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Lex Generalis Derogat Legi Speciali: IHL in Human Rights Regulation of Military Courts Operating in Situations of Armed Conflict

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The operation of military courts is clearly allowed for and, in some cases, mandated by international humanitarian law (IHL). Nevertheless, the use of military courts has been one of the most controversial and hotly debated areas of human rights. Despite the ostensibly exclusive military domain, many human rights bodies have registered significant scepticism towards this type of justice. Consequently, they have sought actively to regulate this 'IHL space' with scant attention to the requirements of IHL itself. The article examines comments, case law, draft rules and other measures taken by two human rights frameworks: the United Nations Human Rights Council and the African Commission on Human and People's Rights. It will analyse how, since 2000, these bodies have approached the issue of IHL when assessing the legitimacy and operation of military courts. For instance, do they consider IHL as a source of law guiding their efforts and rely on IHL instruments? How do they resolve conflicts between IHL and international human rights law? Additionally, the article will consider the validity, legality and effectiveness of these efforts. It concludes that, in reviewing military courts, there exists significant neglect of IHL in human rights frameworks. Through overlooking IHL or relegating it to a sub-specialty of international human rights law, these bodies not only ignore applicable law, they deprive themselves of the wealth of expertise found in commentary, debate, jurisprudence and practice in the IHL sphere. Instead, integrating IHL analysis and theory and affording it its appropriate respect within relevant human rights discussions will allow for greater legal and policy coherence, and human rights bodies will be better placed to fulfil their mandates.

Keywords: military courts, human rights, international humanitarian law, justice, United Nations, Africa

1. Introduction

The operation of military courts is clearly contemplated by and allowed for in international humanitarian law (IHL).[1] Military justice has been sanctioned as part of proto- and modern IHL instruments for more than 150 years. Military courts have been employed thousands of times across the globe – in the midst of and in the aftermath of armed conflict, situations of occupation, civil unrest and periods of mass terrorism.[2] Nevertheless, the use of military courts has

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[1] See, eg, Geneva (III) Convention relative to the Treatment of Prisoners of War, 12 August 1949 (entered into force 21 October 1950) 75 UNTS 135 (GC III), arts 84, 87; Geneva (IV) Convention relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 66.

[2] eg, Yonah Jeremy Bob, *Justice in the West Bank? The Israeli-Palestinian Conflict Goes to Court* (Gefen 2019); International Commission of Jurists, 'Fuero militar y Derecho internacional: Los civiles ante los tribunales militares Volumen II', 2018, https://www.icj.org/wp-content/uploads/2018/05/Universal-Tribunales-Militares-Vol-II-Publications-Reports-Thematic-reports-2018-SPA.pdf; Ronald Naluwairo, 'The Development of Uganda's

been one of the most controversial and hotly debated topics, dating back to the earliest days of the codification of IHL.[3]

Issues raised by military courts include their use in peacetime, the interplay between military and civilian courts, the defining of crimes as violations of domestic law versus the laws of war, jurisdiction over 'common' crimes, jurisdiction over civilians, the scope of military necessity, competence and expertise, strategic role, and due process protection.[4] Despite the ostensibly exclusive military domain, given the civil and human rights concerns, many human rights bodies have registered significant scepticism towards this type of justice.[5] Consequently, they have sought actively to regulate this 'IHL space', confining the jurisdiction and workings of military courts. Yet many of these bodies significantly neglect IHL when undertaking these efforts.

The United Nations (UN) Human Rights Council, various working groups and special procedures, treaty bodies including the Human Rights Committee and the Committee Against Torture, the European Court of Human Rights (ECtHR), the Court of Justice of the Economic Community of West African States (ECOWAS), the African Commission on Human and Peoples' Rights, and the Inter-American Commission and Court of Human Rights have all engaged in efforts to regulate military courts.

This article examines comments, cases, draft rules and other measures taken by two of these frameworks, one international and one regional: the UN Human Rights Council and the African Commission on Human and People's Rights.[6] The Human Rights Council was selected because it is a universal (and the most influential) framework for developing and disseminating human rights norms. A regional framework was chosen for comparison. While the Inter-American

Military Justice System and the Right to a Fair Trial: Old Wine in New Bottles?' (2018) 2 *Global Campus Human Rights Journal* 59; Jason Burke, 'Secret Trials of Thousands of Boko Haram Suspects To Start in Nigeria', *The Guardian* (UK), 9 October 2017, https://www.theguardian.com/world/2017/oct/09/nigeria-begin-secret-trials-thousands-boko-haram-suspects; UN General Assembly, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy (12 September 2006), UN Doc A/61/384, paras 18–47.

[3] See, eg, Martin Lederman, 'The Law(?) of the Lincoln Assassination' (2018) 118 *Columbia Law Review* 323 (examining controversy over use of military commissions in the United States post-Civil War); *Ex Parte Quirin*, 317 U.S. 1, 27–36 (1942) (discussing history dating back to the Lieber Code in the US and European countries relating to the use of military commissions to try violations of the laws of war).

[4] For instance, military courts may fail to be sufficiently independent from the military chain of command and therefore subject to interference; they may impose secrecy regulations or operate in closed proceedings; military judges may lack legal training or expertise on a par with that of civilian judges; see, eg, Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (Cambridge 2016); Dan Maurer, 'Are Military Courts Really Just Like Civilian Criminal Courts?' *Lawfare*, 13 July 2018, https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts.

[5] In *Mustafa v Bulgaria*, for example, the European Court of Human Rights (ECtHR) found that the military courts did not meet the requirements for a fair trial (specifically independence and impartiality) over a civilian (tried for committing a crime alongside a service member) on the ground that both the judges and jurors were members of the military, and that there was no 'compelling' reason to try a civilian in a military court: ECtHR, *Mustafa v Bulgaria*, App no 1230/17, 28 Nov 2019; see also ECtHR, *Incal v Turkey*, App no 22678/93, 9 June 1998. In *Durand y Ugarte v Peru*, the Inter-American Court of Human Rights (Inter-AmCtHR) found that military courts could not adequately investigate and punish military members for human rights violations as such crimes could not be considered to be of a 'military' nature and did not meet the requirements of an independent or impartial court as laid out in the American Convention on Human Rights: *Case of Durand y Ugarte v Peru* (2000) Inter-AmCtHR (ser C) No 68. In *Castillo Petruzzi et al v Peru*, it was found that military courts could not be established to supplant the jurisdiction of the ordinary courts: *Case of Castillo Petruzzi et al v Peru* (1999) Inter-AmCtHR, Judgment of 30 May 1999 (ser C) No 52.

[6] See n 39 and accompanying text.

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and European human rights systems are slightly more complex and developed in some ways, the African Commission is a fascinating and dynamic, albeit under-examined, human rights body. There exists extensive academic literature relating to the military courts and the role of IHL in the Inter-American and European human rights systems. In contrast, there is considerably less scholarly coverage of the African Commission's work, despite its recent innovative approaches to IHL and the regulation of military courts. These developments merit attention.

In looking at the Human Rights Council and the African Commission, the article will analyse how, since 2000, these bodies have approached the issue of IHL when assessing the legitimacy and operation of military courts. For instance, do they consider IHL as a source of law guiding their efforts and do they rely on IHL instruments? How do they resolve conflicts between IHL and international human rights law (IHRL)? Additionally, the article will consider the validity, legality and effectiveness of these efforts, and concludes that there exists a substantial neglect of IHL in human rights frameworks. By overlooking IHL or relegating it to a sub-specialty of IHRL, these bodies not only ignore applicable law, they deprive themselves of the wealth of expertise found in commentary, debate, jurisprudence and practice in the IHL sphere.

2. MILITARY COURTS IN IHL

Military courts, operating during times of both war and peace, are a feature of military justice – a legal system that developed historically distinct from the civilian justice system. The creation of military justice was based on the rationale that the civilian justice system does not possess the expertise to adjudicate military matters or understand the unique hierarchical character and discipline requirements of the military.[7]

Military courts can be standing (typically found in civil law systems) or ad hoc (more predominant in common law countries).[8] The features of military courts vary widely and this area is rapidly changing, but there are several commonalities. Military court officials such as judges, prosecutors, juries, and even defence counsel come from military ranks. These courts establish their own rules of procedure and adjudicate violations of military codes, laws of war and crimes specially delegated to the military courts, including in times of civil unrest and emergencies. Military courts can be employed during the imposition of martial law. They are implemented in situations of occupation and in several countries may operate only during wartime.[9] Some countries have abolished military courts altogether.[10]

[7] Mindia Vashakmadze, *Understanding Military Justice Guidebook* (The Geneva Centre for the Democratic Control of Armed Forces 2010) 10, https://www.dcaf.ch/sites/default/files/publications/documents/Milit.Justice_Guidebook_ENG.pdf. There is an advancing trend, however, to integrate the military justice system into the civilian system and to greatly constrain its jurisdiction: see nn 54–63.

[8] ibid 11.

[9] ibid 11–13 (providing a good description of the differences in various military courts). See also UN General Assembly, Office of the High Commissioner for Human Rights (OHCHR), Expert Consultation on the Administration of Justice Through Military Tribunals, 24 November 2014, Contribution of Arne Dahl, https://www.ohchr.org/EN/Issues/AdministrationJustice/Pages/ExpertConsultationonAdministrationofJusticeNovember2014.aspx.

[10] Vashakmadze (n 7) 14.

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While there are many variants of military court globally, and though they operate in distinct political environments, the following section provides the normative framework for the operation of these courts during armed conflict as prescribed by IHL.

The use of military courts is expressly allowed, and in several cases required, under IHL. IHL also embeds multiple protections for due process throughout the various legal instruments, and it rejects the idea of 'summary justice'.[11] Common Article 3(d) of the Geneva Conventions, which regulates the treatment of 'persons taking no active part in the hostilities', prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court', and affords 'all the judicial guarantees which are recognized as indispensable by civilized peoples'.[12] Denial of fair trial standards is a grave breach under Article 130 of the Third Geneva Convention (GC III), Article 147 of the Fourth Geneva Convention (GC IV), and Article 85(4)(e) of Additional Protocol I (AP I).

Article 84 of GC III provides exclusive jurisdiction for the military courts for prisoners of war (POW) ('a prisoner of war shall be tried *only* by a military court'), unless the laws of the Detaining Power 'expressly permit the civil courts to try a member of the armed forces of the Detaining Power' for the 'offence alleged to have been committed' (emphasis added). It also mandates that:

> [i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognised, and, in particular, the procedure of which does not afford the accused the rights and means of defense provided for in Article 105.

The use of military courts is not strictly limited to POWs or to violations of military law. IHL instruments explicitly endorse their use in situations of occupation and do not exclude jurisdiction over civilians.[13] For instance, in a 1998 report summarising a meeting of experts, the International Committee of the Red Cross (ICRC) notes that GC IV was crafted to 'strike a balance' between the occupying power's interests and the need to protect the civilian population.[14] Military courts are part of this balance. Under Article 27 of GC IV the occupying

[11] eg, Jean S Pictet (ed), *The Geneva Conventions of 12 August 1949 – Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross (ICRC) 1952) 54; Lindsey Cameron and others, 'Commentary of 2016 Article 3: Conflicts Not of an International Character', in ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, ICRC and Cambridge University Press 2016) 126, paras 674–88.

[12] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II); 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); GC III (n 1); GC IV (n 1).

[13] GC IV (n 1) art 70 refers to prosecution of 'protected persons'.

[14] ICRC, 'General Problems in Implementing the Fourth Geneva Convention: 27-10-1998 Report – Meeting of Experts', October 1998, https://www.icrc.org/en/doc/resources/documents/report/57jpf6.htm.

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power 'may take such measures of control and security in regard to protected persons as may be necessary as a result of the war' and as such 'has the right to constitute military courts to deal with offences jeopardizing its security'.

