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Understanding Military Justice: A Practice Note

Mindia Vashakmadze

Security Sector Reform Working Group: Military Justice 2



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What is the purpose of this practice note?

Legislating for the security sector is a complex and difficult task. For this reason, many lawmakers are tempted to copy legislation from other countries. This expedites the drafting process, especially when texts are available in the language of the lawmaker. However, it frequently results in poor legislation. Even after being amended, the copied laws are often out of date before coming into effect. They may no longer be in line with international standards, and may not fully respond to the requirements of local context or legal order.

In Eastern and Central Europe, as well as the countries of the Former Soviet Union (FSU), the public debate on the security sector has been ongoing since the fall of the Berlin Wall. However, in many states within this region, the creation of a sound legal framework for the effective operation of security sector agencies, including justice institutions, remains a challenge. It is crucial to ensure that such a legal framework is based on international legal standards, as well as lessons learned from comparative experience.

The motivation for this Practice Note came from practitioners involved in reform processes across the region who seek guiding principles and comparative analyses of legal models in various areas, including the judiciary. There is growing support within domestic legal systems of these

countries for increased judicial accountability of the armed forces (and other security sector agencies). Military justice is an important tool to ensure such accountability.

This practice note is primarily addressed to those who intend to draft new military justice legislation or amend existing laws. This includes parliamentarians, civil servants, legal experts and nongovernmental organisations. The note may also be helpful for security officials. Additionally, it may serve as a reference tool for researchers and students interested in security sector legislation.

The analysis herein is largely based on international standards and comparative experience and provides easy access to international norms as well as examples of legislation from the region and beyond.

What does this practice note contain?

The objective of this practice note is to provide readers with essential information about the function and main principles of military justice in a democratic society. It also focuses on policies and the role of different stakeholders in shaping the legal and institutional framework for an effective and transparent system of military justice. It provides an overview of different military justice systems and outlines the challenges they face, placing particular focus on the countries of Eastern and Central Europe as well as those within the Former Soviet Union.

This practice note is to a significant extent based on the content and structure of the *Understanding Military Justice: Guidebook* published in 2009.¹

What is military justice and why are specialised military courts established?

Military justice is a distinct legal system that applies to members of the armed forces, and in some cases, to civilians closely associated with the armed forces. The main purpose of military justice is to preserve discipline and good order in the armed forces, and ensure its operational effectiveness. Structures, rules and procedures in military justice can be substantially different from their civilian counterparts. In many cases, military justice operates in a separate court system with stricter rules and procedures in order to enforce

internal discipline and ensure the operational effectiveness of the armed forces. This may lead to questions concerning the principle of civilian supremacy or issues of compliance with international human rights standards, such as fair trial guarantees.

Box 1	The purpose of a separate system of military tribunals (R. v. G��n��reux, Canadian Supreme Court) ²
“The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation’s security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and frequently, punished more severely than would be the case if a civilian engaged in such conduct. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.”	

Many of today’s military justice systems were established many years ago and have greatly evolved since their creation. The argument for military justice systems operating in parallel to their civilian counterparts is predicated on the commonly held view that civilian judges typically lack the necessary expertise in military affairs. The main rationale for a specialised court system is the unique character of military life, where discipline, organisation and hierarchy play a crucial role. These are fundamental for

maintaining the effectiveness and combat readiness of the armed forces. Cases where they are violated must be dealt with quickly and sentences for certain offences can be severe.

Why and when to reform military justice systems?

Military justice systems are reformed to improve their effectiveness; the quality of justice delivered by military courts, and to adapt them to changing domestic legislation, international human rights standards or to the specific needs of the military institution in question.

Moreover, reform of the military judiciary aims to enhance the independence of military judges and prosecutors and ensure a better application of fair trial guarantees within the system.

Concerns regarding the compatibility of military justice systems with human rights standards may induce states to review their systems of military justice and to implement certain changes. The European Convention of Human Rights (ECHR) considerably influenced the development of the national military law systems across Europe, especially with respect to strengthened judicial independence and a better application of fair trial guarantees by military courts.

Changing operational environments, the widening of the mandates of modern armed forces and the need for more effectiveness can also drive military justice reforms. National armies are increasingly deployed abroad to

ensure international peace and security, and fight against terrorism at the domestic or international level.

Armed forces may also be deployed internally to deal with long-term crises or intra-state armed conflicts. National army units may also be integrated into international forces. These developments may require the adaptation of military justice systems.

Fundamental changes in domestic law can also result in the need to modify the system.³

Serious human rights violations committed in or by the armed forces may also induce military justice practitioners to question the viability of the system. If initiation rituals for new recruits result in degrading treatment, if commanders apply arbitrary punishments, or if otherwise unlawful practices have a systematic character and are not prevented effectively, questions concerning the effectiveness of military disciplinary and criminal justice systems may be raised.

In some cases, military justice reforms are implemented within the framework of broader judicial reforms in transitional societies, and measures taken to rationalise the system. This may lead to some fundamental changes—from revising the legal basis and the institutional framework to abolishing the system of specialised courts altogether. For example, in December 2016, the Parliament of *Kyrgyzstan*, while

implementing the recommendations of the Judicial Reforms Commission, decided to abolish military courts. The initiators of this reform argued that the amount of financial resources spent on the military justice system could not be reasonably justified—the military courts, according to this view, proved largely ineffective. As a consequence of this reform, specialised military judges were transferred in the first instance to civilian courts. It is interesting to note that this reform has also been framed as an anti-corruption measure.

In *Ukraine*, the system of military courts was abolished in 2010 with the adoption of the Law on Judiciary and Status of Judges.

Military justice systems may be reorganised in a post-conflict situation or in a post-authoritarian context. For instance, military judiciaries have been subjected to fundamental revisions or built from scratch in a variety of post-conflict situations in countries such as the *Democratic Republic of Congo*, *Afghanistan*, *Timor-Leste* and *Iraq*. Such reforms may be especially demanding when they are a part of a broader state-building process in a post-conflict society, like that of *Afghanistan* and *Timor-Leste*.

In the context of a post-authoritarian transition, the success of reforms may largely depend on the willingness of the armed forces to cooperate. Such cooperation may evolve slowly and face particular challenges, as is the case with

Indonesia. However, in some countries which have not experienced active interference of the armed forces in civilian politics and civilian life, reforms can prove more effective—largely due to better cooperation between civilian and military stakeholders (some Eastern and Central European countries belong to this category).

In general, military justice reforms can be split into three types:

- 1) A separate military justice system is abolished and incorporated into the civilian judiciary.
- 2) Civilian and military justice systems are to a certain extent merged and a hybrid system with military and civilian participation created.
- 3) The autonomy of the military justice system is largely maintained, while its structural elements are revised and further developed in order to ensure its effectiveness and compatibility with international human rights standards.

What traditions of military justice exist?

There are significant differences between systems of military justice based on common law (Anglo-Saxon tradition), as opposed to those based on civil law (continental European tradition). Common law systems (e.g. USA, UK, Australia, New Zealand, South Africa) are familiar with *ad hoc* military tribunals that convene on a case-by-case basis, whereas standing military courts (or civilian courts with specialised judges) operate in civil law systems. However, common

law countries are increasingly moving towards a system of standing military courts. One of the main drivers of this trend is the belief that it improves the flexibility of the system of military justice as well as its compatibility with international human rights standards.

One of the major differences between these two legal traditions relates to the role of commanders within the system of military justice. In common law countries commanders have an important, even central role to play in different stages of a case. They may be involved in the discovery as well as investigation of offences. Further competences may include the referral of charges, and specific functions in trial and post-trial stages. In civil law systems, the role of the commander usually ends upon discovery of the offence and initial investigation.

Military justice systems in common law countries are based on the exclusive jurisdiction of military courts over offences committed by military personnel (sometimes, their jurisdiction extends to different categories of civilians as well).

In a great number of continental European countries, civilian courts have jurisdiction over military offences. For example, in *Germany*, no peacetime standing military courts operate. Administrative (disciplinary) tribunals deal with service offences, while civilian courts concentrate on crimes.

A somewhat similar situation exists in many

Eastern and Central European countries and the countries of the Former Soviet Union (FSU). However, developments in Eastern Europe and the post-Soviet space are far from uniform. Some Eastern and Central European countries abolished standing military courts in peacetime after the dissolution of the Soviet Union, but their Constitutions still allow for the creation of military tribunals in wartime (e.g. Georgia).⁴

However, a number of countries that inherited a Soviet model of civil-military relations and legal system maintain a separate, highly autonomous and specialised system of military justice with a broader scope of jurisdiction over offences committed by members of the armed forces and various militarised agencies. These systems of military justice are subordinated to the authority of the Ministry of Defence (MoD).

For example, in *Kazakhstan*, military jurisdiction covers a wide range of offences. Military courts can deal with cases of corruption within the MoD, various offences committed by border troops and by students of military high schools.⁵ Similarly, *Tajik* legislation prescribes a broad scope of military jurisdiction covering offences committed by members of the armed forces and various militarised agencies (as well as certain categories of civilians). Such militarised agencies may include a wide range of security sector institutions. This regulatory framework extending to militarised agencies considerably broadens the scope of jurisdiction of military courts.⁶ The Law

on Courts of *Uzbekistan* equally regulates the functioning of the system of military justice.⁷ Military jurisdiction covers crimes committed by members of the armed forces on the territory of *Uzbekistan*. However, personal jurisdiction extends to military service personnel, members of the border troops, persons serving at the National Security Agency, in Internal Troops, other military units created according to the law as well as to conscripts during the preparation (for military service) phase. Military courts also try non-military offences committed by servicepersons and complaints against regarding an unlawful act committed by a commanding officer. It is interesting to note that military courts try all criminal and civil offences equally in places where due to exceptional circumstances the courts of general jurisdiction do not operate, as well as in cases related to state secrecy (Art. 40 of the Law on Courts).⁸

What is the role of civilians in military justice?

The main rationale for civilian-military interaction in the sphere of the judiciary is to ensure civilian supremacy over the system of military justice and at the same time, to reinforce public confidence in the operation of this system. However, in many cases, a delicate balance needs to be kept between civilian and military interests so as not to undermine military competences and the operational effectiveness of the army.

It has been argued that the presence of civilian

judges in military tribunals would reinforce the impartiality and independence of such tribunals, since such judges are not part of the military hierarchy.

Those who oppose an enhanced role for civilian judges in the military judiciary argue that the armed forces require judges who are familiar with the unique nature of military life. These judges should understand military life and have experience in practicing military criminal law.

It has also been argued that civilian judges who are not subject to army hierarchy can be adequately trained to qualify for dealing with service-related offences. The number of countries where civilian judges are responsible for military offences has increased in recent years.

