International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity

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1. Introduction

One of the hallmarks of the discussion and practice of international human rights law and of international criminal law in this decade has been a keen desire to preclude impunity for the commission of gross

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violations of international human rights and breaches of international humanitarian law.[1] This desire underpinned much of the impetus for the creation of the *Rome Statute of the International Criminal Court*[2] and continues to energize much of the enormous volume of state practice, academic commentary and internal discussion within the Court. A corollary of this desire has been an understandable visceral antipathy on the part of academics and advocates in the field of international human rights (many of whom have witnessed their abuses in Latin America in particular) towards military tribunals. Sometimes, however, even when motivated by the best of intentions, striving to advance the yardsticks of international law can overshoot the mark and produce a real-world effect contrary to that intended.

Animated by a desire to avoid impunity for the commission of gross violations of human rights and for breaches of international humanitarian law, the Special Rapporteur of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, with the support of the Office of the High Commissioner for Human Rights and of the International Commission of Jurists, has produced a set of *Draft Principles Governing the Administration of Justice through Military Tribunals*,[3] with the intention that it be considered and

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[1] The Independent Expert to update the set of principles to combat impunity, Diane Orentlicher, defines impunity as meaning 'the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims': *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, 61st Sess., UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005) at 6 [*Updated Set of Principles*]. Principle 1 of these updated principles declares that 'impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations' : *Updated Set of Principles* at 7.

[2] 17 July 1998, 2187 U.N.T.S. 90, UN Doc. A/CONF.183/9, 37 I.L.M. 999 (entered into force 1 July 2002) [*Rome Statute*].

[3] *Draft Principles Governing the Administration of Justice through Military Tribunals*, 62d Sess., UN Doc. E/CN.4/2006/58 (13 January 2006) [*Draft Principles*]. This latest version of the principles, produced by the Special Rapporteur, Mr Emmanuel Decaux,

adopted by the Human Rights Council.[4] More than merely an exercise in international standard-setting, its proponents aspire for the *Draft Principles* to constitute an important form of 'soft law' which would stand as a bulwark against barbarism and impunity. Significant effort by many eminent international legal scholars has gone into their drafting and refinement. The principles are said to be intended to become a 'minimum system of universally applicable rules'[5] to govern the administration of justice by military tribunals.

And there is the rub. For while the *Draft Principles* are a commendable effort and may make a significant contribution to informing debate and improving national practice in this important area of law, they remain significantly flawed in several respects. It is the contention of this article that, in an effort to be universal, 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 whose full potential has yet to be realized. It is a truism that in human affairs, 'where one stands depends on where one sits.' Therefore, it is not surprising that the outlook of the *Draft Principles* document

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built upon earlier versions developed by Mr Louis Joinet. The *Draft Principles* were the subject of discussion at expert meetings on human rights and the scope of jurisdiction of military tribunals organized by the Office of the High Commissioner for Human Rights and the International Commission of Jurists in Geneva in January 2004 and November 2006, and in Brasilia in November 2007, in which the author participated.

[4] See *Draft Principles*, *ibid*. at 2 (Summary), which details the procedural history of development and consideration of the *Draft Principles* from 2000 through 2006. This version of the *Draft Principles* was intended to be considered by the Commission on Human Rights at its sixty-second session. While the Commission ultimately did not examine the *Draft Principles* during its last and final session, the newly established Human Rights Council decided 'to consider at its forthcoming session all outstanding reports referred by the Commission on Human Rights to the Human Rights Council': Human Rights Council, *Extension by the Human Rights Council of all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights*, 1st Sess., UN Doc. A/HRC/DEC/1/102 (2006) at para. 5. As of November 2007, consideration of the *Draft Principles* by the Human Rights Council was still pending as the recently established Council has been preoccupied with first agreeing fundamental issues concerning its procedures.

[5] *Draft Principles*, *ibid.* at 2.

reflects the perspectives arising from the experiences of its primary drafters and proponents, who are predominantly civilian legal academics schooled in civil law traditions.[6] While there are instances of tribunals promoting impunity and perverting military justice, such as Latin American junta-appointed military tribunals, these should not be taken as representative of military courts as a whole. One should not extrapolate from these unfortunate examples a universal proposition that military courts cannot try soldiers and civilians fairly and should be done away with, especially those subject to constitutional restraints and the supervisory jurisdiction of civilian appellate courts as in Canada, the United Kingdom, Australia, New Zealand, and the United States. Moreover, it is important to avoid the risk of creating or perpetuating situations of de facto impunity with respect to certain increasingly important categories of person, such as civilian contractors and other persons accompanying armed forces on international deployments, an outcome which would be perversely contrary to the intent which animates the creation and expression of such principles.

In order to offer a useful critique of the *Draft Principles*, it will be necessary to first set the frame of reference by examining more broadly the issues of what constitute military courts, what are the legitimate purposes of military justice systems and what attributes need to be possessed by military courts. Further, one needs to examine what principles should guide their operation. In this, particular attention should be paid to the issue of sentencing. It will also be necessary to examine the international legal framework to ascertain what conventional and customary law is applicable. This will be followed by a discussion of the jurisprudence of various courts and human rights treaty bodies concerning military tribunals in respect of international human rights law. In light of these considerations, the intent of this article will then be to examine what principles should guide the exercise of jurisdiction by military tribunals and how these principles interact with the legal framework of international human

[6] Rather than, say, military common law practitioners, such as the author.

rights law, particularly concerning the judicial guarantees in article 14 of the *International Covenant on Civil and Political Rights*.[7]

The conclusions reached in this global analysis will differ significantly from some of those which underpin the *Draft Principles* as they are currently presented for consideration by the Human Rights Council and will lead to a specific examination of three important areas where the author differs from the conclusions of the Special Rapporteur concerning the human rights dimensions of military justice systems: (*a*) the question of civilians being tried by military judges, especially contractors and persons accompanying the force on United Nations peacekeeping missions or other extraterritorial deployments; (*b*) the question of the rights and judicial guarantees afforded to military personnel who are brought to trial in military courts; and (*c*) the vexed question of military personnel who are alleged to have committed human rights violations being tried by military courts.[8] A number of subsidiary issues will also be briefly examined.

Why does this matter? It matters now in particular because there are currently few more 'hot topics' in international human rights and international criminal law than the avoidance of impunity, dealing with massive unresolved backlogs of cases in situations of transitional justice such as the Democratic Republic of the Congo (DRC) and dealing with the past abuses of military regimes. But it also matters because military justice systems, when properly constituted, play a crucial role in the preservation and promotion of the rule of law, both domestically and in the context of international peacekeeping and peacemaking operations, and may be anticipated to do so to an even greater extent in the future. There is a global outcry calling for increased intervention by the international community in places such as the Darfur region of Sudan, the DRC, as well as in myriad other hotspots. To do so effectively, without adding to the misery of the

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7 International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR].

8 Federico Andreu-Guzmán, Background Note No. 1, *The Rationale for Military Tribunals*, OHCHR/ICJ Expert Meeting on the Scope of Jurisdiction of Military Tribunals, 6-7 November 2006, Palais des Nations, Geneva at 4 [Andreu-Guzmán Briefing Note No. 1], which characterizes the human rights dimensions of military justice as encompassing these three main areas.

unfortunate inhabitants of such places who have already been victimized, or suffering humiliating and debilitating harm to their own national reputations and the operational effectiveness of their armed forces, states will require increasingly effective military justice systems both to discipline their own armed forces and to regulate the civilians who accompany them.

2. Military Courts

2.1. What constitutes a Military Court?

Before embarking on this analysis, it is necessary for the purposes of the present discussion to specify with some precision what is meant by 'military court'. State practice is heterogeneous as to what actually constitutes a military court, with military tribunals taking various forms in different states. As noted by one prominent commentator,

> Looked at from the point of view of domestic legislation, military jurisdiction as an institution presents a rich and heterogeneous panorama. In terms of personal, territorial, temporal and subject-matter jurisdiction, national legislation regulates military justice in a wide variety of ways. Military jurisdiction varies in terms of functions, composition and operation from one country to another. The position of military courts within the structures of the state and their relationship to the judiciary also vary.[9]

Although there will thus be a wide spectrum of the scope of jurisdiction *ratione materiae*, *ratione personae*, *ratione loci* and *ratione tempore*, one distinction common to many military justice systems, particularly those which evolved from the British model, is between jurisdiction by officers in the chain of command to try relatively minor disciplinary-type offences by some form of summary trial and more formal courts martial (akin to civilian courts), which are presided over by a military

[9] Federico Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, vol. 1 (Geneva: International Commission of Jurists, 2004) at 13 [Andreu-Guzmán, *Military Jurisdiction*]. See also Andreu-Guzmán, *Military Jurisdiction* at 153-378 (Part II), which provides a comprehensive survey of domestic legislation dealing with military jurisdiction in 30 states.

judge, have more elaborate procedural and evidentiary rules, and try more serious offences.[10]

While both summary trials and courts martial are key elements of a fully functional military justice system, for the purposes of the present article, the term 'military court' will be used more restrictively to refer to a court martial-type of tribunal. That is, a form of judicial body established by a constitution or legislation to try persons under the military law of the state, presided over by a military judge or by a civilian judge sitting as a Judge Advocate,[11] in which the triers of fact are military, and possessing the core attributes of a court.

2.2. Purposes of a Military Justice System

It must be recognized as a point of departure for discussion of this topic that there is widespread skepticism about the fairness or legitimacy of purpose of military justice systems and that such initial

[10] See e.g. *National Defence Act*, R.S.C. 1985, c. N-5, ss. 163-164, which statutorily creates summary trial jurisdiction (in the Canadian military justice system, there are three types of summary trials for the trial of military members accused of the commission of relatively minor offences, presided over by officers in the chain of command of the accused individual: summary trial by commanding officer, by delegated officer, or by superior commander). See also *National Defence Act*, ss. 166-196, which statutorily creates and governs the court martial jurisdiction (there are four types of courts martial in the Canadian system for the trial of more serious offences, presided over by a military judge appointed by the Governor in Council in a manner closely analogous to that in which judges of civilian courts are appointed: a Standing Court Martial (trial by a military judge sitting alone); a Disciplinary Court Martial (trial by a Military Judge plus a panel of three officers or senior non-commissioned members roughly analogous to a jury in the civilian context); a General Court Martial, for the trial of the most serious offences (a Military Judge sitting with a panel of five officers or senior non-commissioned members); and, a Special General Court Martial (a Military Judge sitting alone for the trial of civilians subject to the Code of Service Discipline)). See also *2005-2006 Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces* (Ottawa: Office of the Judge Advocate General, 2006) at 84 [*2005-2006 JAG Annual Report*]: the summary trial will usually be the workhorse of the military justice system on a day-to-day basis; for example, in 2005-2006, 97% of the charges in the Canadian military justice system were tried by way of summary trial.

