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"El juzgamiento de civiles por tribunales militares a la luz del derecho internacional de los derechos humanos"

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Me han pedido que hiciera una presentación general de la jurisprudencia de los órganos de Naciones Unidas sobre el juzgamiento de civiles por tribunales militares. Este es un tema que ha generado abundante jurisprudencia por parte de los organismos de control sobre los últimos 15 años. Los órganos de control también han discutido si los tribunales militares tienen o no la competencia y los atributos de independencia e imparcialidad necesarios para juzgar violaciones de derechos humanos. Los tratados internacionales sobre derechos humanos no dicen absolutamente nada sobre justicia militar. Todo debe ser inferido, todo debe ser interpretado. En la Declaración de las Naciones Unidas sobre las desapariciones forzadas de 1992, la disposición sobre tribunales militares es de alguna manera el testimonio de algo que emergió ayer en la sala: la fuerte convicción de lo gobiernos y sociedades civiles de América Latina de que los civiles no deben ser juzgados por tribunales militares a la luz de las experiencias de los años ochenta. Esta Declaración fue redactada en el año 1991 y la experiencia de la región estaba muy fresca. Si ustedes examinan los trabajos preparatorios, verán que esta posición fue el resultado de la actitud de algunos gobiernos y organizaciones latinoamericanos que impulsaron este punto.

El punto de partida es que ninguno de los tratados de derechos humanos contiene disposiciones específicas sobre la justicia militar. En cuanto a la jurisprudencia el punto de partida es la **Observación General número 13 del Comité de Derechos Humanos**, llamada de igualdad ante los tribunales y derecho de toda persona a ser oída públicamente por un tribunal competente establecido por ley, que analizó el artículo 14 del Pacto hace veinte años. El Comité precisó que muy a menudo la razón para establecer tribunales militares es "permitir la aplicación de procedimientos excepcionales que no se ajustan a las normas habituales de justicia". Y aclaró que el Pacto no prohíbe esta categoría de tribunales pero que si bien no los prohíbe, las condiciones que estipula indican claramente que el procesamiento de civiles por tribunales militares debe ser "muy excepcional y ocurrir en circunstancias que permitan ver la plena aplicación de las garantías previstas en el artículo 14". Y del resto del contexto resulta claro que lo que el

Comité tenía en mente era la posibilidad de derogación de garantías del debido proceso en función de las disposiciones del artículo 4. Y en esos casos de suspensión, si un estado de excepción fuera declarado, el Comité consideró que los Estados deben garantizar que la suspensión no rebase lo que estrictamente exija la situación en el momento. Una frase que durante años fue algo enigmática es la que exige que se respeten las demás condiciones estipuladas en el párrafo primero del artículo 14. Esta última parte dio lugar a mucho debate a lo largo de los años porque no completo significado quedaba totalmente claro.
Lo importante es que en el año 1984, el Comité consideraba que los tribunales militares podían juzgar civiles en condiciones de estado de excepción por lo menos, siempre y cuando se apegaran a las garantías del artículo 14.

Ahora, voy a describir la jurisprudencia o las tendencias jurisprudenciales que están reflejadas en el informe del Profesor Decaux. A partir de 1984 el Comité de derechos humanos modificó su enfoque a lo largo de los años para terminar considerando que la práctica de juzgamiento por los tribunales no es compatible con las disposiciones del Pacto. Pero esto no emana de una nueva observación general sino más bien de la jurisprudencia, a través del análisis de los informes de los Estados y de la resolución de comunicaciones individuales. El cambio fue bastante paulatino. Tuvo lugar sobre todo en la década de los noventa y los años 1997-99 fueron los que trajeron una reflexión más intensa sobre este tema. Pero ya en el año 1992, por ejemplo en el caso de Argelia, el Comité había expresado dudas acerca del respeto del derecho de defensa en particular ante tribunales militares. En este caso, es el tema de la pena de muerte que alienta al Comité a analizar algunos procesos en particular. También está el caso de Colombia y el caso de Egipto en el 1993 y el 2002 respectivamente. Esta jurisprudencia se repite cuando el Comité considera que los tribunales militares no deberían estar habilitados para juzgar asuntos que no sean constitutivos de infracciones cometidas por miembros de fuerzas armadas en ejercicio de las funciones. El Comité no niega la posibilidad de existencia de los tribunales militares sino dice que los mismos deben tener jurisdicción únicamente sobre miembros de las fuerzas armadas en ejercicio de sus funciones. Similar jurisprudencia se repite en 1994 (en el caso de Rusia) donde el Comité expresa preocupación por la jurisdicción de los tribunales militares en casos civiles. Luego, Perú fue un caso muy especial porque dio lugar a una enorme cantidad de material jurisprudencial tanto en el ámbito universal como en el ámbito interamericano. El Comité continuó expresando preocupación por el hecho de que los sospechosos eran acusados de traición a la patria. Fueron juzgados por las mismas fuerzas militares que los ha detenido y acusado y los miembros de los tribunales militares eran oficiales de servicio activo sin formación jurídica; tampoco existía ninguna norma de revisión de la condena. También se ocupa el Comité de la legislación cuando en 1997 le pide al Estado Parte que revise la jurisdicción de los tribunales militares pero además que traspase a tribunales ordinarios la competencia para juzgar casos relativos a civiles.

Posteriormente surgen las observaciones a Polonia y a Camerún en 1999. Es interesante observar el tipo de delitos que el Comité encara en el caso de Camerún. El Comité critica el hecho de que algunos civiles sean juzgados por tribunales militares y que se haya ampliado la jurisdicción militar a delitos que no tienen en sí mismo carácter militar, por ejemplo, todos los delitos en que se utilicen armas de fuego. Resulta obvio de esta jurisprudencia de Camerún que jurisdicción de los tribunales militares se había extendido de manera totalmente desproporcionada en aquel país.
Chile fue un "cliente habitual" del Comité en esta materia y frecuentemente recibió críticas muy duras. Hacia el final de este periodo, en una reflexión relativa a Perú, el Comité termina por concluir que la jurisdicción sobre civiles no se reconcilia con una

justicia equitativa, imparcial e independiente. Y allí se consolida esta tendencia que venía de poner el énfasis en la lista de garantías judiciales del artículo 14 y pasa a analizar el carácter del tribunal.

La segunda parte es la parte de las **comunicaciones individuales**. Y allí, los uruguayos quebramos todos los *records* en materia de comunicaciones. El problema con los casos uruguayos es que las violaciones cometidas por los tribunales militares eran tan flagrantes y el estado de derecho se había socavado de forma tal que el Comité nunca tuvo real necesidad de analizar a fondo el tema de la independencia y de la imparcialidad en la gestión de los tribunales militares individuales. Fue suficiente analizar las violaciones sistemáticas a las garantías judiciales del artículo 14. Sin embargo en un caso de 1983 el caso *Cariboni* en el que la víctima había sido juzgada en secreto, el Comité deja de hablar de las garantías individuales y dice que hay un derecho a ser oído públicamente y con debidas garantías por un tribunal independiente e imparcial. En cuanto a los otros Comités: El **Comité contra la tortura** analiza varios casos: Jordania, Perú y nuevamente Chile. En el caso de Perú, lo que plantea es la aceptación por parte de los tribunales militares de confesiones arrancadas bajo tortura.
En el caso del **Comité de los derechos del niño**, hay tres casos paradigmáticos: Peru, Turquía y la RDC. En el caso de la RDC, nuevamente es el tema de la pena de muerte impuesta por tribunales militares. Allí el Comité pide que no se someta a menores de 18 años a la justicia militar.

Dejando de lado el tema de los órganos de control de tratados, aparece el tema de los órganos políticos de Naciones Unidas. La **Asamblea General** empieza a pronunciarse sobre esto en el 1984 al mismo tiempo que surgía la Observación General 13 y se sigue pronunciando casi todos los años.

Sin embargo una de las fuentes de reflexión más importante sobre este tema es el **Grupo de trabajo sobre las detenciones arbitrarias de las Naciones Unidas.** El Grupo ha generado una interesante doctrina en esta materia. El Grupo empezó coincidiendo con la Observación General n°13 y después evoluciona en la misma dirección que el Comité de Derechos Humanos y que el Relator especial sobre la independencia de jueces y abogados. Debí haber dicho antes que el Relator especial sobre la independencia de jueces y abogados de la Comisión de derechos humanos, en un momento de su propia evolución respecto de este tema, critica la Observación General n°13 diciendo que en realidad se necesita más que lo que la Observación propone y que sería conveniente que es estableciera el principio de que los civiles no deben ser juzgados por tribunales militares.
El Grupo de trabajo planteó allá en el 1984 que, a la luz de su experiencia, comprobaba que la casi totalidad de los casos en los que civiles son juzgados por tribunales militares, conllevan riesgos de arbitrariedad para las personas civiles. El Grupo, que recibe denuncias individuales sobre posibles detenciones arbitrarias, ha concluido que el juzgamiento de civiles por tribunales militares también se riñe con el proceso justo. El Grupo formuló cuatro recomendaciones principales sobre el tema. La primera es que la justicia militar debería declararse incompetente para juzgar civiles. La segunda es que debería declararse incompetente para juzgar a militares si entre las víctimas hay civiles. Este es un criterio interesante para la aplicación a los conflictos internos. Este criterio requiere una discusión en profundidad en relación a los conflictos armados internacionales dado el rol que los tribunales militares juegan cuando ejercen su jurisdicción en el exterior. Unos de los problemas es que, en caso de que se verifiquen infracciones graves a los Convenios de Ginebra, no se trate de perder todas las protecciones que ofrece el estatuto de prisionero de guerra. En tercer lugar, debería declararse incompetente par juzgar a civiles y a militares en los casos de rebelión,

sedición, o cualquier delito que imponga o pueda poner en peligro un régimen democrático. Acá me voy a permitir hacer una breve reflexión. En la experiencia de Uruguay todos los civiles sometidos a los tribunales militares fueron sometidos a abusos enormes; sin embargo los peores casos fueron los casos de los militares demócratas sometidos a los tribunales militares. Es suficiente dar una mirada a los expedientes judiciales militares, que hoy son público, para constatar que se producía una verdadera colección completa de violaciones a los derechos del debido proceso. Eso es un tema de reflexión: el tema del delito político como tal. Por último el Grupo plantea un cuarto límite sobre el que puede ser difícil obtener ciertos consenso aunque es seguramente deseable: que no sean autorizados para imponer la pena de muerte.
El Grupo ha aplicado estos criterios en sus visitas a Indonesia y Nepal y también en sus opiniones en casos individuales. Hay uno muy interesante sobre Palestina en 1999. Un caso siempre difícil es el del líder del PKK Öcalan donde el Grupo de trabajo adopta la doctrina de la Corte europea sobre la apariencia y critica la presencia de un juez militar.

No quiero extenderme mucho más. Hay más pronunciamientos del **Relator sobre ejecuciones extrajudiciales, sumarias y arbitrarias** sobre todo concentrado en el tema de la pena de muerte. Hay en materia de libertad de expresión, y también en materia de los relatores por países. El caso quizás que se ha elaborado más es el de **Guinea ecuatorial**. En Guinea ecuatorial, hay una expansión desorbitada de la justicia militar y allí concluye el Relator, particularmente en periodo de inestabilidad política, que no es buena solución el funcionamiento de tribunales militares integrados por oficiales de las fuerzas armadas que juzgan la conducta de civiles o de sus propios compañeros de armas. Recomienda restringir la competencia de esa jurisdicción.

No voy a tratar de sacar muchas conclusiones sobre esto porque quizás la única conclusión que se necesita en mi opinión es un esfuerzo de sistematización y de aclaración de muchos de estos elementos jurisprudenciales que han surgido en estos últimos años. Lo que a algunos nos gustaría ver es una nueva observación general sobre el artículo 14 que trate de todo el artículo 14 pero que además trate este tema y que haga un buen análisis de los primeros párrafos del artículo 14 donde los conceptos de independencia e imparcialidad se desarrollen más a fondo.

"Le jugement de civils par les tribunaux militaires à la lumière du droit international: le cas africain»

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Interights

Introduction générale

Je vais m'employer dans cet exposé à vous entretenir de ce qui a été fait pendant les quinze dernières années au niveau africain sur la question du jugement des civils par les tribunaux militaires. Je vais le faire en utilisant la jurisprudence de la Commission africaine de droits de l'homme et des peuples (ci-après la Commission africaine) qui est, pour le moment, l'unique organe de protection et de promotion des droits humains en Afrique. Mais je voudrais, au préalable, faire les remarques suivantes :

La première est qu'il me sera difficile de vous présenter, comme vient de le faire M. Wilder Tayler, tout le travail accompli par la Commission africaine sur cette question, notamment lors de l'examen des rapports périodiques que les Etats parties à la Charte africaine des droits de l'homme et des peuples sont censés lui présenter tous les deux ans (article 62 de la Charte africaine). En effet, à la fin de l'examen de ces rapports, la Commission africaine, contrairement aux organes chargés de la surveillance de l'application des traités relatifs aux droits de la personne conclus dans le cadre du système des Nations Unies, ne présente pas de synthèse de ses travaux qui aurait pu donner une indication des progrès mais aussi des lacunes des systèmes juridiques des États africains en matière de protection des droits de la personne. Cette documentation n'étant pas disponible, je me limiterai donc simplement à l'examen de la jurisprudence et à une analyse d'un document important publié l'année dernière par la Commission africaine, à savoir les Principes et Directives sur le droit à un procès équitable et à l'assistance judiciaire en Afrique (*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*) qui contiennent des éléments très intéressants sur la question des tribunaux militaires. (c.f. annexe)

Il faut, en deuxième lieu, préciser qu'il y a confusion, dans le contexte africain, entre tribunaux militaires et tribunaux spéciaux. Cela est, en grande partie, dû au fait que dans beaucoup de pays africains, les tribunaux spéciaux étaient soit dirigés par des militaires soit comprenaient des militaires. C'est la raison pour laquelle, la Commission africaine, dans sa jurisprudence, ne fait donc pas de distinction entre tribunal militaire et tribunal spécial.

En troisième lieu, il est important que vous compreniez pourquoi cette question du jugement des civils par les militaires est une question à la fois délicate et importante en Afrique. Elle est importante car les États africains sont confrontés à une violence multiforme liée à la pauvreté et aux autres problèmes sociaux dont la gestion est souvent confiée à des structures militaires ou paramilitaires. Ce qui fait que les personnes accusées de violence sont le plus souvent déférées devant des tribunaux spéciaux ou, quand ils sont plus chanceux, devant des tribunaux militaires. Mais il y a aussi le fait qu'en Afrique, jusqu'à présent, près d'un tiers des régimes sont, soit des régimes militaires, soit des régimes militaires «civilisés».

En quatrième lieu, je voudrais signaler le rôle que ces juridictions jouent dans la lutte contre le terrorisme. Le continent, à l'image d'autres parties du monde, est confronté à différentes formes de terrorisme et beaucoup de pays -je pense en particulier à l'Egypte et au Soudan- ont développé une stratégie qui consiste à faire juger toutes les affaires de terrorisme par les tribunaux militaires et les tribunaux spéciaux. Cela aboutit, en pratique, à ne juger que des civils devant ces tribunaux.

La Commission africaine a rendu à ce jour à peu près trois cents arrêts dont un peu plus du quart traite d'affaires liées au respect de la procédure judiciaire (procès équitable). L'ampleur du phénomène a été tel que la Commission africaine a consacré une bonne partie de ses activités à compléter les dispositions lacunaires de la Charte africaine (notamment l'article 7) à travers des résolutions et des réunions. C'est d'ailleurs suite à une de ces réunions que l'idée d'adopter des directives a fait son chemin. La chance de la Commission est qu'elle a, contrairement à beaucoup de structures sous-régionales de son genre, la possibilité de recourir, dans le cadre de ses activités, aux normes et à la jurisprudence internationales (Art. 60 et 61 de la Charte africaine). C'est ce qui explique le fait que, dans beaucoup de ses décisions, vous verrez des références, non seulement aux décisions des organes des Nations Unies, mais aussi à celles des instances juridictionnelles ou quasi-juridictionnelles des systèmes interaméricain et européen.