In many military justice systems, legislation establishes civil appellate courts and sometimes defers to the civil Supreme Court as its highest appellate authority. For example, in *Canada*, the civilian Supreme Court is the last instance after the Court Martial Appeal Court. In *Hungary*, military judges in the Supreme Court operate at the first instance and appellate level. One of the Chambers of the *Polish* Supreme Court is specialised in military offences.⁹ According to Article 183 paragraph 1 of the *Polish* Constitution, “[t]he Supreme Court shall exercise supervision over common and military courts regarding judgments.”

In many countries in Eastern and Central Europe

and the Former Soviet Union (for instance, *Czech Republic, Georgia and Lithuania*), there are no specialised military courts. For this reason,

civilian judges (and prosecutors) are responsible for dealing with military (service) offences.

Table 1: Advantages and disadvantages of military and civilian justice models

	Military courts	Civilian courts
Expertise and experience	Advantage: Military judges possess expertise in military criminal law and service procedures. They have a good understanding of the specifics of military life and culture.	Disadvantage: Civilian judges may have no specialist knowledge of military affairs and limited experience of practicing military criminal law.
Independence	Disadvantage: As members of the armed forces, military judges may be subordinated to the chain of command. They may therefore be tempted to follow the view of the superior in charge of the case in question.	Advantage: Civilian judges are not subordinated to military hierarchy. The incentives to follow the view of army representatives may therefore be weaker.
Efficiency	Advantage: Fast procedures for minor offences and disciplinary infractions.	Disadvantage: There are no guarantees that minor offences will be dealt with swiftly.
Fair trial guarantees	Disadvantage: Fair trial guarantees are not always fully applied.	Advantage: A more consistent application of fair trial guarantees.

How to define court levels, territorial organisation and types of procedures

Court levels and the territorial organisation of military justice systems largely depend on the context of the country in question and its legal system; in particular, on the missions and the structure of the armed forces.

If a country maintains a small-sized military force, it may decide to create a simplified structure of military justice—preferring the application of disciplinary proceedings in the armed forces and delegating the trial of criminal offences to

ordinary courts (e.g. *Timor-Leste*). The system of military justice can be structured according to the regional division of the country in question. In some cases, *ad hoc* tribunals are created abroad within the places in which armed forces are deployed.

The organisation of the system may be adapted to changing circumstances on the ground. For example, if there is an armed conflict taking place within the territory of a State in which the national armed forces are directly involved, military tribunals can be created in the conflict zone. If the conflict has a protracted character

and remains high in intensity, military courts may be established in the areas close to the conflict zone in order to ensure easy and fast access to justice.

Systems of military justice may have three or more levels of courts. Trial courts usually constitute the first instance. Second-level military courts deal with appeals that have been brought against first instance decisions. Sometimes, there is a military chamber within a civilian appeals court (like the Military Chamber of the Arnhem Court of Appeal in the *Netherlands*). A special military chamber in a high court may constitute the third level of the military justice system (this is the case in *Poland*). At this stage, the civil Supreme Court may deal with the wrong application or interpretation of a law. It may also consider a decision of the lower courts which is based on unlawful procedures.

Summary trials are a separate system for minor or disciplinary offences. Most countries in the region make a distinction between disciplinary and criminal proceedings (for instance, *Turkey* makes a distinction between military disciplinary courts and military criminal courts). Summary courts generally use simple procedures for dealing with minor offences in order to guarantee a fast and expedient process.

The role of the commander may be crucial in

disciplinary matters, as he or she can initiate the investigations, decide to submit the case to the military prosecutor (or the military police), or determine the (disciplinary) punishment her or himself. Since the commander is subject to the military hierarchy, there may be conflicts of (military and justice) interests (this is discussed in further detail below).

In some countries, disciplinary liability issues are dealt with at the level of administrative courts of civilian judges (*Germany*). However, this model does not exclude some specialisation in military legislation.

Military law should identify the authority which deals with disciplinary offences, the type of punishment and the appeal procedures (for example, in the *United Kingdom*, members of the armed forces can appeal against any decision taken by a commanding officer to a Summary Appeals Court).

International human rights law (ECHR and ICCPR) request that states establish safeguards for their summary trials and disciplinary proceedings at various levels. Such guarantees can be incorporated into the disciplinary codes or other laws regulating military service (see, for instance, the *Estonian Military Service Act*, which includes a disciplinary section regulating disciplinary violations and punishments¹⁰).

Table 2: Composition of courts on different levels

	Military systems	Hybrid systems	Civilian systems
Trial Court	First instance military courts—consisting of one or more military judges.	First instance military courts—including civilian elements.	Civilian courts—including civilian judges only.
Appeal Court	Military Appeals Court—military judges of higher rank sitting on the bench.	Military Appeals Court—may include civilian elements or a civilian Appeals Court with military elements.	Civilian Appeals Court—including civilian judges only.
Supreme Court	Supreme Military Court has jurisdiction over the most serious of military offences and can also deal with offences committed by military judges. It may also be competent to resolve jurisdictional conflicts within the system of military justice.	Civilian Supreme Courts—may incorporate a military chamber dealing with military offences.	Civilian Supreme Court—including civilian judges only.

What are the current trends and challenges?

Two major trends in military justice are currently visible. The first is to transfer judicial competences from military to civilian courts. The second is to limit the military courts' jurisdiction to servicepersons by excluding civilians from their scope.¹¹ Moreover, many national military justice systems are subject to revision and reform in order to increase the system's effectiveness and compatibility with international human rights guarantees.

Both the UN Special Rapporteur on the Independence of the Judiciary and the Working Group on Arbitrary Detention recommend

limiting military jurisdiction. Their view is based on “the current development of international law which is towards the prohibition of military tribunals trying civilians.”¹² This should be seen in the context of recent developments in international human rights law, especially in the light of the practice of the UN Human Rights Committee and the jurisprudence of the European Court of Human Rights (ECtHR).

In his Report of 7 August 2013, the UN Special Rapporteur on the Independence of Judges and Lawyers specified certain limitations on the trying of civilians in military courts:

“The trial of civilians in military courts should be limited strictly to exceptional cases concerning civilians assimilated to military personnel by virtue of their function and/or geographical presence who have allegedly perpetrated an offence outside the territory of the State and where regular courts, whether local or those of the State of origin, are unable to undertake the trial.”¹³

The *Paris Minimum Standards of Human Rights Norms in a State of Emergency* of the International Law Association (1984) also indicate that:

“...civil courts shall have and retain jurisdiction over all trials of civilians for *security and related offences*; initiation of any such proceedings before their transfer to a military court or tribunal shall be prohibited [emphasis added]”.¹⁴ Similar prohibitions are included in the *Basic Principles on the Independence of the Judiciary* approved by the UN General Assembly.”¹⁵

In its General Comment 32 on Article 14 of the International Covenant on Civil and Political Rights (1966), the UN Human Rights Committee stated:

“The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The

Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to *cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials* [emphasis added]”.¹⁶

Thus, one of the possible justifications for resorting to military courts is to ensure effective access to justice. This presupposes, however, that the military justice system satisfies the

fundamental requirements of judicial independence and a fair trial.

One of the main challenges in military justice is to find ways to increase the independence of military courts. International standards on this issue should be taken into consideration when revising and reforming a system of military justice. According to the UN Human Rights Committee, the requirement of independence refers to:

“...the procedure and qualifications for the appointment of judges, and guarantees concerning their security of tenure, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch or legislature.”¹⁷

Many countries are modifying their military justice systems to include civilian elements with the aim of ensuring a higher degree of judicial independence. For instance, Public Prosecutors instead of military legal advisors are increasingly prosecuting servicepersons.

Judicial independence of military judges can be strengthened through a variety of means. Increasing the civilianisation of the system is one such way. However, this does not mean that the separate systems of military justice cannot, as a matter of principle, satisfy the requirements of judicial independence. In some Eastern and

Central European States, the guarantees that apply to civilian judges are equally applicable to military justice systems (e.g. *Bulgaria, Romania, and Poland*).

However, in some countries, military courts still deal with grave human rights violations committed by military servicepersons or security forces. Recent historical experience during the 20th Century demonstrates that military jurisdiction in such cases often served as a tool to sustain impunity for those who committed grave human rights violations. This has led national and international stakeholders to increasingly question the impartiality of military courts when dealing with grave human rights violations. Their criticism implies that jurisdiction over human rights matters should be transferred from military to civilian courts.

However, these criticisms do not mean that impunity can only be avoided through civilian courts (which, in some cases, may also enhance impunity). If the military justice system is truly independent and satisfies all requirements of impartiality, it can also be regarded as an important tool in the fight against impunity within military institutions. Such systems enjoy increased public confidence and contribute to the effectiveness of the armed forces.

When assessing the need for reforms with a view to strengthening impartiality, the country context—in particular, the main features of civil-

military relations and the role of the army as well as all existing guarantees for independence and impartiality of military courts—should be taken into consideration.

Table 3: Trends of military justice: Towards civilian models

Czech Republic	The Czech Republic abolished its military courts system in 1993 as a result of political and socio-economic changes in the country. Civilian judicial organs assume the tasks of military courts.
Russia	The military prosecution system was reformed in 2017. It became a part of the system of general prosecution.
Belarus	In 2014, the system of military justice (military prosecution and military courts) was abolished. The tasks of prosecuting and trying military service personnel shifted to the ordinary judiciary and prosecution.
Ukraine	In 2010, the system of military courts and prosecutors were abolished. However, in 2014, the office of the military prosecutors resumed its activities. Legislative initiatives on the re-establishment of military courts are currently under parliamentary and expert review.
Moldova	In 2010, the military courts and military prosecutors were abolished; with the former integrated into the system of ordinary judiciary. The competences of first instance military courts were transferred to the first instance courts of general jurisdiction. This change was implemented as a part of broader judicial reforms.
Kyrgyzstan	In December 2016, the parliament of Kyrgyzstan implemented the recommendations of the Judicial Reforms Commission, and abolished military courts.

How to set the context for military justice reform?

How to assess the needs to establish or reform military justice?

Military justice systems can be created, reformed or abolished in many different contexts. Some countries with a long tradition of military justice

carry out regular reviews with a view to improving the system. Effectiveness of the system and its compliance with fundamental human rights are often one of the main criteria used in the revision process (e.g. *Australia, and Canada*).

The influence of the practice of international human rights monitoring bodies and courts on

military justice systems is considerable. As indicated in Table 3, some Eastern and Central European countries as well as the countries of the former Soviet Union (FSU) have abolished specialised systems of military justice and integrated them into the ordinary judiciary. Human rights considerations also played a role in this process.

What are the main objectives of reform processes? Reform processes may lead to major structural changes or in some cases, to a number of changes in the subject-matter jurisdiction of military courts, limiting the scope of jurisdiction. Personal jurisdiction, guarantees for judicial independence as well as the applicability of fair trial guarantees and the territorial organisation of the military justice system are usually also subject to review and revision.

