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# The Scope of Military Jurisdiction for Violations of International Humanitarian Law

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*Drafters of international humanitarian law (IHL) treaties clearly envisaged a role for military justice systems in the implementation and enforcement of these treaties. Nevertheless, the adequacy of military jurisdiction over violations of international law is being questioned in certain spheres. In the context of these debates this article considers the domestic rationale for military justice systems and explores the role and limits of military jurisdiction in combating impunity for violations of IHL. In focusing on the need to effectively repress and suppress all violations of IHL, the article addresses the extent to which some sort of military justice may be necessary for the effective enforcement of certain provisions. It also explores the way in which increased scrutiny of the impact of these justice systems on the rights of individuals has led to restrictions on the format and scope of military jurisdiction. Although there are difficulties in internationalising the discussion on military jurisdiction because of differences in domestic legal traditions, the choice of effective IHL enforcement mechanisms, which includes the choice of military or civilian jurisdiction, is key in combating impunity for violations of this body of law and protecting the rights of those involved.*

**Keywords**: military jurisdiction, IHL violations, combating impunity, military justice, military offences

## 1. Introduction

It is clear from the drafting of international humanitarian law (IHL) treaties that military justice systems were envisaged to have a role in their implementation,[1] inter alia in the suppression and repression of violations. The use of military justice systems is explicitly provided for in the Geneva Conventions of 1949 in the case of prisoners of war and situations of occupation, and

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[1] The term 'military justice systems' is used here in a very broad sense, encompassing a variety of proceedings used to enforce laws and regulations within the military, from informal disciplinary proceedings to criminal judicial proceedings. Military justice systems in practice will vary considerably from state to state in their structure, the status and hierarchy of those involved, and their relationship with the operational branches of the military. The term 'military jurisdiction' is used to denote the field of responsibility of these military justice systems, namely the set of laws and regulations under the authority of the military justice systems. It is not limited to criminal proceedings. 'Military laws' is used to refer to the set of laws applicable only to military personnel. See Rain Liivoja, 'Military Justice' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 326.

implicitly acknowledged for the overall implementation of the treaties,[2] although the increasing role of civilian authorities was also acknowledged in commentaries on the treaties.[3] It is, after all, military personnel who are first and foremost concerned with the rules and restrictions that exist under IHL. Military commanders must, for example, 'take the decisions required by the Convention, give orders and instructions to ensure their execution, supervise compliance and ensure, if breaches have been committed, that disciplinary and, if necessary, penal sanctions are imposed'.[4]

This article critically examines the contemporary role that military justice systems play in combating impunity for violations of IHL by considering some of the reasons for, and limitations on, military jurisdiction. Using examples from Europe and the Americas, it addresses how such military justice systems emerged from relatively ad hoc institutions dealing with internal regulations and domestic laws to bodies with delegated responsibilities under international law, and therefore under increased scrutiny at the international level. In response to certain trends that advocate the restriction of military jurisdiction over violations of international law, this article analyses the situations in which military jurisdiction may be necessary for the effective implementation of IHL and, on the other hand, the degree to which it may be necessary to restrict it for the same reasons. The current literature on the topic of military jurisdiction has rarely addressed state obligations arising under IHL directly, and debates have often conflated domestic legal traditions with international principles. Some arguments point to the fact that many states have abolished military jurisdiction over criminal offences in times of peace, but this leaves little understanding as to how military justice systems that exist in times of war must operate,[5] or how states should respond to allegations that members of their armed forces have committed violations of IHL.

A historical contextualisation of some of the reasons for the creation of military justice systems and their expansion over time enables an analysis of whether this rationale can still justify their existence today in the context of armed conflict. Historically, the need to maintain

[2] eg, Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III), art 84; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 66; Geneva Convention (I) 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), art 45; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II), art 46; 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), arts 86, 87.

[3] Jean 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* (ICRC 1952) (Commentary GC I (1952)), art 1, 26; 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), https://ihl-databases.icrc.org/ihl/full/GCI-commentary (Commentary GC I (2016)), art 45, para 2714.

[4] Commentary GC I (2016) (n 3) art 45, para 2718.

[5] The politically declared state of 'war' is not identical to the factual existence of an armed conflict (and therefore of the application of IHL). Nevertheless, there is a definite overlap between the two, as well as with other political states, which may trigger extended use of military jurisdiction such as states of emergency or martial law.

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discipline, the need to codify specific 'military offences', and the need for expertise and portability all explain the widespread use of military justice systems for matters relating to military personnel.[6] We consider how well these justifications hold up to the scrutiny of contemporary international obligations. Finding that there are indeed important reasons to retain and strengthen military justice systems to combat impunity for violations of IHL, some of the limitations of these justice systems are nevertheless explored, particularly in relation to the rights of those involved in judicial proceedings.

We conclude that states must address their international responsibilities with regard to the implementation of IHL in a holistic manner, and consider the role of both civilian and military jurisdiction in implementing their obligations in an effective way. We find that there is no blanket prohibition under international law on the use of military jurisdiction in situations of armed conflict, and that the scope of what is addressed by military justice systems will differ depending on the domestic legislative framework and historical developments, with most systems now using a complementary military–civilian system. What is mandated under international law is that the systems of justice used must respect international standards of fair trial and general principles of justice in order to combat impunity effectively for violations of IHL.

This article will first present (in Section 2) an overview of some of the historical trends in the emergence of military justice systems, with a focus on discipline as the *raison d'être* of military justice. It will also consider the problematic way in which the concept of military offences is sometimes defined in relation to this concept of discipline, and critically examine how the effective implementation of IHL requires an adequate consideration of the range of offences which can constitute IHL violations. Section 3 analyses some of the more practical reasons for the use of military jurisdiction, including in armed conflict, related to expertise and portability. Finally, Section 4 examines how an increased focus on the rights of the accused and victims has necessarily led to reforms of and restrictions on the scope of military jurisdiction in many systems.[7] It concludes by highlighting some of the reasons why military justice systems can still be effective tools in combating impunity in situations of armed conflict, but that what matters more than their civilian or military nature is whether they amount to proper systems of justice able to effectively implement all relevant domestic and international obligations.

[6] This choice of explanatory factors is not exhaustive but are the reasons most cited in the defence for, and the criticisms of, the use of military jurisdiction, and therefore enable a cross-cutting analysis of the arguments. There exists a myriad of other considerations as to why military justice systems exist and are still used that are much more state-specific, such as the willingness of military institutions to be subject to civilian authority or the historical civil–military ties.

[7] This article focuses on the actions taken by states in relation to members of their own armed forces for the implementation of IHL and therefore does not cover issues such as jurisdiction over civilians or members of other armed forces; see Rain Liivoja, 'Trying Civilian Contractors in Military Courts: A Necessary Evil?' in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (Cambridge University Press 2016) 81; Evelyne Schmid, 'A Few Comments on a Comment: The UN Human Rights Committee's General Comment No. 32 on Article 14 of the ICCPR and the Question of Civilians Tried by Military Courts' (2010) 14 *The International Journal of Human Rights* 1058; UN General Assembly, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul (7 August 2013), UN Doc A/68/285, para 102.