Articles 64 to 78 of GC IV provide multiple regulations for the operation of justice in an occupied territory. For instance, Article 66 explicitly states that 'the Occupying Power may hand over the accused to its properly constituted, non-political military courts'. Article 68 mandates that the death penalty may be applied only in cases of 'intentional death' where the death penalty was part of the local law. Under Article 68 no 'protected person' under the age of 18 may be sentenced to death. No sentence for death may be carried out for at least six months (Article 75). Article 71 refers to 'competent courts' and 'regular trial'. Under Article 73, however, there is not necessarily a guaranteed right of appeal. The Convention also distinguishes between the use of administrative detention (Articles 42, 78) – subject periodically to court or board review, with a right of appeal – and those convicted and imprisoned pursuant to a judicial procedure with the required due process guarantees (Article 64).[15] Children may also be subject to the military court process.[16]

Additional Protocols I and II (AP I and AP II) enumerate multiple fair trial guarantees. Article 75(4) of AP I requires the use of an 'impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure' as well as multiple other due process protections. These guarantees include:

- the right to be informed of charges and all rights to a defence both before and during trial (Article 75(4)(a));
- no imposition of convictions or punishments *ex post facto* (Article 75(4)(c));
- the right to be presumed innocent (Article 75 (4)(d)) and the proscription of trials in absentia (Article 75(4)(e));
- the right against self-incrimination and the right to cross-examine witnesses (Articles 75(4)(f)–(g));
- prohibition against double jeopardy (Article 75(4)(h)); and
- the rights to public pronouncement of judgment as well as the right to be informed of post-conviction rights (Articles 75(4)(i)–(j)).

The 1987 Commentary on the Additional Protocols adds:[17]

> [Article 75(4)] represents an important step forward in humanitarian law by laying down several minimum rules of protection for the benefit of all those who find themselves in time of armed conflict in the power of a Party to the conflict, whereas in such circumstances provisions of human rights law are subject to possible derogations.

[15] Yoram Dinstein, *Law of Belligerent Occupation* (Cambridge 2009) 138–39.
[16] GC IV (n 1) art 68 bars the death penalty for 'protected persons' under the age of 18; art 76 discusses preferential treatment for child detainees. The Convention would not need to include such provisions were children excluded from the judicial process.
[17] See 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* (ICRC and Martinus Nijhoff 1987) para 3006.

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The Commentary also notes that this 'article must therefore be seen as a victory for humanitarian law'.[18] Article 6(2) of AP II requires courts to offer 'the essential guarantees of independence and impartiality'.[19]

3. CRITIQUES OF MILITARY COURTS

Although military courts are expressly allowed under IHL and are required to embed due process protection, there has been substantial and long-standing criticism of their use even in times of armed conflict. The International Commission of Jurists exemplifies the dominant narrative in the human rights community: '[O]n the whole, as far as ensuring that justice is dispensed independently and impartially is concerned, military courts do not adhere to general principles and international standards and their procedures are in breach of due process'.[20] As noted by the UN Deputy Commissioner for Human Rights, however, there is a 'wide variety of military justice systems' making 'generalizations about such institutions difficult, if not impossible'.[21] In addition, there are many states where military courts are 'perceived as credible judicial institutions and subject to civilian judicial oversight'.[22] Nevertheless, the critiques of military courts do not date just from the international human rights era. For instance, towards the end of the United States Civil War, conspirators in the assassination of President Abraham Lincoln were tried by military court.[23] The use of a military court, as opposed to a civilian court, even though Washington DC was under martial law at the time, prompted outrage.[24] The US Attorney General was forced to issue an opinion as to why resort to a military court for the conspirators, as opposed to a civilian court, was acceptable as a matter of law.[25]

The human rights critiques of military courts tend to fall into three categories. The first is whether military courts have the competence to try offences committed by service members that go beyond the scope of military duties, such as common crimes like drunk driving or burglary. This includes the more pressing concern of whether military courts have legitimacy to adjudicate gross human rights violations or crimes of mass atrocity. A second category of criticism

[18] ibid.
[19] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (AP II).
[20] Fredrico Andreu-Guzmán, *Military Courts and International Law* (International Commission of Jurists 2004) 10.
[21] UN General Assembly, OHCHR, Summary of the Discussions held during the Expert Consultation on the Administration of Justice through Military Tribunals and the Role of the Integral Judicial System in Combating Human Rights Violations (29 January 2015), UN Doc A/HRC/28/32, para 2.
[22] ibid para 3.
[23] Elizabeth Leonard, *Lincoln's Avengers: Justice, Revenge, and Reunion after the Civil War* (Norton 2004) 67.
[24] ibid 72–3; Lederman (n 3) 401.
[25] In his opinion, Attorney General James Speed explained: 'the question is one of great importance – important, because it involves the constitutional guarantees thrown about the rights of the citizen, and because the security of the army and government in time of war is involved; important as it involves a seeming conflict between the law of peace and of war': 'Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President', July 1865, http://media.virbcdn.com/files/12/878e06e3f448699b-Bplact16.pdf. See also Leonard (n 23) 73; John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (Free Press 2012) 289–98.

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relates to the trying of non-military actors – which includes civilians, police officers and security personnel – and juveniles. The last area of critique can be categorised as concerns relating to due process protections, including judicial independence and impartiality, qualifications and training of the judiciary, adherence to fair trial standards, severe punishments such as the death penalty, and whether there is a right of appeal to civilian authorities.[26]

Critics of military courts almost exclusively measure their legitimacy and adequacy against standards proffered under IHRL, even when such courts are utilised in the context of armed conflict and even though IHL contains multiple, if not concomitant, due process protections. Rarely are the requirements of IHL discussed; nor do they wrestle with the issue of *lex specialis* and how the primacy of IHL might affect whether and how they can exercise competence to regulate military courts in situations of armed conflict. For instance, as mentioned, under IHL civilians may be tried by military courts, while most human rights advocates believe that this violates IHRL.[27] The death penalty is also allowed by IHL, albeit with limitations, but more strictly limited and disfavoured in the major international human rights instruments.[28]

The interplay between IHL and IHRL remains a highly contested legal issue.[29] Specifically, how should courts, practitioners and scholars interpret the notion of IHL as the *lex specialis* or 'specialty' area of law? Sang describes three potential approaches that characterise the

[26] eg, Duxbury and Groves (n 4); Andreu-Guzman (n 20); Fionnuala D Ní Aoláin, 'Principle 29: Restrictions on the Jurisdiction of Military Courts' in Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford University Press 2018) 315 (commenting that '[n]ormative development in international law, as well as the jurisprudence of international courts and tribunals, has increasingly stymied the operation of military courts, and affirmed that such courts must be human rights and specifically fair-trial compliant').

[27] See, eg, Ní Aoláin (n 26); Elizabeth Santalla Vargas, 'Military or Civilian Jurisdiction for International Crimes? An Approach from Self-Interest in Accountability of Armed Forces in International Law' in Morten Bergsmo and Tianying Song (eds), *Military Self-Interest in Accountability for Core International Crimes*, FICHL Publication Series No. 25 (Torkel Opsahl Academic Publisher 2015) 397. In general, these critiques evaluate military trials of civilians that are not taking place in the context of armed conflict. These analyses rarely address the issue of civilians directly participating in hostilities and how that might have an impact on the competence of a military court or its legitimacy to try such civilians. Another issue that requires more attention is how civilian courts can manage the necessity of IHL expertise, a difficult and highly technical area of law; see Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press 2014) (taking a Gramscian approach in analysing the application of IHL by national courts, and instead advocating the use of international courts). It is unclear, however, whether international courts are necessarily more competent in addressing IHL issues (as is discussed below) or are freer from the politics and structural deficiencies she challenges; see, eg, Derek Jinks, Jackson Nyamuya Maogoto and Solon Solomon, 'Introducing International Humanitarian Law to Judicial and Quasi-Judicial Bodies' in Derek Jinks, Jackson Nyamuya Maogoto and Solon Solomon (eds) *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (TMC Asser Press 2014) 1, 1–2 (noting that international courts have not always adequately addressed IHL).

[28] See, eg, GC IV (n 1) arts 68, 75. Contrast with the International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 6, and its Second Optional Protocol.

[29] Jinks, Maogoto and Solomon (n 27) 11; Shana Tabak, 'Armed Conflict and the Inter-American Human Rights System: Application or Interpretation of International Humanitarian Law?' in Jinks, Maogoto and Solomon (n 27) 219, 222–25; Oona Hathaway and others, 'Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law' (2012) 96 *Minnesota Law Review* 1883, 1893–94; Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 310, 311.

relationship: separation, complementarity and integration.[30] In other words, does IHL apply to fill in gaps of *lex generalis* (general law)? Can IHL apply alongside other bodies of law, or does it exist as a wholly separate law that supplants other bodies of law when it is applicable?[31] Another issue is how to characterise IHRL. What role, if any, does IHLR have to play in armed conflict? Is it considered the *lex generalis* or does it exist as a complementary body of law alongside IHL?

The International Court of Justice (ICJ) has issued three opinions (two of which are advisory) addressing this conflict. In the 1996 advisory opinion on the *Legality of the Threat of Nuclear Weapons* the Court noted that the International Covenant on Civil and Political Rights (ICCPR) 'does not cease in times of war'. In determining the arbitrary deprivation of life, however, the Court said it must be 'determined by the applicable *lex specialis*, namely, the law applicable in armed conflict' and 'not deduced from the terms of the Covenant itself'.[32] In a second advisory opinion, *Construction of the Wall in the Occupied Palestinian Territories*, the ICJ elaborated that there are 'three possible solutions' regarding the relationship between IHL and IHRL: 'some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law'. It further stated that the 'the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law'.[33] Finally, in the contentious case of *Democratic Republic of Congo v Uganda* the ICJ found that 'the rules of international human rights law and international humanitarian law … are relevant and applicable in the specific situation'.[34]

While contending that IHRL and IHL both apply in situations of armed conflict, but also describing IHL as the *lex specialis*, the ICJ jurisprudence is difficult to parse. Legal scholar Françoise Hampson[35] interprets it as meaning 'whereboth IHL and human rights law are applicable, priority should be given to IHL', but she explains that in the Court's view IHRL 'remains

[30] Brian Sang YK, 'International Humanitarian Law in the Jurisprudence of African Human Rights Treaty Bodies' (2016) 29 *Hague Yearbook International Law* 1, 8 (citing Hans-Joachim Heintze, 'Theories on the Relationship between International Humanitarian Law and Human Rights Law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 53).

[31] International Law Commission, 'Fragmentation of International Law: A Study of *Lex Specialis* and Special Regimes in International Law' (2003), https://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf.

[32] *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion [1996] ICJ Rep 226, [25].

[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion [2004] ICJ Rep 136, [105]–[106].

[34] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment [2005] ICJ Rep 168, [179].

[35] Françoise Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 *International Review of the Red Cross* 549, 558–59.

applicable at all times' (a *lex generalis*?) and findings 'based on IHL' should be 'expressed in the language of human rights law'.[36]

Other factors that might shift the balance between IHL and IHRL and the duties owed by a state party are whether a conflict is classified as international or non-international and the status of particular combatants and civilians.

While human rights instruments often make cursory reference to the applicability of IHL, there appears also to be a misguided perception among human rights advocates that IHL is less protective than IHRL, based on the acceptance in IHL of military action and necessity, as well as (at least in prescribed circumstances) collateral damage.[37] As such, IHRL is generally privileged over IHL in the work of human rights bodies. Indeed, the International Commission of Jurists again presents the predominant attitude relating to review of military courts: 'the issue should be approached from the perspective of whether or not military jurisdiction is compatible with the obligations incumbent under international human rights law'.[38]

The remaining sections of this article will examine how one international framework, the UN Human Rights Council, and one regional body, the African Commission on Human and People's Rights, have sought to regulate the military courts and, in so doing, how they relate to IHL. As the primary and most influential international framework addressing human rights issues, the Human Rights Council provides an example of how, through a global platform, advocates have sought to implement universal change regarding military courts. Importantly, because the work of Council procedures can be officially endorsed subsequently by member states either at the Council or the UN General Assembly, there is the potential for greater state compliance. Examining the African Commission offers a local perspective on how a region that has experienced significant armed conflict and widespread use of military courts has sought to address the relevant human rights and legal issues.[39] Because the Commission's work is regionally focused, it can be tailored to issues specific to the African context which might otherwise be overlooked in a universal framework like the Human Rights Council.

[36] ibid 558. Many of these issues hinge on whether IHRL is considered to apply extraterritorially. Several states reject this proposition, while most international human rights bodies and the ICJ disagree.

[37] See, eg, Quincy Wright, *The Role of International Law in the Elimination of War* (Manchester University Press 1961); Samuel Hartridge, 'The European Court of Human Right's Engagement with International Humanitarian Law' in Jinks, Maogoto and Solomon (n 27) 257, 260 (quoting Louise Doswald-Beck and Sylvain Vité, 'International Humanitarian Law and Human Rights Law' (1993) 33 *International Review of the Red Cross* 94, 101: '[IHL] indicates how a party to a conflict is to behave in relation to people at its mercy, whereas human rights law concentrates on the rights of the recipients of a certain treatment'); Michael Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 *Virginia Journal of International Law* 795, 822.