J'aimerais, en dernier lieu, souligner le fait que la Charte africaine n'accepte pas de dérogation ni de réserves. La Commission africaine a donc les coudées plus franches pour traiter de ces questions de manière efficace.

A vrai dire, la question du jugement des civils est très importante en Afrique car elle a souvent conduit à des exécutions de civils après des jugements rendus par des tribunaux militaires (Exemple de la Sierra Leone où des civils ont été exécutés pour tentative de coup d'état). C'est peut-être pour cette raison que la Commission africaine a, très tôt, pris la question à bras le corps.

La Commission africaine a conscience de l'évolution du droit et des pratiques internationales sur cette question et exprime, à travers sa jurisprudence, une nette volonté d'appliquer les standards internationaux sur le continent *[Communication* 218/98 *CLO et autres, paragraphe 35]*. Dans une décision contre la Gambie, la Commission africaine a dit que «les autorités compétentes ne devraient pas édicter des lois qui limitent l'exercice (des libertés) ou outrepasser les dispositions de la constitution ou amoindrir les règles de droit international. C'est un principe fondamental qui s'applique aux droits et libertés contenus dans la Charte africaine. Pour qu'un État puisse se prévaloir de cet argument, il doit démontrer que cette loi est conforme à ses obligations à l'égard de la Charte.»*[Communication* 147/95 *et* 149/96 *Sir Dawda* K. *Jawara contre État de Gambie, paragraphe 59].*

Pour terminer cette partie générale, j'aimerais encore dire que la Commission africaine, en même temps qu'elle se déclare opposée au jugement des civils par des militaires, développe dans une de ses décisions [*Communication No218/98 CLO contre État du Nigeria*] l'idée qu'il est parfois difficile de séparer les civils des militaires. Dans un cas de tentative de coup d'Etat qui impliquait également des civils, la Commission africaine a dit qu'« elle n'est pas convaincue que dans cette affaire il était possible de séparer les procès, de même qu'il n'a pas été allégué que les civils ont demandé une telle séparation. Il semble que la cause de la justice civile n'aurait pas été servie par une telle séparation. Dans de telles circonstances et, à cet égard, nous ne sommes pas en position de constater une violation

de l'article 7(1)(d) de la Charte africaine.» *[Communication 218/98 CLO et autres, paragraphe 42]*

Les raisons pour lesquelles la Commission africaine refuse la compétence des tribunaux militaires pour juger des civils sont liées au respect de certaines garanties institutionnelles et procédurales.

Les garanties institutionnelles

Au niveau des garanties institutionnelles, la Commission africaine pose le principe suivant à savoir qu'«un tribunal militaire *per se* n'est pas en contradiction avec les droits stipulés dans la Charte africaine et n'implique pas une procédure injuste et inéquitable. Les tribunaux doivent être soumis aux mêmes exigences d'équité, de transparence, de justice et d'indépendance et de respect de la procédure légale que les autres instances. L'infraction réside dans le fait de ne pas respecter les normes fondamentales susceptibles d'assurer l'impartialité.» *[Communication 218/90 CLO et autres contre Etat du Nigeria, paragraphe 44].*

Quelles sont les règles d'impartialité et d'indépendance identifiées par la Commission africaine?

En ce qui concerne l'indépendance, elle a retenu quatre critères:

1) Mode de désignation des juges

Dans la plupart des cas, ce sont des juges désignés par l'Exécutif. Par exemple, selon la loi soudanaise «le chef de l'État choisit personnellement les membres du tribunal, l'autorité qui confirme les jugements prononcés est le Conseil de gouvernement provisoire qui dirige le gouvernement militaire fédéral dont les membres sont exclusivement des membres de forces armées.». En outre, «les juges sont nommés pour chaque affaire par le pouvoir exécutif et l'équipe comptait une majorité de militaires ou de responsables du maintien de l'ordre, en plus d'un juge en activité ou à la retraite… le système de confirmation par la pouvoir exécutif, par opposition aux appels, constitue une violation de l'article 7." *[Communications consolidées 222/98 et 229/98- Law Offices* of *Ghazi Suleiman c. État du Soudan, paragraphes 61 et 62]*

2) Durée du mandat (inamovibilité)

Dans de nombreux cas, ces tribunaux spéciaux sont créés de manière *ad hoc* et n'ont pas de caractère permanent.

3) Garanties contre les pressions extérieures (statut légal des juges, avis extérieurs)

Le cas du Nigeria est très intéressant car, dans la quasi-totalité des cas, le statut des juges est très précaire et la plupart des juridictions reçoivent des instructions de la part du gouvernement. La Commission africaine a trouvé que cela contrevenait aux règles d'indépendance d'un tribunal.

4) l'apparence ou non d'indépendance du tribunal

"La Commission considère que la sélection d'officiers militaires en activité, sans aucune formation en droit, pour jouer le rôle de magistrats, constitue une violation de l'indépendance du tribunal" *[Communication 224189 Média Rights Agenda contre État du Nigeria, paragraphe 60]*

S'agissant maintenant des questions d'impartialité, la Commission africaine affirme que «la seule composition d'un tribunal donne la mesure, voire même la réalité, du manque d'impartialité et constitue par conséquent une violation de l'article 7 (1)(d) de la Charte africaine.» *[décision 48190, 50191, 52191* et *89/93 Amnesty, Comité Loosi Bachelard, Lawyers*

Committee for Human Rights et *Association des membres de la conférence épiscopale de l'Afrique de l'est contre Etat du Soudan, paragraphe* 68*].*

Elle a également affirmé que "(la) seule composition du tribunal militaire donne la mesure du manque d'impartialité. La comparution et le jugement des civils par un tribunal militaire, présidé par des officiers militaires en activité, qui sont encore régis par le règlement militaire viole les principes fondamentaux du procès équitable. De même, le fait de priver le tribunal d'un personnel qualifié pour garantir son impartialité est préjudiciable au droit d'avoir sa cause entendue par des organes compétents." *[Communications consolidées 222/98 et 229/98 - Law Offices* of *Ghazi Suleiman c. Etat du Soudan, paragraphe 64]*

J'aimerais encore insister sur un aspect. La Commission africaine insiste sur l'importance de la formation des juges comme élément de leur impartialité. Elle dit qu'un juge, quel que soit le tribunal, doit être formé pour rendre la justice. Or, dans la plupart des cas, les juges n'ont pas été formés pour régler les questions qui leur sont présentées. C'est d'ailleurs la raison pour laquelle quand la Commission africaine a examiné les questions d'indépendance et d'impartialité au niveau de ses Principes et Directives, elle a beaucoup insisté sur cette question de formation mais également sur le fait qu'un des éléments qui fait qu'on qualifie une institution judiciaire d'indépendante et d'impartiale est quand ces institutions judiciaires sont dans un système qui permet aussi leur évaluation périodique. Si ce système-là n'existe pas, cela pose des problèmes d'impartialité.

Les garanties procédurales

Il n'y a pas de grandes différences entre ce qui se passe au niveau africain et au niveau des autres systèmes régionaux et internationaux. On retiendra les garanties suivantes contenues dans les décisions de la Commission africaine et les Principes et Directives sur le droit à un procès équitable : les garanties avant et pendant le procès.

Avant le procès, il y a toutes les garanties concernant l'arrestation et la détention. La Commission africaine, à l'examen de ces affaires-là, a beaucoup insisté sur le fait que, parce qu'un certain nombre de garanties ne sont pas accordées aux civils, ces civils ne devraient pas être traités de la même manière que les militaires. Dans beaucoup de pays, notamment au Soudan, en Egypte et au Nigeria, l'accès à un avocat leur est refusé. En Egypte, dans les affaires concernant le terrorisme, on peut arrêter une personne et la garder pendant plus de trente jours sans qu'elle puisse avoir accès à un avocat.

Quant aux garanties concernant le procès lui-même, je soulignerais l'importance de la « publicité de l'audience ». Dans beaucoup de ces affaires, la Commission africaine a insisté sur le fait que la plupart de ces procès se déroulaient à huis clos. D'après elle, le huis clos constitue l'exception et les audiences publiques, le principe. Quand le huis clos est décidé, il doit l'être sur la base d'éléments objectifs et non subjectifs. Or, dans la plupart des cas, on se rend compte que le huis clos est décidé sans le respect de ces règles fondamentales.

Conclusion

Je dirai, en conclusion, que la Commission africaine a, à travers ce processus d'examen des plaintes étatiques, non seulement confirmé le principe selon lequel les civils ne doivent pas être jugés par des tribunaux militaires, mais, en plus, consacré dans ses Principes et Directives un chapitre entier à cette question (la partie L des Principes et Directives

concerne le droit des civils à ne pas être jugés par des tribunaux militaires). En Afrique, peut-être mieux qu'ailleurs, les organes chargés de la protection des droits humains déploient un effort considérable pour compléter les dispositions lacunaires d'un texte -la Charte africaine- qui était au départ un texte de compromis dans un contexte politique dominé par l'absence de démocratie et de culture de respect des droits de la personne. En une quinzaine d'années, la Commission a su faire preuve d'ingéniosité en utilisant les pouvoirs importants que lui confère la Charte africaine pour combler les lacunes de la Charte. La question qui se pose désormais est celle de savoir si la future Cour africaine va suivre cette évolution et imposer aux Etats une refonte de leur législation interne relative aux tribunaux militaires. Nous ne pouvons répondre à cette question aujourd'hui mais espérons que les juges africains seront sensibles à l'effort déjà accompli par la Commission et qu'ils feront tout pour renforcer le dispositif mis en place par celle-ci. Je vous remercie.

"Juzgamiento de civiles por tribunales militares a la luz del derecho internacional de los derechos humanos: la jurisprudencia de la Corte Interamericana de Derechos Humanos[1]"

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Corte Interamericana de Derechos Humanos

Me voy a referir al tema de la evolución de la jurisprudencia de la Corte Interamericana de Derechos Humanos sobre el juzgamiento de civiles por parte de tribunales militares. La Corte se ha detenido en este tema en dos sentencias. Una se refería al **caso Loayza Tamayo** contra el Perú, caso en el cual fue emitida la sentencia de fondo en septiembre de 1997. Posteriormente lo hizo en el **caso Castillo Petruzzi y otros** también contra el Perú en septiembre de 1999. En la primera oportunidad, la Corte eludió pronunciarse sobre la compatibilidad entre la aplicación de la justicia penal militar a civiles y la Convención americana. Concretamente, entre esa aplicación y el artículo 8.1 de la Convención (que ordena que toda persona sea oída con las debidas garantías por un juez o un tribunal competente, independiente e imparcial).

Miremos el caso Loayza Tamayo. Ella había sido capturada y acusada de ser terrorista. Fue sometida a un proceso penal militar, fue absuelta por un tribunal militar y condenada posteriormente por un tribunal ordinario en relación con los mismos hechos. En esa oportunidad la Corte no se ocupó de si la aplicación de la justicia penal militar constituía *per se* una violación del artículo 8 de la Convención. Se concentró en una cuestión diferente y más específica: la violación del articulo 8.2 de la Convención por el Estado peruano dado que, al someter dos veces a juicio a la acusada por los mismos hechos, se había desconocido la garantía del *non bis in idem*. Sin embargo, con la ocasión de ese fallo, dos jueces presentaron un voto separado. De acuerdo con ese voto separado, un tribunal militar especial, compuesto por militares nombrados por el poder ejecutivo, sometidos a la disciplina militar, que asume una función que le compete específicamente al poder judicial, que están dotados de jurisdicción para juzgar no sólo a militares sino también a civiles y que emiten como en el caso de Loayza Tamayo una sentencia desprovista de motivación, actúan de tal manera que no se alcanzan los estándares de independencia e imparcialidad requeridos por el articulo 8.1 de la Convención americana.

Dos años después, la Corte conocía el caso Castillo Petruzzi. Fue un caso que se relaciona con el hecho de que cuatro chilenos fueron capturados en el Perú y acusados de pertenecer a una organización terrorista peruana. Estas personas fueron sometidas a juicios penales militares y condenadas a cadena perpetua. En esta segunda oportunidad, la Comisión Interamericana, al presentar la demanda y al alegar el transcurso del proceso, centró sus baterías en una doble crítica a la actuación del Estado. Primero formuló una crítica contra la imparcialidad y además formuló críticas en el plano de la violación de las garantías del debido proceso por parte de la justicia penal militar. Al hablar de parcialidad de los tribunales penales militares, la Comisión señaló dos cosas. En primer lugar, que los tribunales militares pertenecen al poder ejecutivo y, en segundo lugar, que pertenecen al aparato estatal que enfrenta más directamente a las organizaciones terroristas o subversivas. En estas condiciones, concluyo la Comisión, la justicia penal

[1] This paper is a **transcript** of Judge De Roux's statement during the conference.

militar carece de la imparcialidad necesaria para investigar, juzgar y condenar a civiles y en particular a civiles acusados de terrorismo.

Al despacharse en relación con el tema de las violaciones al debido proceso, la Comisión formuló una amplia lista de reparos señalando que, como correspondía a la naturaleza, a la cultura prevaleciente en el marco de la actuación penal militar, los civiles fueron objeto de los llamados juicios en el teatro de operaciones, que son juicios breves, sumarios en cuyo marco no se garantiza el debido proceso. No entraré en los detalles de las críticas que la Comisión le formuló a las actuaciones de la justicia penal militar en relación con las violaciones a las garantías del debido proceso. Y al fin y al cabo eso no fue el tema del que se ocupó a fondo la Corte. La Corte centró su análisis en la cuestión de la naturaleza de los tribunales penales militares y de las consecuencias que tiene aplicar esa jurisdicción a los civiles. Al respecto, se despachó de la siguiente manera.
Primero reconoció dos hechos aducidos por la Comisión: Que quién nombra a los jueces en la justicia penal militar es el poder ejecutivo y, en segundo lugar, que las fuerzas militares están inmersas en el combate contra los grupos insurgentes. Esas dos circunstancias, concluye la Corte, le restan de una manera radical imparcialidad a los tribunales militares. Insisto: el hecho de que los jueces son nombrados por el ejecutivo y en segundo lugar que se trata de un aparato del ejecutivo que enfrenta directamente a las organizaciones terroristas.
En segundo lugar, la Corte definió en términos positivos para qué debe servir la justicia penal militar acotando al respecto que ha sido creada para mantener el orden y la disciplina dentro de las fuerzas armadas.
En tercer lugar, precisó lo anterior señalando que la justicia penal militar se aplica sólo a los militares que hayan incurrido en delitos o faltas dentro del ejercicio de sus funciones.
En cuarto lugar, declaró que el procesamiento de civiles por la justicia penal militar implica excluir al juez natural del conocimiento de las respectivas causas porque los civiles no pueden incurrir en conductas contrarias a las funciones y a los deberes militares.
Esa sentencia fue de septiembre de 1999, dos años después de un primer pronunciamiento en que la Corte había omitido el ocuparse de la cuestión de la naturaleza y el carácter de los tribunales militares y de la violación del articulo 8.1 de la Convención que podría producirse por el hecho de juzgar civiles por militares.

