'while engaged as one of the personnel of a ship or aircraft having the national character of that State.'[118] Offences committed by such seamen on board the vessel itself would, of course, come within the flag principle. The quoted principle suggests, however, that on-shore offences are also covered.[119]

Similar logic might well be applied to members of the armed forces.[120] For one, the US State Department, in its *General Instructions to Claimants*, has put on record its policy of regarding alien seamen and members of the armed forces as equally placed for the purposes of US protection.[121] In the *Reparation for Injuries* case before the ICJ, two judges, in their dissenting opinions, travelled along a similar path. Their views are worth citing in full. According to Judge Hackworth

> [n]ationality is a *sine qua non* to the espousal of a diplomatic claim on behalf of a private claimant. Aside from the special situation of protected persons under certain treaties and that of seamen and aliens serving in the armed forces, all of

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115 'Mr Blaine, Sec of State, to Sir E[dward] Thornton, June 3, 1881' (1906) 2 *Moore's Digest of International Law* 606, 607.

116 *Merchant Shipping Act 1894*, 57 and 58 Vict c 60, s 687. Conversely, it was accepted that a British subject serving on a foreign ship became amenable to the law of the flag of that ship. Bowett, above n 96, 70.

117 Michael Akehurst, 'Jurisdiction in International Law' (1974) 46 *British Year Book of International Law* 145, 157 n 5.

118 Harvard Research, above n 84, 542.

119 Stanger, above n 44, 50 (arguing that the nationality of the seaman does not make a difference in allocating jurisdiction between the flag State and littoral State, and the jurisdiction of the flag State supersedes that of State of nationality).

120 Michael Byers, 'Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective' (1995) 17 *Michigan Journal of International Law* 109, 158 n 162.

121 Cited in *Hilson (US) v Germany*, 7 RIAA 176, 177 (US–Germany Mixed Claims Commission, 1925).

> whom are assimilated to the status of nationals, it is well settled that the right to protect is confined to nationals of the protecting State.[122]

Judge Badawi Pasha went a bit further in explaining why this may be the case, stating that

> the classes of cases envisaged in the Opinion seem to relate to the protection of the flag and of armed forces, in which case protection extends to everyone in the ship or in the forces, independent of nationality. But it must be pointed out that as the condition of nationality is satisfied as regards the flag or the forces, its absence, in the case of one or more units or persons of a national entity, may be held to be covered by a principle of the indivisibility of the flag or of the armed forces.[123]

Putting crew-members of ships and members of the armed forces on the same footing has merit. Specifically, whatever arguments there may be for extending diplomatic protection to alien seamen, those arguments must apply a fortiori to the crews of warships, that is to say, naval forces. The crew of a warship is certainly even more 'indivisible' and even more intimately connected to the flag state than that of a merchant vessel. And, if naval personnel came within the scope of the relevant rules by such a construction, it would seem awkward to deny the same privilege — or burden, as the case may be — to members of other branches of the armed forces.

Thus, it is unsurprising that the Harvard Draft contains a provision that comes reasonably close to equating public officials of a state to alien seamen. According to the Draft, '[a] State has jurisdiction with respect to any crime committed outside its territory … [b]y an alien in connection with the discharge of public functions which he was engaged to perform for that State'.[124] As the commentary explains, public officials coming within the scope of this provision include 'diplomatic and consular officers, officers of military and naval forces, customs officials, public health officers, officials of government operated transportation systems, etc'.[125]

The language in the Harvard Draft is admittedly limited in scope. First, it applies, according to the commentaries, only to offences connected with the official duties of the person.[126] Second, the above cited portion of the commentary seems to suggest that only the officer corps is covered, whereas foreigners serving in the armed forces more commonly belong to the rank and file. Yet there seems little need to be tied up with the precise formulation: the general point is that service-members, like alien seamen, could be assimilated to nationals.[127]

All of this looks very promising. However, some sceptical remarks are in order. First, as concerns the diplomatic protection, the capacity of a state to make

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122 *Reparation for Injuries* [1949] ICJ Rep 174, 202–3 (Judge Hackworth).

