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National Criminal Jurisdiction Over Australian and US Military Personnel

This chapter will offer an introduction to the law applicable to Australian and US defence force personnel when serving in a peace operation, and the extraterritorial application of that law. An understanding of this law is necessary before discussing the substantive provisions within it. The law applicable to the US Armed Forces (USAF) is fairly straightforward, but the legal structure governing criminal conduct by Australian Defence Force (ADF) personnel is complex.

2.1 Law Applicable to Australian Defence Force Personnel

Discipline and criminal accountability of ADF personnel are governed by the *Defence Force Discipline Act 1982* (Cth) (DFDA) (Austl.). ADF personnel can be prosecuted for the commission of offences under Part III of the DFDA, such as offences relating to operations against the enemy and offences relating to ships, vehicles, aircraft and weapons. Such offences are referred to as service offences,¹ and criminal liability for such offences is determined by Chapter 2 of the federal *Criminal Code 1995*

(Cth) (*Criminal Code*) (Austl.) which determines the general principles of criminal responsibility. Chapter 2 of the *Criminal Code* covers elements of offences, defences, extensions of criminal responsibility and geographical jurisdiction.

Defence members and civilians fall under the term 'ADF personnel'. Both categories of personnel are subject to the same legislative obligations. Under section 61 of the DFDA, a defence member or a defence civilian² is guilty of an offence if the person engages in conduct in or outside the Jervis Bay Territory, whether or not in a public place, and engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory. The maximum punishment for such offences is the fixed punishment set for the relevant Territory offence, or otherwise a punishment that is not more severe than the maximum punishment for the relevant Territory offence. The DFDA defines a Territory offence as:³

- (a) an offence against a law of the Commonwealth in force in the Jervis Bay Territory other than this Act or the regulations; or
- (b) an offence punishable under any other law in force in the Jervis Bay Territory (including any unwritten law) creating offences or imposing criminal liability for offences.

The Jervis Bay Territory is located within the state of New South Wales but was acquired by the federal Commonwealth government in order to ensure the federal government access to the sea, through the *Jervis Bay Territory Acceptance Act 1915* (Cth) (*Acceptance Act*).

Aside from service offences under the DFDA, ADF personnel can be prosecuted for the commission of offences that would be Jervis Bay Territory offences. Although the Jervis Bay Territory is not part of the Australian Capital Territory (ACT), section 4A of the *Acceptance Act* states that:

Subject to this Act, the laws (including the principles and rules of common law and equity) in force from time to time in the Australian Capital Territory are, so far as they are applicable to the [Jervis Bay] Territory and are not inconsistent with an Ordinance, in force in the Territory as if the Territory formed part of the Australian Capital Territory.

It is also explicitly stated that, unlike in the case of service offences under the DFDA, 'Chapter 2 of the *Criminal Code [Act]* does not apply in relation to, or in relation to matters arising under, a law in force in the Territory because of section 4A'.⁴ Thus criminal responsibility is determined by the relevant Act under which offences are deemed to have been committed. The principal piece of legislation under which Territory offences are prosecuted is the *Crimes Act 1900* (ACT) (Austl.).

The system governing the applicable law is clearly quite complex. It also raises the question of whether it is appropriate to use the laws of one territory (or state) as the applicable law over ADF personnel when serving abroad. Australia is a federation of states and territories, and criminal law falls under the ambit of both federal and state/territory law. Federal law applies throughout the country, but each state or territory law only applies within the boundaries of that state or territory. Criminal laws and their application may differ between the states and territories. Inevitably, the criminal law of the ACT is not necessarily representative of the laws of the Commonwealth of Australia as a whole and, therefore, it may not be appropriate to apply these territorial laws to ADF personnel when serving abroad, or even when stationed elsewhere within Australia. The most prominent example of this problem is the non-criminalisation of prostitution in the ACT, resulting in no express provision applicable to prostitution-related conduct carried out by Australian peacekeepers.

ADF personnel also fall under the jurisdiction of the federal *Criminal Code*.

2.2 Extraterritorial Jurisdiction Over Australian Defence Force Personnel

Section 9 of the DFDA expressly grants extraterritorial operation of all provisions of the DFDA:

'9 Extraterritorial operation of Act

The provisions of this Act apply, according to their tenor, both in and outside Australia but do not apply in relation to any person outside Australia unless that person is a defence member or a defence civilian.'

