

Expert Consultation on the Administration of Justice through Military Tribunals

**Subject Matter Jurisdiction of Military Courts**  
**Remarks by Mr. Patrick Gleeson<sup>1</sup>**

Monday, 24 November 2014

Conference Room XIX, Palais des Nations  
Geneva – Switzerland

**INTRODUCTION**

Good afternoon, it is a pleasure to be here today and I would like to express my thanks to the Office of the High Commissioner for the opportunity to participate in this expert consultation.

Having been deeply involved in major reforms to the Canadian military justice system since the late 1990s, I am convinced that properly structured and empowered Military Courts play an important role in contributing to military effectiveness, and that they minimize the risk of impunity as a nation's military forces and accompanying elements operate in parts of the world where governmental institutions are weak or non-existent.

Furthermore, and certainly of relevance within the international context, it is often these portable military justice systems that directly contribute to the preservation and promotion of the rule of law in expeditionary operations. A function that I would submit is heavily relied on both formally and informally in international capacity building missions.

I welcome the efforts to establish universal standards that have brought us together here today and applaud the work that has been done in preparing the current draft of the *Principles Governing the Administration of Justice through Military Tribunals*.

I also applaud and welcome much of what is contained in the *Draft Principles*, but am concerned that in some areas the principles are much too narrowly crafted, and reflect an unwarranted bias against military courts in favour of "ordinary courts or judicial tribunals".

I have been asked to address the question of subject matter jurisdiction, and would suggest that this bias is evident when one considers *Draft Principles* 8 and 9, which address the issue. Principle 8 provides that

**"The jurisdiction of *military courts should be limited to offences of a strictly military nature* committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status."**

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And Principle 9 provides:

***“In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations*** such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.”

This bias is troubling and internally inconsistent with goals and objectives of the *Principles*.

One of the stated objectives behind the development of the *Draft Principles* is that military justice must be “an integral part of the general judicial system”. This core requirement is clearly articulated and reflected in *Principle 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.”

I would argue, that where a military tribunal is an integral part of a nation’s justice system and that court applies standards and procedures internationally recognized as necessary to the conduct of a fair trial – principle 2 and expanded upon in principles 12 through 15 - that military court or tribunal is part of, not distinct from, the “ordinary courts” within the state. In this circumstance military courts are simply one other specialized court within a judicial structure that may have many specialized courts exercising jurisdiction in specific areas of law.

Clearly this is not the case in all jurisdictions and thus the value in articulating universal standards. However, there are many sophisticated military justice systems operating today where this is the case. These courts are as competent and capable as any other national court to deal with and address misconduct that impacts on discipline.

When one looks at the issue from this perspective one is able to separate legitimate military justice systems from those unfortunately too many examples of illegitimate tribunals operating under the banner of military justice in advancing gross violations of individual rights and impunity for reasons of self-interest. These illegitimate systems however are identified for what they are when they are measured against *Principles 1, 2 and 12 through 15*.

Operating on the basis that **properly constituted** military courts within a nation are in no better or worse a position than civilian courts in delivering open, fair and unbiased justice one is left to consider question of jurisdiction against the backdrop their specialized role - the purposes and functions of military justice.

So let me now spend a few minutes on the question of purpose and function of military justice systems and some of the attributes that are required if these systems are to successfully fulfill their role and mandate.

## **THE FUNCTION/PURPOSE AND ATTRIBUTES**

The seminal articulation in Canadian Law of the purpose of a military justice system is found in the Supreme Court of Canada Decision of *Généreux* in 1992, a decision that has been widely cited internationally. The court states that

“The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation’s security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.”<sup>2</sup>

This oft cited passage reflects that the primary role or purpose of military justice is the enforcement of discipline in furtherance of the operational effectiveness and efficiency of the military force.

This maintenance of discipline purpose for military justice is widely recognized and appears to have been very strictly construed in the development of *Principle 8*.

There is however another compelling and important purpose behind military justice systems also highlighted in *Généreux* where the court states:

“Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. ***The Code serves a public function as well by punishing specific conduct which threatens public order and welfare.***”<sup>3</sup>

This recognition of the “public function” of a military justice system reinforces the point made earlier that military justice systems, when properly constituted, are an integral part of the broader justice system. Like all courts, military courts play a key role in protecting broader public order and welfare. These two core purposes of military justice have recently been codified in Canadian Military Justice Legislation where the purpose of the System is described as follows:

- (a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and
- (b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

This dual function, although seldom formerly recognized, makes much sense in a framework where the military is intended to serve broader society and reflect societal interests and values. It is also consistent with the notion that those who serve in the profession of arms are taking on

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<sup>2</sup> *R. v. Généreux* [1992], 1 S.C.R. 259 at 293.

<sup>3</sup> *R. v. Généreux, ibid*, at 281.

additional societal responsibilities and obligations when they enter the profession arms, they are not being shielded from the obligations and responsibilities of all citizens to comply with the law.