[38] Andreu-Guzmán (n 20) 12.

[39] The Inter-American and European regional systems also have a considerable body of output on military courts, but they have been analysed extensively in the academic literature. In contrast, the African human rights bodies have been less a topic of focus, but no less deserving of study and analysis; see, eg, Sang (30) 2 and n 2 (commenting that examination of the African system has 'not received as much, as detailed, or as sustained attention as that given to the same questions in the practice of other human rights treaty mechanisms').

4. UN HUMAN RIGHTS COUNCIL (FORMERLY THE COMMISSION ON HUMAN RIGHTS)[40]

The issue of military courts has been on the agenda of the UN Human Rights Council[41] and its predecessor, the Commission on Human Rights,[42] for more than half a century.[43] Beginning in 2000, however, the Commission began to take significant steps to develop universal rules for military courts, building on several UN General Assembly resolutions and several international guidelines, which recommended extensive limitations on military court jurisdiction, but had not done so comprehensively.[44]

The Council is assisted in its work by, among others, the Special Procedures and the Advisory Committee (formerly the Sub-Commission on Human Rights).[45] Both of these bodies have been

[40] It is important to note that almost all of the policy work of the Human Rights Council and the Commission is conducted under the auspices of the OHCHR, and the special procedures mandate holders, advisers and other rapporteurs are engaged by the OHCHR. Although this section discusses initiatives that take place under the auspices of the Council, it is the OHCHR staff, mandate holders and consultants who engage in the actual work. In some cases these individuals are appointed and approved by the member states of the Council; in others they are selected and hired by the OHCHR.

[41] The Human Rights Council began operating in June 2006.

[42] The Commission was disbanded in 2005.

[43] eg, Mohammed Ahmed Abu Rannat, Equality in the Administration of Justice (1969), UN Doc E/CN.4/Sub.2/296/Rev.1. In 1994 the Sub-Commission on Prevention of Discrimination and Protection of Minorities presented draft principles on fair trials and remedies. One provision sought to greatly narrow the scope of when civilians could be tried by military courts ('Military courts do not have legal authority over civilians except in narrowly defined circumstances, for example, when the civilian has committed an offence in a military facility': UN Economic and Social Council, Commission on Human Rights, Draft Body of Principles on the Right to a Fair Trial and Remedy (3 June 1994), UN Doc E/CN.4/Sub.2/1994/24, Annex II, para 44).

[44] eg, Principle 38 of the 1997 version of the United Nations Principles to Combat Impunity includes the following: 'Because military courts do not have sufficient statutory independence, their jurisdiction must be limited to specifically military infractions committed by members of the military, to the exclusion of human rights violations, which must come within the jurisdiction of the ordinary courts': Louis Joinet, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) (2 October 1997), UN Doc E/CN.4/Sub.2/1997/20/Rev.1, 38; the 1992 Declaration of the Protection of all Persons from Enforced Disappearance, art 16, states that persons charged with acts of enforced disappearances 'shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts': UN General Assembly, Declaration on the Protection of All Persons from Enforced Disappearance (12 February 1993), UN Doc A/RES/47/133; Principle 5 of the 1985 Singhvi Basic Principles on the independence of the judiciary (adopted by the Commission in 1989) limited military court jurisdiction solely to 'military offences': UN Economic and Social Council, Commission on Human Rights, Final Report by the Special Rapporteur, Mr L.M. Singhvi: Draft Universal Declaration on the Independence of Justice (24 August 1987), UN Doc E/CN.4/Sub.2/1985/18/Add.5/Rev; Principle 22(b) of the Johannesburg Principles forbids military courts from trying civilians for 'security related crimes': UN Economic and Social Council, Commission on Human Rights, Johannesburg Principles on National Security, Freedom of Expression and Access to Information (2 March 1996), UN Doc E/CN.4/1996/39, Annex; see Andreu-Guzmán (n 20) for more information on these instruments. Similarly, the UN Working Group on Arbitrary Detention commented that the legitimacy of military courts hinges on the observance of four rules: '(a) It should be incompetent to try civilians; (b) It should be incompetent to try military personnel if the victims include civilians; (c) It should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime; and (d) It should be prohibited from imposing the death penalty under any circumstances'; see Andreu-Guzmán (n 20) 92, 95.

[45] OHCHR, 'Special Procedures', https://www.ohchr.org/EN/HRBodies/HRC/Pages/SpecialProcedures.aspx; OHCHR, 'Advisory Committee', https://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/HRCACIndex.aspx.

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involved in crafting military court standards.[46] This work led to the drafting and promotion of the Draft Principles Governing the Administration of Justice through Military Tribunals, issued in 2006, the first international attempt[47] to codify comprehensively rules relating to military courts.[48] These principles, however, have yet to be adopted by the member states of the Council.

4.1. THE JOINET REPORT

In 2000–01, the Sub-Commission on Human Rights, the 'think tank'[49] of the Commission on Human Rights, renewed intense study of the issue of military courts, building on its 'pioneering role' in this area.[50] The Sub-Commission, in 2001, asked Rapporteur Louis Joinet to draft a report, 'Issue of the Administration of Justice through Military Tribunals'.[51] Joinet was a logical choice to undertake this study. In 1997 he drafted the original version of the United Nations Principles to Combat Impunity, containing Principle 38, which limits military court jurisdiction to military offences committed by military members, and transfers jurisdiction over human rights violations to 'ordinary courts'.[52]

[46] The Special Procedures involved in this work have included the Working Group on Arbitrary Detention, the Committee on Enforced Disappearances, and the Special Rapporteur on the independence of judges and lawyers.
[47] Other international guidelines such as those mentioned in n 46 briefly address the issue of military courts as part of broader issues (eg, judicial independence, enforced disappearances, impunity) but did not do so in a comprehensive way.
[48] This section covers in considerable detail the process leading to the creation of the Draft Principles and their later promotion. This is not only because of the insight it provides into how the Human Rights Council and subsidiary bodies view military courts but also because it provides an interesting case study of how an issue works its way through the UN human rights system. It also demonstrates how the choice of drafter and his or her personal experiences affect and shape the creation of human rights instruments. As noted by Haldemann and Unger, '[w]hile the Principles figure prominently in contemporary human rights discourse, their drafting history is often unknown. This has much to do with the fact that there are no *travaux préparatoires* documenting multilateral work of the UN in the arena of human rights. The knowledge of who was behind a particular initiative is therefore often lost or transferred within a very small circle of experts. Some information can be found in sources such as decisions, requests, resolutions by the different multilateral human rights entities, but a systematic review of the drafting history is rarely provided. This leaves room for misinterpretation and distortion of the real meaning, ideas, and dynamics behind this initiative': Frank Haldemann and Thomas Unger, 'Introduction' in Haldemann and Unger (n 26) 4, 6. So, too, a summary of the proceedings relating to the Decaux Principles (Section 4.2 below) is useful.
[49] OHCHR, 'The Sub-Commission on the Promotion and Protection of Human Rights 2005', https://www.ohchr.org/Documents/HRBodies/SC/Leaflet2005_En.pdf.
[50] The Sub-Commission 'since the 1960s, … has played a pioneering role in drawing the attention of the Commission on Human Rights to the risks of human rights violations arising when the justice is administered by military tribunals': Louis Joinet, 'Issue of the Administration of Justice through Military Tribunals' (9 July 2002), UN Doc E/CN.4/Sub.2/2002/4, para 1 (Joinet Report).
[51] ibid.
[52] Diane Orentlicher, 'Prologue' in Haldemann and Unger (n 26) 1. According to Ní Aoláin, '[t]he phrasing of Principle 38 is somewhat more tenuous than its revised form in the Orentlicher 2005 Updated Set of Principles. In the 1997 version, the provision qualifies the exclusion of military courts exclusively because they "do not have sufficient statutory independence". By 2005, the ouster is definitive and without qualification: "The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel"': Ní Aoláin (n 26) 316.

Joinet's report was presented to the Sub-Commission in July 2002. The underlying narrative of the report is that 'there is a growing consensus on the need to limit the role of military tribunals, or even abolish them'.[53]

Joinet examined several issues in his report. First, he looked at three different categories of civilian and whether the individuals in each category could be tried by military courts (civil employees of the military, civilians committing offences alongside the military, and civilians with no military ties who have engaged in primarily 'political' or security offences).[54] Another highlight was examining whether military tribunals had competence to try members of the military for gross human rights violations, 'frequently a source of impunity'.[55] Joinet's legal analysis was based solely on IHRL – namely, the ICCPR, the regional human rights instruments, decisions of oversight mechanisms and soft law declarations. He does not include reference to IHL, even though significant fair trial guarantees are contained in IHL,[56] and despite invoking in his report clear scenarios where IHL could apply (such as 'civilians committing offences alongside the military').[57]

For example, Joinet claims that:[58]

> the broad interpretation of the various criteria for jurisdiction, particularly when a state of war or emergency is declared, extends the jurisdiction of military tribunals. In this situation, their activities consist less and less of trying military personnel and more and more of initially trying armed opponents and then gradually civilians who demonstrate their opposition by peacefully exercising the rights recognized and guaranteed by international standards and procedures, particularly in the areas of freedom of expression, association and demonstration.

While Joinet's observations may be accurate, he does not legally examine if, or to what extent, the expansion of such jurisdiction is allowed for in the context of armed conflict and the rules of IHL.

[53] Joinet Report (n 50) para 13. Joinet's examples to reflect the 'growing consensus' are 'the positions of the Special Rapporteur on the independence of judges and lawyers, the Working Group on Arbitrary Detention, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Representative of the Commission on Human Rights to monitor the situation of human rights in Equatorial Guinea': ibid para 37. It should be noted that Joinet's history linking the broadening of military jurisdiction over civilians to 'colonial wars', decolonisation and 'dictatorships in Latin America' as opposed to 'conventional wars' is lacking. However, according to a former Sub-Commission member interviewed by the author, Joinet was particularly affected by his experiences in monitoring military courts in Latin America and this substantially influenced his approach to the issue. Nevertheless, his rhetoric that military jurisdiction has been expanded to target 'peaceful civil society' cannot be universally applied, given the very real contexts of civil unrest, terrorism and violent insurgencies that surrounds much use of military courts.

[54] Joinet Report (n 50) para 5.

[55] ibid 4, paras 4, 17.

[56] It could be argued that Joinet relied on the ICCPR (n 28) as it is the primary source of such protection in IHRL. However, IHL instruments from the outset have also embedded concepts of due process. See, eg, arts 12 (death sentences issued by military courts must be reviewed by a higher authority before being carried out), 13 (limits the jurisdiction of military courts), and 148 (prohibition of summary execution of captives) of the Lieber Code: Francis Lieber, 'General Orders No 100: Instructions for the Government of Armies of the United States in the Field', 24 April 1863, https://ihl-databases.icrc.org/ihl/INTRO/110.

[57] Joinet Report (n 50) para 5.

[58] ibid para 6.

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Joinet concludes his report with nine recommendations which he says are aimed at achieving the 'long-term objective' to 'abolish military tribunals'.[59] As part of this goal he calls for ending all military tribunals in peacetime; banning military courts from trying children under the age of 18 (Recommendation 8), including child soldiers, members of armed opposition groups, and children with the legal status of civilian (all are references to situations of armed conflict governed by IHL); and outlawing the death penalty (Recommendation 9). Note that the latter two suggestions could conflict with IHL. Again, Joinet offers no mention of the governing law, the role between IHRL and IHL, or how his suggestions might have an impact on the legal framework of IHL.