123 Ibid 206–7 n 1 (Judge Badawi Pasha).

124 Harvard Research, above n 84, 539.

125 Ibid; see also Bishop, above n 25, 320 ('[w]e might also speculate as to how far employment by the state might substitute for the tie of nationality, as a basis for jurisdiction which should be admitted by other states').

126 Harvard Research, above n 84, 539.

127 Georg Dahm, Jost Delbrück and Rüdiger Wolfrum, *Völkerrecht* (De Gruyter, 2nd ed, 1989) vol i/1, 321.

international claims in respect of alien service members is not clear. The ILC *Draft Articles on Diplomatic Protection*, whilst accepting such a right as regards alien seamen — with extraordinary efforts of persuasion in the commentary, one might add[128] — does not mention service members. To be sure, there are special instances under the law of armed conflict where they might be accorded protection by their flag state. For instance, when combatants are captured by the enemy forces and become prisoners of war, the 'power on which they depend' may make representations with regard to their treatment either directly or through a protecting power to the detaining power.[129] And the 'power on which they depend' cannot in this context mean anything else than the state in the armed forces of which they serve. However, it is not entirely clear to what lengths this principle might be taken as a matter of analogy under general international law.

Second, to equate service members to nationals would bestow upon them some sort of quasi-dual nationality. However, in the case of dual nationality, calling on one state of nationality for assistance vis-à-vis another state of nationality goes against international practice.[130] Yet, both the US and UK recognise that the actual state of nationality can come to the aid of a service member in judicial proceedings by offering consular assistance.[131]

Third, coming back, more specifically, to questions of jurisdiction, the validity of jurisdiction over service members has been explicitly recognised without taking a stance on whether nationality based jurisdiction could, in similar circumstances be, be upheld. According to the Federal Court of India, jurisdiction over service members stands on its own feet:

> Whatever may be the rule of international law as regards the ordinary citizen, we have not been referred to any rule of international law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits.[132]

Finally, the protection accorded to alien service members can hardly be regarded as the *main* justification for holding them responsible to the laws of the sending state. As Roland Stanger points out:

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128 See *Draft Articles on Diplomatic Protection*, UN Doc A/61/10, commentary to art 18.

129 Protecting powers are, importantly, stand-ins for the belligerent parties to the conflict, that is States themselves, rather than personal representatives of the detained combatants. See, eg, UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) 418–19. Thus the link to a State on whose behalf protecting powers operate is critical.

130 See Colin Warbrick, 'Protection of Nationals Abroad' (1988) 37 *International and Comparative Law Quarterly* 1002, 1003.

131 As regards the US, see Departments of the Army, the Navy and the Air Force, *Consular Protection of Foreign Nationals Subject to the Uniform Code of Military Justice*, Reg AR 27–52/SECNAVINST 5820.6/AFR 110–13 (5 November 1968); James J McGowan and William D Haught, 'Consular Protection of Foreign Nationals in the United States Armed Forces' (1970) 48 *Military Law Review* 166. With respect to the UK, see, eg, Army Headquarters Adjutant General, *British Army Chain of Command Guide: Supporting Foreign and Commonwealth Citizens and Their Families*, DPS(A)28/9/PS4(A) (31 March 2008) 5.

132 *Mohammad Mohy-ud-Din v The King Emperor* (1946) 8 FCR 94, (Federal Court of India) 105.