[11] As currently in the United Kingdom. The term 'Judge Advocate' historically denoted the legally trained person who presided at a court martial, who may at various times and places and in different national systems have been either a military or civilian lawyer or judge.

skepticism is not unjustified.[12] It must be acknowledged that in many states, the military view their primary purpose as being to serve their own interests rather than those of their parent society or they view themselves as the 'guardians' of the 'true' character of that society, possessed with a sort of veto entitling them to intervene militarily to 'correct' the evolution of affairs if it is disagreeable to them. The sad litany of abusive military regimes across much of Africa, Asia, Europe and Latin America over the past sixty years needs little elaboration.[13] Such regimes have undoubtedly victimized their own populations and have often utilized military tribunals as one instrument with which to do so. Recent history is replete with examples of their attempts to subsequently grant themselves amnesties to shield themselves from accountability for their actions.[14] The universal tide of repugnance at perceived impunity arising from this has already been alluded to.

But in many democratic states which are committed to observance of the letter and spirit of human rights, professional militaries also exist as legitimate institutions which are fully subservient to civil authority and consider themselves to be constrained in their actions by the rule of law. A key foundational concept in this regard is the model of civil-military relations which prevails in a given state:[15] abuse of military tribunals is a symptom of a wider systemic societal dysfunction in this regard, not its primary cause. When states take collective action under the authorization of the United Nations Security Council for the maintenance of international peace and security or to alleviate humanitarian suffering in failed or failing states, their militaries are, of necessity, usually amongst the

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[12] In a now clichéd phrase, the French Prime Minister Georges Clemenceau was famously claimed to have said that 'military justice is to justice what military music is to music.' Whether the attribution of the remark to him is apocryphal or not, the maxim is now a commonplace.

[13] A partial list would include Chile, Argentina, Brazil, Paraguay, Uruguay, Colombia, Peru, Ecuador, Honduras, Guatemala, Greece, Spain, Portugal, Turkey, Burma, Thailand, Pakistan, and many of the states of sub-Saharan Africa.

[14] In Chile, for example.

[15] For a classic exposition of this theme, see Samuel P. Huntington, *The Soldier and the State: the Theory and Politics of Civil-Military Relations*, (Cambridge: The Belknap Press of Harvard University Press, 1957).

primary instruments of choice. No change to this fact is realistically on the horizon. It is thus facile to pretend that having an effective military justice system is optional for modern states which possess armed forces: disaster and opprobrium await those which do not. This is especially true for those states which shoulder their share of the international community's burden by deploying their troops extraterritorially in support of UN-mandated operations. There is, of course, considerable debate about how the creation of such a system might best be accomplished and a wide spectrum of models of how to do it.

A classic and internationally cited articulation of the necessity for the existence of a separate military justice system in a modern liberal constitutional democracy is that provided by Chief Justice Lamer in his reasons for judgment in the Supreme Court of Canada case of *R. v. Généreux*:

> 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. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military.

> There is thus a need for separate tribunals to enforce special disciplinary standards in the military.[16]

All military justice systems thus find their primary raison d'être in the necessity for the maintenance of discipline. Discipline contributes to assuring that operational aims are achieved through the appropriate use of armed force. The use of military force can never be left uncontrolled. Undisciplined forces may come to constitute a danger not only to themselves but to others, including their parent society. As Rowe notes, the need for discipline is especially prominent during multinational extraterritorial operations: '[t]he degree to which soldiers act as a disciplined body whilst forming part of a multinational force will largely determine the success of the operation in relation to the respect due to the civilian population.'[17]

But discipline is not solely an end in itself. Rather, it is a means to an end as one component of the concept of operational effectiveness. Operational effectiveness means the capacity of the armed forces of a country to effectively achieve the purpose for which it is created and maintained: to conduct military operations on the direction of the government of, and in service to the interests of, the state. That is why states have armed forces. It is widely recognized in military sociology that there is a triad of factors which contribute to operational effectiveness: discipline, efficiency and morale.[18]

In more sophisticated military justice systems, this raison d'être of the military justice system will be reflected in a statutory articulation of the purposes of the system. The place where this may most effectively be expressed might be in the sentencing principles articulated to guide military courts (and, in more sophisticated systems, civilian appellate courts exercising supervisory appellate jurisdiction over military courts). This is because, expressed in colloquial terms, sentencing is where 'the rubber meets the road' in

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[16] *R. v. Généreux* [1992], 1 S.C.R. 259 at 293.

[17] Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006) at 225 [Rowe].

[18] *2005-2006 JAG Annual Report*, *supra* note 10 at vii. See generally Canada, Department of National Defence, *Leadership in the Canadian Forces: Conceptual Foundations*, CF Pub. No. A-PA-005-000/AP-004 (Kingston, Ontario: Canadian Defence Academy Canadian Forces Leadership Institute, 2005).

terms of what one is actually trying to accomplish in trying someone in the military justice system. In a modern state, the statutory articulation of the fundamental purpose of the military justice system will likely be a synthesis of military and civilian sentencing principles. As an example, in the Canadian context,[19] proposed legislation provides that the fundamental purposes of sentencing in the military justice system are both:

> (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.[20]

This articulation of fundamental principles may be further amplified by a statement of the objectives of sentencing in the military context. Once again, using the Canadian legislative framework as an example, proposed legislation provides that the fundamental purposes shall be achieved by imposing just sanctions that have one or more of the following objectives:

> (a) to promote a habit of obedience to lawful commands and orders;
>
> (b) to maintain public trust in the Canadian Forces as a disciplined armed force;

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[19] Examples of the Canadian military justice system will be used repeatedly throughout the article for several reasons: after a period of considerable controversy, it has recently undergone extensive scrutiny and statutory reform and may thus be regarded as amongst the most 'leading-edge' military justice systems in the world, which has been studied as an example by other states contemplating reform of their systems such as Australia, New Zealand and the United Kingdom; its historical origins lie in the British military model, many of whose core elements remain common to the systems of countries such as Canada, the United Kingdom, Australia, New Zealand, Kenya and even, to a certain extent, the United States; and, not least, it is the system with which the author is most familiar. It will thus be utilized as a primary vehicle for the examination of many of the issues raised in the present article, which are common to the military justice systems of many countries. This is not to suggest, of course, that the Canadian system is perfect or could not benefit from further improvement: see *2005-2006 JAG Annual Report* , *ibid.* at xi ('reform of the military justice system is not a one-time event, but rather a continuing process of improvement').

[20] Bill C-7, *An Act to Amend the National Defence Act*, 1st Sess., 39th Parl., 55 Elizabeth II, 2006, cl. 64 [*Bill C-7*], proposing amendments to the *National Defence Act*, *supra* note 10, by the creation of a new s. 203.1(1).

> (c) to denounce unlawful conduct;
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> (d) to deter offenders and other persons from committing offences;
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> (e) to assist in rehabilitating offenders;
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> (f) to assist in reintegrating offenders into military service;
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> (g) to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;
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> (h) to provide reparations for harm done to victims or to the community; and,
>
> (i) to promote a sense of responsibility in offenders, and an acknowledgement of the harm done to victims and to the community.[21]

This represents a synthesis of the classic criminal law sentencing objectives of denunciation, general and specific deterrence, and rehabilitation and restitution, with those targeted at specifically military objectives, such as promoting a habit of obedience to lawful commands and orders, and the maintenance in a democratic state of public trust in the military as a disciplined armed force. This synthesis illustrates that military law has a more positive purpose than the general criminal law in seeking to mould and modify behaviour to the specific requirements of military service. Simply put, an effective military justice system, guided by the correct principles, is a prerequisite for the effective functioning of the armed forces of a modern democratic state governed by the rule of law. It is also key to ensuring compliance of states and their armed forces with the normative requirements of international human rights and international humanitarian law.

It should also be recognized that international law requires states with armed forces to possess a disciplinary code and a functional military justice system if the state wishes members of its armed forces to have the benefit of being treated as prisoners of war if they are captured during armed conflicts. As Rowe notes, 'there is therefore a *quid pro quo* for prisoner of war status, that individuals can be

[21] *Ibid*. (proposing a new s. 203.1(2) of the *National Defence Act*, *supra* note 10).

punished under [the disciplinary system of their own forces] for breaches of international humanitarian law (or the laws of war) and that a superior officer is responsible for those under his command.'[22]

2.3. Required Attributes of a Military Court

Before essaying universal categorization and prescription of principles in general terms such as those in the *Draft Principles*, it is important to articulate what states require military justice systems to actually do and what attributes they therefore will functionally need to possess. This will also determine what categories of person the military justice system should have jurisdiction over and in what circumstances. These questions are logically prior to declarations about what principles one may desire to obtain in the abstract. It is patent that states will not accept sweeping aspirational statements of general principles which they fear may detract from something as important as the efficacy of their armed forces, without being persuaded that the principles are well-grounded in practicality as well as in law. Demonstrating a logical linkage between such general principles and effective operation of military justice systems would help assuage such concerns. In other words, it is necessary to be both principled and pragmatic. In military parlance, states and their armed forces will need to be persuaded that adherence to such principles will be a 'force-multiplier' rather than an 'ivory tower' obstacle to operational effectiveness.

