Sitting on Solid Ground: The International Legal Basis for Overseas Sittings of the Military Court of Australia

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Abstract

Legislation to establish the Military Court of Australia lapsed when the Commonwealth Parliament was prorogued ahead of the 2013 Australian federal election. Like the legislation that created the Australian Military Court (which the High Court declared unconstitutional in 2009), it purported to allow for court sittings on foreign soil. Before sitting in another country, however, the Military Court of Australia would need to have regard to 'the international legal basis' for its own presence there. This article examines the circumstances in which the proposed Court's power to sit in another country would be exercised in accordance with international law. It argues that an overseas sitting of the Military Court of Australia would be, as a matter of public international law, fundamentally different to an overseas hearing before any of the current mechanisms of Australian military justice. The article concludes that the Military Court of Australia would only have a sound 'international legal basis' for sitting in another country if it had express or implied consent to do so, or if Australia was engaged in a military occupation of the territory on which it sat.

I Introduction

Prior to the 2013 Australian federal election, a proposal of the Labor government to overhaul the Australian system of military justice was before Parliament. If it had passed, it would have created the Military Court of Australia ('Military Court') as the primary organ of Australian military justice and would have relegated present mechanisms to 'back-up' status.[1] The proposal lapsed when the Parliament was prorogued on 5 August 2013.

This was not the first time in recent years that Parliament had sought to make military justice more independent and transparent by replacing its traditional institutions with a 'court'. Indeed, the fact that both major parties have proposed such a course in recent years makes it likely that the Parliament will consider it again before long. A previous attempt by the Coalition government, the 'Australian Military Court',[2] was declared unconstitutional by the High Court in August 2009.[3] The Military Court of Australia Bill

* Commonwealth Attorney-General's Department. All views here expressed are my own and should not be understood to reflect the views of any past or present employer.

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2012, 7414, 7415 (Nicola Roxon, Attorney-General); Explanatory Memorandum, Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 2, 7.

2 Note the difference in terminology. The former body was the 'Australian Military Court', whereas the proposed body was to be called the 'Military Court of Australia'.

3 *Lane v Morrison* (2009) 239 CLR 230 ('*Lane*').

2012 (Cth) ('Military Court Bill') and the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 (Cth) ('Transitional Bill') (together, 'the Bills') sought to create a successor that repelled any future constitutional attack.[4]

This article examines one particular aspect of the Military Court — the provision made for it to sit overseas — from the standpoint of public international law. The Military Court Bill provides that, if it is 'both necessary and possible', the Military Court may sit outside Australia.[5] Before sitting in another state ('Ruritania'),[6] however, the Court must have regard, among other things, to the international legal basis for its own presence there.[7] This article examines the circumstances in which the Military Court should consider that basis to be sound; put another way, it examines the circumstances in which the power to sit in another country would be exercised in accordance with international law.

Part II discusses the present system of Australian military justice, the former Australian Military Court, the successful High Court challenge to it and the proposed Military Court. Part III establishes that a sitting of the Military Court (in Australia or elsewhere) is an exercise of Australian sovereign power, but a fundamentally different type of sovereign power to that exercised by a court martial. Because of that difference, the question of whether a sitting in Ruritania violates Ruritanian sovereignty is distinct from the question of whether the presence of the Australian Defence Force ('ADF') does so. Part IV argues that the Military Court would only have a sound 'international legal basis' for sitting in Ruritania if it had express or implied consent to do so, or if it was engaged in a military occupation of Ruritanian territory.

II Australian Military Justice — Present Arrangements and Proposed Reforms

Present Arrangements

The *Defence Force Discipline Act 1982* (Cth) ('*DFDA*') contains the substantive offences of Australian military justice,[8] as well as the mechanisms for investigation, determination of guilt, and punishment. It applies to Australian 'defence members', 'defence civilians'

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4 The constitutional vulnerabilities of the Bills are explored in Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Military Court of Australia Bill 2012 and Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012* (9 October 2012) [3.14]–[3.17], [4.4]–[4.12] ('*2012 Senate Report*'), Dissenting Report by Liberal Senators, [1.3]–[1.13]. See also the submissions referred to in those paragraphs.

5 Military Court Bill cl 51(1).

6 The fictional State of Ruritania is used throughout this paper for illustrative purposes. For other such uses, see Robert J Beck and Anthony Clark Arend, 'Don't Tread on Us: International Law and Forcible State Responses to Terrorism' (1993) 12 *Wisconsin International Law Journal* 153; Clive M Schmitthoff, 'Claim of Sovereign Immunity in the Law of International Trade' (1958) 7 *International and Comparative Law Quarterly* 452; J H C Morris, 'The Proper Law of a Contract: A Reply' (1950) 3 *International Law Quarterly* 197.

7 Military Court Bill cl 51(4)(c).

8 'Military justice' generally refers to two systems, the disciplinary and the administrative. The former — with which this article is primarily concerned — deals with the investigation and prosecution of offences under the *DFDA*. The latter concerns decisions and processes associated with the command, control and administration of the ADF. It includes provisions for inquiries, adverse administrative action (such as counselling, formal warnings and censures and termination), as well as redress and complaint. See generally Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System* (2005) ('*2005 Senate Report*').

(together, 'defence personnel'), and prisoners of war.[9] The Act operates extraterritorially,[10] so it can be used, for example, to charge an Australian soldier with a sexual assault allegedly committed while on leave in Thailand.[11] Charges may presently be tried by one of the following means (in decreasing order of formality, seniority, jurisdiction and powers of punishment, roughly speaking): court martial, Defence Force magistrate, summary authority and discipline officer.[12]

Following a conviction by court martial, Defence Force magistrate or summary authority, a 'reviewing officer' conducts an automatic review[13] using grounds similar to those used by a court of criminal appeal.[14] This officer has power to quash the conviction, order a retrial,[15] substitute a conviction of a lesser offence,[16] reduce the sentence,[17] or order acquittal.[18] Further reviews may be conducted on petition or by the Chief of the Defence Force or a service chief.[19] This review procedure is additional to the appeals to the Defence Force Discipline Appeals Tribunal.[20]

While the *DFDA* does not explicitly authorise the conduct of trials outside Australia, it does so impliedly — the whole of the Act applies extraterritorially[21] and, in particular, there are different rules concerning representation where a trial before a court martial or a Defence Force magistrate is held outside Australia.[22] Of the 29 trials for offences allegedly committed overseas held between 2000 and 2004, only four were held outside Australia.[23] As at September 2012, the last court martial held overseas was in 2006.[24]

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9 *DFDA* ss 3, 7(1).

10 Ibid s 9.

11 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308.

12 For an explanation of these mechanisms, the differences between them and the present Australian system of military justice generally, see F Healy, 'The Military Justice System in Australia' (2002) 52 *Air Force Law Review* 93; A Mitchell and T Voon, 'Justice at the Sharp End — Improving Australia's Military Justice System' (2005) *University of New South Wales Law Journal* 396. Note also that courts martial may be general or restricted and a summary authority can be a superior summary authority, commanding officer or subordinate summary authority.

13 *DFDA* ss 150, 152.

14 Ibid s 158(1); *Lane* (2009) 239 CLR 230, 259 [90] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

15 *DFDA* s 159.

16 Ibid ss 161, 142, sch 6.

17 Ibid s 162.

18 Ibid s 160.

19 Ibid ss 153, 155.

20 See the *Defence Force Discipline Appeals Act 1955* (Cth).

21 *DFDA* s 9.