> [T]hose considerations of policy which bear upon the wisdom of asserting jurisdiction over nationals with respect to their conduct abroad are largely irrelevant in the case of troops. The relevant considerations are rather those which underlie the exercise of jurisdiction on the protective principle, that is, those which concern the security of the state.[133]

Hence, even those states that do not generally subject their nationals to the operation of their criminal law abroad, routinely apply their national law to the acts of service members.[134] Yet

> [t]he nationality principle may … because of its respectability, be invoked in situations in which it is not strictly applicable, as in the case of seamen not nationals of the flag state or alien members of an armed force abroad. One can, of course, speak of assimilated nationality, in terms of temporary allegiance and a correlative claim to the state's protection abroad. The real justification and motivation is, however, surely protection of those primary interests of a state; the operation of its merchant marine and its national security.[135]

C *Protective Principle*

This conveniently brings me to the protective principle, which is a formidable candidate as a basis of jurisdiction over service members. Many authors claim that the jurisdiction over the armed forces falls squarely within the security principle. It has been argued that offences committed in the course of, or relating to, official functions are, in the final analysis, directed at the state.[136] As Dietrich Oehler has concluded, almost all of the German literature on the subject is of the opinion that the application of domestic law to office-holders abroad is premised on the protective principle.[137]

To the extent that one is concerned with disciplinary offences or crimes that directly impact upon the coherence and morale of the armed forces, this line of thinking is perfectly adequate. By criminalising certain behaviour the state attempts to maintain the standards of conduct within the forces with a view to the efficiency of the force as a whole.

Moreover, such offences tend to be of very little interest to the territorial state. Practice has shown that even in circumstances where the territorial state can under treaty arrangements prosecute foreign service members and associated civilians, it will refrain from doing so if the offence can be regarded as purely internal to the force itself. The purpose of the protective principle is precisely to cover those offences against the national interests of a state which other states are not willing to protect by means of their criminal law.[138]

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133 Stanger, above n 44, 86.

134 See, eg, the discussion in *R v Page* [1954] 1 QB 170.

135 Stanger, above n 44, 11–12.

136 Matti Tupamäki, *Valtion rikosoikeudellisen toimivallan ulottuvuus kansainvälisessä oikeudessa* [The Reach of the Criminal Jurisdiction of a State under International Law] (Finnish Branch of the International Law Association, 1999) 325.

137 Dietrich Oehler, *Internationales Strafrecht* (Carl Heymann, 1973) 401–2.

138 Cameron, above n 26, 331; *R v Holm, R v Pienaar* [1948] 1 SA 925 (A), 14 ADIL 91 (Appellate Division, Supreme Court of South Africa); but see *Re van den Plas* [1955] ILR 205 (Court of Cassation of France) (a Belgian convicted by a French court for treason against Belgium).

Focusing on the broad effect of the offence, rather than the nationality of the offender, conveniently does away with the technical problems of nationality encountered under the active personality principle. However, the glove of the protective principle fits neatly only where the military personnel are abroad in their official capacity[139] and on duty. When they are engaged in some frolic of their own, it is a bit of a stretch to say that their acts impact the national security of the sending state.

However, I readily admit that the conduct of service members reflects upon the state and probably more so than that of ordinary citizens. Moreover, military discipline is a malleable concept and in its broadest interpretations might cover the integrity of personnel also while off-duty.[140] Yet placing non-duty-related acts under military criminal law on grounds that they have indirect effect on discipline tends to spark controversy under constitutional law.[141] Hence, the argument that such acts could fall under the protective principle for international law purposes should also be treated with due care.

D *Representational Principle*

Certain manifestations of service jurisdiction can also be explained in terms of the representational principle. This applies in particular to extraterritorial offences that have no service connection. Under most peacetime Status of Forces Agreements ('SOFAs'), such offences would, in the first place, be dealt with under the law of the host state.[142] However, it is possible for the host state to waive its jurisdiction in favour of the sending state.[143] This presumes the sending state's law would be applicable. One could argue that in such a case, the sending state does not act in its own right, but as a surrogate for the host state.