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## 2. Historical Overview and Relevant Offences

### 2.1. Discipline: The *Raison d'Être* of Military Justice Systems

The development of military jurisdiction in different states across the globe and over time did not initiate with concerns of international law, but was rather focused on military efficiency and necessity, and above all the maintenance of discipline. Discipline is perhaps the oldest, yet arguably the most important argument for the existence of some kind of military justice.[8] The need to maintain strict discipline within an institution the members of which are required to make life and death decisions upon an order's notice is a well-observed theme running throughout the academic discussion of military justice.[9] Discipline is necessary both for the effectiveness of military operations, and for the implementation of internal regulations and domestic legislation. Furthermore, the ability of commanders to promptly and effectively punish breaches of discipline is key to the implementation of IHL.

Military discipline requires the 'efficient and rapid sanction of any slightest hint of disobedience, insubordination, revolt',[10] and must take into account not only 'the particular or relative gravity of the malfeasance in the context of the armed forces' but also 'the particular circumstances of military activity and life'.[11] In the context of military operations the stakes are high: 'if high standards of discipline are not maintained within units of the armed forces, the most serious of all crimes can be committed easily, principally against civilians'.[12] Because of the nature of military operations, military personnel are equipped with great potential for use of lethal force; it is important that this potential is not misused, and that abuses are promptly and effectively punished.

#### 2.1.1. Early Disciplinary Systems

The enforcement of discipline in very early military institutions appeared to have remained rather ad hoc, and reliant upon the whim of the commander – as, for example, during the Roman Empire when 'the military man was submitted to the will of his chief, of his commander'.[13]

[8] See, eg, from the fifth century BC, Sun Tzu, *The Art Of War* (Lionel Giles tr, 1910) Ch 9, para 43.
[9] Amy H McCarthy, 'Erosion of the Rule of Law as a Basis for Command Responsibility under International Humanitarian Law' (2018) 18 *Chicago Journal of International Law* 2; John Gilissen, 'Evolution actuelle de la justice militaire' (1981) 8 *Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre* 1, 40; Patrick Gleeson, 'Subject Matter Jurisdiction of Military Courts: Remarks by Mr. Patrick Gleeson', Expert Consultation on the Administration of Justice through Military Tribunals, 24 November 2014, 3; Michael Gibson, 'Military Justice in Operational Settings, Peacekeeping Missions and Situations of Transitional Justice' in Duxbury and Groves (n 7) 381, 383.
[10] Gilissen (n 9) 40.
[11] ibid 43.
[12] Peter Rowe, 'How Well Do International Human Rights Bodies Understand Military Courts?' in Duxbury and Groves (n 7) 15, 16.
[13] Gilissen (n 9) 48.

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Indeed, the commander who gave orders was also expected to sit in judgment of breaches of these orders.[14] The creation of standing armies in Europe, principally during the Middle Ages, saw the creation of written legislation to regulate laws and punishments applicable to these armies;[15] yet, in general, matters of enforcement of justice remained in the hands of the commander.[16] Early European military justice was most likely 'a rather summary thing' because of the 'little ceremony attendant upon the event of trial or hearing; concern for the rights of the individual were of little or no moment; and punishment followed the judgment in rapid "one-two" order'.[17] There would also have been very little review of summary justice by superior authorities.[18]

Whereas future developments in military justice were to reduce the arbitrariness of proceedings, the need to maintain discipline has remained throughout the evolution of military justice institutions. An 1858 commentary on the 1857 French Code of Military Justice states that 'the maintenance of discipline is the exclusive purpose of Military Justice'.[19] Indeed, from the requirement of discipline 'stems the need for a specialised judicial law in relation to all the needs, all the requirements of military life'.[20] This explicit recognition of the need for a 'specialised' law for the specific needs and requirements of military life is key to understanding the evolution of military jurisdiction. A similar view was expressed twenty years later in the *Grande Encyclopédie* under the entry on 'Military Justice': 'military justice is exerted only by military men …, who, as guardians of discipline, can be solely enlightened and competent judges in the conditions in which justice can fulfil the means of disciplinary repression'.[21]

The need for discipline as the *raison d'être* of a separate military justice system was considered more recently in a well-known case before the Canadian Supreme Court. In *R v Généreux*, in which the need for military justice systems at all was put into question, the Court found that:[22]

> [t]he purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. *To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently.*

[14] David H Denton, 'The Australian Military Justice System: History, Organisation and Disciplinary Structure' (2016) 6 *Victoria University Law and Justice Journal* 26, 26–27.
[15] William Winthrop, *Military Law and Precedents* (2nd edn, Washington Governmental Printing Office 1920) 18.
[16] Gilissen (n 9) 48.
[17] Robert O Rollman, 'Of Crimes, Courts-Martial and Punishment – A Short History of Military Justice' (1969) 11 *US Air Force JAG Law Review* 212, 214.
[18] ibid 214.
[19] Jean Pariselle, 'La Justice Militaire Française à la Lumière de Son Histoire' (1980) 19 *Military Law and Law of War Review* 291, 300 (citing Victor Foucher, Conseiller à la Cour de Cassation, *Commentaire sur le Code de Justice Militaire pour l'Armée de Terre* (1858).
[20] ibid 300.
[21] ibid 300–01.
[22] Supreme Court of Canada, *R v Généreux* [1992] 1 SCR 259, 293 (emphasis added). Some of the arguments put forward in this case were again under review in the Canadian Supreme Court in 2019 in *R v Stillman* [2019] SCC 40; the Court once again emphasised the need for a separate military justice system.

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> Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.

Discipline as a justification for the existence of a separate system of military justice is echoed across time, and remains a strong tenet of modern military justice systems.

#### 2.1.2. Discipline and Enforcement of IHL

Discipline is crucial not only for military effectiveness and the implementation of domestic laws and regulations, but also for the implementation of IHL. Although the 1949 Geneva Conventions (unlike some earlier treaties) were clear in emphasising that responsibility for enforcement of the treaties is upon the state as a whole,[23] it is clear throughout the drafting of IHL treaties that military commanders were envisaged as holding an important role in this enforcement,[24] illustrating the belief that 'respect for the law of war is a matter of order and discipline'.[25] In fact, the capacity for a military hierarchy to enforce discipline is a presumed criterion for any organised armed group under IHL,[26] and it is also a necessary requirement for members of armed groups to be entitled to prisoner of war status.[27] Furthermore, the disciplinary authority of a commander is explicit under the notion of command responsibility for the actions of subordinates, as commanders have an explicit duty to suppress all violations of IHL.[28] Cases adjudicated under international criminal law on the concept of command responsibility have turned on the very fact that the commanders had not installed discipline, or may have lost disciplinary power, over their troops.[29]

The role of the military commander is crucial for the maintenance of discipline, and it is perhaps one of the most important reasons why some element of military jurisdiction will always be perceived as necessary for as long as military bodies exist. In the implementation of IHL, which requires a balance between military necessity and considerations of humanity, commanders have a responsibility to oversee the actions of soldiers who must 'essentially suspend [a developed