22 Ibid s 136, which reads as follows:
A person shall not represent a party before a court martial or a Defence Force magistrate unless the person is:
where the trial is held in Australia--a member of the ADF or a legal practitioner; or
where the trial is held in a place outside Australia--a person referred to in paragraph (a) or a person qualified to practise before the courts of that place.

23 *2005 Senate Report* [5.30]. The Senate report notes that, '[o]f the 29 Service personnel tried between 2000 and 2004, only four trials were conducted overseas', suggesting that only 29 trial were held during that period. The document cited as evidence for this conclusion, however, is labelled as only relating to 'OFFENCES COMMITTED OVERSEAS': Tabled Document 143 before Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 6 August 2004 (Colonel Ian Westwood).

24 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 14 September 2012, 47 (Air Commodore Paul Cronan).

The Australian Military Court

In 2005, a Senate committee examined *The effectiveness of Australia's military justice system*. It noted that '[o]verseas jurisdictions have increasingly moved towards structures that impart greater independence and impartiality'[25] and concluded that '[a]n independent Permanent Court, staffed by independently appointed judges possessing extensive civilian experience, would extend and protect Service personnel's inherent rights and freedoms, leading to more impartial, rigorous and fair outcomes'.[26]

In response to the 2005 report, Parliament passed the *Defence Legislation Amendment Act 2006* (Cth), which abolished courts martial and Defence Force magistrates[27] and replaced them with the Australian Military Court ('AMC').[28] The AMC was described as a 'court of record'[29] and was comprised of officer-judges[30] of specified rank[31] and legal experience.[32] The AMC operated outside the chain of command: its decisions were not reviewable except by the Defence Force Discipline Appeals Tribunal (which itself lies outside the chain of command)[33] and its judges were ineligible for promotion (except for an automatic promotion midway through their ten-year terms).[34] Contempt of the AMC was criminalised,[35] but the AMC only had power to punish for contempt by defence personnel.[36]

Like the proposed Military Court, the AMC was empowered to sit outside Australia by the operation of s 117:

> (1) The Australian Military Court may sit at any place in or outside Australia.
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> (2) The Australian Military Court may, at any stage of proceedings in the Court, order that:
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> (a) the proceedings; or
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> (b) a part of the proceedings;
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> be conducted or continued at a place specified in the order, subject to such conditions (if any) as the Court imposes.[37]

Lane v Morrison

In 2009, a naval reservist — Brian George Lane — successfully challenged the constitutionality of the AMC in the High Court. Although the decision turned primarily on

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25 *2005 Senate Report* [5.81].
26 Ibid [5.85].
27 *Defence Legislation Amendment Act 2006* (Cth) sch 1 cl 11.
28 Ibid sch 1 cl 11 s 114.
29 Ibid sch 1 cl 11 ss 114(1A).
30 Ibid sch 1 cl 11 s 114(2).
31 Ibid sch 1 cl 17 ss 188AD(b), 188AR(1)(b), 188AR(2)(b).
32 Ibid sch 1 cl 17 ss 118AD(a), 188AR(1)(a), 188AR(2)(a).
33 Ibid sch 1 cll 25, 206. The members of the Tribunal must be judges and their decisions are reviewed by the Federal Court of Australia: *Defence Force Discipline Appeals Act 1955* (Cth) ss 8, 52.
34 Ibid sch 1 cl 17 ss 188AJ, 188AX.
35 Ibid sch 1 cll 33A, 49A (which inserted such an offence for a 'person' into the *Defence Act 1903* s 89 and for defence personnel into *DFDA* s 53).
36 Because the AMC only had jurisdiction in respect of offences in the *DFDA* (and the contempt offence in the *DFDA* only applied to defence personnel): ibid sch 1 cl 11 s 115; *DFDA* s 3 (definitions of 'charge' and 'service offence').
37 *Defence Legislation Amendment Act 2006* (Cth) sch 1 cl 11 s 117.

questions of Australian constitutional law, some of the observations made by the Court are relevant to the issues here considered.[38]

The 'judicial power of the Commonwealth' of Australia may only be exercised by courts that comply with ch III of the *Constitution*. Since it was common ground that the AMC did not comply,[39] the key issue was whether the AMC exercised 'the judicial power of the Commonwealth'. If it did, the AMC would be unconstitutional.

The Commonwealth denied that the AMC exercised the judicial power of the Commonwealth, pointing to (a) the legislative notation that the AMC was 'not a court for the purposes of Chapter III of the Constitution'[40] and (b) previous explanations by the High Court that courts martial exercise 'military judicial power' (an element of the defence power) and did not, therefore, need to comply with ch III.[41]

These arguments were rejected. The Court emphasised that the AMC differed from the institutions of military justice that it had previously considered because it was empowered to make 'binding and authoritative decisions … without further intervention from within the chain of command'.[42] It was the 'independence of the [AMC] from the chain of command which [was] the chief feature distinguishing it from earlier forms of service tribunal'.[43] This independence meant that the AMC was not an internal disciplinary mechanism, but rather exercised the judicial power of the Commonwealth and was invalid for failing to comply with ch III. The Court also found that the description of the AMC as 'a court of record' supported this conclusion[44] without being necessary to it.[45]

Following the decision, the previous system of courts martial and Defence Force magistrates was restored.[46] During its life (October 2007–August 2009), the AMC conducted 21 trials before a jury and 110 before a judge sitting alone.[47] It did not sit abroad.

The Military Court of Australia Bill 2012

Following the demise of the AMC, the government set about creating a military court that would comply with the requirements of ch III.[48] The Military Court of Australia Bill 2010

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38 See further K Cochrane, 'Lane v Morrison' (2010) 61 *Australian Institute of Administrative Law Forum* 62; H Burmester, 'The Rise, Fall and Proposed Rebirth of the Australian Military Court' (2011) 39 *Federal Law Review* 195.

39 *Lane* (2009) 239 CLR 230, 266 [113] (Hayne, Heydon, Crennan, Kiefel and Bell JJ). The AMC did not comply with the requirements of ch III because it did not satisfy the appointment, remuneration and tenure requirements of s 72 of the *Constitution*: at 237 [9], 251 [65].

40 *Defence Legislation Amendment Act 2006* (Cth) sch 1 cl 11, note 1 to s 114(1).

41 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 541 (Mason CJ, Wilson and Dawson JJ), 598 (Gaudron J).

42 *Lane* (2009) 239 CLR 230, 261 [98] (Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also 248 [49]–[51] (French CJ and Gummow J), 256 [79], 260 [95], 261 [97]–[98] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

43 Ibid 254 [75] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

44 Ibid 239–40 [19]–[20], 243–4 [32]–[34] (French CJ and Gummow J), 261–6 [99]–[114] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

45 Ibid 261 [98] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

46 *Military Justice (Interim Measures) Act (No 1) 2009* (Cth).

47 Brigadier I D Westwood, 'Australian Military Court: Report for the Period 1 October to 31 December 2007' (Annual Report, Chief Military Judge, ADF, 7 April 2008); Brigadier I D Westwood, 'Australian Military Court: Report for the period 1 January to 31 December 2008' (Annual Report, Chief Military Judge, ADF, 20 April 2009); Major General the Hon Justice R R S Tracey, 'Defence Force Discipline Act 1982: Report for the period 1 January to 31 December 2009' (Annual Report, Judge Advocate General, ADF, 10 May 2010).