4.2. The Decaux Reports and Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)

The Sub-Commission asked Rapporteur Emmanuel Decaux to take over from Joinet in 2002 and update the report.[60] Decaux's 'aim' in the update was 'to clarify the many issues contained in the [Joinet] study in order to structure the public debate that must be held'.[61] Decaux's report contained an 'analysis of the special jurisdictions of military tribunals and of the judicial guarantees inherent in the concept of an independent and impartial tribunal'.[62] It revised Joinet's recommendations in accordance with the Commission on Human Rights Resolution 2003/39, finding that governments must 'ensure that [military] courts are an integral part of the general judicial system'.[63]

Decaux, like his predecessor (at least initially), viewed the issue of military justice solely within the framework of human rights law. He recognised that for historical reasons, military and 'general' justice became bifurcated, but asserted that today 'the development of "military justice" must be situated within the framework of the general principles governing the proper administration of justice'.[64] In order to do so, he notes that 'it is important to draw attention to legal consequences [of military courts] in the light of international human rights law'.[65] He also laments that the integration of military courts into the general justice system 'has long been opposed by the logic of exceptions [such as sieges or states of emergency], which has often been used to justify the establishment of military courts'.[66] He does not mention, however, that the differing system not only relates to historical evolution, but also to the separate legal framework applicable to armed conflict and the notion of IHL as *lex specialis*.[67] Although his

[59] ibid para 29.
[60] The reason for this change is not apparent from the record.
[61] Emmanuel Decaux, 'Issue of the Administration of Justice through Military Tribunals' (27 June 2003), UN Doc E/CN.4/Sub.2/2003/4, para 5.
[62] ibid para 7.
[63] ibid. UN Commission on Human Rights, Resolution 2003/39, Integrity of the Judicial System (23 April 2003), UN Doc E/CN.4/RES/2003/39.
[64] ibid.
[65] ibid.
[66] ibid.
[67] See nn 29–36 and accompanying text.

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initial report is somewhat unclear as to his personal position,[68] it appears that Decaux takes a more moderate stance than that of his predecessor Joinet, who advocated full abolition of military courts.[69]

Decaux acknowledges that military jurisdiction differs in peacetime from times of war, offering a cursory mention of relevant IHL principles.[70] He notes that IHL does apply in international and non-international armed conflicts and cites Article 84 of GC III, which requires prisoners of war to be tried by military courts, and the due process protections offered in Articles 102 and 105.[71] He offers no analysis, however, as to how these principles apply in relation to IHRL or how they will have an impact on his proposed recommendations.

While Decaux does not advocate abolition, he calls for significant restrictions on military court jurisdiction, concluding that military courts should not be competent to try civilians or gross violations of human rights, and that they should be employed only in limited cases relating to military personnel.[72]

For example, Decaux raises the issue of minors in military courts, but relies on human rights instruments.[73] He mentions very briefly the military court trials of Palestinian minors charged with attacking Israeli soldiers (paragraph 19), but does not discuss how a situation of occupation and the attendant IHL rules might dictate which courts are employed. In some cases, during armed conflict, military courts might be the only available option, but he does not propose alternative solutions. He states in his recommendations that minors must be tried in accordance with the Convention on the Rights of the Child (CRC) and the Beijing juvenile justice principles (Beijing Rules),[74] and therefore claims that military courts do not have competence.[75] However, neither the CRC nor the Beijing Rules prohibit the use of military courts; nor are there requirements in these instruments that in principle could not be met by a military court.

In addition, Decaux asserts that 'the idea that perpetrators of human rights violations cannot be tried before military tribunals is becoming increasingly accepted today', citing the Declaration

[68] Decaux states: 'In the light of this situation, two solutions are possible, without being incompatible: one can recommend the abolition …' (Decaux (n 61) para 9). Perhaps as a result of an editing error, he does not provide the second solution in the text, creating confusion as to whether he supports abolition as an ultimate goal. Nevertheless, his recommendations appear to support permanent integration rather than abolition.

[69] It appears that his more moderate stance was affected by a working paper prepared by Sub-Commission member Françoise Hampson, pursuant to Sub-Commission Decision 2002/104, on the scope of the activities and accountability of armed forces, UN civilian police, international civil servants and experts taking part in peace support operations: UN Economic and Social Council, Commission on Human Rights, Working Paper on the Scope of Activities and Accountability in Peace Support Operations submitted by Françoise Hampson (7 July 2005), UN Doc E/CN.4/Sub.2/2005/42. Hampson notes that members of the armed forces could be held accountable via courts martial conducted by the sending states and recommends that the issue is discussed further in the process spearheaded by Decaux (n 61) paras 10, 32.

[70] Decaux (n 61) paras 24–34.

[71] ibid para 31.

[72] ibid para 23.

[73] ibid para 19.

[74] Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3 (CRC); UN Standard Minimum Rules for the Administration of Juvenile Justice (adopted by General Assembly Resolution 40/33 of 29 November 1985).

[75] Decaux (n 61) para 85.

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for Enforced Disappearances, Article IX of the 1994 Inter-American Convention on Forced Disappearance of Persons, and a couple of soft law instruments.[76] Therefore, he proposes that military courts should be barred from trying such cases. Again, he does not evaluate IHL, mention whether he considers human rights violations to include violations of IHL, or discuss if civilian courts have the competence to properly analyse violations of IHL.

Like Joinet, Decaux includes proposed recommendations. He expands the number of recommendations from 9 to 13, and re-orders them. For instance, Joinet's Recommendation 1 (that military courts should be prohibited from trying serious human rights violations) is Decaux's second proposal. In contrast, Decaux's first recommendation is that 'military courts should, in principle, not have competence to try civilians, and their competence should be limited'.[77] Joinet does not include such a recommendation. Other differences include that Decaux separates the requirement of habeas into its own recommendation, adds a recommendation for independent and impartial hearings, and proposes that conscientious objectors should be tried solely by civilian courts.[78]

Based on Decaux's report, in 2003 the Sub-Commission issued Resolution 2003/8, calling for the 'composition, operation, and procedures' of military courts to comply with 'international standards and rules providing for a fair and just trial'.[79] The Sub-Commission also called for the drafting of 'principles and guidelines' relating to military courts, asking Decaux to continue with his work.[80] In preparation for compiling draft principles, the Sub-Commission also asked for input from governments, UN bodies, regional organisations, non-governmental organisations and 'specialized institutions'.[81] It did not specifically include military sources in this list.[82] However, in a summary of its proceedings, the Sub-Commission did welcome the organisation of a seminar on the issue by the International Commission of Jurists and the Office of the High Commissioner for Human Rights, 'including military experts'.[83]

The Commission on Human Rights backed the work of the Sub-Commission, passing Resolution 2003/39.[84] Notably, the Commission endorsed the more moderate approach of Decaux, as opposed to an abolitionist stance: '9. Calls upon States that have military courts for trying criminal offenders to ensure that such courts are an integral part of the general judicial system and use the duly established legal proceedings'.[85] In Resolution 2004/32 the Commission emphasised that military courts must 'apply due process procedures that are internationally recognized as guarantees of a fair trial, including the right to appeal a conviction and a sentence' but

[76] As will be discussed, this provision was explicitly rejected in the Convention.
[77] Decaux (n 61) para 74.
[78] ibid paras 77, 78, 84.
[79] UN Economic and Social Council, Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2003/8 (3 August 2003), UN Doc E/CN.4/Sub.2/RES/2003/8, chapeaux.
[80] ibid para 2.
[81] ibid para 4.
[82] ibid.
[83] ibid para 5.
[84] UN Commission on Human Rights, Resolution 2003/39 (n 63).
[85] ibid.

changed the earlier wording of 2003/39 to 'that such courts, where required by applicable law, are an integral part of the general judicial system'.[86] Interestingly, Decaux expressed hesitation that the change 'required by applicable law' 'loses the conciseness'.[87]

Decaux prepared a follow-up report in 2004, based on the seminar of experts held jointly with the International Commission of Jurists.[88] His report also contained a set of 17 principles based upon his previous recommendations, which would form the foundation of his 2006 Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles).

Primarily, Decaux advocates that military courts must be wholly integrated into the general justice system rather than stand as a form of 'exceptional justice'.[89] By doing so, he also notes that it protects such courts from being 'sanctified' or 'demonized'.[90] He calls his work part of 'the path of normalization – the process of "civilizing" military justice'.[91] He also emphasises the role of 'military experts' (perhaps to legitimise his work and obtain buy-in from member states, as his proposals would significantly constrain the exercise of military justice).[92] He notes, for example, the 17 new principles 'revised in the light of the comments made by experts, particularly military experts'.[93] These new principles also give greater attention to IHL.

Decaux's revision includes a new Principle 1, which mandates the full integration of military courts into the general justice system. Under this provision, military courts must guarantee internationally recognised fair trial standards.[94] In his commentary on this principle Decaux explicitly references IHL. For example, he cites Article 75(4) of AP I and how it provides for due process protection, including an 'impartial and regularly constituted court'.[95] He reiterates that Article 6 of AP II also guarantees 'independence and impartiality'.[96] He notes that, if even in armed conflict the law requires due process safeguards, all the more so they are required in time of peace.[97]

Principle 2 forbids military courts from taking jurisdiction over civilians. Interestingly, in this case, however, Decaux does not invoke IHL, despite it clearly allowing for such cases. He does

[86] UN Commission on Human Rights, Resolution 2004/32, Integrity of the Judicial System (19 April 2004), UN Doc E/CN.4/RES/2004/32. Neither resolution mentions IHL.
[87] Emmanuel Decaux, 'Issue of the Administration of Justice through Military Tribunals' (14 June 2004), UN Doc. E/CN.4/Sub.2/2004/7, para 6 (Decaux II). He does not explain exactly his concern but it appears that the new wording could be used to exclude some military courts from the requirements of being integrated and employing the same due process standards.
[88] ibid. Interestingly, his report, as did previous Sub-Commission reports and resolutions, made a point of referring to this seminar as 'the seminar of experts, including military experts', as opposed to just 'the seminar of experts'.
[89] ibid para 7.
[90] ibid.
[91] ibid.
[92] ibid para 8.
[93] ibid.
[94] ibid. 'Principle No. 1: Establishment of military tribunals by the constitution or the law. Military jurisdictions, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. Military tribunals should be an integral part of the general judicial system and apply due process procedures that are internationally recognized as guarantees of a fair trial'.
[95] ibid para 13.
[96] ibid.
[97] ibid.

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remark, though, that 'there is no doubt a grey area that deserves further investigation in order to clarify the meaning' of 'personnel treated as military personnel', such as military contractors or paramilitary forces.[98] He invokes IHL again and the prohibition against holding prisoners incommunicado when discussing Principle 4, which sets out limitations on military secrecy.[99]

Principle 8 delineates internationally recognised fair trial guarantees.[100] Here, too, Decaux mentions Article 75(4) of AP I. He also mentions that similar guarantees are provided for in Article 14 of the ICCPR. He cites General Comment No 29 of the Human Rights Committee according to which these guarantees are non-derogable. The Committee had noted that if fair trial rights are 'explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations'.[101] Decaux does not discuss which standards would prevail should there be a conflict between the two.

With regard to military trials of minors (Principle 13), Decaux states that during 'peacetime' the CRC should be applicable.[102] He then notes that during armed conflict the CRC mentions that IHL should apply (Article 38). He then advises, however, albeit somewhat unclearly as to the specific case to which he is referring, that regarding child soldiers 'in the case of war crimes or large-scale violations of human rights … [o]nly civilian courts would appear to be well placed to take into account all the requirements of the proper administration of justice'.[103]

The most notable addition to Decaux's Principles is Principle 15: Application of humanitarian law.[104] It is interesting that towards the end of the Principles, rather than at the beginning, Decaux acknowledges the applicability of IHL. Although Principle 15 states expressly that IHL is 'fully applicable to military courts' in 'times of armed conflict', Decaux does not discuss the relationship between human rights law and IHL during armed conflict, the differences between the requirements of human rights law and IHL vis-à-vis military courts, or how some of his principles should be approached if they conflict with IHL. Also, he discusses the rules of GC III, but does not specify here the applicable rules from GC IV or the Additional Protocols.

Following the passage of two Commission Resolutions (2005/30, 2005/33), which continued to provide support for Decaux, he submitted a new report, following a 'lively' discussion with the Sub-Commission.[105] This new report revised the Draft Principles Governing the Administration of Justice through Military Tribunals, expanding them from 17 to 20 principles and re-ordering them. The draft was submitted to the Commission for review.[106]

[98] ibid para 16.
[99] Decaux cites GC III (n 1) section V, and AP I (n 12) art 32.
[100] Decaux II (n 87) 14.
[101] ibid para 34.
[102] ibid para 50; CRC (n 74).
[103] ibid para 50. It is unclear if Decaux is saying that it would be acceptable for a military court to try child soldiers who were not involved in war crimes or mass human rights violations.
[104] Decaux writes: 'In time of armed conflict, the principles of humanitarian law, and in particular the provisions of the Geneva Convention relative to the Treatment of Prisoners of War, are fully applicable to military courts', and quotes GC III (n 1) arts 5, 84, 102.
[105] Emmanuel Decaux, Draft Principles Governing the Administration of Justice through Military Tribunals (13 January 2006), UN Doc E/CN.4/2006/58, para 7 (Decaux Principles).
[106] ibid.