Experience has demonstrated that military courts or service tribunals must possess certain attributes in order to meet the requirements of military justice and discipline of modern, effective armed forces of a democratic state, as well as adhere to legal principles

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[22] Rowe, *supra* note 17 at 67. See *Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land*, 18 October 1907, 205 Cons. T.S. 277, art. 1, 36 U.S. Stat. 2277 (entered into force 26 January 1910); *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, 12 August 1949, 75 U.N.T.S. 135, art. 4(2) (entered into force 21 October 1950) [*Geneva Convention III*]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, art. 43 (entered into force 7 December 1978) [*Additional Protocol I*]. For example, *Additional Protocol I*, art. 43(1) requires that '... armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.'

manifesting fundamental conceptions of fairness and the rule of law.[23] First, they must possess the requisite legal jurisdiction to deal with matters pertaining to the maintenance of discipline and operational effectiveness. This means both that they must be established by law and form part of the regular justice system of the state, and that they must be ascribed sufficiently broad jurisdiction to deal effectively with the various categories of person whose conduct will have an impact on the discipline and operational effectiveness of the armed forces. Second, they must not only possess an understanding of the necessity for, and role of, discipline in an armed force, but also an understanding of the specific requirements of discipline. The import of these two closely related criteria is that the tribunal must either be military or staffed with judges with military experience and an intimate knowledge of the operation of the armed forces.

Next, military courts and tribunals in a modern society must act in a manner which is both fair and perceived to be fair. In addition to legal requirements of fairness, this is very important both for the maintenance of broader societal support for the military justice system and for maintaining the support of the members of the armed forces themselves. In modern all-volunteer forces, soldiers, sailors and airmen will not long abide or acquiesce in the judgments of a disciplinary system which does not comply with this basic requirement. A classic articulation of the necessity for fairness was provided in the *Powell Report* of 1960:

> Discipline-a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed-is not a characteristic of a civilian community. Development of this state of mind among

[23] See especially OHCHR/ICJ, Expert Meeting on Administration of Justice by Military Tribunals, *Briefing of the Canadian Forces Office of the Judge Advocate General: Purposes of a Military Justice System* (Palais des Nations, Geneva: 6-7 November 2006). The concepts in the discussion in this section of the present article dealing with the required attributes of military justice systems are drawn from the briefing, which in turn were drawn from the JAG Communiqué portion of the *2005-2006 JAG Annual Report* , *supra* note 10 at x-xi. Although the particular wording articulating them in this section 2.3 of the present article is the author's, the concepts represent the collective thoughts of many individuals; in particular, the author would like to highlight the prominent contribution in this regard of Colonel Patrick Olson and Colonel Patrick Gleeson of the Canadian Forces Office of the Judge Advocate General.

> soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice-the two are inseparable.[24]

A further criterion is that the operation of military justice systems should be compliant with the basic constitutional requisites of the law in that state. In the context of the Canadian Forces, this means that military law and the operations of military courts must be fully compliant with the requirements of the *Canadian Charter of Rights and Freedoms*.[25] Constitutional exemptions should not be granted to military justice systems. In the context of international law, this also means that such systems should be compliant with the due process requirements and judicial guarantees of article 14 of *ICCPR* for those countries that are states parties to the Covenant.[26] International humanitarian law also prescribes certain guarantees concerning the right to a fair trial, due process and humane treatment of persons subject to military jurisdiction.[27] In respect of civilians in the power of a party to a conflict who do not take a direct part in hostilities, as well as all persons *hors de combat*, state practice also arguably establishes as a norm of customary international law applicable in both international and non-international armed conflicts that 'no one may

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[24] U.S., Department of Defense, *Report to Honorable Wilber M. Brucker, Secretary of the Army by Committee on the Uniform Code of Military Justice, Good Order, and Discipline in the Army ('Powell Report')* (OCLC 31702839) (18 January 1960) at 11.

[25] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[26] *ICCPR*, *supra* note 7, art. 14.

[27] Additional Protocol I, supra note 22, art. 75, para. 4; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609, art. 6, para. 2 (entered into force 7 December 1978) [Additional Protocol II]; Geneva Convention III, supra note 22, arts. 82-108; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 12 August 1949, 75 U.N.T.S. 287, arts. 64-77 (entered into force 21 October 1950) [Geneva Convention IV].

be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.'[28]

The next three criteria arise from considerations of practical necessity. First, military courts must be able to dispense justice promptly. If the primary raison d'être for military courts is the enforcement of discipline as a requisite of operational effectiveness, then discipline must be enforced proximate in time to the alleged offence. It does little good for the maintenance of discipline in an operational setting on deployment on a UN peacekeeping mission in the DRC, for example, to hold a trial a year later at some distant remove in another country. The extended delay in bringing matters to trial seemingly endemic in many civilian justice systems makes them manifestly unsuited for the positive purpose of maintaining military discipline, which requires a more expeditious handling of breaches of discipline and the concomitant alleged commission of offences. Extensive delays in dealing with offences which have disciplinary implications will result in the rapid erosion of discipline and a consequential negative impact on operational effectiveness of the force.

Second, military courts must be portable and deployable, both across the national state and abroad. If one of the primary reasons states possess and invest in armed forces is to enable them to undertake extraterritorial deployments in furtherance of the goals of the state and of the international community (for example, deployment of forces from diverse countries on a UN-mandated or UN-sanctioned mission in a troubled state abroad), then the military justice system should be capable of holding trials in that state, both for reasons of practical effectiveness and of justice. One of the greatest sources of shame for the international community in recent years has been allegations that UN peacekeepers have engaged in the sexual victimization of vulnerable women and children in the DRC, Somalia

[28] Jean-Marie Henckaerts and Louise Doswald-Beck, eds., (International Committee of the Red Cross) *Customary International Humanitarian Law Volume I: Rules*, (Cambridge: Cambridge University Press, 2005) at 352 (Rule 100).

and elsewhere.[29] The local population in such countries should be considered entitled, as a simple matter of justice, to observe that justice is done in respect of crimes committed against them by being able to attend at least some of the actual trials of military personnel accused of such crimes. The requirement to possess the ability to hold trials *in situ* is also buttressed by considerations of practical necessity. For example, if an offence is alleged to have been committed in the DRC, then that is where the bulk of the witnesses are likely to be found. It is impractical to suggest that the inconvenience and expense of bringing those witnesses back to the national state of the accused to attend at trial will often be borne by that state. The extensive expenditures which have marked the operations of the International Criminal Tribunal for the Former Yugoslavia are unlikely to be replicated at the level of national military courts by many states. Further, as a perhaps ugly but also salient truth, it is also quite likely that the Foreign and Immigration Ministries of many countries would inform the Defence authorities that they cannot acquiesce in holding many such trials on the home territory of the national state, because of the practical risk that witnesses from distant war-torn impoverished countries would immediately make claims for refugee status once present on the territory of the national state.

Portability is linked to flexibility, the last criterion, by which it is meant that the military justice system must be capable of holding trials in operational theatres at all levels in the spectrum of conflict, from peacetime to combat operations. Because of this potential requirement to hold trials in close proximity to zones of active military operations, while the procedures and the body of law which they employ may be quite sophisticated in some cases, the physical circumstances in which military courts hold trials might be quite primitive. The courtroom might be a tent. Advocates of doing away with military courts entirely and letting civilian courts handle all military cases should note that, as the sardonic may observe of the seemingly universal sense of self- importance concerning their status

[29] See *Report of the Secretary-General*, '*Special Measures for Protection from Sexual Exploitation and Sexual Abuse*', 58th Sess., UN Doc. A/58/777 (23 April 2004). See also *Summary Record of the 1707th Meeting*, CCPR/C/SR.1707 (27 October 1998), relating to Belgian soldiers in Somalia.

which attends many of them across all societies, civilian judges don't *do* tents.

3. International Human Rights Legal Framework

3.1. Conventional Law

Neither the *ICCPR*, nor the other United Nations or regional human rights treaties contain specific provisions on the subject of military courts. In particular, none of the treaties address the rationale for or the nature of military jurisdiction,[30] regulate specifically the administration of justice by military tribunals, or prohibit the trial of civilians by military tribunals.[31] Neither do they provide a definition of what should constitute a military offence or prescribe what combination of criminal or disciplinary types of offences should fall within military jurisdiction.[32]

As courts exercising jurisdiction over criminal offences and possessed of powers of punishment incorporating true penal consequences, military courts should be subject to the judicial guarantees provided for in article 14 of the *ICCPR* for states party to the Covenant,[33] in article 6 of the *European Convention on Human*

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[30] Andreu-Guzmán Briefing Note No. 1, *supra* note 8 at 5.

[31] Federico Andreu-Guzmán, Background Note No. 3, *Personal Jurisdiction: Military Personnel and Civilians as the Objects of Military Tribunals*, OHCHR/ICJ Expert Meeting on the Scope of Jurisdiction of Military Tribunals, 6-7 Nov 2006, Palais des Nations, Geneva, at 11 [Andreu-Guzmán Briefing Note No. 3].

[32] Federico Andreu-Guzmán, Background Note No. 2, *The Concept of Military Offences (Criminal and Disciplinary)*, OHCHR/ICJ Expert Meeting on the Scope of Jurisdiction of Military Tribunals, 6-7 Nov 2006, Palais des Nations, Geneva, at 4 [Andreu-Guzmán Briefing Note No. 2]. See also Andreu-Guzmán, *Military Jurisdiction*, *supra* note 9 at part II, for an extensive discussion of the topic of what combination of disciplinary and criminal types of offences should fall within military jurisdiction.

[33] *ICCPR*, *supra* note 7, art. 14. As of 20 July 2007, 160 states were parties to *ICCPR*: Office of the United Nations High Commissioner for Human Rights website, accessed 29 July 2007: "Ratifications and Reservations: Status by Treaty: CCPR-International Covenant on Civil and Political Rights", online: Office of the United Nations High Commissioner for Human Rights <http://www.unhchr.ch/tbs/doc.nsf/newhvstatbytreaty?OpenView&Start=1&Count=250&Expand=3.2> (last checked 20 January 2008).

Rights[34] for states party to that instrument or those in any other international treaty to which the state is a party. It should be noted that the rights provided for in article 14 are not amongst those specifically enumerated as non-derogable in article 4(2) of *ICCPR* and thus are notionally susceptible to some derogation 'in time of public emergency which threatens the life of the nation,' and 'to the extent strictly required by the exigencies of the situation.'[35]

3.2. Jurisprudence

The widespread abuse of human rights by militaries in Latin America has generated a large number of cases in national courts,[36] as well as several important cases in the Inter-American Court of Human Rights.[37] The jurisprudence of the European Court of Human Rights has concentrated on issues of the independence and impartiality of the tribunal and guarantees of a fair trial under article 6 of the *ECHR*. [38] The African Commission of Human and Peoples' Rights has examined the question of the trial of civilians by military courts, analyzing the practice in light of Articles 7 and 26 of the *African Charter on Human and Peoples' Rights*,[39] which concern the right to a fair trial and the obligation to ensure that courts are independent. Generally speaking,

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[34] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, art. 6, Eur. T.S. No. 5, (entered into force 3 September 1953) [*ECHR*].