## **DRAFT PRINCIPLE 8**

Within the framework of this dual role for military justice one should consider *Draft Principle 8*. Implicit in the principle is the conclusion that only uniquely military offences impact upon military discipline and ultimately morale and operational effectiveness. This quite frankly is simply not the case.

Acts of theft, assault, fraud, the use of, and trafficking in, illicit drugs etc., are all offences under civilian law. However the mere fact that they happen to be civilian offences in no way diminishes their impact on discipline for the reasons identified by the Supreme Court of Canada in *Généreux*.

These are service offences as well - assault on a peer in a military unit has no less a corrosive effect on discipline and morale than does an act of insubordination. To allow a military justice system to deal with the insubordination but not the assault does not promote or advance the purposes of military justice, it undermines it.

It is also important to recognize that civilian offences may well have a significantly different impact in a military setting than might be the case in a civilian context, something that civilian justice system officials may not always appreciate.

For example until the late 1990s sexual assault was one of a very few civilian offences over which the Canadian Military justice system did not have jurisdiction where the alleged offence was committed in Canada.

Low level sexual assaults can be extremely corrosive to unit morale and discipline, particularly when inflicted upon individuals by more senior military members. While instances of this nature were viewed as requiring justice system action when they occurred, the military was subject to the exercise of discretion by officials within the civilian justice system in regards to pursuing these offences.

Civilian justice system officials were often unable to appreciate the importance of prosecuting objectively low level offences that would normally not attract a complaint of criminal misconduct in a civilian context. Considerations such as case load, fiscal restraints and an inability of civilian prosecutors to fully appreciate unique military circumstances meant these offences often were not prosecuted. Even where a prosecutor might be convinced to move forward in such an instance the courts themselves often were unable to appreciate the seriousness of the impugned conduct in a military context in the sentencing process. As noted in *Généreux* there are occasions when breaches of discipline must be punished more severely than would be the case if a civilian engaged in the same conduct

In these circumstances it was recognized that the specialized military justice system would be much better suited to address the needs of military discipline and the Parliament of Canada extended jurisdiction to prosecute sexual assault as part of a major military justice reform package in the late 1990s.

In addition, military interests and more broadly national interests often require that military justice systems be in a position to demonstrate an ability to prosecute offences, regardless of their nature, in a foreign state. This is particularly true when seeking the special jurisdictional consideration from host nations that are key elements of the Status of Forces Agreements entered into between sending and receiving states.

The purpose and function of a military court, the unique requirements of military discipline, the impact civilian criminal offences have on discipline, and the practical requirements of nations deploying their forces on expeditionary operations all highlight the appropriateness of military justice systems being in a position to exercise jurisdiction over civilian offences.

The 2013 report of the Special Rapporteur on The Independence of Judges and Lawyers to the 68<sup>th</sup> Session of the General Assembly speaks to the concern of military tribunals displacing the jurisdiction of the “ordinary courts”.<sup>4</sup>

In this regard I want to make clear that extending jurisdiction over civilian offences to military justice systems is not an either/or proposition. Again I will use the Canadian model as an example but Canada is certainly not unique in this regard.

The Canadian justice system creates a concurrent jurisdiction model as between the military justice system and the civilian justice system. This model essentially provides jurisdiction over military members to both systems concurrently, and as such military members are liable to be charge and tried in either system for most civilian offences. In this model, there is no displacement of civilian jurisdiction; rather there is a layering on of an additional option where an individual’s status brings them within the jurisdiction of the military justice system.

This concurrent jurisdiction model has extraterritorial effect as a result of a specific provision in the defence legislation that provides civilian courts with jurisdiction over any person subject to military jurisdiction who commits an offence outside the country.

The question of whether military jurisdiction should be exercised simply on the basis of status, or linked to some requirement for nexus, either within the exercise of prosecutorial discretion, or as a matter of law, is certainly open to debate. However there is a legitimate need for military justice systems to exercise jurisdiction over civilian offences and that exercise of jurisdiction need not be undertaken in a manner that displaces the jurisdiction of the civilian courts

*Principle 8*, in its current form is much too narrowly framed and needs to be reframed or removed from the draft principles.

## **DRAFT PRINCIPLE 9**

Draft principle 9 provides that military courts should never exercise jurisdiction in response to allegations of serious human rights violations. This view is adopted by the Special Rapporteur in her report to the 68th Session of the General Assembly where it is stated that:

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<sup>4</sup> The 2013 report of the Special Rapporteur on The Independence of Judges and Lawyers to the 68th Session of the General Assembly, para 99

“The jurisdiction of ordinary courts should prevail over that of military courts to conduct inquiries into alleged offences involving serious human rights violations and to prosecute and try persons accused of such crimes, *in all circumstances, including when the alleged acts were committed by military personnel.*<sup>5</sup>

Two reasons for this position are advanced in the commentary contained in the *Draft Principles*. First that the commission of human rights violations is outside the scope of the duties performed by military personnel and secondly, military authorities might be tempted to cover up such cases.