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The 'lively' Sub-Commission discussion prompted significant additions to the Draft Principles. Sub-Commission member Françoise Hampson advocated the addition of a principle to allow military law to apply to civilians in times of martial law, as this was 'preferable to no justice at all'.[107] This suggestion was added as Principle 3. Some Sub-Commission members expressed concerns about the criticisms of military courts. One noted that military justice could be 'equal or even superior' to civilian justice if administered by 'competent individuals who have seen or been trained in combat and have a better understanding of what happens in wartime'.[108] He also advocated maintaining the death penalty. Another member questioned whether the Principles would be helpful in the context of failed states where 'ordinary courts had ceased to function'.[109] This member noted that reform of the justice system in the Democratic Republic of Congo had actually begun with military justice reforms.[110] It does not appear that these criticisms were integrated.

Besides the addition of the martial law provision, several other notable changes appear in the revised draft. Principle 2 calls on military courts to observe international fair trial standards, 'including the rules of international humanitarian law'. IHL is mentioned again in Principle 4, which was moved up from Principle 15. The commentary mirrors that of previous drafts except that a paragraph was added specifically to address situations of occupation, and noting that IHL clearly allows for military courts provided they 'sit in the occupied territory' and accord with 'general principles of law'.[111] The commentary on Principle 9 (limiting military court jurisdiction for serious human rights violations) acknowledges that the draft treaty on enforced disappearances did not adopt the approach of the General Assembly Declaration on Enforced Disappearances or the approach of the 1994 Inter-American Convention on Forced Disappearance of Persons on the same topic.[112]

After publication of the Decaux Principles, the text of the International Convention on Enforced Disappearances was adopted in December 2006.[113] As with the draft treaty, the final text of the Convention rejected the wording of the General Assembly Declaration, which had prohibited military courts from trying alleged perpetrators charged with enforced disappearance. Instead, Article 16 of the Convention states: 'Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law'. In other words, Article 16 does not rule out the use of military courts in these cases so long as it is 'competent, independent, and impartial'.[114]

[107] ibid para 7.
[108] ibid.
[109] ibid para 8.
[110] ibid.
[111] ibid para 19.
[112] ibid para 33.
[113] International Convention for the Protection of All Persons from Enforced Disappearance (entered into force 23 December 2010) 2716 UNTS 3.
[114] Gabriela Knaul, Report of the Special Rapporteur on the Independence of Judges and Lawyers (7 August 2013), UN Doc A/68/285, para 72.

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The Decaux Principles were never adopted by the Commission on Human Rights, nor to date by the Human Rights Council. The failure to endorse these Principles officially may have stemmed from the fact that they were submitted to the Commission shortly before it was disbanded and then fell off the agenda of the new Council. It is also possible that there was an absence of will on the part of member states to formally adopt these guidelines.[115]

4.3. Special Rapporteur on the Independence of Judges and Lawyers

In March 2012 the issue of military courts re-emerged on the Human Rights Council agenda. The Council passed Resolution 19/31,[116] prompting a report on the administration of justice through military tribunals by the Special Rapporteur on the independence of judges and lawyers. The Rapporteur, Gabriela Knaul, presented her report to the UN General Assembly at its 2013 session.[117] The Special Procedures mandate of the Special Rapporteur on the Independence of Judges and Lawyers appears annually under the Human Rights Council Agenda Item 3.[118] Military courts and tribunals are at the 'core' of the Rapporteur's mandate.[119]

Although Resolution 19/31 focused on the issue of fair trial standards, the Rapporteur expanded her review to include the issues of independence of military courts, competence to prosecute civilians, and competence to prosecute gross human rights violations – the latter two being the most contentious issues among member states.[120]

The Rapporteur appears to depart somewhat from the more moderate approach of Decaux and indicates a return to the abolitionist stance advocated by Joinet. She questions the legitimacy of using military courts at all, claiming:[121]

> In many States, the primary purpose of military tribunals continues to be that of serving the interests of the military, rather than those of society, and military tribunals end up constituting a weapon for combating the so-called 'enemy within' rather than being a tool for disciplining the troops.

The Rapporteur set out in detail the international standards used to prepare her report. The benchmark for her evaluation was judged exclusively against the standards of international human

[115] According to ICRC officials interviewed by the author, the Decaux Principles were deemed non-workable and, as a result, do not appear on the ICRC website.
[116] UN General Assembly, Human Rights Council, Resolution 19/31, Integrity of the Judicial System (23 March 2012), UN Doc. A/HRC/RES/19/31, para 8: '*Calls upon* States that have military courts or special tribunals for trying criminal offenders to ensure that such bodies are an integral part of the general judicial system and that such courts apply due process procedures that are recognized according to international law as guarantees of a fair trial, including the right to appeal a conviction and a sentence'.
[117] Knaul (n 114).
[118] UN OHCHR, 'About the Mandate of the Special Rapporteur on the Independence of Judges and Lawyers, https://www.ohchr.org/EN/Issues/Judiciary/Pages/Mandate.aspx.
[119] Knaul (n 114) para 13. The webpage for the mandate listing relevant international standards does not include any IHL instruments: OHCHR, 'International Standards', https://www.ohchr.org/EN/Issues/Judiciary/Pages/Standards.aspx.
[120] Knaul (n 114) para 4.
[121] ibid para 24.

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rights law.[122] Her work in preparing the report also involved disseminating a questionnaire to states on military justice, which sought detailed responses regarding the jurisdiction and due process guarantees in the military courts and how its procedures comply with the requirements of the ICCPR.[123]

Also, in contrast to the Decaux Principles – which, at least to some extent, addressed the context of armed conflict and made several references to IHL – the Rapporteur does not discuss armed conflicts or their relevance to the issue of military courts. She omits any discussion of IHL standards, even when raising particular cases where the existence of a non-international armed conflict (NIAC) is clear.[124] She does not evaluate the interplay between IHL and IHRL, or how to address conflicts between the two. She does not address the use of military courts during armed conflict, the issue of occupation (occurring in international armed conflict (IAC)), or the potential difference in how these courts should be utilised in an IAC as opposed to a NIAC. These questions should have been raised at the start of her legal analysis.

In a notable example the Rapporteur claims that 'using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism is a regrettably common practice that runs counter to all international and regional standards and established case law'.[125] She does not address whether these practices are taking place within the context of armed conflict, occupation or the concept of direct participation in hostilities. She also does not mention that IHL clearly contemplates the trial of civilians for such purposes. Surprisingly, she admits that '[i]nternational human rights treaties do not address the trial of civilians by military tribunals explicitly', and acknowledges that the Human Rights Committee 'does not prohibit the trial of civilians in military or special courts'.[126] In addition, while referencing the International Convention for the Protection of All Persons from Enforced Disappearance as a source of soft law, she does not mention that the Convention text differed markedly from the Declaration on Protection of All Persons from Enforced Disappearance, explicitly rejecting the bar on the use of military tribunals.[127]

The Rapporteur concludes her report with several recommendations:

- integrating military tribunals into the general justice system;
- military courts 'when they exist' must meet Articles 9 and 14 of the ICCPR;[128]
- 'because they have the distinct objective of dealing with matters related to military service,[129] military tribunals should have jurisdiction only over military personnel who

[122] ibid paras 16–19.
[123] UN OHCHR, 'Questionnaire on Military Justice', https://www.ohchr.org/EN/Issues/Judiciary/Pages/QuestionnaireMilitaryJustice.aspx.
[124] For instance, she mentions Colombia, Russia (Chechnya), Peru and Central African Republic – all accepted, or at least arguably, situations of NIAC: Knaul (n 114)) para 68.
[125] ibid para 46.
[126] ibid paras 46–47, 51 (citing General Comment 32).
[127] ibid para 58.
[128] ibid para 88.
[129] This is not necessarily the case – particularly in post-conflict or peacekeeping situations, or in the context of occupation.

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commit military offences or breaches of military discipline, and then only when those offences or breaches do not amount to serious human rights violations;'[130]

- 'military tribunals should be limited to criminal offences of a strictly military nature, in other words to offences that by their own nature relate exclusively to legally protected interests of military order, such as desertion, insubordination or abandonment of post or command';[131]
- '[t]he trial of civilians by military tribunals should be prohibited'.[132]

She also calls on the Council and the General Assembly to adopt and endorse the Decaux Principles.[133]

Following submission of the Report, the Council did not adopt the Decaux Principles but passed Resolution 25/4,[134] echoing the Special Rapporteur, stating that 'military tribunals, when they exist, must be an integral part of the general justice system and operate in accordance with human rights standards, including by respecting the right to a fair trial and due process of law guarantees'. The Resolution calls on states to ensure that military courts 'apply procedures that are recognized according to international law as guarantees of a fair trial, including the right to appeal a conviction and a sentence'.[135] It also charged the Office of the High Commissioner for Human Rights (OHCHR) to convene an 'expert consultation' for 'an exchange of views on human rights considerations relating to the issues of administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations'.[136]

The consultation was held in November 2014 with 13 experts, predominantly experts on international human rights law.[137] Decaux was a notable participant. Only three presenters had been members of the military, though interestingly none of their presentations engaged

[130] ibid para 89.
[131] ibid para 98.
[132] ibid para 101.
[133] ibid para 92.
[134] UN General Assembly, Human Rights Council, Resolution 25/4, Integrity of the Judicial System (10 April 2014), UN Doc. A/HRC/RES/25/4.
[135] ibid para 10. Notably, the countries in favour of the resolution have almost all been charged with employing military courts that do not comply with any of these standards and engage in serious abuses: Algeria, Argentina, Botswana, Brazil, Burkina Faso, Chile, China, Congo, Costa Rica, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kuwait, Mexico, Morocco, Namibia, Pakistan, Peru, Philippines, Russia, Sierra Leone, South Africa, United Arab Emirates, Venezuela and Vietnam. The US voted against, while all other western countries abstained: Austria, Benin, Côte d'Ivoire, Czech Republic, Estonia, France, Gabon, Germany, Ireland, Italy, Japan, Kenya, Macedonia, Maldives, Montenegro, Romania, Saudi Arabia, South Korea, and the United Kingdom.
[136] The Council called for the 'participation of representatives of States, the special procedures, including the Special Rapporteur on the independence of judges and lawyers, the chairperson-rapporteurs of the Working Group on Enforced or Involuntary Disappearances, and the Working Group on Arbitrary Detention, the treaty bodies and regional human rights mechanisms, as well as non-governmental organizations and national human rights institutions': ibid para 12. Surprisingly, the Council did not call explicitly for the participation of military officials or IHL experts.
[137] Expert Consultation (n 9); OHCHR, 'Agenda', https://www.ohchr.org/Documents/Issues/AdministrationJustice/Consultation2014/Agenda.doc.

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extensively with IHL.[138] One participant, a scholar from Yale who briefly served in the US Coast Guard and was President of the National Institute for Military Justice for 20 years,[139] mentioned that the Geneva Conventions were an 'additional issue' to take into account.[140] Two of the military experts (Dahl and Jha) took highly critical views of military courts and favoured implementing extensive restrictions.[141] In fact, Arne Dahl, a former military official from Norway, noted that his country had abolished peacetime military courts in 1921. Patrick Gleeson, on the other hand, was the sole presenter to discuss the benefits of military courts as well as a substantive critique of the Draft Principles.[142] No ICRC representative appeared on the schedule.

