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The 'Soul of an Army': A Defence of Military Court Trials for Violations of the Law of Armed Conflict

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Military justice as a body of law was subject to much criticism in the preceding decades before undergoing significant reforms to ensure that fair trial rights could be achieved. However, modern military justice systems are appropriate mechanisms for addressing law of armed conflict (LOAC) violations committed by service members. It is argued that the goals of military justice are consistent with LOAC, and that military justice has a valid legal basis to try violations. Such trials have a large body of precedent. The purported disadvantages of military trials are sufficiently mitigated to prevent cover-ups and unfair trials. Furthermore, military justice offers several benefits that cannot be achieved in a civilian or international forum. It is concluded that although military legal systems are imperfect, their role in the enforcement of international criminal law is worthy of further debate.

Keywords: military justice, international criminal law, war crimes, military courts, law of armed conflict (LOAC)

1. Introduction

Many military commanders have recognised that discipline is essential in maintaining effective war-fighting forces. General George Washington described discipline as 'the Life and Soul of an Army',[1] a sentiment echoed by General Eisenhower 160 years later, who added 'soul is nothing but discipline, and discipline is simply the certainty that every man will obey orders promptly, cheerfully and effectively'.[2] The rationale for this 'soul' hardly needs elaborate explanation: in combat, a force that is disciplined will act effectively, standing better chances of success. Given this, it is small wonder that many states have enacted systems of military justice to enforce discipline.

Discipline inherently requires compliance with the law of armed conflict (LOAC). However, the interaction between LOAC and military justice remains underexplored. Modern international criminal law (ICL) focuses largely on prosecutions within international or ordinary courts. The limited focus on the relationship between LOAC, ICL and military justice is unsurprising, given the latter's chequered past. Military justice's most infamous forays into ICL have been criticised,

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[1] George Washington, 'General Orders: Head Quarters, Cambridge, January 1, 1776' in John C Fitzpatrick (ed), *The Writings of George Washington*, vol 4 (Government Printing Office 1931) 202–03.

[2] Dwight D Eisenhower, 'Letter to John SD Eisenhower (22 May 1943)' in Louis Galambos (ed), *The Papers of Dwight David Eisenhower: The War Years* (Johns Hopkins University Press 1970).

as has the way in which human rights have been addressed within military legal systems. However, human rights reforms and the crises facing ICL make it timely to consider whether *modern* military justice has a role to play in the prosecution of war crimes.

A review of modern military justice systems suggests that using military courts to prosecute LOAC violations committed by service members can enhance efforts to end impunity. Five key propositions will be presented in support of this argument. First, military justice is philosophically compatible with the enforcement of LOAC. Second, military jurisdiction is valid as a matter of domestic and international law. Third, there is precedent for military trials for LOAC violations. Fourth, although there have been historical disadvantages to military justice, these are mitigated in the modern era. Fifth, military prosecutions of LOAC violations offer advantages which cannot be achieved through international or civilian courts. After addressing these propositions, it is concluded that military justice is a valid means of enforcing LOAC, and offers many benefits that cannot be easily achieved in a domestic or international trial.

2. DEFINING MILITARY JUSTICE

2.1. MILITARY JUSTICE AND MARTIAL LAW

Military justice is distinct from but often confused with martial law. Military justice concerns the governance and discipline of members of the armed forces.[3] In contrast, martial law 'consists of a system of rules and principles regulating or modifying the rights, liabilities, and duties, the social, municipal, and international relations in time of war, of all persons, whether neutral or belligerent'.[4] During times of martial law, civilian courts rarely interfere with decisions of military authorities.[5] Military justice involves the application of statutory law by military courts, whereas military courts in a state of martial law 'are merely the instrument of the commanding officer to ensure that his military objectives are achieved'.[6]

Typically, states with a civil law tradition have limited the scope of military justice. In some, military jurisdiction is exercisable only in armed conflict[7] or over military-specific offences.[8] By comparison, common law states permit wider jurisdiction. The wider jurisdiction that is typically found in common law military justice systems means there are more military prosecutions for LOAC violations from common law states, while many civil law examples are historical.[9]

[3] William Whiting, *Military Government of Hostile Territory in the Time of War* (John L Shorey 1864) 25; William C de Hart, *Observations on Military Law and the Constitution and Practice of Courts Martial* (D Appleton & Co 1864) 17.
[4] Whiting (n 3) 24.
[5] *R (O'Brien) v Military Governor of the Military Internment Camp, North Dublin Union* [1924] 1 IR 32 (CA) 38 (Molony CJ).
[6] *Close v Maxwell* [1945] NZLR 688 (CA) 692.
[7] Bundes-Verfassungsgesetz (Federal Constitutional Law) (Austria), art 84.
[8] Wehrstrafgesetz in der Fassung der Bekanntmachung vom 24 Mai 1974 (BGBI I S 1213) (Military Penal Code 1974) (Germany); Costituzione della Repubblica Italiana 1947 (Constitution of Italy), art 103(3).
[9] eg, *Trial of Wagner* (1946) 13 LRTWC 118 (Permanent Military Tribunal, France).

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2.2. Exercising Military Jurisdiction

The initial stages of a military investigation essentially mirror those in the civil (as in civilian) legal system: an offence is detected by an investigatory body (whether a military unit, civil police or military police) or an individual makes an allegation of offending. Much like the civil system, this leads to an investigation. Unlike civil systems, the decision as to whether a service member faces trial often falls to the accused's chain of command.[10] Thus, it is the commander of the accused who decides whether the accused will face trial, and often the forum in which the trial is to be held. This discretion, however, is often limited. In New Zealand, for example, an allegation must proceed through a military trial, or be referred to the relevant civilian authorities, if it is 'well-founded'.[11] Furthermore, several jurisdictions are proscriptive in that certain offences cannot be heard in summary proceedings and must be addressed judicially.[12]

Broadly speaking, military justice systems within many nations have two tiers of trial in contested cases: (i) those heard by superior officers within an accused's chain of command (summary proceedings), and (ii) those heard within a military court by an independent judge, and often a panel of decision makers somewhat akin to a jury (judicial proceedings). There are, of course, further complexities to the matter. In the United States, for example, non-judicial punishments are permitted in certain circumstances,[13] whereas in others all allegations of offending must proceed to trial.[14]

The levels of punishment that can be awarded in summary and judicial proceedings are significantly different, with the penalties open to a court martial of the highest level generally being equal to a sentence that could be imposed by a civilian court sentencing for the same offence. For obvious reasons, it is at this higher level where all war crimes prosecutions within a military jurisdiction must operate.

3. The Compatibility of Military Justice and LOAC Enforcement

3.1. Introduction

At first instance military justice and ICL appear to have divergent aims. Military justice exists to 'assure the maintenance of discipline, efficiency and morale of the military'.[15] For the military to be in a state of readiness, it 'must be in a position to enforce internal discipline effectively and

[10] eg, New Zealand Defence Force (NZDF), *Manual of Armed Forces Law: Commander's Handbook on Military Law*, DM 69 (2 ed) vol 1 (2008) para 7.2.9; Joint Services Committee on Military Justice, *Manual for Courts-Martial United States* (Department of Defense 2019), Part II, Ch III, r 306(a); United Kingdom (UK) Ministry of Defence, *Manual of Service Law*, vol 1 (2013) paras 1-6–1-8.
[11] Armed Forces Discipline Act 1971 (NZ) (AFDA), s 102.
[12] UK Ministry of Defence (n 10) vol. 1, paras 1-6–1-11.
[13] Uniform Code of Military Justice, 10 USC s 815 (UCMJ), art 15.
[14] eg, AFDA (n 11) s 102(1).
[15] *Moriarity v R* 2015 SCC 55; [2015] 3 SCR 485, [46] (Cromwell J).

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efficiently'.[16] In contrast, the purpose of ICL is to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished'.[17] Thus, whereas military law requires combatants to 'obey orders promptly, cheerfully and effectively',[18] ICL compels a combatant to disobey commands where obedience would result in breaches of LOAC.[19]

Although it may appear that the two bodies of law have conflicting objectives, military justice is compatible with the enforcement of ICL and LOAC. Thus, the first key proposition in support of military jurisdiction over LOAC violations – that military justice is compatible with the enforcement of LOAC – falls for consideration.

3.2. The Compatibility of the Two Legal Systems

Militaries have long recognised that commanders cannot give orders in violation of the law[20] and that unlawful killings can give rise to liability. Furthermore, military leaders have, albeit with exception, been willing to follow and enforce LOAC for the same humanitarian reasons that underpin humanity's interest in seeing the law enforced. The point is aptly made by Lieutenant Colonel (retired) Gary Solis, who states that '[w]e obey LOAC limits because we cannot allow ourselves to become what we are fighting and because we cannot be heard to say that we fight for the right while we are seen to commit wrongs'.[21] Solis' remarks are also supported by Leslie Green's canvassing of the history of LOAC, which notes that limits on warfare have been imposed by commanders since Biblical times.[22] Evidence also indicates that soldiers who face the enemy within the battlefield 'often discover that the enemy is actually just a man like themselves and a mutual respect will often build up'.[23]

This rationale for complying with LOAC also includes a desire for and self-interest in the punishment of its violations. LOAC violations contravene the values held by humanity as a whole, which are the same values as those held by the vast majority of service members.[24] It is worth bearing in mind that modern ICL was born largely out of military-run trials, with the Nuremburg Trials being presided over mainly by military officers. There will, of course, be those in uniform who disregard LOAC and do not believe in the humanitarian concerns underpinning it. Such individuals form a small minority whose careers are generally short-lived for

[16] *Généreux v R* [1992] 1 SCR 259, 293.
[17] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 91 (Rome Statute), preamble.
[18] Eisenhower (n 2).
[19] eg, *Trial of General Anton Dostler* 1 LRTWC 22 (US Military Commission 1945).
[20] *Warden v Bailey* (1811) 4 Taunt 67.
[21] Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, Cambridge University Press 2016) 10.
[22] Leslie C Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester University Press 2008) 26–65.
[23] Sara Mackmin, 'Why Do Professional Soldiers Commit Acts of Personal Violence that Contravene the Law of Armed Conflict?' (2007) 7 *Defence Studies* 65, 80.
[24] Bruce Houlder, 'The Self-Interest of Armed Forces in Accountability for Their Members for Core International Crimes: Carrot Is Better than Stick' in Morten Bergsmo and Tianying Song (eds), *Military Self-Interest in Accountability for Core International Crimes* (2nd edn, Torkel Opsahl Academic EPublisher 2018) 85, 92–93.

their incompatibility with the values that underpin military life.[25] For the most part, members of the armed forces understand the significance of LOAC and its enforcement.