My former colleague, Colonel Michael Gibson addresses both of these reasons in his article entitled *International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity*,<sup>6</sup> noting that while it is true that the commission of human rights violations do not properly fall within the scope of the duties of military personnel neither does the commission of ‘ordinary’ crimes such as murder, rape, fraud or theft.

These activities are all offences under military and criminal law in the same manner as extrajudicial executions, enforced disappearances and torture are. As highlighted at the outset of my remarks the real issue here is how one characterizes military courts. Again, I reiterate, where a court, military or otherwise, is properly constituted as described in *Draft Principles 1* and *2* and *12 – 15* there is no principled basis to adopt a universally applicable rule that would deny those courts jurisdiction over these types of grave offences. The conclusion implied by this *Principle*, that military justice systems worldwide cannot be trusted to deal with these offences, ignores the objective facts.

The approach I am advocating to offence jurisdiction is, interestingly, accurately reflected in the International Convention for the Protection of All Persons from Enforced Disappearances: which provides:

“any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.”<sup>7</sup>

This is a principled approach that focuses on the attributes of the court or tribunal as opposed to its specialized function or character.

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<sup>5</sup> 2013 report of the Special Rapporteur, *ibid* at 106.

<sup>6</sup> Michael Gibson, “International human rights law and the administration of justice through military tribunals: preserving utility while precluding impunity”, in *Journal of International Law and International Relations*, vol. 4, No. 1 (2008), pp. 1-48.

<sup>7</sup> International Convention for the Protection of All Persons from Enforced Disappearance, GA Res. 61/177, 61st Sess., UN Doc. A/RES/61/177 (20 December 2006) 1 at 5 (art. 11, para. 3).

The *Draft Principles*, as they currently exist, suggest that a non-compliant civilian court or justice system is a more acceptable option when dealing with such grave offences than would be a fully compliant military tribunal.

It is also important to recognize that offences of this nature strike at the very core of military discipline and operational effectiveness. Armed forces have a significant interest in seeing that such breaches are dealt with fairly and expeditiously and it is important to recognize that the failure of military commanders to quickly and effectively respond to allegations of serious human rights violations raise potential questions of personal liability through the doctrine of command responsibility.

The second reason advanced to support this Draft Principle is that, military authorities might be tempted to cover up such cases.

Of course this is not a risk that is unique to military justice systems. Once again, the universal standard should focus on the attributes of the system conducting an investigation or prosecution – these include independence, procedural protections, the level of professionalism of the armed force and the state of civil/military relations in the state.

In its current form *Draft Principle 9* presumes that any military justice process will be inherently sympathetic to members of the military committing gross violations of human rights and will be inclined to mitigate punishment imposed on an accused. Such an approach in a disciplined military force subject to appropriate civilian oversight is contrary to the ethos of a professional military.

It is also worth noting that should military justice systems fail in this regard and impunity concerns arise, the concurrent jurisdiction model I described earlier provides an important safeguard by ensuring recourse to the nation's civilian justice system remains available.

Finally, on a very practical level, one needs to recognize that the circumstances in which these offences often arise is in post-conflict states. Military forces in such circumstances are frequently one of the few institutions operating in these environments that possess the resources and organizational ability to effectively and expeditiously deal with the evidence and alleged perpetrators. To adopt an international standard that provides for no circumstance in which military justice systems should be engaged in response to allegations of serious human rights violations might well have the unintended effect of promoting impunity.

*Principle 9* like *Principle 8*, is much too narrowly framed in its current form. It needs to be redrafted to reflect the attributes required of a system involved in the investigation and prosecution of serious human rights violations as opposed to the current class disqualification approach the *Draft Principles* have adopted.

## CONCLUSION

To conclude let me again re-iterate that I recognize and welcome the value in the development and promulgation of universal standards in relation to the Administration of Justice by military tribunals.

However those universal principles should be based on international standards and requirements. The Principles need to recognize the legitimate purposes and functions of Military Justice systems. The framers of the Principles should not step into the shoes of States in determining how they address questions of jurisdiction within their national justice systems, regardless of how tempting this may be in light of the inexcusable abuses that have occurred in certain parts of the world under the umbrella of military justice.

To again quote Colonel Michael Gibson:

“...the Draft Principles seek to capture too broad and varied a spectrum of phenomena and subject them to the same unjustifiably dismissive assessment. In doing so, they distort the reality of many legitimate military justice systems which currently exist and risk demonizing a necessary, valuable and sometimes irreplaceable species of court...”<sup>8</sup>

Thank you.

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<sup>8</sup> Gibson, *supra* note 6, at 3.