Hence, all offences committed by ADF personnel, whether they be service offences under the DFDA or civil criminal offences under ACT law, are applicable extraterritorially.

With regard to the federal *Criminal Code*, all applicable offences are designated as having an extraterritorial application through Part 2.7 'Geographical jurisdiction' of the *Criminal Code*, which means the *Criminal Code* has extraterritorial jurisdiction over ADF personnel. Part 2.7 delineates both standard (Div. 14) and extended geographical jurisdiction (Div. 15). Standard jurisdiction covers offences in which conduct constituting an offence or a result of the conduct occurs wholly or partly within Australia. Extended geographical jurisdiction grants different categories of extended jurisdiction over conduct committed outside Australia, including conduct committed wholly outside Australia by an Australian citizen or by a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Extended geographical jurisdiction is categorised from Category A to D. Category D is the most extensive, granting jurisdiction over conduct '(a) whether or not the conduct constituting the alleged offence occurs in Australia; and (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia', and is not restricted to Australian citizens or nationals (s.15.4). Which jurisdictional category a particular offence falls under is provided in the section that applies to the offence. For example, Category D applies to genocide, war crimes and crimes against humanity, rendering all ADF personnel subject to being prosecuted for such offences (O'Brien 2012).⁵

The Constitutional validity of the exercise of extraterritorial application of civilian criminal law over military personnel was considered in the 2004 case *Re Colonel Aird* (Mitchell and Voon 2005).⁶ The case raises issues particularly relevant to the consideration of criminal jurisdiction over Australian peacekeepers for sexual offences committed while involved in a PSO. Private Alpert was a defence member serving in Malaysia, and it was alleged that, while on leave in Thailand, he raped an English woman. Alpert was charged under the ACT *Crimes Act*, under the authority granted by the DFDA, and was to be prosecuted by a general court-martial in Australia.

The issue in question in the case was whether the Constitutional defence power⁷ granted the Commonwealth the power to exercise extraterritorial jurisdiction over defence personnel in respect of the alleged offence. The issue was based on the 'service connection' versus 'service status' test, concepts that determine whether or not the military has jurisdiction over a person. The 'service connection' argument requires the crime itself to have a connection with the military. The 'service status' argument maintains the valid exercise of criminal jurisdiction over defence personnel based solely on their status as a defence member.

The question in *Re Colonel Aird* was: given that Alpert was on leave, in civilian clothing, on a holiday paid for by his money, was it a valid exercise of the defence power to charge him with rape under the DFDA authority? The 4–3 decision confirmed it was and that the 'service connection' test is the applicable test in Australian law. However, the method of application of that test was not entirely agreed upon by the judges, leading to the 4–3 split decision. Justice McHugh felt that 'the prohibition against rape goes to the heart of maintaining discipline and morale in the Defence Force. Rape and other kinds of sexual assault are acts of violence. It is central to a disciplined defence force that its members are not persons who engage in uncontrolled violence' (para. 42).

It was held to be irrelevant that the alleged rape was committed while Alpert was on leave. 'A soldier who rapes another person undermines the discipline and morale of his army. He does so whether he is on active service or recreation leave' (para. 45).

Further reasons behind the majority judgment emphasise the existence of the military as a 'special community', the importance of concepts such as discipline and morale to the military community, and how the commission of serious crimes can impact on this.

It need hardly be said that other members of the Defence Force will be reluctant to serve with personnel who are guilty of conduct that in the Australian Capital Territory amounts to rape or sexual assault. This may be out of fear for personal safety or rejection of such conduct or both. Such reluctance can only have a detrimental effect on the discipline and morale of the armed services (para. 42).

The majority view also based the decision on the special position of the military in the global community, which has particular resonance in the context of PSOs. The potential impact of such serious criminal behaviour by members of the ADF was held to be an important reason for the service connection. Justice McHugh rightly pointed out that, whether on leave or not, defence personnel are perceived by foreign governments and local people as representatives of the Australian government, and that it is irrelevant if defence personnel are in civilian dress or not. The judge recognised that the commission of undesirable conduct by ADF personnel may result in criticism and even hostility by the local community towards the ADF and its members. The behaviour may even result in opposition from the government to the presence of ADF personnel in the country. Such reactions would not only have a negative impact on the discipline and morale of defence personnel but may seriously damage inter-state relations and result in the ADF being ejected from or refused entry into a state for purposes such as training or peacekeeping.