Setting humanitarian concerns aside, there are several self-serving benefits for militaries in enforcing LOAC. Enforcement aids in the restoration of peace and the resumption of friendly relations between warring parties.[26] Furthermore, violations of LOAC may cause reputational damage and loss of support for the armed forces,[27] which makes the conduct of operations increasingly difficult. A lack of self-accountability may also risk loss of support for a force among the local population, with demands that more resources be expended in an area. Furthermore, effective enforcement efforts by militaries in theatre may reduce the risk of reprisals.[28] The point is aptly summarised by Houlder, who states:[29]

> A flabby force, an ill-disciplined force or a military that makes its own rules, worse still mixes its own messages, and does not respect international norms, will in the end defeat itself in operations, and in the public mind. A sound democracy needs the legitimacy of a principled force, not a repressive one.

3.3. SUMMARY

Even though military justice and ICL may appear to have opposing goals, military justice is compatible with enforcing LOAC. For a military commander, the enforcement of LOAC is not only a moral imperative as with the rest of humanity; it also benefits the armed forces in succeeding in military operations.

4. THE VALIDITY OF MILITARY JUSTICE IN DOMESTIC AND INTERNATIONAL LAW

4.1. INTRODUCTION

The second key proposition in support of military jurisdiction over LOAC violations is the validity of military jurisdiction in domestic and international law. At the municipal level the validity of military justice has not been in serious doubt over the last decade. Although the nature of military jurisdiction in international law remains underexplored, jurisprudence suggests that military jurisdiction has legal validity.

[25] Roberta Arnold, 'Prosecuting Members of the Armed Forces for Core International Crimes: A Judicial Act in the Self-Interest of the Armed Forces?' in Bergsmo and Song (n 24) 341, 351.
[26] UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383 (2004) para 1.8.
[27] NZDF, *Manual of Armed Forces Law: Law of Armed Conflict*, vol 4 (2nd edn, Defence Manual (DM) 69 2017) para 2.2.7.
[28] Morten Bergsmo and Tianying Song, 'Ensuring Accountability for Core International Crimes in Armed Forces: Obligations and Self-Interest' in Bergsmo and Song (n 24) 1, 16.
[29] Houlder (n 24) 94.

4.2. MILITARY JURISDICTION IN DOMESTIC LAW

By virtue of being members of the armed forces, service members typically become subject to the military jurisdiction of the state which they serve.[30] This ancient proposition is uncontroversial in so far as members of a state's regular forces are concerned.[31] What is significantly more controversial is the exercise of military jurisdiction over civilians. While the trial of civilians within military courts may be justifiable in exceptional circumstances,[32] when and the extent to which this exception applies is a matter for discussion elsewhere.

An individual who is subject to military justice becomes subject to a range of laws and obligations. Military jurisdiction confers the ability to prosecute certain offences which have no civilian counterpart – such as insubordination, absence without leave, and disobeying orders. In many military justice systems the armed forces can also prosecute service members for offences against civilian law.[33] It is common for limitations on this to be imposed. In New Zealand, for example, offences such as murder or sexual violation cannot be tried by the military without the Attorney-General's consent.[34] Likewise, Canadian military courts cannot try murder or certain other offences if they occur in Canada.[35]

A service member may be tried in either the civilian or military legal system for violations of civilian law. To argue for exclusive military jurisdiction over the crimes of the armed forces is 'outrageous and obnoxious to common sense'.[36] In some jurisdictions, such as New Zealand, any civil offence, whether related to the offender's military service or not, may be tried by the military system.[37] Some jurisdictions – such as the US, Canada, and Australia – have historically limited the scope of military jurisdiction over civilian offences to offending which is in some way connected with the accused's role in the armed forces.[38] This limitation has been judicially abandoned in the US[39] and Canada,[40] and it is questionable whether it applies in Australia.[41] As ICL forms part of criminal law in the civilian legal system, the implication is

[30] *Grant v Gould* (1792) 2 H Bl 69, 126 ER 434 (CP).
[31] UCMJ (n 13) s 802, art 2(a)(1); AFDA (n 11) s 6; National Defence Act, RSC 1985 cN-5 (Can) (NDA), s 60(1)(a)–(b); Armed Forces Act 2006 (UK) (AFA), s 367(1).
[32] Human Rights Committee, *El Abani v Libyan Arab Jamahiriya*, Communication No 1640/2007 (views of 26 July 2010), UN Doc CCPR/C/99/D/1640/2007, Annex, para 7.8.
[33] AFDA (n 11) s 74(1); Defence Force Discipline Act 1982 (Aus) (DFDA), s 61(1); NDA (n 31) s 130(1); AFA (n 31) s 42(1); Bas Van Hoek, 'Military Criminal Justice in the Netherlands: The "Civil Swing" of the Military Judicial Order' in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (Cambridge University Press 2016) 218, 220–21.
[34] AFDA (n 11) s 74(4).
[35] NDA (n 31) s 70.
[36] *Bandang v Public Prosecutor* [1998] 4 MLJ 629 (HC), 630–31.
[37] AFDA (n 11) s 74(1).
[38] *O'Callahan v Parker* 395 US 258 (1969), 272–73; *White v Director of Military Prosecutions* [2007] HCA 29, (2007) 231 CLR 570; *Déry v R* 2017 CMAC 2 (Can).
[39] *Solorio v US* 483 US 435 (1987).
[40] *R v Stillman* 2019 SCC 40; 436 DLR (4th) 193, [86]–[96].
[41] Matthew Groves, 'The Civilianisation of Australian Military Law' (2005) 28 *UNSW Law Journal* 364, 379–81.

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that, as a matter of municipal law, there is a prima facie basis for the exercise of military jurisdiction over violations of LOAC.

4.3. Military Jurisdiction in International Law

With a few exceptions, there has been little examination of the basis of military justice in international law. A detailed analysis of the validity and scope of military jurisdiction from an international law perspective is beyond the scope of this article. However, a high-level analysis of the international legal bases for the exercise of military jurisdiction reveals that there is a basis within the international law of jurisdiction for the exercise of what Liivoja terms 'service jurisdiction'.[42]

What remains underexplored is whether, and to what extent, such a jurisdictional basis allows for the exercise of service jurisdiction over war crimes. The acceptance of six crucial points leads to the conclusion that there is, or should be, a jurisdictional basis in international law for the trial of war crimes by military tribunals.

4.3.1. The Validity of Military Jurisdiction Generally

First, it is uncontroversial that a state may exercise jurisdiction over its armed forces abroad. This exercise of extraterritorial jurisdiction, particularly in common law countries, is perhaps the most used basis of extraterritoriality. The rationale for the exercise of such jurisdiction is also relatively straightforward: an armed force must be disciplined at all times to achieve success in an operational environment.

Second, this exercise of jurisdiction is not fully consistent with any of the classic jurisdictional bases. The jurisdiction that a state exercises over its armed forces abroad is often said to rely on nationality jurisdiction – that is, the right of states to exercise jurisdiction over their nationals abroad. For example, in a case concerning the constitutionality of the exercise of jurisdiction over a member of the Australian Defence Force for an alleged rape occurring in Thailand, it was remarked that such a prosecution did not offend international law on the ground of its conformity with the nationality principle.[43]

However, given the increasing number of foreign nationals serving in armed forces, pure nationality jurisdiction cannot be a fully satisfactory explanation for a state's jurisdictional basis. Although it has been argued that the active personality jurisdictional basis extends to cases of persons who are acting on behalf of a state, including those in its armed forces,[44] this explanation is not satisfactory.[45] It ignores the fact that jurisdiction over service members 'has

[42] Rain Liivoja, *Criminal Jurisdiction over Armed Forces Abroad* (Cambridge University Press 2017).
[43] *Re Aird, ex p Alpert* [2004] HCA 44, [124]–[125] (Kirby J).
[44] eg, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, 202–03 (Judge Hackworth dissenting) and 206–07 (Judge Badawi Pasha dissenting).
[45] Liivoja (n 42) 244–45; Aurel Sari, 'The Jurisdictional Immunities of Visiting Forces under Public International Law: A Case Study of the European Security and Defence Policy', PhD thesis, University College London, 2008, 80;

been explicitly recognised without taking a stance whether nationality based jurisdiction could, in similar circumstances, be upheld'.[46] State practice suggests that the jurisdictional basis for extra-territorial application of laws over armed forces is a separate basis.[47]

Third, service jurisdiction – or the jurisdiction of states over their armed forces – must, therefore, exist as a basis of international jurisdiction. Liivoja notes a decision of the Federal Court of India,[48] which held:[49]

> Whatever may be the rule of international law as regards the ordinary citizen, we have not been referred to any rule of international law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits.

Service jurisdiction has 'a distinctly personal character, yet one that is based on functional status, not nationality, and is thus free of the limitations generally applied to the active personality principle'.[50] Support for the proposition of a separate basis of jurisdiction over members of the armed forces is also found in Seyersted's concept of 'organic jurisdiction'. Seyersted states:[51]

> The organic jurisdiction of a State implies that all its relations with—and all relations between and within—its organs and officials as such are governed by the public law and by the executive and judicial organs of that State and not by the public or private law or the organs of any other State.

Seyersted noted that this organic jurisdiction is normally exercised within the state's territory or over its nationals, so is 'thus obscured behind its territorial and/or personal jurisdiction'.[52] Furthermore, there is support for the proposition that organic jurisdiction best explains a 'State's competence to exercise extra-territorial prescriptive, adjudicative and enforcement jurisdiction over its armed forces' abroad.[53] There will, of course, be cases where it is not so obscured, such as when a service member is neither a national nor located in the territory of his or her state. Such was the case in the *Casablanca Arbitration*, in which Germany sought to exercise diplomatic protection over nationals who had deserted the French Foreign Legion. The Permanent Court of Arbitration found in favour of the French claims, holding that the German deserters

Joop Voetelink, *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (TMC Asser Press 2015) 155.

[46] Liivoja (n 42) 245.

[47] Sari (n 45) 78.

[48] Liivoja (n 42) 245.

[49] *Mohy-Ud-Din v The King Emperor* (1946) 8 FCR 94 (Ind), 105.

[50] Liivoja (n 42) 251 (citations omitted).

[51] Finn Seyersted, 'Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organisations (1)' (1965) 14 *International and Comparative Law Quarterly* 31, 33–34; see also Liivoja (n 42) 252.

[52] Seyersted (n 51) 34.

[53] Sari (n 45) 77.

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'remained subject to the *exclusive military jurisdiction*'.[54] The implication which can be drawn from these sources is that service jurisdiction exists in its own right.

Fourth, although universal jurisdiction theoretically could be used to prosecute war crimes of non-nationals in a state's armed forces, service jurisdiction is a less complex basis. It is largely accepted that international law permits the exercise of universal jurisdiction over certain international crimes.[55] Even absent the existence of service jurisdiction, a state could exercise universal jurisdiction over a non-national in its armed forces who has allegedly breached LOAC.