In what context does a reform take place? The reform of the military justice system can be a part of a broader judicial reform package and may also be related to a fundamental reshaping of civil-military relations in a state. This is especially relevant in transitional societies, where the mission of the armed forces needs to be redefined and the principle of civilian supremacy over the military effectively implemented.

Thus, it is essential to take into account the historical and legal legacy of the country, the character of its civil-military relations and the missions of its armed forces. Moreover, the main

tasks of the military in question should also be considered. Are the armed forces involved in ensuring internal security and if so, to what extent? What is the definition of the armed forces (for the purposes of military jurisdiction)? What are the international engagements of the armed forces? Should military courts also be able to decide on cases abroad? Answering these questions would help clarify what the military justice system needs to achieve in a specific context.

The scope of reforms may vary from case to case, and largely depend on the specific context of the country in question. Demand for reform can be triggered by a major event such as a foreign aggression or an internal armed conflict, which can subsequently lead to major changes in the functioning of military justice systems. The involvement of the armed forces in the maintenance of internal security may also influence the scope of jurisdiction of military courts.

Conflict and post-conflict situations, where there is an increased need for accountability and reconciliation, may require the adoption of special or temporary regulations on military courts. However, fundamental fair trial safeguards should not be undermined in the process.

International human rights obligations and the compliance of the military justice system with

these obligations should always be taken into consideration. This applies in all possible reform contexts.

It should be carefully considered as to what experiences from other countries—with respect to reform processes and lessons learnt—may benefit reformers the most. This may be particularly relevant when legal systems are closely related or belong to the same legal tradition (for example, *Australia, Canada, UK and USA* belong to the common law legal tradition and significantly benefited from each other's reform experiences).

However, in each case the local context and circumstances should always be taken into account. Although a number of countries in a particular region may have similar experiences with respect to military justice reform (in Latin America, South-East Asia or Central and Eastern Europe, for example), the situation in some countries may be quite specific (for example, see the case of *Ukraine*, where judicial authorities face a challenge to implement disciplinary and criminal liability of servicepersons and members of volunteer battalions alike).

It is recommended that a thorough needs assessment be conducted as early as possible and prior to the development of any concrete reform plan. Such an assessment should clarify the different levels of issues as identified in Table 4.

Moreover, it is necessary to establish a

consultation mechanism that guarantees the effective participation of all stakeholders. The costs and benefits of reform efforts should also be analysed. The primary goals and necessary measures should be identified and publicised. The process of the needs assessment should include representatives of military institutions, members of all branches of government, experts and civil society representatives. International experts can also be asked to participate if required. A mechanism for regular reviews should be stipulated in the legislation (see the case of *Canada*, for example¹⁸).

It is recommended that a holistic approach to the reform process be taken, in which military courts and military prosecution are seen and assessed as closely interrelated parts of the same system (however, in many cases military courts and military prosecutions are subject to reforms independently from one another). Material and procedural norms on criminal and disciplinary procedures may need revision (for example, it is advisable to consolidate various disciplinary provisions into a single disciplinary code). Moreover, reforms of the military justice system may be undertaken within broader security sector reforms. In such a case, the process of change in the military justice system should be connected with the change that is envisaged to take place within the entire security sector. For example, the process of demilitarising security sector agencies and ensuring a clearer separation

of competences may directly influence the material and personal scope of military jurisdiction.

How the military justice system is connected to other tools for the protection of rights is also an important area to consider. For example, reformers should take into account existing complaints mechanisms and the competences of the military ombudsman. It is advisable that respective complaints mechanisms are structured in such a way as to ensure that there are no unnecessary overlaps with other legal remedies.

What should be considered when preparing the budget?

The size of a military justice system should depend on the size of its corresponding armed forces. Moreover, the number of military courts and judges, and the structure of military courts will also depend on the existing model of military justice. For example, in hybrid systems, the number of “purely” military courts will be limited.

The court levels and territorial organisation of military justice also influence the size and budget

of military justice systems. Countries that deploy troops abroad may consider establishing military courts within overseas military facilities. Particular situations, such as multilingualism, may also raise costs. For example, in *Switzerland*, the chancelleries of the military courts include German, French and Italian speaking sections. Thus, in similar cases additional costs will be required to ensure an effective delivery of military justice.

The budget of military justice system varies from country to country. However, overall funding should cover the main issues related to the functioning of the military justice system. Funding should also create social guarantees for judges and ensure their financial independence.

Budgets for military justice systems are often included in the annual defence budget, particularly in countries where military courts are part of the military institution. If the military justice system is subordinated to the civilian judiciary, the budget for military courts will usually be included in general state funding for the ordinary judiciary.

Table 4: Essential questions for establishing or reforming military justice

Level	Questions
The general situation and national legal framework, as well as international trends and obligations	<ul style="list-style-type: none"> • What are the current trends and international standards in military justice? • How to ensure compliance with international standards and obligations? • What international human rights obligations of the country should be taken into consideration? • Who are the stakeholders of military justice in general and of the reform process in particular, and what is their role? • What is the degree of autonomy of the armed forces in the country? • What triggered the demand for reform? • Is there any particular national situation to be taken into consideration, such as a post-conflict environment or state of war?
Civil-military cooperation	<ul style="list-style-type: none"> • What is the nature of civil-military relations? • How is formal and informal civilian oversight organised? • Is it realistic to subject members of armed forces to the ordinary judiciary? • What are the connections between civilian and military jurisdictions? • How can civilians be beneficial to military justice?
Legislation on military justice	<ul style="list-style-type: none"> • What is the legal tradition of the country? • Which laws and regulations on military justice currently apply? • What are the shortcomings of the current legislation? • What other national legislation should be taken into consideration? • What is the vision of justice, law and order of the country? • How is this described in the constitution?
The organisation of military justice	<ul style="list-style-type: none"> • How to ensure the independence of the military judiciary? • What is the appropriate size and budget for military justice? • How many levels of military courts are appropriate? • Which territorial organisation is appropriate?
The operation of military justice	<ul style="list-style-type: none"> • How to ensure fair trial procedures? • Should civilians be involved? • Are there enough qualified civil lawyers to sit on the bench of military courts? • What kind of training would be necessary for civilian judges to be able to effectively deal with military offences? • What are the main shortcomings in the administration and operation of military justice? • How to respond to these shortcomings?

What role for Parliament?

Parliament should have the power to pass military justice legislation and to approve the related budget. Parliamentary defence committees should be involved in the drafting process for military legislation. During the process, these committees can improve military legislation in cooperation with representatives of the military and civilian judiciary and executive branch of government. At this stage, the parliament may also invite military law experts and civil society representatives to participate in drafting the law or discussing the existing draft.

In general, there are two levels of control. The parliament may ask questions regarding the independence of the military judiciary if, for example, a report of the military or parliamentary Ombudsman or Inspector General raises serious concerns. Parliament may equally discuss the budget and other general policy issues, as well as the need to reform the existing military justice system.

Parliamentary committees can discuss some specific questions in greater detail; the Parliamentary Judicial Committee, the Defence and Security Committee, and the Human Rights Committee may deal with the functioning of the military justice system within the framework of their respective mandates. If the activities of military courts involve questions of national security, a group of deputies who have special

legal powers allowing access to classified information may be involved.

What role for military ombudsman institutions?

The institution of military ombudsman, or/and Inspector General, operates separately from the military justice system.¹⁹ It exercises oversight with respect to the armed forces. It can, however, equally contribute to the effective protection of fundamental rights of servicepersons. Military ombudsman institutions may also promote accountability and administrative effectiveness in the armed forces.

In certain cases, the military ombudsman/parliamentary representative or commissioner of the armed forces may form a part of the parliamentary oversight over the armed forces (e.g. *Germany, Norway and Ukraine*).

A military ombudsman usually deals with individual grievances reported by members of the armed forces. He or she investigates possible human rights violations in the military and issues recommendations to prevent their further reoccurrence. Additionally, the military ombudsperson may have the competence to issue recommendations on how to improve the functioning of the military institution as a whole, and remedy any systemic deficits. Such recommendations are usually not legally binding, but can produce considerable effects for the

military institution and trigger new reform initiatives in the military sphere. The recommendations of the military ombudsman can also contribute to various reforms in military justice systems (this was the case in *Australia*, where the Defence Force Ombudsman played such a role).

A military ombudsman may include a special section in his or her annual report to the parliament on different violations of fundamental rights committed in the process of administering justice in the armed forces. A military ombudsman, in his or her report may also emphasise the main deficits in criminal and disciplinary proceedings, and make suggestions on how to improve these. For example, the German Parliamentary Commissioner for the Armed Forces, in his Annual Report 2015, draws attention of the parliamentarians to “the disadvantages that servicewomen and men suffer due to the excessively long of disciplinary proceedings”.²⁰ He also makes clear that “detering a subordinate from submitting a petition to the Parliamentary Commissioner for the Armed Forces is punishable under the Military Criminal Code as ‘suppression of complaints’, both in routine operations and on deployments abroad”.²¹

There is a unique mechanism of independent administrative oversight of the military justice system in *Australia* exercised by the Inspector General of the Australian Defence Force.²² The

Inspector General can deal with individual complaints and conduct an independent audit of systemic issues related to the effective functioning of the Defence Force. The members of the Defence Force can make submissions to the Inspector General on suggested improvements to the military justice system (see Box 2).

The Inspector General operates within the defence system; however, his or her office remains independent of the chain of command, an essential safeguard against external influence.

In the countries of Eastern and Central Europe and the former Soviet Union (FSU), three models of military ombudsman operate:

- 1) General ombudsman offices without a special division dealing with military issues;
- 2) Ombudsman offices with a specialised division/representative for the armed forces (e.g. *Ukraine, Georgia*); and
- 3) A specialized military ombudsman institution (e.g. *Kyrgyzstan*).

All of the above can, to varying degrees, influence the operation of the military justice system through exercising authority effectively. They can issue recommendations on how to improve legal practice and in some instances, can also exercise the right to legislative initiative. In some countries, the military ombudsman has the power to monitor the implementation of his or

her recommendations and to issue public statements and reports accordingly.

There are also more specialised institutions for defence. For example, in *Lithuania*, a serviceperson whose rights have been violated may refer to a superior commander or the Inspector General of National Defence. They must investigate the facts and take the necessary remedial measures.²³

Box 2:	Inspector general of the Australian Defense Force ²⁴
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“The Inspector General of the Australian Defence Force (IGADF) was established by the CDF [Chief of the Defence Force] to provide a means for review and audit of the military justice system independent of the ordinary chain of command. It is also an avenue by which failures of military justice may be exposed and examined so that the cause of any injustice may be remedied. In relation to the military justice system, the IGADF:

- Receives submissions and investigates complaints;
 - Conducts performance reviews;
 - Provides advice; and
 - Contributes to awareness and improvement.
- Submissions may be received by any person on any matter concerning military justice, for example:
- Abuse of authority/process;
 - Denial of procedural fairness;
 - Avoidance of due process;
 - Cover up and failure to act;
 - Unlawful punishments;
 - Victimisation, harassment, threats, intimidation, bullying and bastardisation; and
 - Suggested improvements to Military Justice.”