It was also held that the application of one set of standards to ADF personnel serving overseas, regardless of local laws, was necessary. Applying standard regulations and laws results in avoidance of complications as to which laws are applicable, as well as ensuring appropriate behaviour of ADF personnel at all times.

While defence members serving overseas must obey local laws, the imposition of minimum standards of behaviour by reference to Australian law is a legitimate means of preserving discipline, bearing in mind that Australian forces might be located in places where there is no government, or where there is a hostile government, or where peacekeeping is necessary ... If it is accepted to be a proper concern of Parliament to require defence members, when serving overseas, to behave according to standards of conduct prescribed by Australian law, then there is power to impose such a requirement generally; it does not vary according to local circumstances and conditions in different places (para 6).

In contrast, the dissent of Justices Callinan and Heydon argued that there was an insufficient 'service connection' for the charge to be a valid exercise of power. Their Honours felt that applying the 'service

connection' test to any conduct that constitutes 'an undisciplined application of force' or 'would be regarded as abhorrent by other soldiers' would be over-inclusive (para. 163).

Justice Kirby's dissent also declined to overextend the reach of the defence extraterritorial jurisdiction but was the only judgment to consider the validity of the exercise of extraterritorial jurisdiction. After reference to passive and active nationality jurisdiction, he concluded that the exercise of such extraterritorial jurisdiction was entirely legitimate under international law (paras. 121–125).

It was an accepted fact in the case that Thailand also held jurisdiction over Alpert, but that the ADF had assumed jurisdiction because the complainant had made the complaint to the ADF and not the Thai authorities; and that Thailand had not made any application for surrender of Alpert. It was also noted that England also held legitimate jurisdiction, as the complainant was an English national (para. 124).

Re Colonel Aird plainly demonstrates that Australian law supports the prosecution of ADF personnel for crimes committed when posted overseas in any capacity, even when committed on leave. The 'service connection' test may be more restrictive than the 'service status' test, but it is nonetheless broadly interpreted, and liberally applied. The majority decision clearly applied this interpretation based on comprehension of the military as a 'special community' which abides by different principles from the ordinary civilian community. It is appropriate that the potential negative repercussions of such conduct to Australia's international position and the ability of the ADF to be involved in international deployments are also expressly considered.

2.3 Law Applicable to the US Armed Forces

Members of the USAF are subject to the US Uniform Code of Military Justice (UCMJ), which is part of the US Code (10 U.S.C.). Persons subject to the UCMJ include 'members of a regular component of the armed forces', 'in time of declared war or a contingency operation, persons serving with or accompanying the armed forces in the field', and

‘subject to any treaty or agreement to which the USA is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the USA and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands’ (10 U.S.C. § 802. Art. 2(a)). USAF personnel are also subject to the federal US Code and state law (Schlueter 2015b, pp. 254–256).

2.4 Extraterritorial Jurisdiction Over the US Armed Forces

The USA has express extraterritorial jurisdiction over crimes committed by members of USAF. The UCMJ specifically declares that it ‘applies in all places’ (10 U.S.C. § 805. Art. 5).

It was discussed above that in the Australian military, jurisdiction is granted through the liberal application of the ‘service connection’ test. There was previously a service connection requirement for court-martial jurisdiction in the USA, where jurisdiction was limited to offences that were ‘service-connected’.⁸ With regard to military personnel assigned overseas:

The exception to the overseas rule rested in the possibility that extraterritorial application of the federal penal code might exist. Thus, if the overseas offense could have been prosecuted in a United States federal court, and the accused would be entitled to the right to indictment and jury trial, the military prosecutor was required to establish service connection over the offense. (Schlueter 2015b, p. 245)

Now there is no longer a service connection requirement (Schlueter 2015a, pp. 241–253, 2015b). This requirement was deemed no longer necessary by the US Supreme Court in *Solorio v. United States*, 483 U.S. 435 (1987), which involved sexual offences against young children. The Supreme Court held that jurisdiction is based on the status of the accused as a member of the armed forces, and not a connection of the offence to service.