¿Cómo es previsible que evolucionen las cosas? Mi impresión personal es que la Corte habrá de introducir desarrollos adicionales a estos pronunciamientos de carácter general a propósito de ciertas situaciones que se presentan en el hemisferio. La que me parece más importante comentar, por la riqueza de sus posibles implicaciones, es la que se relaciona con países en los cuales los militares no juzgan a civiles pero en los cuales miembros de las instituciones militares participan en las actividades de investigación de civiles en el marco de procesos penales conducidos por jueces civiles. Esa situación ha tomado especial relevancia en el caso colombiano y voy a dedicar los minutos que me quedan a reflexionar sobre eso.

En Colombia, la Constitución previa a la actual, que era una Constitución de 1886, no prohibía expresamente el juzgamiento de civiles por parte de los militares. Sin embargo, en 1986, la Corte Suprema de Justicia, interpretando la Constitución, llego a la conclusión de que el juzgamiento de civiles por parte de tribunales militares violaba la Constitución. Esta fue una construcción jurisprudencial, una construcción basada en una particular interpretación de la Constitución vigente. El tema quedó radicalmente zanjado en 1991 porque al expedirse la Constitución de ese año, que es la actualmente vigente, se estableció con toda claridad que los civiles no podrían ser juzgados por tribunales militares. Se prohibió el juzgamiento de civiles por parte de militares. No obstante, con

posterioridad de la expedición de esta segunda constitución, fue emitido un decreto de acuerdo con el cual a las fuerzas militares se las dotó de facultades de policía judicial. Es decir, de la posibilidad de actuar como auxiliares de los jueces, decretando, practicando, controlando, custodiando, evaluando pruebas. La Corte constitucional consideró en dos oportunidades que el otorgamiento de facultades de policía judicial a las fuerzas militares contravenía la prohibición de que los civiles fueran juzgados por los militares. Es decir, consideró que el ejercicio de facultades de policía judicial por los militares, en el marco o al servicio de procesos conducidos por jueces civiles, contravenía la prohibición de juzgar civiles por parte de los militares. En otras palabras, estimó que esas facultades de alguna manera estaban estructuralmente incorporadas a las labores propias del poder judicial. El punto dio lugar a muchas discusiones. Para algunos no está claro que la policía judicial ejerza labores cuasi judiciales. De todas maneras, la Corte constitucional se mantuvo en su posición y esto a pesar de grandes presiones que se ejercieron en el país sobre ella y sobre otras instancias para dotar a las fuerzas militares de facultades de policía judicial. Las fuerzas militares han reclamado insistentemente el otorgamiento de esas facultades y han señalado que, en la lucha contra los grupos subversivos, es una herramienta fundamental para ellas el poder contar con facultades de policía judicial. Al respecto se suele señalar con frecuencia que en los enfrentamientos entre la fuerza pública y los grupos subversivos, sobre todo en regiones apartadas, es difícil contar con un colaborador de policía judicial, en particular de la policía judicial directamente dependiente de la Fiscalía General de la Nación, a efectos por ejemplo de controlar la escena donde se producen los combates, donde hay muertos, donde hay que levantar los cadáveres, donde hay que tomar pruebas de muy diversa naturaleza, recaudar testimonios, recuperar evidencias, custodiar esas evidencias para ser entregadas después a los fiscales y a los jueces. Entonces, las fuerzas militares han dicho una y otra vez que requieren de facultades de policía judicial. Pero ha habido mucha prevención al respecto. Se recuerda la época en que los militares juzgaban a los civiles y recaudaban pruebas para los efectos de la acusación y el enjuiciamiento de civiles. Se recuerda que en esas épocas la fuerza pública ejerció esas facultades de policía judicial de una manera que se violaban las garantías del debido proceso y que en no pocas oportunidades, en un marco de hostilidad y de paranoia en la lucha contra la subversión, llegaron a producirse pruebas falsas que después se cayeron cuando los fiscales y los jueces civiles se ocuparon de la tramitación de las respectivas causas. Se trata de un punto de mucha sensibilidad, el del otorgamiento de facultades de policía judicial a las fuerzas militares.

En términos de la normatividad interna, el asunto ha quedado zanjado por el hecho de que el ejecutivo ha promovido una reforma de la Constitución que consiste en lo siguiente: se mantiene el principio general de que los civiles no podrán ser juzgados por los militares pero, en una norma más específica, se otorga a las fuerzas militares facultades de policía judicial. Es una reforma que ha sido promovida por el gobierno del Presidente Uribe, que ha contado con el beneplácito de las fuerzas militares y que próximamente entrará en vigencia una vez que se produzca la norma legal reglamentaria. La pregunta que se me ocurre a mí y que tarde o temprano llegará a la consideración de la Corte Interamericana es si, independientemente de lo que haya ocurrido con el régimen constitucional colombiano, ese otorgamiento de facultades de policía judicial a las fuerzas militares viola o no el artículo 8.1 de la Convención americana bajo o de acuerdo con la interpretación que la Corte Interamericana le ha dado a ese artículo 8.1.

De acuerdo con esta interpretación los tribunales penales militares no pueden juzgar a los civiles. Así están planteadas las cosas en el ámbito hemisférico y creo que podemos estar a la espera de desarrollos y de concreciones de esta muy importante definición de la Corte interamericana de acuerdo con la cual los civiles no pueden ser juzgados por tribunales

penales militares. Porque de hacerlo, el respectivo Estado incurrirá en responsabilidad internacional como violador de la Convención americana. Gracias.

<u>Session:</u> Military criminal procedure and jucidical guarantees of military personnel accountable for military offences

Brigadier T K Githiora
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Introduction

1. Today there is a wide acceptance that international law is concerned with the continuing capacity of a population freely to express and effect choices about the character and policies of those who govern it. Thus emphasis is on the protection of the people through creation of institutions capable of safeguarding the concept of "the popular will". Political legitimacy and governmental authority are based on popular support.

The Universal Declaration of Human Rights whose driving force was the desire to accord basic protections to the common people based on the "dignity" and "worth of the human person" sought to encourage respect for others and peace. The Declaration's principles are repeated in many other international Conventions and instruments and are incorporated in domestic laws throughout the world. Military Institutions have included the principles in their organizational and operational structures and procedures as well as their disciplinary law systems.

Human rights and Military discipline

2. The armed forces enjoy human rights in much the same way as the public subject to differences which are justified by the nature of military service. Accordingly, exceptions are made to enjoyment of several rights including political rights, freedoms of expression, movement and assembly. There is compensation for the curtailment of those rights which is provided in safeguards such as the disciplinary process, system of review and the Redress of Complaints System. Emphasis has however grown on the right of all persons including members of the armed forces to enjoy all fundamental human rights. Changes are increasingly being made to military law, procedures and rules in order to comply with these standards. The pressure for change has concentrated for many good reasons on the military justice system.

Accountability and transparency in the military disciplinary system can only be properly addressed in the context of the traditions and character of the professional military organisation. Two principles are fundamental to the professional military organisation; *the ability to discipline itself and the accountability of the military com1J1ander* for command and the troops assigned to his command. Without discipline an army cannot achieve its purpose which is to win. A distinct military justice system which has portable service tribunals capable of operating promptly in peace or conflict both at home and abroad is essential to military discipline.

Military Justice

3. The military justice system consists of **summary trial, Review** and **Petitions, Courts martial and Appeals.** Although administrative in character the **Redress of Complaints System** forms part of military justice. This complaints system which progresses through levels of command to Service Commanders, Service Boards and the Defence Minister is in addition to other regulated processes of pursuing remedies. A military justice system, and indeed a country's system of justice, is dependent for its growth and development on factors such as the economic situation (reflected in the distribution of resources and competition for them); politics and existence of contests for power, strains in society caused by ethnicity or religious differences and other factors peculiar to a particular society. Where the developmental struggle is compounded by one or more of these factors a country may experience little challenge at least to its military justice system calling for statutory or regulatory change. National priorities lie elsewhere. On the other hand in many developed countries where priorities are necessarily different, changes to the military justice system have been rapid as has been evident in recent years in response to the evolving world strategic order. The relationship between society and its military forces has changed and there is closer scrutiny of military systems and accountability.

4. A military accused person is subject to loss of liberty or property when the power to investigate or inquire into an accusation is exercised. This power affects his rights or interest. The whole process of inquiry is therefore *judicial* and the exercise of any power in this process whether it is administrative or executive must be fair and the principles of natural justice must apply.

Summary Trial

5. Non-judicial punishment or summary trial is administrative disciplinary action by a commander for military offences and other minor infractions and in most criminal systems the punishment awarded does not constitute a criminal conviction. This system involves the investigation and disposal of an offence under the relevant armed forces Code of discipline often a law enacted by Parliament. In the example of Kenya's military the Commanding Officer, traditionally the leader and father figure to the soldiers in his command, is the disciplinarian. For those offences he may be empowered by law to dispose of summarily in the case of NCO's and below, the punishments range from dismissal from the service, confinement for up to 42 days, reduction in rank, fines, reprimand and admonition. Safeguards available to the accused include:

a. **Arrest**- There is a mandatory obligation **to charge a suspect within 24 hours**. Delays beyond 8 days are possible to facilitate preparation of trial by court martial but subject to a **special report by the CO**. The delay must not exceed a total of 72 days (a report must be submitted every 8 days)

b. **Trial**- The CO hears the evidence in the presence of the accused who may **question witnesses**. Alternatively the CO may order the taking of an abstract of evidence and thereafter read the witness statements to the accused. The accused has **a right to demand the presence of witnesses** for cross-examination and he may **call defence witnesses**.

c. **Punishment** - Accused has **a right to elect trial by Court Martial** where the punishments intended are dismissal/ loss of seniority, fine or reduction in rank.

Punishments of dismissal and reduction in rank are **subject to confirmation by the Commander** of the service to which the accused belongs.

d. Where the summary procedure is against an officer before an **Appropriate Superior Authority** safeguards include:

(i) **Jurisdiction -** Only limited offences may be dealt with summarily.

(ii) **Investigation** - An abstract of evidence must be compiled and **handed to the accused 24 hours before trial.**

(iii) **Trial** - An accused may **demand the presence of witnesses** for cross-examination.

(iv) **Punishment** - There is a right to **elect trial by Court Martial**

e. **Review** - Any charge dealt with summarily and not dismissed may be **reviewed at any time by an authority superior in command to the trying officer.** The highest Reviewing authority is the Defence Council whose Chairman is the Minister for Defence and members include the Assistant Minister, CGS, service Commanders and the Permanent Secretary of the Ministry of Defence.

Where on review an award of punishment is substituted to the prejudice of the accused, **he is entitled to be heard in person** or by written submission.

Court Martial

6. The procedural safeguards guaranteeing a fair trial built into the court martial system are the following:

- The decision to refer a case to a Court Martial is made by the Commanding Officer after charges have been investigated and an abstract of evidence compiled. **Legal advice** is provided to investigators. The Convening Officer seeks **legal advise** from Military legal officers before convening the Court Martial. He ensures that the accused has the services of a **defending officer**. For capital offence cases a **lawyer is appointed** at public expense. The Convening Officer takes steps for the **appointment of a Judge Advocate** who is a member of the judiciary or a senior legal practitioner and appoints the court Martial members care being taken to consider seniority and discipline of the members.

Court Martial members **swear an oath** to try the accused in accordance with the law. The oath is a central feature of the members' independence and is intended to ensure a **fair trial** uninfluenced by considerations other than evidence and the law.

The findings and sentence of the Court Martial are subject to **confirmation by the Convening Officer** who may exercise the right to quash a conviction or reduce sentences. In exercising this function, the Convening Officer receives legal advise from military legal experts.

7. **Appeals** - There is a **right of appeal** to the High Court (A Court Martial Appeal Court) against conviction. The **High Court is independent** and presided over by civilian judges with Constitutional guarantees of Security of Tenure. This provides a convergence between military and civilian criminal justice processes and ensures **uniform standards of justice** for the two processes.

It is to be noted that a court martial is subject at all times to the supervisory jurisdiction of the High Court. Its decisions are reviewable by the High Court.

8. **Review and Petitions** - there is **automatic review** of Court Martial proceedings by a "Reviewing authority" which is higher than the Convening Officer. A Review remains in

abeyance awaiting the outcome of an appeal when one has been filed. An accused is entitled to file a petition against sentence through Command channels.

Modern Trend Towards Change

9. The history of military disciplinary law has evolved from an unquestioning acceptance that military discipline places limitations on certain rights and freedoms of members of the armed forces incapable of being placed on civilians but which were in the interest of good order, discipline and fulfillment of the military mission. Today the demand is that military justice provisions and processes must be reconciled with Constitutional protections of "a fair trial held in public" so that Military tribunals are seen to be "independent" and "impartial" in the modern context of a modern judiciary which is the product of the separation of powers principle. These requirements for fairness, independence and impartiality have extended to the whole process of investigation and disposal of service offences by summary procedure before commanding officers, the process of review and the Court martial system.

10. The experiences of the United Kingdom and many other countries including South Africa and Canada in the last decade point to the need for countries like Kenya who inherited the British military justice system to review military law and strengthen judicial guarantees in the military justice system in response to demands for the full enjoyment of "human rights" by members of the armed forces. New legislation implementing international human rights principles is quickly taking root in many countries making changes to the military justice system quite urgent.

It is clear that attention will continue to focus on :

a. **Arrest** - Stricter observance of standards limiting periods spent in close arrest and requiring **speedy trial** of offenders. Release from **pre-trial custody** will be the task of a military judge or appropriate judicial review process.

The Military Police will require proper legal controls and guidance for the proper exercise of the power of arrest and investigation.

b. **Summary trial -** Participation of counsel in this process will be required to safeguard the rights of an accused. Controls should be necessary on Commanding Officers' jurisdiction over offences; punishments should be limited and. more offences should be referred to a prosecuting authority. More and more the Commanding Officer's powers will be reduced in the pursuit of independent and impartial processes of trial.

c. **Review Process** - Care should be taken to ensure applicability of the principles of natural justice. An applicant must receive a hearing by an impartial authority which is supported by independent legal advice. This process which includes the complaints system should preferrably be given the character of a judicial process. Reasons should be given for decisions made on Review.

d. **Courts Martial** - Separate the Command from prosecutors, defence, judge advocates and the actual court martial constitution and administration responsibilities.

The current powers of the Convening authority over prosecutors, defence, judge Advocates, court members, court administration and the confirmation process are not consistent with the requirements for an independent and impartial Court- Martial.

The manner of appointment of court members and their terms of office do not guarantee impartiality. The Convening authority's powers of confirmation fail to respect the principle that a tribunal's binding decision should not be altered by another non-judicial authority.

The judge advocate should be independent and a full member of the Court-Martial. He should determine all legal questions and his rulings should bind the court.

Conclusion

11. Judicial guarantees for serving military personnel are today receiving the type of attention that they have for far longer received in ordinary criminal judicial process for civilians. It is essential that the armed forces move with appropriate urgency to accommodate changes to its various components of the military justice system. Those changes when properly researched and introduced through timely and comprehensive legislation will strengthen military discipline and not weaken professionalism. Military legal advisers will be required to play a central role in this process. They will need to closely support the co-ordination necessary between the command and various authorities established to prosecute, defend and try serving personnel charged with military offences.
12. The judicial nature of the inquiry, trial and review processes which constitute the military justice system will always demand the guarantees of fairness, impartiality and independence which must be seen in practice through faithful application by Commanders, the military police, prosecutors, judge advocates, court martial members and review authorities. The task is urgent.

January, 2004

"Military criminal procedures and judicial guarantees: the example of Switzerland"

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1. Introduction

Since the Nuremberg and Tokyo Trials held by the Allies to try war criminals responsible for the atrocities committed during WWII, not much attention has been devoted to military tribunals.[3] Only with the creation of the UN Tribunals for the Former Yugoslavia and Rwanda (ICTY and the ICTR), the civil society has started reconsidering the question of which fora may be better suited to try individuals responsible for war crimes and other gross human rights violations. The US war against terrorism and their intention to try the suspects detained in Guantanamo Bay (Cuba) in military courts, or to be newly constituted special military commissions, has contributed to furthering the debate. Civil society's current view seems to be very critical of military justice systems, claiming that these should be abolished in favour of civil courts, which are subject to public and democratic scrutiny, and, allegedly, more respectful of fair trial principles.