[35] *ICCPR*, *supra* note 7, art. 4. For the author's view on this subject, see below.

[36] See Andreu-Guzmán, *Military Jurisdiction*, *supra* note 9 for a fulsome discussion of such cases.

[37] *Durand and Ugarte Case (Peru)* (16 August 2000), Inter-Am. Ct. H.R. (Ser. C) No. 68; *Castrillo Petruzzi et al Case (Peru)* (30 May 1999), Inter-Am. Ct. H.R. (Ser. C) No. 52; *Genie Lacayo Case (Nicaragua)* (29 January 1997), Inter-Am. Ct. H.R. (Ser. C) No. 30; *Velázquez Rodriguez Case (Honduras)* (29 July 1988), Inter-Am. Ct. H.R. (Ser. C) No. 4.

[38] See e.g. *Engel v. Netherlands* (1976), 1 E.H.R.R. 647; *Kalac v. Turkey* (1997), 27 E.H.R.R. 552 ; *Incal v. Turkey* (1998), 29 E.H.R.R. 449; *Findlay v. United Kingdom* (1997), 24 E.H.R.R. 221 [*Findlay*]; *Cooper v. United Kingdom* [GC], no. 48843/99, [2003] 39 E.H.R.R. 8 [*Cooper*]; and, *Martin v. United Kingdom*, no. 40426/98, [2006] 44 E.H.R.R. 31.

[39] *African Charter on Human and Peoples' Rights* (1981), 27 June 1981, 1520 U.N.T.S. 217, arts. 7, 26, 21 I.L.M. 58 (1982) (entered into force 21 October 1986).

the ACHPR has taken the view that 'a military tribunal per se is not offensive to the rights in the Charter nor does it imply an unfair or unjust process. We make the point that Military Tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process.'[40] Elsewhere, it has expressed its opposition to the trial of civilians by military courts.[41]

4. The *Draft Principles*

4.1. Positive Developments

Before turning to a discussion of important areas of difficulty with the *Draft Principles* produced by the Special Rapporteur, one should acknowledge those principles articulated in the draft which are deserving of approbation and whose adoption would constitute a signal advance in this field. The first of these is Principle No.1, which relates to the establishment of military tribunals by the constitution or the law:

> 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.[42]

As the Special Rapporteur declares, 'emphasis must be placed on the unity of justice.'[43] To occupy a legitimate place in the justice system of a country, military courts should be an integral part of the general judicial system established by law and not brought into being as some species of 'star chamber' created by the executive on an ad hoc or exceptional basis, as so many of the disreputable Latin American examples were.

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[40] *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria* (7 May 2001), African Comm. on Human and Peoples' Rights, Communication No. 218/98 at para. 44.

[41] *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*, (African Union Doc. DOC/OS(XXX) 247), (May 2003) at Principle L.

[42] *Draft Principles*, *supra* note 3 at 8 (Principle No. 1).

[43] *Ibid*. at para. 14.

Second, it is important that respect for the standards of international law be exemplified in the operation of military courts, as provided for in Principle No. 2:

> Military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.[44]

These are most importantly for the present purposes codified in the judicial guarantees of article 14 of *ICCPR*. As the Special Rapporteur states, 'if article 14 of the Covenant does not explicitly figure in the "hard core" of non-derogable rights, the existence of effective judicial guarantees constitutes an intrinsic element of respect for the principles contained in the Covenant, and particularly the provisions of article 4, as the Human Rights Committee emphasizes in its general comment No. 29.'[45]

The other principles which should be readily agreed with include: (*a*) the guarantee of the right to *habeas corpus*[46]; (*b*) the right to be tried by a competent, independent and impartial tribunal[47]; (*c*) the full application of the principles of international humanitarian law to the operation of military courts[48]; (*d*) the compliance of military prisons with international standards and their accessibility to domestic and international inspection bodies[49]; (*e*) that all principles relating to the administration of justice by military tribunals should continue to apply in full during times of emergency, and that military tribunals should not be substituted for ordinary courts in times of emergency, in derogation from ordinary law [50]; (*f*) non-imposition of the death penalty for offences committed by persons under the age of 18,

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[44] *Ibid*. at 8 (Principle No. 2).

[45] *Ibid*. at para. 15.

[46] *Ibid*. at 16-17 (Principle No. 12).

[47] *Ibid*. at 17-18 (Principle No. 13).

[48] *Ibid*. at 9-10 (Principle No. 4).

[49] *Ibid*. at 16 (Principle No. 11).

[50] *Ibid*. at 9 (Principle No. 3).

pregnant women or persons suffering from mental or intellectual disabilities [51]; and (*g*) the public nature of hearings.[52]

4.2. Jurisdiction of military courts to try civilians

One of the aspects of the jurisdiction of military courts most fraught with controversy and suspicion is the scope of their jurisdiction to try civilians. The abuses of military tribunals in trying civilians in Latin America during the 1970s and 1980s are one of the primary sources of the animus against such courts as a general category of tribunal.[53] This deep-seated mistrust animates Principle No. 5 of the *Draft Principles*:

> Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.[54]

It is not difficult to understand what motivates the desire to advance such a proposition. In the commentary of the *Draft Principles*, the Special Rapporteur alludes to the Human Rights Committee's General Comment No. 13 on article 14 of the *ICCPR*.[55] The full text of paragraph 4 of this General Comment provides

> The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not

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[51] *Ibid*. at 23-24 (Principle No. 19).

[52] *Ibid*. at 18-19 (Principle No. 14).

[53] See generally Andreu-Guzmán, *Military Jurisdiction*, *supra* note 9 for an extensive discussion of this.

[54] *Draft Principles*, *supra* note 3 at 10 (Principle No. 5).

[55] *Ibid*. at para. 20.

prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.[56]

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[56] Human Rights Committee, *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*, 21st Sess., UN Doc. A/39/40 (13 April 1984) at para. 4. See also *ICCPR*, *supra* note 7, art. 14. See also Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 90th Sess., UN Doc. CCPR/C/GC/32 (23 August 2007) at para. 22, which was adopted by the Human Rights Committee on the right to equality before courts and tribunals and the right to a fair trial under Art. 14 of ICCPR, replacing General Comment 13. Paragraph 22 of GC 32 declares:

> The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard

One should agree with the declaration of the Special Rapporteur that 'tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.'[57] The spectre of military kangaroo courts being instituted to cow the civilian population through enforcement of some species of martial law during periods of crisis tends to haunt consideration of this issue. However, in its desire to avoid such evils, the bald assertion of Draft Principle No. 5 goes too far. This is because there are indeed circumstances where it is appropriate that military courts should have jurisdiction over civilians and in which the subject civilians would *prefer* that this be so. Further, the existence of such jurisdiction may be required to prevent situations of de facto impunity arising, which would be exactly contrary to the desire which animates the advancement of the *Draft Principles* by their proponents.

The first of these propositions relates to the civilian dependants of military members posted abroad who accompany those members to live for a time in the territory of a different state. Both the armed forces of the sending state and the dependants who accompany them are present on the territory of the receiving state with the consent of that state. This is a very common arrangement amongst states which, since it is based on consent, involves no derogation from the sovereignty of the receiving state. Such forces stationed on the territory of another state with the consent of that state are usually referred to as 'visiting forces'. An example would be the forces of other NATO countries stationed in the United Kingdom, Belgium, Italy and Germany. The legal status of such civilian dependants will usually be governed by a Status of Forces Agreement (SOFA) between the various states parties.[58] Such a SOFA will address, amongst other issues, the question of which state would assume primary and secondary jurisdiction in relation to criminal or other offences allegedly committed by the civilian dependants on the territory of the receiving

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to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.

[57] *Draft Principles*, *supra* note 3 at para. 21 (commentary).

[58] See e.g. *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces*, 19 June 1951, 199 U.N.T.S. 67.

state.[59] It will also commonly permit the sending state to hold military courts on the territory of the receiving state for the purpose of trying offences allegedly committed both by military members and by civilian dependants accompanying the armed forces of the sending state.

It is readily apparent why the sending state should wish to have such jurisdiction over its own nationals. This permits it to exercise control over persons who have the potential to engage its state responsibility through their misconduct. It also allows it to be satisfied that its own nationals are being treated fairly. However, such an arrangement is also beneficial to the civilian dependants concerned, for several reasons. First, it allows them to be subject to the domestic law of their national state and tried in accordance with its national procedures, rather than the possibly unfamiliar law and procedures of the receiving state, as well as being subject to its punishments. The greater the difference between the two national legal systems, the greater the degree of comfort this is likely to bring. Second, it allows them to be tried in a court which uses their own language for its proceedings. Third, the provision of legal aid will allow them to choose to be defended by a lawyer who speaks their language and is well versed in their national law. As an ancillary benefit, the morale of the military member concerned will likely be better if he or she knows that their dependants are being tried in their own national legal system rather than that of another state.[60]

There are also other categories of civilian persons who may be subject to the jurisdiction of military courts abroad. These may include 'persons accompanying the force,'[61] such as contractors, cooks,

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[59] See generally D. Fleck, ed., *The Handbook of the Law of Visiting Forces*, (Oxford: Oxford University Press, 2001).

[60] Rowe, *supra* note 17 at 105.