48 *Parliamentary Debates* above n 1, 7413 (Nicola Roxon, Attorney-General).

(Cth) was introduced into Parliament on 24 June 2010,[49] but lapsed when the Parliament was prorogued prior to the 2010 federal election.[50]

The Bills under consideration here were introduced into the House of Representatives and read for a second time on 21 June 2012.[51] If they had been enacted prior to the proroguing of Parliament, they would have created the Military Court of Australia,[52] which would have been a 'superior court of record'[53] with original jurisdiction in relation to service offences under the *DFDA*.[54] The court would have consisted of a Chief Justice, other judges and federal magistrates[55] that:

- Have judicial experience or are legal practitioners of five years' standing;[56]
- Are appointed until the age of 70;[57]
- Have an understanding of 'the nature of service' in the ADF;[58] but
- Are *not* members of the ADF.[59]

The Military Court would conduct trials presided over by a single judge or federal magistrate or a panel of three judges (but would not conduct trials by jury)[60] and hear appeals from judgments of single judges or federal magistrates.[61] (Appeals to the Defence Force Discipline Appeals Tribunal would be abolished.)[62] The Military Court would be able to compel witnesses to attend, answer questions and produce documents[63] and would have the same power as the High Court in respect of contempt.[64]

Sittings outside Australia

Clause 51 of the Military Court Bill provides that, where 'both necessary and possible', the Military Court may (but is not required to) sit outside Australia. Necessity is to be determined by reference to the location of the offence, the accused and any witnesses.[65] Possibility is to be identified as follows:

> (4) If the Military Court determines that it is necessary for it to sit at a place outside Australia, the Military Court must also determine whether it is possible for it to sit at that place, having regard to:
>
> (a) the security of the place; and

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49 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2010, 6522 (Robert McClelland, Attorney-General).
50 *2012 Senate Report* [1.18]; Burmester, above n 38, 195.
51 *Parliamentary Debates*, above n 1.
52 Military Court Bill cl 9(1).
53 Ibid cl 9(2).
54 Ibid cl 63(1)(a).
55 Ibid cl 9(3).
56 Ibid cl 11(3)(a).
57 Ibid cll 11(4)–(5).
58 Ibid cl 11(3)(b).
59 Ibid cl 11(4).
60 Ibid cl 52.
61 Ibid cl 94(a).
62 Transitional Bill sch 4.
63 Military Court Bill cl 169.
64 Ibid cl 61.
65 Ibid cl 51(3).

(b) any relevant Australian or foreign laws; and
(c) if the place is in another country
    (i) any relevant agreements or arrangements that are in force between Australia and that country; and
    (ii) the international legal basis for the presence of the Australian Defence Force in that country; and
    (iii) the international legal basis for the presence of the Military Court in that country; and
(d) any submissions made by the accused person or the Director of Military Prosecutions.[66]

There was to be no diminution in the powers of the Court outside Australia.[67]

If a sitting outside Australia was necessary but impossible, the charge would be deemed to have been withdrawn,[68] but the Director of Military Prosecutions would have been able to direct that the matter be referred to a court martial, Defence Force magistrate, superior summary authority or commanding officer.[69] The procedures of courts martial and Defence Force magistrates would be retained as 'residual mechanisms' for such purposes.[70]

Senate Committee Report

The Senate Legal and Constitutional Affairs Legislation Committee endorsed the Bills and, subject to an amendment to the explanatory memorandum, recommended that they be passed.[71]

On the question of the Military Court sitting abroad, the Committee noted submissions concerning the rarity with which courts martial sit overseas, the possibility of giving evidence by videolink and the dangers that might attend the overseas deployment of the Court.[72] Only the Law Council of Australia raised a question of international law — its submission noted that it might not be possible for the Military Court to sit in another state that permits ADF operations but objects to the Military Court's presence.[73] The Committee expressed no views and made no recommendations on the question of overseas sittings.

III The Military Court Abroad: Prima Facie Violation of Sovereignty

Sovereignty and the Duty of Non-Interference

Sovereignty has been described as '[i]ndependence in regard to a portion of the globe … to exercise therein, to the exclusion of any other State, the functions of a State'.[74] It includes a

66 Ibid cll 51(4).
67 Ibid cl 59.
68 Ibid cl 51(5).
69 Transitional Bill sch 1 cl 73 s 103C.
70 Ibid sch 1 cl 165 pts 1, 2.
71 *2012 Senate Report* [4.54]–[4.55]. Liberal Senators dissented, recommending that the Bills not be passed unless amended to provide for (a) trial by jury and (b) the appointment of reservists and standby reservists to the court: Dissenting Report by Liberal Senators, [1.19]–[1.21]. The Australian Greens also recommended that provision be made for trial by jury: Additional Comments by Australian Greens [1.8].
72 Ibid [3.43]–[3.47].
73 Ibid [3.44].
74 *Netherlands v United States* (1928) 2 RIAA 829 ('*Island of Palmas Case*') 838.

state's right to be free from 'the threat or use of force against [its] territorial integrity and political independence'.[75]

A (logical) concomitant of sovereignty is the duty of non-interference. In the *Lotus* case, the Permanent Court of International Justice opined that 'the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State'.[76] This principle of non-intervention is also expressed in the *Charter of the United Nations*[77] and the *Friendly Relations Declaration*.[78] The International Court of Justice has described the duty as 'an essential foundation of international relations'[79] and Ian Brownlie called it a 'master rule' of international law.[80] It is, of course, subject to exceptions, such as consent and self-defence.

An element of the duty of non-interference is the prohibition on the exercise of sovereign power (through, for example, the performance of official duties) in other countries without consent.[81] For example, Australian authorities could not arrest a fugitive[82] or use lethal force[83] in Ruritania without consent.

Relevantly, this principle extends to the establishment of courts and the performance of judicial functions on the territory of another state.[84]

For the purposes of this article, a distinction must be drawn between the courts of a state (a) having 'extraterritorial jurisdiction', being jurisdiction[85] over an event that occurs

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75 *Charter of the United Nations* art 2(4).

76 *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (Ser A) No 10, 18–19.

77 *Charter of the United Nations* art 2(7) ('Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII').

78 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with The Charter of The United Nations*, GA Res 2625, UN GAOR, 25th sess, 1883rd mtg, Supp No 28 (24 October 1970) art 3. See also 'Draft Declaration on Rights and Duties of States' [1949] *Yearbook of the International Law Commission* 286 art 3.

79 *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 35.

80 I Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 292.

81 M Akehurst, 'Jurisdiction in International Law' (1972) 46 *British Yearbook of International Law* 145, 145 ('Not every act by one State in the territory of another State is contrary to international law; common sense suggests that the representative of one State who signs a commercial contract in another State is not acting contrary to international law'); M Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 650–1.

82 See, eg, *Question relating to the case of Adolf Eichmann*, Security Council Resolution 138, UN Doc S/RES/138 (1960); *Attorney-General of the Government of Israel v Eichmann* (1961) 36 ILR 5. See also Shaw, above n 81, 680–1; Brownlie above n 80, 309, n 58.

83 For a current, controversial example, see B Emmerson, 'Statement of the Special Rapporteur Following Meetings in Pakistan' (Statement, 14 March 2013) ('As a matter of international law the US drone campaign in Pakistan is therefore being conducted without the consent of the elected representatives of the people, or the legitimate Government of the State. It involves the use of force on the territory of another State without its consent and is therefore a violation of Pakistan's sovereignty.')