However, there remain eminent scholars who suggest that the legality of universality is 'probably still not entirely resolved'.[56] The International Court of Justice (ICJ), in the *Arrest Warrant* case, refused to rule on the legality of Belgium's purported exercise of universal jurisdiction.[57] Further, in its application in the *Certain Criminal Proceedings* case,[58] the Democratic Republic of the Congo argued that France's purported exercise of universality violated the UN Charter.[59] The removal of the case from the ICJ list without issuing a judgment on the merits means that the ICJ has not yet ruled on the legality of universal jurisdiction.[60] While it is unlikely that international law will adopt a position rejecting the legality of universal jurisdiction, the fact remains that the exact mechanisms and scope are uncertain.

The recognition of service jurisdiction is a means by which a state can exercise control over foreign nationals within their armed forces in a manner that is unlikely to be challenged for want of legality. Given that states have shown a willingness to exercise diplomatic protection on numerous occasions in cases where their nationals have been subject to military tribunals of a state, it is in the best interests of ICL for states to use a mechanism that is settled and uncontroversial, rather than universal jurisdiction, when undertaking such prosecutions. Service jurisdiction offers this increased certainty.

Fifth, service jurisdiction is often exercised exclusively by military courts. Consider, for example, New Zealand, the civilian courts of which have criminal jurisdiction conferred upon them by statute. The Criminal Procedure Act 2011, which outlines the cases that may be brought before the District Court, specifically excludes offences against military law.[61] The fact that many states grant the exclusive exercise of service jurisdiction to military courts suggests that such tribunals are an accepted basis in which to try crimes.

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[54] Casablanca Arbitration (France v Germany) (1909) 3 *American Journal of International Law* 755 (PCA), 758 (emphasis added).
[55] *A-G of the Government of Israel v Eichmann* (1961) 36 ILR 5 (Israel DC), 26.
[56] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016) 346.
[57] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment [2002] ICJ Rep 3, [43].
[58] *Certain Criminal Proceedings in France (Republic of the Congo v France)*, Application of the Republic of the Congo instituting Proceedings, General List No 129, 9 December 2002.
[59] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI.
[60] *Certain Criminal Proceedings in France (Republic of the Congo v France)*, Order of 16 November 2010 [2010] ICJ Rep 635.
[61] Criminal Procedure Act 2011 (NZ), s 7(2).

4.3.2. MILITARY JURISDICTION AND THE GENEVA CONVENTIONS

Sixth, international law requires that service members be subject to a code of discipline which can enforce LOAC. For parties to Additional Protocol I to the Geneva Conventions, their armed forces must be 'subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict'.[62] The passing of this provision was uncontroversial and unanimously approved, 'as it is clearly impossible to comply with the requirements of the Protocol without discipline'.[63] At the time of writing, 174 states have accessioned or ratified the Protocol. No declarations or reservations have been made by any of these states regarding the obligation to provide a disciplinary system.[64] Thus, for a significant majority of states an obligation exists to ensure that they have a military justice system which is competent to try LOAC violations.

Military courts are also required for prosecution of prisoners of war.[65] Although Geneva Convention III does not state explicitly that this rule applies to war crimes, there is no exclusion listed with regard to alleged violations of LOAC. Notably, the Nuremberg trials for captured Nazi officials were heard before military, rather than civilian, courts. It follows, then, that for a large majority of states in the world, having a military justice system that is equipped to prosecute violations of LOAC is a requirement, and that military justice has a strong legal basis to prosecute LOAC violations.

4.4. SUMMARY

Military justice has a valid basis in domestic law. By joining the armed forces, an individual becomes subject to any system of military justice in force within that state. This jurisdiction often confers on the military the ability to prosecute civilian, as well as military, offences. On the international plane the validity of military jurisdiction is also well established. A state's ability to exercise jurisdiction over its forces abroad is uncontroversial, and this is often achieved through military justice. International law requires that military jurisdiction exists, and that it has the competency to try LOAC violations.

[62] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 43(1).
[63] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross and Martinus Nijhoff 1987) para 1675.
[64] International Committee of the Red Cross, 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, Status of Ratifications, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.
[65] Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III), art 84.

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5. PRECEDENT FOR MILITARY PROSECUTION OF LOAC VIOLATIONS

5.1. INTRODUCTION

Although service jurisdiction may be valid within international law, that is a different matter entirely from whether this jurisdiction should extend to violations of LOAC. Thus, the third key proposition in support of military trials for war crimes – that such exercises of military jurisdiction have a significant body of precedent – calls for examination.

5.2. EARLY PRECEDENTS

The first modern code of the laws of warfare – the Lieber Code – was promulgated to Union Forces in the midst of the US Civil War. In accordance with these orders, military law was to be enforced by courts martial in the case of crimes against statute, and by military commissions for breaches of 'the common law of war'.[66] There were numerous instances of individuals being charged before these bodies for violations of the laws of war during the Civil War.[67] Trials were undertaken for sexual violence[68] and murder within the military jurisdictions.[69] Charges were also laid for targeting persons who would now be considered to be 'protected',[70] and other conduct which, in modern terms, would be analogous to a war crime.[71] Precedents exist also from the Second Boer War, when three Australian lieutenants were tried by court martial for the murder of Boer prisoners and a missionary. Two were executed as a result.[72]

[66] Francis Lieber, 'General Orders No 100: Instructions for the Government of Armies of the United States in the Field', 24 April 1863, art 13, https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf.

[67] Gideon M Hart, 'Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions' (2010) 203 *Military Law Review* 1.

[68] *Trial of Private Mathew Patterson, Company A, 19th US Infantry* (General Court Martial Orders No 46, Court Martial Headquarters Department of Texas, 29 May 1871); *Trial of Corporal John Lowney, Company D, 3rd Missouri Cavalry* (General Orders No 32, Military Commission Headquarters Department of the Missouri, 29 April 1863).

[69] *Trial of Private Peter O'Brien, Company B, 8th Regiment, Illinois Volunteers* (General Order No 18, Military Commission Headquarters Department of the Missouri, 7 December 1861); *Trial of First Sergeant Charles Adams, Company G, 1st Missouri Light Artillery* (General Orders No 23, Military Commission Headquarters Department of the Missouri, 20 January 1862).

[70] *Trial of Private Elijah Collard, of Captain HP Hawkin's Company of Missouri Cavalry* (General Orders No 25, Military Commission Headquarters Department of the Missouri, 24 January 1862).

[71] *Trial of James Fitzgerald* (General Order No 27, Military Commission Headquarters Department of the Missouri, 8 December 1862); *Trial of John F Bouse* (General Orders No 33, Military Commission Headquarters Department of the Missouri, 1 May 1863).

[72] George Witton, *Scapegoats of the Empire: The True Story of Breaker Morant's Bushveldt Carbineers* (Oxford City Press 2010).

5.3. The Second World War

Following the Second World War, several trials were held with regard to Axis war criminals. Many of the trials were held in military courts[73] and presided over by officers of the Allied forces.[74] Of course, the use of military trials at Nuremberg is not an example of a state prosecuting members of its own armed forces. Interestingly, Geneva Convention III would come to require that prisoners of war be tried by military courts.[75] Despite the fact that the trials at Nuremberg were over enemy forces, at the outset of modern international criminal law states trusted the prosecution of it to military forces, as opposed to civilian courts.

5.4. The Post-War Period

In modern times, military courts have continued to play a role in attempts to enforce LOAC. Indicatively, courts martial have been held for offending in relation to Vietnam, Somalia, Afghanistan and Iraq.

5.4.1. The Vietnam War

Most infamous of these modern trials followed the My Lai massacre, when forces commanded by Lieutenant William Calley murdered at least 350 civilians. The handling of the My Lai saga 'was not the military justice system's brightest moment'.[76] At trial, Calley was sentenced to dismissal and confinement at hard labour for life. After various appeals and reductions by courts and military authorities, he was ultimately paroled after having served only four and a half months of confinement post-conviction.[77] Twenty-five participants in the massacre were charged, but only four brought to trial. Calley was the only offender who was sentenced to life. Much of this was as a result of commanders choosing to dismiss matters outside the court martial process.[78]

5.4.2. Somalia

More appropriately handled were the trials undertaken by the Canadian Armed Forces regarding the torture and killing of a 16-year-old Somali male. The evidence suggested that the main

[73] eg, *Trial of Yamashita* 4 LRTWC 1 (US Military Commission 1946); *Trial of Schonfeld* (1946) 11 LRTWC 64 (UK Military Court); *Trial of von Leeb* 12 LRTWC 1 (US Military Tribunal 1948) (*German High Command Trial*).
[74] *Trial of Wielen* (1947) 11 LRTWC 31 (UK Military Court) (*Stalag Luft III Case*); *Trial of von Falkenhorst* (1946) 11 LRTWC 18 (UK Military Court); *Trial of Klein* 1 LRTWC 46 (US Military Commission 1945) (*Hadamar Trial*).
[75] GC III (n 65) art 84.
[76] Solis (n 21) 399.
[77] ibid 397–99.
[78] Jeannine Davanzo, 'An Absence of Accountability for the My Lai Massacre' (1999) 3 *Hofstra Law & Policy Symposium* 287, 294–96.

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perpetrator was Master Corporal Clayton Matchee, who was charged with murder and torture in relation to the death. The Court Martial found there was sufficient evidence to put him on trial.[79] However, as a result of mental health issues and a permanent brain injury, he was found to be unfit to stand trial and charges were withdrawn in 2008.[80]

Private Kyle Brown assaulted the victim and posed for photographs with him. He was found guilty of manslaughter and torture and sentenced to five years' imprisonment, a decision upheld on appeal.[81] Charges were also brought against Private David Brocklebank for aiding and abetting torture and negligent performance of a military duty. He was found not guilty of both charges, a decision upheld on appeal.[82] An officer was reduced in rank and severely reprimanded for failure to control his subordinates,[83] and a non-commissioned officer was sentenced to 90 days' detention for failing to ensure the victim's safety.[84] The Commanding Officer, Major Anthony Seward, was sentenced to a period of three months' imprisonment and dismissal from service for giving the orders that resulted in the torture and death.[85]

5.4.3. AFGHANISTAN

Courts martial also took place for conduct in Afghanistan. Captain Robert Semrau of the Canadian Armed Forces was accused of killing a wounded male prisoner. Found not guilty of murder, he was found guilty of behaving in a disgraceful manner – a military offence – in respect of the killing. Spared prison, Semrau was reduced in rank and dismissed from service.[86] A prosecution was also brought by the Australian Defence Force following the death of five children in an assault against an insurgent position in Afghanistan. Charges were laid against the soldiers involved for manslaughter and dangerous conduct with negligence as to the consequences – a military offence. An opinion given by the Chief Judge Advocate stated that it is 'contrary to reason and policy to impose a criminal duty' of care in relation to manslaughter charges.[87]