Dahl offered the important point that military justice involves not only the court process, but also investigatory procedures. In other words, he notes that 'one needs to consider the whole procedural chain from investigation via prosecution to adjudication before drawing conclusions about the qualities of a particular system of military justice'.[143] While it does not appear in his presentation, nor did it appear to be part of the overall discussion, this is another area where there is considerable divergence between the framework and requirements of IHL and human rights law.[144] Dahl acknowledges that the primary driving force for changes relating to military courts have stemmed from 'human rights influence'.[145]

Gleeson, while involved extensively in reforms of the Canadian military courts, opened his remarks 'convinced that properly structured and empowered Military Courts play an important role in contributing to military effectiveness', and that they can 'minimize the risk of impunity'.[146] He also explained how they can 'contribute to the preservation and promotion of the rule of law' when operating in areas 'where governmental institutions are weak or non-existent'.[147]

Gleeson offered critique of the Decaux Principles, focusing primarily on Principles 8 (limiting jurisdiction to military offences committed by military personnel) and 9 (barring jurisdiction over serious human rights violations).[148] He expressed concern that 'in some areas the principles are much too narrowly crafted' and 'reflect an unwarranted bias against military courts in favour of "ordinary courts or judicial tribunals"'.[149] He noted that military courts should be viewed as a

[138] The three military experts were Mr Arne Willy Dahl, former Norwegian Attorney General for the Armed Forces, and former President, International Society for Military Law and the Law of War; Wing Commander (Dr) Umesh Chandra Jha (ret.), Indian Air Force; and Colonel Patrick Gleeson (ret.), former Deputy Judge Advocate General/Operations, Canadian Armed Forces Office of the Judge Advocate General.
[139] Eugene R Fidell, Yale Law School Faculty, https://law.yale.edu/eugene-r-fidell.
[140] Expert Consultation (n 9) Contribution of Eugene Fidell.
[141] ibid Contribution of Arne Dahl.
[142] ibid Contribution of Patrick Gleeson.
[143] ibid Contribution of Arne Dahl.
[144] Under international human rights law there is a presumptive requirement to investigate every death caused by state action. The same is not found under IHL: Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harvard Security Law Journal* 31, 51.
[145] Expert Consultation (n 9) Contribution of Arne Dahl.
[146] ibid Contribution of Patrick Gleeson, 1.
[147] ibid.
[148] ibid 1–2.
[149] ibid.

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'specialized court' that is part of a state's justice system.[150] In addition, he points out that '*properly constituted* military courts within a nation are in no better or worse a position than civilian courts in delivering open, fair and unbiased justice'.[151]

Regarding the proposal to exclude military courts from trying cases involving gross human rights violations, he rejects the approach of the Decaux Principles that 'suggest that a non-compliant civilian court or justice system is a more acceptable option when dealing with such grave offences than would be a fully compliant military tribunal'.[152] Instead, he advocates the approach of the International Convention for the Protection of All Persons from Enforced Disappearances, which allows for 'competent' courts to take jurisdiction.[153] In his view 'this is a principled approach that focuses on the attributes of the court or tribunal as opposed to its specialized function or character'.[154]

He concludes his remarks by noting that in post-conflict zones, military forces are 'frequently one of the few institutions operating in these environments that possess the resources and organisational ability to effectively and expeditiously deal with the evidence and alleged perpetrators'.[155] To exclude such actors from dealing with serious abuses 'might well have the unintended effect of promoting impunity'.[156]

During his presentation Decaux expressed the idea that, despite the disappointment with the final wording of Article 16 of the International Convention on Enforced Disappearances, he thought states could instead expand Principle 9 to include a prohibition against military investigations of serious human rights violations.[157] With regard to Principle 8 (limiting military court jurisdiction to trying military personnel for military offences), while he agreed there may be justification for using military courts in these circumstances, he did not think the same rationale should be applied to appellate jurisdiction.[158] Therefore, appeals should fall within civilian court jurisdiction.

He also mentions briefly the applicability of IHL but does not go into detail as to how these provisions should be viewed in relation to human rights law.[159] Instead, he invokes the following example, expressing concern regarding violations of the laws of war: 'in particular violations of the "right to life" within the meaning of Article 2 of the European Convention on Human Rights.

[150] ibid 2.
[151] ibid (emphasis in original).
[152] ibid 6.
[153] ibid.
[154] ibid.
[155] ibid 7.
[156] ibid.
[157] ibid Contribution of Emmanuel Decaux, 2.
[158] ibid 4.
[159] ibid 5. The UN summary of the meeting includes a footnote to GC III, arts 84 and 102, as well as to GC IV, art 66: UN High Commissioner for Human Rights, Summary of the Discussions held during the Expert Consultation on the Administration of Justice through Military Tribunals and the Role of the Integral Judicial System in Combating Human Rights Violations (29 January 2015), UN Doc A/HRC/28/32 (Summary of Expert Consultation), para 63. Decaux's written remarks, however, do not mention these items and the reference to IHL in his remarks is quite tangential in the final paragraph. It is unknown if his oral presentation included this information.

Should the use of lethal force by the armed forces be subject to the discretion of a specialized judge, a military judge?'[160] He does not elaborate on why a military judge would be less qualified to rule on 'violations of the laws of war' given that they would be significantly more familiar with the legal and factual context.[161]

Although the Decaux Principles were yet to be adopted by the Council, and the International Covenant on Enforced Disappearances presented a setback for advocates of more stringent restrictions on military courts, Decaux did note that the European Court of Human Rights cited the Draft Principles in several cases. In *Icen v Turkey*, for example, the Court, citing Principle 5, found that military courts should try civilians only in 'exceptional circumstances' and only where there was a 'compelling reason to justify such a situation'.[162]

The renewed effort to address the issue of military courts did not result in the adoption of the Decaux Principles by the Council. Instead, the OHCHR invited states to 'request technical assistance and advisory services'.[163]

The drafting history of the Decaux Principles provides an interesting case study of how an international human rights framework, the UN Human Rights Council, sought to create a set of universal principles regulating military courts and how that body approached the issue of IHL during these efforts. Like the Council, the regional human rights systems have also taken on the issue of military courts. An examination of the approach of the African Commission on Human and People's Rights sheds light on how this regional body analyses the issue of military courts and addresses IHL within the specific context of Africa.

5. AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS

The African continent has been plagued by armed conflict and military rule.[164] Military courts are widespread and exercise extensive jurisdiction. Yet, as noted by legal scholar Ronald Naluwairo, 'many military courts in African countries do not adhere to the internationally accepted principles

[160] Expert Consultation (n 9) Contribution of Decaux, 4.
[161] ibid.
[162] Summary of Expert Consultation (n 159) para 62. The European Court of Human Rights also referred to Principles 1, 2 and 5 in *Ergin v Turkey*, App no 47533/99, 9 May 2006, para 24; and *Maszni v Romania*, App no 59892/00, 21 September 2006, para 31.
[163] Summary of Expert Consultation (n 159) para 77. In March 2018 and November 2019, Yale Law School hosted a group of legal experts to revise the Decaux Principles such that they would gain more international acceptance. That process is still ongoing, though a draft of their proposed revisions can be found at: Global Military Justice Reform, 'Decaux Principles Workshop', http://globalmjreform.blogspot.com/2018/04/decaux-principles-workshop.html. As noted by Naluwairo (one of the experts at the Yale conference), the Yale version offers a more nuanced approach than Decaux on the issue of whether military courts may try civilians, and it clearly acknowledges the role of IHL: Ronald Naluwairo, 'Improving the Administration of Justice by Military Courts in Africa: An Appraisal of the Jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 19 *African Human Rights Law Journal* 43, 60.
[164] See, eg, Martin Meredith, *The State of Africa* (Simon & Schuster 2013); Solomon Ayele Dersso, 'Addressing Human Rights Issues in Conflict Situations', African Commission on Human and People's Rights (AComHPR), October 2019, 13–20.

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for the administration of justice' and instead mete out 'injustice'.[165] As a result, the African human rights mechanisms, most notably the African Commission on Human and People's Rights, have been particularly active in seeking to regulate military courts and enforcing these regulations. In doing so, however, there is inconsistent engagement with IHL, as will be discussed below.

5.1. African Charter on Human and People's Rights

In its work the Commission relies on and interprets the African Charter on Human and People's Rights, which enshrines due process and fair trial rights.[166] Article 4 states that '[e]very human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'. Article 6 forbids arbitrary arrest and detention. Article 7 addresses fair trial standards, which include the right of appeal to 'competent national organs' against rights violations (7a), the presumption of innocence by a 'competent court or tribunal' (7b), the right to be defended by one's counsel of choice 7(c), and the right to be tried within a reasonable time by an impartial court or tribunal (7d). Article 26, which provides that 'States parties to the present Charter shall have the duty to guarantee the independence of the courts', is also relevant to the issue of military courts.[167] Under Article 60 the Commission is authorised to 'draw inspiration from international law'; under Article 61 the Commission shall take into consideration 'customs generally accepted as law', 'general principles of international law', and 'legal precedents and doctrine'.[168] The Commission has interpreted these articles to allow for reference to IHL in its work.[169] The African Charter is unique in this respect as the Inter-American and European systems do not explicitly allow for reference to other areas of law.[170]

5.2. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

As part of its work, the Commission, in 2003, issued the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which directly addresses several issues related to

[165] Naluwairo (n 163) 44.
[166] African Charter on Human and Peoples' Rights (entered into force 21 October 1986), OAU Doc. CAB/LEG/67/3 rev. 5, (1982) 21 *International Legal Materials* 58. The only African country not to have ratified the Charter is Morocco; this is because of the African Union position on Western Sahara admitting it as a member state: International Justice Resource Center, 'Following Three Decades of Isolation, Morocco Rejoins the African Union', 6 February 2017, https://ijrcenter.org/2017/02/06/following-three-decades-of-isolation-morocco-rejoins-african-union/#:~:text=As%20a%20party%20to%20specific,monitored%20by%20UN%20treaty%20bodies.&text=All%20AU%20members%2C%20except%20South,on%20Morocco%20to%20follow%20suit.
[167] ibid.
[168] ibid.
[169] See nn 193–212 and accompanying text; Dersso (n 164) 28.
[170] Sang (n 30) 23; Michaela Hailbronner 'Laws in Conflict: The Relationship between Human Rights and International Humanitarian Law under the African Charter on Human and Peoples' Rights' (2016) 16 *African Human Rights Law Journal* 339, 346.

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military courts.[171] The Principles were drafted under its mandate in Article 45(c) of the Charter: 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation'.[172] The Principles have been used by the Commission as a benchmark in its cases and in other work.[173]

The first part of the Principles sets out due process standards for 'all legal proceedings', which include the right to independent and impartial judges and a public hearing, and the right to be represented by counsel of one's choosing. They also include 'equality of arms between the parties to proceedings, whether they be administrative, civil, criminal, or military'.[174] Another provision states that military courts 'that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies'.[175]

Section L specifically addresses whether military courts may try civilians. The Principles note that 'the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel;' military courts must respect the fair trial standards in the Charter as well as the Principles.[176] Importantly, '[m]ilitary courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts'.[177] Notably, the Principles do not prohibit courts from imposing the death penalty. They also do not prohibit military courts from trying children. The Principles do, however, ban all states from fixing the age of criminal responsibility below 15, or arresting and detaining children who are younger than 15 years old.[178]

The Principles conclude that 'no circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial'.[179] However, it does not specify what the contours of such a right might look like and the applicable law in each of these cases.

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[171] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), African Union Doc DOC/OS(XXX)247 (Fair Trial Principles). The Commission issued a resolution in 1999 calling for the drafting of these guidelines. In 2018 the Commission passed a resolution relating to Somalia which referred to the Principles, noting it was 'disturbed by the continued imposition of the death penalty' by military courts: AComHPR, Resolution 410 (13 November 2018), Doc ACHPR/Res. 410 (LXIII). In its 2006 and 2009 Concluding Observations on the Periodic Report of Uganda, the Commission refers to the Principles, noting that it 'clearly prohibits the trial of civilians by military tribunals': AComHPR, 'Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Uganda', 40th Session, 15–29 November 2006; AComHPR, 'Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Uganda', 45th Session, 13–27 May 2009.

[172] Fair Trial Principles (n 171).

[173] University of Pretoria Human Rights Centre, *A Guide to the African Human Rights System* (Pretoria University Law Press 2016) 9.

[174] Fair Trial Principles (n 171) A.2.a.

[175] ibid A.4.e.

[176] ibid section L.

[177] ibid.

[178] ibid section O.

[179] ibid section R.

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5.3. The African Commission and the Role of IHL

The African Commission on Human and Peoples' Rights is tasked by Article 45 of the Charter to interpret the Charter upon request; to implement a communications procedure and state reporting; to facilitate dispute settlement; to appoint Special Rapporteurs; and to engage in the public promotion of human rights.[180] It has issued numerous comments on whether military court proceedings meet the requirements of Articles 4, 6 and 7 of the Charter.[181] Despite the fact that most of these cases relate to situations of armed conflict, the issue of IHL is rarely discussed.

