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Governance



MILITARY JUSTICE

National Institute of Military Justice and DCAF

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Foreword

This DCAF publication is a product of the Geneva Centre for Security Sector Governance in consultation with the National Institute of Military Justice.¹ Its goal is to enhance our understanding of military justice, that is the specialized processes and procedures which provide criminal justice for those serving in the armed forces. To that end, this publication identifies the chief characteristics of contemporary military justice systems within modern western democracies, emphasizing the need for effective oversight and limited jurisdiction. The current state of military justice affairs is examined, largely by outlining recommended principles of military justice. The primary challenges of administering military justice systems are also set out, as are potential solutions to such challenges. In reflecting on the current context of the war in Ukraine and ongoing efforts to re-establish its military justice system, this publication specifically overviews the historical development of military justice in Ukraine. It points to challenges and the implications of establishing a robust, modern military justice system there today.

We hope that this publication will help to improve our understanding of military justice systems and their relationship to civilian criminal justice systems; we also hope that it will enhance appreciation of the challenges of administering military justice in alignment with national and international fair trial norms and requirements. Finally, we hope that the present paper will assist the government of Ukraine as it considers the most effective and the fairest mechanisms for ensuring good order and discipline within its armed forces.

Darko Stančić

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¹ The views expressed in this publication do not necessarily reflect those of the National Institute of Military Justice nor of its individual board members.

Introduction

The phrase “military justice” in this publication generally refers to criminal justice for those serving in a nation’s armed forces (its military services). The typical military justice system not only sets substantive standards of behaviour by articulating specific crimes. It also provides processes and procedures for levying penal sanctions – thus ensuring criminal accountability – for service members who violate those substantive standards. Viewed broadly, a military justice system is a system of laws and regulations that govern the conduct of members of the armed forces, and this system provides for penal sanction when such laws are violated by military members. A fundamental characteristic of such a system is that it is not applicable to the State’s civilian population; with the exceptional cases of civilians accompanying the military in time of war. Military justice systems are designed to ensure that members of the military follow military laws and regulations, while also providing a fair and efficient means of determining innocence or guilt in line with internationally recognized procedural guarantees.

This publication outlines both reasons for operating a distinct military justice system for those serving in a State’s armed forces, as well as the vulnerabilities of these systems. Regarding the former, the distinct nature of military justice, operating separately from civilian criminal justice processes, allows for a specialized set of laws, regulations, and procedures tailored to the unique needs of the military. Indeed, as this publication explains, there is a need for a system that can take into account the exigencies of the battlefield and of hierarchical military organizational dynamics reliant on obedience to orders. This publication outlines the possible advantages to maintaining a separate military justice system for the adjudication of allegations of criminal misconduct by service members. One such claim is for the greater efficiency in adjudicating cases and appeals; namely the idea that military courts are faster than their civilian counterparts. Proponents have long argued that military justice systems provide swift and decisive punishments for those who disobey orders or regulations. In this way these systems ensure that the relevant military remains an effective and disciplined fighting force.

Buttressing this claim (one that has not always been empirically supported) is a stronger argument: specialized military justice systems best represent the military community, and thus are better suited to implementing the critical messaging effect of criminal law within said community. This flows from an understanding that criminal law marks society’s collective condemnation of behaviour. The military uniquely condemns some behaviour that the greater civilian community deems to be non-criminal: for instance, disobedience, dereliction of duty, desertion, conduct prejudicial to good order and discipline, etc. It is, then, arguably most appropriate for military courts to sit in judgement of members of the military. These courts can then influence these uniquely-military behavioural

standards, and contribute to the deterrent effect of military criminal law.

Military justice systems, however, are also vulnerable to structural weaknesses if not designed appropriately. Given commanders' pivotal role in military hierarchies, commanders can inappropriately influence military justice processes. This potential can give the sense, sometimes unfortunately with justification, that military justice is simply a tool for achieving commanders' objectives, as opposed to an impartial mechanism for the adjudication of guilt and innocence based on facts. Furthermore, as the present publication acknowledges, military justice has been perceived as being disproportionately severe, overly punitive, and arbitrary in its selective prosecution – these are perceptions which often flow from systemic failure to safeguard against command influence.

Perceptions of unfairness can undermine the legitimacy of a State's military justice system and hence degrade its ability to reinforce good order and discipline. For instance, there is often criminal punishments for minor infractions or the matter of more frequent prosecution of junior rather than senior service members. Perceptions are important, and a lack of understanding regarding the necessity of criminalizing military-unique crimes may contribute to negative perceptions. Another de-legitimizing issue is a lack of sufficient checks and balances regarding the exercise of prosecutorial discretion, as well as on sentencing parameters and processes: this is true at least of some military justice systems. Additionally, given that the legal principle of due process is, by its very nature contextual, due process in a military milieu has different effects than in a civilian criminal justice system. This can result in negative perceptions of this system. Finally, military justice has been seen as a means of suppressing dissent and of protecting the military from external criticism, rather than a fair and impartial system of criminal accountability for service members.

This publication concludes that military justice, if run fairly to provide criminal consequences for service members misconduct, can meaningfully contribute to the national security of a State. It can do so while simultaneously remaining consistent with the State's obligations to ensure fair and just process for those prosecuted within that system. This balancing act can only be achieved with the establishment of a system of limited jurisdiction with meaningful internal and external structural checks and balances that include robust oversight by the State's federal legislative body.

1. UNDERSTANDING MILITARY JUSTICE

1.1 Evolution of military justice

Military justice is as old as history itself. As one authority has noted, the “penal military justice system has been standing from time immemorial.”² Alexander Gillespie, in his comprehensive history of the laws of war, demonstrates that “as long as humanity has been waging wars it has also been trying to find ways of legitimising different forms of combatants and regulating the treatment of captives.”³ A comprehensive history of military justice is beyond our scope. But it is useful to focus on key waypoints in the evolution of military justice. One of the oldest instances of the administration of military justice is found in ancient Greece, and can be traced back as far as the fourth century B.C.⁴

Another key moment came in the firstst century B.C., when the Romans adopted feudal law—which addressed military relationships, among other concepts—from the Teutons. Following the fall of the Roman Empire, the various Germanic tribes continued to employ feudal law and thus spread it throughout Europe. By the 11th century, the Lombards had codified feudal law; it was this comprehensive system that William the Conqueror brought to England in 1066.⁵

Over the following centuries, codification increased and a great many European countries enacted military codes establishing separate military tribunals.⁶ In England, the monarch would promulgate

2 Gilles Létorneau, Introduction to Military Justice: an Overview of Military Penal Justice System and Its Evolution in Canada 1 (2012).

3 Alexander Gillespie, A History of the Laws of War: The Customs and Laws of War with Regards to Combatants and Captives (Vol. 1, 2011).

4 Sotirios Kyrkos, *Military Justice in Greece; Historical Evolution, Contemporary Institutional Developments and Future Prospects* (2011), https://www.academia.edu/7809896/Military_justice_in_Greece_Historical_evolution_contemporary_institutional_developments_and_future_prospects.

5 William B. Aycock & Seymour W. Wurfel, *Military Law Under The Uniform Code of Military Justice* 4 (1955).

6 *Id* at 6.

the Articles of War to govern the Army on expeditions.⁷ On the continent, perhaps the most famous code was that promulgated by King Gustavus Adolphus of Sweden in 1621. King Adolphus personally drafted the text of his *Articles of War*; the Articles – there were 150 – comprised a set of orders and established a clear hierarchy of military jurisdiction.⁸ King Adolphus' Code represented a landmark in the history of military justice. The American Articles of War, adopted by the Continental Congress in 1775, drew upon the British Articles of War, which had in turn incorporated key aspects of King Adolphus' code. Today, most countries regulate their military justice systems through a composite code.

Another major historical trend, which has become more manifest over the last century, is the civilianization of the military justice system. In some jurisdictions, the state has shifted jurisdiction over military justice to the civilian court system. And in many systems, civilian influence on military legal matters has grown in importance.⁹ Eugene Fidell notes that “especially since World War II, military justice has increasingly approximated civilian criminal justice.”¹⁰ Thus, in the modern world, the military rules of evidence are “typically a carbon copy of the rules followed in civilian criminal trials.” The passage and amendment of military legal rules “involves civilian officials.”¹¹ Despite the trend towards civilianization, the majority view would seem to be that it is “difficult to conceive of an effective armed force...without a separate system of justice or at least a system which acknowledges the unique nature of military service.”¹² Moreover, there remain aspects of the military justice system that are unique to the military context; for example, there are military offences “that have no counterpart in civilian criminal law.”¹³

The primary function of a military justice system has traditionally been to ensure discipline and good order in a State's armed forces. However, States have increasingly recognized that the most effective way to obtain good order and discipline is through fair and just procedures for determining guilt and for apportioning punishment. **Hence the primary function of modern military justice systems is the achievement of justice, not simply the attainment of good order and discipline.** The use of criminal justice procedures that accord with fair trial rights -- fundamental judicial guarantees aimed at ensuring that accused persons receive a fair trial -- support the goal of just accountability for service members who commit criminal misconduct. There is also the collateral objective of good order and discipline in the ranks.

7 *Id* at 5.

8 Kenneth Ögren, *Humanitarian Law in the Articles of War Decreed in 1621 by King Gustavus II Adolphus of Sweden*, 313 *International Review of the Red Cross* (1996).

9 Panagiotis Kremmydiotis, *The Influence of Human Rights Law on the Reform of Military Justice*, in *Military Justice in the Modern Age*, 311 (Alison Duxbury & Matthew Groves eds., 2016).

10 Eugene R. Fidell, *Military Justice: A Very Short Introduction* 22 (2016).

11 *Id* at 23.

12 His Honour Judge Jeff Blackett, Foreword, in *Military Justice in the Modern Age* xv, xv (Alison Duxbury & Matthew Groves eds., 2016).

13 *Fidell*, *supra* note 9 at 24.

Despite common and global trends in military justice, it must be noted that military justice systems differ from country to country. After all, military justice systems in part reflect the specific values and history of a given country. One over-arching division is between those military justice systems that are based on common law and those based on civil law.¹⁴ Common law-based military justice systems often feature military courts with exclusive jurisdiction over offences committed by military personnel. In certain civil law-based European jurisdictions, however, civilian courts have jurisdiction over military cases.¹⁵

The Military justice system in Switzerland

The military justice system in Switzerland has a long history and the former Swiss Defence Minister Arnold Koller stated that it has a century-long tradition of functioning efficiently.¹⁶ The Military Criminal Code was enacted 13 June 1927, and it remains valid to this day - subject of course to numerous amendments - complementing the civilian Criminal Code of 1937. In addition, the military tribunal system has, since 1979, followed a modern Federal Military Criminal Procedure Code. It is thus ensured that members of the armed forces will continue to be judged by their own specialised courts.¹⁷ Switzerland has wholly separate military courts at the trial and at the appellate level, established by Title 1 Chapter 3 of its Military Criminal Procedure Code (MStP) of 23 March 1979. Austria, Belgium, Denmark, Estonia, France, Germany, the Netherlands, Norway, Portugal, Slovenia and Sweden, now have no military courts in peacetime. The Swiss model is designed to operate in both peacetime and war.¹⁸

The scope of application of military criminal law is limited to the armed forces and the Border Guard and their organisations and to the members of the national security services. This list of offences does not encompass typical civilian crimes such as those against the family, offences against official or professional duties, or frauds related to debt collection and bankruptcy. If a member of the armed forces or a member of the Border Guard commits a crime of this type during his term of service, he/she will remain subject to the civilian criminal code and to the jurisdiction of the civilian courts.¹⁹ However, when the state and its armed forces are under serious threat, the material and personal scope of the Code is extended. Thus, for example, business employees that are important to National Supply may become subject to the provisions of the Military Criminal Code. In addition, a wider range of acts become criminal offences when on active service and in times of war and penalties are increased.²⁰ Functions within the Swiss military justice system are carried out exclusively by military personnel.

14 Mindia Vashakmadze, *Guidebook: Understanding Military Justice*, Geneva Centre for the Democratic Control of Armed Forces 11 (2010), https://www.dcaf.ch/sites/default/files/publications/documents/Milit.Justice_Guidebook_ENG.pdf.

15 *Id* at 11.

16 Arnold, Robert. "Military Criminal Procedures and Judicial Guarantees: The Example of Switzerland". *Journal of International Criminal Justice*, Vol. 3, Issue 3, (pgs. 749-777). 2005.