The aim of this paper is to rebut this criticism by illustrating the Swiss military judicial system. It will analyse the judicial guarantees provided for in the Swiss Military Penal Code (MPC)[4] and Code of Military Penal Procedure (CMPP).[5] It will also explain the categories of crimes and persons falling within the jurisdiction of the Swiss Military Tribunals (MTs) and the repartition of competencies between the military and ordinary courts. Due to Switzerland's neutrality, there have been no cases involving Swiss members of the armed forces in war crimes trials. Therefore, the respect of judicial guarantees under these circumstances will be discussed by reference to the only two war crimes trials held by the Swiss MTs, i.e. the *G Case*[6] and the *Niyonteze Case*,[7] which involved civilians of foreign nationality. These precedents will prove that military fora may be also suitable to try civilians charged with war crimes.

The paper will be structured as follows. After the introduction, part two will briefly illustrate the organisation of the Swiss military justice system, and explain the jurisdiction (rationae materiae and rationae personae) of the Swiss MTs pursuant to the current and proposed new legislation. The Swiss MPC and CMPP, in fact, are under revision. Part three will discuss the implementation of international fair trial standards into the Swiss military penal laws, giving some examples of their application in the jurisprudence. A particular section will be devoted to the analysis of the judicial guarantees that came into play in *the G Case* and the *Niyonteze Case*. Part four will discuss the necessity of the

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[3] The cases were dealt respectively by the International Military Tribunal of Nuremberg and the International Military Tribunal of the Far East, which consisted of a joint enterprise of the Allies, based on their joint jurisdictional powers.

[4] Military Penal Code (MPC), RS 321.0, available at http://www.admin.ch/ch/d/sr/c321_0.html.

[5] Code of Military Penal Procedure (CMPP), RS 322.1, available at http://www.admin.ch/ch/d/sr/c322_1.html.

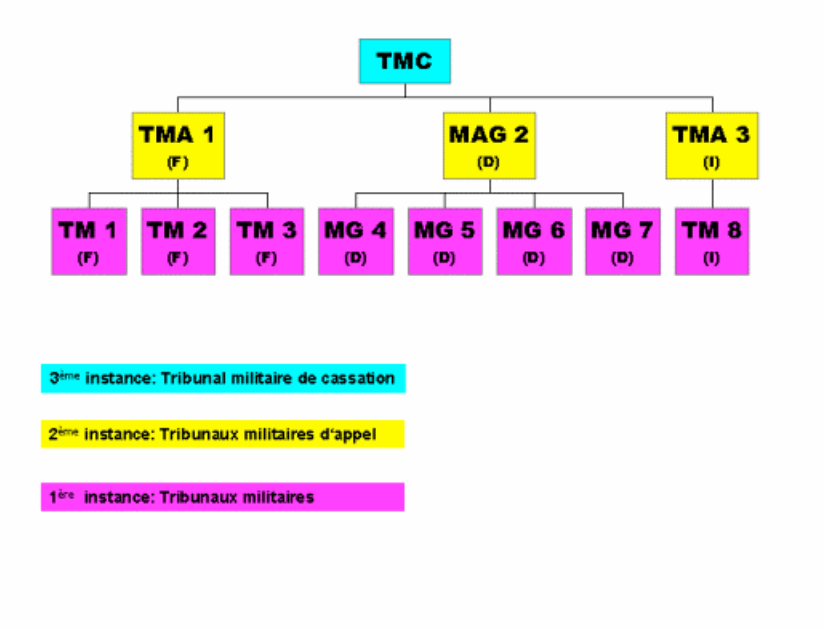
[6] *G Case*, Judgement of the Divisional Military Tribunal I, 14-18 april 1997, Lausanne, at http://www.vbs-ddps.ch/internet/groupgst/de/home/peace/kriegsv0/umund/chrechtsprechung.html.

[7] Swiss Military Justice, Information Service, ‚Affaire Fulgence Niyonteze', Jugement rendu par le Tribunal de Division 2, 30 April 199 (Extrait). This judgement (unpublished) was put at the disposal of the author by gentle concession of Office of the Military Attorney General. The MAT and MCC decisions, however, are available at http://www.vbs-ddps.ch/internet/groupgst/de/home/peace/kriegsv0/umund/chrechtsprechung.html.

existence of military tribunals, looking at their the pros and cons, whereas the fifth and final part will draw the conclusions.

2. The Swiss Military Justice System

2.1. Structure[8]



The Swiss military justice (MJ) is mainly governed by the 1928 Military Penal Code and its amendments (MPC) and the 1979 Code of Military Penal Procedure (CMPP) and its amendments.[9]

There are eight[10] Military Tribunals (formerly known as Divisional Tribunals[11]) of first instance. Three seat in French, four in German, and one in Italian. There are respectively three Military Appeal Tribunals (MAT),[12] one per linguistic region. Each of them has a committee. The MAT decide on appeals against first instance judgements, whereas the committees decide on objections concerning disciplinary measures.[13] At the highest level there is the Military Court of Cassation (MCC). This has the same authority of the Swiss Federal Tribunal. Among others, it rules on conflicts of jurisdiction between the different MTs.[14] The system is headed by the Military Attorney General (*Oberauditor*), a Brigadier who, together with the other members of the court, are appointed by the Swiss Federal Council. He holds a four-year-mandate and responds to the Swiss Department of Defence. His tasks are the supervision of the correct functioning of the system[15] and the performance of prosecutorial roles in military court proceedings. He has extensive powers in procedural matters, which will be discussed in more details later.

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[8] Source: Website of the Swiss Military Justice, at http://www.vbs-ddps.ch/internet/vbs/fr/home/rund/oa011/oa006.html

[9] Another important regulation is the Military Criminal justice Order (MCJO) of 24th October 1979 (RS 322.2), as modified on 29th October 2003 (in force since 1.1.2004), Available at http://www.admin.ch/ch/d/as/2003/4541.pdf (Amtliche Sammlung (AS) 2003, 4541).

[10] Art. 13 MCJO, supra, note 9.

[11] The term was changed with the modification of 29th October 2003 of the MCJO, supra, note 10, Art. 1(1).

[12] Art. 17 MCJO, supra, note 10.

[13] Art. 18 MCJO, supra, note 10.

[14] Art. 32 Code of Military Penal Procedure, (CMPP), supra, note 5, RS , and Art. 26 of the MCJO, supra, note 10.

[15] Art. 20(1) MCJO, supra, note 10.

All courts are headed by a president (usually with the rank of a colonel of the military justice). The judge advocates (*Auditoren*) usually hold the rank of Lieutenant Colonel or Major, whereas the examining magistrates (*Untersuchungsrichter*) must hold the rank of Major, Captain or Specialist Officer (*Fachoffizier*). The Court clerks can currently be non-commissioned officers, or simple soldiers. They no longer have to be Specialist Officers.[16] Judge Advocates are responsible for bringing the charges to the court and can sit as single judges in cases involving offences punishable with a maximum of one month's imprisonment or a fine of maximum 1000 Swiss Francs.[17]

The competence of these tribunals depends on the incorporation of the accused. This means that they are attached to a military unit and have jurisdiction over every serviceman belonging to that unit, regardless of where the offence was committed. This is one of the advantages with respect to ordinary cantonal tribunals, which have a territorial competence. Since the accused may have been incorporated into a unit of language different from his mother tongue, the Military Attorney General may delegate the case to a tribunal working in his language.[18] The Swiss MJ is composed only by career members of the military or citizens doing their compulsory military service. With the exception of the Military Attorney General (MAG), no MJ member holds his/her own position as his/her main job. This structure is the same in peace- and wartime.

Since the president of each military court is always accompanied by two officers and two non-commissioned officers, who are fresh of experience with the troops, and therefore have an updated knowledge of the military duties and system, it is guaranteed that the accused will be tried by peers who are additionally competent and specialised lawyers.

2.2. Jurisdiction

The Swiss military and ordinary penal codes are under revision.[19] The aim of this revision is to reconsider the repartition of competencies of the civil and military tribunals for the trying of suspects of violations of international law, and to draft more specific international crimes provisions, in order to fully implement the Statute for an International Criminal Court (ICC).[20] Therefore, the following paragraphs will illustrate the jurisdiction of the MTs under the current and proposed legislation.

A common feature is the general rule that military penal laws can be enforced only by MTs. Only in exceptional cases can the Military Attorney General delegate to civil courts the competence to try persons subject to the military justice.[21] On the other hand, the application of the ordinary Penal Code (PC) generally rests with the civil courts.

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[16] New art. 2 CMPP, modified on 4th October 2002, in force since 1.1.2004. At http://www.admin.ch/ch/d/as/2003/3957.pdf, in the Appendix to the new Military Law (Amtliche Sammlung 2003, 3957)

[17] Information available on the website of the Swiss MJ, at http://www.vbs-ddps.ch/internet/vbs/de/home/rund/oa011/oa006.html (in German and French) and http://www.vbs-ddps.ch/internet/vbs/de/home/rund/oa011/oa007.html (in German and French).

[18] Website of the Swiss Military Justice, http://www.vbs-ddps.ch/internet/vbs/de/home/rund/oa011/oa004.html.

[19] The Department of Justice and Police, the Department of Defence, Protection of the Population and Sport, and the Department of Foreign Affairs are currently working on the draft proposal.

[20] Switzerland signed the Statute of the ICC on 18th July 1998 and ratified it on 12th October 2001. The ICC Statute came into force on 1st July 2002. The ICC has jurisdiction over the most serious crimes of international law: war crimes, crimes against humanity, genocide and aggression (still to be defined). With the inclusion of the crime of genocide in the Swiss Penal Code (Art. 264) in 2000 and the general description of war crimes in Art. 109ss of the Swiss Military Penal Code, Swiss legislation is well prepared to deal with two of the three categories of crimes currently dealt with by the ICC. What still needs to be further implemented, in particular, is the category of crimes against humanity. For futher info on implementation, see the website of the Swiss Federal Office of Justice, at http://www.ofj.admin.ch/e/index.html .

[21] Art. 221 MPC, supra, note 4, and Art. 46 (2) CMPP, supra, note 5.

Exceptions are provided for in Art. 218(3) MPC, for violations of the Federal Laws on Roads and Traffic,[22] and Art. 218 (4) MPC for minor violations of the Federal Laws on the Use of Drugs,[23] such as the intentional use of small quantities of drugs[24] and preparatory acts to this while in duty.[25] The Swiss Federal tribunal is competent to decide about jurisdictional conflicts between the ordinary and military tribunals.[26] This issue was raised in the *Sommacal Case*, which will be discussed later.

2.2.1. Jurisdiction pursuant to the current legislation

The personal and material jurisdiction of the Swiss MTs can be summarised as follows[27]:

Type of crime	Norms	Author	Type of protected object
Purely military crimes	Art. 61-85	military personnel	military
Crimes vs. the national defence	Art. 86-107	everyone	military
Violations of the laws of nations/int. law	Art. 108-114	everyone[28]	civil
War crimes against the patrimony	Art. 138-140	everyone	civil
Common crimes (which are parallel to the ones contained in the Civil Penal Code	Art. 115-137b Art. 145-179a	military personnel	civil
	Art. 141-144	everyone	military/civil

Not to be confused with these are the *purely ordinary crimes*, which are those enshrined only in the Swiss Penal Code (PC).

As a general rule, only *military personnel* is subject to the Swiss MJ. Pursuant to Art. 6 MPC, exceptions apply for crimes committed by civilians concerning attempts to national defence (Art. 86-107) and breaches of international law (108-114 MPC).

2.2.1.1. Jurisdiction rationae materiae: the different categories of crimes

As seen, there are several categories of crimes, restated also in Articles 6 and 220 MPC. The focus of this paper is on military crimes and war crimes, which can be considered military crimes, too, in a large sense.

[22] Loi fédérale du 19 décembre 1958 sur la circulation routière, SR 741.01, at http://www.admin.ch/ch/f/rs/c741_01.html .

[23] Loi fédérale du 3 Octobre sur les stupéfiants et les substances psychotropes, RS 812.121, at http://www.admin.ch/ch/f/rs/c812_121.html

[24] Severe violations of the law on the use of drugs are subject to civil jurisdiction. Art. 218(4) MPC, supra, note 4

[25] In this latter case disciplinary sanctions may be enacted by the disciplinary authorities. As a rule, the military justice is not invoked.

[26] Art. 223 MPC, supra, note 4.

[27] Source: S. Flachsmann et al., *Tafeln zum Militärstrafrecht*, (Zürich: Schulthess Polygraphischer Verlag)(1999), at 53. See also Articles 6 and 220 of the Swiss MPC, supra, note 4.

[28] The author, who belongs to a minority, believes that civilians shall be liable of war crimes only if they had a link to one of the parties to the conflict. Roberta Arnold, The liability of civilians under IHL's war crimes provisions', in A. McDonald & others, *Yearbook of International Humanitarian Law*, (The Hague: TMC Asser Press)(2001)(3), (forthcoming). On this see also Peter Popp, *Kommentar zum Militärstrafgesetz vom 13.Juni 1927-Besonderer Teil*, (St. Gallen: Dike Verlag)(1992), at 559, para. 35 (comments on the active personal scope of application of Art. 109 of the MPC, supra, note 4).

a. Purely military crimes

The first category is that of so-called *purely military crimes* (Art. 61-85 MPC). These are divided into four sub-categories:

Sub-categories of purely military crimes	Provisions	Description
Crimes Vs the military hierarchy	Art. 61-65	Art. 61: disobedience Art. 62: assault and threat Art. 63-64: mutiny and preparation thereof Art. 65: crimes against guards
Abuse of duty powers	Art. 66-71	Art. 66: abuse of the power to give orders Art. 67: excess of the power to impose penal sanctions Art. 68: suppression of complaints Art. 69: arrogation of the right to give orders Art. 70: endangerment of subordinates Art. 71: assault and threat
Violation of duty	Art. 72-80	Art. 72: disregard of official instructions Art. 73: abuse and dissipation of material Art. 74: cowardice Art. 75: capitulation Art. 76: crimes related to guard duties Art. 77: violation of official secrets Art. 78: falsification of official documents Art. 79: failure to notify a crime Art. 80: drunkenness
Violation of the obligation to perform duty	Art. 81-85	Art. 81: Refusal to perform military duties and desertion Art. 82: failure to perform military duties and unauthorised leave Art. 83: negligent failure to perform military duties Art. 84: disregard of a military service call up Art.85: unauthorised absence

Purely military crimes are those which can be only committed within the framework of military life, such as the non-observance of military hierarchies (disobedience, mutiny) and duties (desertion, cowardice).[29] These cannot be generally perpetrated by a civilian who has not been enrolled. Since civilians are not allowed to participate in combat,[30] also desertion and cowardice can only be committed by military personnel.

b. Crimes against national defence

The crimes against national defence (Art. 86-107 MPC) include espionage, breaches of neutrality, performing of military service in foreign armies, and the disturbance of military security. They can be committed both by military and civilian personnel.[31]

[29] For details see P. Popp, supra, note 28, at 131ss.

[30] See R. Arnold, ‚Training with the opposition: the status of the „Free Iraqi Forces" in the US' war against Saddam Hussein', 2003 (63) 3 *Heidelberg Journal of International Law* 631, 642.

[31] For details see P. Popp, supra, note 28, at 345ss.

c. War crimes and violations of international treaties

The third category is that of violations of international law committed during an armed conflict (international or non-international).[32] It encompasses the following offences:
- Art. 109: violation of the laws of war
- Art. 110: abuse of protective signs
- Art. 111: hostilities against internationally protected persons and things
- Art. 112: violation of the duties towards the enemy
- Art. 113: breach of an armistice or peace
- Art. 114: offence against parliamentarians.