I have some doubts as to whether the states concerned would actually see the matter in this light. A SOFA is generally not regarded as a grant of jurisdiction to the sending state. Rather, it is seen as a limitation upon the exercise of jurisdiction by the host state. Moreover, it is clear that states do not make the scope of their military laws over service members dependent on the existence of SOFAs: the national law follows the soldier even when there is no SOFA.[144]

III SERVICE JURISDICTION AS JURISDICTION *SUI GENERIS*

While particular applications of service jurisdiction are covered by the 'usual' principles of international law, the European Committee on Crime Problems has noted that 'under special circumstances, forms of jurisdiction have been established which cannot be classified under any of the traditional principles of

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139 Oehler, above n 137, 405.

140 Stanger, above n 44, 87.

141 For a critical view, see *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 360–1 (Callinan and Heydon JJ) ('*Re Aird*').

142 See *Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces*, signed 19 June 1951, 199 UNTS 67 (entered into force 23 August 1953) art VII(3)(b).

143 See, eg, *Puhl v US*, 376 F2 d 194 (10th Cir, 1967) (a member of the US armed forces of German nationality tried by US court-martial for an off-duty crime committed in Germany after Germany waived primary jurisdiction).

144 See, eg, *Re Aird* (2004) 220 CLR 308.

jurisdiction … [t]hese can be found, for example, in military law …'[145] Indeed, as the foregoing discussion shows, service jurisdiction is unique. It is neither territorially limited[146] nor offence-specific. Rather, it has a personal character,[147] yet one that is based on functional status, not nationality, and is thus free of the possible formal limitations of the active personality principle.[148] Iain Cameron has observed that 'jurisdiction over military personnel should really be seen as a form of hybrid active personality/protective principle jurisdiction, with certain special features of its own'.[149]

If service jurisdiction is, as I would contend, a separate head of jurisdiction its scope would have to be determined independently, with reference to state practice and the interests that states can legitimately expect to protect using such jurisdiction. As a matter of international law, a state can undoubtedly make a service member amenable to its laws, irrespective of the place of commission or the nature of the offence.[150] This unfortunately does not help very much in clearing up the position of associated civilians. In these final sections, I will sketch a few arguments for the rationalisation of service jurisdiction and point out some implications for its scope.

A *Organic Jurisdiction*

One of the few authors to have touched upon the peculiarities of service jurisdiction in international law was Finn Seyersted, even though his focus of interest was slightly different. He argued that each state has certain 'organic jurisdiction', which is supplementary to the two main bases of jurisdiction, territoriality and nationality.[151] Seyersted described this form of jurisdiction as follows:

> The organic jurisdiction of a State implies that all its relations with — and all relations between and within — its organs and officials as such are governed by

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145 European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction* (Council of Europe, 1990) 16.

146 United States Army Office of the Judge Advocate General, *A Digest of Opinions of the Judge Advocate General of the Army, 1912* (Government Printing Office, 1917) 511 ('the military jurisdiction does not recognize territoriality as an essential element of military offenses but extends to the same wherever committed').

147 HCJ 27/48 *Lahis v Minister of Defence* (1948) 1 PE 236 16 ADIL 96 (Supreme Court, Israel); Archibald King, 'Jurisdiction over Friendly Foreign Armed Forces' (1942) 36 *American Journal of International Law* 539, 555 ('military and naval jurisdiction is personal, not territorial, and follows the soldier or sailor wherever he may go on the face of the earth').

148 See, eg, *Wehrstrafgesetz* [Military Penal Code] (Germany) § 1a (stating that the code applies irrespective of local law); see also Appeal/32/69 *Chief Military Prosecutor v Farhi & Ganeni* [1969] PDZ 206 (Israel) (double criminality for offences abroad not required with respect to persons covered by military law).

149 Cameron, above n 26, 67 n 124.

150 The previous *Restatement of US Foreign Relations Law* addressed service jurisdiction separately by simply declaring that '[a] state has jurisdiction to prescribe rules attaching legal consequences to … conduct of any person who is a member of its national military services.' American Law Institute, *Restatement, (Second) of the Foreign Relations Law of the United States* (1965) § 31.