84 *Glass v Sloop Betsey* (1794) 3 US 6, 16 ('AND the said Supreme Court being further of opinion, that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, IT IS THEREFORE DECREED AND ADJUDGED that the admiralty jurisdiction, which has been exercised in the United States by the Consuls of France, not being so warranted, is not of right'); Charles Cheney Hyde, *International Law* (Little Brown, 2nd ed, 1947) vol 1, 641; A McNair, *International Law Opinions* (Cambridge University Press, 1956) 70–4; Akehurst, above n 81, 145; Brownlie, above n 80, 323.

85 'Jurisdiction' here refers to the 'the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court': J Beale, 'The Jurisdiction of a Sovereign State' (1923) 36 *Harvard Law Review* 241. See also Brownlie above n 80, 299 (defining jurisdiction as the sovereign's 'judicial, legislative, and

outside that state's territory;[86] and (b) exercising sovereign power extraterritorially (while the officials in question are physically outside the state's territory). For example, it is one thing for Australia to exercise extraterritorial jurisdiction by making it a crime for Australian citizens and residents to engage in sexual intercourse outside Australia with children under the age of 16,[87] but it would be quite another to have Australian police enter Ruritanian territory to arrest and charge someone of such a crime and to have an Australian court sit in Ruritania to try and convict the Australian. This article is concerned not with the persons or events over which the Military Court may exercise its adjudicative powers, but rather *where* Australian authorities may be when they exercise those powers. Its focus is on the extraterritorial exercise of sovereign power inherent in an overseas sitting (that is, (b) above), not the fact that the Military Court would possess extraterritorial jurisdiction (that is, (a)). If the Military Court conducted a trial overseas for a crime that allegedly occurred overseas, it would, of course, be exercising extraterritorial jurisdiction. This would easily be justified as a matter of international law, however, on the basis of the nationality principle in the case of defence personnel[88] and, in the case of prisoners of war, the power to exercise criminal jurisdiction conferred by the *Third Geneva Convention*.[89]

Divisible Sovereignty, Limited Exceptions

It was previously the orthodox position that sovereignty was, as Grotius put it, 'a unity, in itself indivisible'.[90] Morgenthau thought that 'the conception of a divisible sovereignty is contrary to logic and politically unfeasible'.[91]

The better position is, however, that sovereignty *is* divisible.[92] Many authors describe this divisible sovereignty as a 'bundle' of powers or rights,[93] much like the legal concept of

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administrative competence'); C Blakesley, 'United States Jurisdiction over Extraterritorial Crime' (1982) 73 *Journal of Criminal Law and Criminology* 1109 (defining jurisdiction as 'the authority to affect legal interests'). American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (American Law Institute Publishers, 1987) divides jurisdiction into the following three aspects at § 401:

a. jurisdiction to prescribe, ie, to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;
b. jurisdiction to adjudicate, ie, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;
c. jurisdiction to enforce, ie, to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

86 Brownlie, above n 80, 300–8.

87 *Criminal Code Act 1995* (Cth) sch 1 ss 272.6, 272.8(1).

88 Brownlie, above n 80, 303–4. Any defence personnel who are not Australian citizens would presumably owe sufficient allegiance to Australia to remain covered by the nationality principle: see footnote 30 in Brownlie, above n 80, 304 and the associated text.

89 *DFDA* s 7; *Geneva Conventions Act 1957* (Cth) s 5(2); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, [1958] ATS 21 (entered into force 21 October 1950) arts 82, 84.

90 H Grotius, *De Jure Belli ac Pacis* (1625), quoted in E Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press, 2002) 43–4 noting, however, that there were a large number of exceptions to the principle of indivisible sovereignty in practice. See also D Lake, 'The New Sovereignty in International Relations' (2003) 5 *International Studies Review* 303, 305–6.

91 H Morgenthau, 'The Problem of Sovereignty Reconsidered' (1948) 48 *Columbia Law Review* 341.

92 J Verzijl, *International Law in Historical* Perspective (AW Sijthoff-Leyden, 1968) vol 1, 256; B Chimni, 'A Just World Under Law: A View from the South' (2006) 22 *American University International Law Review* 199, 203; K Raustiala,

property in Australia.[94] As a bundle, of course, the rights of sovereignty — like property — may be separated from one another.[95]

There are many historical examples of states that did not enjoy the full gamut of sovereign rights, such as vassal states, protectorates, members of federations, and free cities and territories.[96] In particular, a number of states throughout history have renounced the right to wage war, supposedly the sine qua non of state sovereignty.[97] Even the Treaties of Münster and Osnabrück — the 'Peace of Westphalia' — did not confer total sovereignty; they contained limitations in relation to the treatment of religious and ethnic minorities.[98] In modern times, of course, states often sacrifice some of the rights of sovereignty to international organisations such as the United Nations and European Union.[99]

Because sovereignty is divisible, the exceptions to the duty of non-interference may be limited so as to apply only to certain sovereign powers. That the exceptions are divisible may be demonstrated by reference to the bundle of property rights: temporarily waiving my right to exclusive occupation of my land (by inviting you to dinner) or assigning to you the right to exclusive occupation (through a lease) will not compromise my ownership of the land. Likewise, allowing the establishment of a Ruritanian embassy in Australia will permit the exercise of certain Ruritanian sovereign powers on Australian soil (such as its rights under diplomatic law) but not others (such as the power to detain persons).[100] Whether a particular sovereign power may be exercised on foreign soil will depend on the nature and extent of the exception relied upon. In the case of consent, it will depend on the precise content of the agreement between the States concerned (which may have express and implied elements).[101]

'The Geography of Justice' (2005) 73 *Fordham Law Review* 2501, 2510–1; Brownlie, above n 80, 113. See also below n 90, nn 92–6.

93 H Lauterpacht, *International law, being the collected papers of Hersch Lauterpacht* (Cambridge University Press, 1977) vol 3, 8; O Hathaway, 'International Delegation and State Sovereignty' (2008) 71 *Law and Contemporary Problems* 115, 120; M Lind, *Compounded and Divided: Toward a Synthesis of Popular Sovereignty and Divisible Sovereignty* (unpublished manuscript, on file with the *Connecticut Law Review*) 3, 21, cited in S Krakoff, 'The Virtues and Vices of Sovereignty' (2005) 38 *Connecticut Law Review* 797.

94 *JT International SA v Commonwealth of Australia* [2012] HCA 43 [37] (French CJ), [299]–[300] (Crennan J); *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 230–1 [44]; *White v DPP (WA)* (2011) 243 CLR 478, 485 [10] (French CJ, Crennan and Bell JJ); *Yanner v Eaton* (1999) 201 CLR 351, 365–6 [17] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

95 H Maine, *International Law* (J Murray, 1890) 58, cited in F Vali, *Servitudes of International Law: A Study of Rights in Foreign Territory* (Frederick A Praeger, 2nd ed, 1958) 300.

96 See Verzijl, above n 92, vol 2, 339–459.

97 See E Dickenson, *The Equality of States in International Law* (Arno Press, 1972) 250–5; C Fenwick, *Wardship in International Law* (Scholarly Resources Inc, 1974) 12–14.

98 S Krasner, 'Westphalia and All That' in J Goldstein and R Keohane, *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Cornell University Press, 1993).