[23] See, eg, Common Article 1 of the Geneva Conventions 1949 (n 2); GC I (n 2) art 51; GC II (n 2) art 52; GC III (n 2) art 131; GC IV (n 2) art 148.
[24] See, eg, GC I (n 2) arts 18(1), 30(10); GC II (n 2) arts 28, 37; Commentary GC I (2016) (n 3) art 52, para 2721; ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces* (ICRC and Cambridge University Press 2017) (Commentary GC II (2017)), art 46, para 2832; AP I (n 2) arts 86, 87.
[25] Frederic de Mulinen, 'Law of War and Armed Forces' (1982) 21 *Military Law and Law of War Review* 35, 47–48.
[26] Céline Renaut, 'The Impact of Military Disciplinary Sanctions on Compliance with International Humanitarian Law' (2008) 90 *International Review of the Red Cross* 319, 319–26.
[27] GC III (n 2) art 4; AP I (n 2) art 43.
[28] AP I (n 2) art 87.
[29] McCarthy (n 9); United States Military Commission, *Trial of General Tomoyuki Yamashita*, Manila, 8 October – 7 December 1945; and the Supreme Court of the United States, 4 February 1946, as recorded in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* Vol IV (1948) 1–96; ICTY, *Prosecutor v Enver Hadžihasanović and Amir Kubura*, Judgment, IT-01-47-A, Appeals Chamber, 22 April 2008, [1777]; ICTR, *Prosecutor v Bagilishema*, Judgment, ICTR-95-1A-T, Trial Chamber I, 7 June 2001, [50].

killer's instinct] at a moment's notice in order to exercise humanitarian constraint and preserve the crucial line between legitimate and illegitimate violence'.[30] It is key for the respect of IHL and the effective functioning of the armed forces that a commander does not lose all disciplinary authority and responsibility.[31]

The need to maintain discipline was therefore a driving force for the founding of early military justice systems, in particular to ensure effective military operations. Nevertheless it is also found to some degree as a crucial mechanism for the implementation of modern humanitarian principles.

### 2.2. 'MILITARY OFFENCES' AND THE PROBLEMATIC DISCIPLINARY/CRIMINAL DIVIDE

The maintenance of discipline within the unique context of military institutions eventually led to the need to legislate over specialised offences that did not exist in civilian jurisdiction. The concept of 'military offences' can be used to refer to offences that do not exist in civilian life, or those that require different considerations in a military context. This concept is sometimes associated with that of 'disciplinary offences', or used to denote those offences which should make up the acceptable scope of military jurisdiction.[32] However, the concept does not have one single definition and, depending on the domestic context, can be used to mean disciplinary (or non-criminal) offences, and in others any offence committed within a military context.

This section explores how the specific context of military life as well as the implementation of IHL require the legislation of specialised offences, but that these offences cannot be restricted to a disciplinary/criminal divide. Nor is use of the term 'military offences' helpful when discussing obligations arising under international law, as the scope of this term will be entirely dependent upon the domestic legislative tradition. There are, however, some implications which can be drawn from the nature of offences on the choice of civilian versus military jurisdiction that should exist for the adequate enforcement of legal obligations, and examples are given here to contrast the approaches taken in so-called 'civil law' versus 'common law' jurisdictions.

#### 2.2.1. THE CASE FOR SPECIALISED OFFENCES

In the historical conduct of military operations it became clear that certain actions or forms of behaviour which did not amount to offences in civilian life most certainly posed a threat, inter

[30] Victor Hansen, 'The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences' in Duxbury and Groves (n 7) 106, 108.
[31] ibid 129; Arne Willy Dahl, 'Military Justice and Self-Interest in Accountability' in Morten Bergsmo and Tianying Song (eds), *Military Self-Interest in Accountability for Core International Crimes* (Torkel Opsahl Academic EPublisher 2016) 21, 32; Benjamin Heng and others, 'Military Justice in a Comparative and International Perspective' (2016) 20 *Journal of International Peacekeeping* 133, 137.
[32] UN Economic and Social Council, Commission on Human Rights, Issue of the Administration of Justice through Military Tribunals: Report Submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux (13 January 2006), UN Doc E/CN.4/2006/58, Principle 8, and commentary on Principle 9, para 32; Michael R Gibson, 'International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity' (2008) 4 *Journal of International Law and International Relations* 1, 39.

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alia, to the maintenance of discipline in armed forces, and to the general understanding of justice.[33] In England, it was the absence of existing legislation on offences unique to military life (namely desertion and mutiny) which led to the first Parliamentary military laws. The accession of King William III to the throne in 1688 during the Glorious Revolution to replace King James II caused 'the mutiny and substantial desertion of a detachment of troops, mainly Scotch, which adhered to the cause of the Stuarts'.[34] Although these were offences punishable by death during times of war, Parliament had no way of exercising jurisdiction over such offences in times of peace.[35] This led Parliament to vote in the Mutiny Act in 1689, justified in its preamble so that 'Soldiers who shall Mutiny or stirr up Sedition or shall desert Their Majestyes Service be brought to a more Exemplary and speedy Punishment than the usuall Forms of Law will allow'.[36] The Mutiny Act thus granted permission for such offences to be tried by court martial.[37] The creation of military law in this case was based upon the need to codify the prohibitions against desertion, mutiny and sedition, which would otherwise have gone unpunished. In effect, separate laws and ways of enforcing these laws needed to be developed in order for actual justice to be done, inter alia, to avoid impunity for members of the armed forces.[38] Of course, in the case of 'impunity' for the offence of mutiny the main entity being victimised would have been the state. However, there are other instances of military justice being developed explicitly to protect those who would today be understood as 'civilians', such as the codification by royal decree of the crime of pillage against subjects of the French Kingdom in the fourteenth and fifteenth centuries.[39] There are other such 'purely' military offences, which do not exist in civilian life.[40] Absence without leave is seen as particularly serious in military life, in particular in times of combat, as it can 'permit a military person to escape death, whereas their colleagues remain exposed to it'.[41] Disobedience and insubordination 'can be the cause of defeat, as much for hyper-motorised and hyper-sophisticated modern militaries, as for those of the past, be it those of Napoleon's times or those of the war of American independence'.[42] The exercise of military jurisdiction is therefore used in some contexts to cover specific offences that are unique to military life.

There are other offences which may exist in civilian jurisdiction, but do not necessarily have the same consequences or impact when committed in a military setting, and therefore need to be adequately addressed within a military context. This means that they may need to be addressed

[33] Pariselle (n 19) 308.
[34] Winthrop (n 15) 19.
[35] ibid 19.
[36] 'William and Mary, 1688: An Act for Punishing Officers or Soldiers Who Shall Mutiny or Desert Their Majestyes Service [Chapter V. Rot. Parl. pt. 5. nu. 2.]' in John Raithby (ed), *Statutes of the Realm: Vol 6, 1685–94* (s l, 1819) 55–56, preamble, https://www.british-history.ac.uk/statutes-realm/vol6/pp55-56.
[37] ibid; Rain Liivoja, *Criminal Jurisdiction over Armed Forces Abroad* (Cambridge University Press 2018) 178.
[38] Henry Wager Halleck, 'Military Tribunals and Their Jurisdiction' (1911) 5 *American Journal of International Law* 958, 959.
[39] Pariselle (n 19) 293.
[40] Gilissen (n 9) 39–40.
[41] ibid 39–40.
[42] ibid 40.