151 Seyersted, above n 104, quoting Charles Rousseau, *Droit international public* (Paris, 1953) 241, as a source of inspiration; see also Wilhelm Wengler, *Völkerrecht* (Springer, 1964) vol 2, 949–51 (speaking of *Diensthoheit*).

> the public law and by the executive and judicial organs of that State and not by the public or private law or the organs of any other State.[152]

Crucially, Seyersted regarded organic jurisdiction as exclusive, but carefully distinguished it from the situation created by the application of immunities. Immunities, which form a procedural bar to judicial and administrative proceedings before the authorities of other states, do not affect the underlying substantive legal obligations. Organic jurisdiction, on the other hand, means exclusive legislative competence, completely exempting the issues involved from the legislation of other states. In other words, some matters are such that they can, by their very nature, only be regulated by the state to which the organ belongs.

With respect to the armed forces, there are a great many issues that fall within this category. For instance, command structures, ranks, promotions, pay and decorations can conceivably only be dealt with by the state to which the forces belong. Any attempt to address these questions by another state would not only be considered meddling in the domestic affairs of the flag state but would be manifestly absurd.

As concerns criminal law, disciplinary offences of service members are a case in point. A service member will not be prosecuted for, say, insubordination or being absent without leave by a foreign state. It would make little sense to say that the service member has immunity in foreign courts with respect to these offences: such conduct would not be justiciable in a foreign court for the lack of applicable law. Consider the case of a hypothetical US service member who, unwilling to be deployed with his unit in a conflict zone, attempts to settle in Canada. Under US military law he could clearly be prosecuted for desertion.[153] Yet, although he is physically committing part of the offence in Canada, he could not be prosecuted there because desertion from the US armed forces is not, and could not be, punishable under the laws of Canada.

Curiously, this also means that he could not be extradited. States generally grant requests for extradition only where the alleged offence is punishable under the laws of both states concerned.[154] That requirement would not be met in case of desertion. Moreover, purely military offences — desertion being a prime example — are generally not extraditable at all.[155] So far, Canada has dealt with

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152 Seyersted, above n 104, 33–4.

153 *UCMJ* art 85(a)(1)–(2) (defining desertion as, inter alia, being absent from one's unit 'with intent to remain away … permanently' or 'with intent to avoid hazardous duty or to shirk important service').

154 More strict conditions may be applicable, but 'double criminality' is usually the basis. See, eg, *European Convention on Extradition*, opened for signature 13 December 1957, 359 UNTS 276 (entered into force 18 April 1960) art 1(1) ('Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.'); see also Charles K Burdick, 'Extradition' (1935) 29 *Supplement to the American Journal of International Law* 15, 81–6.

155 American Law Institute, *Restatement, (Third) of the Foreign Relations Law of the United States* (1987) [476] comment (f) (observing that States 'extradite military personnel only for common crimes, not for purely military offenses'); see also *Model Treaty on Extradition*, GA Res 45/116, UN GAOR, 45th sess, 68th plen mtg, UN Doc A/RES/45/116 (14 December 1990) art 3(c) ('Extradition shall not be granted … [i]f the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law').

cases of this nature by deporting the service members to the US border, where they have been arrested by US authorities.

Organic jurisdiction is not necessarily limited to offences committed by service members: some acts of associated civilians might also fall under its scope. In particular, various kinds of inchoate offences come to mind. For example, the incitement to mutiny by an associated civilian seems no less amenable to organic jurisdiction than an actual act of mutiny committed by a service member.

B *Maintenance of Discipline*

But the jurisdiction that a state claims over service members and associated civilians is not limited to offences that would come within organic jurisdiction. It also extends to ordinary offences, which go beyond the sphere where no other state has any business legislating. The instance where a service member of a visiting force commits an offence against a national of the host state would be a clear example of a case where local law could apply. Even where one service member of a visiting force commits an offence against another, the act may breach the peace of the locality and thus violate its laws.