5.4.4. IRAQ

Finally, a court martial held as a result of conduct in Iraq saw the first conviction for a war crime of a UK service member. Corporal Payne was charged with manslaughter and inhumane treatment in relation to the death of detainee Baha Mousa, who was beaten and subjected to inhumane and degrading treatment. He died in September 2003, two days after he was made captive. The

[79] *R v Matchee* 2004 CM 14 (Can).
[80] Government of Canada, 'Charges against Ex-Master Corporal Clayton Matchee Withdrawn', 15 September 2008, https://www.canada.ca/en/news/archive/2008/09/charges-against-ex-master-corporal-clayton-matchee-withdrawn.html.
[81] *Brown v R* (CMAC Canada, 6 January 1995).
[82] *R v Brocklebank* (1996) 106 CCC (3d) 234 (CMAC).
[83] *R v Sox* (CMAC Canada, 4 July 1996).
[84] *R v Boland* (CMAC Canada, 16 May 1995).
[85] *R v Seward* (CMAC Canada, 27 May 1996).
[86] *R v Semrau* 2010 CM 4010 (Can).
[87] *Re Civilian Casualty Court Martial* (2011) 259 FLR 208 (Chief Judge Advocate), [101].

manslaughter charge was dismissed, but Payne pleaded guilty to inhumane treatment, resulting in a sentence of 12 months' imprisonment and dismissal.[88] Six others were acquitted in relation to the death.[89]

5.5. SUMMARY

Military trials for conduct which violates LOAC are not novel. They have been held since at least the time of the Lieber Code. When modern ICL was born, states entrusted the enforcement of it to military courts in the prosecution of Axis war criminals. Furthermore, since the Vietnam War courts martial trials have formed a part of how LOAC violations have been prosecuted by states.

6. THE PURPORTED DISADVANTAGES OF MILITARY JURISDICTION OVER WAR CRIMES AND HOW THEY ARE MITIGATED

6.1. INTRODUCTION

Of course, the fact that precedent exists does not necessarily mean that the exercise of military jurisdiction through courts martial is beneficial. Much criticism has been made of military justice. No justice system is perfect; the same is true of military justice. Imperfections within military justice systems should rightly be identified and remedied. Thus, the fourth proposition in support of the exercise of military jurisdiction over violations of LOAC – that the purported disadvantages of military jurisdiction are largely mitigated in the modern era – calls for exploration.

6.2. THE RISK OF MILITARY COVER-UPS

Perhaps one of the main concerns with military prosecutions of LOAC violations is the allegation that a military's interest is in covering up, rather than addressing, offending. It cannot be denied that militaries have covered up serious offending in the past. The UN Economic and Social Council recognises this risk. It suggests that military jurisdiction be set aside in favour of civilian jurisdiction where serious human rights violations are to be tried because of the risk of cover-ups.[90] A harrowing account of such a cover-up was given by Sergeant Samuel Provance to the US Congress concerning the treatment of detainees at Abu Ghraib:[91]

> When I made clear to my superiors that I was troubled about what had happened, I was told that the honor of my unit and the Army depended on either withholding the truth or outright lies … Everything

[88] *R v Payne* (Court Martial UK, 30 April 2007) (*Payne*, Sentencing Transcript), 15, 17.
[89] *R v Payne* (Court Martial UK, 13 February 2007) (*Payne*, No-Case Ruling).
[90] UN Economic and Social Council, Draft Principles Governing the Administration of Justice through Military Tribunals (13 January 2006), UN Doc E/CN4/2006/58, Principle 9.
[91] Quoted in Joshua ES Phillips, *None of Us Were Like This Before: American Soldiers and Torture* (Verso 2012) 118.

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> I saw and observed at Abu Ghraib and in Iraq convinced me that if I filed a report [about the abuse], I wouldn't be listened to, it would be covered up. I thought that the best case [scenario] was that I would be considered a troublemaker and ostracized, but that, potentially, I might even place my life in danger.

As the world becomes increasingly globalised and technology advances, covering up violations of LOAC is increasingly unlikely to succeed. A study into the role of technology in the Israel–Palestine conflict concluded that increased access to digital technology makes information control and keeping secrets increasingly difficult for military authorities.[92] Human rights agencies and the media play a crucial role in ensuring that allegations are not covered up. Despite the attempts to cover up offending at Abu Ghraib, the matter still made it into the public domain and resulted in prosecutions.[93]

Military actions are increasingly subject to oversight by external entities, such as inquiries and coronial proceedings.[94] Such developments mean that commanders are more inclined to investigate matters at the time, and to deal with them appropriately. The risk to a commander's reputation, let alone the potential criminal consequences, means that although there may be some self-interest in covering up investigations, it is outweighed by the interest in ensuring proper prosecutions. Although it could be suggested that a military commander may cover up, ignore or endorse violations of LOAC to win a conflict, this appears of little tactical benefit. Armed forces engaging in acts of barbarism have historically been more likely to be defeated, and the length of armed conflicts is also drawn out as a result of increased resistance from the local population.[95] There is, therefore, very little benefit in law or military reality in covering up or endorsing LOAC violations.

6.3. The Need for Independence and Impartiality

One common criticism levelled at military justice systems is an alleged lack of independence and impartiality.[96] As commanders play a pivotal role in investigations and prosecutorial decisions, it is often contested that there is a risk that they choose not to prosecute to protect their own reputations and subordinates from liability.[97] The level of control which a commander historically could exercise over the military justice system has been suggested to 'deprive the court-martial of any

[92] Gadi Wolfsfeld, 'The Role of the Media in Violent Conflict in the Digital Age: Israeli and Palestinian Leaders' Perceptions' (2018) 11 *Media, War & Conflict* 107.
[93] eg, *US v Smith* (Army Ct Crim App, 27 October 2008); *US v Harman* 68 MJ 325 (CAAF 2010); *US v Graner* 69 MJ 104 (CAAF 2010).
[94] Christopher Waters, 'Democratic Oversight through Courts and Tribunals' in Duxbury and Groves (n 33) 36, 42.
[95] Ivan Arreguín-Toft, 'The [F]Utility of Barbarism: Assessing the Impact of the Systematic Harm of Non-Combatants in War', paper presented at the annual convention of the American Political Science Association, 2003.
[96] Elizabeth Santalla Vargas, 'Military or Civilian Jurisdiction for International Crimes? An Approach from Self-Interest in Accountability of Armed Forces in International Law' in Bergsmo and Song (n 24) 397, 398.
[97] ibid; *Guzmán v Mexico* (2006) Inter-Am Comm HR, Report of 28 February 2006.

real independence'.[98] In many systems a commander has the ability to determine whether the matter will be investigated, if the accused will be charged, and the forum in which charges are to be heard.[99] These abilities have been described as a 'major threat' to the system.[100] Others have suggested that the risk of a lack of independence means that military trials for violations of human rights law may be 'perceived as illegitimate or devoid of confidence by public opinion'.[101] Further, in jurisdictions such as the US, command retains the ability to reduce court martial sentences, and may also hold command over decision makers on the military panel who will determine guilt.[102]

It would be foolish to argue that command influence has never affected a military trial, or that the authorities have never attempted to cover up military offending. History is replete with examples. Indeed, this occurred following the My Lai massacre, in which the brigade accused of committing the massacre investigated it, and rumours of the massacre were dismissed through propaganda efforts.[103] So too did a 'pattern of indifference' exist with regard to the abuse committed against detainees during the Iraq and Afghanistan campaigns.[104] However, although the risks do exist, military law has ample measures which limit the risk of command influence over military justice. This, coupled with the fact that many countries now hold military trials in the same open manner as in civilian courts, means that military trials are often held in conditions equal to civilian trials.[105]

6.3.1. Domestic Limitations on Command

The notion that military commanders do not enjoy unfettered power is not novel.[106] This is implicit in the early English decision in *Warden v Bailey*. The case concerned the lawfulness of an order given to soldiers to learn to read and write, and to pay a tax to cover the lessons. The court said:[107]

> We think then that the order to attend the school most probably was bad, and an excess of authority, but the order of taxation was certainly so; and that order was never rescinded. The subject cannot be taxed, even in the most indirect way, unless it originates in the lower house of parliament.

[98] Arthur E Farmer and Richard H Wels, 'Command Control – Or Military Justice' (1949) 24 *New York University Law Quarterly Review* 263, 267.
[99] 'Can Military Trials Be Fair? Command Influence over Courts-Martial' (1950) 2 *Stanford Law Review* 547, 547–48.
[100] Luther C West, 'A History of Command Influence on the Military Judicial System' (1970) 18 *UCLA Law Review* 1, 151.
[101] Santalla Vargas (n 96) 412.
[102] 'Can Military Trials be Fair?' (n 99) 548.
[103] Kendrick Oliver, 'Atrocity, Authenticity and American Exceptionalism: (Ir)Rationalising the Massacre at My Lai' (2003) 37 *Journal of American Studies* 247, 247–48.
[104] Huw Bennett, 'The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan' (2014) 16 *British Journal of Politics and International Relations* 211, 216.
[105] Houlder (n 24) 88.
[106] Harris Prendergast, *The Law Relating to Officers in the Army* (Parker, Furnivall and Parker 1899) 123–28.
[107] *Warden v Bailey* (n 20) 89.