[61] In order to avoid disputes about questions of fact as to who constitutes a 'person accompanying the force', it is useful to have an explicit statutory definition. See e.g. *National Defence Act*, *supra* note 10, s. 61(1), which provides that a person accompanies a unit or other element of the Canadian Forces that is on service or active service if the person:

(a) participates with that unit or other element in the carrying out of any of its movements, manoeuvres, duties in aid of the civil power, duties in a disaster or warlike operations;

cleaners, maintenance personnel, translators, or in some other capacity related to the welfare or functioning of the force. It would also include reporters embedded with the force. A further category would be persons not otherwise subject to military jurisdiction who serve with or in aid of the force under an engagement with the government whereby the person agrees to be subject to military jurisdiction.[62]

These categories of person are increasingly important to military forces deployed on operations outside their own territory, including on peacekeeping or peace enforcement missions sanctioned by the United Nations. In many modern armed forces, civilian contractors who accompany the armed forces and work alongside them now perform maintenance and servicing functions for a broad spectrum of military equipment, from ordinary trucks to the most sophisticated aircraft, radars and other weapons systems. Many basic logistic support functions previously performed by military members may also now be performed by civilian contractor cooks, mechanics, translators, launderers, drivers, security guards, supply and welfare support personnel.[63] Other important logistics-related functions may be performed by other nationals of the sending state operating at a greater remove from the deployed force and less under their immediate scrutiny or supervision.[64] This is where the capacity to require such persons to enter into agreements to be subject to military jurisdiction becomes important, where it is less obvious that they would be captured by the statutory definition of persons accompanying the force.

(b) is accommodated or provided with rations at the person's own expense or otherwise by that unit or other element in any country or at any place designated by the Governor in Council;

(c) is a dependant outside Canada or an office or non-commissioned member serving beyond Canada with that unit or other element; or

(d) is embarked on a vessel or aircraft of that unit or other element.

[62] See e.g. *ibid.*, s. 60(1)(j), which is a statutory provision providing for this.

[63] Many of these functions would previously have been performed by junior non-commissioned members of the armed forces. In Iraq, for example, the United States has some 130,000 civilians, many of them U.S. nationals, supporting 150,000 soldiers and marines: John M. Broder, "Low profile and high price for Iraq contractors" *International Herald Tribune* (17 July 2007) at 1.

[64] Long-distance truck drivers who may transit through several countries, for example.

This brings one to the second proposition, relating to the avoidance of the creation of a situation of de facto impunity. One of the most problematic and notorious aspects of the intervention of the international community in places such as Bosnia, Kosovo, East Timor and the DRC has been the degree to which civilian contractors, of varying degrees of closeness of connection with the forces they are supporting, have victimized the local population by engaging in criminal behaviour, often involving theft, smuggling, black marketing or sexual abuse.[65] This has occurred in a practical vacuum of jurisdiction, resulting in a situation of de facto impunity. In addition to being morally wrong, this conduct is practically injurious to the effectiveness of the operation because it erodes the trust with the local population and damages the reputations of the United Nations and the countries concerned. Proposals for some sort of UN Court to exercise jurisdiction over such persons associated with a UN mission[66] are currently a distant dream. As Rowe puts it, 'any possibility of the United Nations taking disciplinary action against its peacekeepers is non-existent, despite the issue of misconduct being raised on a number of occasions.'[67] This would seem to apply *a fortiori* to civilian personnel.

The level of conduct spoken of here, while egregious, will not meet the threshold for engagement of the jurisdiction of the International Criminal Court, which anyway will not have the level of

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[65] See *Report of the Secretary-General, Comprehensive Report Prepared Pursuant to General Assembly Resolution 59/296 on Sexual Exploitation and Sexual Abuse, Including Policy Development, Implementation and Full Justification of Proposed Capacity on Personnel Conduct Issues*, 60th Sess., UN Doc. A/60/862 (24 May 2006); *Report of the Secretary-General on Children and Armed Conflict*, 55th Sess., UN Doc. A/55/163-S/2000/712 (2000); *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc. S/1999/957 (1999); "Only Just Staying in One Piece", *The Economist* 384:8539 (28 July-3 August 2007) 55 at 56.

[66] See e.g. Frederick Rawski, "To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations" (2002) 18 Conn. J. Int'l L. 103 at 124; Manfred Nowak, "The Need for a World Court of Human Rights" (2007) 7 Hum. Rts. L. Rev. 251.

[67] Rowe, *supra* note 17 at 225. See generally Peter Rowe, "Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents" (2000) 5 J. Confl. & Sec. L. 45.

resources to prosecute the large number of cases which would be involved in effective enforcement.[68]

Local courts and police forces in such situations are often either non-existent or lacking in the capacity to deal with such cases. Nations should be obliged to take responsibility for the conduct of their civilian nationals in such situations when their presence in the countries concerned is attributable to the presence and operations of their national military contingents. Therefore, it must be acknowledged that there is no practical alternative on the horizon to the exercise of national military jurisdiction over such persons.[69]

Moreover, the same argument which applies to the trial of civilian dependants of military members would apply to civilian contractors, if they were actually faced with the choice between a trial in their own national legal system, utilizing their own law and language, and a trial by local judicial authorities in the local system. Given that such civilian contractors or support personnel accompany the force a voluntary basis and, unlike members of the armed forces, cannot be compelled to serve in a particular location, the assurance that one would be tried in one's own national legal system would constitute a significant reassurance. The contrary possibility might well serve as a powerful disincentive to such civilians' willingness to work in such situations. It must also be borne in mind that such civilian persons willingly consent to subject themselves to the jurisdiction of military courts as a condition of their employment (in systems which

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[68] This point is raised here because it has been suggested in some quarters as an alternative to effective military jurisdiction. Such a suggestion ignores the fact that the ICC, in the terms of the *Rome Statute*, *supra* note 2, preamble, is meant to exercise its jurisdiction over only 'the most serious crimes of international concern,' and confuses a fond aspiration for the future effectiveness of the ICC with the practical reality of resource constraints. It also ignores the basic fact that the ICC is meant to operate on the principle of complementarity with national jurisdictions, not to replace them. It is illustrative of the degree to which proponents of the ICC have often invested it with wholly unrealistic expectations. The ICC is not the new Sheriff in such situations: nations will have to police themselves.

[69] The United Kingdom has provided for a Standing Civilian Court (civilian judge sitting alone) to deal with relatively minor cases of civilian dependants abroad (primarily in Germany), but more serious cases must still be dealt with by court martial. It is far from clear that such a civilian judge would be willing or able to sit in the conditions of deployed peacekeeping missions: Rowe, *supra* note 17 at 108.

provide for this). No one forces them to accept that particular employment. There is at least an implied consent, which may be reinforced by a written acknowledgement of understanding. In respect of those who enter into actual written agreements with the government to be subject, the consent is explicit. Respect for their autonomy of choice seems a dispositive argument in this context.

Some questions might well then be posed in respect of these two categories of civilians discussed above: why does it have to be a military court which exercises jurisdiction over these civilians? And how does this relate to the primary raison d'être of military courts as being the maintenance of discipline and operational effectiveness of the armed forces expounded above, when we are speaking of civilians? The assertion of jurisdiction of military courts over civilians in such situations does not seem to sit entirely comfortably with the fundamental premises advanced above of the first principles justifying the existence of military justice systems.

These are certainly valid questions which seem at first impression to pose some awkward challenges. The answer lies in a combination of legal and practical reasons. First, one must not underestimate the difficulties inherent for countries with common law legal systems in providing for the extraterritorial application of their criminal law. This is an issue in the discussion of this topic which seems to be often underappreciated by lawyers from civil law systems. Common law legal systems are inherently resistant to the extraterritorial application of their criminal law. While many have legislated to provide their military justice systems with jurisdiction over offences which occur while they are deployed abroad, few have more than a skeletal extension of their ordinary criminal law enforced by civilian courts to acts occurring outside their national territory. Exceptions are usually narrowly confined to specific areas involving offences such as hijacking, terrorism and piracy. Countries which are states parties to the *Rome Statute of the International Criminal Court* have undertaken certain obligations to allow for prosecutions for the offences in the *Rome Statute* which have occurred abroad, namely war crimes, crimes against humanity, genocide and aggression,[70] but these

[70] *Rome Statute*, *supra* note 2, art. 5.

'most serious crimes of concern to the international community as a whole'[71] will not capture a civilian dependant who has engaged in impaired driving in Germany or a civilian contractor who has sexually assaulted one person in the DRC.

The practical reasons may be even more salient. Even if some sort of extraterritorial jurisdiction over civilians by civilian courts were established, considerations of expense and convenience militate against it: the numbers of cases are unlikely to warrant a civilian court sitting to try dependants in another state. Further, civilian judges are unlikely to be willing to expose themselves to the dangers and privations of trying cases in failed or failing states which are the locus of deployed peacekeeping missions, even presuming the unlikely situation where the authorities of the local state would permit the civilian courts of another state to try cases on their territory. Accepting the jurisdiction of military courts of the sending state provided for under a SOFA to try cases on their national territory is now a widely accepted feature of international state legal practice. Accepting the operation of a national civilian court of another state on their own territory is another matter, however, which many states would regard as an unacceptable intrusion on their sovereignty. Moreover, it may well be that the bulk of witnesses are located there and could not be subpoenaed to attend a trial in the home state of the accused.[72] As to the question of raison d'être, if one takes a holistic view of what impacts operational effectiveness, then the exercise of the jurisdiction of military courts over certain categories of civilian nationals abroad is consistent with this concept. Currently, one must concede that there is no more viable alternative practically available for most states.

As Rowe notes, an instinctive concern may perhaps arise that there is a 'greater *perception* of the lack of independence and impartiality of a military court when it is trying a civilian.'[73] However,

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[71] *Ibid*., preamble.

[72] This was the case in *R. v. Martin* [1998] A.C. 917, [1998] 2 W.L.R. 1. The House of Lords dealt with an accused who was charged with murder while his father, a British soldier, was serving in Germany and who was convicted in a trial by court martial in Germany. See also *Martin v. United Kingdom*, *supra* note 38, on the subsequent disposition of the *Martin* case by the European Court of Human Rights, discussed below.