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more promptly and harshly or, as the case may be, leniently.[43] Some offences may take on specific gravity in a military context, such as 'the sabotage of military equipment, the negligence in its maintenance' or 'the abuse of power causing a lack of confidence in superiors'.[44] There are obvious serious consequences which can arise from such acts, such as serious injury or death, including of one's own forces, in the case of meddling with equipment. It has also been suggested that civilian justice systems may not always be able to 'appreciate the importance of prosecuting objectively low level offences that would normally not attract a complaint of criminal misconduct in a civilian context',[45] but which may in a military context have particularly grave repercussions on discipline and confidence in the military hierarchy. The prioritisation of cases may also differ from a military perspective, as a commander may perceive certain cases as needing to be 'investigated and solved quickly, maybe with a higher priority than the civilian police (if within reach) would give to a similar offence involving two civilians'.[46] It is therefore undeniable that some offences in a military context require specific adjudicatory arrangements, although this is not to say that the jurisdiction must exclusively be of a military nature.[47]

#### 2.2.2. LEGISLATING VIOLATIONS OF IHL: ADMINISTRATIVE AND CRIMINAL VIOLATIONS

The implementation of IHL requires that states codify in domestic legislation violations as set out in international treaties. Just as a military context may entail offences that do not exist in civilian life, the context of armed conflict entails obligations that have no equivalent in peace time. This need for specific legislation is found in the obligation on states parties to implement legislation in peace time ready for situations of armed conflict.[48] On the face of it, there is no obligation that specifically civilian or military jurisdiction be applied to these offences, as long as it is effective. Nevertheless, the fact that violations of IHL may be criminal or non-criminal in nature may affect the ability of one jurisdiction or another to adjudicate effectively.

States are under an obligation to suppress all violations of IHL. For the purposes of the administration of justice in enforcing this obligation, IHL violations can be divided into two categories: criminal and administrative violations. Under treaty and customary international law, states have an obligation to criminalise certain violations (grave breaches and other war crimes), using criminal procedures and respecting internationally recognised principles of fair trial.[49] There is, furthermore, a broader obligation to suppress all violations which will require other

[43] Gleeson (n 9) 4.
[44] Gilissen (n 9) 41.
[45] Gleeson (n 9) 4.
[46] Dahl (n 31) 30.
[47] Pauline Collins, *The Military as a Separate Society: Consequences for Discipline in the United States and Australia* (Lexington 2019) 25.
[48] Common Article 2 of the Geneva Conventions 1949 (n 2).
[49] States may choose to criminalise at the domestic level a broader range of IHL violations beyond war crimes; see Geneva Academy of International Humanitarian Law and Human Rights/ICRC, 'Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice', September 2019, para 16.

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measures beyond criminal proceedings.[50] This includes a range of measures which can be named 'administrative' proceedings, to review incidents, cease violations and guarantee their non-repetition. Such administrative measures may include disciplinary proceedings (with no element of criminal liability) against individuals, or review and inquiry proceedings into procedural mistakes, or systemic issues in the carrying out of military operations.

The debate at the international level of the adequacy of military jurisdiction over violations of international law is compounded in part by the difficulties in translating concepts which have defined meanings within a domestic system, not least to do with the domestic legal differences between so-called 'common law' and 'civil law' systems. For example, there is no international definition of the concept of 'disciplinary offences'. Whereas in some contexts (principally civil law countries) it may be used in contrast with 'criminal' offences,[51] in others (common law) it is often used to encompass all breaches of military discipline, including criminal offences.[52] The concept of 'discipline', as explored above in Section 2, can be understood to cross-cut both administrative and criminal violations, as the commission of criminal offences in a military setting can have disciplinary consequences. Under international criminal law, a commander's responsibility to 'discipline' troops includes the initiation (where relevant and permissible) of criminal proceedings. The debate, therefore, is more helpfully understood framed along the administrative/criminal divide rather than the disciplinary/criminal divide.

Many states have used military laws and military jurisdiction to codify and enforce IHL obligations,[53] but the implementation of IHL does not mandate exclusive military jurisdiction. In many contexts there is no reason why criminal offences (including war crimes) cannot be considered in the civilian justice systems.[54] There are indeed domestic systems in which 'serious' offences (such as war crimes) are under the jurisdiction of civilian justice systems.[55] In contrast,

[50] ibid paras 12–17; Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts' (2011) 14 *Yearbook of International Humanitarian Law* 37, 45; Jesse Medlong, 'All Other Breaches: State Practice and the Geneva Conventions' Nebulous Class of Less Discussed Prohibitions' (2013) 34 *Michigan Journal of International Law* 829, 840; Françoise J Hampson, 'An Investigation of Alleged Violations of the Law of Armed Conflict' (2016) 46 *Israel Yearbook on Human Rights* 1, 12; Commentary GC I (1952) (n 3) commentary on art 49, 368; Commentary GC I (2016) (n 3) commentary on art 1, paras 2841, 2896.

[51] See, eg, the way in which this division is used in commentaries on the Geneva Conventions 1949: Commentary GC I (1952) (n 3) commentary on art 49, 368; Commentary GC I (2016) (n 3) commentary on art 1, para 2841 ('Penal sanctions, as opposed to disciplinary ones, will be issued by judicial institutions, be they military or civilian'). This divide has also been considered in various international human rights law cases, eg, before the European Court of Human Rights (ECtHR), as to what constitutes a 'disciplinary' versus a 'criminal' offence for the purposes of fair trial guarantees: Panagiotis Kremmydiotis, 'The Influence of Human Rights Law on the Reform of Military Justice' in Duxbury and Groves (n 7) 311, 322; ECtHR, *Engel and Others v The Netherlands*, App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1986, paras 82 and 85.

[52] Gibson (n 32) 39.

[53] See the ICRC National Implementation Database, which collects information on domestic legislation on IHL obligations, https://ihl-databases.icrc.org/ihl-nat.

[54] Some exceptions are presented below in Section 4.2.

[55] Belgium, Colombia, Czech Republic, France, Germany, Greece, Kenya. See responses to the International Society for Military Law and the Law of War (ISMLLW), 'Comparative Studies on Military Jurisdiction in the World', carried out in 2001 and 2011; *Recueils* of the ISMLLW are available from the General Secretariat of the ISMLLW at brussels@ismllw.org, https://www.ismllw.org/publications (ISMLLW *Recueil* (2011)).

there are systems where all violations of IHL, including war crimes, are solely under military jurisdiction,[56] and a number of countries in which either civilian or military jurisdiction may apply, often depending upon decisions of the Attorney General or equivalent authority.[57]

The case is arguably different for administrative violations which do not require criminal judicial proceedings. Such violations can have particularly serious consequences even though there is no indication of criminal liability, such as where there is a failure to take precautions in attack resulting in accidental loss of civilian life. In dealing with administrative violations which have solely a disciplinary component, military institutions may have a broad range of regulations and associated penalties which do not have equivalents in civilian life and are often solely within the remit of an individual's commander. The civilian justice system would be inadequate and ineffective in most such cases. Other incidents may constitute administrative violations of IHL, yet may not be attributable to the fault of any individual but are rather the result of a systemic problem within the military. Internal systems of military investigation and review can be crucial in effectively investigating such incidents and ensuring their non-repetition.[58] The latter example does not mandate exclusive military jurisdiction, and in some particularly serious cases civilian systems of inquiry are adopted. Nevertheless, effective military systems of review can be an effective first recourse in addressing administrative violations of IHL.