One might conclude that because the Commission is a human rights body charged with ensuring state compliance with the rights guaranteed by the Charter, it does not view IHL as falling within its remit. Yet, the Commission is clearly cognisant of IHL and recognises its primacy in armed conflict. For instance, in the Commission's General Comment No 3 on the Right to Life, the Commission echoes the view of the ICJ in its advisory opinion in the *Nuclear Weapons* decision[182] that IHL is the *lex specialis* and provides the benchmark for determining whether the deprivation of the right to life is 'arbitrary'.[183]

In addition, as mentioned, the Commission relies on Articles 60 and 61 as the basis upon which it can refer to applicable rules of IHL. In *DRC v Burundi*, the Commission cited Articles 60 and 61 to support its decision to apply the Geneva Conventions and Additional Protocols in the case, noting that they 'constitute part of the general principles of law recognized by African States'.[184]

In a 2018 Communication, *Kwoyelo v Uganda*,[185] regarding the case of a former child soldier who claimed to have been kidnapped, tortured and refused amnesty by the government,[186] the Commission provided, to date, the most extensive explanation of its approach to IHL. In examining the merits of the claim, the Commission first decided that the complainant had not been shot and kidnapped by Ugandan military intelligence, but rather had been shot and wounded during active combat duty.[187] The Commission then noted that because he was 'wounded in the

[180] AComHPR, 'Mandate of the Commission', https://www.achpr.org/mandateofthecommission.
[181] Naluwairo (n 163) section 3.
[182] *Nuclear Weapons* (n 32).
[183] At the same time the Commission recognises IHL, it recommends fundamental changes to the framework of IHL such as advocating the capture of combatants; proscribing that the use of weaponry that does not strengthen the right to life; and that new technologies should conform to 'international law' but not specifically to IHL; see AComHPR, General Comment No 3 on the African Charter on Human And Peoples' Rights: The Right To Life (Article 4), 57th Session, 4–18 November 2015 (General Comment No 3): 'F. The use of force in armed conflict … In armed conflict, what constitutes an "arbitrary" deprivation of life during the conduct of hostilities is to be determined by reference to international humanitarian law'.
[184] AComHPR, *Democratic Republic of Congo v Republics of Burundi, Rwanda and Uganda*, Communication No 227/99, 29 May 2003, January–June 2006, paras 64, 69–70.
[185] AComHPR, Communication No 431/12, 17 October 2018.
[186] ibid para 93. The government denied that the claimant was a child soldier and claimed he was a war criminal charged with committing multiple grave breaches under the Geneva Conventions.
[187] ibid para 141.

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context of a conflict situation, while being a member of an armed rebel group', and captured on a battlefield during active combat, it triggered the question of whether IHL was applicable.[188]

The Commission began its analysis with a determination of whether the conflict at issue constituted an IAC or a NIAC in order to know which IHL rules applied.[189] The Commission determined that the conflict constituted a NIAC and because the complainant was a Lord's Resistance Army combatant rendered *hors de combat*, it had to analyse the law not only on the basis of the Charter, but also 'the rules of IHL that govern the detention and treatment in detention of detainees in NIACs'.[190] The Commission clarified that 'the provisions of the Charter persist even in times of armed conflict' and that the ICJ has established that 'in cases of armed conflicts human rights law and IHL rules apply complementarily'.[191] In other words, it found that both the Charter and IHL rules relating to NIAC apply concurrently and that because of this concurrence, there were various approaches the Commission could take.[192]

Although both the Charter and IHL applied, the Commission noted it would 'only make a finding of violations of the Charter',[193] meaning that IHL rules are to 'serve as standard by reference to which the rights of the Charter are interpreted', rather than applied directly.[194] Therefore, in the case it would look to the standard of treatment specified in Common Article 3 relating to the treatment of detainees (noting that it had achieved the status of customary law)[195] and Articles 4 and 6 of AP II. In addition, because of the principle of *lex specialis*, in the event there is a tension between IHL and the Charter, the Commission would apply the rules of IHL.[196] Yet, where the alleged acts took place outside or unrelated to the conduct of hostilities, human rights law would prevail. The Commission thus determined that IHL applied until transfer to the police, and from that point the Charter would be applied directly.[197]

In October 2019 the Commission reaffirmed the *Kwoyelo* analysis and strengthened its engagement with IHL, issuing the study 'Addressing Human Rights Issues in Conflict Situations'.[198] The report, authorised by Commission Resolution 332, 'presents … not only the Commission's authoritative view on human rights in conflict situations'.[199] The study emphasises the primacy of IHL, noting that while the 'Commission does not directly apply IHL', in situations where IHL applies the Commission uses 'the applicable IHL rules' rather than 'normal

[188] ibid para 142–43.
[189] ibid para 143.
[190] ibid para 148.
[191] ibid para 148.
[192] ibid para 149.
[193] ibid para 150.
[194] ibid para 151.
[195] ibid para 151.
[196] ibid para 152.
[197] ibid para 154.
[198] Dersso (n 164) 23–29.
[199] ibid vi. According to Sang, however, apart from a couple of isolated decisions from the Inter-American Court of Human Rights, 'none of the international or regional courts and tribunals have used *lex specialis* to analyse and elaborate how and to what extent IHL interacts with human rights law': Sang (n 30) 8. The in-depth Commission study and its characterisation as the authoritative view of the Commission going forward appears to mark an important milestone in the regional human rights systems.

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human rights standards' for assessing whether Charter rights have been violated.[200] It will be interesting to see if the Commission's future opinions will reflect the new study and if its resonance will expand beyond the Commission to the African Court on Human and People's Rights, the Court of Justice of the Economic Community of West African States (ECOWAS), and the soon to be operational African Court of Justice.[201] Yet, by applying IHL within the context of Charter rules as a gap filler, it raises the question of whether this approach weakens IHL as a separate body of law resting on far different theoretical underpinnings than IHRL, and instead subsumes IHL into IHRL as merely a specialised subset.

Despite the acknowledgement of the applicability of IHL, Commission jurisprudence addressing IHL issues in the context of military courts is scant.

5.4. CASES

The Commission has issued numerous decisions relating to the legitimacy of military courts occurring in situations of armed conflict. The following highlights several of these opinions.

5.4.1. *AMNESTY INTERNATIONAL V SUDAN*

At the end of 1999, the Commission issued a decision in the case of *Amnesty International v Sudan*.[202] In the midst of the armed conflict in Sudan, the government suspended the Constitution, established military courts, allowed the detention of anyone 'suspected of being a threat to political or economic security', allowed the President to order arrest, and suspended many fair trial guarantees.[203] With regard to the new military courts, the laws changed multiple times with increasingly draconian conditions, including limited rights of appeal and questionable standards for appointing judges.[204] Many arrested under these changes were taken at army checkpoints, military areas or conflict zones, and were subjected to the military courts. Some, including many rebels and unarmed civilians, were alleged to have been executed after summary and arbitrary trials.[205] Coupled with the new laws, more than 100 judges who opposed the establishment of these new courts were fired. The complainants challenged these new laws as violations of fair trial guarantees under the Charter. They also alleged that these dismissals were made in order to 'systematically dismantle the judiciary'.[206]

At the outset of its opinion the Commission states that even in the midst of a civil war, a state must act in 'accordance with international humanitarian law'.[207] Nevertheless, the Commission

[200] Dersso (n 164) xi, 23–29.
[201] Sang (n 30) 38–43; Naluwairo (n 2).
[202] AComHPR, *Amnesty International v Sudan*, Communication Nos 48/90-50/91-52/91-89/9315, 1–15 November 1999.
[203] ibid para 3.
[204] ibid paras 11–16.
[205] ibid para 48.
[206] ibid para 16.
[207] ibid para 50. It does not appear that the government raised the issue of the applicability of IHL in its responses to the Commission.

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did not refer to IHL in detail. For instance, it examined the conduct of the Sudanese government under Article 4 of the Charter regarding the right to life rather than the standard under IHL. It did not assess the status of those who were detained (POWs? Civilians? Civilians directly participating in hostilities?), the rights that their status afforded them, what constitutes a fair trial and acceptable punishments under IHL.[208] It also notes that 'in cases of human rights violations, the burden of proof [to investigate] rests on the government'. It does not address the fact that the rule to investigate may be substantially different under IHL.[209]

The Commission also examined whether Article 7 (fair trial standards) and Article 26 (guarantees of judicial independence) of the Charter had been infringed. It looked at the establishment of the special military courts and the claims that there was 'extensive interference' with due process, including denial of counsel, blocking the right to challenge the legal grounds for detention, and the appointment of incompetent judges.[210] The Commission highlighted the case of 28 executed army officers who were denied legal counsel.[211] The Commission found that allowing for three military officers to serve as judges on the courts violated Article 7(1)(d) (right to an impartial trial) and Article 26.[212] It also found that in dismissing the 100 or so judges the Sudanese government was depriving the courts of 'personnel qualified to ensure they operate impartially'.[213] This action also constituted violations of Articles 7 and 26.[214] As with its analysis of Article 4, however, the Court never discussed IHL.

5.4.2. *FORUM OF CONSCIENCE V SIERRA LEONE*

The complainant in this case[215] challenged, under Articles 4 and Article 7(1) of the Charter, the legitimacy of a military court that tried and sentenced to death 24 soldiers allegedly involved in a coup that overthrew the elected government of President Tijan Kabbah in the context of ongoing armed conflict in Sierra Leone.[216] The soldiers were executed in October 1998.[217] They had no right of appeal against the decision or their sentence.

The Commission opened by stating:[218]

> In many African countries Military Courts and Special Tribunals exist alongside regular judicial institutions. The purpose of Military Courts is to determine offences of a purely military nature committed

[208] This is not to say that the outcome of the decision was incorrect but, given that the Commission explicitly noted the applicability of IHL, it should at least have analysed what IHL required.
[209] Schmitt (n 144) 51.
[210] *Amnesty v Sudan* (n 202) paras 62–64.
[211] ibid para 66.
[212] ibid para 68.
[213] ibid para 69.
[214] ibid.
[215] AComHPR, *Forum of Conscience v Sierra Leone,* Communication No 223/98, 6 November 2000.
[216] ibid para 2; 'Sierra Leone War-Time Leader Ahmad Tejan Kabbah Dies', *BBC News*, 13 March 2014, https://www.bbc.com/news/world-africa-26563820.
[217] *Forum of Conscience v Sierra Leone* (n 215) para 1.
[218] ibid para 16.

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by military personnel. While exercising this function, Military Courts are required to respect fair trial standards.

The Commission noted that because the case involved soldiers participating in a coup, it was of a purely military nature and was properly within the competence of a military court. Nevertheless, the court violated Article 7 of the Charter because it did not allow for a right of appeal. This was all the more egregious given that the punishment was irreversible.[219] It also found that this fundamental violation of due process (no right of appeal) was an arbitrary deprivation of life and violated Article 4.[220]

Despite the context of armed conflict, the Commission did not refer to IHL in its analysis.[221]

5.4.3. *Koso v Democratic Republic of Congo* (DRC)

In this 2008 decision[222] the complainants (both civilians and soldiers) were sentenced to death by a five-judge military court after being caught stealing drums of oil. Only one of the judges of the court was a trained jurist and there was no right for review of or appeal against the sentence. The complainants alleged violations of Articles 7(a) and 26 of the Charter as well as a violation of Article 14 of the ICCPR. They sought a declaration from the Commission that a 1997 decree establishing the military court was a violation of the Charter and, specifically, the right to a fair trial. They also sought a declaration that a court having the majority of its members with no legal qualifications was a 'flagrant violation' of Article 26 of the Charter.[223]

In its defence, the DRC government claimed that because it was involved in an armed conflict, it was empowered under its Constitution to utilise military courts.[224] It did not discuss whether its actions were in conformity with IHL.

The Commission, citing an earlier case involving the Sudan, found that 'depriving courts of qualified staff to guarantee their impartiality, infringes on the right to have one's cause heard by competent organs … constitutes a violation of articles 7(1)(d) and 26 of the Charter'.[225] Nevertheless, although the Commission acknowledged that the decree to establish the military court was made during a situation of armed conflict, it did not discuss the relevance of this fact to the legal analysis, nor did it discuss IHL.

The Commission was critical that the military court convicted two civilians along with the three soldiers as 'Military Courts or specialized courts … should in no case try civilians, military courts should not deal with offences which are under the preview of ordinary courts'.[226] It further

[219] ibid para 17.
[220] ibid para 17, 20. Sierra Leone amended its law shortly after the complaint was brought.
[221] ibid para 2.
[222] AComHPR, *Koso v Democratic Republic of Congo*, Communication No 281/2003, 24 November 2008.
[223] ibid para 9.
[224] ibid para 66.
[225] ibid para 79.
[226] ibid para 84.