[73] Rowe, *supra* note 17 at 101.

after stipulating the necessity for sufficient safeguards to be taken to show that the court is, objectively, sufficiently independent and impartial, Rowe declares that

> There is no reason in principle why, if such safeguards are taken where a military court, established by the national law of the State, tries a civilian that court cannot be an independent and impartial tribunal. It is too easy to conclude that a civilian can never receive a fair trial by an independent and impartial court if he is tried by a military court.[74] This would be a surprising conclusion given that the Geneva Conventions 1949 themselves permit the trial of civilians by a military court. The key issue is not the status of the court as a military one or the role of the military officers but whether there are, objectively perceived, sufficient safeguards to guarantee independence from the executive and the impartiality of the court.[75]

As Rowe further notes,

> If it is assumed that a particular military court has acquired a sufficient degree of independence and impartiality to be consistent with human rights instruments, and it is 'an integral part of the general judicial system' why should that independence and impartiality alter depending upon whether the accused is a soldier or a civilian?[76]

He concludes that 'it is likely, however, that this court will satisfy the requirements of an independent and impartial tribunal [in respect of the trial of civilians] if it does so in the trial of soldiers.'[77]

A recent significant case of the European Court of Human Rights requires comment in this context. *Martin v. United Kingdom*

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[74] See *Genie Lacayo Case (Nicaragua)*, *supra* note 37 at para. 84: 'the fact that it [trial of a civilian] involves a military court does not *per se* signify that the human rights guaranteed the accused party by the Convention are being violated.'

[75]Rowe, *supra* note 17 at 101.

[76] *Ibid*. at 100.

[77] *Ibid*. at 107.

was a case in which the civilian teenage son of a British serviceman serving in Germany had been found guilty in 1998 (*R. v. Martin*) of the murder of a young German civilian woman by a British court martial sitting in Germany, and in which the conviction had been upheld by the Court Martial Appeal Court and by the House of Lords.[78] The European Court of Human Rights allowed the complaint of the accused and held that the nature of the court martial in his case violated the right to trial by an independent and impartial tribunal contained in article 6 of the *ECHR*. The case turned on deficiencies in the British Army court martial system as it then existed, primarily concerning the role of the Convening Authority (which have subsequently been changed) similar to those which the Court had previously found to be unacceptable in *Findlay v. United Kingdom*.[79] The Court considered that the essential safeguards that were lacking in *Findlay* were also absent in this case and, as in *Findlay*, the Judge Advocate at the trial did not provide the same guarantees of independence and impartiality as were found to be present in a different factual context in *Cooper v. United Kingdom*.[80]

It is submitted that this particular case turned on its facts regarding certain features of the British Army court martial system as they then existed and thus would be of limited precedential value in considering other military justice systems in which the role of a Convening Authority in the chain of command has been replaced or is not present.[81] Of more importance are the *dicta* of the Court regarding the trial of civilians by military courts generally:

> It [the Court] recalls, by way of preliminary remark, that there is nothing in the provisions of Article 6 to exclude the determination by service tribunals of criminal charges against service personnel. *The question to be answered in each case is whether the individual's doubts about the*

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[78] *Martin v. United Kingdom*, *supra* note 38; *R. v. Martin*, *supra* note 72.

[79] *Martin v. United Kingdom, ibid.* at paras. 46-49; *Findlay*, *supra* note 38.

[80] *Martin v. United Kingdom*, *ibid.* at paras 46-54; *Cooper*, *supra* note 38.

[81] Similar concerns over the role of a military Convening Authority have animated significant changes to the convening of courts martial in the military justice systems in Canada, Australia and New Zealand over the past decade.

> *independence and impartiality of a particular court-martial can be considered to be objectively justified and, in particular, whether there were sufficient guarantees to exclude any such legitimate doubts*….
>
> It is, however, a different matter where the national legislation empowers a military court to try civilians on criminal charges…. *While it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny*, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6…. The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto*….[82]

The Court clearly intended to make a significant statement here, so its language deserves careful analysis. It should first be noted that the Court did *not* make a blanket declaration that the right to trial by an independent and impartial tribunal under the *ECHR* precluded the trial of civilians by a military court. It is keen to insist, however, that the exercise of such jurisdiction should be subject to careful scrutiny and must be substantiated in each specific case. This, it is submitted, is appropriate. It is further submitted that the exercise of such jurisdiction in the circumstances outlined above in the present article would be consistent with the standard adumbrated by the European Court of Human Rights in *Martin*. Clothing military courts with jurisdiction to try civilians accompanying the force for offences committed outside the territory of the national state is not allocating 'certain categories of offence' to military courts *in abstracto*. Rather, it

[82] *Martin v. United Kingdom*, *supra* note 38 at paras. 43-44 [emphasis added].

focuses on the geographic *locus* in which offences are committed, in circumstances where there is no legal or practical alternative to the exercise of jurisdiction over civilian nationals by a military court and in which the consequence of failure to exercise jurisdiction would either result in impunity for the commission of crimes, or be less advantageous to the individual concerned if they were to be tried in the justice system of the local state.

Public confidence that justice has been done in such cases will be buttressed by the availability for both military personnel and civilians tried by military courts of a right of appeal to a civilian appellate court. As Rowe notes, the participation of civilian judges in hearing appeals from military courts may reflect that states accept that civilian judicial scrutiny of trials held by military courts is desirable in ensuring that the accused 'has received a fair trial in the military court or to provide some re-assurance to society generally that the system of military courts is (ultimately) under civilian control in the same way as the armed forces themselves are under civilian control.'[83] The supervisory jurisdiction of civilian appellate courts constitutes an important instrument to achieve this and is a direct demonstration of the integration of military courts into the national legal system as a whole.

The author agrees that there is no legitimate basis for the trial of civilians by a military court within its own national territory, in respect of alleged offences which have been committed on that territory.[84] This is the scenario which prompts the concerns reflected in the *Draft Principles* and which is the origin of the abuses of military tribunals as a genus surveyed above. However, as discussed, for entirely valid and non-sinister reasons, it goes too far to exclude the jurisdiction of military courts over certain civilians on a class basis in

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[83] Rowe, *supra* note 17 at 87.

[84] Except, perhaps, for the offence of spying. While international humanitarian law deals to some extent with who may be accused of espionage and how alleged spies should be treated (see e.g. *Additional Protocol I*, *supra* note 22, art. 46), it does not actually create the offence of spying or declare what species of court should have jurisdiction. That is a matter for domestic legislation. It will be a matter for each state as to whether it creates the offence of being a spy in its military disciplinary code, or its civilian criminal code.

respect of offences allegedly committed outside the territory of the national state.

Before leaving the topic of military jurisdiction over civilians, it should not be forgotten that in certain circumstances international law may *require* states to have military tribunals exercise jurisdiction over civilians. The first of these relates to the Prisoner of War status determination tribunals required by article 5 of *Geneva Convention III*.[85] Certain categories of civilians specified in paragraphs 4, 5 and 6 of article 4 of *Geneva Convention III* (persons who accompany the armed forces without actually being members thereof, members of crews of the merchant marine or of civil aircraft, and inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist invading forces[86]) are, pursuant to article 5, entitled to have their status determined by a competent tribunal, which will almost inevitably be a form of military tribunal.[87] Second, in respect of the duties of an Occupying Power under *Geneva Convention IV*, pursuant to article 66 of that Convention, in the case of a breach of the penal provisions applying to civilians in the occupied territory promulgated by it by virtue of article 64(2), the Occupying Power may hand over the accused to its 'properly constituted, non-political *military* courts, on condition that the said courts sit in the occupied country.'[88] Third, article 84 of *Geneva Convention III* provides that a prisoner of war (who, as indicated above, may actually be a civilian) 'shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of

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[85] *Geneva Convention III*, *supra* note 22, art. 5.

[86] *Ibid.*, art. 4: such persons may be entitled to prisoner of war status, notwithstanding the fact that they are civilians. Recognition of their possession of this status may be of vital importance to them, as it may result in substantially better treatment than they would otherwise be accorded; in some situations, it may even mean the difference between life and death.

[87] See e.g. *Prisoner of War Status Determination Regulations*, SOR/91-134, made pursuant to the Canadian *Geneva Conventions Act*, R.S.C. 1985, c. G-3.

[88] *Geneva Convention IV*, *supra* note 27, art. 66 [emphasis added].

war.'[89] The consequence of these provisions of international humanitarian law is that the adoption of Principle No. 5 of the *Draft Principles* as it is currently proposed by the Special Rapporteur would actually be contrary to existing international law.[90]

4.3. Judicial Guarantees applicable to military personnel tried in military courts

The rationale discussed above regarding the necessity for full judicial guarantees for the trial of civilians is equally applicable to the trial of military personnel in military courts. All of the due process and judicial guarantees exemplified in article 14 of *ICCPR* should be fully applicable to such trials.[91] The key issue in this context, it is submitted, will be whether there are sufficient guarantees of the independence and impartiality of the military court. While military courts are s*ui generis*, they must still satisfy these fundamental criteria as courts of justice. This will involve an assessment of the three key components of judicial independence, which are equally applicable to military judges as they are to civilian judges: whether military judges are possessed of sufficient security of tenure, financial security and institutional independence for the administrative functioning of the court,[92] while still retaining their military character. While the achievement of this requires a careful crafting of the legislative provisions for the selection, appointment, remuneration and security of tenure of military judges, as well as diligence in safeguarding the legal and practical aspects of their relationship with the military chain of command and the executive branch of government, it is indeed possible for military judges in a modern military justice system to satisfy these fundamental

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[89] *Geneva Convention III*, *supra* note 22, art. 84 (but this is subject to the following limitation: 'In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105'). The author is grateful for the opportunity to discuss certain of these issues with and receive input from Professor Charles Garraway.

[90] *Draft Principles*, *supra* note 3 at 10 (Principle No. 5).

[91] *ICCPR*, *supra* note 7, art. 14.

[92] *R. v. Généreux*, *supra* note 16, Lamer CJC.

criteria for objective independence and impartiality.[93] The cynicism reflected in the commentary in the *Draft Principles* in this regard is unwarranted.

4.4 Scope of Jurisdiction of Military Courts

One of the most significant areas of difficulty with the *Draft Principles* is exemplified in its Principle No. 8, which 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.[94]

What the Special Rapporteur intends by this principle, clear from the accompanying commentary, is that the jurisdiction of military courts should be confined to purely 'disciplinary' types of military offences, rather than those of a criminal nature.[95] The difficulty with this is that, as Rowe remarks, '[a] criminal offence committed by a soldier within a military context is no less a breach of discipline than a purely military offence.'[96] The commission of a sexual assault or of a theft from comrades on board a military ship or aircraft or on operations in the field detracts from discipline and operational effectiveness to no less a degree than the classically disciplinary offence of insubordination, as they have a clear nexus to the maintenance of military discipline. This reality is captured by the concept of a 'Service Offence' which in many military justice systems establishes military jurisdiction over offences, meaning that jurisdiction will be established over not only purely military offences, but also criminal offences which have a disciplinary impact.[97] Moreover, as previously discussed, a state may be under an

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[93] See e.g. *Bill C-7*, *supra* note 20, cls. 39-43.