17 Office of the Armed Forces Attorney General. "Principles of Military Criminal Law." *Office of the Armed Forces Attorney General*. Available at: <https://www.oa.admin.ch/en/militaerstrafverfahren/die-grundsaeetze-des-militaerstrafrechts.html>

18 Cotelea, Daniela, et al. "The Role of Military Courts Across Europe: A comparative Understanding of Military Justice Systems". *Finabel: European Army Interoperability Center*. 2021 Available at: <https://finabel.org/wp-content/uploads/2021/06/20.-The-role-of-Military-Courts-across-Europ.pdf>

19 Office of the Armed Forces Attorney General. "Principles of Military Criminal Law." *Office of the Armed Forces Attorney General*. Available at: <https://www.oa.admin.ch/en/militaerstrafverfahren/die-grundsaeetze-des-militaerstrafrechts.html>

20 *Ibid*

Finally, it must be noted that the military justice system does not merely consist of courtmartials. It also includes summary disciplinary proceedings. As the 2019 Yale Draft Principles for Military Summary Proceedings state, summary proceedings are “non-judicial proceedings conducted... by commanders or other officials who exercise disciplinary authority over military personnel.” Military commanders employ summary proceedings in order to “maintain the discipline of personnel under their command.”²¹ In recent years, military experts have focused increasingly on the reform of summary disciplinary proceedings, especially given the central role these proceedings play in various national military justice systems.²²

1.2 Principles of military justice

The provision of military justice must comply with the fundamental guarantees of internationally recognized human rights. To do so, a State’s military justice system has to be situated within the framework of the general principles for the proper administration of criminal justice: after all, a military justice system is a component of the State’s rule of law, and not distinct from it. Military justice should be “an integral part of the general judicial system.”²³ Given this understanding – that military justice is part of ordinary law – its operation must naturally follow the same precepts of the rule of law that generally govern criminal justice. In the early 2000s, in alignment with such an approach, the United Nations spearheaded an effort to articulate “principles governing the administration of justice through military tribunals.” Draft principles were first formerly articulated and presented to the United Nations Human Rights Council in 2006.

Known as the “Decaux Principles” after the United Nations Special Rapporteur who led their drafting, these aspirational principles cover the establishment of military tribunals, their jurisdiction, trial procedures, respect for human rights, review of military codes, and other aspects of military justice and its position within a State’s legal hierarchy.²⁴ The 20 draft principles have since been the subject of considerable comment by governments, experts and the European Court in cases

21 2019 Yale Draft Principles for Military Summary Proceedings 1 (2019), https://puc.overheid.nl/PUC/Handlers/DownloadBijlage.ashx?puqid=PUC_311298_11_1&bestand=Bijlage_bij_bijdrage_Tijd_om_het_militair_tuchtrecht_te_evalueren.pdf&bestandsnaam=Bijlage+bij+bijdrage+Tijd+om+het+militair+tuchtrece.pdf.

22 See e.g. Pascal Lévesque, *Frontline Justice: The Evolution and Reform of Summary Trials in the Canadian Armed Forces* (2020).

23 *Resolution adopted by the Human Rights Council 25/4, Integrity of the judicial system*, March 2014 A/HRC/RES/25/4 paras. 1-2. Available at: <https://www.right-docs.org/doc/a-hrc-res-25-4/> (“military tribunals, when they exist, must be an integral part of the general justice system and operate in accordance with human rights standards, including the right to a fair trial and due process of law guarantees”).

24 Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006), Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux to the UN Commission on Human Rights in 2006 [Decaux Principles]. Available at <http://www1.umn.edu/humanrts/instate/DecauxPrinciples.html>

concerning Ukraine and other States Parties.^{25 26 27}

Updated in 2018 by an international group of experts at Yale Law School in the United States (some of whom contributed to this publication), the “Yale Draft” of the Decaux Principles provides the most up-to-date recommended principles on military justice.²⁸ These comprehensive “Yale Draft” principles, 20 in total, reaffirm the limited authority of military courts, emphasize compliance with fair trial guarantees, clarify the scope of offenses that may be subject to military jurisdiction,²⁹ and *inter alia*, state that the objective of military justice is to **“contribute to the maintenance of military discipline inside the rule of law through the fair administration of justice.”**³⁰

These Yale Draft principles would be instructive if the Government of Ukraine and the Verkhovna Rada were inclined to re-establish military courts to prosecute Ukrainian military personnel within the framework of the national judicial system:³¹

- ❖ **Principle No. 1:** Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.
- ❖ **Principle No. 2:** Military tribunals must, in all circumstances, afford the fair trial rights guaranteed by the ICCPR, including Article 14. They must apply any other standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.
- ❖ **Principle No. 3:** In a State that has separate civilian and military courts, the civilian court has primary jurisdiction over all criminal offences committed by persons subject to military

25 Canadian Armed Forces, Judge Advocate General. “Draft Internal Report – Court Martial Comprehensive Review”. *Government of Canada*. 17 January 2018. Available at: <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/court-martial-comprehensive-review.html>

26 Schmid, Evelyne. “A Few Comments on a Comment: The UN Human Rights Committee’s General Comment No. 32 on Article 14 of the ICCPR and the Question of Civilians Tried by Military Court”. *14 Int’l J. Hum. Rgts.* 1058, 1065-66 & nn.59, 63-64. 2010. ; see also, Gibson, Michael R. “International Human Rights Law and the Administration of Justice Through Military Tribunals: Preserving Utility While Precluding Impunity”. *4 J. Int’l L. & Int’l Relns.* 1. 2008; see also, Fidell, Eugene R. “International Developments in Military Law”. *17 Can. Crim. L. Rev.* 83, 89-90. 2013.; see also, Fidell, Eugene R. “Military Justice: A Very Short Introduction”. *Oxford University Press*, 15-16, 71. 2016. ; Létourneau, Gilles, & Drapeau, Michael W. “Military Justice in Action: Annotated National Defence Legislation”, 2nd Edition. (pg.69). 2015.

27 *Ergin v Turkey (No 6)*, Application No. 47533/99, 4 May 2006, 24; see also, *Maszni v Romania*, Application No. 59892/00, 21 September 2006, 31; see also, *Mikhno v Ukraine*, Application No. 32514/12, 30 January 2017, 06; see also, *Atamanyuk v Ukraine*, Application Nos. 36314/06, 36285/06, 36290/06 & 36311/06, 1 September 2016, 108.

28 Decaux Principles Workshop: The Yale Draft (Yale Draft) (June 2018). Available at: <https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf> [hereinafter Yale Draft].

29 *Id.*, at Principle 3 (noting that military courts should only try crimes that have a “direct and substantial connection with that purpose,” for example, where the “offence is committed by one member of the armed forces against another or is alleged to have been committed in a defense establishment or in relation to military property.”)

30 *Id.*, at Principle 3.

31 Decaux Principles Workshop. “The Yale Draft”. *Yale Law School*. 2018. Available at: <https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf>

jurisdiction. The purpose of military courts is to contribute to the maintenance of military discipline inside the rule of law through the fair administration of justice. Military courts should only try cases that have a direct and substantial connection with that purpose, unless the accused is deployed overseas. In that case it would not be appropriate to subject him or her to the jurisdiction of the ordinary courts of the sending or receiving States.

- ❖ **Principle No. 4:** The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected as judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, *vis-à-vis* the military hierarchy. In no circumstances should military courts be allowed to resort to procedures involving anonymous or 'faceless' judges and prosecutors.
- ❖ **Principle No. 9:** With the exception of circumstances permitted by international humanitarian law, the jurisdiction of military courts should be set aside in favour of the jurisdiction of ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture. Persons accused of such crimes should be tried.
- ❖ **Principle No. 13:** As in matters of ordinary law, public hearings must be the rule, and the holding of sessions in camera should be altogether exceptional and be authorized by a specific, well-grounded decision the legality of which is subject to review.
- ❖ **Principle No. 14:** The exercise of the rights of the defence must be fully guaranteed in military courts under all circumstances. All judicial proceedings in military courts must offer the following guarantees:
 - Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law;
 - Every accused person must be informed promptly of the details of the offence with which he or she is charged and, before and during the trial, must be guaranteed all the rights and facilities necessary for his or her defence;
 - No one shall be punished for an offence except on the basis of individual criminal responsibility;
 - Everyone charged with a criminal offence shall have the right to be tried without undue delay and in his or her presence;
 - Everyone charged with a criminal offence shall have the right to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - No one can be compelled to testify against himself or herself or to confess guilt;
 - Everyone charged with a criminal offence shall have the right to examine, or have examined,

the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

- No statement or item of evidence which is established to have been obtained through torture, cruel, inhuman or degrading treatment or other serious violations of human rights or by illicit means may be invoked as evidence in the proceedings;
- Every accused person must have access to all materials that the prosecution plans to offer in court against the accused or that are exculpatory;
- Everyone convicted of a crime shall have the right to have his or her conviction and sentence reviewed by a higher tribunal according to law;
- Every person found guilty shall be informed, at the time of conviction, of his or her rights to judicial and other remedies and of the time limits for the exercise of those rights.

Many of these principles satisfy existing Ukrainian legal requirements, such as the procedural rights guaranteed by Articles 62 and 63 of the Constitution. Others reflect contemporary understandings of international human rights law, as developed under the ECHR and the ICCPR. The Principles at times overlap with one another (*e.g.*, Nos. 2 and 14).

1.2.1 Military Justice Values

Drawing on the Yale Draft of the Decaux Principles, international experts who contributed to this publication highlight seven important values that help govern the provision of military justice in addition to, or supporting, the articulated principles. These norms are: **respect for human rights and IHL, independence, accountability, professionalism, efficiency, reasonable military secrecy, and delineation of power and jurisdiction**. Greater specificity regarding individual military justice principles is found in the Yale Draft itself; these seven norms essentially undergird those more specific principles.

1. Respect for Human Rights and International Humanitarian Law (IHL): as noted in the Yale Draft of the Decaux Principles,³² military justice should be consistent with the protection of internationally recognized human rights (particularly due process and fair trial guarantees), as well as the dictates of IHL. This means that all persons subject to military justice must be treated in a fair and humane manner, and their rights respected. Military tribunals should always adhere to internationally accepted standards and procedures that ensure due process and a fair trial, including the rules of IHL in their relevant context; derogation, if any, can only be made in accordance with internationally accepted norms and IHL requirements. Military prisons must abide by international standards, such as the Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles for the Treatment of Prisoners, and the Body of Principles for the Protection

32 *Id.*, at Principle 2..

of All Persons under Any Form of Detention or Imprisonment.³³ These prisons should be open to inspection by both domestic and international bodies. Military police and military prosecution agencies must abide by laws, applied without bias and in compliance with international human rights principles.

2. Independence: military justice systems should be free from undue influence from political or higher military leadership, so military justice decision-making is transparent, evidence-based and follows clear principles. This norm includes the appointment of judges who are independent from any political or military bias. It also includes preventative measures to ensure that there is no political or higher military command interference during proceedings, including the initiation of proceedings. All military justice decisions should be made in accordance with established rules and regulations with no external or internal interference, by any parties including legislators.

3. Accountability: in the security sector, accountability can take many forms. This includes legal accountability, which requires that all individuals in the security sector are held to the same standard of law and that any violations of the law are punished accordingly. This can include financial accountability, which involves ensuring that all funds used within the security sector are properly tracked and accounted for. Furthermore, accountability may also include moral and ethical accountability: those working in the security sector are expected to adhere to the highest ethical standards. Accountability is essential in government for reasons of legitimacy and good governance. Accountability ensures that individuals are not able to act with impunity: that any violations of the law or ethical standards are properly addressed and that those responsible are held accountable. Accountability contributes to greater public trust in the relevant governmental institution, as it demonstrates that government personnel, be they military members or civilian defence ministry officials, are taking their roles seriously and are committed to protecting citizens from harm.

- Therefore, a State's military justice system must function in a way that is accountable to the public and to the law. In general this means that all decisions should be transparent and open to scrutiny. All military justice decisions should be subject to robust civilian oversight; any potential bias or conflict of interest should be avoided. Within a healthy military justice system, military personnel should be fairly and consistently held accountable for misconduct. Furthermore, military justice actors should be held accountable for their performance in their military justice roles. Finally, military decision-making should be transparent, with changes in policy or procedure communicated in a clear and timely manner to military members and the public.

33 United Nations, Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, available at: <https://www.refworld.org/docid/3ae6b36e8.html>
UN General Assembly, Basic Principles for the Treatment of Prisoners : resolution / adopted by the General Assembly, 28 March 1991, A/RES/45/111, available at: <https://www.refworld.org/docid/48abd5740.html>
UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly, 9 December 1988, A/RES/43/173, available at: <https://www.refworld.org/docid/3b00f219c.html>

4. Professionalism: professionalism – in the sense of training, expertise, competency, codes of ethics and rigorous standards of behaviour and accountability for breaches – is essential for the operation of a healthy, effective military justice system, just as professionalism is critical in military organizations in general. Military professionals should respect the human rights of both other military members, and of those they interact with, while institutionally subordinate to civilian control. Importantly, the concept of professionalism in the military justice realm should mirror the professional ethics of the civilian criminal justice system, given that military courts, in the word of the Yale Draft, are “an integral part of the general judicial system.” Military judges should be held to clear, transparent judicial ethics codes; as should lawyers working within the military justice system. Similarly, the influence of non-legal professionals on military justice – primarily commanders – needs to be strongly guarded against. Likewise legislators’ interest should be with the system in general, not with individual cases.

5. Efficiency, Evaluation, and Transparency: military justice should be conducted efficiently and effectively in compliance with fundamental fair trial guarantees. Military justice actors ought to strive to efficiently and effectively use public and financial resources to ensure the fairest and most equitable delivery of justice for all service members. Military justice institutions are responsible for compliance with all relevant laws and regulations, and should be tasked with developing and maintaining systems to track and measure the performance of the delivery of justice. This includes gathering data on the outcomes of cases, tracking trends, evaluating the effectiveness of their work, and making information relating to military justice institutions transparent to public and oversight bodies.