Yet, service jurisdiction also covers these offences (making it necessary to insert provisions into SOFAs dealing with claims of concurrent jurisdiction). The basis for the broader claims of jurisdiction can doubtless be explained by the desire to maintain discipline. Indeed,

> [i]t should be beyond dispute that a military commander must be able to maintain discipline over the forces under his command, wherever they may be. If he lacked that power, taking an army into a foreign country would be in effect to disband it. Stated another way, the sending state must have jurisdiction to prescribe rules with respect to the members of its armed forces abroad. For the great majority of the members of an armed force such jurisdiction could be based on nationality; however, this is not the most compelling basis. Rather it is the relationship between an individual and the sending state resulting from his status as a member of the armed forces and not nationality which compels recognition of the sending state's jurisdiction.[156]

Here one should distinguish, at least for analytical purposes, two aspects of discipline. One relates to the good order of the forces and entails suppressing acts directly detrimental to the fighting capability of the force. There is little doubt that both the conduct of service members and associated civilians may have an impact on the good order of a military unit, especially if they are in close quarters, as is often the case. Thus, it has been argued that 'in the interest of discipline a commander should have authority over all those who are connected, directly or indirectly, with the force which he commands.'[157] Service jurisdiction in such circumstances, both with respect to service members and associated civilians, follows naturally.

The situation is somewhat different as concerns discipline vis-à-vis outsiders. Of course, it is possible to speak here of discipline in some broader sense and

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156 Stanger, above n 44, 84.

157 Peter Rowe, *Defence: The Legal Implications — Military Law and the Laws of War* (Brassey's Defence Publishers, 1987) 33.

claim that misdeeds of service members that do not have a direct effect on the efficiency of the force nonetheless impact its overall morale. However, I would argue that the need to maintain 'external discipline' arises quite directly from international law.

The law of armed conflict explicitly provides for the duty of states to secure compliance with the law of armed conflict.[158] As a practical matter, this necessitates a disciplinary system applicable to the armed forces.[159] Moreover, the maintenance of such a system is made an explicit obligation by *Additional Protocol I*, which stipulates that the armed forces of a party to a conflict 'shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict'.[160] This seems to cover both criminal and disciplinary law,[161] and effectively requires that states maintain criminal jurisdiction over members of their armed forces at all times.

To a limited extent, the same principle applies to civilians accompanying the armed forces. The personnel of voluntary aid societies, notably the Red Cross, are granted protection equivalent to that of members of military medical services 'provided that the staff of such societies are subject to military laws and regulations'.[162] The latter clearly necessitates some jurisdiction over them.

In addition to the specific requirements found in the law of armed conflict, the need for a disciplinary system arises more indirectly from the principles that govern state responsibility for the acts of its organs. It is surely superfluous to engage in any detailed discussion here about the status of the armed forces as an organ of the state. The armed forces are an organ of a state par excellence — not only structurally (being integrated into the administrative machinery) but also functionally (defence of the nation being one of the most fundamental reasons for the existence of a state).[163] As with any other agent, a state bears direct responsibility for the conduct of service members while they are on duty.

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158 See common art 1 of the *Geneva Conventions*, which requires '[t]he High Contracting Parties [to] undertake to respect and to ensure respect for the present Convention in all circumstances': *Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention IV* (collectively, '*Geneva Conventions*'). See also *Hague Convention* art 1 ('the Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention').

159 See Jean de Preux, 'Article 43 — Armed Forces' in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross and Martinus Nijhoff, 1987) 505, 514 (claiming that 'it is clearly impossible to comply with the requirements of the [*Additional Protocol I*] without discipline').

160 *Additional Protocol I* art 43(1).

161 De Preux, above n 159, 513.

162 *Geneva Convention I* art 26.