What role for Constitutional Courts?

Constitutional courts have the power to interpret the constitution, to examine the constitutionality of legislative acts and to resolve constitutional disputes between different branches of government. If such a court exists in the country, it may greatly contribute to clarifying issues pertaining to military law.

In some countries, constitutional courts played a prominent role in limiting military jurisdiction with regard to human rights (e.g. *Colombia*) and equally contributed to the strengthening of their judicial independence (e.g. *Turkey*). In other countries, such courts significantly narrowed the notion of service-related offences (e.g. *South Africa*).

These types of court decisions may trigger efforts to reform military law. On the other hand, in some cases, the constitutional courts may also endorse an expansion of military jurisdiction to cover security or terrorism-related offences committed by civilians (this has recently occurred in *Pakistan*).

Thus, the role of constitutional courts depends on the national context—their role and standing may vary from country to country.

How to draft appropriate legislation?

The conceptual framework for military legislation must be clarified in advance. The objectives of the new legislation should be clearly defined. The following points should be addressed in the initial stages of the drafting process:

- The need for new regulations;
- Their legal and institutional repercussions; and
- Their economic and social effects.

This should include:

- An analysis of the problem and its objectives;
- The identification of costs, benefits and impacts;
- Consultations with stakeholders;
- Analyses of practice in the military justice system with a particular focus on compliance with fundamental human rights standards. Such analysis can be carried out within the framework of a regular review process.

Consultations are essential to the legislative drafting process. They enhance transparency in policy development and provide new legislative initiatives with enhanced legitimacy.

The procedures for submitting a legislative initiative must be defined by law and can vary from country to country. A wide range of national stakeholders including civil society organisations may ask for military justice reforms based on

well-founded arguments; moreover, some of them may also be in a position to make constructive proposals. Executive agencies or parliamentary committees can draft legislation to improve amendments. Independent think tanks and representatives of the judiciary may equally offer suggestions on how to improve the draft. The body in charge of the legal reform should ensure such proposals enjoy due consideration.

Public authorities and non-governmental organisations can cooperate in a more or less formal way during the drafting process. For example, they can hold several consultations and workshops on the draft. Such discussions can also take place at the parliamentary committee level in order to focus on the most important issues. International institutions and experts may be required and invited to take part in discussions. Contemporary trends and good practices should be taken into account in order to improve the draft. Parliamentary research departments, expert community and committee staff can also provide input.

Moreover, the process of legislative drafting should follow certain norms of technical and linguistic quality.¹² The language of legal texts should be as clear as possible. It should be consistent, comprehensible and accessible for users (this is particularly important with respect to military criminal law).

In some countries, military justice laws are

concise and general; comprised only of the most necessary provisions, and refer to other relevant national legislation and international standards. In this case, separate regulatory texts address specific issues.²⁵ In other countries, national legislative acts on military justice are more detailed (US Uniform Code of Military Justice, for example).

Thus, the level of detail in military justice legislation varies from country to country, depending on legal traditions. Moreover, in many cases, military criminal codes and disciplinary codes are kept separate; military offences may also be included in a general criminal code; and sometimes, both the disciplinary and criminal liability of military service personnel are regulated in one legislative act.

Is a regular review necessary?

The implementation of the legislation, as well as its compliance with changing societal environments and international requirements, should be monitored on a regular basis. There should also be an assessment of existing legislation to determine whether or not it has achieved its intended aim.

As the Principles Governing the Administration of Justice through Military Tribunals state:

“Codes of military justice should be subject to periodic systemic review, conducted in an independent and transparent manner,

so as to ensure that the authority of military tribunals corresponds to strict *functional necessity* [emphasis added].”²⁶

A regular review mechanism should seek to determine the most pressing needs of the military justice system and offer recommendations for further improvements. It should attempt to adapt it to any changes in the legal and political context of the society in question. Such a review should take into consideration both national and international legal developments.

Parliamentary committees (in cooperation with external experts) or independent commissions composed of military law experts and practitioners can lead such reviews.

Reviews should be carried out in an independent manner and invite contributions from different stakeholders. Both military and civilian officials should be involved in the regular review process. Independent and non-governmental organisations can provide relevant contributions.

An obligation to regularly review legislation on military justice can be enshrined in domestic law (e.g. the National Defence Act of *Canada*). This would make it easier for the reviewing body to take into consideration changing circumstances (operational or normative) on a regular basis. It is essential that such a review remains independent.

<p>Box 3:</p>	<p>Review mechanisms for military justice: the cases of Australia, Canada and the USA</p>
<p>Australia:</p> <p>In 2005, the Senate Foreign Affairs and Trade References Committee conducted a review of the military justice system and issued a report on “The Effectiveness of Australia’s Military Justice System”. The aim of the review was to assess the changes and determine whether or not further reforms were required.</p> <p>The work plan of the review team was: to examine the implementation of all accepted recommendations; the adequacy of necessary recourses; the structural suitability of the military justice system; identify any systemic disciplinary and administrative irregularities in the delivery of military justice; and assess the ability of the system to deliver impartial and fair outcomes. As a result, the government commissions regular independent reviews on the state of the military justice system. Such reviews are headed by a “qualified eminent Australian.</p> <p>Canada:</p> <p>The Minister of National Defence conducts an independent review of the provisions and operation of the National Defence Act every five years. He is also obligated to present a report of the review to Parliament.</p> <p>The Minister of National Defence appoints the person who conducts an independent review of the Bill. The Appointee has unrestricted access to the Canadian Forces and interviews individuals who have remarks on the military justice system. He or she requests comments on how the changes set out in the Act are affecting the functioning of the military justice system.</p>	<p>USA:</p> <p>An independent commission offers a forum for the study of current issues in military justice. Its Chair is selected by the National Institute of Military Justice and by the Military Justice Committee of the American Bar Association’s Criminal Justice Section. The commission examines the operation of the military justice system and determines whether the Uniform Code of Military Justice meets the needs of the military service to ensure good order and discipline in a fair and efficient way. The commission submits its report to the President, Congress, the Department of Defence, and its sponsoring organisations.</p> <p>The commission invites ideas and suggestions from civilian and military attorneys, military commanders and non-commissioned officers, bar associations, law schools and groups with special interest in military matters, as well as from the general public.</p> <p>The commission discusses topics such as the role of the military judge, the defence, court reporters, trial court arrangements, crimes, offences and punishment, and appellate reviews of court-martials. The commission also deals with international human rights issues related to the military justice system.</p>

How do military and civilian justice systems interact?

Military and civilian authorities (police and ordinary courts) need to cooperate in the arrest,

detention and transfer of people falling under either military or civilian jurisdiction. They also need to coordinate their action on legal issues. However, the mutual distrust that in some cases

characterises relations between the military and civilian justice systems can put the safeguard of basic rights at risk.

When two separate systems exist, the interaction between them should be based on constructive cooperation that ensures an effective delivery of justice. Moreover, the military and ordinary civilian systems of justice should apply comparable standards with respect to training, judicial independence and career development as well as judicial ethics. At the same time, the military justice system should not be completely isolated from its civilian counterpart. Interaction between civilian and military systems should prevent the overlap of jurisdictional competences.

Legislation must clarify when and under what circumstances an accused should be transferred to ordinary courts for trial. When in doubt, courts should presume that civilian courts have jurisdiction.

If a person is charged with several offences, some subject to the military and some to ordinary courts, the Military Prosecutor may transfer the case to an ordinary tribunal. However, the same offence should never be tried by both civil and military courts (so as not to violate the principle of *ne bis in idem*). The legislation should also determine jurisdiction for more complex cases, in which both military service members and civilians commit civilian

offences (prescribed by the general criminal code). In such cases, civilian authorities should be responsible. Any exception should be clearly established by legislation and be justified.

If there is a dispute over jurisdiction, an independent and impartial court (for example, the civilian Supreme Court) must decide which court has jurisdiction. In some cases, the special military chamber within the ordinary Supreme Court settles jurisdictional conflicts. However, there are other more specific national regulations. For example, Article 158 of the *Turkish Constitution* determines that:

“The Court of Jurisdictional Disputes shall be empowered to deliver final judgments in disputes between civil, administrative, and military courts concerning their jurisdiction and judgments [emphasis added].”

What is the scope of military jurisdiction?

Military jurisdiction may be status-based (covering all members of the armed forces), service-connected (covering only criminal offences related to military service), or based on the notion of purely military crimes (covering crimes only of a military character and committed by military service personnel). National legal systems may use any combination of these conceptions.

Service-relation should be defined in legislation. Only offences that directly interfere with military interests and effectiveness should be seen as service-related offences for purposes of military justice. There may be some overlap with the notion of purely military crimes (however, its scope is likely narrower).

Status-based military jurisdiction means that all members of the armed forces and personnel with a comparable status (in some countries, there are militarised security and police forces that fall equally within military jurisdiction) are tried by military courts, irrespective of the offence. Thus, civilian criminal offences committed by soldiers are also covered. This jurisdiction can be limited to military personnel on active service. However, in many cases it extends to retired military personnel as well. Moreover, national laws may place servicepersons on duty and in some cases, off duty within the jurisdiction of military courts.

Service-connected jurisdiction means that military courts deal with all offences related to military life and to the functioning of the military institution. Service-connection may have different modalities and/or implications in the domestic legal order. Under certain circumstances, it may pose challenges to determining the scope of jurisdiction. This may undermine the principle of legal certainty and facilitate an unjustified extension of the material and personal scope of military jurisdiction to

several categories of individuals and offences (that can also be dealt with under the general criminal code).

At the same time, there is no universally accepted definition of purely military crimes. Its definition may vary from country to country and the jurisdiction of military courts is rarely based only on the concept of purely military crimes.

Serious human rights violations excluded from military jurisdiction should also be excluded from that which constitutes a purely military crime. An enumeration of such violations should be as comprehensive as possible. There is no reason to include torture in the scope of military jurisdiction and to leave out, for example, extrajudicial killings committed by members of the armed forces.

There is an emerging consensus in the sphere of international human rights that civilian courts are more suited to trying the most grave human rights violations in order to preclude impunity. However, military courts may have to deal with violations of international humanitarian law in times of armed conflict and other exceptional circumstances such as emergencies, or in situations where the civilian judiciary has collapsed.