99 P Nichols, 'Integrated Sovereignty' (Paper presented at Legal Studies Workshop, University of Pennsylvania, April 2008) 8 <http://works.bepress.com/philip_nichols/3/>; J Walker, 'The Demise of the Nation-State, the Dawn of New Paradigm: Warfare, and a Future for the Profession of Arms' (2001) 51 *Air Force Law Review* 323, 325; B Chimni, 'A Just World Under Law: A View From the South' (2007) 22 *American University International Law* Review 199, 203; J Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 *American Journal of International Law* 782, 794.

100 Akehurst, above n 81, 151.

101 Ibid.

Different Types of Sovereign Power — the Fundamental (and Crucial) Differences between a Court Martial and the Military Court

Sovereignty, then, is a bundle of powers and an exception that permits the exercise of one such power in another State may not permit the exercise of other powers. It is important, therefore, accurately to characterise the sovereign power that is being exercised and the extent of the exception when determining if the power falls within the exception. Two such powers (or bundles of powers) are presently relevant. I will refer to them as 'sovereign military power' and 'sovereign judicial power'; the former encapsulates military activities that are also exercises of sovereignty (such as conducting exercises or fighting a war), while the latter refers to those powers typically held by courts that only sovereign States may exercise. If Australia exercises sovereign judicial power in disciplining Australian troops in Ruritania when Ruritania has only consented to the exercise of certain sovereign military powers, Australia will have fallen foul of the duty of non-interference.

I suggest that no clear test will easily distinguish between an institution of military justice that exercises sovereign military power and one that exercises sovereign judicial power. A balancing of numerous factors is required. The relevant questions will, it seems to me, include the following:

- Is the institution's jurisdiction limited to persons subject to military authority?
- Are the members of the institution (the judges, tribunal members etc) members of the armed forces?
- Is the final decision on guilt and/or sentence made within the chain of command? (Trial and subsequent review by the accused's superior officers will suggest an affirmative answer, but other factors may also do so.)
- Does the institution have the power to compel non-military witnesses to give evidence?
- Does the institution have the power to charge non-military personnel with contempt?
- Is the institution considered part of the judicial branch of government for the purposes of domestic law? (This question — which, in Australia, will equate with the question of whether the institution exercises the 'judicial power of the Commonwealth' — will be of less relevance in the case of domestic legal systems that do not observe a strict separation of powers between the judicial and other branches of government.)

The answers to these questions suggest that Australian courts martial and Defence Force magistrates exercise sovereign military power. They perform an *internal* disciplinary function: they are composed of officers who try charges against their subordinates; their convictions and sentences are subject to review by superior officers; their powers to compel witnesses and punish contempt are exercisable only over defence personnel;[102] and, finally, it is settled that they are not part of the judicial branch of the Australian

[102] It is an offence for non-defence personnel to commit contempt of a service tribunal (*Defence Act 1903* (Cth) s 89), but such an offence committed by non-service personnel would be prosecuted by the Commonwealth Director of Public Prosecutions. The point here, though, is that this power is not exercisable by the service tribunal.

government.[103] They are a formalisation of a commander's inherent power to discipline troops[104] and, as such, are aspects of sovereign military power.

On the other hand, the Military Court would have exercised sovereign *judicial* power. Although it would only be empowered to try defence personnel and prisoners of war, the remaining factors enunciated above suggest that it would not perform a merely internal disciplinary function. Its members would not be defence personnel and it would make binding decisions that are not subject to review within the chain of command. It would have full power to compel non-defence personnel to testify and to punish them for contempt. Finally, it was intended to be a 'superior court of record' and therefore 'part of the judicial system administering the law of the land'[105] and exercising the 'judicial power of the Commonwealth'.

Clause 51 recognises that the ADF and Military Court exercise different types of sovereign power by posing as different questions the legality of the presence of each in another country.

Consequences for the Deployment of the Military Court

Before sitting in Ruritania, the Military Court would be required to consider the 'international legal basis' for the ADF's presence and its own presence there.[106] The presence of the ADF and/or the Military Court would be a prima facie violation of sovereignty, calling for examination of relevant exceptions. Because the ADF and the Military Court exercise different types of sovereign power, however, these two mandatory considerations would involve distinct inquiries and, potentially, different conclusions. For example, Ruritania might consent to Australian soldiers exercising certain aspects of sovereign military power in Ruritania (by conducting training exercises, for example), but that does not mean that it has consented to the Military Court exercising sovereign judicial power there.

It is necessary to consider, therefore, the circumstances in which an exception to the general duty of non-interference would apply to the Military Court.

IV Exceptions

I suggest that there are two circumstances in which the Military Court would be permitted, as a matter of international law, to exercise sovereign judicial power within another state: where the other state consents (explicitly or impliedly) or where Australian forces are occupying territory. Other circumstances, however, would not justify a sitting of the Military Court.

Non-Applicable Exceptions

The most obvious non-applicable exception would be where there was no legal justification for the presence of the ADF or the Military Court in Ruritania; that is, if the Military Court determined that Australia had invaded illegally. In such circumstances, the

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103 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 541 (Mason CJ, Wilson & Dawson JJ), 598 (Gaudron J).
104 Akehurst, above n 81, 151.
105 *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 23 (Dixon J).
106 Military Court Bill cl 51(4).

Military Court Bill cl 51(4)(c)(ii) would require the Military Court to declare publicly that there was no international legal basis for the ADF's presence in Ruritania (an outcome attended by not insignificant political consequences). A sitting of the Military Court would also violate international law.

Second, there would be no international legal basis for the Military Court's presence in Ruritania if the only legal basis for the ADF's presence was Australia's right of self-defence in response to an armed attack, as enshrined in art 51 of the *Charter of the United Nations*. It is trite law that this exception to the duty of non-interference does not authorise violations of sovereignty that are unnecessary or disproportionate.[107] While a restrained exercise of sovereign military power in the territory of Ruritania (including the enforcement of military discipline) may be both 'proportional to the armed attack and necessary to respond to it',[108] an exercise of sovereign judicial power would not be. This is because the same end (enforcing troop discipline) could be achieved by means that involve less of an interference with Ruritanian sovereignty. In such cases, one of the residual mechanisms (that is, a court martial or trial by Defence Force magistrate) should be convened in place of the Military Court so that discipline is enforced through an exercise of sovereign military power.

Third, the Military Court would also violate international law if it were to sit in a state where the ADF had deployed pursuant to a Security Council resolution authorising action under ch VII of the *Charter of the United Nations*. Article 42 provides that, in certain circumstances, the Security Council 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. As with self defence, an exercise of sovereign judicial power would not be *necessary* for such a purpose and one of the residual mechanisms should be convened.

The above conclusions mean that, in the circumstances considered, defence personnel should not be tried by an institution that was designed to enhance their access to 'a fair and public hearing by a competent, independent and impartial tribunal'.[109] While this state of affairs may be regretted, it appears to be necessary as a matter of public international law for the reasons described above.

Explicit Consent — the Lockerbie Trial

The first circumstance in which the Military Court *would* be permitted to sit in another country would be if the other state explicitly consented.

There are a number of historical examples of the courts of one state exercising its adjudicative jurisdiction inside the territory of another with that other state's consent[110] — these include the United States Court for China,[111] the American consular courts in

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107 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14, 103.