The enforcement of discipline by military authorities has always been seen as necessary for the conduct of military operations, and was also considered crucial for the implementation of IHL. The enforcement of military discipline may be understood in a broad sense through the prohibition of a range of different offences, both criminal and administrative. Under IHL, the obligation to implement adequate legislation for both criminal and administrative violations does not mandate a specific jurisdiction or a specific jurisdictional divide. While across the globe the practice varies greatly of whether civilian or military jurisdiction is exercised over criminal offences committed by members of the armed forces (including war crimes), greater consensus may be found on the matter of administrative violations committed by individuals. Because of the nature of these violations and the unique context of military life, military jurisdiction will often be necessary to effectively suppress such violations.

[56] Bulgaria, Democratic Republic of the Congo, Switzerland, Tunisia. See responses to ISMLLW *Recueil* (2011) (n 55); Joshua E Kastenberg, 'Universal Jurisdiction and the Concept of a Fair Trial: *Prosecutor v. Fulgence Niyonteze*: A Swiss Military Tribunal Case Study' (2004) 12 *University of Miami International and Comparative Law Review* 1.

[57] Australia, Cameroon, Canada, Ireland, The Netherlands, New Zealand, Singapore, United Kingdom, United States. See responses to ISMLLW *Recueil* (2011) (n 55); and Second Report of the Public Commission to Examine the Maritime Incident of 31 May 2010 (The Turkel Commission): Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law', 2013, Annex C, https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_b475-941.pdf (Second Turkel Report, Annex C).

[58] Examples include reviews carried out for 'lessons-learned' purposes, or military inquiries; see Geneva Academy (n 49) Guideline 13.

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## 3. PRACTICAL MATTERS AFFECTING THE SCOPE OF JURISDICTION: EXPERTISE AND PORTABILITY

There are very practical reasons why military justice systems have been used to deal with offences committed by members of the armed forces, mostly related to the need for expertise and portability of judicial systems. Nevertheless, while these may be good reasons to adopt military jurisdiction, they do not necessarily justify the exclusive use of such jurisdiction.

### 3.1. EXPERTISE

It is clear that judicial officers, in investigating and trying an offence, require a degree of legal and technical competence and expertise in the matter at hand.[59] For military operations it may be necessary to understand military dynamics, technicalities and contexts of operations in considering adequate levels of responsibility and the appropriate punishment.[60] This is also true for many violations of IHL that involve the conduct of military operations, such as obligations relating to what was 'feasible' at the time or those dependent upon what the commander knew at the time.[61] Examples have been given of various forms of technical expertise that are crucial to an investigation into air strikes,[62] or the need to understand artillery distances to determine the possible commission of a war crime.[63] This specialisation can have the further advantage of providing legitimacy for those over whom it has jurisdiction, as 'military justice must be 'accepted' by the armed forces, as much by the commander as by the troops'.[64]

Nevertheless, it is not the case that only military judicial personnel are able to adjudicate in such matters. Many other areas of law also require specialisation, and the use of experts is often

[59] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14(1); Rowe (n 12) 24.

[60] Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harvard National Security Journal* 31, 84; James Goldrick, 'A Strategic Commander's Perspective' in David W Lovell (ed), *Investigating Operational Incidents in a Military Context* (Brill/Nijhoff 2015) 21, 23; Helen Durham and Eve Massingham, 'Moving from the Mechanics of Accountability to a Culture of Accountability: What More Can Be Done in Addition to Prosecuting War Crimes?' in Jadranka Petrovic (ed), *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack* (Routledge 2016) 267.

[61] Ian Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff 2009) 167; APV Rogers, *Law on the Battlefield* (3rd edn, Manchester University Press 2012) Ch 5 'Precautions in Attack'; Carolin Wuerzner, 'Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects before International Criminal Tribunals' (2008) 90 *International Review of the Red Cross* 827, 915; Alon Margalit, 'Did LOAC Take the Lead? Reassessing Israel's Targeted Killing of Salah Shehadeh and the Subsequent Calls for Criminal Accountability' (2012) 17 *Journal of Conflict and Security Law* 147.

[62] Schmitt (n 60) 84; Dahl (n 31) 27–28 ('In a high-tech environment such as in air and missile warfare, the demands for expertise are substantially higher. An investigator who does not understand, for example, weapons options, fusing guidance systems, angle of attack, optimal release altitudes, command and control relationships, communications capabilities, tactical options, available intelligence options, enemy practices, pattern of life analysis, collateral damage estimate methodology, human factors in a combat environment, and so forth, will struggle to effectively scrutinise an air strike').

[63] Dahl (n 31) 27. See also Wuerzner (n 61) 925.

[64] Gilissen (n 9) 41; Gibson (n 9) 385; Hampson (n 50) 3.

called for in such cases.[65] Furthermore, in many systems judicial officers may be civilian but are required to undertake some form of military training or spend time in military contexts. Magistrates in Belgium who are employed to deal with military matters must hold a 'diploma in military techniques', which must be renewed every five years to ensure sufficient knowledge of military contexts and to adapt to life in operations; some magistrates participate in short-term missions abroad alongside troops.[66] In other systems civilian judicial officers are specialised and deal only with military cases. In France, since 2012, it is a civilian specialised military chamber of the Tribunal de Grande Instance which has jurisdiction over military criminal offences (committed in times of peace).[67] Finally, military justice systems are not necessarily composed exclusively of active military members. The composition of various domestic systems range from full military personnel, or hybrid military–civilian, to entirely civilian personnel.[68]

### 3.2. PORTABILITY AND EXTRATERRITORIAL REACH

Ensuring the effectiveness of judicial proceedings requires an assessment of their ability to function when and where required. In a military context quick and efficient justice requires a judicial body that is able to intervene when and where necessary; this often means one that is able to accompany the armed forces on military operations to some degree. For practical and sometimes jurisdictional reasons it is often military authorities which are chosen to accompany the armed forces.[69] The 1952 Commentary on Article 45 of the First Geneva Convention 1949 states that 'military authorities are in fact in a unique position to ensure and enforce compliance with the Conventions by means of orders and instructions to subordinate levels of the military hierarchy, close supervision of their execution, and sanctions in case of breaches'.[70] This reference to their 'unique position' can refer not only to the expertise and familiarity they possess, but also to physical and geographic position, namely for the 'close supervision' of the implementation of IHL rules. This is particularly important in times of armed conflict, and/or when the military is 'on the move' on operations either in its own country or abroad.

The need for portability is particularly crucial for common law systems, where civilian jurisdiction often only covers offences committed within the state's territory.[71] States have an obligation under IHL to exercise jurisdiction over war crimes committed by their armed forces, whether

[65] Heng and others (n 31) 135.
[66] ISMLLW *Recueil* (2011) (n 55) 71–79. Czech Republic, Finland, France, Germany and The Netherlands also have provisions for the training of civilian judicial officers in military matters.
[67] Code de justice militaire (France), art L.111-1. The Tribunal aux Armées was abolished in 2012, although specialised military courts can still be set up in times of war or other situations of emergency.
[68] Heng and others (n 31) 135.
[69] Gibson (n 9) 386.
[70] Commentary GC I (2016) (n 3) commentary on art 45, para 2711.
[71] Rain Liivoja, 'Service Jurisdiction under International Law' (2010) 11 *Melbourne Journal of International Law* 309, 310.