The following questions should be used to determine the scope of military jurisdiction:

- Should military jurisdiction be limited to

military personnel on active duty?

- How should the offence be connected to military service?
- Should military jurisdiction be limited to violations of service duty?
- What is service-duty? Where and how should it be defined?
- Should associated civilians also fall under military jurisdiction and if so, under what circumstances?
- What are the categories of civilians? What are the criteria to apply when determining the category of associated civilians? (For example, should the contracted civilians serving in the armed forces be subject to military jurisdiction?). What about civilians deployed in missions abroad or accompanying the armed forces in such missions?

Clear answers to these questions in domestic legislation should help specify and limit the scope of military jurisdiction.

What is a military criminal offence?

There are two categories of military offences: criminal offences and breaches of discipline. However, some countries make no clear distinction between them. For instance, in the United States, the concept of “service offence” covers both criminal and disciplinary offences, and military courts try both types of offences.

In countries that belong to the continental European system, including the countries of Eastern and Central Europe, criminal offences and disciplinary violations constitute two distinct categories of offences and are regulated by different legal acts (disciplinary codes, laws and military criminal codes, and general criminal codes including a chapter on military service offences).

Military criminal offences are serious violations directed against military capability, combat readiness, discipline and effectiveness of the armed forces. Such offences usually directly harm military interests and have serious consequences.

Military offences under the (Military or General) Criminal Code may include, but are not limited to:

- Offences against the duty to perform military service (such as avoiding military service, for example, or absence without leave under certain circumstances);
- Offences against service discipline such as desertion (although it may also be considered as a disciplinary violation);
- Offences against military property (not all offences against property should fall under military jurisdiction);
- Offences against the rules of service;
- Offences against the rules on command responsibility; and
- Offences committed during wartime,

such as:

- surrendering to the enemy; and
- violations of international humanitarian law.

These offences can only be committed by members of the armed forces and are directly linked to service duties. However, as the International Commission of Jurists emphasised in a recent study on military law:

“...different systems of military criminal law criminalize different kinds of unlawful behaviour and there is no consistency in terms of what is meant by a military offence.”²⁷

For example, *German* legislation identifies the following categories of criminal offences as military in nature: offences against the duty to deliver military service; offences against the duty of obedience; offences against the duties of commanders; and offences against other military duties.

The *Polish* Criminal Code contains somewhat comparable categories of criminal offences including offences against the duty to perform military service; offences against the principles of military discipline; offences against the principles of justly dealing with a subordinate; offences against the rules of dealing with weapons and activated military equipment; offences against the rules of service; and offences against military property. Some offences (against the Rules of

Service) also apply to civilian employees of the armed forces.²⁸

According to Chapter 24 of the *Estonian* Penal Code (§§ 431-450), offences relating to service in Defence Forces specifically include:

- Refusal to obey orders;
- Failure to obey orders;
- Threatening of person serving in Defence Forces;
- Unauthorized departure from military unit or other place of service;
- Unauthorised departure from military unit or other place of service while carrying service weapon;
- Unauthorised departure from military unit or other place of service in battle situation;
- Desertion;
- Evasion of service in Defence Forces;
- Violation of requirements of driving or operating machinery;
- Violation of requirements for flights or preparation for flights;
- Violation of requirements for navigation of vessels;
- False service report;
- Abuse of authority;
- Negligence in service;
- Dissipation of property of Defence Forces;
- Surrendering of armed units or surrendering of property to enemy; and
- Abandoning of sinking warship.²⁹

Punishments for military criminal offences committed during a state of emergency or in wartime can be more severe. Aggravating circumstances may further include other issues; and for example, if the offence is committed in a group or service equipment is used while committing such an offence, the applied punishment will be more severe.

The hierarchical structure of the armed forces and the necessity to ensure discipline in the military can justify the application of harsh punishments.

The problem of a possible overlap between general criminal law and military criminal law should be dealt with seriously not only in practice but also at the legislative level, where laws are drafted and amended. Double jeopardy must be avoided. It is advisable to include an explicit prohibition of double punishment in the respective legislation on criminal procedure. It seems equally advisable to apply the standards (at least in peacetime) closest to the civilian standards of punishment.

What is a breach of discipline?

Disciplinary violations are typically minor offences that can be dealt with by a military superior or military court in summary proceedings or by disciplinary (administrative) tribunals. In general, military crimes constitute more serious offences.³⁰ However, the circumstances of the offence may be relevant to determine jurisdiction: when certain minor

offences are committed in wartime or repeatedly, and which seriously disrupt the functioning of the armed forces, they may be characterised as military crimes. For example, it is clear that absence without leave is not an infraction as serious as desertion (especially if committed during wartime). However, both of them may constitute military crimes (if such violations are committed repeatedly, for example, or in times of hostilities).

Disciplinary offences may include a wide range of violations. Such offences may also be defined in broader terms, giving certain discretion to law-applying authorities. According to the *Estonian Military Service Act* (§ 166), disciplinary offences include the following violations:

- Negligence of the principles related to duties arising from an act or legislation established on the basis thereof and a failure to perform the requirements for service and duties and unsatisfactory performance thereof;
- Wrongful causing of damage to the property of an authority or the wrongful causing of danger of such damage or a wrongful act of a serviceman which is in conflict with the generally recognised moral standards, or which discredits the serviceman or an authority, regardless of whether the act is committed by the military serviceman in or out of service; and

- Violations of restrictions on service by a serviceman.

The level of differentiation between military crimes and disciplinary violations depends on each country's legislative framework. It is recommended to decriminalise minor offences so that they only constitute disciplinary violations.

Disciplinary (non-judicial) punishments may include, but are not limited to, the deprivation of liberty (such as arrest in quarters, disciplinary arrest, sending to disciplinary battalion, and restriction), financial punishment (deprivation of pay), reduction in rank, and reprimands. As a rule, the military commander has the power to award the punishments. There should be a possibility to appeal against the decision of the commander to a higher military authority and (administrative) courts.

If the disciplinary punishment resulted in detention or confinement to barracks, a number of procedural guarantees should be applicable. According to international human rights standards, persons deprived of liberty shall be provided with such guarantees (see, for example, Article 5 of the European Convention on Human Rights).

The law or a single disciplinary code should preferably regulate disciplinary punishments to avoid any fragmentation of the legislative

framework and inconsistency in its interpretation and/or application in practice. They may serve different functions in peace- and wartime. During an armed conflict, a military commander can impose disciplinary punishments in order to ensure compliance with international humanitarian law.

The discretion of the commander should clearly be determined and only serve the purpose of maintaining discipline and good order in the army. However, in some military justice systems, commanders enjoy wide discretion to impose disciplinary punishments, including disciplinary arrest. Such powers can easily be applied in an arbitrary manner. The lack of procedural guarantees in such cases may lead to the violation of servicepersons' fundamental rights. Therefore, it is essential to establish independent complaints mechanisms and impose obligations of care and reporting in order to enhance respect for human rights in the armed forces.

In many countries of Eastern and Central Europe, disciplinary law is clearly separated from military criminal law (see, for example, the practice of the *Baltic States and Armenia*). Disciplinary sanctions are regulated in general military service legislation or specific laws and regulations on disciplinary proceedings.

According to the Military Service Act of *Estonia*, a commander exercises disciplinary authority (§

158). Disciplinary detention, which is different from disciplinary arrest in the Estonian legal order, can be applied under certain circumstances in order to prevent a continuous commitment of disciplinary offences or imminent danger to serviceman's health, life or property or the health, life or property of other persons.

Disciplinary penalties include reprimand, disciplinary arrest, fines, reduction of basic salary, withdrawal of a decoration of the Defence Forces and release from active service (§ 168). Disciplinary arrest of up to fourteen days may be imposed on a serviceman who has committed "serious or repeated violations of military discipline" (§ 171).

§ 173, paragraph 1 of the Act enshrines an important procedural safeguard:

"The commander who imposes disciplinary arrest shall immediately notify the administrative court of the location of the military unit of the imposition of the disciplinary arrest, submitting, among other, the following documents: 1) an approved copy of a directive on the imposition of the disciplinary arrest on a serviceman; 2) summary of the disciplinary investigation and other relevant materials".

The judge may declare the imposition of the disciplinary arrest lawful or unlawful.

As a rule, the immediate commander opens disciplinary proceedings. However:

"the Commander of the Military Police of the Defence Forces may commence disciplinary proceedings due to the complexity of the facts of the commitment of a disciplinary offence or due to the effect of the disciplinary proceedings on the Defence Forces" (§ 179, 3).

A serviceperson can challenge the disciplinary punishment by recourse to his or her superior commander or the Ministry of Defence.

In *Latvia*, Rules of Procedure for the Soldier and National Guardsman Military Discipline regulates disciplinary liability. The commander can initiate investigations into disciplinary offences. Rule 88 states that military servicepersons can:

"...contest the disciplinary punishment with the *Board of Appeals* of the Ministry of Defence [emphasis added]."

The Board of Appeals examines the application [of the law] and makes a decision within the time period set out in the Administrative Procedure (Rule 91).

"A soldier or a national guardsman has the right to appeal the decision of the Board of Appeals in accordance with the procedures laid down in the Administrative Procedure Law" (Rule 94) [The appeal can also be submitted to

court].

Art. 26 of the Lithuanian Law on the Organisation of the National Defence System and Military Service determines the disciplinary and material liability of military servicepersons. Official investigations into disciplinary violations are carried out in accordance with the procedure stipulated by the Disciplinary Statute of the Army. The Minister of National Defence or the Commander of the Armed Forces may also carry out such investigations (para. 4).

It is interesting to note that there is a mandatory preliminary out-of-court procedure stipulated by the Disciplinary Statute of the Army for examining disputes concerning military service (Art. 48). Decisions taken in this out-of-court procedure may be appealed against to a regional administrative court. Administrative courts can also deal with disputes regarding admission to military service, dismissal from professional military service or volunteer service, and expulsion from military training establishments (in the absence of a violation of discipline). The court may reinstate a person to professional or volunteer military service (Art. 48 paragraph 3).

Thus, one can conclude that it is important to clearly define the scope of disciplinary offences and punishments and to ensure the application of certain procedural guarantees to disciplinary proceedings. Guarantees should include the obligation to notify the soldier, to provide his or

her adequate representation during the proceedings and to ensure his or her access to all evidence. Moreover, summary proceedings should be subject to effective review in all cases.

The importance of judicial review for summary trials has been emphasised in the case law of the European Court of Human Rights. In particular, in the case of *Pulatli v Turkey* (Judgment of 26 April 2011), the Court found that:

“...the systemic lack of a right to judicial review for summary trials by commanding officers in Turkey breached Pulatli’s right to liberty and security.”³¹

Who should fall under military jurisdiction?