6. Reasonable Military Secrecy: military justice should be conducted with reasonable procedures to protect information that could harm national security. However, the rules that make it possible to protect classified military information should not be diverted from their original purpose in order to obstruct the course of justice or to violate human rights.³⁴ Military secrecy may be invoked, under the supervision of independent monitoring bodies, when it is strictly necessary to protect information concerning national defence, according to established procedures.

7. Delineation of power and jurisdiction: military justice has a limited jurisdiction. It should narrowly regulate the conduct of members of the armed forces and, in exceptional circumstances, civilians.³⁵ Civilians ought to be prosecuted for criminal offences near exclusively within ordinary civilian courts. Furthermore, ordinary civilian courts should “maintain primary jurisdiction over all criminal offenses committed by persons subject to military jurisdiction” – service members. Given that “[t]he purpose of military courts is to contribute to the maintenance of military discipline inside the rule of law through the fair administration of justice ... [m]ilitary courts should only try cases that have a direct and substantial connection with that purpose.”³⁶ However, military courts may

34 See Yale Draft, *supra* note 10, at Principle 10.

35 See Yale Draft, *supra* note 10, at Principle 6 (“Military courts have no jurisdiction to try civilians except where there are very exceptional circumstances and compelling reasons based on a clear and foreseeable legal basis.”)

36 *Id.*

try service members even without such a connection when there are compelling reasons to forgo civilian courts: for instance, during deployment overseas or otherwise during armed conflict when military necessity precludes the use of ordinary courts.

- Military justice institutions should ensure that their investigative and disciplinary competencies are clearly defined and that they do not unnecessarily overlap with other domestic investigative bodies and institutions such as the police, the judiciary, or government departments; if there is overlap, clear guidelines should be established to accord logical primacy.
- Military courts should not have jurisdiction over those under the age of 18 (unless a voluntary member of the services aged 15 to 18 as allowed by article 38 of the Convention on the Rights of the Child); all proceedings should strictly comply with guarantees provided in the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).
- Periodic and systematic reviews of the jurisdiction of military justice should be conducted in an impartial and open manner to ensure that the power of military tribunals only applies to essential situations and does not interfere with the jurisdiction of regular civil courts.
- With the exception of circumstances permitted by international humanitarian law, military courts ought not be involved in the investigation or trial of serious human rights violations. These might include extrajudicial executions, enforced disappearances, and torture. Instead, civilian courts should be granted jurisdiction to investigate and bring to trial those accused of such crimes.

1.3 Military justice benefits and risks

A healthy military justice system that accords due process and guarantees of fair trial rights can strengthen obedience to orders – hence good order and discipline – within a State’s armed forces. The most effective military justice systems are complemented by a parallel administrative disciplinary system that includes summary proceedings for acts of minor misconduct.³⁷ The synergy between the two systems helps ensure a well-ordered military organization, one whose compliance with international humanitarian law and the rule of law overall is maintained.

However, military justice is a “round peg in a square hole.” It is supposed to be an independent and impartial criminal justice system predicated on principled decision-making based on facts and evidence. This essential *modus operandi* of impartiality and independence is challenging to achieve. After all, a military justice system functions within a strictly hierarchical, command-driven organization that values obedience over critical thinking; indeed, military culture prizes

37 See 2019 Yale Draft Principles For Military Summary Proceedings. Available at: <https://drive.google.com/file/d/16T2kbTDGdVKXCjkrazns-aOLjdHoYex4/view>.

loyalty to mission and to unit above all else.³⁸ This fundamental tension between military justice's independent, impartial, and principled evaluation of facts through formalized procedure *versus* a command-centric military organizational culture, exists in every military justice system. It must be clearly recognized with both internal and external procedural safeguards.

1.3.1 Primary Benefits

CONTRIBUTION TO GOOD ORDER AND DISCIPLINE IN THE ARMED FORCES

Military justice, done correctly, provides just accountability mechanisms for substantive offenses that are unique to military forces, as well as for other offenses committed by service members which have a substantial connection to military service, or for which an ordinary civilian court is not feasible due to deployment or war. An effective military justice system therefore contributes to internal discipline hence the operational effectiveness of the armed forces by strengthening the critical dynamic of obedience to orders. It provides accountability for criminal misconduct, accountability which is absolutely vital for functional military effectiveness. This is particularly so when ordinary civilian courts are not able to provide such accountability.

Furthermore, military justice provides for the adjudication, by military triers of fact, of uniquely-military crimes (such as insubordination, dereliction of duty, malingering, failure to repair, etc.). Those judging the factual guilt or innocence of a service man or woman typically are other service men or service women, as opposed to civilian members of the public in ordinary courts. Military members are likely to better understand the context and seriousness of military-unique crimes, as well as of ordinary crimes committed within a military context (such as theft in a military barracks). While, of course, ordinary courts can effectively judge military-unique crimes as well – just as they do regarding charges of criminal dereliction against civilian law enforcement officials – there is a benefit to having members of one's community sit in judgment when it is that community's standards that have allegedly been violated. The outcome is likely more just, and the resultant deterrent effect of conviction is likely to be stronger.

Finally, within a military justice system, penalties imposed by military courts can be more varied and specific than in civilian courts. For instance, there is demotion, loss of military benefits, and discharge from service.

For example, the Romanian "Law of the Criminal Procedure Code" contains provisions ensuring that participants in military justice systems are of a certain rank or of certain experience levels. This guarantees that military court proceedings are conducted by individuals who know and who have experience with the Romanian military.³⁹

38 Samuel P. Huntington, *The Soldier and the State: The Theory and Practice of Civil-Military Relations* (Cambridge: Belknap Press, 1985), at 9. ("The military ethic is basically corporative in spirit.")

39 European Commission For Democracy Through Law (Venice Commission). "Romania Law on the Criminal Procedure Code". *Council of Europe*. 10 September 2018. Available at: [CDL-REF\(2018\)043-e \(coe.int\)](https://www.coe.int/t/doh/CDL-REF(2018)043-e_(coe.int))

EFFICIENCY

Nonjudicial summary proceedings – the disciplinary systems that supplement military justice systems – include swift procedures for minor offences and disciplinary misconducts. These kinds of minor infractions are disposed of quickly, thus keeping good order and discipline in a unit. Military justice proceedings, however, given that they must comply with due process and fair trial guarantees, are less expeditious than such summary, nonjudicial disciplinary proceedings. They can still, though, be more expedient than disposing of criminal charges within busy civilian courts.

REDUCING WORKLOAD FOR SOME INVESTIGATIVE BODIES

In many countries investigative bodies carry a tremendous workload, which in armed conflict only increases. Hence, creating a new military investigative body would relieve some of that workload. A military justice system also provides a way for members of the military to address grievances and disputes with military personnel and institutions as against using the civilian courts.

For example, in 2021, the UK Service Prosecuting Authority processed 601 requests for ‘pre-charge’ advice from Service Police. Consulting with the SPA and isolating military judicial activity allows for the public court system to move more efficiently, by reviewing fewer cases.⁴⁰

POTENTIAL CHALLENGES

Ensuring independence

Although in theory the principle of independence can be stipulated, in reality, it may be extremely difficult to ensure the full independence of all military justice decision-making from the military command. In contrast, judges from the ordinary courts and regular prosecutors are not subordinated to military hierarchy. It is important to ensure budgetary independence as well.

Today, there are cases being considered in the national courts regarding grave human rights violations committed by military members or by security forces. This had led to the impartiality of the military courts being questioned and questions as to whether grave human rights violations by service members should be transferred from military to civilian courts.⁴¹ However, particularly regarding war crimes, the deterrent effect of criminal prosecution may be best achieved through military courts.

For example, UK troops were allegedly involved in human rights abuses in Iraq in 2003 and later. In cases where it has been decided there was to be no prosecution the army/military police/

40 Ibid.

41 Vashakmadze, Mindia. “Understanding Military Justice”. Geneva Centre for Security Sector Governance (DCAF). 2010. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/Milit.Justice_Guidebook_ENG.pdf

government have been accused of politically motivated cover-ups.⁴²

Another example is found in Romanian law, which gives police officers accountable to the Military prosecutor a military-like status, thus escaping civilian control. When it comes to the accountability of Romanian police officers, the lack of impartiality on the part of prosecuting authorities has been criticised on various occasions.⁴³

Budgetary Constraints

The creation and establishment of any new institution/body envisages significant costs such as organizing selection procedures, trainings, purchasing equipment, new premises, etc.

For example, in Azerbaijan, Chairmen of the Military Grave Crimes Court get paid at a higher rate than most other court chairmen (80% of the Supreme Court Chairmen's wage compared to 60% for chairmen of other courts).⁴⁴

Ensuring due process

There is always a risk that shortened procedures can be abused and used as an excuse for non-compliance with all the necessary procedural rules. In this regard, it is important to cite Article 14 of the International Covenant on Civil and Political Rights which envisages the right to equality before courts and tribunals and to a fair trial. In its General Comments to this article, the UN Human Rights Committee has highlighted that the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military.⁴⁵

Overlapping competences

If there are multiple agencies with investigative functions, it is crucial to establish a clear delineation of tasks and competences. This takes some time and may require legislative amendments.

Jurisdictional challenges

It is of the utmost importance to establish clear scope and limits of military justice jurisdiction, namely who can be held liable for which kind of offences. When speaking about the scope of the military justice, the most controversial question is whether civilians can fall under the jurisdiction

42 Dahl, Arne Willy. "Independence, impartiality and competence of the judiciary, including military court". Presentation given at expert consultation organized by the Office of the UN High Commissioner for Human Right. 24 November 2014. Available at: https://www.ohchr.org/Documents/Issues/AdministrationJustice/Consultation2014/Arne_Willy_Dahl.ppt

43 Cotelea, Daniela, et al. "The Role of Military Courts Across Europe: A comparative Understanding of Military Justice Systems". *Finabel: European Army Interoperability Center*. 2021 Available at: <https://finabel.org/wp-content/uploads/2021/06/20.-The-role-of-Military-Courts-across-Europ.pdf>

44 "Law of the Republic of Azerbaijan on Courts and Judges". Council of Europe. March 2007. Available at: <https://rm.coe.int/ct-legislation-azerbaijan-courts-and-judges/16806415cb>

45 UN Human Rights Committee. "General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial". *UN Human Rights Committee*. 23 August 2007. Available at: <https://www.refworld.org/docid/478b2b2f2.html>

of military justice. There is no universally accepted approach here. There is no direct prohibition on including civilians in the military jurisdiction in any international legislation. Their international human rights law is increasingly supporting the exclusion of civilians from military jurisdiction, even in cases of emergency.⁴⁶ The UN Principles Governing the Administration of Justice through Military Tribunals stipulate that in no case should minors be placed under the jurisdiction of military courts (Principle 7) and that conscientious objector status should be determined by the civil court (Principle 6).⁴⁷

UN Human Rights Committee has established:

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.⁴⁸

In the case of *Ergin v. Turkey* (No. 6), the European Court of Human Rights (ECHR) found a violation of Article 6 of the European Convention on Human Rights (right to a fair trial).⁴⁹ Ahmet Ergin, a Turkish national, was a newspaper editor and despite being a civilian, he was tried by the military court as he was charged with incitement for publication of an article that allegedly encouraged his readers to evade military service. The ECHR established that the applicant's doubts about the independence and impartiality of the military court were objectively justified. Among the member States of the Council of Europe, Turkey is the only country whose Constitution explicitly provides that military courts may try civilians in peacetime.

Public opinion

The creation of separate institutions that have special status and internal procedures may have a negative impact on public opinion and create doubts regarding the transparency and independence of such institutions.

46 Vashakmadze, Mindia. "Understanding Military Justice". Geneva Centre for Security Sector Governance (DCAF). 2010. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/Milit.Justice_Guidebook_ENG.pdf

47 UN Commission on Human Rights (Sixty-second session). "Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity. Issue of the administration of justice through military tribunals". *United Nations*. 13 January 2006. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/77/PDF/G0610677.pdf?OpenElement>

48 UN Human Rights Committee. "General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial". *UN Human Rights Committee*. 23 August 2007. Available at: <https://www.refworld.org/docid/478b2b2f2.html>

49 *Ergin v. Turkey* (no.6) – 47533/99. *European Court of Human Rights*. May 2006. Available at: <https://hudoc.echr.coe.int/fre#%22itemid%22:%22002-3322%22>

2. MILITARY POLICING AND MILITARY DISCIPLINARY INVESTIGATIONS

This section addresses challenges and options for the development of a more robust military policing capacity that would include the requirement to conduct pre-trial investigations. It adopts a broad approach to the issues, including the contemplation of options beyond what might be construed narrowly as military police to include investigative functions for the maintenance of discipline, efficiency, and the morale of Ukraine's armed forces. Consequently, the term 'military policing' should be viewed as encompassing not solely uniformed military police who are part of the Ukrainian Defence Forces, but the roles involved in policing the armed forces of Ukraine.