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or not they are committed on their territory.[72] This means they must have a legal way of enforcing criminal jurisdiction over actions of their armed forces even if committed abroad. Military jurisdiction is the only codified way in which states such as the UK, the US and Canada can legally investigate and prosecute most criminal offences committed by members of their armed forces abroad, whether or not they are involved in an armed conflict.[73] In such contexts removing military jurisdiction would be tantamount to promoting impunity.

Even within systems whose civilian courts may have jurisdiction over actions of their armed forces abroad, there are other reasons to have such mobile and flexible military justice systems. Many states which can exercise jurisdiction *rationae personae* over its citizens abroad for criminal offences will still have specific legislative provisions for service jurisdiction over members of its armed forces abroad, including in some cases accompanying civilians.[74] This service jurisdiction is not always of a purely military nature as criminal cases may be brought before civilian courts, but military authorities will often have a role in the proceedings. For example, military police who are more likely to have been present at the scene may carry out the preliminary steps of an extraterritorial criminal procedure, such as the investigation.[75]

The mobility of military justice systems is crucial for the promptness of justice, which in turn is related to discipline of the armed forces. In a combat environment 'the commander may need to quickly address misconduct to prevent the spread of indiscipline'.[76] As military justice systems will usually accompany the armed forces, they will be able to step in promptly with specific expertise for the matters at hand. The need for a more 'speedy punishment' than the usual forms of law would allow was explicitly part of the foundations of military law in England.[77] Fair trial rights also mandate that criminal offences be tried within a reasonable time.[78] Furthermore, security considerations related to ongoing armed conflict may affect who is able and/or willing to access the scene of incidents. Enabling safe access to a scene for investigators or other law enforcement officials may require the expenditure of significant resources to provide security for the transport and operation of the investigation,[79] and in many contexts it may be that military personnel are the preferred choice.

Finally, prompt and on-site justice may be important for the perception of justice. The UN Zeid Report, carried out to develop 'a comprehensive strategy to eliminate future sexual

[72] GC I (n 2) art 49; GC II (n 2) art 50; GC III (n 2) art 129; GC IV (n 2) art 146; AP I (n 2) art 85. For customary law see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (ICRC and Cambridge University Press 2005, revised 2009) (ICRC Study) rule 158.
[73] There are often exceptions; for example, in the UK for sexual offences against children, certain terrorism-related offences, fraud and bribery; see Crown Prosecution Service, Legal Guidance: 'Jurisdiction' (updated 7 November 2019), https://www.cps.gov.uk/legal-guidance/jurisdiction; Liivoja (n 71) 310.
[74] Liivoja (n 71) 310; Gleeson (n 9) 5; Heng and others (n 31) 135. See above n 7.
[75] eg, The Netherlands and France; Second Turkel Report, Annex C (n 57) 918; Response of France to the UN Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, States' Responses to Questionnaire on Military Courts (2011) 6.
[76] Hansen (n 30) 126.
[77] Gilissen (n 9) 49.
[78] Gibson (n 9) 386.
[79] Dahl (n 31) 28.

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exploitation and abuse in United Nations peacekeeping operations', recommended that on-site courts martial be used in peacekeeping settings, as this would 'afford immediate access to witnesses and evidence in the mission area. An onsite court martial would demonstrate to the local community that there is no impunity for acts of sexual exploitation and abuse by members of military contingents'.[80] The role of military justice in peacekeeping operations is by no means a simple or resolved issue, whether or not in situations of armed conflict, but it is noteworthy that in some circumstances it has been considered in contributing towards combating impunity.[81]

While expert and portable justice is not necessarily under the sole purview of military jurisdiction, it is undoubtable that military authorities will always have a role to play in extraterritorial operations. Being physically present is key to the dispensation of prompt and efficient justice, and in some cases the current legal status quo does not allow for civilian jurisdiction abroad. Nevertheless, many obstacles can also be overcome by adequately training expert civilian judicial officers, and in some cases by adapting domestic legislation. That either civilian or military authorities theoretically could be used in many contexts begs the question of which should be used. The following section explores further factors which must be taken into account in answering this question.

## 4. RESTRICTIONS ON MILITARY JURISDICTION: THE RIGHTS OF THOSE INVOLVED

As military justice systems expanded in scope and sophistication, so did scrutiny of the 'justice' element of these systems, in particular in relation to the individual rights of those involved. The codification of international human rights law in the twentieth century influenced the protection afforded to those involved in military justice proceedings, most notably through the lens of rights of fair trial and due process. It is important to consider this protection in combating impunity for violations of IHL, not least because fair trial guarantees are a fundamental tenet of IHL.[82] While fair trial guarantees in many contexts are focused on the rights of the accused, increasing attention is also given to the rights of victims under international law, inter alia, under the broader concept of due process. This section analyses how increased attention to the rights of those involved in judicial proceedings before military justice systems has affected the format and scope of military jurisdiction.

[80] UN General Assembly, Report of the Secretary-General's Special Advisor, Prince Zeid Ra'ad Zeid al-Hussein, on a Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations (24 March 2005), UN Doc A/59/710, para 35.
[81] Gibson (n 32) 37; Rowe (n 12) 28.
[82] ICRC Study (n 72) rule 100; GC III (n 2) arts 99, 102, 105, 106; GC IV (n 2) arts 5, 66, 71; AP I (n 2) art 75(4), Common Article 3 of the Geneva Conventions 1949 (n 2); 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, art 6 (AP II); ICCPR (n 59) art 14.

### 4.1. The Rights and Liberties of Those Accused of Offences

One of the most important changes in the scope and format of military jurisdiction has been the development of civil liberties and fair trial rights of those accused of offences.[83] The commander-centred disciplinary systems which made up early forms of military justice over time presented various problems, not least with the perceived arbitrariness and summary nature of proceedings. Military 'justice' worldwide, thankfully, looks very different now from how it appeared in its early days,[84] in particular as serious punishments are usually no longer administered so summarily or arbitrarily by commanders. In fact, one of the greatest impacts on military justice systems globally has been the development of due process rights of the accused, and eventually the impact of human rights law on judicial proceedings.[85]

Changes were made gradually to military justice systems in various states, principally in response to events which brought widespread public attention to these military institutions. In the United States, for example, the two World Wars were catalysts for substantive changes in the format of military justice. In the aftermath of the First World War, 'Congress conducted a searching inquiry into the administration of military justice as a result of criticisms levelled at practices during the war'.[86] Whereas the previous Articles of War of 1775 had held the commanding officer at the centre of proceedings, the new Articles of War of 1920 included substantial changes such as 'procedural aspects of courts-martial and subsequent related actions, including appeals, all of which evidenced concern for the rights of the individual'.[87] The Second World War once again drew public opinion to focus on military justice, leading to the creation of a special committee in 1948 to 'prepare a code, uniform in substance, interpretation and application, that would protect the rights of those subject to it and increase public confidence in military justice, without impairing the military function'.[88] This led to the creation of the Uniform Code of Military Justice,[89] which is the basis for military jurisdiction over the US armed forces today. The increased focus on the rights of those accused of offences, linked to the need to maintain public confidence in military justice, was thus a driving force behind reform in the US military justice system.