The law should clarify the scope of military jurisdiction. It seems debatable whether or not military courts and tribunals should try certain categories of individuals. Should reservists, students in military schools or retired military personnel fall under military jurisdiction? Or should military jurisdiction be limited to military personnel on active service?

Although State practice in this area—including in Eastern and Central European countries—is far from uniform, international human rights monitoring bodies recommend excluding civilians from the jurisdiction of military courts. For example, in its concluding observations on *Tajikistan*, the UN Human Rights Committee stated:

“The Committee notes that military courts have jurisdiction to examine criminal cases concerning both military and civil persons. *The State party should make the necessary amendments to its Criminal Procedure Code in order to prohibit this practice, strictly limiting the jurisdiction of military courts to military persons only* [emphasis added].”³²

Similarly, in its concluding observation on *Serbia and Montenegro* issued in 2004, the Human Rights Committee expressed concern:

“...at the possibility of civilians being tried by military courts for crimes such as disclosure of State secrets”.

It recommended that:

“The State party should give effect to its aspiration to secure that civilians are not tried by military courts.”³³

However, in many countries military courts can try civilians (e.g. employees of ministries of defence or civilians employed by the armed forces) for offences related to military service. Such trials are not always possible in peacetime and in some cases are explicitly limited to wartime or other exigencies.³⁴

In general, the trial of civilians by military tribunals remains compatible with the ICCPR. The question as to what extent this legal position may be evolving should be further discussed and

analysed in light of recent developments. However, the scope of this study precludes such an endeavour. As a minimum, it can however be argued that international human rights law is increasingly supporting the exclusion of civilians from military jurisdiction, even in emergency cases. Recent international developments in military justice also indicate that civilians (including civilian employees of defence ministries or the national armed forces) are becoming increasingly excluded from military jurisdiction.

In their joint opinion to *Musaev v Uzbekistan* communications nos. 1914-1916, the Human Rights Committee members Salvioli and Posada emphasised:

“...the need to review the current position of the Committee, which considers the trial of civilians in military courts to be compatible with the Covenant”.

According to the authors:

“...*ratione personae*, military courts should try active military personnel, never civilians or retired military personnel; and *ratione materiae*, military courts should never have jurisdiction to hear cases involving alleged human rights violations. Only under these conditions can the application of military justice...be considered compatible with the Covenant.”³⁵

According to a recent report of the UN Special Rapporteur on the independence of judges and lawyers:

“The trial of civilians in military courts should be limited strictly to exceptional cases concerning civilians assimilated to military personnel by virtue of their function and/or geographical presence who have allegedly perpetrated an offence outside the territory of the State and where regular courts, whether local or those of the State of origin, are unable to undertake the trial.”³⁶

Thus, it is advisable to exclude civilians from military jurisdiction. One of the ways in which to do this is to limit the jurisdiction of military courts to military personnel on active duty only.

However, some regional discrepancies in this area remain. The European Court of Human Rights, like the UN Human Rights Committee, allows for military trials of civilians in certain exceptional circumstances, albeit with state justification. The Inter-American Human Rights Commission, however, clearly states in one of its leading decisions *Castillo Petruzzi et al. v Peru* that:

“...domestic laws that place civilians under the jurisdiction of the military courts are a violation of the principles of the American Convention. Therefore, the State is to adopt the appropriate measures to amend

those laws and ensure the enjoyment of the rights recognized in the Convention to all persons within its jurisdiction, without exception.”³⁷

In one of its rulings, *Martin v. UK*, the European Court of Human Rights found that:

“...the power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation and if so only on a clear and foreseeable legal basis. This existence of such reasons must be substantiated in each specific case.”³⁸

Thus, the ECHR imposes specific limitations that need to be taken into consideration when bringing civilians for trial to military courts under certain exceptional circumstances. Such trials need to be justified by the authorities and be clearly stipulated in law.

Such justifications may also refer to special circumstances, in which military trial may be necessary in order to ensure access to justice. For example, disciplinary and criminal liability may apply to civilian employees of military units serving abroad (*Poland*). Under certain circumstances, so-called associated civilians, including military contractors, may also be subject to military trial. This may be necessary in order to preclude impunity.

In some countries, *police and intelligence officers*

are also placed under military jurisdiction. This model can only be amended as a result of a comprehensive security sector reform and the separation of competencies and responsibilities between the armed forces, police and intelligence agencies.

Broadly defined security-related offences or offences related to terrorism should not remain within the jurisdiction of peacetime military courts and tribunals. In such cases, space for abuse exists. Moreover, placing broadly defined security-related offences or offences related to terrorism within the jurisdiction of peacetime military courts and tribunals would not be in line with the functional concept of jurisdiction. Rather, the problem should be dealt with at the legislative level in the first place in order to ensure legal certainty with respect to any national security-related offences.

Constitutions can determine the scope of military jurisdiction and explicitly exclude any national security offences and civilians from the scope of military jurisdiction. For example, according to Article 145 of the *Turkish Constitution*:

“Military justice shall be exercised by military courts. These courts shall have the jurisdiction to try military offences committed by military personnel and offences committed by military personnel against military personnel or related to

military service and duties. *Cases regarding crimes against the security of the State, constitutional order and its functioning shall be heard before the civil courts in any case. Non-military persons shall not be tried in military courts, except during a state of war* [emphasis added]”.

The Constitution of *Mexico* is even more exacting:

“under no case and for no circumstance, military courts can extend their jurisdiction over persons who are not members of the Armed Forces. Civilians involved in military crimes...shall be put on trial before the competent civil authority [emphasis added]” (Article 13 of the Mexican Constitution).

However, in some cases, constitutions may establish broader exceptions to the general principle of the non-trial of civilians by military courts. According to Article 204 of the 2014 Constitution of *Egypt*:

“Civilians cannot stand trial before military courts except for crimes that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes

that represent a direct assault against its officers or personnel because of the performance of their duties”.

Other categories of individuals should also be excluded from the scope of military jurisdiction. According to the Principles Governing the Administration of Justice through Military Tribunals, conscientious objectors and minors should equally be excluded from military jurisdiction (Principles 6 and 7).³⁹ This and other recommendations mentioned above should be implemented at the domestic level to ensure that international human rights standards in the armed forces are effectively applied.

Box 4:	Military trials of civilians (Human Rights Committee)
“The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.” ⁴⁰	

How to address serious human rights violations?

As has been elaborated above, grave human rights violations such as extrajudicial killings, torture, inhuman and degrading treatment, or

forced disappearances, should not be left to the competences of military courts. It has been argued that placing serious human rights violations within the scope of military jurisdiction would most likely lead to impunity. Moreover, according to the Principles Governing the Administration of Justice Through Military Tribunals:

“Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons” (Principle 13).

The Updated Set of principles for the protection and promotion of human rights through action to combat impunity states that:

“The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court” (Principle 29).⁴¹

Thus, there is a growing consensus in

international human rights law that these types of violations should not fall under military jurisdiction but rather within the competence of civilian courts.

It can be argued, however, that if military justice systems function effectively and provide sufficient procedural guarantees in accordance with the principle of judicial independence and impartiality, they will be in a position to deal with serious human rights violations in an impartial and independent manner. Accordingly, they can also serve as an effective tool against impunity.

National law should avoid ambiguity when defining the scope of military jurisdiction. For example, if the notion of a service-related offence is vague, it may lead to interpretations that extend military jurisdiction to violations of individual rights that are not of a strictly military nature.

In some contexts, the trial of grave human rights violations by military courts may be especially controversial, particularly if the country in question has an authoritarian history and if historically, military courts were used as an instrument of impunity for authoritarian regimes and vested elites.

In post-conflict settings, governments may attempt to shield armed forces previously involved in an internal armed conflict from accountability by using military courts to achieve

impunity. In such cases, it remains essential that an independent mechanism of accountability be created or that military courts are subject to strict civilian oversight within the ordinary judiciary.

What is the distinction between war and peacetime?

Military tribunals are often created during wartime. Moreover, peacetime military jurisdiction is usually extended in wartime and during a state of emergency. The military jurisdiction created in wartime should be suspended when the state of war ends.

Some countries in Eastern and Central Europe abolished peacetime military courts and only allow for the creation of such courts in wartime. This is the case in *Georgia*, for example, with Article 83 paragraph 3 of the Georgian Constitution stating that:

“Military courts may be established under martial law and exclusively within the courts of general jurisdiction”. A similar provision is included in the *Latvian* Constitution. According to Article 82, “In Latvia, court cases shall be heard by district (city) courts, regional courts and the Supreme Court, but in the event of war or a state of emergency, also by military courts.”

Some constitutions explicitly prohibit the establishment of specialised courts, including

military courts. According to Article 126 of the *Slovenian Constitution*, in peacetime it is prohibited to establish extraordinary courts, as well as military courts. Similarly, Article 143 of the 2006 *Serbian Constitution* states that:

“Provisional courts, courts-martial or special courts may not be established.”

Military courts were abolished in *Bosnia and Herzegovina* in the 1990s. The previous Constitution of the *Czech Republic* stated that:

“Until the thirty-first of December 1993, military courts shall also form a system of courts.”

The establishment of military tribunals during wartime can be authorised by the Head of State and subsequently approved by Parliament.

Parliament may also have special wide-ranging legislative competences regarding any emergency modification of individual rights.

During wartime, military jurisdiction can be extended to include, for example, offences against State security, espionage, or infractions against members of the military (such jurisdiction may also cover civilians). Some offences may be deemed as more serious if committed during wartime and harsher punishments may therefore apply (for example, for desertion).

During an armed conflict, military courts may be used to try prisoners of war and residents in territories under occupation. In such situations, all requirements established by international humanitarian law should be respected.

Table 5: Different approaches to define jurisdiction of military courts

	Status-based offences	Service-related offences	Purely military offences
Concept	Offences committed by servicepersons, e.g. people having the status of member of the armed forces.	Offences that are related to military service.	Offences of a military character that can only be committed in and by the armed forces.
Advantages	Jurisdiction is limited to military personnel.	Non-service-related offences, even if committed by military personnel, are excluded from military jurisdiction and should be tried by civilian courts.	This approach is in line with modern aspirations to limit military jurisdiction to purely military crimes.
Disadvantages	Military status is sometimes defined very broadly in legislation, or the definition used is unclear.	It allows for a broad interpretation of military jurisdiction. This might allow for military courts to try civilians.	It may prove difficult to define the scope of jurisdiction and to draw a line between purely military and non-military offences.

Can military courts be established abroad?

Countries deploying troops abroad may consider establishing military courts (or courts-martial) in the respective places of deployment. However, this can be a challenge in terms of resources and logistics.