163 See Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co, 5th ed, 1937) vol 1, 607.

Moreover, in the practice of international tribunals, states have been held to a higher degree of responsibility for acts of service members than for the acts of other agents.[164] The logic is that states are expected to maintain a particularly high level of discipline in the armed forces, because service members, when uncontrolled, tend to pose a more significant danger to foreign nationals than other public servants (for example, visa officers of an embassy). Responsibility is particularly strict in armed conflict, where a state will become directly liable for 'all acts committed by persons forming part of its armed forces',[165] no matter how remote these acts are from official duties.

Seen in this light, military disciplinary and criminal law should work as a practical deterrent and avoid, or at least minimise, the possibility of a state incurring responsibility for damage caused by its service members to other states or their nationals. Moreover, when a service member has already perpetrated an act that creates liability for the state, carrying out an investigation and ultimately punishing the soldier responsible would serve as a form of satisfaction.[166]

The argument could also be made that the absence of a remedy for an act committed by a service member leads to state responsibility.[167] There is some case law on the denial of justice with respect to incidents involving service members. These are cases where members of the armed forces, acting in their private capacity and in the territory of their own state, have caused injury to foreigners, and the state has been held responsible not for the acts as such but for the failure to adequately investigate and punish the acts.

One example would be the 1929 case of *Morton*.[168] A lieutenant colonel in the Mexican armed forces, while drunk, approached an American national in a Mexican cantina and fired upon him. The American was instantly killed. The colonel was tried for homicide and sentenced to four years imprisonment, a term that he allegedly did not serve. The US–Mexico General Claims Commission emphasised '[t]he responsibility of a nation under international law for failure of authorities adequately to punish wrongdoers'.[169] The failure to carry out the punishment was not sufficiently proven, but the Commission found a failure on the part of the Mexican authorities to collect all available evidence and a significant misapplication of Mexican law with regard to the sanction.

I would submit that this principle should also apply in circumstances where the armed forces of the state are present abroad. If they cause, in their private capacity, injury to locals and the sending state denies effective redress, it is difficult to see why the sending state itself should not be held responsible. This, of course, may create an interesting problem of joint responsibility. If the lack of accountability is due to the combination of a SOFA depriving the host state of jurisdiction and lacunae in the sending state's jurisdiction of which the host state

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164 Alwyn V Freeman, 'Responsibility of States for Unlawful Acts of Their Armed Forces' (1955–II) 88 *Recueil des Cours* 263, 289.

165 *Hague Convention* art 3; *Additional Protocol I* art 91.

166 On the possible modalities of satisfaction, see International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN GAOR, 53rd sess, Supp No 10, UN Doc A/56/10 (3 August 2001) commentary to art 37, [5].

167 Freeman, above n 164, 274.

168 *Morton (US) v Mexico*, 4 RIAA 428 (Mexico–US General Claims Commission, 1929) ('*Morton*').

169 Ibid 429.

was aware, any denial of justice would seem to be the joint responsibility of both states.

In light of the above, I believe that it would be permissible, as a matter of international law, for a state to legitimately extend criminal jurisdiction over persons who can, through their behaviour, implicate the state. Most importantly, to the extent that the state can be held responsible for the conduct of private military contractors,[170] the State ought to have criminal jurisdiction over them, irrespective of their precise status under the law of armed conflict.

C *Corollary of Immunities*

While on foreign soil, service members and associated civilians usually have some sort of insulation from the local legal system. Early on, their special status — quite like the position of diplomatic agents — was explained in terms of extraterritoriality. At the core of this concept is the legal fiction that the persons concerned are on their national territory and not in the host state.

There are several reasons for disregarding this logic. Crucially, the construction of extraterritoriality is far too rigid and absolute to account for the rather complicated interaction between the law of the sending state and that of the host state that prevails today. However, removing this fiction risks throwing the baby out with the bathwater. Extraterritoriality suggested that the individuals in question are constantly amenable to some territorial law — not the law of the state where they were physically present, but the law of the state where they were constructively present. To put it in modern terms, the lack of host state jurisdiction implied the existence of the sending state's jurisdiction.