Article 108 MPC[33] provides that these provisions shall apply in all cases of *international* armed conflicts, violations of the principle of neutrality (not only attempts to Swiss neutrality)[34] and resort to force to neutralise such attacks.[35] Paragraph 2 specifies that the violation of international treaties is moreover punishable when these treaties provide for a *wider* scope of application. This holds true, for instance, for violations of the Hague Convention of 14th May 1954 for the Protection of Cultural Property in the Event of Armed Conflict[36] and Art. 3 common to the 1949 GCs and Additional Protocol II of 1977, which apply also in non-international conflicts.[37]

Article 109 MPC provides for the repression not only of the *most serious* breaches of international humanitarian law, as required by the 1949 GCs and their Additional Protocols of 1977, but *every* violation thereof,[38] including violations of customary law.[39] In this sense, the Swiss Military Penal Code goes further than international law.[40] In order to guarantee equitable sanctioning, paragraph 2 of Article 109 provides that less severe violations may be punished with disciplinary sanctions. This may apply, for example, when a prisoner of war did not receive the pay foreseen by Article 60 of the III Geneva Convention of 1949.[41] At current stage, only the Swiss MTs are competent to try violations of the laws of war.[42]

Although these crimes constitute a distinct category, it may be argued that they are military crimes, too. In fact, although modern conflicts witness the increasing involvement

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[32] For details see P. Popp, supra, note 28, at 538ss.
[33] Art. 108 MPC, supra, note 4: (original French version)
[1] Les dispositions de ce chapitre sont applicables en cas de guerres déclarées et d'autres conflits armés entre deux ou plusieurs Etats; à ces conflits sont assimilés les atteintes à la neutralité, ainsi que le recours à la force pour repousser de telles atteintes.
[2] La violation d'accords internationaux est aussi punissable si les accords prévoient un champ d'application plus étendu.
[34] P. Popp, supra, note 28, at 543, para. 4.
[35] P. Popp, supra, note 28, at 543, para. 4. See also *Niyonteze Appeal Case*, held by the Swiss Military Appeal Tribunal 1A, decision of 26th May 2000, at 27 (decision available online at http://www.vbs-ddps.ch/internet/groupgst/de/home/peace/kriegsv0/umund/chrechtsprechung.html).
[36] Some provisions apply already in peacetime. See Art. 9 and 18. Available at http://www.icrc.org/ihl.nsf/0/ea805b1d46112374c125641e004ac0a3?OpenDocument . P. Popp, supra, note 28, at 544, para. 6.
[37] Marco Sassoli, ‚Le génocide rwandais, la justice militaire suisse et le droit international', 2002 (2) *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 151, 164.
[38] Marco Sassoli, supra, note 37, at 162.
[39] *Niyonteze Appeal Case*, supra, note 35, at 28.
[40] On the several categories of violations of IHL and their repression (disciplinary or penal measures), see R. Arnold, 'The development of the notion of war crimes in non-international conflicts through the jurisprudence of the UN ad hoc tribunals', (2002) 3 *Humanitäres Völkerrecht-Informationsschriften* 134, at 135. Available at http://www.ruhr-uni-bochum.de/ifhv/publications/huvi/arnold.pdf .
[41] See Marco Sassoli, supra, note 37, at 162.
[42] Art. 29(2) CMPP, supra, note 5.

of civilians, the laws of war were primarily drafted for members of regular armed forces. This is proven by the rule of international law, that civilians who take up arms may be tried under ordinary criminal law for unlawful participation in combat.[43] This rule still applies today. However, the procedural difficulties raised by ordinary criminal procedures, such as the fact that in many countries, a suspect can be detained without specific evidence for a maximum of one or two days, have led some governments to apply the laws of war – or at least their penal provisions – also to civilians.[44] The reason is that if a civilian is charged with war crimes, and is therefore considered a subject bound by the laws of war, he may be also considered a combatant who can be detained with no specific charge until the end of the hostilities. This is the scenario that occurred in relation to the terrorist suspects detained in Guantanamo Bay.[45] However, as said, the laws of war were originally drafted to guarantee the protection of military personnel engaged in combat and their observance of military order. Thus, it could be argued that war crimes are military crimes, too. The same holds true for the crimes against the patrimony, addressed in Art. 129-140.

The final category is that of common crimes, addressed in articles 115-137b and 141-179a CMPP. These offences are those which can be found also in the civil penal code. Examples are murder (Art. 115 MPC), personal injury (Art. 121-122 MPC), theft (Art. 132 MPC), slander (Art. 146 MPC), or sexual crimes (Art. 153-159b MPC).

2.2.1.2. Jurisdiction rationae personae: the different categories of persons subject to Swiss Military Jurisdiction

As a general rule, Swiss military penal laws apply to Swiss military personnel. However, under some circumstances, there may be other categories of people subject to them. Art. 2 MPC summarises these categories:

1. Persons who have the obligation to serve in the Swiss Armed Forces:
   1.1. for acts committed while on duty (an exception applies to those on leave, for violations of Art. 115-137 and Art. 147-179 MPC unrelated to their military service)
   1.2. for acts committed off duty, such as:
      - violations of Art. 61-114 and Art. 138-144 MPC, if they were wearing the uniform.
      - violations related to their military situation and service duties.
   1.3. for failure to present themselves at the recruitment and during the military service
2. Persons who form part of the fortification guards, for acts committed while on duty, and for acts committed off duty but related to their military obligations or committed while wearing the uniform.
3. Persons who perform peace support operations abroad, pursuant to Art. 66 of the Swiss Federal Law of 3rd February 1995 on the army and the military administration, also for acts committed off duty but related to their obligations and service function, or committed while wearing the uniform.
4. Civil servants, employees and workers of the military administration of the Swiss Confederation and cantons, for acts concerning national defence.

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[43] On this, see R. Arnold, supra, note 30, at 642.

[44] On the problem of the liability of civilians for the commission of war crimes, see R. Arnold, supra, note 28. For a debate on whether civilians may be liable only if they had a link to one of the parties to the conflict, or whether a link to the conflict itslef is sufficient, see also Peter Popp, supra, note 28, at 140-141, and M. Sassoli, supra, note 37, at174. The latter shares the views both of ICTR's Appeal Chamber in the *Akayesu Case* and the Swiss Military Appeal Tribunal in the *Niyonteze Case*, supra, note 35.

[45] See R. Arnold, supra, note 30, at 642.

Under some circumstances, civilians can be subject to the MPC, too. Art. 2 MPC provides for:

1. Civilians employed permanently by the troop or who are employed for special duties.
2. Civilians who are liable of treason for having violated secrets concerning the national defence (Art. 86 MPC), sabotage (Art. 86a MPC), attacks against the defence of the land (Art. 94-96 MPC), violation of military secrets (Art. 106 MPC) or for having disobeyed to measures taken by the military and civilian authorities for preparing or executing the mobilisation of the army or for the safeguard of the military secrecy (Art. 107 MPC).
3. Civilians who, during an armed conflict, have committed violations of the laws of nations (art. 108-114).

This latter competence is restated in Article 6 MPC. It was introduced to comply with Switzerland's international obligation to prosecute foreigners liable of violations of international law.[46] In fact, under the Swiss MPC, only Swiss citizen bound to perform the military service in Switzerland constitute military personnel.[47]

All other individuals, under Swiss military legislation, are civilians. Thus, a foreign soldier who commits a *common crime* (e.g. murder) encompassed by the MPC, cannot be tried by the Swiss MTs. The competence stays with the ordinary courts, which will prosecute him for the same charges, but pursuant to the ordinary Penal Code. Alternatively, the accused may be extradited and be tried by the military courts of his homeland.

At current stage, the Swiss Penal Code does not contain a war crimes catalogue. Thus, if Art. 2 MPC did not provide for jurisdiction over civilians (in the sense of the Swiss legislation),[48] foreign military officials guilty of war crimes who are in Switzerland would find a safe haven.[49]

For similar reasons, also persons who, *per se*, would not be subject to the MPC, but who either committed purely military crimes jointly with others who are subject to the MPC, or who attempted to the defence and security of the state, will be tried by the Swiss MTs.[50]

2.2.2. Jurisdiction according to the draft proposal

Switzerland ratified the ICC Statute on 12th October 2001. The latter came into force on 1st July 2002. Pursuant to Art. 5, the ICC exercises jurisdiction over the most serious crimes of international (customary) law:[51] war crimes, crimes against humanity, genocide and

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[46] *Niyonteze Appeal Case*, supra, note 35, at 30, referring to the decisions of the Swiss Federal Tribunal, TF 1967 I 612 and 613.

[47] However, even those who are under this obligation, but who commits offences while off duty, are generally subject to the ordinary (civil) legislation. S. Flachsmann & al., supra, note 27, at 5.

[48] Under international law, there is a different notion of civilians and military personnel. See R. Arnold, supra, note 30, at 642. The discussion here is limited to the prosecution of foreign military officials, since there is another debate about the legality of trying civilians – non military personnel in front of military tribunals. On this see M. Sassoli, supra, note 37, at 164. He refers to a decision of the European Court of Human Rights, which claimed that civilians tried by military courts cannot avail themselves of the fair trial procedures provided by ordinary courts. The Swiss Military Justice system, however, proves the contrary and it should be moreover observed, that the decision of the European Court of Strassbourg dealt with a Turkish Case (Incal c. Turkey, 9 June 1998, Recueil des arrêts et des décisions 1998-IV, pp. 1572-1573, paras 70-72).

[49] On this, see Brigadier Dieter Weber (Military Attorney General),„Kein sicherer Hafen für Kriegsverbrecher: die Rolle der Schweizer Militärjustiz in Strafverfahren', *Neue Zürcher Zeitung*, 24.12.2003.

[50] Art. 220(1) MPC, supra, note 4.

[51] See also the Message of the Swiss Federal Council of 2001. IStGH-Botschaft, 2001 *Federal Journal (Bundesblatt - BBL)* 391, at 489 (at http://www.ofj.admin.ch/e/index.html)

aggression (still to be defined). With the inclusion of the crime of genocide in the Swiss Penal Code (Art. 264) in 2000 and the general clause on war crimes in Art. 109ss of the Swiss MPC, the Swiss legislation can already deal with two of the three categories of crimes currently dealt with by the ICC. Further implementation is particularly required for crimes against humanity. At the same time, in order to fully comply with the principle of legality, the war crimes provisions need further specification. At current stage, Art. 109 MPC simply refers to international treaties on the laws of warfare.[52] However, since only the most serious crimes should be explicitly addressed in the new Civil and Military Penal Codes, this general clause shall be retained, in that it permits to encompass future international crimes, too.

Since 15th December 2000, the crime of genocide is encompassed by Art. 264 of the Swiss PC. Following to the principle of non-retroactivity, only crimes committed after this date can be prosecuted by the Swiss ordinary courts. The idea is to introduce a count on genocide also in the Swiss MPC, which, at current stage, has no jurisdiction over it.[53] This was the reason why the Swiss Divisional Tribunal 2 denied its competence to try the count of genocide in the *Niyonteze Case*.[54]

Crimes against humanity, as said, are neither present in the PC nor in the MPC. Therefore, the draft proposal provides for a list of specific offences falling under this category to be introduced into both codes.

War crimes are only contained in Articles 108ss MPC. At current stage, both civilian and military personnel, independently from their nationality and place of occurrence, may be tried by the Swiss MTs. The draft proposal aims at including a category of war crimes also in the ordinary Penal Code. The idea is that in future, civilians charged with war crimes shall be tried by Switzerland's newly constituted Criminal Supreme Court.

If someone is charged with several offences, some subject to the MJ and some to the ordinary courts (for example genocide, currently subject to the civil justice, and war crimes, currently subject to the MJ), the Military Attorney General can decide to defer the whole case to the ordinary tribunals (art. 221 MPC and art. 46(2) CMPP). On 24th March 2000, para. 2 of Art. 221 MPC was introduced, providing that if a case involves the count of genocide, the whole proceedings should be transferred to the ordinary tribunals. This provision, however, has never entered into force.[55]

Another discussion at the basis of the draft proposal, was whether the three core-crimes provided by the ICC Statute (war crimes, crimes against humanity and genocide) shall be delegated to either the military or ordinary tribunals, or to both of them. The Swiss Federal Council has chosen the latter option. After careful consideration of the advantages and disadvantages, it decided that the competent forum should depend on the status of the accused. In peacetime, the competencies of the Swiss MJ should be limited to members of the Swiss armed forces, whereas in wartime, they should extend to all individuals guilty of international crimes. The advantage this way, is that MTs can focus on the adjudication of Swiss servicemen. Ordinary courts shall instead be competent to try foreigners liable of war crimes (be these civilians or members of foreign armed forces). The compatibility with Art. 84 III GC is guaranteed, too. This provision states that a prisoner of war (POW) shall be tried only by a military court, unless the laws of the detaining Power provide for the competence of the ordinary courts also for its own members of the armed forces. It is a norm which applies only in times of armed conflicts. Since foreign military personnel shall be tried by ordinary courts only in cases of

[52] On this see M. Sassoli, supra, note 37, at 163.
[53] See Art. 264 and 340 Swiss PC, RS 311.0, at http://www.admin.ch/ch/d/sr/c311_0.html and Art. 2 and 7 MPC, supra, note 4.
[54] *Affaire Fulgence Niyonteze*, supra, note 7.
[55] Federal message on genocide, 1999 Federal Journal 4911, 4935, 4940 ; 2000 Federal Journal 2070.

peacetime, for crimes committed during a conflict they would still be subject to the jurisdiction of the MTs.

3. Judicial guarantees within the Swiss Military Justice System

3.1. Initiation of proceedings

If a person is suspected of having committed an offence for which no disciplinary measures come into consideration, a preliminary investigation is undertaken. This aims at ascertaining the commission of a crime. If some elements are missing, or if the crime is either murder or serious assault, a provisional gathering of evidence is ordered.[56] This serves to establish the facts discreetly and without the knowledge of the person concerned. It is warranted, for instance, when the evidence is not yet conclusive or the suspicion is still unsubstantiated.

The military penal procedure is set into motion by:

- an order of the battalion-/unit- or course commander, as a general rule
- by the Military Attorney General, if the act occurred off duty or if the act was a violations of the laws of nations/international law.[57]

3.2. Applicable judicial guarantees

Switzerland ratified both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). Following these legal bases, in particular Art. 14 ICCPR and Art. 5-7 ECHR, and Art. 29-32 of the Swiss Constitution,[58] several procedural rights apply. The principal ones are:

1. The presumption of innocence[59]
2. The principle of *ne bis in idem*[60]
3. The independence and impartiality of the judges.[61]
4. The principle of legality (*nulla poena sine lege*).
5. The right to be tried without undue delay.[62]

These rights are also reflected in the CMPP. For example, Art. 1 restates the principle of legality. Pursuant to it, an accused can only be charged for a crime explicitly provided for in the Swiss MPC. As already mentioned, it was strictly adhered to by the Swiss MTs in the *Niyonteze Case*, with regard to the charge on genocide. Pursuant to practice, whenever there is a doubt between the applicability of the MPC and the ordinary PC, the latter - considered to be the *lex generalis* – shall apply.[63]

The independence and impartiality of judges is restated in Art. 1 and 107 CPPM. The latter states that the examining magistrate shall investigate without the interference of the military superiors of the accused/ suspect. The independence of the Military Attorney General, who must have at least the rank of Brigadier, is guaranteed by the appointment

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[56] Brigadier Dieter Weber , „The implementation of the law of armed conflict: national measures", written summary of a speech delivered on Friday 29th October 1999 on occasion of the Swiss Seminar on the Law of Arme Conflict, para. 2.2.2., available at http://www.vbs.admin.ch/internet/GST/KVR/d/index.htm.