We employ here the terms 'disciplinary code' to refer to an armed forces' legislated disciplinary regime (its military justice system) and 'criminal code' to refer to the civil penal, that is, civilian criminal justice regime. Military justice disciplinary regimes typically consist of penal codes which provide for uniquely military crimes, such as insubordination; some nation's military penal codes also incorporate non-military-unique crimes such as burglary, murder, etc. Regimes of this kind typically also provide for summary, non-judicial (and non-criminal) disciplinary mechanisms for minor offenses.

2.1 The evolution of military policing

Military policing, as it is understood in modern armed forces, is a relatively recent phenomenon. The antecedents of military police in many Western democracies are historic Provost Marshals or Provost Corps, with narrower scopes than modern military police.

The development of Military Provosts under commanders such as Arthur Wellesley, the Duke of Wellington, are illustrative of these origins. The role of Wellington's Provost Marshals was to aid commanders in maintaining discipline in field forces deployed outside the borders of their nation or during the conduct of armed conflicts. In the 18th and 19th Centuries, they had a limited, if any, role within the borders of the nation from which the armed forces were drawn.

In the 18th, 19th, and even the early 20th century, many democratic nations, when presented with exceptional circumstances, relied upon their armed forces to augment domestic law enforcement or policing activities. Some of these circumstances gave rise to the controversial uses of armed

forces.⁵⁰ Many of those nations still have provisions in legislation relating to the control and administration of their armed forces that permits the use of armed forces in 'Aid of the Civil Power' particularly in times of domestic emergency.⁵¹

Military policing up to the 20th century focused generally on two broad and interrelated objectives, which were also reflected in the military disciplinary codes: (a) maintaining a disciplined force (often referred to as "the maintenance of good order and discipline"); and (b) ensuring compliance with the laws of war.

The jurisdiction of disciplinary codes has traditionally been limited in scope. Typically, disciplinary codes did not extend to criminal misconduct by members of the military arising within the territory of the state, outside of crimes that were unique to the military. The military disciplinary code would be domestically applied to minor breaches of non-criminal misconduct that were detrimental to good order and discipline, as well as to more serious misconduct that constituted unique military crimes such as the failure to obey and mutiny. Disciplinary codes originally were primarily designed, out of necessity, for use during an armed conflict or circumstances in which the armed forces were deployed outside state borders. Hence there was a divide between war time and deployed conditions, and peacetime or where military forces are not deployed outside state borders: the latter demonstrated the precedence of civil jurisdiction over criminal justice. During peacetime, despite the primacy of civilian justice systems, residual exercise of jurisdiction under disciplinary codes remained for military disciplinary matters.

Such distinctions were not universal across Western democratic states, nor were they always consistently applied within individual states. By the 20th century, a doctrine of 'military nexus' or 'military connection' began to emerge in certain countries. Generally, this doctrine established that military personnel alleged to have contravened a state's criminal code could (or would) be tried within the disciplinary code if the misconduct, including civil crimes, was connected to the accused's military service.

In Anglo Common Law states, this doctrine was not applied consistently, and, in recent years, appellate and apex courts have eliminated the requirement for a military nexus or connection to justify reliance on a disciplinary code during peacetime and within the territorial boundaries of the state. In such states, disciplinary codes enjoy parallel jurisdictions where the decision to proceed before either a civil court of criminal jurisdiction or a military tribunal is the subject of relatively broad discretion by state actors. Nevertheless, there may be sub-national, regional, or local agreements or arrangements between military and civil authorities regarding the primacy of investigation or prosecution where a matter falls within concurrent jurisdiction.

In this respect Anglo military justice is different from Continental European civil law systems, which have increasingly restricted the use of their military disciplinary codes to circumstances arising in deployed operations or armed conflicts. This gives rise to two general schools of thought regarding

50 Alexander, Fran, et al. "Encyclopedia of World History". *Oxford University Press*. (pgs. 520-521,671). 1998.

51 See, The Insurrection Act, Ch. 13, 10 U.S.C. §§ 251-255 (2016); see also, National Defence Act, R.S.C.1985, c N-5 (Can.); see also, Emergencies Act, R.S.C. 1985, c P. 22 (Can.)

the application of military disciplinary codes: the 'expansive approach' of the Anglo Common Law states and the 'restrictive approach' of Continental Civil Law states.

This distinction influences the roles and functions of military police in those states. In both circumstances, military police perform what may be viewed as 'traditional' military police activities: (a) force protection; (b) securing and transporting prisoners of war (PW); (c) control of route circulation; and (d) the investigation of minor breaches of discipline. During armed conflicts or deployments outside the state the military police from both traditions will perform investigative functions not only of breaches of discipline, but also of serious or criminal misconduct. Particular attention is paid to breaches of international humanitarian law.

As a distinguishing feature, where the expansive approach is applied, military police will also typically have a robust capacity for investigations of criminal misconduct during peacetime and within state borders .

2.2 Advantages and disadvantages

Each of the approaches has advantages and disadvantages. **The restrictive approach of the Continental European states provides for the unambiguous primacy of the civil criminal justice system.** Military personnel are subject to the same criminal justice system as other citizens or residents of the state, and the disciplinary code is limited to minor, non-criminal breaches of discipline during peacetime and within the state. The broader application of the disciplinary code is limited to armed conflict and analogous circumstances in which the maintenance of discipline has more a profound impact.

However, these kinds of limitations can restrict the development of skill sets among disciplinary actors, including the military police, and can potentially reduce the effectiveness of the disciplinary code. **In Common Law states, the expansive application of military justice during peacetime and domestic operations enhances the development of skills by military justice actors. It can lead to a more robust understanding of the disciplinary code while contributing to 'good order and discipline' in military personnel through the consistent application of the disciplinary code.**

The expansive approach, though, gives rise to 'shared' jurisdiction with the civil criminal justice system, which can lead to confusion or to the arbitrary selection of the justice regime that will be applied in a given circumstance. This can create inefficiencies and inequity if the exercise of discretion is inconsistent, or if clear agreements or arrangements are lacking as to jurisdictional primacy. The consequent impact on military policing is comparable.

2.3 Roles and functions of military police

Notwithstanding their evolution over the past three centuries, the roles and functions of military police today remain relatively consistent: (a) force protection; (b) safeguarding and transporting PW; (c) circulation control; and, (d) investigation of misconduct by members of the military. This brief will focus principally on the last of these functions. The first three functions are consistent in both the expansive and restrictive approaches. The last of the functions varies between those approaches.

In this section we expressly exclude the investigative functions of other bodies that do not play a direct role in the investigation of disciplinary or criminal wrongdoing by military members. For example, this briefing does not include the role and functions of: (a) Inspectors General or Ombudspersons; (b) grievance processes; (c) safety and mishap investigations; or (d) administrative boards of inquiry. There can be overlap between these investigative functions and that of military police. This overlap can often require: legislation; policy identifying priority; or precedence of various investigative organizations and delineation of responsibilities. These are necessary in order to avoid conflicting roles, and to clarify the admissibility of other investigations in the military adjudicative processes. For example, the findings of safety investigations are precluded from use in subsequent or simultaneous law enforcement investigations given the differing purpose and the need for expeditious information for safety objectives.

This part will include a discussion of professional military criminal investigative organizations that exist within some modern armed forces, distinct from the military police, and that have been assigned the duty to investigate serious crimes. Additional discussion includes that of investigations conducted by non-investigative professionals; these fall under command authority and are described within the Additional Protocols to the Geneva Conventions in particular for the investigation of battlefield criminality; they are outlined below given their common use in some modern militaries for incidents including but not limited to battlefield incidents.

2.4 Oversight

One modern development in military policing are robust oversight mechanisms for military policing functions. Civil control of the military is a common principle among democratic governments. Oversight of the armed forces, including military policing functions, is typically vested with the executive – a representative of sovereign state power – and exercised through a Minister or Secretary of Defense. Legislatures have varying levels of influence over armed forces. This influence is often exercised through the enactment of principal legislation governing the control and administration of the armed forces and the financing of the armed forces through budgetary measures.

Military policing has increasingly been subject to more enhanced oversight mechanisms. This is particularly true in Anglo Common Law states that employ an expansive approach to military

discipline, where disciplinary codes share concurrent jurisdiction with criminal codes. When military police perform roles and functions analogous to civil police, often with concurrent jurisdiction, they have increasingly been subject to analogous oversight mechanisms. These mechanisms offer limited accountability frameworks similar to those applied to civil law enforcement.

Military legal advisors – typically uniformed lawyers who are part of a legal service organization within the armed forces – can play a significant role in military disciplinary investigations. They provide guidance and advice on governing legal paradigms, evidentiary issues, search and seizure, elements of crime, etc. The level of involvement of military legal advisors varies. The involvement of military legal advisors can mitigate against the shortcomings of inexperienced investigators. This is particularly true in command-directed investigations conducted by personnel whose primary function is not investigation.

In this role, military legal advisors structurally serve as a check on investigators. They help ensure effective, comprehensive investigations that meet the relevant principles of law and procedure. Best practice seemingly indicates that frequent involvement by trained legal advisors, starting as early as possible in investigative stages, yields the best investigative results; ‘best’ here for thoroughness and compliance with relevant human rights and domestic law.

2.5 Investigative Modalities

In many states, the investigative jurisdiction of military police extends to civilian contractors, civilian family members, other civilians present on military installations, and civilians accompanying armed forces in extra-territorial operations. Civilian law enforcement investigations, are governed exclusively by international human rights and domestic law. Military investigations, on the other hand, are governed by those same legal paradigms but also by international humanitarian law during times of armed conflict and occupation. Consequently, military investigations can be employed to address a broader scope and scale of circumstances. While external civilian law enforcement investigations focus exclusively on incidents of criminality, military investigations also include non-criminal disciplinary infractions (as well as training accidents, safety mishaps, etc., that are outside the scope of this paper).

Almost all modern militaries include non-judicial, administrative disciplinary measures and proceedings for responding to minor, non-criminal military misconduct (see, for example, the Danish military justice system).⁵² Some militaries incorporate the most serious of these measures into their disciplinary codes, particularly those that can result in sanctions involving limited deprivation of liberty and property: for example, restrictions to base, demotion and reduction in rank. Others have separate administrative regimes distinct from their disciplinary codes. Some states, including Canada, have similar regimes both within, and distinct from, their disciplinary codes.

52 “The Danish Military Justice System”. *Danish Ministry of Defence*. 2020. Available at: <https://www.fauk.dk/globalassets/fauk/dokumenter/2020/-the-danish-military-justice-system-2020-.pdf>

While separate from criminal investigations and criminal prosecutions, these kinds of disciplinary (and administrative) proceedings support the same objective as military criminal proceedings: the strengthening of good order and discipline within the ranks and justice for victims and perpetrators. There is potential overlap between allegations of minor disciplinary infractions (typically investigated and adjudicated by military commanders and supervisors), and more serious criminal misconduct (generally investigated by military police or military criminal investigative organizations, and adjudicated before courts martial or similar tribunals). It is, therefore, vital that legislation must clearly identify which investigative entities have priority and authority for each type of incident and allegation. It should also be clear which decision-maker has the authority for the ultimate disposition (such as criminal prosecution, summary disciplinary proceeding, no action). A distinction between disciplinary/administrative versus criminal proceedings must be made. When there is conflict as to who possesses investigative and dispositional priority, the modern trend has been for the ultimate decision-maker to be within the ministry of defence but outside of the chain of command (see, for example, the Danish model).⁵³ However, this trend is not universal.

The general principles guiding investigations under international human rights law and international humanitarian law are usually considered to be the same.⁵⁴ Under both bodies of law, “effective” investigations are required following credible allegations of criminal misconduct. The description of the relevant threshold may vary between states – e.g., ‘reasonable basis,’ ‘credible’ allegations, ‘actual and reasonable suspicion’, etc. However, effective investigations are generally defined as meeting the following principles:

- ❖ independence;
- ❖ impartiality;
- ❖ thoroughness
- ❖ promptness; and,
- ❖ transparency.⁵⁵

While military investigations can, and should, adhere to these principles, particular care must be taken in their overall organization, structure, and operation to ensure adequate investigative independence and impartiality. These attributes are most often of concern for military investigations.

While governed by the same basic principles, investigations into alleged misconduct that are conducted within militaries often differ from those conducted by civilian law enforcement agencies.

53 *Ibid.*

54 “Second Report – The Turkel Commission. Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law”. *The Public Commission to Examine the Maritime Incident of 31 May 2010*. February 2013. Available at: https://hamoked.org/files/2013/1157610_eng.pdf; see also, Schmitt, Michael N. “Investigating Violations of International Law in Armed Conflict”. *Harvard National Security Journal*, Volume 2. 2011. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1683980

55 Simmons, Claire. ‘Whose perception of justice? Real and perceived challenges to military investigations in armed conflict,’ *International Review of the Red Cross*. December 2021. Available at: <https://international-review.icrc.org/articles/military-investigations-in-armed-conflict-914>

This is true both in terms of the personnel involved and in terms of investigative complexity. An important issue with personnel relates to the independence of investigations. A common perception that the military is, in effect, ‘investigating its own’ can cast doubt upon impartiality. This is particularly relevant in command-directed administrative investigations. These may involve members of the same unit, with little to no investigative experience, investigating other members based on regulatory guidance.