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The limitations of command have also long been recognised, even in times of war. For example, a 1903 South African case held that an order to kill could act as a defence to a charge only if the orders given were lawful.[108]

There are also significant safeguards against command influence having an undue effect on military discipline. Although command has the ability to determine whether a person will face trial, where there are reasonable grounds to suspect that there has been offending committed[109] the only option practically open to the commander is to ensure the matter proceeds to trial.[110] For example, in the New Zealand military justice system, if there is a 'well-founded allegation' of offending, a trial must be set down or the matter referred to the relevant civilian authorities.[111] This means that a commander's actions cannot properly oust the jurisdiction of a court martial once it is set down.[112] In some jurisdictions the exercise of undue command influence is expressly prohibited by statute.[113] Military courts are increasingly ensuring that command influence does not have an impact on justice.[114] For example, measures with the aim of in any way resulting in bias on the part of members of the military panel whose function is to determine the guilt or innocence of an accused are prohibited,[115] as are criticisms of panel members whose decisions do not align with the commander's intent.[116] Thus, recent developments in military law indicate that courts will be willing to take 'measures to ensure not only the actual fairness of the military justice system but the appearance of fairness by all those that practice within it'.[117]

Although there is some command oversight and influence within military justice systems, this is compatible with independent prosecutions or with ICL. It is for the purposes of command that military discipline systems exist. In the Australian Defence Force it is 'a command priority (as well as a command responsibility)' to ensure that any shortfalls within the military justice system are addressed.[118] Military authorities are increasingly asserting that misuse or abuse of the military discipline system is to be dealt with in some cases by placing those who committed the misuse themselves through a disciplinary process.[119] Furthermore, retention of command influence within a military justice system is essential: military justice must aid in the preservation of the authority of the commander.[120]

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[108] *R v Celliers* [1903] ORC 1 (HC) (South Africa), 5–6.
[109] DFDA (n 33) s 87(1); AFDA (n 11) s 102(1).
[110] Australian Defence Force (ADF), *Discipline Law Manual (ADFP 06.1.1)*, vol 3 (4th edn, 2009) para 4.47; NZDF (n 10) vol. 1, para 4.2.3; UK Ministry of Defence (n 10) 1-6–1-16.
[111] AFDA (n 11) s 102(1).
[112] *R v Bannister-Plumridge* (Court Martial NZ, 13 February 2019) [68]; aff'd [2019] NZHC 1909 (CMAC).
[113] UCMJ (n 13) s 837 art 37(a).
[114] Mark L Johnson, 'Confronting the Mortal Enemy of Military Justice: New Developments in Unlawful Command Influence' [2007] *Army Lawyer* 67.
[115] eg, *US v Upshaw* 49 MJ 111 (CAAF 1998).
[116] eg, *US v Youngblood* 47 MJ 338 (CAAF 1997).
[117] Johnson (n 114) 75.
[118] ADF (n 110) vol 3, para 1.52.
[119] ibid vol 3, paras 1.81–1.82.
[120] William C Westmoreland, 'Military Justice: A Commander's Viewpoint' (1971) 10 *American Criminal Law Review* 5, 6.

Military legal systems have long recognised that commanders who do not properly exercise discipline are themselves subject to sanctions. Following the My Lai massacre, Brigadier General Samuel Koster was subject to administrative action for failure to conduct a prompt and proper investigation. A court refused to overturn the sanctions.[121] Militaries have a self-interest in the investigation of violations of LOAC. Such accountability may contribute to the credibility of the armed forces[122] and result in less scrutiny within international forums.[123] From a purely pragmatic view, commanders are incentivised to discipline their forces, as disciplined troops are more beneficial from a tactical perspective.[124]

6.3.2. The Role of Command Responsibility

The role that command responsibility plays within the military justice system is often overlooked in debates.[125] A commander of a force is obliged to prevent, repress and punish the offending committed by subordinates.[126] The failure of a commander to fulfil these obligations has long been a principle upon which responsibility for offending can attach to the commander in the commander's own right.[127] Santalla Vargas suggests that military prosecutions may not be capable of fulfilling the obligations of command responsibility, writing:[128]

> From the perspective of the advocated interest in self-accountability of armed forces, the entrenched component of the superior responsibility of a military commander or superior under international humanitarian law of ensuring investigation and prosecution for alleged violations of humanitarian law committed by subordinates, that under international criminal law entails criminal responsibility ensuing from its breach, is to be fulfilled not merely by referring the case to the competent jurisdictional authorities, as prescribed by domestic law, but rather referring to a jurisdictional forum capable of conducting genuine proceedings.

Although it is undoubted that commanders may in many cases fulfil their obligations by referring the matter to a civilian authority,[129] it is not required, nor is it in the interests of military discipline or ICL. To hold that a commander cannot use military justice systems to enforce LOAC is likely to have unintended consequences in ICL with regard to whether the commander can still be said to have control over the forces, and the circumstances in which a commander can be punished for failure to punish crimes when jurisdiction to so do is limited.[130]

[121] *Koster v US* 685 F 2d 407 (1982), 414.
[122] Bergsmo and Song (n 28) 15; Arnold (n 25) 351.
[123] Bergsmo and Song (n 28) 16.
[124] Arnold (n 25) 350–51.
[125] Victor Hansen, 'The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences' (2013) 21 *Michigan State International Law Review* 230, 251.
[126] AP I (n 62) art 87(1); Rome Statute (n 17) art 28.
[127] *In re Yamashita* 327 US 1 (1946) (*Yamashita* (SC)).
[128] Santalla Vargas (n 96) 414–15 (citations omitted).
[129] ibid 416; ICTY, *Prosecutor v Halilović*, Judgment IT-01-48-A, Appeals Chamber, 16 October 2007, [182].
[130] Hansen (n 125) 260.

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Furthermore, if commanders are to be held liable for the war crimes of their subordinates, it is essential that they have the ability to properly punish those crimes.[131] There are, hypothetically speaking, five different jurisdictions to which the commander could refer matters for investigation. The matter could be referred to the territorial state, an international court, or any state exercising universal jurisdiction. Although such options exist, a commander cannot be expected to use them in most circumstances. The territorial state is an impractical option where it is at war with the commander's state. This would mean that the commander was surrendering the subordinate to become a prisoner of war, who would remain in the custody of the territorial state, even if found not guilty. Even where the commander's forces are in the territorial state with consent, the jurisdiction of the territorial state over foreign forces is often limited by a status of forces agreement, and the relationship of status of forces agreements with LOAC and ICL is currently unclear.[132] In relation to an international court or a foreign state exercising universal jurisdiction, commanders may be limited by their own domestic or military law in making such a referral. At the very least, it is an action which may have significant political ramifications as opposed to referring the matter to an authority in a commander's home state. This leaves two forums: the first is the civilian jurisdiction of a commander's home state; the second is military jurisdiction. Use of the home state civilian jurisdiction may be impractical for a military commander for several reasons.

First, there is authority to suggest that referring matters to a civilian authority should not be the first step taken by a commander who has the practical ability to investigate. *Halilović* affirmed that 'the duty to punish includes at least an obligation to investigate possible crimes or have the matter investigated, and *if the superior has no power to sanction, to report them to the competent authorities*'.[133] Thus, a commander with the practical ability to address a matter must not simply refer it to another authority. The International Criminal Court (ICC) has affirmed that whether a commander took all necessary and reasonable measures 'will require consideration of what measures were at his or her disposal in the circumstances at the time'.[134] If the exercise of military justice is a measure available to the commander, its use, or lack thereof, will form part of the determination as to whether the commander has fulfilled these obligations.

Second, a commander is not a legal expert. While the civilian courts of the home state are likely to have jurisdiction, based on universality, to try war crimes, they may not have the ability to try most civilian crimes committed extraterritorially. By referring the matter to the civilian authorities, rather than causing military authorities to investigate the matter, the commander

[131] ibid 261.
[132] Aurel Sari, 'The Status of Armed Forces in Public International Law: Jurisdiction and Immunity' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar 2015) 319, 326.
[133] *Halilović* (n 129) [182] (emphasis added).
[134] ICC, *Prosecutor v Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/08 A, Appeals Chamber, 8 June 2018 (*Bemba Gombo*, Appeal Judgment), [168].

may be inadvertently delaying justice if the offence happens to be a civilian crime, triable only by the military justice system, rather than a war crime triable by the civilian courts.

Third, it is possible that the civilian authorities will be unable to investigate the offending, or at the very least not with the same ease as military authorities. This matter will depend on the jurisdiction conferred on the civilian law enforcement authorities by the domestic state. While there is some authority to suggest that law enforcement agencies are required to investigate extra-territorial international crimes,[135] so doing is likely to lead to legal complexities which do not exist where the investigation is undertaken by military police, who are potentially already deployed in theatre and have a clearer mandate to act extraterritorially.

Fourth, the commander will have more influence over an investigation by a military authority than that of the civilian authorities. As previously discussed, this will include the convening and conduct of the investigation, and the laying of any charges. Given the high burden rightfully placed on command by ICL, it would be an injustice to remove the key ability by which a commander can ensure those obligations are met.

The notion that military justice can be a sufficient basis for the dispensation of the obligation to punish has some support in ICL. Bemba Gombo's defence to various charges of command failures referred in part to the fact that he had the ability to undertake courts martial, and in fact did so. One of the reasons that Bemba Gombo was found to be a commander who had effective authority and control over his subordinates was his ability to 'initiate inquiries and establish courts-martial'.[136] One of the measures that was determinative of guilt at trial was the finding that Bemba Gombo failed to initiate 'genuine and full investigations into the commission of crimes, and properly [try] and [punish] any soldiers alleged of having committed crimes'.[137] Given that the Trial Chamber found that Bemba Gombo had effective authority and control over his subordinates, and his ability to establish military investigations and courts martial, the implication is that the military justice system would have been sufficient to fulfil the obligation to punish. Bemba Gombo's conviction was overturned on appeal with some, albeit limited, stock being placed on the Trial Chamber's failure to consider the 'disciplinary authority' conferred on subordinate commanders in the field by Bemba Gombo.[138]

6.4. THE FAIR TRIAL RIGHTS OF THE ACCUSED

The implementation of fair trial rights within the military justice system has often been criticised,[139] and has led to the suggestion that the 'very existence of a separate administration of justice based on status, parallel to the ordinary judicial system, contradicts the notion that

[135] *National Commissioner of the South African Police Service v Southern Africa Human Rights Litigation Centre* [2014] ZACC 30, 2015 (1) SA 315 (CC), [81].
[136] ICC, *Prosecutor v Bemba Gombo*, Judgment pursuant to Article 74 of the Statute ICC-01/05-01/08, Trial Chamber III, 21 March 2016, [697].
[137] ibid [729].
[138] *Bemba Gombo*, Appeal Judgment (n 134) [182].
[139] Christina M Cerna, 'The Inter-American System and Military Justice' in Duxbury and Groves (n 33) 325, 326.

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international human rights are universally applicable'.[140] However, following crucial human rights cases over the last few decades,[141] significant reforms have been undertaken to ensure that the accused enjoys the benefits of fair trial rights comparable with civilian systems. This has resulted in reforms concerning appeal rights and other procedural safeguards in order to ensure fairness in military trials.[142]

6.4.1. Civilianisation of Military Justice

Many of the reforms discussed in relation to the independence and impartiality of military courts have gone a significant way in ensuring fair trials. It is, of course, crucial to have a fair trial within any legal system. This outcome is achievable in part by the partial civilianisation – that is, increased civilian oversight – of the military justice process. Judges of the Court Martial of New Zealand, for example, are not members of the military. Instead, persons are eligible to become a Court Martial judge only if they have been a lawyer for at least seven years or currently serve as a District Court judge.[143] In other jurisdictions a mixture of civilian and military judges are provided for. The Constitution of Brazil, for example, provides that the Superior Military Court is to be formed by 15 life-tenured judges. Of those judges, two-thirds are to be military officers and one-third are civilians.[144] Similarly, full-bench military chambers in the Netherlands have two civilian judges and one military member.[145]

Even in jurisdictions where charges are still heard by military judges the judiciary is increasingly resisting the control that military commanders have over them. Such is evident in the recent Canadian case of *Pett*. Master Corporal Pett lodged an application seeking a declaration that the court martial was not an independent and impartial court, given military orders purporting to subject judges to the military hierarchy. The court held that the order in question was unlawful and had no force,[146] a decision also reached in a later case.[147]

In many jurisdictions, such as the Netherlands, military courts remain subservient to civilian courts of appeal.[148] In Canada, for example, appeals can be made to the Court Martial Appeal Court.[149] The decisions of that court can be taken to the Supreme Court on appeal.[150] This is exemplary of a general trend towards military justice systems coming under increased oversight by civilian

[140] ibid 331.
[141] eg, *Findlay v UK* (1997) 24 EHRR 221; *Généreux* (n 16).
[142] Peter Rowe, 'A New Court to Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court' (2003) 8 *Journal of Conflict and Security Law* 201.
[143] Court Martial Act 2007 (NZ), s 11(1).
[144] Constituição da República Federativa do Brasil 1988 (Constitution of Brazil), art 123.
[145] Wet op de rechterlijke organisatie (Judicial Organisation Act) (The Netherlands), art 55.
[146] *R v Pett* 2020 CM 4002 (Can), [144].
[147] *R v D'Amico* 2020 CM 2002 (Can), [81].
[148] Van Hoek (n 33) 225–26.
[149] NDA (n 31) s 230.
[150] ibid s 245.