Troops participating in international military operations remain in principle under the jurisdiction of the sending State. For minor violations, a military judge attached to their unit can try members of the armed forces. For more serious military offences, military personnel can be transferred to the sending State and tried before a military court. However, there are also cases in which military personnel who committed serious offences are subsequently transferred to the sending state's civilian judiciary to stand trial.

How to ensure judicial independence?

Military justice legislation should define legal guarantees to protect the institutional independence of the military judiciary in relation to the executive and legislative branches of government. Individual and functional independence of military judges should also be ensured.

In one of its important decisions *Findlay v United Kingdom*, the European Court of Human Rights recalled that:

“...in order to establish whether a tribunal

can be considered as “independent”, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.”⁴²

The way in which military judges are appointed is a good indicator of the independence of military courts. Other indicators include whether there is any subordination in rank to a higher military authority, the security of tenure, and other institutional and procedural guarantees of independence and impartiality. These guarantees include the conditions of qualification and promotion, transfer and cessation of judicial functions, and the disciplinary accountability of military judges.

Assessing guarantees for the independence of the Military Chamber of the Arnhem Court of Appeal, the European Court of Human Rights in *Jaloud v. The Netherlands* arrived at the following conclusion:

“The Court has had regard to the composition of the Military Chamber as a whole. It sits as a three-member chamber composed of two civilian members...and one military member. The military member is a senior officer qualified for judicial office...In his judicial role he is not subject to military authority and discipline; his

functional independence and impartiality are the same as those of civilian judges.”⁴³

How to select and appoint military judges?

Legislation on military courts should define rules for the selection and appointment of military judges. It is essential to ensure that the procedure for appointing judges does not exclusively depend on the chain of command and is based on formal criteria defined by law.

It can be argued that persons who have some knowledge of the armed forces and their missions should select the judges of military courts. However, great diversity exists with respect to appointment procedures. In any case, the selection should be based on merit and qualifications. Military judges should have received appropriate training and gained practical legal experience. The criteria for selecting appellate judges can differ. For example, candidates may need to have prior experience as trial judges.

In a number of countries in Eastern and Central Europe, civilian authorities appoint military judges (or judges with military specialisation). However, in some countries of the former Soviet Union (FSU), the judges of military courts are still selected and appointed by the executive (the Ministry of Defence). In countries where the military judiciary is integrated into the civilian system, the judges of military courts are appointed according to general appointment

procedures: the Head of State or the Ministry of Justice has the authority to appoint them. In other cases, in which military justice is a part of the armed forces, the Ministry of Defence will be responsible for appointments.

For example, in *Bulgaria*, the same appointment requirements apply for military and civilian judges as well as for civilian and military prosecutors. The Supreme Judicial Council is responsible for appointing military judges. Similarly, in *Hungary*, the National Judicial Council appoints military judges upon the advice of the chairperson of the court. Article 187 paragraph 1 of the *Polish Constitution* states that:

“...the National Council of the Judiciary shall be composed as follows...15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts.”

A comparable procedure applies in *Romania* where the Supreme Council of Magistracy issues appointment proposals to the President, who may then appoint the judges to office. Moreover, the Council is equally responsible for the promotion and transfer of judges. It can also issue (disciplinary) sanctions against them.

It is important that the judges of military courts are subject to the same performance appraisal and evaluation procedures as their civilian counterparts. The independence of such evaluations must be guaranteed. Selected judges

should not be concerned about professional advancement within the military, and should not be subject to army assessment reports, which would affect their judicial activities and impair their independence. This remains difficult to achieve in practice, especially in countries where there is no clear separation between judicial and military functions at military courts. An effective guarantee in this respect is to appoint judges who are not members of the armed forces or who are at the very minimum removed from the sphere of command influence (and who are not subject to military discipline).

How to hold military judges accountable?

In countries where military courts form part of the ordinary judiciary, general disciplinary accountability procedures and promotions systems apply. The authorities responsible for ensuring accountability of the military judiciary may also include some military elements—e.g. high ranking and qualified members of the armed forces may be involved in some cases. However, in many cases, the exclusive authority for ensuring accountability remains with the military institution or the executive power more broadly.

When military judges exclusively report to the ministry of defence, their judicial independence may be compromised. In some countries, there is no clear separation between the judicial functions and military activities of officers serving on the bench of a military court. Military officers

may thus feel compelled to issue rulings that are in line with a superior's view of the case. For this reason, military superiors should not assess the performance of military judges as members of military courts; nor should military judges be promoted on the basis of their court duties. Moreover, military judges should not report to the same chain of command as the accused. One way to ensure the independence of military judges is to select candidates of higher rank. High-ranking officers would feel less compelled to comply with the interests of their chain of command in their judicial activities.

The institution that has the power to discipline or remove a judge should be independent and objective in imposing sanctions. Such an institution should be composed of representatives of the military judiciary and ordinary courts. Its rules and procedures are comparable to those of its civilian counterpart. When a civilian model of accountability applies, like in *Bulgaria*, *Poland* and *Romania*, the independence of the respective institution and accountability mechanisms may appear less questionable.

Why the term of office matters?

A way of promoting judicial independence is to set a fixed term of office for judicial office (this may be four years or longer). This is also the case for military judges: if they have sufficient tenure, their command's interests will be less likely to

influence them. This seems less problematic in countries where military judges work within the ordinary judiciary.

Constitutions should determine the main guarantees of judicial independence including the term of office. They should be applicable to military judges as well. Some recently adopted constitutions, which regulate the functioning of military courts, explicitly state this. For example, the Constitution of *Egypt* adopted in 2014 determines: “Members of the Military Judiciary are autonomous and *cannot be dismissed*. They share the securities, rights and duties stipulated for members of other judiciaries [emphasis added]” (Art. 204).

How to prevent the misuse of judicial immunity?

Military judges should not be required to testify on matters related to the exercise of their judicial functions. However, the law must guarantee that their immunity cannot be misused in order to achieve impunity. On the other hand, it is necessary to respect the status of judges. Countries with authoritarian pasts that choose to implement radical reforms in order to restore public confidence in the judiciary should respect the principle of proportionality and not apply such measures in a discriminatory manner.

How to deal with conflicts of interests?

Legislation should define the circumstances under which military judges should not sit on a

case where there is a reasonable suspicion of bias. For example, if the judge participated in proceedings as a military prosecutor or was involved in preliminary investigations, he or she should not be permitted to sit on the bench dealing with the same issue in trial proceedings. The same applies if there is a kinship or other close link between the military judge and the accused.

Why financial and security guarantees are important?

Judicial assignments should be sufficiently appealing so as to attract highly competent candidates. The State should provide adequate financial resources to allow for the effective administration of justice and take safety measures to protect military judges. The law should ensure the safety and adequate remuneration of military judges. However, the standard applied in this respect may vary from country to country depending on its social and economic context.

How to plan for professional development of judges?

Military judges should be professionally trained, like their civilian counterparts. Moreover, military judges and prosecutors should undergo continuous training. They should also take part in international cooperation programmes and networks for training and knowledge exchange.

Under no circumstances should the executive be

responsible for evaluating judges' performance of professional duties. In those countries where judges with military specialisation are members of ordinary courts, the judicial councils (or other civilian agencies) should be in charge of taking systematic and continued measures for the professional development of members of the judiciary. Specialised academies for judges can play an important role in this respect.

It is essential that judges of military courts are familiar with the legal framework applicable in both peace and wartime; and human rights law and international humanitarian law should be provided as part of the training program.

What is the structure of criminal proceedings for military personnel?

According to Council of Europe standards:

“The organisation and operation of military courts, where they exist, should fully ensure the right to everyone to a competent, independent and impartial tribunal at every stage of legal proceedings.”⁴⁴

Military law usually contains provisions regarding the discovery, investigation and prosecution of military crimes. It also defines the competences of different authorities involved in this process.

The commander or the military (civilian) police may be required to conduct initial investigations into offences, and to submit the case to the

prosecutor. However, there are also other models of investigation, whereby the investigative function is delegated to the office of investigations (see the case of *Armenia*, where this is carried out by the Central Investigative Office).

The law should include provisions on the competences (rights and duties) of the prosecutor; the collection of evidence; the presence of a defence counsel and the conclusion of the investigation. The law should define equal time limitations on criminal (or disciplinary) proceedings and the period of custody and detention. It is essential that other procedural guarantees are also included in the legislation. For example, parties involved in a given dispute should remain informed with respect to the on-going proceedings and availability of legal remedies.

In many military justice systems, military commanders have the authority to conduct initial investigations and gather evidence. It is essential that the independence and effectiveness of such an investigation is assured.

Domestic law should prescribe the investigative competencies of a commander. The legal framework should equally clarify how the commander cooperates with the military police and under what circumstances and at what stage the materials of the case have to be handed over to the military police, as well as when the

prosecution should conduct further investigations.

In some cases, a division of labour between the commander and the military police may be required. However, it is important that the commanding officer does not influence investigations conducted by the military police. If the military police are closely associated with the armed forces (the chain of command), they may not be inclined to effectively investigate military offences. Thus, the military police should enjoy a sufficient degree of institutional independence.

For example, in *Lithuania*, the military police, which operates within the system of the Ministry of Defence, conducts investigations into service offences. If the military commander in the course of his or her investigation arrives at the conclusion that there are elements of crime involved, he or she should immediately inform the military police and hand over the all the materials necessary for the pre-trial investigation to the military police. Further, pre-trial investigations are conducted by the military police.

The investigation process should be both independent and fair. If the investigation process lacks objectivity and impartiality, it may undermine the integrity of the entire military justice system. Thus, any investigation into military offences should be guided by the same principles that are applicable to investigations into civilian offences:

independence, impartiality, thoroughness, effectiveness and promptness. These are the principles that characterise “effective investigation”. As the European Court of Human Rights stressed in *Zalyan and Others v. Armenia*:

“...for an investigation into alleged ill-treatment by State agents to be effective, it should be independent. The independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms.”⁴⁵

Differences between legal systems should be taken into account when designing and implementing military justice reforms. In common law systems, commanders are involved at different stages of the case, including during the investigation; the referral of charges; and the trial and post-trial. In some countries, such as the USA, commanders can substantially influence the course of the proceedings. In civil law systems, the role of the commander usually ends after the initial investigation. The commander is required to hand the case over to the prosecutor (or the military police) for further investigation and the charging decision.

It is important to clearly define the competences of the commanding officer at the investigation stage and to clarify the relationship between civilian and the military authorities. In *Lithuania*, if a police officer detains a soldier, they must inform the military police. The police officer must

hand over all materials necessary for the investigation of a criminal offence to the military police. On the other hand, if the military police detain a civilian, they have to inform the (civilian) police authorities and hand over case materials accordingly.