These may be usefully compared with investigations conducted by trained military police and military criminal investigative organizations, with (in some militaries) both uniformed and civilian professional investigators. While investigative independence is an important factor for effective, impartial, and comprehensive investigations, other contributing factors include robust selection and recruiting criteria, continual training, and the accumulation of experience by personnel whose principal functions include criminal and disciplinary investigation.

In some militaries, such as that of the United States, senior commanders have had a great deal of discretion in deciding the appropriate level and modality of investigation; however, discretion has been increasingly limited by statute and regulation, with the professionalization and structural independence of investigations (as well as prosecutions). In other Common Law jurisdictions, such as Canada, that discretion has been fettered or removed for allegations of serious criminal misconduct. In many Continental systems, commanders have limited discretion in relation to allegations of criminal misconduct.

As mentioned above, within the disciplinary context, there are a wide range of military investigative modalities. At one end of the spectrum we have what may be described as regulatory, command-directed investigations – for minor or relatively uncomplicated matters – ordered by unit commanders and conducted by non-law-enforcement service members (members of the commander’s unit who are diverted from their usual tasks to conduct said investigation). At the other end there are criminal law enforcement investigations conducted by trained military police or professional military criminal investigative organizations.

Additionally, some militaries provide for formal courts of inquiry or boards of inquiry within their penal codes specifically, or military legislation generally.^{56 57} These *ad hoc* tribunals (which are not prosecutorial *fora*), are convened by senior ranking commanders. They consist of military officers specifically tasked with inquiring into particular incidents, especially those of significant international magnitude or of importance to the armed forces.⁵⁸ In some jurisdictions, such as the United States, these are increasingly rare; however, in other Common Law jurisdictions such as Canada and Australia, these continue to be used relatively frequently (though not as frequently as

56 United States Code. 10 USC 935: Art. 135. Courts of Inquiry. Available at: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title10-section935&num=0&edition=prelim>

57 Canadian Department of National Defence. “Volume I – Chapter 21 – Table of Contents Summary Investigations and Boards of Inquiry”. *Government of Canada*. November 2017. Available at: <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/queens-regulations-orders/vol-1-administration/ch-21-summary-investigations-boards-inquiry/table-contents.html>

58 “Navy to Launch Court of Inquiry”. *ABC News*. 19 February 2001. Available at: <https://abcnews.go.com/US/story?id=94046&page=1>

their respective disciplinary processes). These tribunals possess investigative powers such as the authority to subpoena witnesses, including civilian witnesses, and to compel documentary evidence, refusal of which can be punished under ordinary law. In some jurisdictions these tribunals may have a powerful legitimacy given the senior rank of those appointed to preside. However, in other jurisdictions, critics have alleged that the military is investigating itself.

The first modality outlined above, regulatory (termed 'administrative' in the United States) command-directed investigations, are employed by some armed forces to identify root causes of non-criminal incidents. This includes loss of property, as well as minor disciplinary infractions. Some militaries, such as Canada's, draw a clear distinction between disciplinary investigations, including investigations into allegations of misconduct, and purely administrative investigations that do not involve blameworthy conduct.

Some militaries, like that of the United States, also rely on such command-directed regulatory procedures to investigate incidents that could lead to criminal prosecutions. Examples here might include investigations into civilian casualties caused by battlefield operations, as well as investigations into sexual harassment claims within military units (see below for investigations into alleged war crimes).⁵⁹ Criticisms over the lack of independence and impartiality of such command-directed, regulatory investigatory procedures for sexual misconduct within units recently led to legislative change in the United States. Congress mandated that all sexual harassment allegations be subject to independent investigations appointed by commanders outside the specific unit. Years of sexual assault scandals within the U.S. military led to the statutory requirement that all sexual assault allegations (distinct from sexual harassment, which is also a crime within the American military penal code) be investigated exclusively by professional military criminal investigative organizations (MCIOs). Command-directed regulatory investigations were no longer acceptable for sexual assault.

In the United States, which arguably employs the most expansive approach to military criminal jurisdiction among western nations, the law enforcement investigative function in its armed forces is shared by the military police (led by service provost marshals), and MCIOs, with primacy granted to MCIOs for serious offenses. MCIOs are statutorily tasked with investigating all felony-level offenses (i.e., serious offences carrying potential punishment of over a year's imprisonment) allegedly committed by service members. MCIOs also conduct other tasks such as counterintelligence.⁶⁰ Military police investigate allegations of non-felony criminal misconduct as well as, at times, purely non-criminal disciplinary offenses.⁶¹

Examples of structural independence: U.S. MCIOs reporting structures vary from service to service.

59 "In Search of Answers: US Military Investigations and Civilian Harm". *Center for Civilians in Conflict and Columbia Law School Human Rights Institute*. Available at: https://civiliansinconflict.org/wp-content/uploads/2021/10/In-Search-of-Answers-Report_Amended.pdf

60 "Army Regulation 195-2, Criminal Investigation Activities". *Headquarters Department of the US Army*. (1-8a). 2020. Available at: https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN30062-AR_195-2-000-WEB-1.pdf.

61 "32 CFR § 637.4 – Military Police and the USACIDC". *Cornell Law School Legal Information Institute*. 2023. Available at: <https://www.law.cornell.edu/cfr/text/32/637.4>

But all are independent, to varying degrees, from the military chain of command. For example, until 2021, the U.S. Army's MCIO agency was led by the Army's provost marshal general (who doubled as both provost marshal and commander of the MCIO), and he reported to both the Army Chief of Staff and the civilian Army Secretary. However, due to significant flaws with this structure, the Army's MCIO has now been separated from the provost marshal general's control. It is led by a civilian who reports directly to the civilian Army undersecretary.⁶² The U.S. Air Force MCIO reports to the Air Force's military Inspector General, a uniformed officer who, in turn, reports to the civilian Air Force secretary, making the Air Force's Office of Special Investigations seemingly independent from the uniformed chain of command, as with the Army.⁶³

Most modern military police units are directed by provost marshals (or officers with similar titles). They enjoy a degree of institutional independence insofar as military police tend to report to senior military police, and provost marshals typically report to very senior commanders in the chain of command (e.g., the Chief of Staff of a service). In some cases, such as in the U.S. Army, the provost marshal reports directly to a civilian minister.

In some armed services, military police are tasked with investigating minor crimes (such as in the U.S. military). In others, such as, for example, the Danish military, a completely separate Military Prosecution Service (MPS) is tasked with the investigation of all military offences, plus civilian offences with a military nexus, that have been allegedly committed by servicemen or women.⁶⁴ Danish MPS, mostly servicemen or women, report directly to the Minister of Defence and hence is wholly independent from the chain of command. The MPS also makes prosecutorial decisions regarding personnel and offences over which it has jurisdiction, and ensures that relevant cases prosecuted in the civilian court system.

In Canada, whose armed forces are unified into a single 'service', all military police are under the command of the Canadian Forces Provost Marshal (CFPM). Military police must complete their training to receive military police credentials.⁶⁵ Credentialed military police have the status and powers of peace officers. But they do so only in relation to persons subject to the Code of Service Discipline and in relation to the protection of defence establishments.⁶⁶

The CFPM reports to the Vice Chief of the Defence Staff (VCDS), the second highest ranking officer in the Canadian Forces: the only officer with greater seniority is the Chief of the Defence Staff (CDS). While the CFPM does not enjoy the same institutional separation as the Danish MPS,

62 Thayer, Rose. "Army CID will cede oversight to a civilian director in a major reform of the agency". *Stars and Stripes*. 2021. Available at: <https://www.stripes.com/branches/army/army-cid-will-cede-oversight-to-a-civilian-director-in-a-major-reform-of-the-agency-1.672507>

63 "Office of Special Investigations". *United States Air Force*. Available at: <https://www.osi.af.mil/About/Fact-Sheets/Display/Article/349945/office-of-special-investigations/>

64 "The Danish Military Justice System". *Danish Ministry of Defence*. 2020. Available at: <https://www.fauk.dk/globalassets/fauk/dokumenter/2020/the-danish-military-justice-system-2020-.pdf>

65 National Defence Act (R.S.C., 1985, c. N-5). *Canadian Government*. 1985. Available at: <https://www.laws-lois.justice.gc.ca/eng/acts/N-5/>

66 *Ibid.*

Canada's *National Defence Act* defines the CFPM's tenure, powers, duties and functions.⁶⁷ The CFPM acts under the general supervision of the VCDS; the VCDS may issue general instructions or guidelines in respect of the CFPM's responsibilities, and these must generally be available to the public.

The CFPM commands the formation to which military police are assigned, and designates provost marshals to support the various Commands within the CF. The CFPM also exercises command over the Canadian Forces National Investigation Service (CFNIS). The CFNIS is responsible for the investigation of allegations of serious criminal or disciplinary misconduct and sensitive investigations (which include allegations against senior officers). Less serious criminal or disciplinary investigations are investigated by the military police assigned to the relevant Command. CFNIS investigators determine whether they are responsible for a given matter. CFNIS personnel may lay charges in relation to offences defined under the Code of Service Discipline.⁶⁸

Alleged disciplinary misconduct in the Canadian Armed Forces can also be investigated by unit leadership. Where criminal misconduct is alleged, unit leadership must consult their local military police detachment. Where, instead, military police choose to investigate a matter, their investigative jurisdiction will have primacy. However, military police outside the CFNIS do not have the authority to bring charges under the Code of Service Discipline. Investigations conducted by 'local' military police will be referred to unit leadership for disposition.

Military legal services are provided to the Canadian Forces by the Judge Advocate General (JAG) who commands the Office of the JAG (OJAG). The JAG is appointed by the Governor in Council (i.e., the federal cabinet) and reports to the MND, to whom the JAG is responsible for the superintendence of military justice. All military legal advisors are posted to the OJAG. Although part of the Canadian Forces, the OJAG lies outside the chain of command, much as does the Israel Defence Force Military Advocate General.⁶⁹ This differs from their U.S. counterparts, who report to their respective service chiefs.

The OJAG includes the Canadian Military Prosecution Service (CMPS), supervised by the Director of Military Prosecutions (DMP). The CFNIS receives legal advice from the CMPS. DMP is appointed by the MND and enjoys limited independence by virtue of statutory provisions relating to appointment, tenure, and removal. The JAG may issue general direction to the DMP, and this direction must typically be made available to the public. The JAG may also issue direction regarding a specific prosecution, which must be put down in writing.

The OJAG also included Defence Counsel Services. Military defence counsel report to Director of Defence Counsel Services (DDCS) who enjoys, much as the DMP, limited institutional

67 National Defence Act (R.S.C., 1985, c. N-5), Part III: Code of Service Discipline. *Canadian Government*. 1985. Available at: <https://www.laws-lois.justice.gc.ca/eng/acts/N-5/>

68 National Defence Act (R.S.C., 1985, c. N-5), Part III: Code of Service Discipline. *Canadian Government*. 1985. Available at: <https://www.laws-lois.justice.gc.ca/eng/acts/N-5/>

69 "About the MAG Corps". Military Advocate General's Corps. 30 December 2021. Available at: <https://www.idf.il/en/mini-sites/military-advocate-general-s-corps/about-the-mag-corps/>

independence. The defence counsel take instructions solely from their clients, namely military personnel facing courts martial.

It should be noted that regardless of the model adopted, interagency cooperation between military investigative agencies and domestic civilian law enforcement agencies is necessary for effective military policing. The scope, nature, and process for this kind of co-operation should be clearly outlined in legislation, policy, and supporting agreements. This is particularly vital where there is a clear overlap in jurisdiction. Similarly, agreements regarding data-sharing processes should be articulated in policy, amplifying any legislative constraints or powers. Finally, where there is concurrent prosecutorial jurisdiction, military policing will be influenced by any agreements between prosecutorial agencies. Military police (and civilian police) should be consulted in the development of relevant policies and agreements.