Alongside the UCMJ, provisions of the US Code may apply to the USAF, such as Title 18, the War Crimes Act. This will be dependent on the extraterritorial application of the provision. Such extraterritorial application of relevant provisions will be addressed later in this book. However, while it is civilian criminal law which is the main applicable law for ADF personnel, the UCMJ is the principal piece of legislation which governs the conduct of the US military, and it is preferred that USAF personnel are charged under the UCMJ.

2.5 Extraterritorial Jurisdiction Over Civilians Accompanying or Employed by the US Armed Forces

In contrast to the express existence of extraterritorial jurisdiction over ADF civilians, extraterritorial jurisdiction over civilians accompanying or employed by the United States Armed Forces has had an unfortunate history, and, throughout the latter half of the twentieth Century, did not exist.⁹ It was a significant gap in jurisdiction that did not go unnoticed. Between 1957 and 2000, more than 30 bills were introduced into Congress in an attempt to solve this jurisdictional problem, but none were passed (Stein 2005, p. 591).¹⁰

As mentioned above, under 10 U.S.C. § 802. Art. 2(a) certain persons are subject to the UCMJ, including those who are not part of the regular armed forces and accompanying USAF in the field.

The Supreme Court of the US has declared that the exercise of jurisdiction of a military court-martial over a civilian (as defined in 10 U.S.C. § 802. Art. 2(a)) during peacetime is unconstitutional (US Department of Defense 2012).^{11,12} Peacetime was defined as any situation where the USA has not declared war.¹³ A US declaration of war has not occurred since World War II.

Several prominent cases reached the Supreme Court before the end of the 1900s, upholding the gap in the jurisdiction of the UCMJ (Everett 1960; Gibson 1995; Perlak 2001; Stein 2005). *Reid v. Covert*, 354 U.S. 1 (1957) was the first case to remove this extraterritorial jurisdiction, in

relation to civilian dependants of military personnel with regard to capital offences.¹⁴ In 1960, in *Kinsella v. Singleton*, 361 U.S. 234 (1960) the Supreme Court extended the gap in the jurisdiction to non-capital offences. In the same year, the Supreme Court dealt with two cases concerning extraterritorial jurisdiction over civilian employees, a capital offence and a non-capital offence.¹⁵ In both cases, the Court held that the jurisdiction of a court-martial over civilian employees in peacetime was likewise unconstitutional and thus invalid.

In 1969, the Court of Appeals stated that even if it was willing to assert that the Vietnam War was an officially declared war (which it was not), the Court declined to allow court-martial jurisdiction over a merchant seaman for murder whilst on a port-call in Da Nang because the circumstances were too remote to permit jurisdiction.¹⁶ A 1970 case, *United States v. Avarette*, 41 C.M.R. 363 (1970) dealt with a civilian employee, who had been employed as an Army contractor in Vietnam. Avarette was convicted by a court martial of conspiracy to commit larceny and attempted larceny. The Court of Military Appeals (CMA) refused to uphold the conviction, on the grounds that the relevant article of the UCMJ only allowed jurisdiction in time of war. The CMA determined that the Vietnam War was not a congressionally declared war, and thus there was no jurisdiction under the UCMJ to try Avarette before a court-martial (p. 365).

In 2000, the Court of Appeals (Second Circuit) delivered its judgment in *United States v. Gatlin*, 216 F.3d 207 (2nd Cir. 2000). This case dealt with a military spouse who had been convicted in a civilian District Court for sexual abuse of a minor that had been committed on property leased by the US Military in Germany. The case was heard in the District Court because the crime was not discovered until the defendant (and victim) returned to the USA. The District Court determined that it had jurisdiction because the US military base in Germany was within the 'special maritime and territorial jurisdiction of the United States'. However, the Court of Appeals disagreed, and held that this jurisdiction referred to in Title 18 of the US Code does not apply extraterritorially.¹⁷

The Court of Appeals felt that this was such an unfortunate situation (particularly considering the fact that Gatlin had pled guilty to the offence which was undeniable given the young girl gave birth to his child

as proven by DNA testing) that it detailed the history of the jurisdictional gap in terms of the opportunities that the Legislative branch had had to fill the gap, finally taking the step to encourage Congress to fix the problem.¹⁸

Unless the civilians were accompanying the Armed Forces in wartime, they could not be tried for a crime under the UCMJ. Nor could they be tried for a crime under the US Code, because there was simply no general provision in US law for extraterritorial jurisdiction.