Similarly, Article 68 of the *Slovenian* Law on Defence states that:

“Should the military police catch a civilian in a criminal act on a facility or surroundings which are of special importance to defence, or in the camp area, they must immediately notify the police. In such a case, the military police shall have the power to use only absolutely necessary measures and means of restraint to detain him/her until the arrival of the police and to successfully deter any attack on persons or facilities and property that they protect.”

In some countries, there is a separate system of military prosecution, which is in charge of initiating criminal proceedings and bringing charges to court. It may also have important investigative competences. It is essential to guarantee the independence of military prosecutors. They should not be subordinated to the chain of command, nor be part of the military hierarchy. Military prosecutors can however be subordinated to the general prosecutor’s office.

In some cases, the chief military prosecutor is one of the deputies of the general prosecutor (this is the case in a number of Eastern European states).

This formally ensures civilian supremacy, but does not yet constitute a guarantee of independence. If there is a specialised system of military prosecution, the guarantees for its independence, such as appointment procedures and the tenure of office as well as disciplinary accountability, should be enshrined in legislation.

The military prosecutor may be subordinated to the Minister of Justice or the Ministry of Defence as well. In some cases, they are subordinated to the both (*Poland*). However, the legal framework should be clear in order to exclude any doubts with respect to the independence of the prosecution from the chain of command.

Arguably, there is a trend towards transferring the functions of military prosecutors to civilian prosecutors. Indeed, military prosecutors' offices have been abolished in a number of countries.

For example, *Russia*, *Belarus* and *Moldova* have recently abolished a specialised system of military prosecution. In *Romania* and *Bulgaria*, the civilian prosecutors present charges in military courts. The same applies to *Georgia*, where there is no specialised system of military justice and prosecution.

Military prosecution still operates in *Azerbaijan*, *Armenia* (where there are no specialised military courts) and most *Central Asian Republics*. It was also re-established in Ukraine in 2014.

Both the accused and the prosecutor should have

the right to appeal against rulings made by first instance military courts to the courts of military appeals, and to (civilian) supreme courts. In many countries, the courts of military appeals are civilian courts. It is recommended to establish a civilian appellate court in order to ensure the independent and fair review of first instance decisions. In some cases, appellate courts are hybrid, including both civilian and military judges. In any case, independent of the prevailing models for appeals, the right to unhindered access to independent appellate procedures must be effectively guaranteed.⁴⁶

In some cases, the higher courts that take final binding decisions include specialised military chambers (like the Military Chamber of the Federal Administrative Court of Germany). However, more often than not, the judges sitting on the bench are civilians.

The right to a fair trial is a fundamental guarantee enshrined in international human rights law. It protects individuals from arbitrary and unlawful restrictions on her or his liberty. The right to a fair trial should be guaranteed in military courts. The defence should enjoy the same ability to present the case as the prosecution does. However, it remains a challenge in some military justice systems to effectively ensure such equality of

arms. The access of the defence counsel to evidence has been limited in many cases for reasons of military secrecy (or for other national security considerations such as the immediate danger of terrorism). In a democratic society it is essential that such restrictions remain proportional and necessary. The accused should have the right to contest the evidence. Any evidence gathered in violation of the law or through illegal means (for example, torture) remains inadmissible.

In some countries, specialised military lawyers represent and defend the case in courts. However, this does not indicate that the defendant's right to freely choose his or her legal representation should be limited within the system of military justice. The defendant should be able to choose a civilian lawyer to represent and defend his or her interests in military courts.

In many countries in Eastern and Central Europe, there are no specialised military lawyers. Rather, civilian lawyers represent and defend the interests of a defendant in military courts. In such cases, civilian lawyers should be familiar with military life and have sufficient knowledge of the applicable military law (disciplinary and criminal law).

Table 6: Fair trial and rights of the accused, Article 14 of the International Covenant on Civil and Political Rights of 1966

<p>“1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre publique) or national security in a democratic society, or when the interests of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.</p> <p>2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.</p> <p>3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:</p> <p>To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;</p> <p>To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;</p> <p>To be tried without undue delay;</p> <p>To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; 21 to be informed, if he does not have legal assistance, of this right; and to have legal assist-</p>	<p>ance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;</p> <p>To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;</p> <p>To have the free assistance of an interpreter if he cannot understand or speak the language used in court;</p> <p>Not to be compelled to testify against himself or to confess guilt.</p> <p>4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.</p> <p>5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.</p> <p>6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law, unless it is proven that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.</p> <p>7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”</p>
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How to proceed?

This Practice Note provides an overview and insight into the setup, functioning and reform of military justice systems with a focus on countries of Central and Eastern Europe as well as former Soviet Republics. However, the actual setup or reform of military justice systems requires in-depth expertise, substantial support, as well as cooperation with a broad range of actors. This Note should be used in combination with workshops and consultations with peers from other countries facing similar challenges and international experts.

Resources and further reading

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Endnotes

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² R. v. G  n  reux, Canadian Supreme Court, 13 February 1992, Canada Supreme Court Reports, Vol. 1, 1992, p. 259. Online at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/836/1/document.do>

³ In Canada, for example, domestic human rights legislation triggered efforts to reform military justice.

⁴ See Art. 83 (3) of the Georgian Constitution.

⁵ Конституционный Закон “О судебной системе и статусе судей Республики Казахстан” (The Constitutional Law on judiciary and status of judges), 25 December 2000 with amendments. According to this Law, a military court can be created by a Presidential Order. For more information, see: <http://askeri.sud.kz/rus/content/istoriya-voennogo-suda-respubliki-kazahstan>

⁶ Конституционный Закон Республики Таджикистан “О Судах Республики Таджикистан” (Constitutional Law of the Republic of Tajikistan on Courts).

⁷ The Law on Courts, Art. 39-41.

⁸ Art. 40 of the Law on Courts.

⁹ On military law in the Republic of Poland, see M. Kowalski, “Military Law in the Republic of Poland”, in G. Nolte (ed), *European Military Law Systems*, Berlin 2003, at 648 et seqq.

¹⁰ See the Estonian Military Service Act of 13 June 2012 with amendments. Chapter 10 regulates the Disciplinary authority covering military discipline, disciplinary detention, disciplinary offences and disciplinary penalties and disciplinary proceedings.

¹¹ International Commission of Jurists, *Military Jurisdiction and International Law*, Part II, Sec. I, pp. 161 et seqq.

¹² Commission on Human Rights, Fifty-fourth session, Report of the Special Rapporteur on the independence of judges and lawyers, Mr Param Cumaraswamy, E/CN.4/1998/39/Add.1, February 9, 1998

¹³ Report of the Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/68/150, 7 August 2013, paragraph 102; also see UN Doc A/HRC/28/32 (Summary of the discussions held during the expert consultation on the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations), 29 Jan 2015.

¹⁴ The Paris Minimum Standards of Human Rights Norms in a State of Emergency, Article 16 paragraph 4 (Right to remedy), reprinted in *American Journal of International Law* 79, (1985) 1072.

¹⁵ UN General Assembly Resolution 40/32 (29 November 1985) and 40/146 (13 December 1985), Article 5: “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

¹⁶ HRC, General Comment 32.

¹⁷ General Comment 32.

¹⁸ See the Canadian National Defence Act, 273.601 (1) on Independent Review: (1) “The Minister shall cause an independent review...”; (2) “The Minister shall cause a report of a review to be laid before each House of Parliament within seven years after the day on which this section comes into force, and within every seven-year period after the tabling of a report under this subsection”. Online at: <http://laws-lois.justice.gc.ca/eng/acts/n-5/>

¹⁹ See, for example, *Ombuds Institutions for the Armed Forces: Selected Case Studies* (DCAF Publication), Geneva 2017.

²⁰ Information from the Parliamentary Commissioner for the Armed Forces, Annual Report 2015 (57th Report), German Bundestag (18th electoral term) Printed Paper 18/7250, 26 January 2016, at 30.

²¹ Ibid. at 51.

²² See the Inspector-General of the Australian Defence Force Regulation 2016. Online at: <https://www.legislation.gov.au/Details/F2016L01558>.

²³ Art. 21, 5 of the Law on the National Defence System and Military Service.

²⁴ For more details, see: http://www.directory.gov.au/directory?ea5_lfz99_120.&organizationalUnit&e62e5f08-db52-4568-

[b2dc-253097db8ae4](#). Also see: “Administrative Oversight of Military Justice”, Presentation by Mr. Geoff Earley, AM Inspector General Australian Defence Force, 26 November 2008.

²⁵ This is the case in Lithuania, for example.

²⁶ See the Document with commentaries: Issue of the administration of justice through military tribunals. Report submitted by the Special Rapporteur Emmanuel Decaux, E/CN.4/Sub.2/2005/9, 2 June 2005.

²⁷ Federico Andreu-Guzman, Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations, Vol 1 (Geneva: International Commission of Jurists 2004), at p 157.

²⁸ On military law in Poland see M. Kowalski, “Military Law in the Republic of Poland”, in G. Nolte (ed), European Military Law Systems, Berlin 2003, at 648 et seqq.

²⁹ See the Estonian Penal Code, Chapter 24 – Offences relating to Service in Defence Forces.

³⁰ Most European countries make a distinction between disciplinary offences and military crimes.

³¹ *Pulatli v. Turkey*, Application no. 38665/07, Judgment of 11 April 2011.

³² CCPR/CO/84/TJK 18 July 2005, Paragraph 18.

³³ CCPR/CO/81/SEMO, paragraph 20.

³⁴ Legislation allows trial by court-martial of any civilian “serving with or accompanying an armed force in the field” during a contingency operation (which is broadly interpreted in legislative practice). This is not necessarily limited to a situation of armed conflict.

³⁵ CCPR/C/104/D/1914-16/2009, 6 June 2012, paragraph 4.

³⁶ A/68/285, 7 August 2012, paragraph 102.

³⁷ *Castillo Petruzzi et al. v Peru*, Judgment of 30 May 1999, Inter-American Court of Human Rights, Ser. C, No. 52 para. 222.

³⁸ *Martin v. the United Kingdom*, Application no. 40426/98, Judgment of 24 October 2006, para 44.

³⁹ Principles 6 and 7.

⁴⁰ UN Human Rights Committee, Compilation of General Comments and General Recommendations, General Comment No. 13

⁴¹ E/CN.4/2005/102/Add.1, 8 February 2005.

⁴² *Findlay v. the United Kingdom*, Application no. 22107/93, Judgment of 25 February 1997, para 73.

⁴³ *Case of Jaloud v. The Netherlands*, Application no. 47708/08, Judgment of 20 November 2014, para 196.

⁴⁴ CoE PA Recommendation 1742 (2006) on "Human rights of members of the armed forces", Article F (33).

⁴⁵ *Zalyan and Others v. Armenia*, Applications nos. 36894/04 and 3521/07, Judgment of 17 March 2016, para 269.

⁴⁶ Review of the decisions of a military court should not be conducted by a non-judicial authority.