2.6 Battlefield Crime

No particular investigative modality is required for battlefield criminality. But there is a legal duty on the part of states to investigate all credible allegations of violations of international humanitarian law: the laws and customs of war applicable during armed conflict. These include both war crimes (grave breaches of the Geneva Conventions, as well as other serious violations of international humanitarian law).⁷⁰ International humanitarian law and international human rights law require the same principles of effective investigation into alleged criminality: namely, thoroughness, independence, impartiality, promptness, and transparency. However, the methods by which these principles are operationalized for battlefield criminality is measured by reasonableness. The investigation of battlefield conduct often involves unique challenges, from the preservation of evidence, to chain of custody issues, to the availability of witnesses for interview, etc.⁷¹

The Geneva Conventions, their protocols and customary international law give ultimate responsibility to military commanders for ensuring violations of the laws of war are effectively investigated.⁷² This placement recognizes that professional law enforcement resources may not be sufficiently on hand in the midst of combat operations. Hence unit commanders may need to act “like an investigating magistrate”.⁷³ This means that regulatory, command-directed investigative protocols may often be utilized for such investigations, especially in the preliminary stages. A leading study

70 “Customary IHL – Practice”. *International Committee of the Red Cross*. Available at: <https://ihl-databases.icrc.org/en/customary-ihl/v2>

71 Schmitt, Michael N. “Investigating Violations of International Law in Armed Conflict”. *Harvard National Security Journal*, Volume 2. 2011. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1683980

72 UN OHCHR. “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)”. *United Nations*. 8 June 1977. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and>

73 *Ibid.*

notes that in four developed western militaries under examination, military law enforcement entities outside the chain of command are consistently involved when sufficient evidence of serious violations of the laws and customs of war is uncovered.⁷⁴ Furthermore, the International Committee of the Red Cross' guidelines on investigations, while noting that many militaries continue to allow unit commanders to investigate allegations of war crimes, recommends that “[s]tates must have a law enforcement agency outside the chain of command (e.g., the military or civilian police), that conducts investigations into suspected war crimes committed by members of the armed forces in order for criminal investigations to be independent and impartial and be seen as such”.⁷⁵

74 Schmitt, Michael N. “Investigating Violations of International Law in Armed Conflict”. *Harvard National Security Journal*, Volume 2. 2011. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1683980

75 “Guidelines on investigating violations of IHL; Law, policy and good practice”. *International Committee of the Red Cross*. 16 September 2019. Available at: <https://www.icrc.org/en/document/guidelines-investigating-violations-ihl-law-policy-and-good-practice>

3. OPTIONS FOR THE PROSECUTION OF MILITARY OFFENSES

3.1 Principles and Functions

The prosecutor occupies a unique role in the justice system; as the Supreme Court of Canada has affirmed, “It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the [state] considers to be credible evidence relevant to what is alleged to be a crime.”⁷⁶ The role of prosecutors depends on whether a jurisdiction follows the adversarial, common law model, or the inquisitorial, civil law one.⁷⁷ In criminal justice systems that follow the adversarial model, prosecutors function by: (1) deciding what criminal cases are worth pursuing; and (2) by litigating those cases. The first function—the use of discretion—flows primarily from a recognition that scarcity of resources will always require a criminal justice system to allow some, or even many, offenses to go unpunished. Discretion in prosecution is also valuable in that it allows for individualized decision-making when applying general rules to particular cases. In this way it avoids absurd or unjust results not anticipated by legislators. The second function—litigation—involves the investigation of offenses deemed worthy of prosecution, and then the pursuit of conviction either by plea or in court in a contested case. Due to both these functions, prosecutors must be legally trained and be able to advance arguments relating to various topics, particularly search and seizure law, due process requirements, the law of evidence, and substantive criminal law.

The prosecution’s function in military justice is quite similar. Many Western democracies use uniformed military prosecutors, who are legally trained and independent from the military chain of command, to both exercise discretion and to litigate. A notable exception to the general Western trend is that of the United States, which still permits a non-lawyer senior military commander to possess prosecutorial authority over most offenses committed by service-members. This should be seen as a deviation from accepted practice in Western democracies, and has engendered claims that

76 *Boucher v. the Queen*, [1955] S.C.R. 16, at 23-24 (Can.). Available at: <https://www.canlii.org/en/ca/scc/doc/1954/1954canlii3/1954canlii3.html>

77 Ligeti, Katalin. “The Place of the Prosecutor in Common Law and Civil Law Jurisdictions”. *The Oxford Handbook of Criminal Process*. (pgs. 139-163). 11 February 2019. Available at: <https://academic.oup.com/edited-volume/28221/chapter-abstract/213247878?redirectedFrom=fulltext>

the U.S. system is noncompliant with international law.⁷⁸ There are no compelling arguments in favor of retaining an outdated system.⁷⁹ After a nearly eight-year long debate in the U.S. Congress, a number of offenses were removed from commanders' discretion in 2021; there is pending legislation to add to this number. Ukraine should avoid making the mistake that the United States made by retaining an archaic, commander-operated military justice system. It should, instead, join the large number of NATO allies who have abandoned it.⁸⁰

Beyond the discretionary and litigation function a less appreciated role of prosecutors is that of investigator. There is often a greater emphasis in the military than in the civilian context due to the unique circumstances of military missions: unlike ordinary crime, which occurs within a framework of well-established civilian investigative expertise and competence, military forces often work in peacekeeping and combat situations where processes are upended. The military prosecutor must develop ways to gather evidence in the unique (and often dangerous) military context. Witness access may be challenging or non-existent, and the simplest tasks are made difficult because of the unique circumstances of combat. The military prosecutor's assistance with criminal investigations also means guarding against the spoliation and suppression of evidence by interested parties.⁸¹

Underlying the investigative, discretionary, and litigative functions is a need for the professional independence of military prosecutors; as with civilian prosecutors, independence (as well as impartiality and accountability) are essential for justice.⁸² This includes independence from commanders, but also independence from political influences. Criminal justice is always vulnerable to politicization, with sensational cases becoming flashpoints for larger debates.⁸³ This has been especially true of military cases, where the politics of war overshadow what an individual defendant may or may not have done. Observers will recall presidential involvement and commentary on the American case of Bowe Bergdahl, and in Canada, that of the former Guantanamo detainee Omar

78 International Covenant on Civil and Political Rights, Dec. 16 1966, 999 U.N.T.S. 171 at art. 14; UNHRC, *General Comment No. 32: Article 14, 90th Sess.*, Sec. 3, 19 & n.31, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007); Decaux 13, 45-46; Separate Statement of Eugene R. Fidell, U.S. Dep't of Defense, Defense Legal Policy Board, Rep. of the Subcomm. on Military Justice in Combat Zones 184-90 (May 30, 2013); Separate Statement of Elizabeth L. Hillman & Harvey Bryant, Report of the Response Systems to Adult Sexual Assault Crimes Panel 173-75 (June 27, 2014), <https://www.protectourdefenders.com/wp->

79 Col. Michael Lewis, U.S. Air Force. "Major Changes in the Uniform Code of Military Justice". *American Bar Association*. 7 October 2022. Available: https://www.americanbar.org/groups/judicial/publications/judicial_division_record_home/2022/vol26-1/major-changes-in-uniform-code-of-military-justice/

80 Shadow Advisory Report Group of Experts. "Alternative Authority for Determining Whether to Prefer or Refer Charges for Felony Offenses Under the Uniform Code of Military Justice". *House Committee on Armed Services*. 20 April 2020. Available at: <https://s3.documentcloud.org/documents/6861828/Shadow-Advisory-Report-April-20-2020.pdf>

81 "Prosecutorial Discretion Under the Uniform Code of Military Justice". *National Institute of Military Justice*. 12 May 2021. Available at: https://www.caaflog.org/uploads/1/3/2/3/132385649/nimj_dispositional_authority_position_statement_12_may_2021.pdf

82 "Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors". *International Association of Prosecutors*. 23 April 1999. Available at: [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx); see also UN Office on Drugs and Crime. "Crime Prevention and Criminal Justice". *United Nations*. Available at: <https://www.unodc.org/unodc/justice-and-prison-reform/index.html>

83 Simon. Jonathan. "Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear". *Oxford University Press*. 2007.

Khadr.⁸⁴ Structural protections for the independence of military prosecutors are therefore crucial.

Protecting the independence of military prosecutors requires both case-specific rules insulating them from undue influence, as well as systemic rules ensuring that their careers will not be affected by the decisions they make. In the Canadian context, the commanding officer of the accused or certain other specified officers can decide not to proceed with any charges that the military police investigators have laid. One recent report warned that this practice could be perceived as an attempt by the chain of command to exercise undue influence over the military justice process; the report recommended that charges laid by military police investigators be referred directly to military prosecutors, without any intervention by the accused's chain of command.⁸⁵ This recommendation would insulate military prosecutors from accusations of undue influence. An example of a law that protects independence in specific cases is the prohibition on "unlawful command influence" in American military justice.⁸⁶

Finally, the investigative, discretionary and litigation functions all require professional competence. Criminal litigation is a technical area of law that demands an understanding of substantive criminal law, criminal procedure, evidence law, and administrative regulations. Moreover, military criminal litigation involves specific jurisdictional doctrines. All this knowledge, along with the basic skill of trying cases, takes time to develop. One issue with military prosecutors in some militaries is that frequent assignment changes negatively affect their competence in criminal litigation; they are not allowed to develop the appropriate depth of litigation experience. In a 2018 report to the Canadian Parliament, the Auditor General of Canada argued that Canadian Armed Forces prosecutors were not developing enough prosecution experience. The average Canadian military prosecutor accumulated 2.25 years of experience as a prosecutor; the Auditor General recommended that prosecutors stay in their positions for a minimum of five years.⁸⁷ International experts recommend that, if the decision is made to employ military prosecutors, then prosecutorial competence be furthered by making criminal litigation a dedicated career track in the Ukrainian officer corps.⁸⁸ They further recommends that experience of the counsel be a crucial factor in choosing between different courses of action, such as whether to try a case within the military justice system or to refer it to civilian authorities for civilian prosecution.

84 United States v. Bergdahl, 80 M.J. 230, 239 (C.A.A.F. 2020); see also, Canada (Prime Minister) v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44.

85 The Honourable Morris J. Fish. "Report of the Third Independent Review Authority to the Minister of National Defence". *Minister of National Defence*. 30 April 2021. Available at: <https://military-justice.ca/wp-content/uploads/2021/06/Third-Independent-Report-Fish.pdf>

86 *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017); see also, *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999); see also, *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018)

87 "Report 3 – Administration of Justice in the Canadian Armed Forces". *Office of the Auditor General of Canada*. 2018. Available at: https://www.oag-bvg.gc.ca/internet/English/parl_oag_201805_03_e_43035.html

88 Judge Advocate General. "Military Justice Litigation Career Track". *Department of the Navy*. 1 May 2020. Available at: https://www.jag.navy.mil/library/instructions/JAGINST_1150.2E.pdf

3.2 Oversight

The oversight is accomplished by supervisory chains of responsibility, but also by the law and the adjudication system governing legal ethics. The primary goal of these forms of oversight should be to deter and to respond to misconduct that could affect the fairness of an accused's investigation and trial. A secondary goal might be to prevent misfeasance and inefficiencies.

Critical to maintaining both appropriate oversight and the independence of prosecutors is their location in the overall structure of the nation's civilian ministry or in the department of defense. Military prosecutors in many western militaries report to a chief prosecutor who does not report to the military chain of command. Instead, they report directly to the civilian defense minister. This is the case in Canada, in Denmark and in relation to the Israel Defense Forces. It is recommended that military prosecutors have structural independence from the operational military chain of command.

Military prosecutorial offices should be structured so that there is a clear line of authority running up to a senior officer who is experienced in criminal litigation. Methods for reporting misconduct ('whistleblowing') should be established. There should be options for reporting both 'up' and 'out' of this chain if the misconduct involves the supervisor or if a report is ignored. A properly functioning military justice system must guard against undue secrecy. A healthy functional system of military prosecution is one in which military prosecutors are held to the same ethical standards as civilian prosecutors. When it comes to attorney discipline, justice must not only be done but be seen to be done: records of attorney discipline should be publicly available as equivalent records are available for civilian lawyers.

A functioning legal ethics system must be in place—either internally, or by referral of misconduct cases to a civilian court and bar. As professionals, all attorneys must abide by rules of professional conduct, and this includes special rules covering prosecutors.⁸⁹ When these rules are violated, many legal systems have in place a system to investigate and adjudicate complaints, with disbarment as a possible sanction. Egregious legal ethics violations by prosecutors should be prioritised within this disciplinary system.⁹⁰

Additionally, a regular, independent review system can ensure that the military prosecution wing of a military justice system remains in good health. In the Somalia Affair, Canadian troops who were deployed to Somalia as peacekeepers brutally killed several unarmed Somali civilians. As a consequence the Canadian Parliament established a mechanism of regular, independent review. Under that system, a retired Canadian civilian judge reviews the operation of the Canadian military justice system and recommends required changes to the military justice system. To date, three independent review authorities have discharged their mandates; in each case, a prominent retired

89 American Bar Association. "Model Rules of Professional Conduct". *American Bar Association*. 1983. Available at: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/

90 Morrison, Nina. "What Happens When Prosecutors Break the Law?" *New York Times*. 18 June 2018. Available at: <https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html>

Canadian judge has served as the independent review authority. All three independent review authorities set out a variety of recommendations that address the responsibilities of and protections for military prosecutors.⁹¹ A system of regular, independent review can ensure that a national military does not become too set in its ways. One caution is that the national legislature must ensure the timely implementation of reform recommendations; without timely implementation, a system of regular, independent review is largely useless.

3.3 Case Studies

3.3.1 Venue

U.S. military prosecutors faced a dilemma when U.S. Army Staff Sergeant Robert Bales was credibly accused of murdering numerous Afghan civilians in Kandahar, Afghanistan on March 11, 2012.

On the one hand, they could leave him in Afghanistan and conduct the criminal investigation and prosecution there. The advantage of this approach was that all fact witnesses were nearby. Investigators could visit the scene and gather evidence. The incident understandably incensed the local population, and a local criminal trial held on a U.S. military base would give the local population a chance to not only see the trial, but also to see that justice was being done.