It was not until 2000 that a bill finally passed through Congress and sought to remedy the situation. The Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–3267 (2000) [hereinafter MEJA] specifically addresses the issue of extraterritorial jurisdiction over civilians accompanying or employed by the armed forces outside the territory of the USA. It provides for US jurisdiction over ‘criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States’ (§ 3261). The criminal offences included are offences of the US Code, ‘punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the USA (1) while employed by or accompanying the Armed Forces outside the USA; or (2) while a member of the Armed Forces subject to chapter 47 of title 10’;¹⁹ that is, only felony offences are covered by the MEJA (Schlueter 2015a).

The MEJA does not, however, strictly impose US jurisdiction in these circumstances, allowing for jurisdiction to be exercised by a host country (§ 3263). Provision for foreign jurisdiction is not without conditions. Authorities of the host country must take the initiative and request delivery of the person, which in turn must be permissible under a treaty or agreement. This means that the terms of a Status of Forces Agreement (SOFA) become particularly relevant in that they must authorise the delivery of a US national to the host country. Given that peace operation SOFAs expressly and exclusively grant jurisdiction to the sending states, this statutory requirement may result in a loophole with regard to peacekeepers unless the USA has a separate bilateral or multilateral treaty or agreement with the host state. Yet even if delivery to foreign authorities were authorised under an agreement, the provision states that

a person *may* be delivered to foreign authorities. Hence, there is thus no obligation upon the US authorities to deliver a suspect to foreign authorities.

Despite being decades in the making, the MEJA nonetheless suffered from considerable deficiencies in the granting of jurisdiction. Several are discussed by Stein (Schmitt 2005; Stein 2005, pp. 599–606), but the most significant and the most relevant to jurisdiction over peacekeeping personnel is that jurisdiction in relation to civilian employees was only granted over those civilians who were employed by the Department of Defense (DoD), either directly or by a contractor with the DoD. The shortcomings of this section were discovered after the abuses at Abu Ghraib prison in Iraq were revealed. Civilian employees were working in Iraq through contracting firms that did not have contracts with the DoD, but with the Interior Department or the CIA (Elsea 2005, pp. 17–18). As a result, neither US courts-martial nor federal civilian courts had the jurisdiction to prosecute these particular civilian offenders for their role in the Abu Ghraib abuses.

As a consequence, in late 2004 the MEJA was amended. The definition of a civilian employee now includes civilian employees, contractors or employees of contractors (or subcontractors) of ‘any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas’ 18 U.S.C. § 3267(1)(A). This of course, however, still limits jurisdiction to agencies supporting the mission of the DoD.²⁰

Another amendment was made in 2006: the addition of ‘contingency operation’ and substitution of ‘declared war’ in place of ‘war’, to Art. 2(a) (10). The term contingency operation is any military operation which the Secretary of Defense deems so, ‘in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the USA or against an opposing military force’ (10 U.S.C. § 101(a)(13)(A)). It has been described as ‘a fairly sweeping statutory term that encompasses most overseas (and some domestic) military deployments’ (Vladeck 2012). It can be reasonably surmised that this provision would apply to a PSO, during which members of the armed forces do or may become involved in military actions, operations or hostilities against an opposing military force.

The MEJA has been applied.²¹ A prominent case is that of *United States v. Ali* No. 12-0008/AR (18 July), a 2012 decision from the Court of Appeals for the Armed Forces (CAAF).²² This focused on the prosecution of a non-US national who had been working as a military interpreter with USAF in Iraq. The CAAF decision approved the authorisation of trial by court-martial of a civilian contractor during a contingency operation. The majority found that Ali was serving with the army in a contingency operation ‘in the field’; therefore, court-martial jurisdiction could be exercised.²³

Civilians are likewise subject to any provision of the US Code that has extraterritorial application. Relevant provisions and their jurisdiction are detailed in subsequent chapters.