108 Ibid 94.

109 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, [1980] ATS 23 (entered into force 23 March 1976), art 14; *Explanatory Memorandum, Military Court of Australia Bill 2012* [25]–[39]; *2012 Senate Report* [4.43].

110 Raustiala, above n 92, 2510–1 (noting that '[t]hese courts, typically founded on coercive treaties, adjudicated claims among western citizens abroad as well as between western citizens and locals, on the theory that the local law was barbaric, unpredictable, and strange').

111 See C Lobingier, 'A Quarter Century of our Extraterritorial Court' (1931) 20 *Georgetown Law Journal* 427; M Helmick, 'United States Court for China' (1945) 14(18) *Far Eastern Survey* 252; T Lee, 'The United States Court for China: A Triumph of Local Law' (2004) 52 *Buffalo Law Review* 923.

Japan,[112] and the foreign courts established in Britain during World War II.[113] The United States retains a procedure for consular courts to exercise jurisdiction in the United States over disputes between seamen of foreign states whenever provided for by treaty.[114] More recently, the suspected Lockerbie bombers were tried in a Scottish Court sitting in the Netherlands. As this last example shows, however, the subjects on which agreement would need to be reached are extensive.

On 21 December 1988, Pan Am Flight 103 was blown up over Lockerbie in southern Scotland. All 243 passengers and 16 crew members were killed, as were 11 people on the ground. The government of Libya was suspected of involvement (although not initially), and later confessed.[115]

On 24 August 1998 — almost 10 years after the tragedy — the British and American governments wrote to the UN Secretary General and proposed that the suspects be tried by a Scottish court sitting in the Netherlands.[116] The proposed court would apply normal Scots law and procedure, except that the jury would be replaced by a panel of three judges. The British and American governments made various undertakings to ensure a fair trial for the accused, including the presence of international observers and hearings in public. They confirmed that the government of the Netherlands had consented to the proposal, as had the Organisation of African Unity, the League of Arab States, the Non-Aligned Movement and the Islamic Conference.

The treaty supporting these arrangements had 29 articles.[117] It included provisions that established:

- The consent of the Dutch government 'to host the Scottish Court for the sole purpose, and for the duration, of the trial';[118]
- A jurisdiction for the Scottish Court that was limited to the trial, including appeals;[119]
- The ability of Scottish authorities to detain the accused in the Netherlands 'in accordance with Scots law and practice'.[120] Aside from the accused, no person was to be detained within the premises of the Scottish Court, except insofar as the Scottish Court ordered:[121]
    - the temporary detention of witnesses transferred in custody to the premises of the Scottish Court;

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112 See *In re Ross* (1891) 140 US 453.

113 McNair, above n 84, 70

114 22 USC §§ 256–8 (1864). For an example of such a treaty, see the *Consular Convention between the United States of America and Ireland*, signed 1 May 1950, 222 UNTS 107 (entered into force 12 June 1954), arts 22–3, esp art 22(3) ('The consular officer may, provided the judicial authorities of the territory do not take jurisdiction in accordance with the provisions of Article 23, decide disputes between the master and members of the crew of a vessel referred to in Article 21, including disputes as to pay and contracts of service, arrange for the engagement and discharge of the master and members of the crew, and take measures for the preservation of good order and discipline on the vessel').

115 See generally K Matar and R Thabit, *Lockerbie and Libya: A Study in International Relations* (McFarland & Co, 2003).

116 *Lockerbie: Text of UK/US Letter to the UN Secretary-General*, 2062 UNTS 94.

117 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands concerning a Scottish trial in the Netherlands*, signed 5 May 1999, 2062 UNTS 81 (entered into force 5 May 1999).

118 Ibid art 3(1).

119 Ibid art 3(2); see also definition of 'the trial', art 1(i).

120 Ibid art 3(3).

121 Ibid art 3(3).

  - the temporary detention of witnesses in the course of their evidence;
  - the temporary detention of persons who may have committed offences within the premises of the Scottish Court, including contempt of court; and
  - the imprisonment of persons found guilty summarily of contempt of court;
- The continued operation of Dutch law within the premises of the Scottish Court (except as otherwise provided for in the treaty).[122] The Scottish Court was entitled to establish, however, regulations that were 'necessary for the full execution of its functions';[123]
- The explicit waiver by the Dutch government of its right to exercise Dutch criminal jurisdiction over the accused in respect of acts, omissions or convictions prior to their arrival in the Netherlands. Such waiver was to cease when 'the accused, being obliged to leave the territory of [the Netherlands], have not done so or, having left it, have returned';[124]
- The obligation of the Dutch government to allow court officials, witnesses and international observers to enter the Netherlands for the 'sole purpose' of attending the trial;[125]
- The obligation of the Dutch government to provide protection for witnesses where requested[126] and for persons who were 'indispensable for the proper functioning of the Scottish Court';[127]
- The obligation of the British government to bear all costs incurred by the Dutch government that related to the establishment and sitting of the Scottish Court;[128] and
- The granting to the Scottish Court the kinds of privileges and immunities enjoyed by diplomatic missions. These included provisions for:
  - the inviolability of the premises of the Scottish Court;[129]
  - the protection of the premises of the Court by the appropriate Dutch authorities;[130]
  - '[I]mmunity from every form of legal process';[131]
  - the inviolability of all archives, documents and materials of the Scottish Court;[132]
  - exemption from taxes and duties;[133]
  - communications facilities;[134]

122 Ibid art 6.
123 Ibid art 6(3).
124 Ibid art 16(3).
125 Ibid arts 17(1), 18, 21, 22.
126 Ibid art 17(4).
127 Ibid art 23.
128 Ibid art 24(1).
129 Ibid art 5.
130 Ibid art 7.
131 Ibid art 8.
132 Ibid art 9.
133 Ibid art 10.
134 Ibid art 11.

- entitlements to display emblems, markings and flags;[135] and
- the privileges and immunities of judges, officials, solicitors and advocates.[136]

On the same day the treaty was signed (18 September 1998), letters concerning contempt of court were exchanged between the British Ambassador to the Netherlands and the Dutch Minister for Foreign Affairs.[137] They agreed that the Scottish Court would be able summarily to 'deal with and punish' contempt, but only if such contempt took place in the course of the trial. The Scottish Court would not be able to institute separate criminal contempt proceedings; any such proceedings would be instituted in Scotland or by Dutch authorities in the Netherlands.

There are obvious pitfalls in making a direct comparison between the treaty that provided for one of the most anticipated terrorism trials ever conducted and an agreement that would provide for sittings of the Military Court. The former contains provisions that would be unnecessary in the latter; these include the authority to detain the accused (who would be ADF personnel and therefore able to be detained by internal disciplinary mechanisms, or who would be prisoners of war already detained) and the obligation on the state in which the court is sitting to provide protection for the court, witnesses and other 'indispensable persons' (which the ADF could provide). Nevertheless, Australian authorities would do well to model any treaty concerning an overseas sitting of the Military Court on the Lockerbie treaty, which contains considerable detail on topics that would need to be dealt with, such as the consent to exercise sovereign judicial power, diplomat-like privileges for the Military Court and its staff, and powers to punish contempt and compel witnesses. (The Scottish Court did not have power to compel the appearance of witnesses outside Scotland,[138] but the Military Court Bill apparently provides for worldwide compellability.)[139] Other topics, such as the application of Australian or Ruritanian law, would likely be dealt with in a pre-existing 'Status of Forces Agreement' ('SOFA').