On the other hand, leaving such a high-profile defendant in country potentially for months raised other challenges. Sergeant Bales' presence in country might create new threats that could undermine the US's military mission. A court-martial in Afghanistan would require not just a US military judge and defense counsel to travel to the country, but also potentially for civilians to make the journey (e.g. a psychiatrist, family members, and civilian defense counsel).

Holding the trial in country was not jurisdictionally required. U.S. military law permitted the trial to be held anywhere. Ultimately, the military decided to move Sergeant Bales from Afghanistan to the United States to face trial. This meant that some aspects of trying the case were easier, but others required massive logistical efforts, including for dozens of Afghan witnesses to travel to the military courthouse in Fort Lewis, Washington—literally half a world away. Sergeant Bales was ultimately convicted of the murders he had committed. His case is a reminder of how the choice of venue for trials is a matter of weighing both military and legal considerations.

91 The Honourable Morris J. Fish. "Report of the Third Independent Review Authority to the Minister of National Defence". *Minister of National Defence*. 30 April 2021. Available at: <https://military-justice.ca/wp-content/uploads/2021/06/Third-Independent-Report-Fish.pdf>

3.3.2 Self-Dealing

On 1 March 2019, the U.S. military conducted an air attack on what was reported as a last hideout of Islamic State fighters in Baghouz, Syria, in support of partner forces. While the U.S. military claimed that enemy fighters were indeed targeted and killed in the strike, up to eighty civilians may also have been killed in the bombing.⁹² There was little public transparency at the time by the U.S. government. But it quickly became apparent within the participating U.S. and coalition units that the attack had, indeed, killed a high number of civilians. U.S. military investigative modalities were not followed, and the incident was eventually reported to the U.S. Congress. This precipitated a high-level U.S. military investigation that acknowledged investigatory failures in the initial proceedings, though it did not hold anyone accountable for those failures.⁹³

The revelations of malfeasance by those initially assessing the strike did, however, prompt the civilian secretary of the U.S. Department of Defense to order a wide-ranging assessment of civilian casualty reporting and minimization procedures.⁹⁴ Given the international humanitarian law implications of this airstrike, and the related potential of war crimes, it is critical that independent military prosecutors be involved from the initial reporting of incidents like this to help ensure that an effective investigation is conducted. The U.S. military lacks any such resource: it is currently developing military prosecutors independent from the chain of command for only certain offenses because it has been forced by federal legislation to do so. It is interesting to note that the whistleblower in the above Baghouz strike incident was a military attorney serving as a legal advisor to a higher command that had situational awareness of the strike.

3.3.3 Military Culture

In 2010, a Canadian court martial found Captain Robert Semrau guilty of behaving in a disgraceful manner contrary to section 93 of the Code of Service Discipline.⁹⁵ Section 93 states that every person “who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment.”⁹⁶ Captain Semrau, who deployed to Afghanistan and trained Afghan National Army troops, was found to have carried out

92 Philipps, Dave; Schmitt, Eric. “How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria”. *The New York Times*. 13 November 2021. Available at: <https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html>

93 Philipps, Dave; Schmitt, Eric. “Pentagon Faults Review of Deadly Airstrike by Finds No Wrongdoing”. *The New York Times*. 17 May 2022. Available at: <https://www.nytimes.com/2022/05/17/us/politics/us-airstrike-civilian-deaths.html>

94 U.S. Department of Defense. “Department of Defense Releases Memorandum on Improving Civilian Harm Mitigation and Response”. *U.S. Department of Defense*. 27 January 2022. Available at: <https://www.defense.gov/News/Releases/Release/Article/2914764/departement-of-defense-releases-memorandum-on-improving-civilian-harm-mitigation/>

95 *R v Semrau*, 2010 CM 4010. Available at: http://www.jmc-cmj.forces.gc.ca/assets/CMJ_Internet/docs/en/2010cm4010.pdf

96 National Defence Act (R.S.C., 1985, c. N-5). *Canadian Government*. 1985. Available at: <https://www.laws-lois.justice.gc.ca/eng/acts/N-5/>

a mercy killing: during a patrol, Semrau shot an unarmed and wounded insurgent who was lying on a path by a cornfield.

The Semrau case is a valuable case study for military prosecutors. First, for those concerned with venue, it must be noted that the Canadian military justice system held a portion of Captain Semrau's court martial at Kandahar Airfield in Afghanistan. The court martial heard from local witnesses, such as the Afghan interpreter who accompanied Captain Semrau on his patrol.⁹⁷ One potential criticism of the Canadian military justice system's decision to hold an in-theatre court martial is that a court martial could easily have heard witness testimony over video-link. Yet it is undeniable that in-theatre court martials offer concrete advantages.

Second, the Canadian Forces' National Investigation Service almost did not find out about Captain Semrau's actions. Although Captain Semrau was not the only Canadian soldier on the patrol, it was an Afghan soldier who first reported Semrau to the chain of command. The Afghan soldier did so two months after the shooting had occurred, at which point the National Investigation Service swung into action. Although the National Investigative Service executed a successful investigation, which laid the groundwork for a fair court martial, it is troubling that an Afghan soldier—rather than the Canadian troops who had trained him—was the first to speak up. The Semrau case indicates that the various elements of a sound military justice system are deeply interrelated. Even if military prosecutors are well trained, it falls on ordinary soldiers to report offences and on military police to effectively investigate alleged offences. All ranks must respect the rule of law for a military justice system to work effectively.

97 The Canadian Press. "Semrau did a 'good job' shooting insurgent: witness". CTV News. 19 June 2010. Available at: <https://www.ctvnews.ca/semrau-did-good-job-shooting-insurgent-witness-1.524257>

4. OPTIONS FOR THE TRIAL OF MILITARY OFFENCES IN UKRAINE

4.1 The case of Ukraine

After the declaration of its independence in 1991, Ukraine had military tribunals in place, which were later renamed as military courts. The system functioned until 2010, when judicial reform was implemented, and, as a result, military courts in Ukraine were abolished by Presidential decree on 14 September 2010.⁹⁸ This decision was based on the view that the activities of military courts are contrary to the principles of democracy; they do not meet the criteria on the independence of judges in the administration of justice and the provisions of the Universal Declaration of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms.⁹⁹

The author of the 2018 DCAF report regarding Ukrainian military justice observed that an official Government document from 2006 on the Ukrainian court system and fair trial contained an overly negative assessment of the Ukrainian military justice system. According to this document “there shall not be military courts within the judiciary of Ukraine.” Military judges have a special status, deliver military service, have military ranks and receive benefits for their service. This is in contravention to the status of a judge: it is not in accordance with the requirements of the judicial independence and impartiality and it is not in line with the European standards as interpreted by the European Court of Human Rights.

Since 2010, all offences by members of the Ukrainian armed forces, other than minor offences dealt with administratively under the Disciplinary Regulations of the Armed Forces of Ukraine, have been tried in the ordinary (civilian) criminal courts.¹⁰⁰ This includes specific military offences, such as desertion and disobedience to orders, which are provided for in Part XIX of the Criminal Code.¹⁰¹

98 Vashakmadze, Mindia. “Military Justice in Ukraine: A Guidance Note”. DCAF. 2018. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/Military_Justice_Guidance_Note_eng.pdf

99 Ю.Полянський, Військова юстиція в Україні: проблемні питання, № 3 (2019): Юридичний вісник. Available at: http://yurvisnyk.in.ua/v3_2019/3.pdf

100 Law of Ukraine of 24 March 1999 No. 551-XIV. Available at: <https://cis-legislation.com/document.fwx?rgn=17812>

101 Penal Code of 5 April 2001. No 2341-III. Available at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=59164

The Military Prosecutor's Office of Ukraine was disbanded in 2012. In 2014, due to the escalation of the situation in eastern Ukraine, the decision was taken to reintroduce military prosecutions. However, in 2019 in the light of the new reform, the order went out to phase out military prosecution. The decision was most likely taken because there were numerous reports in the media about military prosecutions overstepping their jurisdiction. The leadership of the military prosecutor's office was often criticised for corruption, inefficiency, and interference in cases that did not fall under the competence of the military prosecutor's office.¹⁰²

There are no military police in Ukraine. However in 2002 the Military Law Enforcement Service in the armed forces was created. It is a special unit that ensures order and discipline among military personnel. However, it has more limited functions than that of simple military police.

Since Ukraine's independence, discussions about the introduction/reintroduction of elements of the military justice system have been ongoing. With Russia's full-scale invasion, the introduction of martial law and a consequent massive increase in the number of military personnel, the question of the reintroduction of military justice in Ukraine has become acute. Currently, the Ukrainian Parliament is considering reintroducing elements of a military justice system. Apart from deciding on the structure and main functions, the time frame of any such amendments is important. Decisions have to be taken whether the introduction of a military justice system in Ukraine is a temporary solution for the war. Or will it be a system that will also operate after the end of war?

Ukraine's experience in this regard demonstrates that military justice is, as an operative concept, evolving. It is not an isolated phenomena, but rather part of a system that reflects on the current situation in the country. Ukraine's armed forces have grown to over a million soldiers in the year since Russia launched its full-scale invasion in February 2022; up from 250,000 personnel before the war began.¹⁰³ With such a huge number of soldiers mobilized in a very short time, some of whom had no previous military experience, it is to be expected that issues of internal discipline continue to arise. In order to be able to address these issues effectively, the Ukrainian authorities are currently exploring the possibility of creating a military police force and have prepared several draft laws to regulate this force.

Today, 132 courts (20% of all courts in Ukraine) are not operational due to Russia's invasion.¹⁰⁴ This puts tremendous pressure on the judicial system in the country. The first war crime trials in Ukraine, closely scrutinised by the international community, prompted a discussion around: the capacity of the Ukrainian courts to prosecute war crimes; their ability to do so in compliance with fair trial guarantees; and the appropriateness of doing so while the war is ongoing.¹⁰⁵ While some argue for

102 "TI Ukraine announces opening of disciplinary proceedings against Matios". *Interfax Ukraine*. 15 August 2017. Available at: <https://en.interfax.com.ua/news/general/442416.html>

103 Melkozerova, Veronika. "Ukraine army discipline crackdown sparks fear and fury on the front". *Politico*. 5 February 2023. Available at: <https://www.politico.eu/article/ukraine-zelenskyy-war-military-law/>

104 Kinak, Margarita. "War as a new challenge for the justice system". *Yurydychna gazeta*. 27 April 2022. Available at: <https://yur-gazeta.com/golovna/viy-na-yak-noviy-viklik-dlya-sistemi-pravosuddya.html>

105 Nuridzhanian, Gaiane. "Prosecuting war crimes: are Ukrainian courts fit to do it?". *European Journal of Law*. 11 August 2022. Available at: <https://www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/>

the creation of the military courts in Ukraine, the current Chairman of the Supreme Court of Ukraine in his recent interview stated that “such courts should have been established earlier. Currently, it is not financially and organisationally possible to create military courts, and when the war is over, there will be no need for them.”¹⁰⁶

4.2 Miroshnik v Ukraine

The compliance of Ukrainian military courts with the European Convention on Human Rights and Fundamental Freedoms (**ECHR**), to which Ukraine is a State Party, was considered by the European Court of Human Rights (**European Court**) in *Miroshnik v Ukraine* in 2008.¹⁰⁷

Aleksey Miroshnik was administratively discharged from the armed forces of Ukraine in 1998. He challenged his discharge in the Ukrainian military court, which had jurisdiction over such matters at the time. Those proceedings were unsuccessful, as were his subsequent domestic appeals. He then lodged his application to the European Court complaining that, *inter alia*, the structure and process of the Ukrainian military courts violated article 6(1) of the ECHR, which provides *inter alia* that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

In its decision that the Ukrainian military court process did not comply with article 6(1), the European Court recalled that:¹⁰⁸

...the right to a fair trial, of which the right to a hearing before an independent tribunal is an essential component, holds a prominent place in a democratic society... The Court reiterates that, in order to establish whether a tribunal can be considered “independent”, regard must be had, *inter alia*, to the manner of the appointment of its members and their term of office, the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence. In this latter respect, what is at stake is the confidence which such tribunals in a democratic society must inspire in the public and, above all, the parties to the proceedings. In deciding whether there is a legitimate reason to fear that a particular court lacked independence or impartiality, the standpoint of the party to the proceedings is important without being decisive. What is decisive is whether the party’s doubts can be held to be objectively justified (see, *mutatis mutandis*, *Incal v. Turkey*, judgment of 9

106 Kinak, Margarita. “War as a new challenge for the justice system”. *Yurydychna gazeta*. 27 April 2022. Available at: <https://jur-gazeta.com/golovna/viy-na-yak-noviy-viklik-dlya-sistemi-pravosuddya.html>

107 *Miroshnik v Ukraine*, European Court of Human Rights, Application no. 75804/01. (33-37). 27 November 2008.

108 *Miroshnik v Ukraine*, European Court of Human Rights, Application no. 75804/01. (61). 27 November 2008.

June 1998, Reports 1998-IV, pp. 1572-73, § 71; and *Cooper v. the United Kingdom* [GC], no. 48843/99, § 104, ECHR 2003-XII).