I believe that there is still merit in this logic: to the extent that a state is able to secure immunity for certain individuals abroad, it ought to exercise its own jurisdiction over them.[171] This is, at the same time, a justification for service jurisdiction and a normative argument to the effect that states should make sure that they have, under domestic law, jurisdiction over individuals covered by immunities. Thus, service jurisdiction should be used to fill areas devoid of all law, avoiding 'legal Bermuda triangles'.[172]

IV CONCLUDING REMARKS

If states wish to adequately deal with the conduct of service members and associated civilians abroad, the law needs to be made applicable to these categories of persons. To what extent such applicability ought to be established by special provisions in legislation obviously depends on the particular legal system and the composition of the armed forces. However, the reliance on the active personality principle (in so far as it only covers nationals) may be

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170 See, eg, Chia Lehnardt, 'Private Military Companies and State Responsibility', in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market* (Oxford University Press, 2007) 139–58; Carsten Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 *European Journal of International Law* 989–1014.

171 The *Crimes (Overseas) Act 1964* (Cth) is based on this logic. Sections 3A–3C extend the criminal law of the Australian Capital Territory to Australians who enjoy immunities abroad.

172 K Elizabeth Waits, 'Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of US Criminal Jurisdiction over Foreign Nationals' (2006) 23 *Arizona Journal of International and Comparative Law* 493.

insufficient to reach all the persons that it may be desirable to reach from a disciplinary perspective. Also, the immunities granted to service members and associated civilians may necessitate jurisdiction over a broad range of offences so as to avoid legal vacuums. From this perspective, the protective principle may not provide a comprehensive jurisdictional umbrella to cover all of the conduct with respect to which the host state's jurisdiction has been excluded.

The *Ali* case,[173] mentioned above as the first trial of a civilian under the revised *UCMJ*,[174] provides a vivid illustration. Mr Ali was originally charged with aggravated assault for allegedly stabbing another contractor at a combat outpost in Iraq. After the military judge accepted his guilty plea to false official statement, wrongful appropriation of a knife and obstruction of justice, the prosecution dismissed the assault charge.[175] Given that the accused was a dual national of Canada and Iraq, he clearly could not have been prosecuted by the US under the active personality principle. Indeed, without reliance on service jurisdiction, it is unclear whether US law would have applied at all.

I would submit that this issue has become acute regarding private military contractors. The recently adopted Montreaux Document notes that states acquiring the services of military contractors ought to

> take measures to suppress violations of international humanitarian law committed by the personnel of [contractors] through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.[176]

This clearly presumes the applicability of the contracting state's law to personnel of contractor firms. Yet, given the reliance of military contractors on personnel having different nationalities, the active personality principle may not provide a complete solution.

The extension of national law to military contractors with foreign nationality might attract the objection that it is not allowed by international law.[177] But this objection would be well-founded only if jurisdiction over service members had to be examined under the 'usual' principles of criminal jurisdiction. If service jurisdiction is accepted as a separate category with its own rationale, its possible application to contractors would have to be assessed in light of that rationale. I would argue that the scope of this jurisdiction must coincide with the disciplinary needs of the armed forces and mirror the exemptions granted to individuals from host state law. These considerations would clearly warrant the extension of national criminal law to certain categories of civilians associated with the armed forces.

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173 *Ali* (US Court of Appeals for the Armed Forces, Misc No 09-8001/AR CCA 20080678, 18 December 2008) 67 MJ 186.

174 See n 11 above.

175 Multi-National Corps — Iraq: Public Affairs Office, *Civilian Contractor Convicted at a Court-Martial* (Press Release, 20080623-01, 23 June 2008) <www.mnf-iraq.com/index.php?option=com_content&task=view&id=20671&Itemid=128>.

176 'The Montreaux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' (International Committee of the Red Cross, 2009) pt 1 s A(3)(c).

177 For an analysis headed towards such a conclusion, see Waits, above n 172, 530–4.