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appeal courts. Furthermore, both civilian and international courts have required significant reforms of military justice systems, which align military trials closer with civilian counterparts.[151]

Despite moves towards the civilianisation of military justice, a distinct military flair must remain within a military justice system. An understanding of the military context of the alleged offending will be crucial from the investigation through to sentencing to ensure that all matters are addressed fairly.[152] The military context which applies to offending within a service context often means that offending may need to be treated differently from civilian offending, with various considerations applying at all stages.[153]

6.4.2. The Right to Trial by Jury

The most pertinent fair trial right that is argued to be lacking in a military trial is the right to be tried by a jury of one's peers. A court martial typically does not have a jury, but a panel of military members who determine the innocence or guilt of the accused. The ranks and number of panel members is determined by several factors, including the rank of the accused and seriousness of the charges being faced. However, a member of the armed forces may be tried by a panel of as few as three military members where they would be tried by a jury of 12 in a civilian court trial for the same offence.

This purported unfairness was recently subject to debate in Canada. In *Beaudry*, the Court Martial Appeal Court held that trial by court martial of offences where the accused would be entitled to jury trial in the civilian system – that is to say where the accused is facing five or more years' imprisonment – was unconstitutional.[154] On appeal, *Beaudry* was overturned by the Supreme Court in *Stillman*[155] – an indication that military trials are not in themselves inconsistent with human rights law because of the lack of a jury trial system. The *Stillman* decision will undoubtedly generate significant academic comment on both sides of the debate. Further, the recent US Supreme Court decision in *Ramos*, which held that unanimous jury verdicts are required for convictions for serious crimes,[156] has rekindled interest as to how fair trial rights apply in a military context.[157] An analysis of jury trials within a military system falls outside the scope of this article. What should be considered, however, is whether trial by a military panel in the court martial can meet fair trial standards.

Meyer has argued that 'there is great merit in the continued use of professional military officers as finders of fact in appropriate international criminal tribunals', particularly for the trial of

[151] Waters (n 94) 39–40.
[152] Arne Willy Dahl, 'Military Justice and Self-Interest in Accountability' in Bergsmo and Song (n 24) 21, 23.
[153] *Davies v R* [2019] NZHC 1017 (CMAC), [85]; *McCartin v R* [2016] NZHC 1807 (CMAC), [49].
[154] *Beaudry v R* 2018 CMAC 4, 430 DLR (4th) 557, [71]–[72].
[155] *R v Stillman* (n 40).
[156] *Ramos v Louisiana* 206 L Ed 2d 583 (2020).
[157] Eugene R Fidell, 'Is Military Jury Unanimity Now in the Cards?', *Global Military Justice Reform*, 20 April 2020, https://globalmjreform.blogspot.com/2020/04/is-military-jury-unanimity-now-in-cards.html.

war crimes.[158] Most military panels consist of commissioned officers, which, in Meyer's opinion, make them ideal candidates as finders of fact:[159]

> If one could envision the ideal adjudicator, she would possess the following characteristics: above average intelligence, extensive education, worldly/practical experience and a paramount dedication to the principle of justice. The US military has created a system that aspires to fill its active duty officer corps with exactly this type of individual.

Furthermore, in many military justice systems officers are given quasi-judicial functions and undertake roles similar to those of a prosecution or defence counsel. This experience increases the fairness of their decisions, as a military panel has a higher level of skill than a lay jury. Moreover, a military officer is a professional in warfare, which cannot be expected of a civilian jury.[160] This, too, is of significance. Consider, for example, if a charge were to be laid against a service member for the death of civilians in what was ultimately a proportionate, and therefore legal, attack. Explaining to a civilian jury what is meant by concepts such as 'proportionality' to ensure that they are properly applied may prove difficult. On the other hand, military officers are under no illusion as to what these core concepts are, being essential for their trade.

While civilian juries are called upon to determine a wide variety of complex factual matters, they have rarely been used to determine matters relating to LOAC violations. In the international sphere determinations of guilt regarding war crimes have not been dealt with by juries. Judges in the ICC and the ad hoc tribunals established for Rwanda and the former Yugoslavia must have experience in either domestic criminal law or international law, particularly LOAC.[161] What this essentially means is that those tried for violations of LOAC in an international forum have the benefit of the factual circumstances of their case being determined by an expert in the field. This offers a significant advantage not only to defendants, but also to victims of offending, as there is an increased likelihood that the subject matter of the case will be fully understood. A trial for a LOAC violation by a court martial is far more likely to enable expert input into the final decision than can be said for a jury trial.

6.5. VICTIMS' RIGHTS

Finally, military justice is often criticised as being inadequate to give victims their rights to justice.[162] The Inter-American Court of Human Rights, for example, stated:[163]

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[158] Richard V Meyer, 'Following Historical Precedent: An Argument for the Continued Use of Military Professionals as Triers of Fact in Some Humanitarian Law Tribunals' (2009) 7 *Journal of International Criminal Justice* 43, 44.
[159] ibid 46.
[160] ibid 47–48.
[161] Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (3 May 1993), UN Doc S/25704, art 13(1), adopted by UNSC Res 827 (25 May 1993), UN Doc S/RES/827 (1993); UNSC Res 955 (8 November 1994), UN Doc S/RES/955, art 12; Rome Statute (n 17) art 36(3).
[162] Cerna (n 139) 340–43.
[163] *Case of Radilla-Pacheco v Mexico* (2009) Inter-Am Ct HR, Judgment of 23 November 2009, (Ser C) No 209, [313].

> Upon expanding the competence of the military jurisdiction to crimes that are not strictly related to military discipline or with juridical rights characteristic of the military realm, the State has infringed the right to a competent tribunal of the next of kin.

Showing victims of international crimes that the matter is being treated seriously is significant.[164] It can, however, be achieved through a military trial. Much of the criticism concerning victims' rights is based on a lack of impartiality in military trials, a matter considered elsewhere in this article. Furthermore, the benefits of military justice discussed below, such as its portability and wider jurisdictional scope, offer many advantages to victims that would not exist in a civilian trial.

6.6. SUMMARY

Although military justice is often criticised, many of these critiques are overstated. There may be some military commanders who prefer to cover up offending or seek not to prosecute their forces. However, the increasing prevalence of digital technologies and civilian oversight make these actions impractical. There is also no tactical imperative to do so. Military legal systems increasingly have mechanisms in place to address any risks to independent and fair trials.

7. THE BENEFITS OF MILITARY JURISDICTION

7.1. INTRODUCTION

In the academia that criticises the military justice system and its ability to try international crimes, what is often overlooked are the advantages that military justice systems offer over civilian trials. These advantages are worthy of significantly greater discussion than historically they have been afforded. Thus, the final proposition in support of military jurisdiction over violations of LOAC – that military trials offer many advantages which cannot be achieved in other forums – falls for consideration.

The ability of military justice to enhance the international community's goal of ending impunity for international crimes in ways not open to civilian court trials makes it an effective tool within ICL. Those key advantages include the portability of military law, its ability to address offending overseas which is outside an armed conflict, and the ability of military authorities to prosecute alternatives to war crimes.

7.2. THE PORTABILITY OF MILITARY TRIALS

One of the key benefits of the exercise of territorial jurisdiction is the fact that it has convenient access to the location in which the offending took place.[165] This has many practical benefits: it

[164] *The 'Kouwenhoven' Case* (2017) 181 ILR 568 (The Netherlands CA) 700; *JuRI-Nepal v Government of Nepal* (2014) 158 ILR 476 (Nepal SC), 518–19.
[165] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 442.

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enables witnesses to attend trials, thereby facilitating their participation, and shows the affected community that any matters are being dealt with seriously. A civilian court hearing based on nationality or universal jurisdiction cannot achieve the same outcomes with such ease. On the other hand, a military court, which may sit overseas, has the same benefit in this regard as does a territorial civilian court. Trying international crimes in the state in which they were committed goes a long way towards showing the local population that offending is being taken seriously.[166] It also means that victims can more readily attend the court hearing than if the matter were to be heard in the home state of the accused.

Victim participation in justice is of great significance. In the international criminal realm this is recognised in the Rome Statute by granting victims participation rights.[167] The trial of Captain Carl Bjork illustrates how courts martial for complex matters can, and in some cases should, be tried within theatre. Bjork was deployed to Iraq in 2006 and returned to the United States on completion of his tour. Once he returned, allegations arose that he had ordered two Iraqi detainees to be executed. Because of the significant number of Iraqi witnesses, a decision was made to redeploy Bjork to Iraq to face court martial on two counts of murder. An account of the trial records that several local civilians were called as witnesses, and site visits were arranged to the crime scene.[168] Such access could not be readily afforded had the trial been held in the US. It is not, however, a requirement that a court martial be held in theatre. The issue arose in the trial of Captain Robert Semrau for murder of an insurgent in Afghanistan. A challenge to the Court Martial's jurisdiction on the basis that it was not held in Afghanistan failed.[169]

Although there may be instances where the demands of combat mean that holding courts martial in theatre is impractical,[170] the portability of military trials raises the perception of justice within those affected populations.[171] While theoretically it would be possible for a state to facilitate victim access to trials in a civilian court, considerations such as travel and the removal of victims from their support networks, culture and locality in what is undoubtedly a traumatic time mean that such an option may have negative consequences. Regardless of the legality of a civilian court sitting overseas, it would be impractical, if not impossible, to gather a jury of civilians and take them to another country for a trial.[172] To do so would also raise questions about the protection of civilian jurors who were being brought into a combat zone.