[57] For a summary, see the website of the Swiss Military Justice, at http://www.vbs-ddps.ch/internet/vbs/fr/home/rund/oa011/oa004.html.

[58] The English version can be found at http://www.admin.ch/ch/itl/rs/1/index.htm.

[59] Art. 14(2) ICCPR; Art. 6(2) ECHR

[60] Art. 14(7) ICCPR;

[61] Art. 14(1) ICCPR; Art. 6 ECHR

[62] Art. 14(3)(c) ICCPR; Art. 5(3) and 5(4) ECHR.

[63] S. Flachsmann et al., supra, note 27, at 16. Art. 7(1) ECHR.

of the Swiss Federal Council for a period of four years (Art. 17 CMPP). The MAG is directly answerable to the Swiss Department of Defence.[64] Impartiality is further warranted by the council of the military judges. All military courts are composed by five officials: the president, two officers and two non-commissioned officers or soldiers. The independence is safeguarded by Art. 33-37 CMPP, ruling the compulsory and facultative refusal of a judge for conflict of interests. The right to be tried without undue delay is particularly warranted in the Swiss MJ. Thanks to the restriction of its jurisdiction to specific crimes and actors, the MTs do not face the same problems of overburdening like the civil courts. Therefore, expeditiousness is better guaranteed in military than civil proceedings.

Other judicial guarantees specifically applicable to the accused are:

1. The right to be informed promptly.[65]
2. The right to defend him-/herself and choose his/her own lawyer.[66] This is foreseen by Art. 99(3) CPPM. The MT may refuse, for national security issues, the defence lawyer proposed by the accused, who, in this case, is invited to choose another one. The accused can already invoke the right to be assisted by a lawyer at the ordinary inquiry stage (Art. 109 CPPM). The presence of a defence lawyer is compulsory during the debates (Art. 127 CPPM).
3. The right to be tried in his presence.[67] Art. 130 (1) CPPM provides that the accused must be present throughout the debate proceedings. However, if the accused fails to present himself, notwithstanding regular invitation, and with no sufficient excuse, a decree to be brought to the proceedings can be emanated. If he cannot be retrieved or if the tribunal renounces to his/her presence, the procedure ‚in absentia' comes into play (Art. 131(2) and Art. 155ss CPPM). An interesting case on this matter, which also proves the application of the principle of presumption of innocence, is the decision of the Military Court of Cassation (MCC) of 6th September 2000.[68] The case dealt with a judgement in absentia, pursuant to Art. 155(3) of the CMPP, following a serviceman's failure to show up at his compulsory refreshment military course on 12th October 1998. The unit commander had communicated his absence to the Swiss Military Department.[69] The inquiries led to the conclusion that the accused had left Switzerland, presumably for the USA. Neither his parents nor the Swiss Department of Foreign Affairs (DFA) knew of his whereabouts. Following several negative solicitations to present himself, the President of the Divisional Tribunal 11 invited the accused to the main trial proceedings, charging him with several violations of duty services. Since his place of residence was unknown, the invitation was published in the Federal Journal (*Bundesblatt*). Since the accused did not reply to the invitation, the Divisional Tribunal 11 sentenced him in absentia. Pursuant to Art. 155(3) CMPP, sentences in absentia can either be an acquittal or a condemnation. Since the Divisional Tribunal could neither prove beyond doubt that the accused had de facto violated the MPC, in that he may for example been dead, and therefore been unable to attend the military refreshment course, it found itself compelled to acquit him. The judge advocate (*Auditor*) brought the case to the Military Court of Cassation (MCC). This concluded that the only thing known to the authorities, was that the accused had failed to absolve two compulsory military repetition courses and violated the duty to

[64] Art. 16 CMPP, supra, note 5. See Federico Andreu-Guzmàn, Military Jurisdiction and International Law, Geneva: International Commission of Jurists, March 2003, at 152.
[65] Art. 14(3)(a) ICCPR, Art. 5(2) ECHR.
[66] Art. 14(3)(b) ICCPR. Art. 6(c) ECHR.
[67] Art. 14(3)(d) ICCPR.
[68] Decision of the Military Court of Cassation of 6th September 2000, Decisions of the MCC, Volume 12, Nr. 18, at http://www.vbs-ddps.ch/internet/vbs/de/home/rund/oa011/oa009.Par.0024.DownloadFile.tmp/Entscheid%20018.pdf
[69] This was the name, at the time, of the Swiss Department of Defense, Protection of the Population and Sport.

present himself. The other known thing was that he had left the country in 1998. However, since March of 1998, his whereabouts had been unknown both to his close relatives and the Swiss authorities. Therefore, it was questionable whether he could respond of his deeds. The options of the Divisional Tribunal were limited. Unlike the ordinary procedure, the ‚in absentia' procedure does not provide for the chance to close a case for formal reasons or lack of evidence.[70] The argument of the legislator to justify this difference, was that the proceedings must be concluded at some stage.[71]On the other hand, a deferral of the proceedings would have only made sense if the place of residence of the accused had been known.[72] Therefore, due to the ambiguity of the situation, and the limited choices available in the ‚in absentia proceedings', the Military Court of Cassation decided that the judgement of the Divisional Tribunal 11 was to be upheld and the accused acquitted.

4. The right to legal assistance.[73] Art. 109 (2) CPPM, foresees that, in the event of serious offences, defence lawyers ‚ex officio' shall be assigned to the accused.
5. The right to free legal assistance, if the accused does not have sufficient means to pay for it.[74]
6. The right to free assistance by an interpreter and translator if he/she cannot understand or speak the language used in court[75] (Article 95 CPPM). These expenses are in charge of the Swiss Confederation (Art. 151(4) CPPM).
7. The right of juvenile persons, to have their age taken into consideration in the procedure.[76] Pursuant to the Swiss MPC, only persons over 18 can be tried by the MTs.[77] Thus, by default, juveniles are subject only to the civil criminal codes and procedures. This limitation is important in relation to the prosecution of foreign juveniles suspected of war crimes. As seen, only the MPC encompasses these offences. Recent conflicts like the one in Sierra Leone, however, have seen an increasing involvement of child or teenage soldiers. Due to their age, however, these juveniles are not subject to the MPC, even though Additional Protocol II (AP II) to the 1949 GCs foresees the possibility of juveniles of more than 15 years being subject to the laws of war. Art. 4(3)(c) AP II, in fact, provides that the laws of war shall be applicable to juveniles of more than 15 years of age. By default, these juveniles must be tried pursuant to the ordinary Swiss Penal Code (Art. 89ss), which, however, does not provide for war crimes. Although these offenders may be tried under counts like killing or assault, the gravity of the offences would not be taken into consideration the same way. Thus, notwithstanding the good aims of this provision, this procedural guarantee effectively poses some difficulties to the prosecution of juveniles responsible of international crimes.
8. The right to compensation in the event of a false condemnation.[78] A good example of the application of this principle by the Swiss MJ is provided by the *G Case*, which will be discussed later.
9. Principle of non-retroactivity.[79] As already mentioned, this principle was adhered to strictly in the *Niyonteze Case* in relation to the charge of genocide.[80]

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[70] See para. 4(a) of the MCC judgement, supra, note 68. (*Einstellen des Verfahrens*).
[71] Para. 4(b) of the MCC judgement, supra, note 68.
[72] Para. 4(b) of the MCC judgement, supra, note 68.
[73] Art. 14(3)(d) ICCPR. Art. 6(c) ECHR.
[74] Art. 14(3)(d) ICCPR.
[75] Art. 14(3)(f) ICCPR. Art. 6 (e) ECHR.
[76] Art. 14(4) ICCPR.
[77] Art. 13-14 and Art. 218(1) of the Swiss MPC, supra, note 4. Pursuant to para. 2, this applies also if the fact was committed abroad.
[78] Art. 14(6) ICCPR.Art. 5(5) ECHR.

10. Article 14(5) ICCPR further provides that *‚everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'*. Art. 152(3) CMPP provides that the President of the Military Tribunal of first instance, after having communicated his/her judgement to the parties in a public session, shall inform the parties of the possible further legal means. These are in particular:

1. The objection (Art. 122 CPPM)[81]
2. The revocation of the sentence emitted in absentia (Art. 156 CPPM). [82]
3. The administrative appeal (Art. 166 CMPP)[83]
4. The appeal against first instance decisions (Art. 172ss CMPP)[84]

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[79] According to this, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Article 15(1) ICCPR.

[80] Switzerland, at the time of the proceedings, was not a party to the 1948 Genocide Convention, yet. However, an argument would have been to rely on it by virtue of its customary status. See for example Art. 7(2) ECHR and Art. 15(2) ICCPR.

[81] Within 10 days following notification, the condamned and the Military Attorney General can object to a sentence of condamnation by written declaration to the Military Attorney. Art. 122 (original French text).

Dans les dix jours qui suivent la notification, le condamné et l'auditeur en chef peuvent faire opposition à l'ordonnance de condamnation par une déclaration écrite adressée à l'auditeur. Le lésé peut faire opposition si l'ordonnance de condamnation touche ses prétentions civiles ou peut avoir des effets sur le jugement de ces dernières.[1]

[2] Si l'opposition est faite en temps utile, la procédure ordinaire est suivie. L'ordonnance de condamnation tient lieu d'acte d'accusation.

[3] Lorsque l'opposition ne vise que le prononcé sur les frais ou sur l'indemnité, elle doit contenir une proposition motivée. Le tribunal statue sans débats.

[82] If somone convicted in his absence decides to present himself or gets arrested, he will be resubmitted by the police or the examining magistrate a copy of the judgement. If he disagrees with it, he can require a ‚relief'.

Art. 156:

1. Lorsque le condamné par défaut se présente ou qu'il est arrêté, la police ou le juge d'instruction lui remet un exemplaire motivé du jugement par défaut. Le condamné peut, dans les dix jours, demander le relief. La demande qui n'a pas à être motivée, peut être faite par écrit ou oralement, auquel cas elle est mentionnée au procès-verbale. Elle est admissible tant que la peine n'est pas prescrite. Si le relief est demandé, le président du tribunal militaire de première instance peut ordonner que l' enquête soit complétée par le juge d'instruction. Celui-ci transmet ensuite le dossier à l'auditeur.
2. La demande de relief suspend l'exécution du jugement par défaut, sauf décision contraire du président du tribunal militaire de première instance.
3. Dès que le tribunal a mis à néant le jugement par défaut, une nouvelle procédure de jugement est suivie en la forme ordinaire.

[83] This appeal can take place against decisions, acts or omissions of the examining magistrate, as well as against decisions on preventive detention, seizure or perquisition, taken by the presidents of the military tribunals of first instance or appeal. It cannot be invoked against decisions related to the conduct of the trial. This right can only be invoked by the affected person.

Art. 166 (French original version):

[1] Plainte peut être portée contre les décisions, les opérations ou les omissions du juge d'instruction, ainsi que contre les décisions en matière de détention préventive, de séquestre et de perquisition qui ont été prises par les présidents des tribunaux militaires de première instance ou des tribunaux militaires d'appel. Il n'y a pas de plainte contre les décisions prises en matière de conduite du procès.

[2] Le droit de plainte appartient à la personne touchée directement.

[84] Details on the right to appeal pursuant to the CMPP are contained in Franz Bollinger, *Appellation im Militärstrafprozess*, Disseration, Zürich, 1998.

The right of appeal applies against decisions of the first instance military tribunals, with the exception of those taken in absentia. Art. 172 (French original version):

[1] La voie de l'appel est ouverte contre les jugements des tribunaux militaires de première instance, à l'exception de ceux qui ont été rendus par défaut.

[2] Lorsque le prononcé attaqué ne porte que sur les prétentions civiles ou sur les frais et l'indemnité, seule la voie du recours est ouverte.

5. The cassation (Art. 184ss CMPP)[85]
6. The recourse (Art. 195ss CMPP)[86]
7. The revision (Art. 200ss CMPP)[87]

Some of these remedies were introduced in 1979, with the revision of the CMPP (in force since 1980), in order to implement the European Charter of Human Rights.[88] In fact, prior

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[3] Sont en outre susceptibles d'appel les décisions rendues en matière de révocation de sursis par les tribunaux militaires de première instance.

[85] This right applies against decision of the military appeal tribunals and decisions of lacking competence, decisions of the military appeal tribunals concerning the revocation of the above mentioned decisions, and the decisions made in absentia by the military tribunals of first instance. Original French text:

Art. 184 Recevabilité

[1] La voie de la cassation est ouverte contre:

a. Les jugements des tribunaux militaires d'appel et les décisions par lesquelles ils se déclarent incompétents;

b. Les décisions rendues par les tribunaux militaires d'appel en matière de révocation de sursis;

c. Les jugements rendus par défaut par les tribunaux militaires de première instance.

[2] Dans les cas visés à la let. b, les art. 185 à 194 sont applicables par analogie.

[86] Art. 195 provides that the recourse is allowed against the decisions of the first instance and appeal military tribunals. Exceptions apply to the case of execution of suspended penalties, reintegration into a function, striking off of the inscription in the criminal records, refusal of the revocation of a decision in absentia, decisions about the civil action, fee charges and indemnities, confiscation and devolution of presents and other advantages, readmission to the personal service, immediate arrest warrant following the communication of the judgement. Art. 195, original French version:

La voie du recours au Tribunal militaire de cassation est ouverte contre les décisions des tribunaux militaires de première instance et des tribunaux militaires d'appel, à moins qu'elles ne soient susceptibles d'être attaquées en appel ou en cassation, notamment dans les cas suivants:

a. Mise à exécution des peines suspendues, après l'exécution des mesures de sûreté;

b. Réintégration dans la capacité d'exercer une charge ou une fonction;

c. Radiation de l'inscription au casier judiciaire;

d. Refus du relief;

e. Prononcé sur l'action civile;

f. Condamnation aux frais et demandes d'indemnité;

g. Confiscation et dévolution des dons et autres avantages;

h. Réadmission au service personnel;

i. Ordonnance d'arrestation immédiate lors de la communication du jugement.

[87]The revision of a valid condemnation or executory sentence can be requested when there are facts or evidence that were not in the knowledge of the judge and which may determine acquittal or a less severe sentence, or, reversely, his or her condamnation or a more severe sentence. It also applies in cases a punishable act has influenced the previous proceedings; after the judgement, a second and incompatible judgement has been emitted; after the judgement, the accused has made a guilty plea; the rules on abstention or objection have not been observed and this could not be invoked earlier: the ECHR has determined a violation of the European Charter on Human Rights and the fault can be compensated only with a revision of the case.

Art. 200 (original French version):

[1] La révision d'une ordonnance de condamnation ou d'un jugement exécutoire peut être demandée lorsque:

a. Il existe des faits ou des preuves dont le juge n'avait pas connaissance lors du procès antérieur et qui sont de nature, à eux seuls ou en relation avec les faits constatés auparavant, à provoquer soit l'acquittement du condamné ou la fixation à son égard d'une peine notablement moins sévère, soit la condamnation de l'accusé acquitté, soit une condamnation pour une infraction plus grave;

b. Un acte punissable a influé sur le sort du procès antérieur;

c. Depuis le jugement, un second jugement pénal inconciliable avec lui a été rendu;

d. Depuis le jugement, l'accusé acquitté a fait un aveu digne de foi;

e. Des dispositions sur la récusation ont été violées et que cette violation n'a pu être invoquée plus tôt;

f.[1] La Cour européenne des droits de l'homme ou le Comité des Ministres du Conseil de l'Europe a admis le bien-fondé d'une requête individuelle pour violation de la convention de sauvegarde des droits de l'homme et des libertés fondamentales, du 4 novembre 1950[2] ou de ses protocoles, et que réparation ne peut être obtenue que par la voie de la révision; dans ce cas, la demande de révision doit être introduite dans les 90 jours à compter de la notification de la décision des autorités européennes par l'Office fédéral de la justice.