Implied Consent — Status of Forces Agreements

Instead of concluding a specific agreement, it is possible that consent to sittings of the Military Court could be sourced in the text of a pre-existing SOFA. These agreements regulate certain aspects of the presence of one state's armed forces within another's territory and often include statements concerning criminal and/or disciplinary jurisdiction over members of the visiting forces. Their terms vary, so whether a particular agreement includes an implied consent to the exercise of sovereign judicial power will depend on those terms. 'Like all restrictions or limitations upon the exercise of sovereignty', such terms will be 'construed as restrictively as possible and confined within [their] narrowest limits' in cases of doubt.[140]

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135 Ibid art 13.

136 Ibid arts 14, 15.

137 *Letters Exchanged between the Ambassador Extraordinary and Plenipotentiary of the United Kingdom of Great Britain and Northern Ireland at The Hague and the Minister for Foreign Affairs of the Kingdom of the Netherlands on 18 September 1998*, 2062 UNTS 98–9.

138 M Scharf, 'Terrorism on Trial: the Lockerbie Criminal Proceedings' (1999-2000) 6 *ILSA Journal of International & Comparative Law* 355, 358.

139 Military Court Bill cll 59, 169.

140 *SS 'Wimbledon' (United Kingdom v Germany)* [1923] PCIJ (ser A), no 1, 24–5; O Dörr, 'Article 31: General Rule of Interpretation' in O Dörr & K Schmatenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 538, 538–9.

Some of the SOFAs that currently regulate the presence of Australian forces abroad include the following provisions:[141]

- In Afghanistan, Australian membership of the International Security Assistance Force is regulated by a 'Military Technical Agreement', which provides that all relevant personnel 'will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan'.[142]
- The Solomon Islands has agreed that '[c]riminal and disciplinary jurisdiction shall not be exercised over a member of the [Regional Assistance Mission to the Solomon Islands] arising out of an action taking place in Solomon Islands if such jurisdiction is asserted over that member in respect of that action by [one of the participating States]'.[143]
- In South Sudan, Australian members of the UN Mission to South Sudan are subject to a jurisdictional clause taken from the UN's *Model Status-of-Forces Agreement for Peacekeeping Operations*.[144] As such, they have immunity for all acts performed in their official capacity and 'shall be subject to the exclusive jurisdiction of [Australia] in respect of any criminal offences which may be committed by them in South Sudan'.[145]
- The agreement between Kyrgyzstan and Australia says simply that 'the Government of the Kyrgyz Republic authorises the Australian Government to exercise criminal jurisdiction over Australian personnel'.[146]

When a restrictive interpretation is employed, it should be concluded that these states have not impliedly consented to a sitting of the Military Court on their territory. The clauses authorise Australia to exercise jurisdiction, but are silent as to the institution/s that may exercise it and where.[147] The 'narrowest limits' of the consent, therefore, would not extend beyond the exercise of Australian sovereign military power, which is already envisaged in the agreements and which is sufficient to allow the criminal/disciplinary jurisdiction to be exercised.

On the other hand, the jurisdictional clauses of a number of the SOFAs to which Australia is a party have been closely modelled on the NATO SOFA;[148] these include

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141 Some SOFAs are not publicly available and so have not been discussed here.

142 UN Doc S/2002/117, Annex A at [3]. The agreement is still in force: North Atlantic Treaty Organization, *ISAF's Mission in Afghanistan* (25 October 2013) NATO, <http://www.nato.int/cps/en/natolive/topics_69366.htm>.

143 *Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the operations and status of the police and armed forces and other personnel deployed to Solomon Islands to assist in the restoration of law and order and security*, signed 24 July 2003 [2003] ATS 17 (entered into force 24 July 2003), art 10(3).

144 United Nations Secretariat, *Model status-of-forces agreement for peace-keeping operations*, UN GAOR, 45th sess, Agenda Item 76, UN Doc A/45/594 (9 October 1990) arts 46, 47(b).

145 *Agreement between the Government of Sudan and the United Nations Concerning the Status of the United Nations Mission in Sudan*, signed 28 December 2005, 2351 UNTS 63 (entered into force 28 December 2005) arts 50, 51(b).

146 *Agreement between Australia and the Kyrgyz Republic on the Status of Australian Forces in the Kyrgyz Republic*, signed 14 February 2002, [2002] ATS 14 (entered into force 9 July 2002).

147 See Part III concerning the relevance of the concept of jurisdiction in this article.

148 *Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces*, opened for signature 19 June 1951, 199 UNTS 67 (entered into force 23 August 1953) art VII.

treaties with the Philippines,[149] Malaysia,[150] and New Zealand.[151] They provide both the sending and receiving states with jurisdiction over visiting forces to the extent that it exists in their own law. In cases of overlapping jurisdiction, the sending state has primary jurisdiction over offences against (a) the property or security of the sending state, (b) members of the visiting force and (c) over offences arising from the performance of official duties. In all other cases, the receiving state will have primary jurisdiction. The key provision for present purposes, however, is as follows in the Philippines agreement:

> The Authorities or Service Authorities of the Sending State *shall have the right to exercise within the Receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the Sending State* over all persons subject to the Service Law of the Sending State.[152]

The broad definitions of 'Authorities' and 'Service Authorities' clearly encapsulate the Military Court,[153] which has been granted the right to exercise *all* of its criminal and disciplinary jurisdiction. A sitting would not violate international law. However, there is still room for ambiguity: are citizens of the receiving country 'subject to the Service Law' of Australia for the purposes of compellability and contempt? The Australian 'Service Law' (that is, the Military Court Bill) certainly purports to bind them. In respect of these issues, the ambiguity must be resolved by use of a restrictive interpretation; the Military Court would not be authorised by public international law to exercise these powers.

Some SOFAs would permit the Military Court to sit overseas, therefore, but others would not. In a similar vein, the British *Visiting Forces Act*[154] and the *United States Code*[155] contain broad statements of consent to the exercise of jurisdiction in those countries by the 'service courts' of allied states.

Finally, it should be noted that relying on consent implied from a SOFA could have serious political and diplomatic consequences. The state in which the Military Court proposes to sit may not agree that such consent can be implied and may object. This could create tension between allies and, for this reason, it would be unwise to ask the Military

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149 *Agreement between the Government of Australia and the Government of the Republic of the Philippines concerning the Status of Visiting Forces of Each State in the Territory of the Other State*, signed 31 May 2007, [2012] ATS 31 (entered into force 28 September 2012) art 11.

150 *Agreement between the Government of Australia and the Government of Malaysia concerning the Status of Forces*, signed 3 February 1997, [1999] ATS 14 (entered into force 22 July 1999) s 1 of Annex II.

151 *Agreement Between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, signed 29 October 1998 [2005] ATS 12 (entered into force 27 May 2005) art 4].

152 *Agreement between the Government of Australia and the Government of the Republic of the Philippines concerning the Status of Visiting Forces of Each State in the Territory of the Other State*, signed 31 May 2007, [2012] ATS 31 (entered into force 28 September 2012) art 11 (emphasis added) The relevant articles of the agreements cited above differ only slightly. Article 1(m) provides that '"Service Law" means any act, statute, order, regulation or instruction of the Sending State governing all or any of the members of the Visiting Force. Where the laws of the Sending State so provide, Service Law shall also apply to members of the Civilian Component'.