Notes

1. The *Defence Forces Discipline Act 1982* (Cth) s 3 ‘interpretation’ (Austl.) states:
“service offence” means:
 - (a) an offence against this Act or the regulations;
 - (b) an offence that:
 - (i) is an ancillary offence in relation to an offence against this Act or the regulations; and
 - (ii) was committed by a person at a time when the person was a defence member or a defence civilian.
2. Defence member is defined as
 - (a) a member of the Permanent Navy, the Regular Army or the Permanent Air Force; or
 - (b) a member of the Reserves who:
 - (i) is rendering continuous full time service; or
 - (ii) is on duty or in uniform.

Defence civilian is defined as:
a person (other than a defence member) who:

- (a) with the authority of an authorised officer, accompanies a part of the Defence Force that is:
 - i. outside Australia; or
 - ii. on operations against the enemy; and
 - (b) has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.
3. Notes to the definition:
- Note 1: Paragraph (a) of this definition includes an offence (an ancillary Territory offence) against section 11.1 (attempt), section 11.4 (incitement) or section 11.5 (conspiracy) of the Criminal Code or section 6 (accessory after the fact) of the Crimes Act 1914 in relation to another Territory offence within the meaning of that paragraph.
- Note 2: Paragraph (b) of this definition includes an offence (an ancillary Territory offence) against section 44 (attempt), section 47 (incitement) or section 48 (conspiracy) of the Criminal Code 2002 of the Australian Capital Territory or section 181 (accessory after the fact) of the Crimes Act 1900 of the Australian Capital Territory in relation to another Territory offence within the meaning of that paragraph.
- Note 3: The laws of the Australian Capital Territory in force in the Jervis Bay Territory apply, and Chapter 2 of the Criminal Code does not apply, for the purpose of determining criminal liability for offences referred to in paragraph (b) of this definition.
4. *Jervis Bay Territory Acceptance Act 1915* (Cth) s 4AA (Austl.).
 5. Chapter 8 'Offences against humanity and related offences', Division 268 'Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court', Subdivision K-Miscellaneous, s. 268.117 Geographical jurisdiction.
 6. *Re Colonel Aird; Ex-parte Alpert* [2004] HCA 44; 220 CLR 308; 209 ALR 311 (Austl.).
 7. *Australian Constitution* § 51(vi) & (xxix).
 8. See *O'Callaghan v. Parker*, 395 U.S. 258 (1969); *Relford v. Commandant*, 420 U.S. 738 (1975).

9. Prior to this, extraterritorial jurisdiction over civilians was covered by the Articles of War. *See* Perlak (2001, p. 96).
10. *United States v. Gatlin*, 216 F.3d 207, 222, (2000).
11. *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Krueger* 351 U.S. 470 (1956).
12. *See specifically* Part II ‘Rules for Courts-Martial’, Chapter II ‘Jurisdiction’, R.C.M. 202(a)(4): (United States Department of Defense 2012).
13. Only federal Congress has the power to declare war. *See* *National Sav. & Trust Co. v. Brownell*, 222 F.2d 395 (D.C. Cir. 1955); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), judgment aff’d, 411 U.S. 911, 93 S. Ct. 1545, 36 L. Ed. 2d 304 (1973); *Atlee v. Laird*, 339 F. Supp. 1347 (E.D. Pa. 1972), judgment aff’d, 411 U.S. 911, 93 S. Ct. 1545, 36 L. Ed. 2d 304 (1973); *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970), order rev’d on other grounds, 464 F.2d 178 (9th Cir. 1972); *Even v. Clifford*, 287 F. Supp. 334 (S.D. Cal. 1968); Participation in a war can be authorised by a “constitutional equivalent” for a congressional declaration of war or by a specific ratification of executive actions. *See* *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Com. of Mass. v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Meyers v. Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972).
14. The cases of *Reid v. Covert*, 354 U.S. 1 (1957) and *Kinsella v. Krueger* 351 U.S. 470 (1956) each involved a military spouse charged with a capital crime (murder) committed in the territory of a foreign U.S. base during peacetime. *See* (Warren 2012).
15. *Grisham v. Hagan*, 361 U.S. 278 (1960) (capital offence of premeditated murder committed in France); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (non-capital offences).
16. *Latney v. Ignatious*, 416 F.2d 821 (D.C. Cir. 1969).
17. *United States v. Gatlin*, 216 F.3d 207 220 (2nd Cir. 2000) (‘In short, the legislative history of § 7(3) and its precursors demonstrates unequivocally that Congress, in fact, intended the statute to apply exclusively to the territorial United States. Accordingly, we conclude that Lincoln Village—where Gatlin’s acts occurred—is not within the “special maritime and territorial jurisdiction of the United States”; that 18 U.S.C. § 2243(a) does not apply to Gatlin’s acts; and that the District Court lacked jurisdiction to try him’).