[2] Lorsque l'infraction est prescrite, la révision en défaveur de l'accusé acquitté ou du condamné est exclue.

to 1979, there was only the possibility to refer the case to the Military Court of Cassation (MCC). Among these new remedies is the *right to appeal*.[89] All the decisions of the Divisional (first instance) Military Tribunals can be appealed to the MCC, which is the military equivalent of the Swiss Federal Tribunal. It is also possible to appeal against arrest decisions to the president of the military tribunal. Of particular interest is also the case of provisional arrests and preventive detention. Pursuant to Art. 54ss CMPP, the military commander of the suspect/accused can order his/her provisional arrest for a maximum of three days. This, however, is only allowed if there are serious imperative duty reasons or if the other legal criteria thereto are met. An inquiry into the facts is then set into motion (Art. 100 CMPP and 203 MPC). An appeal against this disciplinary measure is allowed by Art. 209 MPC. Preventive detention can be decreed pursuant to Art. 56 CMPP, when there is a serious presumption of guilt or a high risk that the suspect may either flee, destroy the evidence, influence the witnesses, otherwise compromise the inquiries or continue his illegal activities. The decree must be based upon an arrest warrant written by the examining magistrate or, if the inquiry is closed, by the president of the competent tribunal (Art. 56 CMPP). Appeals against other court orders and official acts must be instead addressed to the Military Attorney General.[90]

The *revision*[91] is an extraordinary legal means which, in 1979, was extended also to the disadvantage of the accused.[92] It can be invoked e.g. against a valid sentence if it turns out that there are facts or evidence which were not known to the judge and which may have been decisive for an acquittal or condemnation of the accused.

The *recourse*[93] is instead a subsidiary legal remedy, also introduced in 1979, [94] which applies when neither the appeal nor the cassation are available (Art. 195 CMPP). In this case the MT has full review powers (unlike in the cassation procedure) and is not bound by the requests of the parties.[95] Unlike in the appeal and the cassation procedures, in the case of recourse, the appeal instance can either decide itself or, if other clarifications are required, refer the case back to the former instance (Art. 198 CMPP). According to Riklin, the list of nine recourse grounds in Art. 195 CMPP is illustrative. The MCC may decide for which other grounds the recourse shall be available.[96] He further observes that the 1979 revision and the introduction of this subsidiary mean, permitted to achieve a closed system, in which there is a legal remedy against every decision. Prior to 1979, it was often necessary to extensively interpret the notion of ‚judgement' (*Urteil*), since the only available remedy was the cassation. The only drawback, in his view, is that with this new system the MCC lost its original function as a court designed to discuss on the law rather than the facts.[97] Moreover, the widening of the legal remedies did not only provide a better safeguard of the procedural rights of the accused, but also extended the length of proceedings, which may be a disadvantage in wartime. Under such circumstances, in fact,

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[88] Maj.Gen. Raphaël Barras, ‚La justice militaire en Suisse: aperçu historique', in „Die schweizerische Militärjustiz", supra, 9-23, at 22.

[89] For a discussion on the advantages and disadvantages of the appeal procedure per se, see LtCol and Prof. Frank Riklin, ‚Die Entwicklung des Rechtsmittelsystems im Militärstrafverfahren der Schweiz in den letzten 150 Jahren', in: *Die schweizerische Militärjustiz: Festschrift zum 150jährigen Jubiläum*, (Opfikon: Lenticularis AG)(1989), 25-40, at 32ss.

[90] Information available on the website of the Swiss MJ, at http://www.vbs-ddps.ch/internet/vbs/de/home/rund/oa011/oa004.html (in German and French).

[91] Art. 200 CMPP, supra, note 5. In German: *Revision*

[92] Riklin, supra, at 36.

[93] Art. 195ss CMPP, supra, note 5. In German: *Rekurs*

[94] Maj.Gen. Raphaël Barras, supra, note 88, at 23.

[95] Art. 197(2) CMPP, supra, note 5. For the details on the difference between this legal remedy, the appeal, and the cassation, see Riklin, supra, at 36.

[96] Riklin, supra, note 89, at 37.

[97] Riklin, supra, note 89, at 37.

military courts must function expeditiously, whereas too many legal remedies may slow down the process. An alternative may be to have two different procedure for peacetime and wartime. However, the same system in both times allows the military tribunals to exercise and train their functions already in peacetime, thereby preparing their fair and efficient functioning under harsher conditions.[98] This is also an argument in favour of the maintenance of military tribunals in peacetime.

Moreover, if a citizen feels that he should have been tried by a civil rather than a Military Tribunal, he may invoke Art. 223 MPC and appeal to the Swiss Federal Tribunal. An example is provided by the *Sommacal Case*.[99] The case dealt with the Mountain infantry Regiment 29 which, between 10th and 29th November 1969, was under the command of Col. Baumann, a professional officer and school commander in Losone (southern Switzerland). Due to the very poor weather conditions and the high responsibilities of the commander, the repetition course in which Mr. Sommacal was taking place appeared to be particularly harsh. Towards the end of the course, several articles appeared in various regional newspapers, criticising the conduct of the course. The author turned out to be fusilier Carlo Sommacal, a part time journalist. On 4th February 1970 the Head of the Federal Military Dept. entrusted the examining magistrate of the Divisional Tribunal 9A with the investigation of the facts reported in the newspapers, and the assessment of their defamatory character. Following the inquiry, on 24th November the judge advocate charged Sommacal with breaches of Art. 145 MPC (defamation) and Art. 72 MPC (violation of service duties regulations). With order of 15th December, the Chief Judge of Divisional Tribunal 9A initiated the main proceedings, setting their beginning on 29th December 1970. On 27th December of the same year, Sommacal brought a claim of breaches of Art. 223 MPC (conflict of competencies) to the Swiss Federal Tribunal. He contested the violation of his service duties and claimed to have written those articles as a journalist enjoying freedom of press. The Military Attorney General invoked dismissal of this appeal ground by the Swiss Federal Tribunal, arguing that the article had been written on the basis of material collected during the repetition course. Moreover, the competence of the Military Tribunal was justified by its composition of members possessing personal service experiences. The Swiss Federal Tribunal concluded that the Military Penal Laws constitute a lex specialis, which, in case of doubt, must withdraw in front of civil criminal law (BGE 61-I-127). It held that in this case the criterion to establish the MT's jurisdiction was not met. In fact, it could not be concluded that the opinions expressed in the press had a direct link with either the military position of the accused or his status as a subordinate of the allegedly defamed officer.[100] The Federal Tribunal concluded that since a civil court can judge defamation cases just as well as military courts, the appeal was accepted and Divisional Tribunal 9A was not competent to try the case. On the other hand, since there had been no appeal concerning the competencies of the MT regarding the violation of Art. 72 MPC (failure to meet service regulations), in that regard the Divisional Tribunal 9A retained its competencies.

This case proves that the Swiss military judicial instances are subject to the control not only of the political parties, which elect its highest representatives, but also of the civil judicial instances. The Swiss Federal Tribunal can decide as the highest instance whether a case was unjustifiably tried by a Military Tribunal. This rebuts the accusations that Military Courts are extraordinary courts beyond democratic control.

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[98] Riklin, supra, note 89, at 38-39.
[99] Decision of the Swiss Federal Tribunal of 17th March 1971, BGE 97 I 143.
[100] BGE 97-I-143, 150, at http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm .

A final remark shall be made on the transparency of military judgements. Art. 60 of the Military Criminal Justice Order[101] states that a copy of all the decisions must be provided to the cantonal authorities responsible for the execution of the sentence, and to the Federal Department of Justice (Swiss criminal records). In addition, pursuant to Art. 61 of the Order, the executed copies of the judgement (*Urteilsausfertigungen*) must be made available, among others, to the defence, the judge advocate, and the accused. The issue of transparency was raised in the *Sutter Case,*[102] decided by the European Court of human rights in 1984. Peter Sutter is a Swiss citizen who, at the time, was a student in Basel. During military repetition courses in 1974-1975, he was given five and seven days strict arrest for refusal to comply with Art. 203 bis of the service regulations, relating to hair-cuts. In 1976, the Judge Advocate charged him with repeated insubordination and failure to observe service regulations, pursuant to Art. 61 and 72 MPC. At the close of a public hearing on 16th May 1977, the Divisional Court Nr. 5 sentenced him to ten days imprisonment.[103] A copy of the decision was sent to him, together with the information of his right to appeal. Mr. Sutter appealed on the ground that it was not consonant with Article 6 ECHR to conduct proceedings entirely in writing. Thus, he requested the court to hold at least one hearing and to pronounce its judgement publicly.[104] At that time, proceedings before the Military Court of Cassation were conducted entirely in writing and not delivered in public. Section 197 of the 1889 CMPP simply laid down that "an extract" of the judgement had to be communicated to the Military Attorney General (MAG), the accused and the grand judge. [105]This Act was repealed by the Code of Military Penal Procedure of 23 March 1979, which entered into force on 1st January 1980 and which is still valid today. The existing system was maintained for proceedings before the Divisional Courts, and extended to the Courts of Appeal, which were created by the 1979 CMPP. The proceedings in front of the Military Court of Cassation, however, were changed. The two innovations introduced by the 1979 Act were that the MCC had to deliver its judgements in open court (Art. 48(3) and 149(1) CMPP) and that in no circumstances could it rule on the merits of the case. The decisions of the MCC are now collected in an annual review which can be consulted upon request to the MAG or the Military Registrar.

Mr. Sutter further claimed that the Military Courts are not impartial.[106] He contended an infringement of the principle of equality of arms, in that he had had no access to the report of the grand judge and the submissions of the MAG,[107] and a violation of Art. 6(1) ECHR.[108] The majority of the European Commission held that there had been no violation of this provision. [109] The reasoning was that:

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[101] Verordnung vom 24. Oktober 1979 über die Militärstrafrechtspflege (MStV), RS 322.2. Available online at http://www.admin.ch/ch/d/sr/c322_2.html .

[102] *Sutter vs Switzerland*, 22.02.1984, Published in A 74, Application Nr. 00008209/78, available at http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=4&Action=Html&X=112170822&Notice=0&Noticemode=&RelatedMode=0

[103] *Sutter v Switzerland*, supra, note 102, para. 14.

[104] *Sutter v Switzerland*, supra, note 102, para. 15.

[105] *Sutter v Switzerland*, ibid, para. 19.

[106] *Sutter v Switzerland*, ibid, para. 21.

[107] *Sutter v Switzerland*, ibid, para. 21.

[108] This reads as follows: "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal .... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[109] *Sutter v Switzerland*, supra, note 102, para. 24.

„The public character of proceedings before the judicial bodies referred to in Article 6 para. 1 protects litigants against the administration of justice in secret with no public scrutiny....[110]

The Commission observed that the formal aspect of the matter, however, is of secondary importance and that the application of Art. 6 depends on the circumstances of the case.[111] Whilst the present case had been heard in public by the Divisional Court, the proceedings before the MCC were conducted in writing, as foreseen by the Swiss legislation. [112] Thus, the commission concluded that:

„The Court of Cassation did not rule on the merits of the case, as regards either the question of guilt or the sanction imposed by the Divisional Court. It dismissed Mr. Sutter's appeal in a judgement that was devoted solely to the interpretation of the legal provisions concerned. There is therefore nothing to suggest that his trial before the Military Court of Cassation was less fair than his trial before the Divisional Court, and it is not in dispute that the latter trial fulfilled the requirements of Article 6. In the particular circumstances of the case, oral argument during a public hearing before the Court of Cassation would not have provided any further guarantee of the fundamental principles underlying Article 6.„[113]

The Commission also concluded that it was not bound to apply a literal interpretation of Art. 6 ECHR. Therefore,

„It considers that in each case the form of publicity given to the "judgement" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1". [114]

Since, as stated in para. 20 of the European Commission's judgement, everyone with an interest can consult the decisions of the MCC, its jurisprudence is open to a certain scrutiny.[115] Thus, the Commission held that *„the Convention did not require the reading out aloud of the judgement delivered at the final stage of the proceedings."*[116] and that for these reasons, the absence of a public hearing and public pronouncement before the Military Court of Cassation did not contravene to Art. 6(1) ECHR.

This case proves two facts: first of all, that where violations of the ECHR are suspected, the case may be brought to the European Court of Human Rights. Second, that according to the European Court of Human Rights the Swiss Military Justice system is conform with international standards.

3.3. Examples on the respect of judicial guarantees by the Swiss MJ in war crimes trials

3.3.1. G Case

The *G Case*[117] is the first war crimes trial held in Switzerland's history. Not only is it interesting because it illustrates how a small and inexperienced country brilliantly managed to meet the difficulties raised by such a complicated case, thanks to the existence

[110] *Sutter v Switzerland*, ibid, para. 26.
[111] *Sutter v Switzerland*, ibid, para 27.
[112] *Sutter v Switzerland*, ibid, para. 30.
[113] *Sutter v Switzerland*, ibid, para. 30.
[114] *Sutter v Switzerland*, ibid, para. 33.
[115] *Sutter v Switzerland*, ibid, para. 34.
[116] *Sutter v Switzerland*, ibid, para. 34.
[117] *G Case*, Judgement of the Divisional Military Tribunal I, 14-18 april 1997, Lausanne.

of a specialised military justice system, but also because it proves how the judicial guarantees of the accused were fully applied by the military tribunals. The case ended with the acquittal of the accused, Mr. Goran G, a citizen of the former Yugoslavia of Serb origins, born in Prijedor in 1965. He had arrived in Geneva, Switzerland on 17th April 1995, where he had requested asylum. While in Geneva, some witnesses indicated him as being Goran Karlica, a guard of the prison camps of Omarska and Keraterm, renown for the brutal treatment of the inmates. During the interrogations by the cantonal police of Geneva, he declared to call himself Goran G., not Goran Karlica, and to have never been in the camps of Omarska and Keraterm.[118] He contested that during the period of the alleged facts he had been in Austria and Germany. On 8th May 1995 he was placed in preventive detention for almost two years.[119] The inquiry concluded that in February 1992, G was employed in Wels, close to Linz (Austria) and that this job encompassed works on a construction site in Germany. A further proof was that during that period, G and a colleague had denounced to the Austrian police the murder of a colleague by another colleague.

However, witness A repeatedly asserted to have been beaten up by the accused and two other guards of the Keraterm Camp, known as Zigic and Dusan, and that Zigic had compelled him to lick his shoe, while the accused was attending the scene.[120] In particular witness Mu. thought to recognise in him one of the tortures of the Trnopolje camp, whereas witnesses Ki and B claimed him to be one of the tortures of Keraterm and Omarska. Other witnesses, however, were less convinced. The accused was therefore charged with violations of Art. 109 MPC (in particular breaches of the III and IV GCs of 1949, including their two Additional Protocols), for the beating up in July 1992 of at least six detainees of the Omarska prison camp and the causing of several wounds to two of them.[121] He was also charged with the alleged participation, jointly with two uniformed individuals, in the beating up of prisoners, thereby harming their physical and psychical integrity. The final charge was the alleged attempt, together with two other uniformed individuals, to the dignity of several inmates of Keraterm prison camp, in particular by forcing one of them to lick the shoes of one of the guards.