It was, however, the codification of international human rights law following the Second World War which had the most notable influence on military justice systems worldwide.[90] The recognition of individual soldiers as beneficiaries of human rights has led to important

[83] Wager Halleck (n 38) 959.
[84] For some gruesome examples see Rollman (n 17) 213–14 (who cites losing one's right hand for threatening to strike a superior officer, or as punishment for murder upon a ship to be 'bound to the dead man and thrown into the sea').
[85] Wager Halleck (n 38) 959; Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press 2006) 79.
[86] Rollman (n 17) 218.
[87] ibid 219.
[88] ibid 220.
[89] ibid 220–21.
[90] Gilissen (n 9) 66.

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forms of protection for individuals.[91] This is evident in the jurisprudence of the European Court of Human Rights, where cases on the need to provide adequate fair trial rights have triggered the reform of various European military justice systems. It has, for example, required increased guarantees of independence and impartiality of military judges, in particular in protection from undue influence from the commander of the accused,[92] and required that sufficient procedural safeguards be put into place in proportion to the severity of the offence being tried and the possible punishment to be imposed.[93] Such safeguards are not only relevant for criminal proceedings, but rather are usually to be understood as requiring a scale of procedural safeguards corresponding with the severity of the offence.[94]

The increased recognition of rights, including international human rights, of individuals has had a substantive impact on both the format and the scope of military jurisdiction, and there is little doubt that these reforms have contributed overall to better administration of justice.

### 4.2. THE ROLE AND RIGHTS OF VICTIMS

The development of individual rights has also led to an increased focus on the rights of victims of violations, including victims of violations of IHL. Unlike rights of suspects and the accused, the impact of the rights of victims on military justice proceedings is harder to observe as such rights have only recently started to gain international traction. Nevertheless, it is clear that the rights of victims have reinforced state responsibility to establish effective proceedings to combat impunity for violations of IHL. The rights of victims at the international level have focused, to a degree, upon the right to a remedy, as demonstrated by the Basic Principles on the right to a remedy and reparation.[95] Nevertheless, such remedies have been understood in some contexts to affect procedural measures, inter alia, through the administration of military justice. This has been particularly apparent in the development of regional human rights courts, although the way in which such regional courts have approached the rights of victims differs quite substantively, especially with regard to the impact on military jurisdiction. Whereas the Inter-American system of human rights has addressed the rights of victims from the perspective of a broad right to due process, the European Court of Human Rights has focused on procedural obligations stemming from other substantive rights.

[91] Rowe (n 85).
[92] ECtHR, *Findlay v UK*, App no 22107/93, 25 February 1997; *Morris v UK*, App no 38784/97, 26 February 2002, para 64; *Incal v Turkey*, App no 41/1997/825/1031, 9 June 1998; *Pauwels v Belgium*, App no 10208/82, 26 May 1988, para 38; *Mikhno v Ukraine*, App no 32514/12, 1 September 2016, para 165; Rowe (n 85) 68–70, 79–88.
[93] *Engel and Others v The Netherlands*, App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1986.
[94] See, eg, the Australian system, which uses a gradual scale of increased punishments and procedural guarantees: Second Turkel Report, Annex C (n 57) 683; Yale Law School, 'Yale Draft Principles for Military Summary Proceedings', 2 December 2019.
[95] UN Office of the High Commissioner for Human Rights (OHCHR), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (16 December 2005), UN Doc A/RES/60/147, Annex (OHCHR, Basic Principles), Principle I.

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To understand the approach of the Inter-American system in its case law on military jurisdiction, it is necessary to examine the broader scope of 'due process' and 'judicial guarantees' used before the enactment of the American Convention on Human Rights (ACHR), which is not equivalent to the concept of 'fair trial' as used, for example, before the ICCPR or the European Court of Human Rights. In these latter contexts it is understood that 'only the accused has a right to a fair trial',[96] and that 'the perpetrator remains and must remain at the centre of any trial'.[97] In contrast, before the Inter-American system of human rights it has become common for the Court to refer to the concept of *debido proceso* (due process) while referring to Articles 1, 8 and 25 ACHR jointly, and is the preferred catch-all term when referring to similar issues, as considered by the term 'fair trial' in Anglophone texts.[98] This broader concept relates not only to procedural rights of suspects or the accused involved in a criminal or civil trial, but also to victims of human rights violations. It encompasses multiple stages of judicial proceedings, from investigation to trial, as well as the provision of an effective remedy. This difference in approach may in part be linked to the tradition of *amparo* in Hispanic jurisdictions, and the prevalent focus on the rights of victims to a remedy as part of judicial procedure.[99]

This use by the Inter-American system of the broader concept of 'due process' when considering the guarantees applicable in judicial procedure has had interesting implications on its jurisprudence related to military jurisdiction. It has applied the same standards to cases which involved rights of the accused to those involving rights of victims, for example, in finding that military jurisdiction is not appropriate for cases involving civilians. In the *Castillo Petruzzi* case, which dealt with a civilian (the accused) being tried by military jurisdiction, the court stated that military jurisdiction was inappropriate, inter alia, because 'in the instant case' the military courts 'did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the American Convention recognises as essentials of due process of law'.[100] This case was subsequently cited in finding military jurisdiction to be inappropriate for cases in which the victim is a civilian.[101] It is important to note that there were fundamental flaws with the military justice proceedings in question beyond the matter of

[96] Salvatore Zappalà, 'The Rights of Victims *v.* the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137, 149.

[97] Marco Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges' (2007) 10 *Yearbook of International Humanitarian Law* 45, 55.

[98] CIADH, 'Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No 12: Debido Proceso' (2017) (in Spanish); *Case of Bámaca Velásquez v Guatemala* (2000) Inter-Am Ct HR, Judgment of 25 November 2000, (Ser C) No 70, para 197; *Case of Heliodoro Portugal v Panama* (2008) Inter-Am Ct HR, Judgment of 12 August 2008, (Ser C) No 186, para 115.

[99] David Weissbrodt, *The Right to a Fair Trial: Articles 8, 10 and 11 of the Universal Declaration of Human Rights* (Martinus Nijhoff 2001) 29. Of course, not all states party to the ACHR are of Hispanic tradition, yet the prevalence of cases concerning such states before the Inter-Am Ct HR is undeniable.

[100] *Case of Castillo Petruzzi et al v Peru* (1998) Inter-Am Ct HR, Judgment of 30 May 1998, (Ser C) No 59, para 132.

[101] *Case of Las Palmeras v Colombia* (2000) Inter-Am Ct HR, Judgment of 4 Feb 2000, (Ser C) No 67, paras 52–53. See also cases surrounding art 13 of the Mexican Constitution of 1917: eg, *Ortega v Mexico* (2010) Inter-Am Ct HR, Judgment of 30 August 2010, (Ser C) No 215.

jurisdiction,[102] but these cases illustrate well the unique approach to due process taken by the Inter-American Court of Human Rights.