18. *Gatlin*, 216 F.3d at 223 ('Finally, it clearly is within Congress's power to change the effect of this ruling by passing legislation to close the jurisdictional gap. It is for this reason that we have taken the unusual step of directing the Clerk of the Court to forward a copy of this opinion to the Chairmen of the Senate and House Armed Services and Judiciary Committees').
19. Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–3267 (2000) [hereinafter MEJA] (subsection (a)(2) allows for prosecution of such categories of people as former members of the armed forces for crimes committed during service, as this was also a previous gap in jurisdiction).
20. Proposed expansion amendments have not come to fruition. *See* (Warren 2012, pp. 187–188) esp. fn. 376.
21. *See e.g. United States v. Brehm*, No. 1:11-CR-11 (E.D.Va Mar. 30, 2011); *United States v. Green*, 654 F.3d 637 (6th Cir. 2011); *United States v. Arnt*, 474 F.3d 1159 (9th Cir. 2007).
22. The 2013 application 12–805 to the Supreme Court of the United States for certiorari was denied.
23. *United States v. Ali*, 75 M.J. 256, No. 12–0008/AR, 14–20 (July 18, 2012). For a critical analysis of the case outside the scope of this book, see Vladeck (2012), Warren (2012, pp. 188–192).

References

- Elsa, J. K. (2005). *CRS report for congress: U.S. Treatment of prisoners in Iraq: Selected legal issues*. Retrieved from <https://fas.org/sgp/crs/mideast/RL32395.pdf>.
- Everett, R. O. (1960). Military jurisdiction over civilians. *Duke Law Journal*, 1960, 366–415.
- Gibson, M. S. S. (1995). Lack of extraterritorial jurisdiction over civilians: A new look at an old problem. *Military Law Review*, 148, 114–185.
- Mitchell, A. D., & Voon, T. (2005). Justice at the sharp end-improving Australia's military justice system. *UNSW Law Journal*, 28(2), 396–425.
- O'Brien, M. (2012). Protectors on trial? Prosecuting peacekeepers for war crimes and crimes against humanity in the international criminal court. *International Journal of Law, Crime and Justice*, 1–19.

- Perlak, J. R. (2001). The military extraterritorial jurisdiction act of 2000: Implications for contractor personnel. *Military Law Review*, 169, 92–140.
- Schlueter, D. A. (2015a). American military justice: Responding to the siren songs for reform. *Air Force Law Review*, 73, 193–230.
- Schlueter, D. A. (2015b). *Military criminal justice: Practice and procedure* (9th ed.). New Providence: Matthew Bender & Co.
- Schmitt, M. G. R. (2005). Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to close an unforeseen loophole. *The Army Lawyer*, 41–47.
- Stein, F. A. (2005). Have we closed the barn door yet? A look at the current loopholes in the Military Extraterritorial Jurisdiction Act. *Houston Journal of International Law*, 27, 579–607.
- United States Department of Defense. (2012). *Manual for Courts-Martial United States* (2012 ed.). Retrieved from <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.
- Vladeck, S. (2012). Analysis of U.S. v. Ali: A flawed majority, conflicting concurrences, and the future of military jurisdiction. *Lawfare*. Retrieved from <https://www.lawfareblog.com/analysis-us-v-ali-flawed-majority-conflicting-concurrences-and-future-military-jurisdiction>.
- Warren, C. B. (2012). The case of the murdering wives: *Reid v. Covert* and the complicated question of civilians and courts-martial. *Military Law Review*, 212, 133–193.

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O'Brien, M.

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