7.3. The Wider Jurisdictional Scope of Military Justice

A further benefit of military jurisdiction is its wider scope. A war crime may be committed only in the context of an armed conflict – that is to say, when there is resort to force between states, or

[166] Dahl (n 152) 28.
[167] Rome Statute (n 17) art 68(3).
[168] E John Gregory, 'The Deployed Court-Martial Experience in Iraq' [2012] *Army Lawyer* 6, 14.
[169] *R v Semrau* 2010 CM 1003 (Can) 8, [22].
[170] Franklin D Rosenblatt, 'Awakening Self-Interest: American Military Justice in Afghanistan and Iraq' in Bergsmo and Song (n 24) 295, 302.
[171] ibid 321–22.
[172] *Stillman* (n 40) [71].

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protracted armed violence of a sufficient intensity between states and an organised armed group, or between said organised armed groups.[173] The intensity requirement is indicated by factors such as the number of attacks and their duration,[174] the territorial spread of the conflict,[175] the number of persons taking part,[176] the number of casualties, and whether engagement of the armed forces is required.[177] It is, therefore, possible for the jurisdiction of a civilian or international court, the jurisdiction of which depends on prosecution of a war crime, to be excluded. This could become particularly problematic when borderline cases of armed conflict are to be addressed by ICL.

Consider the Northern Ireland conflict known as 'The Troubles'. The situation was not treated as an armed conflict by Britain,[178] although the Irish Supreme Court considered it 'common knowledge' that an armed conflict existed.[179] Although no charges were brought for violations of LOAC, several criminal prosecutions for offences such as murder were brought on the basis of territorial jurisdiction. At some points throughout the 30-year span of hostilities, the threshold of an armed conflict was met, but at other times it was not.[180] This was not because of a lack of organisation on the part of the Irish Republican Army, but a lack of intensity. Had war crimes prosecutions been brought, or were they to be brought in a similar situation, a court would be required to assess whether the hostilities at the time of the offending were sufficiently intense to be considered an armed conflict as part of its consideration of the elements of the charge. It is conceivable that under this assessment an individual could walk free not because he or she did not commit the core act alleged, but because the lack of intensity meant that the jurisdictional requirements for prosecution of a war crime did not exist.

It is also foreseeable that this same result could occur because of a lack of organisation of an armed group. Organisation is indicated by factors such as the existence of a headquarters, disciplinary rules, and the ability to plan and coordinate military operations and logistical support.[181] All these indicia are liable to diminish as a force faces defeat. This was recognised in the dissent of Murphy J in *Yamashita*, which noted that disorganisation among Yamashita's troops led to increased levels of offending, and that such disorganisation was largely the result of the US forces overwhelmingly defeating the Japanese.[182] The charges against Yamashita arose in the context of an international armed conflict and did not need proof of organisation or intensity. However, Murphy J correctly observed that there is a real risk of a breakdown of organisation in a military force that is being defeated. Should such a breakdown occur in an organised

[173] ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-AR72, Appeals Chamber, 2 October 1995, [70]; Solis (n 21) 182–83.
[174] Solis (n 21) 183.
[175] ICTY, *Prosecutor v Limaj*, Judgment, IT-03-66-T, Trial Chamber II, 30 November 2005, [168].
[176] Solis (n 21) 183.
[177] ICTY, *Prosecutor v Boškoski*, Judgment, IT-04-82-T, Trial Chamber II, 10 July 2008, [190].
[178] Steven Haines, 'Northern Ireland 1968–1998' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 117, 143.
[179] *Shannon v Fanning* [1984] IR 569 (SC), 586.
[180] Haines (n 178) 143.
[181] Solis (n 21) 182.
[182] *Yamashita* (SC) (n 127) 34–35 (Murphy J dissenting).

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armed group in a non-international armed conflict, it could be argued that the force was insufficiently organised for the organisational requirement to be met.

One key advantage to the use of military jurisdiction, therefore, is its ability to ensure that loopholes that can be created in borderline cases of armed conflict do not act as a means of impunity. The armed forces of a state are, through either nationality jurisdiction or Liivoja's concept of 'service jurisdiction',[183] subject to the jurisdiction of their home state at all times. This means that ordinary criminal law applies to troops and proves to be a powerful tool in borderline cases.

The case of Sergeant Alexander Blackman, who was charged with the murder of an insurgent *hors de combat*, is illustrative of this point. Blackman, at court martial, was sentenced initially to life imprisonment with a minimum non-parole period of 10 years.[184] The charge brought was a charge of murder under civilian law. Although hostilities in Afghanistan would meet the armed conflict threshold, the choice of charge laid by the prosecution authorities meant that consideration of the threshold was unnecessary. A murder charge could have been prosecuted in a civilian court under UK law.[185] However, in many states the jurisdiction of civilian courts is largely territorial. Thus, a soldier accused of the exact same conduct, but serving in a different force, could only have had this charge laid before a court martial.

Blackman's sentence was reduced on appeal to a minimum non-parole period of eight years.[186] A subsequent hearing saw his conviction commuted to manslaughter,[187] and his sentence reduced to a period of seven years' imprisonment.[188] A manslaughter verdict would not have been possible at the ICC: the Rome Statute provides that 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court *only if the material elements are committed with intent and knowledge*'.[189] Although manslaughter is generally included as an alternative charge upon which a conviction can be entered in a murder trial,[190] it is unclear to what extent this principle would apply in a trial where the lead charge is a war crime. While it has been suggested that the diminished responsibility provisions upon which a manslaughter conviction is based would apply to a charge of the war crime of murder in the UK,[191] the fact remains that an absence of case law or statutory guidance – both in the UK and elsewhere – leaves open the possibility that a war crime charge does not include lesser civilian offences. An individual charged with a war crime may escape liability because of diminished, but not non-existent, responsibility. In many jurisdictions, therefore, a military trial may increase the prospects of a successful prosecution.

[183] Liivoja (n 42).
[184] *R v Blackman* [2014] EWCA Crim 1029, [2015] 1 WLR 1900 (CMAC) (*Blackman*, 2014 Sentence), [8]–[10].
[185] Offences Against the Person Act 1861 (UK), s 9.
[186] *Blackman*, 2014 Sentence (n 184) [77].
[187] *R v Blackman* [2017] EWCA Crim 190 (CMAC) (*Blackman*, 2017 Conviction).
[188] *R v Blackman* [2017] EWCA Crim 325 (CMAC) (*Blackman*, 2017 Sentence), [21].
[189] Rome Statute (n 17) art 30(1) (emphasis added).
[190] eg, Criminal Law Act 1967 (UK), s 6.
[191] Kate Grady and Penny Cooper, 'Case Comment – Homicide: *R v Blackman*' (2017) 7 *Criminal Law Review* 557, 560.

That said, the total applicability of manslaughter charges in an armed conflict is subject to some doubt. *Re Civilian Casualty Court Martial* concerned charges laid against several Australian soldiers for manslaughter in relation to the killing of civilians in Afghanistan. It was alleged that the killing occurred through negligent acts. The Chief Judge Advocate held that soldiers do not have a common law duty of care towards others in an engagement during a situation of armed conflict.[192] *Re Civilian Casualty Court Martial* may be distinguished from *Blackman*, in which the guilty finding in relation to manslaughter was based on diminished responsibility rather than the existence of a duty of care.[193]

In a case where a civilian offence is laid over a war crime, the defences that would be possible for an accused charged with an international crime would still be available. The common law courts of several nations have been willing to recognise the concept of combatant immunity in circumstances where it would apply in LOAC.[194] In jurisdictions where it has not yet been judicially considered, the fact that the law is generally presumed to be consistent with international law means that recognition of combatant immunity where a civilian charge is laid is highly likely. Similarly, defences such as the defence of superior orders exist in military jurisdictions and mirror their scope in ICL.[195]

Also beneficial in the military justice system is its ability to prosecute offences where the nexus requirement is not met. The *Elements of Crimes* for the Rome Statute require that the conduct 'was associated with' an armed conflict.[196] This means that the armed conflict must play a 'substantial role in the perpetrator's decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed'.[197] Again, this raises the possibility that a trial for war crimes may potentially fail because of the key jurisdictional pre-conditions not being met. Consider, for example, the case of a soldier on leave who commits a sexual or violent crime against a local civilian. In *Mowers*, the appellant and a co-offender, stationed in Korea, arrived at a local village in an intoxicated state and indiscriminately discharged their rifles, resulting in the death of a Korean civilian.[198] A conviction for manslaughter was overturned on the basis of an unfair trial, with a new trial being ordered. At first glance, the firing of a rifle indiscriminately is a matter which could be considered a war crime had it occurred in an armed conflict. However, it is questionable whether such a conviction could be returned when the perpetrator was on leave. While the conflict in a case like *Mowers* could be argued to play a 'substantial role' in the perpetrator's ability to commit the crimes, it is also possible that such an offence would be too far

[192] *Re Civilian Casualty Court Martial* (n 87) [156].
[193] *Blackman*, 2017 Conviction (n 187) [114].
[194] eg, *Bici v Minister of Defence* [2004] EWHC 786 (QB), *The Times*, 11 June 2004; *Dow v Johnson* 100 US 158 (1880); *Freeland v Williams* 131 US 405 (1889).
[195] *Lawrence v New Zealand Defence Council* (1977) 1 NZCMAR 73 (CMAC), 78.
[196] Assembly of States Parties, 'Elements of Crimes' in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, 3–10 September 2002*, UN Doc ICC-ASP/1/3.
[197] ICC, *Prosecutor v Katanga*, Confirmation of Charges, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, [380].
[198] *Mowers v R* (1953) 1 CMAR 137 (Can).

removed from the armed conflict to invoke the jurisdiction which attaches to war crimes. The *Kunarac* case considered that the nexus requirement would be met where 'the crime was committed as part of or in the context of the perpetrator's official duties',[199] which would seem to exclude the possibility of crimes committed by an individual on leave within theatre. Although the nexus requirement is examined holistically to prevent 'certain persons be[ing] exonerated from individual criminal responsibility for a violation of common Article 3' of the Geneva Conventions on the basis of a technicality,[200] the nexus requirement could see this happen where war crimes are prosecuted in civilian courts. However, the ability of military courts to charge an accused with a civilian law equivalent, such as murder, could go some way towards ensuring that justice is still done in spite of the lack of a nexus with the armed conflict.

Finally, military justice systems also have the benefit of being able to try crimes committed against allied forces and civilians. Historically, LOAC has applied only to how one treats civilians and combatants belonging to hostile populations. Indicatively, Geneva Convention IV provides:[201]

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

While other areas of international law may fill any lacuna, such conduct may fall short of the jurisdictional requirements of a civilian court exercising universal jurisdiction, or an international court. Although there are some indications that the ICC may exercise its war crime jurisdiction over acts towards 'friendly' forces in some cases, such as rape and sexual slavery of child soldiers,[202] the scope of such a development remains unclear. As such, military jurisdiction can serve to fill a lacuna that is not addressed fully by ICL.