In contrast, the European Court of Human Rights has explicitly rejected the application of fair trial rights, or concepts interpreted under such rights such as independence and impartiality, to broader contexts beyond the trial stage or the rights of the accused.[103] The rights of victims under the European Court of Human Rights has had an impact on the role of military justice systems, but mostly in the way in which the ineffectiveness of such systems has inhibited the provision of substantive rights, such as the right to life.[104] Rather than restricting the scope of military jurisdiction, this has had the effect of leading to reforms in the way in which states structure their military justice systems at the domestic level. This is not to say the regional courts are fundamentally at odds with each other in the interpretation of human rights guarantees,[105] but it does highlight their differences in approach.

Although cases before the regional human rights courts deal with human rights issues, they are of importance to states that are considering their obligations under IHL in addressing the rights of those involved in judicial proceedings. The role of victims in military proceedings poses various challenges which need to be explored further, but it is undeniable that the rights of victims are receiving increasing recognition and are an important element of justice.[106] It is also important to recognise the domestic and regional differences in the way in which victims are involved in proceedings, and maintain a contextual approach when assessing a specific domestic system.

Military justice systems have had to come to terms with domestic and international developments that protect the rights of those involved in judicial proceedings. International human rights law bodies have established the most detailed standards for the rights of both the accused and victims, and such standards are crucial when interpreting the obligations of fair trial as mandated under IHL. These developments have led to a move away from early commander-centric systems of administration of justice by military authorities, and must be taken into account in conjunction with the other legal and practical considerations in the choice and structure of civilian or military jurisdiction for the effective implementation of IHL.

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[102] In *Castillo Petruzzi* (n 100), there were structural flaws with the military justice system – inter alia, that military judges remained subordinate to the operational chain of command and were not composed of legal professionals (para 125(e)). In *Las Palmeras* (n 101), there were significant concerns about the independence and impartiality of the investigators (para 53), in addition to the fact that the initial phases of the investigations were fundamentally flawed, including in the tampering, concealing and destruction of evidence (para 57).

[103] ECtHR, *Mustafa Tunç & Fecire Tunç v Turkey*, App no 24014/05, 14 April 2015, paras 217–34; *Imbrioscia v Switzerland*, App no 13972/88, 24 November 1993, para 36; *Brennan v UK*, App no 39846/98, 16 October 2001, para 45; *Shabelnik v Ukraine*, App no 16404/03, 19 February 2009, para 52. The ECtHR has found on some occasions that fair trial rights may apply to some pre-trial proceedings, but only in limited circumstances when these have a direct impact on the trial itself: *Haarde v Iceland*, App no 66847/12, 23 November 2017, para 78.

[104] ECtHR, *Al Skeini v UK*, App no 55721/07, 7 July 2011; *Jaloud v The Netherlands*, App no 47708/08, 20 November 2014.

[105] See, eg, the similar approach on jurisdiction: ECtHR, *Mustafa Tunç & Fecire Tunç v Turkey* (n 103) paras 223–34; *Favela Nova Brasilia v Brasil* (2017) Inter-Am Ct HR, Judgment of 16 February 2017, (Ser C) No 345, paras 186–91.

[106] OHCHR, Basic Principles (n 95).

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## 5. CONCLUSION

The format and scope of military jurisdiction is no longer a domestic affair. Historical examples give us a way of understanding the prevalent use of military jurisdiction for matters involving military personnel, and why military justice systems were foreseen as having an important role in the implementation of IHL, including in the repression and suppression of violations of this body of law. They also demonstrate how increased concern for the rights of individuals has reformed and directed the way in which these justice systems operate. The widespread global reforms of military justice systems have continued to be an important factor in combating impunity and upholding justice both for victims of violations as well as those accused of committing the violations. These reforms in many cases have included a so-called 'civilianisation' of military justice, with increased influence or even transfer of judicial duties to civilian authorities.[107] Nevertheless, the international discourse on the adequacy of military jurisdiction has been difficult to universalise, in part because of the significant differences in domestic legal traditions.

In fulfilling their obligations to implement IHL, states must consider the most effective way of carrying out justice. The importance of highlighting the duty to implement IHL as being one of state responsibility, and not one confined to the military, is that it is up to the state apparatus as a whole to establish the infrastructure and procedures in a way which leads to effective implementation mechanisms. They are, in principle, free to a certain extent to choose how they enforce these obligations – for example, whether to use military or civilian jurisdiction – as long as these measures are effective. This requires careful consideration of how justice can be achieved in the context of IHL violations, by taking into account the nature of the offence (whether criminal or otherwise), the location of the offence (in or out of territory), the domestic legal system and its jurisdictional arrangements,[108] human rights jurisprudence where relevant, and the ability for this jurisdiction to effectively carry out justice.

Many questions remain to be resolved with regard to military justice systems, such as on the precise meaning of the standards of independence and impartiality in a military context, the procedural differences in military versus civilian criminal proceedings, the role of military justice in multinational operations, and how military jurisdiction should relate to private military corporations. This article has not addressed perhaps one of the greatest challenges to the effectiveness of military jurisdiction, namely the context of systematic impunity within a justice system which may affect the appropriate choice of jurisdiction. The concept of systematic violations implies an element of tolerance and repetition of violations,[109] which may also mean that any

[107] Dahl (n 31); Liivoja (n 71); Heng and others (n 31) 136–37.
[108] It has been suggested that any principles addressing the concept of military jurisdiction from an international perspective should ensure knowledge in comparative systems of law: Schmid (n 7) 1066, Gibson (n 32) 43.
[109] Hampson (n 50) 17; International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session, *Yearbook of the International Law Commission*, 2001, vol II, Part Two, Commentary to art 41, para 8; Cecilia Medina Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter American System* (Martinus Nijhoff 1988) 16.

investigation or prosecution carried out by a military body in such cases would be ineffective (for example, if violations are tolerated). Yet such systematic impunity is not often confined to a military justice system: flaws in the administration of justice may prevail across all state institutions, including civilian justice systems. There are reasons why a justice system may fail to bring perpetrators of serious violations to justice, and there may be elements correlated to situations of armed conflict which aggravate this likelihood. Such cases of widespread impunity require careful analysis to understand the root causes of the ineffective administration of justice.

This article has demonstrated that military justice systems need not be frozen in time: many states have adapted to domestic and international trends in the administration of justice and should continue to do so. We have found that military jurisdiction holds an important role in suppressing administrative violations of IHL and maintaining discipline across the armed forces as required under this body of law. Criminal violations of IHL may be dealt with either by civilian or military justice systems, as long as these systems are effective. If there is a possibility that military jurisdiction may be used only or extensively during times of 'war', states must still ensure that they are proper systems of justice, able to effectively suppress and repress violations of IHL. The findings are important because the debates surrounding military jurisdiction often fail to consider either the entire scope of international obligations, or fail to recognise the domestic legal differences which affect the way in which justice is administered. Military justice systems should not be sanctified; nor should they be demonised.[110] Multiple examples of successful military adjudication suggest that there is nothing inherent in the 'militaryness' of an institution which prevents it from carrying out justice. Instead, a holistic and contextual approach to a state's obligations in the many different types of conflict situation, as well as within the many different domestic legal traditions, must be taken in order to establish effective implementation measures. This is key to combating impunity for violations of IHL, and protecting both the rights of those accused of offences as well as those affected by violations.

[110] Gibson (n 32) 48.

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