153 See art 1 of each relevant agreement. The relevant definitions in art 1 of the agreement with the Philippines are as follows: 'Authority' or 'Authorities' means 'the authority or authorities authorized or designated under the law of a Party or by the Government of a Party for the purpose of exercising the powers and responsibilities in relation to which the expression is used'; 'Service Authorities' means 'the authorities empowered by the law of the Sending State to exercise command or jurisdiction over members of the Visiting Force or its Civilian Component'.

154 *Visiting Forces Act 1952* (UK) 15 & 16 Geo 6 and 1 Eliz 2, c 67. Section 2(1) reads as follows: 'The service courts and service authorities of a country to which this section applies may within the United Kingdom, or on board any of Her Majesty's ships or aircraft, exercise over persons subject to their jurisdiction in accordance with this section all such powers as are exercisable by them according to the law of that country'.

155 22 USC §§ 701–6 (1946).

Court to rely only on implied consent when determining the international legal basis for its own presence in another country. Diplomatically, '[t]here is much to be said for an express detailed agreement to regulate the matter',[156] though the example of the Lockerbie trial shows that this may involve extensive negotiation and lengthy further agreements. This problem would not be avoided by providing express authorisation for a sitting of the Military Court in a SOFA; such a tactic would only bring forward the complex negotiations to a time when it would be unclear if the arrangements would ever be used.

There is, however, a circumstance where the consent of the other state would not be required, and it is to that I now turn.

The Obligation to Exercise Sovereignty Abroad — the Case of Occupation

The Military Court would be permitted to sit abroad if Australia were militarily to occupy foreign lands and thereby acquire the rights and duties of an occupying power under international humanitarian law.

A state of occupation will exist if: (a) the former government is unable to exercise its authority; and (b) the occupying power takes effective steps to exercise its own authority over the civilian population.[157] In such circumstances, and absent specific agreement between the states in question, the general rules of occupation apply.[158] While the rules of occupation were developed for use in so-called 'belligerent occupations',[159] states — including Australia[160] — have expressed the intention to be bound by them 'by analogy' when their military forces occupy the territory of a collapsed state for the purpose of restoring law and order.[161] This was the position adopted in 1999 when Australia led the INTERFET force that, with Indonesian consent, sought to restore order in Timor-Leste.[162]

The occupier is required to 'take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.[163] The occupier's obligations under international human rights law continue in the occupied territory.[164]

If Australia occupied parts of Ruritania, it would be permitted by the law of occupation to establish two types of court:

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156 Akehurst, above n 81, 151.

157 *Hague Convention IV — Laws and Customs of War on Land*, opened for signature 18 October 1907, 205 Consol TS 277 (entered into force 26 January 1910) ('*Hague Regulations*') art 42 [Full citation please]; Ministry of Defence (UK), *The Joint Service Manual of the Law of Armed Conflict* (Joint Doctrine & Concepts Centre, 2004) ('*UK Manual*') [11.2], [11.3.2]; ADF, 'Law of Armed Conflict' (Australian Defence Doctrine Publication 06.4, 11 May 2006) ('*Australian Manual*') [12.5].

158 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 30(4)(a); *Australian Manual* at [12.3].

159 '[P]laced under the authority of the *hostile army*': *Hague Regulations*, art 42 (emphasis added).

160 *Australian Manual*, above n 157, [12.4].

161 *UK Manual*, above n 157, [11.1.2].

162 M Kelly, 'Transitional Justice in Peace Operations: Shaping the Twilight Zone in Somalia and East Timor' [2001] *Yearbook of International Humanitarian Law* 213, 242.

163 *Hague Regulations*, above n 157, art 43.

164 See, eg, *Bankovic v Belgium* (2007) 44 EHRR SE5, 85–6; *Loizidou v Turkey* (1995) 20 EHRR 99, 130.

a) 'Replacement courts': Ruritanian courts would owe no duty of allegiance to Australia,[165] but would retain jurisdiction to deal with matters of a non-military nature that do not affect the safety of Australian forces.[166] (These latter matters would remain within the jurisdiction of Australian authorities.) If Ruritanian courts refused to fulfil their functions, or if the circumstances rendered local judicial administration impossible, Australia would be obliged to establish 'replacement courts' to enforce the law of the land,[167] such as were established in the American sector of Berlin during its occupation following World War II.[168]
b) 'Occupation courts': Australia would also be entitled to establish its own 'non-political military courts' to try the locals on charges created by or under Australian legislation.[169] Such legislation would be confined to provisions enabling Australia to respect its obligations under the *Fourth Geneva Convention*, to maintain orderly government and to ensure its own security and that of its personnel.[170] These courts would sit in Ruritania as, ideally, would courts of appeal.[171] They would be able to consist of military or civilian judges, but would need to be responsible to Australian military authorities.[172]

If the proposed Military Court sat in the occupied territory, however, it would not meet the description of either type of court. It would not enforce the law of the land (so could not be a replacement court) and, although it might be argued that it would enforce Australian laws directed to the proscribed ends, it would try Australian defence personnel and prisoners of war (not locals generally) and would not be responsible to military authorities (preventing it from being an occupation court). Despite this, however, I suggest that the Military Court *would* be permitted, as a matter of public international law, to sit in occupied Ruritania.

It might be thought that the situation would be the same as the general position outlined above; namely that, absent specific consent, the operation of the Military Court would violate Ruritanian sovereignty. This conclusion, however, pays too little attention to the role of an occupying power. The occupier has special duties and rights, including the duty to administer occupied territory and the right to establish the two types of court described above. An inherent feature of such courts would be the ability to compel witnesses and punish contempt.[173] If both types of court were in operation, their jurisdiction would be complete within occupied Ruritania except for jurisdiction over Australian defence personnel and prisoners of war in matters of a military nature. If Australian authorities were permitted to exercise sovereign judicial power over Ruritanians in Ruritania, there seems to be no reason to permit an Australian court to exercise similar sovereignty over Australian defence personnel and prisoners of war in Ruritania.

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165 *Hague Regulations*, above n 157, art 45; *Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Fourth Geneva Convention*'), art 54.
166 *UK Manual*, above n 157, [11.26]–[11.27]; *Australian Manual*, above n 157, [12.20], [12.22].
167 *Fourth Geneva Convention*, art 64; International Committee of the Red Cross, Commentaries to the *Fourth Geneva Convention* <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=380&t=com> ('*ICRC Commentaries*') art 64.
168 See *United States v Tiede* (1979) 86 FRD 227.
169 *Fourth Geneva Convention* art 66.
170 Ibid art 64.
171 Ibid.
172 *ICRC Commentary*, above n 167, art 66; *UK Manual*, above n 157, [11.59]–[11.59.1].
173 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432, 443.

Such a sitting would not violate the prohibition on countries extending their civil court system into occupied territory[174] because such a prohibition is directed to preventing the kind of judicial annexation that would occur if the occupying power were to apply its own law as the law of the land in the occupied territory. It is not directed to restricting the manner in which the occupying power may exercise the jurisdiction that it undoubtedly has over its own military personnel and prisoners of war.

V Conclusion

Little public consideration has been given, thus far, to the question of the circumstances in which an Australian court — military or civilian — will be able to sit on the territory of other states. If the Military Court of Australia ever becomes a reality, these are questions with which it will need to grapple. Consent and occupation are the only circumstances in which the Military Court should consider itself able to sit abroad.

[174] *UK Manual*, above n 157, [11.59.1].