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reiterated that the 'objective of the military tribunals is to adjudicate on offences of a purely military nature perpetrated by military personnel. In the dispatch of these duties, the military tribunals should abide by the norms governing a fair trial'.[227] However, it did not analyse whether the civilians were directly participating in hostilities and, if so, how the rules of IHL might alter this analysis.

5.4.4. *MGWANGANGUME V CAMEROON*

In this case of 2009 the Commission examined whether the government of Cameroon had systematically violated the human rights of the peoples of Anglophone Southern Cameroon, including trying leaders of the Southern Cameroon separatist movement in the Francophone military courts of Northern Cameroon.[228] The petitioners referred repeatedly to their territory as occupied and the government of Northern Cameroon to be an occupying power.[229]

Despite the claims of occupation[230] and the context of NIAC, the Commission did not invoke IHL in its analysis, although it did examine whether the government's actions complied with Article 7 of the Charter. In particular, the Commission examined the use of military courts to try the petitioners. It did not invalidate the use of military courts, noting that it had previously found that '[t]he military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial'.[231] Nevertheless, the Commission also stressed that 'very often, the military tribunals are an extension of the executive, rather than the judiciary. Military tribunals are not intended to try civilians. They are established to try military personnel under laws and regulations which govern the military'.[232]

The Commission was troubled in this instance by the fact that Cameroon did not explain why the petitioners had been transferred to military courts and why those courts were located in a jurisdiction other than that in which the alleged offences had occurred.[233] While this language mirrors provisions of IHL relating to occupied territories, the Commission did not refer explicitly to it. In addition, it found that the accused were not members of the military. They should have been

[227] ibid para 85.
[228] AComHPR, *Mgwangangume v Cameroon*, Communication No 266/2003, 27 May 2009, paras 121–22 ('tried for various criminal offences by the Yaoundé Military Tribunal. These offences include unlawful incitement, disturbances of public peace, destruction of public property, assassination of gendarmes and civilian individuals, illegal possession of weapons and ammunition, and the illegal declaration of the independence of Anglophone Cameroon on 30 December 1999').
[229] ibid paras 16, 152, 163. The Commission did not overtly address the occupation claims but found that the Southern Cameroonians, while constituting a people, did not have the right to engage in secessionism.
[230] A situation of occupation exists only in IAC. It does not appear that the claimants were legally precise in the use of their language, but the Commission also did not analyse whether the conflict at hand was an IAC or a NIAC.
[231] ibid para 127 (citing AComHPR, *Civil Liberties Organisation v Nigeria*, Communication No 151/96, 15 November 1999).
[232] ibid.
[233] ibid paras 127, 209.

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tried in 'normal courts' in the jurisdiction in which the alleged offences took place.[234] The Commission therefore found a violation of Article 7.[235]

5.5. ECOWAS COMMUNITY COURT OF JUSTICE

As with the Commission, other courts charged with upholding the African Charter on Human and People's Rights have acknowledged the importance of IHL, but they too have not significantly engaged with it in their decisions relating to the use of military courts during armed conflict. For example, the African Community Court of Justice for the Economic Community of West African States (ECOWAS)[236] has the ability to interpret the African human rights charter and all other subsidiary legal instruments adopted by the Community. The ECOWAS Court can offer advisory opinions, hear contentious cases involving violations inflicted by legal bodies, and rule on cases involving human rights violations by member states.[237]

Like the Commission, the Court recognises the importance of IHL to its work. In March 2019 the ICRC conducted a 'first of its kind' training for judges and staff of the Court to 'develop the role and expertise of the judges in the application of IHL and improve the understanding of the staff of the legal framework to better support the judges'.[238]

In June 2018, the Court, in *Inyang v Nigeria*, issued a notable opinion related to the use of military courts in Nigeria, and which is pertinent to the ECOWAS community more generally.[239] The case involved an appeal to the ECOWAS Court by two Nigerians who were arrested in 1989, convicted by a military tribunal in 1995 and sentenced to death. At the time of the arrest Nigeria had experienced a series of military coups and significant political instability, and was under military rule.[240] The complainants had been sitting on death row for 23 years and had suffered harsh conditions during their detention. They were denied access to lawyers and were unable to appeal against the decision because they were unable to obtain a certified copy of the

[234] ibid para 128. The complainants alleged that Southern Cameroon is occupied by Northern Cameroon: ibid para 16. Although the Commission did not refer to IHL or 'occupation', it is interesting that it found that transferring outside the jurisdiction was a violation of fair trial guarantees, but it also mirrors a similar provision in IHL: GC IV, art 66 (military courts may try the accused 'on condition that the said courts sit in the occupied territory').
[235] ibid.
[236] The member states of ECOWAS are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo: ECOWAS, 'Basic Information', https://www.ecowas.int/about-ecowas/basic-information.
[237] ECOWAS, 'Mandate and Jurisdiction', http://prod.courtecowas.org/mandate-and-jurisdiction-2. Art 9(4) of the ECOWAS Community Court of Justice confers upon the court the 'jurisdiction to determine cases of violation of human rights that occurs in member states'; art 10(c) states that 'access to the court is open to … individuals for relief for violation of their human rights'.
[238] ICRC, 'Nigeria: Judges, Staff of ECOWAS Community Court of Justice Focus on IHL at Workshop', 6 March 2019, https://www.icrc.org/en/document/nigeria-judges-staff-ecowas-community-court-justice-focus-international-humanitarian-law. This training raises the issue that IHL was not previously addressed in decisions of the ECOWAS Court because of a lack of expertise and competence.
[239] ECOWAS Court of Justice, *Inyang v Nigeria*, ECW/CCJ/JUD/20/18, 29 June 2018.
[240] Kenneth Noble, 'Economic Riots are Spreading in Nigeria', *New York Times*, 4 June 1989, https://www.nytimes.com/1989/06/04/world/economic-riots-are-spreading-in-nigeria.html.

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judgment.[241] The complainants alleged that the military tribunal did not comply with the due process standards of the African Charter and that their offence fell within the jurisdiction of the regularly constituted courts and not a military court.[242] The Nigerian government responded that the military court was competent to hear the case, the defendants chose not to appeal to the appropriate body and failed to exhaust their local remedies.[243]

The Court's analysis notes that the issue over the competence of the military court that sentenced the defendants in 1995 'was one of the most contentious issues presented by the applicant for resolution by this Court'.[244] It began its legal review by considering the requirements of Article 7 of the Charter, but did not evaluate IHL at all in the adjudication of the case. It made clear, however, that it is not enough simply to allege that a special tribunal heard the case, but that to show a violation of Article 7 there must be evidence that the tribunal was not impartial.[245]

The Court found that the law that established the military court was improper on its face and in violation of Article 7, citing a decision of the Commission regarding the same law.[246] The Commission, in that decision, found that the law at issue did not allow for appeal and had placed members of the executive branch, who did not 'necessarily possesses any legal experience', to serve as judges on the tribunals.[247] It found that the composition of the tribunals created 'the appearance, if not actual lack, of impartiality', in violation of Article 7.1.d.[248] The Court ordered the prisoners' immediate release.

6. CONCLUSION

As has been shown in the review of the work of the Human Rights Council and the African Commission on Human and People's Rights, it is clear that these bodies view the use of military courts as a significant human rights issue that requires extensive regulation based on IHRL, even where these courts are operating in the context of armed conflict and where IHL is applicable.

Areas where these bodies seek to limit the operation of the courts include strict limitations on the ability to try civilians and on the scope of crimes that can be adjudicated, improved access to appeal procedures, and greater integration into the general system of justice. Other issues of concern are jurisdiction over gross human rights violations, trials of minors, and the imposition of the

[241] *Inyang* (n 239) para 3.3.
[242] ibid para 3.6.
[243] ibid para 3.10. The Court, in rejecting the government's claim of failure to exhaust local remedies, dryly commented that if the charges were indeed true that the military tribunal was not impartial and the defendants were denied the right of appeal, 'what local remedies are available for the applicants to take advantage of in the local arena?': ibid para 6.2.3.
[244] ibid para 6.1.12. The Court rejected claims regarding ill-treatment or denial of family visits for lack of proof.
[245] ibid para 6.1.14.
[246] ibid para 7.1–7.2.
[247] ibid para 6.3.27.14.
[248] ibid.

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death penalty. From a human rights perspective, officials working for these institutions would probably also endorse the abolition of military courts altogether.

Despite the fact that many of the contexts in which these institutions seek to regulate military courts involve armed conflict, there is nevertheless a significant lack of substantial and substantive engagement with IHL. When IHL is invoked, it is either usually discussed in a cursory fashion or selectively referenced (contradictory elements of IHL are ignored). In fact, although IHL is posited as the *lex specialis*, IHRL has often supplanted IHL as the applicable standard. In cases where IHL is applied, this is done through an IHRL lens, and therefore is approached more as a specialised subset of IHRL as opposed to a separate and independent body of law built on a different theoretical framework.

This diminishment of IHL appears to stem from several factors:

- IHL is complicated and technical and most human rights practitioners do not possess the necessary knowledge or expertise.[249]
- Human rights officials view their role as limited to engaging with the relevant IHRL instruments.[250]
- In some cases there may be a desire to marginalise IHL based on the misguided perception that IHL is less protective of human rights.[251]

Nevertheless, given the predominant negative opinion held of military courts (not unjustifiably so given the historical record) and the often beneficial human rights safeguards developed by human rights bodies, this erosion of IHL at first glance may not appear to be of tremendous concern. For those who care about IHL, however, this development should be worrying. Similar attempts by human rights bodies to regulate areas in the IHL domain have been damaging.[252] In overlooking IHL or relegating it to a sub-specialty, these bodies ignore the wealth of expertise found in commentary, debate, jurisprudence and practice in the IHL sphere. Disregarding the theoretical underpinnings of IHL may disrupt the careful balance it has struggled to achieve between humanity and military necessity, and this disruption could lead to less compliance overall with IHL (and even with human rights law). Instead, by integrating IHL analysis and theory and affording it its appropriate respect within relevant human rights discussions, it will allow for greater legal and policy coherence, and human rights bodies will be better placed to fulfil their mandates.

[249] David Kaye, 'Complexity in the Law of War' in Russell A Miller and Rebecca Bratspies (eds), *Progress in International Law* (Brill 2008) 681; Tabak (n 29).

[250] For example, in the *Las Palmeras* case, the Inter-American Court of Human Rights noted that under the American Convention on Human Rights, it only has 'competence to determine whether the acts or norms of the State are compatible with the Convention itself, and not with the 1949 Geneva Conventions': *Case of Las Palmeras v Colombia*, Inter-AmCtHR, Judgment of 4 February 2000, (Ser C) No 67, [28]–[33].

[251] This perception is misguided because IHL contains almost identical due process protections as IHRL and, unlike many aspects of human rights law, cannot be derogated from during armed conflict.

[252] See, eg, critiques on the rise of 'effects-based' analysis of targeting as opposed to the intent-based framework established under IHL: Geoffrey S Corn, 'Targeting, Distinction, and the Long War: Guarding Against Conflation of Cause and Responsibility' (2016) 46 *Israel Yearbook of Human Rights* 135.

In contrast to the work described in this article by the Human Rights Council, the 2018 *Kwoyelo* decision of the African Commission on Human and People's Rights and the 2019 study on armed conflict and human rights point to a more positive direction by a major human rights institution to engage with and integrate IHL more fully into its activities and jurisprudence. Time will tell whether this takes place.[253] If it does, the work of the Commission could serve as a model not only for other regional bodies but for the Human Rights Council itself.

[253] One notable example where this is taking place is in a European Union-sponsored project in the DRC to create 'prosecution support units'. The goal of these units is to help civil and military authorities in bringing 'perpetrators of serious offences, such as war crimes, crimes against humanity, homicide and sexual violence, to justice'. The programme has improved rule of law and respect for human rights. According to the programme manager, 'one of the benefits has been the link between the military and civil justice systems'. He explains that this work has fostered a 'culture of cooperation' rather than 'competition': 'Military justice was more developed in the Democratic Republic of the Congo in the past, but we have reinforced the strength of civil justice': European Commission, 'Service for Foreign Policy Instruments', https://ec.europa.eu/fpi/showcases/restoring-faith-justice-democratic-republic-congo_en.

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