[94] *Draft Principles*, *supra* note 3 at 13 (Principle No. 8).

[95] See e.g. *ibid*. at para. 29.

[96] Rowe, *supra* note 17 at 80.

[97] See e.g. *National Defence Act*, *supra* note 10, s. 2, which provides that a service offence includes any offence specifically created in the *National Defence Act*, all offences in the *Criminal Code*, as well as in any other Act of Parliament, committed by a person while subject to the Code of Service Discipline. It thus becomes a matter for prosecutorial discretion and discussion between military and civilian prosecutors whether an act which

obligation pursuant to a SOFA to exercise jurisdiction over its nationals present on the territory of the receiving state in all circumstances, even if there is limited disciplinary nexus on the particular facts of that case.

For these reasons, the dogmatic approach exemplified in Principle No. 8 is too narrow and should be rejected.

4.5. Trial by Military Courts of Persons Accused of Serious Human Rights Violations

Principle No. 9 of the *Draft Principles* declares that:

> 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.[98]

Once again, it is understandable why the drafters of the *Draft Principles* should feel this way, in light of the Latin American experience in particular. Their rationale is set out explicitly in the commentary:

> Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions,

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straddles both military and civilian aspects should be prosecuted in the military or the civilian criminal justice system, if committed within the domestic territory of the national state.

[98] *Draft Principles*, *supra* note 3 at 13 (Principle No. 9).

> tending to file cases with no action taken or manipulating "guilty pleas" to victims' detriment.[99]

There are several difficulties with this reasoning. It is true that the commission of human rights violations would not properly fall within the scope of the duties of military personnel and that 'the constituent parts of the crime of enforced disappearance cannot be considered to have been committed in the performance of military duties.'[100] However, the fallacy of this assertion in this context is apparent: neither is the commission of such 'ordinary' crimes as murder, rape, fraud or theft properly within the scope of military duties. They are crimes and breaches of discipline. That is why they are offences under military and criminal law, just as participation in extrajudicial executions, enforced disappearances and torture would be.[101] They should be susceptible to being tried by a military court as a court of law. It is important in this context not to conflate the prosecution of criminal offences with threshold issues of liability in tort, where the concept of whether a given act was committed within the scope of the soldier's duties as a Crown servant or agent of the state is important for engaging the vicarious civil liability of the state. The real issue here is whether military courts in a given state are 'real' courts possessed of sufficient integrity, independence and impartiality to try such grave offences. If they are, there is no principled reason to

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[99] *Ibid*. at para. 32 (commentary).

[100] *Ibid*. at para. 33 (commentary). This line of thinking seems to evoke the same principle expressed by Lord Millet and Lord Phillips of Worth Matravers in *R.v. Bow Street Stipendiary Magistrate and Others,ex parte Pincochet Ugarte* [1999] 2 All E.R. 97 (H.L.) [*Pinochet No. 3*] concerning the involvement of the former Chilean dictator General Pinochet in crimes of torture, wherein, with respect to the issue of immunity of heads of state, they held that it could not properly be considered part of the duties of a head of state to be party to the crime of torture. This is certainly correct, but is beside the point in this context, as we are here concerned with jurisdiction of national courts to try criminal offences, not issues of personal or head of state immunity or state responsibility in international law, or vicarious state liability in tort.

[101] For an example of a case where allegations of torture were tried by a military court, see *R. v. Private Elvin Kyle Brown* (1995), CMAC-372, in which a member of the Canadian Airborne Regiment was tried and convicted by a court martial of the offence of torture under s. 269.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, prosecuted under s. 130 of the *National Defence Act*, *supra* note 10, for the torture and killing of a teenager in Somalia. The conviction was upheld on appeal to the Court Martial Appeal Court, and leave to further appeal to the Supreme Court of Canada was declined by that Court.

carve out certain classes of offences from their jurisdiction. If they are not, then there is a broader systemic problem with the particular military justice system which goes to its ability to properly try any sort of grave offence, not just these particular ones. What the drafters of the *Draft Principles* are really saying here is, in effect, we have been so stung by the Latin American experience that we are going to declare that all military courts are inherently untrustworthy and should be considered incapable of trying these sorts of offences. The blanket nature of this declaration, advanced as a 'universally applicable rule' to be applied 'in all circumstances,' is not an objectively accurate depiction of the state of all military justice systems worldwide. The correct approach is rather articulated in the *International Convention for the Protection of All Persons from Enforced Disappearances*: '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.'[102]

As has been consistently argued in the present article, there are military justice systems fully capable of trying such offences properly. This is not to be naïve: of course there are still many military justice systems around the world which could not be trusted to properly try such cases. But such systems would more broadly fail to satisfy the criteria elaborated in this article for the operation of a legitimate military justice system generally. It is not their military character per se which makes them unsuitable for this purpose, but rather their individual deficiencies as courts of justice, which may well spring from a dysfunctional model of civil-military relations within that state or the rottenness of the government as a whole. A properly constituted and operated military court in state X may be much fairer and more competent to try such offences than a civil court in state Y. Furthermore, there are important reasons not to remove from them the jurisdiction to do so.

The first of these goes to the fundamental raison d'être of military justice systems articulated previously: the maintenance of discipline. Whatever else they might be, offences involving the gross

[102] *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).

violation of human rights of other persons are breaches of discipline. There is no legitimate military utility in such actions. The reality is that properly disciplined armed forces respect the civil and human rights of civilians with whom they come in contact.[103] This is true as much for practical as for legal reasons. It is important for the maintenance of discipline within armed forces that such breaches are dealt with expeditiously and fairly, but also severely, and that the armed forces of a state are required to take ownership of this issue by being fixed with the responsibility for dealing with it.[104] Self-regulation is one classic hallmark of professionalism and in this sense it is important to both the self-identity of, and public trust in, the profession of arms.[105]

The second involves an appreciation of the fact that military tribunals can be effective tools for ending impunity. One of the principal fears of the drafters of the *Draft Principles* is that military courts dealing with such cases will be keen to shield military perpetrators of gross human rights abuses, particularly those of senior rank. Again, the real issue in this context goes to the nature of the military court, the professionalism of the armed forces and the actual model of civil-military relations prevailing in the state. It is not the case that any military court will be inherently sympathetic to members of the military committing gross violations of human rights and that it

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[103] The author is grateful to Colonel Dominic McAlea of the Office of the Judge Advocate General for originally suggesting this concept in discussion of this topic.

[104] Concurrent jurisdiction between the military and civilian justice systems for offences committed within the national territory of the state will provide an important safety valve to prevent abuses of this jurisdiction by the military and to preclude impunity for the commission of such offences. It is not argued in the present article that the scope of military jurisdiction should act as a zone of class privilege to shield members of the military from accountability for their actions, which is one of the principal fears expressed in the *Draft Principles* and their commentary; rather, the ability of civil authorities to also prosecute will prevent such a phenomenon. See e.g. *National Defence Act*, *supra* note 10, s. 71, which indicates in the Canadian context that there shall be no interference with civil jurisdiction by providing that nothing in the *Code of Service Discipline* affects the jurisdiction of a civil court to try persons for any offence triable by that court. It would seem that civil law lawyers may be somewhat uncomfortable with the concept of concurrent jurisdiction, but it is common in common law systems. Moreover, it may be considered conceptually akin to the doctrine of complementarity of jurisdiction between different systems which applies in the context of the ICC.

[105] This consideration underpins the sentencing objective of maintaining public trust in the armed forces as a disciplined armed force: see *Bill C-7*, *supra* note 20.

will be inclined to mitigate punishment because of the position of the accused: quite the contrary. In a professional military, abuse of one's rank or position has classically been treated as a greater breach of trust. A statutory articulation of this is found in proposed legislation in the Canadian system respecting the sentencing principles to be applied at court martial which provides that abuse by the offender of his or her rank or other position of trust or authority shall be considered as an aggravating factor on sentencing.[106]

This principle may come to be of great importance in situations of transitional justice. Militaries are frequently one of the few institutions in post-conflict states possessing the resources and organizational ability to effectively and expeditiously deal with large numbers of persons accused of serious offences, many of whom may be imprisoned awaiting some sort of trial. This is not to minimize the very real difficulties which may obtain in such circumstances, including the fact that large numbers of the members of such militaries may very well themselves have been involved in human rights violations. However, it is important to recognize, and for the members of such societies to recognize, that professionalization of the military is one of the core attributes of a mature state. This is one reason why reform of the military justice system of such states as the DRC and Afghanistan has received significant attention from the international community as a perceived key element to progress in the creation of just, stable and sustainable societies.

4.6 Role of victims in proceedings

There are several additional aspects of the *Draft Principles* worthy of brief comment. The first of these relates to the proposed Principles No. 16 (b) and (c) regarding access of victims to proceedings. The thrust of Principle No. 16, surely arising from salutary impulses, is intended to guarantee that due regard be paid to the rights and interests of victims of crimes to be tried in military courts and to provide a safeguard against things being 'swept under the carpet'. However, these specific

[106] *Bill C-7*, *supra* note 20, cl. 64, proposing amendments to the *National Defence Act*, *supra* note 10 by the creation in that Act of a new subparagraph 203.3(a)(i).

proposals go too far in conflating civil with criminal proceedings and would distort the nature of the trial process. They suggest that victims of crimes or their successors should be guaranteed that they

> (b) Have a broad right to intervene in judicial proceedings and are able to participate in such proceedings as a party to the case, e.g. a claimant for criminal indemnification, an *amicus curiae* or a party bringing a private action;
>
> (c) Have access to judicial remedies to challenge decisions and rulings by military courts against their rights and interests.[107]

There are multiple difficulties with these proposals. They conflate criminal proceedings intended to maintain discipline with civil actions in tort.[108] Criminal or disciplinary prosecutions are brought in the name of the state (whether this is styled as the 'Crown' or 'Queen' or 'People' or 'State') against the accused individual. Prosecutions are undertaken in the name of the relevant community because it is alleged that the accused person has broken the criminal law. In common law legal theory, although the gravamen of the offence may involve injury to that particular victim, the wronged party with standing to prosecute as a criminal offence (as opposed to a tort) is society. In the military context, charges are also brought for the positive societal purpose of maintaining discipline in the armed forces as a prerequisite to operational effectiveness. Thus, the military prosecutor should be a minister of justice, not the agent of an aggrieved victim or their family. The alleged victim should not be considered 'a party bringing a private action', nor is it appropriate to convert the military justice system of a

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[107] *Draft Principles*, *supra* note 3 at 21 (Principle No. 16).