The Court found that Ukrainian law at the relevant time did offer certain guarantees of the judicial independence of military judges, namely:¹⁰⁹

- ❖ *Manner of appointment.* Military judges were elected by the Verkhovna Rada.
- ❖ *Term of office.* Military judges were elected for a term of ten years.
- ❖ The inviolability of military judges and the prohibition of interference with the administration of justice provided by section 11 of the law of 15 December 1992 on the status of judges.

However, the Court also observed that:¹¹⁰

...it was foreseen by the domestic law that the judges of the military courts were military servicemen, and in that capacity they constituted a part of the staff of the Armed Forces subordinate to the Ministry of Defence... The Court further observes that it was up to the Ministry of Defence to provide the judges of the military courts with appropriate flats or houses if they needed to improve their living conditions... Finally, the Court notes that the entities of the Ministry of Defence carried out the financing, logistics and maintenance of the military courts on a practical level. While it was not the competence of the Ministry of Defence to decide on the annual scope of the financing and maintenance of the military courts, it did however administer that financing and maintenance on a daily basis...

In the Court's opinion the above aspects of the status of the military courts and their judges, taken cumulatively, gave objective grounds for the applicant to doubt whether the military courts complied with the requirement of independence when dealing with his claim against the Ministry of Defence. The Court, therefore, held that the applicant had not had an opportunity to present his case before an independent tribunal, as required by the Convention...

This decision, taken together with the 2003 decision of the Grand Chamber concerning uniformed Royal Navy judges in *Grievés v United Kingdom*, suggests that Ukraine might struggle to satisfy the European Court that uniformed military judges would be consistent with the State's obligations under article 6(1) of the ECHR – were Ukraine to return to using a military court structure.¹¹¹ That does not, however, rule out the option of military courts with civilian judges or military judges with fixed terms until the end of their service and under supervision of a civilian minister.

109 *Miroshnik v Ukraine*, European Court of Human Rights, Application no. 75804/01. (30-37, 62). 27 November 2008.

110 *Miroshnik v Ukraine*, European Court of Human Rights, Application no. 75804/01. (63, 64). 27 November 2008.

111 Case of *Grievés v. the United Kingdom.*, Application no. 57067/00, 16 December 2003, ECHR 2003-XII. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-61550%22%5D%7D>

4.3 European, international, and constitutional law

In addition to the need to comply with article 6 of the ECHR if military courts were to be re-established in Ukraine, the structure of those courts would need to comply with the country's 1996 Constitution, which imposes some significant limits on policy choices.

Article 124 of the Constitution provides *inter alia* that “justice in Ukraine shall be administered exclusively by the courts”. This may seem basic, but it means that if a military tribunal were established, it would need to exhibit the characteristics of a “court”. That is to say, it would have to comply with article 6 of the ECHR and article 14 of the *International Covenant on Civil and Political Rights (ICCPR)*, to which Ukraine is also a State Party.

Article 125 of the Constitution provides *inter alia* that “high specialised courts may operate under the law” but “the establishment of extraordinary and special courts shall not be permitted”. This language permits the establishment of specialised military courts, but only as permanent courts within the existing judicial structure. *Ad hoc* courts-martial, such as those found in the United States, Canada, Australia, India and many other common law countries, would not be permitted by the Constitution of Ukraine.

Articles 126 and 128 of the Constitution provide for the manner of appointment and terms of office of Ukrainian judges. They are appointed by the President. They hold office for an unlimited term, subject to a retirement age of 65 or removal for inability or misbehaviour following a constitutionally mandated procedure.¹¹²

Articles 127 and 129 of the Constitution provide that Ukrainian courts must consist of either one judge, a panel of judges, or a judge sitting with a jury. The use of jurors is explicitly encouraged by Article 124, which provides that the “people shall directly participate in the administration of justice through jurors”. The Constitution does not explicitly exclude the use of military jurors, although military personnel are presently excluded from serving as jurors or people's assessors in the ordinary criminal courts under Article 61(2) of the Law on the Judicial System and the Status of Judges.¹¹³

112 Constitution of Ukraine. Art. 126, 128, 131. Available at: <https://rm.coe.int/constitution-of-ukraine/168071f58b#:~:text=guided%20by%20the%20Act%20of%20Declaration%20of%20the%20sovereignty%20of%20Ukraine%20extends%20throughout%20its%20entire%20territory.>

113 Law of Ukraine No. 2453-VI on the Judiciary and the Status of Judges. Adopted 7 July 2010. Available at: [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL\(2010\)084-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL(2010)084-e)

4.4 Policy considerations

Some liberal democracies have encountered challenges in ensuring that their military courts comply with international human rights law and the rights enshrined in their national constitutions. However, a number of these liberal democracies have chosen to retain military courts within their judicial systems.

The reasons for doing so include the ability to deploy military courts to areas of operations. The focus of most States in this respect is to facilitate the administration of justice for deployed forces. This has the twin advantage of conducting the trial in a location where witnesses and evidence will be close at hand, while demonstrating to the local populace that justice is being done. In most cases the members of the force will be exempt from local jurisdiction.

In the present Ukrainian context there may be an additional policy justification for reviving military courts. Ukraine has mobilised in the face of unlawful aggression by the Russian Federation. In July 2022, the Minister of Defence is reported to have said that, by that time, Ukraine had armed forces totalling around 700,000 personnel.¹¹⁴ This is a significant increase from pre-war figures. Many of these personnel are confronting well-equipped and determined enemy forces in eastern Ukraine. The fighting is bitter and the casualties are high. In that context, the prospect of being sent to an area of Ukraine far from the battlefield to face trial in a civilian court, with the worst outcome being a period of imprisonment in a relatively safe civilian jail, may be attractive to some personnel. One of the key purposes of military law is to persuade members of the armed forces engaged in combat that desertion or cowardice are unattractive options.

There is a good argument that military courts just behind the front line are more likely to fulfill this purpose than a civilian court. This argument is referred to in a recent article published by some Ukrainian academic lawyers, *Military Justice of Ukraine: Problems of Determining the Bodies that Govern the Construction of its System*.¹¹⁵ The article considers a number of European States which have retained military courts. The example of Poland is examined next.

4.5 The Polish model

Poland represents an interesting point of comparison for Ukraine, due to its status as a fellow Slavic liberal democracy with much shared history. The Polish Constitution guarantees civil rights

114 McGarvey, Emily. "Ukraine aims to amass 'million-strong army' to fight Russia, says defence minister". *BBC News*. 11 July 2022. Available at: <https://www.bbc.com/news/world-europe-62118953>

115 Niebytov, Andrii, et al. "Military Justice of Ukraine: Problems of Determining the Bodies that Govern the Construction of its System". *Access to Justice in Eastern Europe*. 2022. Available at: <https://ajee-journal.com/military-justice-of-ukraine-problems-of-determining-the-bodies-that-govern-the-construction-of-its-system>

equivalent to those guaranteed in Ukraine and it is, of course, also a State Party to the ECHR. However, unlike Ukraine, the Polish Constitution explicitly permits the administration of justice through military courts.¹¹⁶ Article 3(1) of the Polish law of 21 August 1997 on the System of Military Courts provides that the military courts of Poland are made up of garrison courts and district courts. This law is comprehensive and impressive. Article 3(3) provides that:

The Minister of National Defense, in consultation with the Minister of Justice, after consulting the National Council of the Judiciary, by way of an ordinance, establishes and abolishes military courts and defines their seats and areas of competence, bearing in mind the need to ensure rational organization of the military judiciary by adjusting the number of courts, their size and areas of competence for the deployment of the Armed Forces, implementing the principle of access to justice and taking into account the economy of court proceedings, in order to guarantee the exercise of the right to have a case heard within a reasonable time, and taking into account the needs of the Armed Forces in the event of mobilization and in times of war.

Niebytov notes that:¹¹⁷

...there are ten garrison courts, which act as courts of first instance, and two military district courts, which act as courts of appeal. Geographically, they are located in Warsaw and Poznan. At the same time, military district courts consider cases as courts of the first instance in some categories of cases.

While Polish military courts generally hear cases at their seat, they can also deploy into an area of active military operations.¹¹⁸ There is, too, a military chamber of the Supreme Court, Poland's final court of appeal, albeit the Supreme Court is not a military court. This right of final appeal to a civilian court may be seen as an important reflection of Yale Principle No. 1, calling for the primacy of civilian judicial oversight.

Under Article 179 of the Polish Constitution, military judges are, in common with all Polish judges, "appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary".¹¹⁹ Recommendations as to appointments are made by the Assembly of Judges of Military Courts.¹²⁰ Eligibility for appointment as a military judge is limited to officers "performing professional military service" who hold a graduate degree in law and have completed

116 Constitution of the Republic of Poland. Article 175(1). 1997. Available at : <https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm>.

117 Niebytov, Andrii, et al. "Military Justice of Ukraine: Problems of Determining the Bodies that Govern the Construction of its System". *Access to Justice in Eastern Europe*. (n. 20, 215). 2022. Available at: <https://ajee-journal.com/military-justice-of-ukraine-problems-of-determining-the-bodies-that-govern-the-construction-of-its-system>

118 Law of 21 August 1997 on the System of Military Courts, art 7(2)

119 Constitution of the Republic of Poland. Article 179. 1997. Available at : <https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm>.

120 Ibid

prescribed professional legal and judicial training.¹²¹ Military judges whose military service comes to an end have a legally prescribed pathway to becoming judges in the ordinary courts, a measure which goes some way towards assuaging concerns about serving officers' vulnerability to unlawful command influence. It is unclear whether, in the light of *Miroshnik* and *Grieves*, this separation between the military judges and the chain of command (alongside other protections provided for in the law) would be sufficient to satisfy the European Court.

Polish law also provides for lay military members to be appointed to military district courts, performing a function akin to the jurors or people's assessors encouraged by Article 124 of the Ukrainian Constitution.¹²² This option merits further study.

As far as the authors can determine, the Polish system of military courts has not been considered by the European Court. In the limited time available to prepare this publication we have come to the view that, with appropriate modifications to reflect Ukraine's differing constitutional arrangements, the Polish model could, should the Ukrainian Government decide to reintroduce military courts, represent a useful starting point.

4.6 Summary hearings

As a final point, and as mentioned intermittently throughout this publication, the military justice systems of most States include some form of summary hearing process. This permits military commanders to dispose of minor, disciplinary-type offences by the imposition of limited punishments following an abbreviated hearing. The volume of military cases dealt with summarily by commanders far outweighs the volume of those tried in military courts. This reflects the fact that the overwhelming majority of offences by members of the armed forces are indeed disciplinary in nature, hence minor. They can best be handled by the unit in which the defendant is serving. Such summary proceedings for disciplinary offenses directly support commanders in their maintenance of unit order and discipline.

In States where the right to a fair trial by an independent and impartial court is guaranteed by the constitution or a binding treaty obligation such as the ECHR, the use of summary process generally relies on the defendant making an informed decision to waive trial in a court which complies with the relevant rights. Given that such summary hearings are not military courts, they lie outside the primary scope of this publication. Yet they must be considered as they serve as a necessary supplement to criminal processes, regardless of whether a State chooses to employ a specialized military justice system, or ordinary civilian criminal justice court proceedings.¹²³

121 Ibid

122 Constitution of Ukraine. Art. 124 Available at: <https://rm.coe.int/constitution-of-ukraine/168071f58b#:~:text=guided%20by%20the%20Act%20of%20Declaration%20of%20the,sovereignty%20of%20Ukraine%20extends%20throughout%20its%20entire%20territory.>

123 See supra note Yale Draft Summary Proceedings

CONCLUSION

A fair and just system for imposing penal sanctions for criminal misconduct by individuals in a State's military forces is essential to ensuring good order and discipline within those forces. While such an observation does not, *ipso facto*, require a *military* justice system, it does demand that a state ensure that a functioning, healthy criminal justice system is in place for its service members. The nature of criminal law messaging and of criminality within the military - e.g. desertion, not to mention the need for efficiency and speed in times of war means that a special legal system is needed. However, such a system can only operate if appropriately designed and if it operates with robust civilian oversight.

It is important to consider best practices when introducing or readjusting a military justice system in a country, chief among these are the following.

- ❖ Establish and maintain clear policies on the application and enforcement of the principles of military justice. Ensure that all service members are aware of their rights and responsibilities under the respective laws and regulations.
- ❖ Establish and maintain robust civilian oversight of the military justice system, including through an independent appeals process.
- ❖ Ensure that military prosecutors, judges, and defense counsel have the necessary expertise and access to resources to effectively ensure fair trials; ensure prosecutors exercise authority and prosecutorial discretion independent from the military chain of command.
- ❖ Establish a civilian-led military justice review board to monitor the application of military justice and to ensure that all prosecutions are conducted in accordance with fair trial standards.
- ❖ Ensure that all service members are trained in proper procedures for filing complaints against their superiors or other service members.
- ❖ Provide education and training on substantive military justice offenses and procedures to all within its jurisdiction.
- ❖ Establish continuous improvement policies to assess the process of reviewing, adjudicating, and enforcing the principles of military justice.

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