7.4. The Availability of Alternative Charges

The final crucial benefit of military jurisdiction over international crimes has been alluded to already – that is to say, the ability of a military court to exercise jurisdiction over civilian and military offences committed abroad, as well as international crimes, where such an exercise of jurisdiction is not generally possible for civilian or international courts. The laying of alternative

[199] ICTY, *Prosecutor v Kunarac*, Judgment, IT-96-23, Appeals Chamber, 12 June 2002, [59].
[200] ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-A, Appeals Chamber, 1 June 2001, [443].
[201] Geneva Convention relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287, art 4.
[202] eg, ICC, *Prosecutor v Bosco Ntaganda*, Judgment on the appeal of Mr Ntaganda against the 'Second Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06 OA 5, Appeals Chamber, 15 June 2017; for a criticism of the ICC decision see Kevin Jon Heller, 'ICC Appeals Chamber Says a War Crime Does Not Have to Violate IHL', *Opinio Juris*, 15 June 2017, http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/.

charges is lawful within military justice systems.[203] It would, therefore, be open to a military prosecutor to lay a charge for a war crime, with an alternative civilian or military offence as a consideration if the war crime charge could not be proved. The possibilities of so doing are outlined below.

7.4.1. CIVILIAN OFFENCES

Many of the offences which are criminalised in ICL have comparable counterparts in domestic criminal systems. Thus, offences such as unlawful killing or sexual violence in an armed conflict would also meet the elements of offences under civilian law, such as murder or rape. This raises the possibility of civilian charges being laid alongside, or in place of, war crimes charges. Courts martial in which both civilian and war crimes charges have been tried against the accused have occurred. Corporal Payne, for example, faced charges of manslaughter for the killing of detainee Baha Mousa, along with charges of the war crime of inhumane treatment. Payne's manslaughter charge was subject to a successful no case to answer plea before the trial started.[204] Although Corporal Payne pleaded guilty to inhumane treatment,[205] the prosecution failed to show that he was criminally liable for the victim's injuries, resulting in acquittal on the manslaughter charge.[206]

Theoretically, a soldier in Payne's position could be charged with the war crime of murder of a protected person, with an alternative charge of domestic murder or manslaughter should the elements of the war crime charge be found not to be met within a court martial. This would avoid lacunas where a jurisdictional gap, such as the non-existence of an armed conflict, resulted in the accused being able to act with impunity. Such a pattern of charging would increase the likelihood of convictions being achieved. Military courts have often prosecuted homicide (whether murder or manslaughter)[207] and sexual offences cases.[208] They are therefore equipped to address these offences as alternatives to war crimes where that is appropriate.

7.4.2. MILITARY OFFENCES

In addition to civilian offences being used as alternative charges to war crimes, many military-specific offences offer benefits which are not always present in ICL. Members of the armed forces are liable to be tried for negligence in relation to a service duty.[209] This offence foreseeably can be used as an alternative charge for a wide variety of offences. A case of command

[203] *Dubé v R* (1983) 4 CMAR 288 (Can); NZDF (n 10) vol 1, para 4.2.19.
[204] *Payne*, No-Case Ruling (n 89) [16].
[205] ibid; *Payne*, Sentencing Transcript (n 88) 15, 17.
[206] Nathan Rasiah, 'The Court-Martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice' (2009) 7 *Journal of International Criminal Justice* 177, 184.
[207] eg, *Ferriday v Military Board* (1973) 129 CLR 252; *Cheeseman v R* [2019] EWCA Crim 149, [2019] 1 WLR 3621 (CMAC); *Kucek v R* (1954) 1 CMAR 229 (Can); *US v Cannon* 74 MJ 746 (Army Ct Crim App 2015).
[208] eg, *Butler v R* (1954) 1 CMAR 241 (Can); *Burns v Wilson* 346 US 137 (1952); *Lawrence v A-G* (1999) 1 NZCMAR 341 (CA).
[209] *LeBlanc v R* 2011 CMAC 2; *Re Potter's Appeal* (1980) 43 FLR 329 (Cts-Mtl App Trib); *Re Lamperd and the Courts Martial Appeal Tribunal* (1983) 46 ALR 371 (HCA).

responsibility can be charged as a military-specific offence relating to negligent performance of a duty. In the *Payne* Court Martial, Colonel Jorge Mendonca was among the co-accused, and faced a charge of negligence for failing to ensure that detainees were not ill-treated.[210] This charge bears a striking resemblance to the language of command responsibility, which imposes on a commander the obligation to take all reasonable and necessary steps to prevent offending by subordinates.[211] The Court Martial noted that the Crown was not alleging that Mendonca sanctioned the treatment of the detainees.[212] There was no case to answer on the basis that the accused was under the impression that his higher headquarters and legal advisers had cleared the treatment, among other reasons.[213]

It has been argued that negligence relating to a military duty and command responsibility are not appropriate alternatives to each other. In particular, in a negligence charge the existence of a duty is a matter of fact to be proved, whereas a duty to prevent, repress or punish in a command responsibility prosecution is a matter of law. It has also been criticised on the basis that a negligence charge under military law requires proof to be laid that a commander knew of the existence of the duty – a requirement which does not exist within command responsibility.[214] However, these are unlikely to be significant barriers to conviction which result in any greater difficulty than securing a conviction under a command responsibility standard. As a matter of military orders, the existence of a *military* duty on a commander to prevent, repress and punish offences is well established.[215] All military personnel are presumed to know of all orders which apply to them where they could reasonably have known about their existence.[216] As such, in a negligence trial for a commander, while additional elements may need to be proved, it is unlikely to prove to be a significant prosecutorial burden.

Negligence charges also have wider potential applications. A soldier who discharges a weapon in a negligent or unauthorised manner violates military law.[217] Foreseeably, this precedent could apply to situations where a soldier discharges a weapon unintentionally, resulting in death, or is negligent in positively identifying a target. Neither case can be captured by ICL. It must be acknowledged, however, that the availability of negligence charges in an armed conflict is uncertain. There is some authority to suggest that, given that there is no basis in ICL negligence-based liability, they cannot be used in an armed conflict situation.[218] Other case law, however, suggests that in a combat situation negligent charges are appropriate.[219] This underexplored area of law deserves further attention.

[210] *R v Payne*, Charge Sheet, https://publications.parliament.uk/pa/ld200506/ldlwa/50719ws1.pdf.
[211] AP I (n 62) art 87(1); Rome Statute (n 17) art 28.
[212] *Payne*, No-Case Ruling (n 89) [38].
[213] ibid [66]; Rasiah (n 206) 184–85.
[214] Rasiah (n 206) 192.
[215] eg, NZDF (n 27) vol. 4, para 17.4.1–17.4.6.
[216] eg, AFDA (n 11) s 39.
[217] eg, *Ellams v R* (Summary Appeal Court NZ, 11 October 2013); *Nicholls v R* (Summary Appeal Court NZ, 13 September 2013); *Nicholls v R (No 2)* (Summary Appeal Court NZ, 29 April 2014).
[218] *Re Civilian Casualty Court Martial* (n 87) [152]–[156].
[219] *Brocklebank* (n 82).

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Finally, military orders, in the form of rules of engagement (ROE), play a significant role in limiting the use of force that can be exercised in theatre. It has been recognised judicially that ROE may legitimately limit the circumstances in which an accused can use force to fewer than those permitted by LOAC.[220] Such limitations do not fall within either civilian law or ICL.[221] Rather, they represent a values judgment on behalf of military forces and the state to define, and often limit, the actions which their forces may undertake in a conflict setting. ROE cannot lawfully exceed the limitations of LOAC, as military law has long recognised that orders must be lawful.[222] One of the most serious military offences is failure to comply with lawful orders.[223] Thus, prosecutions have been brought for violations of ROE.[224] As ROE seek to limit the situations in which force is lawfully used in an armed conflict, they again offer a convenient alternative to a war crime charge where there is a likelihood that an element of the crime cannot be made out.

7.4.3. A VALUES JUDGMENT

Whether one accepts that alternative charges are appropriate for use for war crimes is ultimately a values judgment. To some, the prosecution of civilian or military offences in place of war crimes is problematic, and understandably so.[225] By prosecuting as civilian or military offences conduct which can properly be prosecuted as war crimes, a state is able to avoid labelling itself as a violator of LOAC and the stigma that goes along with such a label. In cases where a war crime can be made out, it should be the preferred charge. However, ICL has as its noble goal the end of impunity. The use of alternative charges in borderline cases would go a significant way to achieving this goal. Because of the wider jurisdictional scope of military courts, such an outcome is currently achievable only through military prosecutions. In such borderline cases the securing of any conviction must surely be preferable to achieving no conviction at all.

7.5. SUMMARY

Military jurisdiction offers significant benefits which cannot easily be achieved in a civilian jurisdiction. The portability of military courts offers options to hold trials in theatre, and their wider jurisdictional scope means that civilian offences may be charged where a war crime charge is

[220] *Re Civilian Casualty Court Martial* (n 87) [20]; HCJ 3003/18, *Yesh Din v IDF Chief of Staff* (Supreme Court of Israel, 24 May 2018).
[221] Solis (n 21) 474.
[222] *Warden v Bailey* (n 20) 89; *Lawrence v New Zealand Defence Council* (n 195) 78.
[223] eg, *Fitch v R* (1954) 1 CMAR 249 (Can); *Parker v Levy* 417 US 733 (1974); *Stuart v Chief of Army* [2003] ADFDAT 3, (2003) 177 FLR 158.
[224] *R v Mathieu* (CMAC Canada, 6 November 1995).
[225] See, eg, Matthew Heaphy, 'Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court' (2008) 21 *Leiden Journal of International Law* 165.

likely to fail. This, coupled with their ability also to charge military-specific offences, means that military courts offer a greater chance of securing convictions in marginal cases.

8. CONCLUSION

Military law is by no means a perfect system of justice. However, the same is true of every justice system that exists. An examination of modern military justice systems shows that they are not as imperfect as they are often argued to be. Increased fair trial rights and implications for commanders who seek to avoid addressing serious criminal matters, including violations of LOAC, mean that military trials are increasingly becoming appropriate forums in which to try international crimes. Furthermore, the wider jurisdictional scope and availability of alternative charges within a military system mean that they are often better placed to secure convictions than civilian or international courts.

There are further questions that should be addressed insofar as military jurisdiction and international law more widely are concerned. Questions such as the role of military trials within the complementarity regime of the ICC, the appropriateness of trying 'state crimes' such as genocide and aggression, and the impacts of further civilianisation of military justice remain important questions for resolution. There is, therefore, a need for increased discourse on how military discipline, the soul of an army, can be used as an effective tool for practitioners of ICL.

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