[108] It is recognized that there are some substantial differences in practice in this regard between adversarial common law systems and some civil law jurisdictions in which it is more common for civil parties to be joined to criminal proceedings. The author would make two observations in this regard; first, for the reasons elaborated below, this is inappropriate in a military context, having regard to the purpose of the system; and, second, it should be recalled that the *Draft Principles* purport to be of universal application, and their prescriptions must be amenable to both common law and civil law types of systems. The drafting of this suggestion suggests a privileging of civil law over common law principles and practice regarding criminal prosecutions.

state into one of private prosecutions.[109] Still less should alleged victims be considered '*amici curiae*': that concept imports that the *amicus* is essentially neutral and impartial, participating in the proceedings for the purpose of assisting the court as 'friend of the court', not as a partisan participant with a personal interest in the outcome of the trial.[110] To allow such participation could actually infringe the right of the accused to a fair trial, contrary to the requirements of article 14 of *ICCPR*.[111] This is not to say that requiring the offender, once properly convicted, to make some restitution to the victim as one aspect of sentencing or having separate provision for the access of victims to some sort of criminal injuries compensation fund distinct from the trial, are in any way improper; indeed, they are standard aspects of many civilian criminal justice systems and may be present in some military justice systems as well.[112] But providing for victims to 'have access to judicial remedies to challenge decisions and rulings by military courts against their rights and interests' converts them into a litigant in a civil case rather than their proper role as victim in a criminal trial.

Victims have an important role to play in criminal trials, including trials in military courts, as witnesses and as wronged persons seeking justice in the outcome, but not as parties in the trial itself.[113] If

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[109] Notwithstanding the current widespread desire to embrace alternative or indigenous modes of restorative justice in certain societies, such as Gacaca in some African societies, it must be remembered that one is dealing here with a core function of the state in the maintenance of military discipline, which is not amenable to more consensus-oriented modes of proceeding. It should also be recalled that the *Draft Principles* purport to be of universal application, and their prescriptions in this context would in any event not be appropriate to Western militaries.

[110] The drafting of this proposed principle suggests that concern for fair trial rights of the accused has been subordinated to an agenda of ensuring prominence for the interests of victims. In any event, it is submitted that these proposals have been insufficiently thought through in their implications, and need to be reworked.

[111] *ICCPR*, *supra* note 7, art. 14.

[112] See e.g. *Bill C-7*, *supra* note 20, cl. 64, as an example of a proposed statutory authority for a military court to make restitution orders in proposing the creation of a new s. 203.91 in the *National Defence Act*, *supra* note 10.

[113] It is recognized that achieving the correct balance in this regard is not easy. See *Rome Statute*, *supra* note 2, art. 68, para. 3:

a victim wishes to seek damages (as opposed to restitution, which has a more limited scope) against a soldier who has injured them, then the appropriate method to do so would be to initiate an action as plaintiff in a civil trial as a separate proceeding; a military court is not an appropriate forum in which to do so.[114]

4.7. Periodic review of codes of military justice

Principle No. 20 calls for periodic systemic review, conducted in an independent and transparent manner, of codes of military justice.[115] In itself, this is an excellent suggestion. Providing statutorily for periodic review of military justice systems ensures that they will be able to achieve some attention in what may be crowded legislative agendas of governments and guarantees that they will be subject to scrutiny to ensure their continued fairness of operation and that they keep pace with the evolution of the general criminal law within a state.[116] However, the tenor of the language suggesting such reviews in the

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> 'Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'

In the author's view, to avoid unsustainable prejudice to the fair trial rights of the accused, the presentation of the 'views and concerns' of victims in this sense (as opposed to their evidence about what happened) must be confined to the sentencing phase of a trial. In any event, this expression of a right of victims to participate is far more limited and nuanced than the current version of subparagraphs 16(b) and (c) of the *Draft Principles*: *supra* note 3 at 21 (Principle No. 16).

[114] Just as in the common law civilian context, criminal courts are not the appropriate forum for seeking damages. This is without prejudice to the ability of a victim to make a claim for restitution as part of the sentencing phase of the trial in the military court, but that is distinct from an action for damages. It is appreciated that the motivation behind the suggestion may well embrace a desire to afford some access to justice to victims in developing countries or in situations of transitional justice who may not have the resources or the sophistication to initiate separate civil proceedings, but this must not be allowed to distort the fundamental first purpose of a criminal trial: to provide a fair trial for the accused.

[115] *Draft Principles*, *supra* note 3 at 24 (Principle No. 20).

[116] See e.g. *Bill C-7*, *supra* note 20, cl. 109, an example of a proposed statutory provision requiring periodic independent reviews of the military justice system every five years in proposing the creation of a new s. 273.601 in the *National Defence Act*, *supra* note 10.

commentary to Principle No. 20 is misplaced, as it is laced with suspicion of the legitimacy of military justice systems[117] and suggests that the primary purpose of the review would be to continually narrow the scope of jurisdiction of military tribunals, placing the onus on them to continue to justify their existence.

5. Military Commissions

Recently, one of the most prominent topics in international criminal and human rights law has been the subject of military commissions, specifically those proposed by the United States of America to try captured persons held at Guantánamo Bay in Cuba on suspicion that they had committed crimes as members of Al Qaeda or the Taliban while not entitled to lawful belligerent status under the laws of armed conflict.[118] This is an important, complex and fascinating subject worthy of an entire article unto itself; unfortunately, considerations of space do not permit extended discussion of this subject in the present article. A few brief remarks must suffice.

Enormous controversy has attended the passage by the United States Congress of the *Military Commissions Act*[119] in the wake of the judgment of the United States Supreme Court in *Hamdan v. Rumsfeld*,[120] which criticized the structure of the previous system of military commissions created by the Bush Administration.[121] Many have expressed grave concerns as to the compliance of even the revised military commission structure with the requirements of international

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[117] See e.g. *Draft Principles*, *supra* note 3 at para. 64 (commentary) ('since the sole justification for the existence of military tribunals has to do with practical eventualities, such as those related to peacekeeping operations or extraterritorial situations, there is a need to check periodically whether this functional requirements still prevails.').

[118] See generally Charles Garraway, "Military Commissions – Kangaroo Courts?" (2005) 35 Israel Yearbook on Human Rights 101.

[119] Pub. L. No.109-366, 120 Stat. 2600 (2006).

[120] 126 S. Ct. 2749 (2006).

[121] For earlier criticism, see Johan Steyn, "Guantánamo Bay: The Legal Black Hole" (2004) 53 I.C.L.Q. 1; D. Rose, *Guantánamo: America's War on Human Rights* (London: Faber and Faber, 2004).

law,[122] including many of the military lawyers within the armed forces themselves, and have suggested that such military commissions are an unfortunate perversion of military law and of the general fairness of the regular court martial system of the United States Armed Forces governed by the Uniform Code of Military Justice.[123] For the purpose of the present article, the author would like to make clear that it is not considered that such military commissions would fall within the operative definition of 'military court' as it has been used herein and is not advocating that they would satisfy the requirements of international law or that they should be adopted as a valid model by any other state. Given the evolution of recent events involving the dismissal of charges in some of the trials on jurisdictional grounds as well as the continuing domestic and international controversy, many have suggested that it is unlikely that the commissions will survive past their infancy and that the Government of the United States will ultimately be obliged to utilize another model of tribunal for this purpose, perhaps even the regular court martial system. It is submitted that, in both law and policy, this would be a far preferable alternative.

6. Conclusion

Military courts undeniably constitute a salient feature of the legal landscape in many countries and will continue to do so. Their continuing importance and their ability to fully comply with relevant principles of international human rights and international humanitarian law have been vigourously insisted upon in the present article. While the degree of faith in the legitimacy and potential of military courts displayed herein may initially seem to many both counterintuitive and excessively idealistic, it is important not to lapse into a facile cynicism in this regard. Advocates of international human rights should temper their predispositions with a healthy dose of practicality and due regard for the exigencies of current and foreseeable military deployments in support of the principles of the United Nations and the international community which they espouse.

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[122] David W. Glazier, "Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure" (2006) 24 B.U. Int'l L.J. 55.

[123] Louis Fisher, "Detention and Military Trial of Suspected Terrorists: Stretching Presidential Power,"(2006) 2 J. Nat'l Security L. and Pol'y 1.

In the real world, humanitarian intervention for the protection of human rights (whether in the guise of peacekeeping, peacemaking or more robust military humanitarian intervention in extreme situations of humanitarian emergency in failed or failing states) requires professional, effective and well-disciplined military forces to accomplish, if they are not potentially to do more harm than good. As demonstrated, the possession of an appropriate military justice system is key to the creation and operation of such forces. In particular, one should not conflate military tribunals used for political purposes to dominate civilians (the historical Latin American experience) with the legitimate use of military courts to maintain the discipline of military personnel or to respond effectively to the commission of crimes by those civilians who accompany them on extraterritorial deployments. Respect for human rights and the maintenance of military discipline are not mutually exclusive. This is not a Manichean dynamic. The actual practice of military courts of different states today is just as diverse as the character of their parent societies. Some are deserving of praise, others of opprobrium, just as the human rights records of different countries are generally, and no doubt in much the same measure. Military courts should be neither sanctified nor demonized. They are too important both for states and for the rule of law to do so.

As discussed, some aspects of the *Draft Principles* as currently proposed would impair the utility of military courts without actually advancing the goal of precluding impunity. It is important to strike the right balance in this regard. While a worthy undertaking, it is submitted that further consideration should be given to the improvement of the *Draft Principles* prior to their submission for adoption by organs of the international community, lest they become an obstacle to the achievement of the very goals which animate them. The full potential of military courts as a vehicle for the advancement of respect for human rights and to combat impunity has yet to be consistently realized. Their utility in this regard should not be discounted or forestalled.