The accused was found to come within the jurisdiction of the Swiss Military Tribunal on the basis of art. 2(9), 6, 40, 44, 50, 108 and 109 of the MPC, and articles 150 and 151 of the CMPP. The judge advocate requested 4 years of detention. The Divisional Tribunal freely assessed the evidence on the basis of Article 146(1) CMPP. It concluded that notwithstanding their good faith, the witnesses seemed to have confused the accused with another person named Karlica. Due to the excessive contradictions in their reports, and in particular the fact that during the period of the alleged facts the accused was apparently in Austria and Germany,[122] the Divisional Tribunal acquitted him on the basis of the principle of presumption of innocence and *in dubio pro reo*.[123] The tribunal discussed also the issue of compensation for the two-year-long preventive detention against which, however, G. had never appealed.[124] On the basis of the loss of income, the Divisional Tribunal fixed an amount of 30.000 SFr. as reparation for the prejudice resulting from his preventive detention.[125] It further held that although an indictment for war crimes may constitute a grave prejudice, this had not occurred in G's case. Considering the situation in

[118] *G Case*, supra, note 117, at 3.
[119] Until 18th April 1997. Decision of the Military Court of Cassation of 5th September 1997, in the Collection of Decisions of the MCC, Volume 12 (5), at page 3, para 3.
[120] *G Case*, supra, note 117, at 3.
[121] Supra, note 117, at 3.
[122] Supra, note 117, at 3 („en droit").
[123] Supra, note 117, at 4 („en droit"): „Le doute doit profiter à l'accusé et il sera dont acquitté de tous les chefs d'accusation".
[124] Supra, note 117, at 4 („Dommages intérêts et tort moral").
[125] Supra, note 117, at 4 („Dommages intérêts et tort moral").

the former Yugoslavia, this kind of indictment was not unusual and certainly it would not diminish G's consideration by the Serbs living in Bosnia. Nevertheless, the psychical sufferings endured as a consequence of the detention were to be compensated with moral damages, amounting to 70.000 SFr.

On the basis of Art. 195ss CMPP, the judge advocate filed an appeal requesting the reduction of the moral damages to 20.000 SFr. G. counter appealed, holding that the amount fixed by the Divisional Tribunal was correct.[126] The Divisional Tribunal I, sitting as the Military Court of Cassation (MCC), reassessed the issue. It observed that the legal remedy of recurring to the MCC was open against decisions of the Divisional Tribunals which had not been the object of an appeal, and which concerned the reparation of damages (Art. 195(f) CMPP). Since all the criteria were met, the case was admitted.[127] It further observed that the MCC can freely reconsider both the factual and legal aspects of the case, and that it is not bound by the requests of the parties (Art. 182(1) CMPP). It also held that issues related to the reparation of damages are ruled by Art. 117(3) CMPP. This provides that an accused who has been acquitted has the right to an indemnity a) for the time passed in preventive detention; b) for the moral damages, as long as his personal interests have been seriously affected; and c) for the defence fees.[128] Art.117(3) CMPP provides for a causal responsibility of the state, independently from the existence of an illicit act, and, as remarked by the MCC, this is the *only legal basis* for the indemnification of someone who has been acquitted, since no analogous provision is enshrined in either the Swiss Constitution or the European Convention on Human Rights.[129] With regard to the appeal against the moral damages amount established by the Divisional Tribunal I, the MCC observed that pursuant to Art. 117(3)(b) CMPP, these can be only granted if there was a severe attempt to the personality of the accused, and that the amount depends on the gravity of the attempt. A similar method is foreseen in the cantonal civil procedures.[130] The MCC concluded that two elements were to be taken into particular consideration: an objective element, based on the nature of the damage of the victim and its consequences on a person under similar circumstances, and a subjective element, which sometimes permits to correct the objective result.[131] The living standards, instead, do not necessarily have to be considered. What matters mainly is the repercussion of the case on the reputation of the accused. The MCC concluded that the facts had probably had a minor impact on the accused than they would have had on an accused of Swiss origin, due to the particular situation of the former Yugoslavia.[132] It held that by fixing the moral tort to 100 SFr. per each day of detention, the Divisional Tribunal had relied on the practice of several cantons, without however taking into consideration the peculiarities of Mr. G's situation, such as familiar links, social status. Moreover, also the different standards of living in Switzerland and other countries had to be considered. The length of the detention could not be the only relevant element. For all these reasons, the MCC decided that the amount of 70.000 SFr. should be reduced to 50.000 SFr.

This case demonstrates how the Swiss Military Justice system applied all the judicial guarantees provided for in international and national legal instruments. The legal remedies were exhausted, and the accused was compensated for the unjustified preventive detention.

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[126] Decision of the Military Court of Cassation of 5th September 1997, in the Collection of Decisions of the MCC, Volume 12 (5), at page 2. Available online at....
[127] Decision of the MCC, supra, note 126, at 3, para. 1(a).
[128] Decision of the MCC, supra, note 126, at 3, para 2(a).
[129] Decision of the MCC, supra, note 126, at 3, para 2(a).
[130] Decision of the MCC, supra, note 126, at 3, para 2(c).
[131] Decision of the MCC, supra, note 126, at 4, para 2(d).
[132] Decision of the MCC, supra, note 126, at 3, para 2(d).

3.3.2. Niyonteze Case

The *Niyonteze Case* dealt with a civilian asylum seeker of Rwandese nationality, suspected of having participated in the Rwandese genocide. He was indicted by the Swiss Military authorities in 1996 for murder, incitement to murder and serious violations of the laws of war under the MPC. On 30th April 1999, the Divisional MT 2 convicted him for all three counts and sentenced him with life imprisonment and 15 years expulsion from Switzerland. Niyonteze appealed to the Military Appeal Tribunal (MAT). On 26th May 2000 the MAT confirmed the first instance decision concerning the serious violations of the laws of war pursuant to Art. 109 MPC. The convictions for murder, incitement to murder and attempted murder were annulled and the sentence was reduced to 14 years imprisonment and 15 years expulsion. The accused and the judge advocate appealed to the Military Court of Cassation (MCC).[133] Niyonteze claimed that the MAT's decision had not been sufficiently substantiated, thereby violating Art. 185(1) CMPP, Art. 29(2) of the Swiss Constitution, and Art. 6 ECHR. He invoked an arbitrary assessment and appreciation of the facts and testimonial evidence, in violation of the principle of presumption of innocence enshrined in Art. 185(1)(c)/(f) CMPP, Art. 9 of the Swiss Constitution and Art. 32(1) and (6) ECHR. Finally, he claimed that the MAT had trespassed the limits set by the indictment (Art. 185(1)(c), Art. 147 and Art. 181(3) CMPP) and that in fixing the expulsion sentence (Art. 185(1)(d) CMPP), the Military Courts had not taken into consideration his refugee status and integration in Switzerland, where also his family resided.

The Judge Advocate appealed to the MCC on the ground that the MAT had made an arbitrary appreciation of some facts, which had led to the lifting of one of the charges. He further criticised the imprisonment sentence.[134]

With regard to Niyonteze's appeal, the MCC made the following remarks. In relation to the accusation that the MAT had retained some facts which were not indicated in the indictment, in contravention of Art. 147 CMPP, the MCC held that pursuant to Art. 185(2) CMPP, the cassation is only possible if the appellant remarked the irregularities during the proceedings. Since Niyonteze had not done so, this ground of appeal could not be considered by the MCC.[135]

Concerning the appreciation of the evidence, in particular the breaches of Art. 185(1)(e) and (f) CMPP – i.e. insufficient motivation of the judgement and contradiction between essential facts of the judgement and outcome of the administration of the evidence – the MCC observed that Niyonteze had not related this criticism to any specific fact. He had simply made a general critique to the credibility of the witnesses that were heard during the inquiry and the debates. He had claimed that the MAT had established the credibility of the witness' reports without giving a detailed pronouncement on the contradictions, mistakes and lies contained in those reports.[136] However, the MCC held that the procedural laws do not contain any provision on the probatory force of the testimonies or other evidence.[137] The MAT has wide appreciation powers and it must only motivate the effect to which the evidence played a role in the reaching of the final sentence. In assessing whether the judgement had been sufficiently motivated, the MCC referred to the criteria applied by the Swiss Federal Tribunal. It held that pursuant to this, the MAT did not have to take position on the credibility of each witness.[138] It suffices that

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[133] For a summary, see Andreas R. Ziegler, *Militärkassationsgericht, Entscheid vom 27.4.2001, Yverdon-les-Bains)*, 2002 Aktuelle Juristische Praxis 215, 215. See also the Decision of the MCC, supra, note 126.
[134] Decision of the MCC, supra, note 126, at 5, para. E.
[135] Decision of the MCC, ibid, at 12, para II(4)(a).
[136] Decision of the MCC, ibid, at 15, para II(5).
[137] Decision of the MCC, ibid, at 16, para II(5)(b).
[138] Decision of the MCC, ibid, at 15, para II(5)(a).

it established a summary of the witness reports which are relative to the decisive facts. Since the MAT had proceeded in a correct way, the MCC rejected this appeal ground.[139]

A more substantial question is whether the judge abused of his freedom of appreciation of the evidence in establishing the facts on the basis of the administration thereof. In this case, it is possible to invoke the cassatory ground contained in Art. 185(1)(f)PPM. The accused relied on this provision to criticise the appreciation of the testimonial evidence during the instruction (examination) and the debates. He invoked art. 9 (prohibition of arbitrary assessment) and Art. 32(1) of the Swiss Constitution (presumption of innocence). However, the MCC held that pursuant to Art. 185(1)(f), it did not have the power to substitute the MAT's appreciation of the facts with its own. It could only review the MAT's appreciation of the facts under the point of view of arbitrariness. Pursuant to the Swiss Constitutional jurisprudence, a decision is arbitrary if it gravely fails to recognise a clear norm or legal principle and if it infringes gravely and shockingly the sense of justice or equity. It does not suffice that the decision cannot be sustained: it has to be additionally arbitrary.[140] This rule applies also when the principle of presumption of innocence is invoked. The latter is violated when the objective appreciation of the evidence permits the existence of serious and insurmountable doubts about the guilt of the accused. It is not necessary that these doubts be abstract or theoretical, since there is never a hundred per cent certainty. The MCC observed that its jurisprudence was along the same lines of the jurisprudence of the Swiss Federal Tribunal.[141] In order to establish the facts that had led to the conviction of the accused, the MAT had relied on the depositions of several witnesses, including that of the accused. The accused had not contested the facts established therein. The MAT had concluded that whereas the depositions of the witnesses on the decisive points of the case, of which the MAT had made a summary, were credible, those of the accused were not.[142] However, the Appeal Judgement did not report all the single depositions made by the witnesses to the examining magistrates. It simply contained a summary and synthesis of the most relevant facts. Moreover, the MCC observed the unlike the Nazis, the orchestrators of the Rwandese genocide had not made a meticulous record of the facts, so that there were serious difficulties in assessing the credibility of the witnesses. The Swiss authorities had done their best, by sending their examining magistrates in the field, availing themselves of the help of specialists of Rwandese history and culture. The facts taken into consideration presented a concordance of most testimonies.[143] With regard to the other contradictions indicated by the accused, the MCC concluded that these had been of minor relevance for the judgement. Therefore, the appreciation of facts of the tribunal was not arbitrary.[144] Thus, the cassation ground concerning the arbitrariness of the appreciation of facts, on the basis of Art. 185(1)(f) CMPP, was rejected.[145]

The MCC rejected also the appeal against the applicability of the laws of warfare pursuant to Art. 109 MPC.[146] Concerning the length of the expulsion, the MCC concluded that by virtue of Art. 40(1) CMPP, the judge may expel from the country every foreigner condemned with reclusion or detention, for a period between 3 and 15 years. This is an accessory punishment, which has a correspondence in Art. 55 of the Civil Penal Code.[147]

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[139] Decision of the MCC, ibid, at 15, para II(5)(a).
[140] Decision of the MCC, ibid, at 18, para II(5)(b), with reference to the jurisprudence of the Swiss Federal Tribunal.
[141] Decision of the MCC, ibid.
[142] Decision of the MCC, ibid, at 22, para II(6)(a).
[143] Decision of the MCC, ibid, at 24-25, para II(6)(a).
[144] Decision of the MCC, ibid, at 26.
[145] Decision of the MCC, ibid, at 27.
[146] Since this was a material ground of appeal, it is not going to be considered in detail. For comments, see Sassoli, supra, note 37. Decision of MCC, supra, note 126, at 45, para. 9(I). References were made to the jurisprudence of the ICTR.
[147] MCC Decision, supra, note 126, at 45, para. 10 (a).

The MCC concluded that the rights foreseen in Art. 32(1) of the 1951 Refugee Convention and Art. 65 of the Swiss Law on Asylum had to be considered, too. However, these legal bases permitted the expulsion of a refugee for public security reasons, which came into play in this case. Moreover, according to the MCC, pursuant to Article 8(2) ECHR the presence of the family of the accused in the country does not prevent his expulsion.[148]

However, the MCC concluded that the MAT had failed to take into consideration the criteria of Art. 32 (1)(1) MPC, according to which the judge may suspend the sentence, where the precedents and the character of the condemned permit to foresee that this measure will deter him from committing other crimes.[149] Since it is not up to the MCC to make previews about the behaviours of the accused, the MAT's judgement had to be partially annulled.[150] This issue had to go back to the MAT. This, however, did not affect the validity of the other parts of the judgement, i.e. the declaration of guilt, the sentencing to 14 years of imprisonment and the sentencing to the payment of the justice expenses.[151]

Then the MCC discussed the grounds raised by the Judge Advocate. He had also contented that some essential facts had been established in an arbitrary manner by the MAT. However, the MCC concluded that this ground was not well founded.[152] The Judge Advocate further claimed that by fixing the punishment, the MAT had not sufficiently taken into account the gravity of the facts. By reference to the jurisprudence of the Swiss Federal Tribunal, the MCC concluded that a sentence to 14 years of detention is a sufficiently harsh punishment, even if it is true that in some cases the ICTR had been more severe. However, the criteria applied by the ICTR do not necessarily correspond to the one foreseen by Art. 44 CMPP. Therefore, this ground of appeal was rejected, too.

In conclusion, the MCC partially accepted Niyonteze's appeal. The sentencing part on concerning the expulsion was nullified and the matter was sent back to the MAT. The other grounds of appeal, including those of the judge advocate, were instead rejected. The 14 years detention sentence was confirmed.

This case demonstrates the well functioning of the Swiss military judicial system. The accused was allowed to bring the case to the two available appeal instances, and his request to reconsider the expulsion was accepted. In some instances, the Swiss Military Penal Laws provided to be even more generous that the European Convention on Human Rights. It also shows how, in their judgements, the Swiss military courts take into consideration the jurisprudence of the Swiss civil courts, in particular the Federal Tribunal, and of international tribunals like the European Court of Human Rights or the ICTR. This approach, coupled with the special know-how of his members, proves that the military justice is an institution to be kept and that can, at best, provide for a fair trial of suspects accused of military crimes or war crimes.

4. Is there really need for a Military Justice?

As once highlighted by former Swiss Defence Minister Arnold Koller, the Swiss military justice has a solid centennial tradition of efficient functioning.[153] Its opponents often claim that it is anti-constitutional and extraordinary. This, however, does not hold true. All the laws applicable by the military, including the MPP and the CMPP, are legislated by the parliament[154] and subject to the constitution and international law.

[148] MCC Decision, supra, note 126, at 47.
[149] MCC Decision, ibid, at 48.
[150] MCC Decision, ibid, at 48.
[151] MCC Decision, ibid, at 49.
[152] MCC Decision, ibid, at 51.
[153] Arnold Koller, *150 Jahre Militärjustiz*, in „Die schweizerische Militärjustiz", supra, 51-55, at 52.
[154] Arnold, Koller, supra, note 153, at 52.

They are not extraordinary tribunals, either. They are simply composed by personnel with a special know-how, both from the legal and military perspective As observed by Koller, MTs can be considered analogously to juveniles' tribunals, which no one would not certainly consider as extraordinary, either!.[155] Who better than MTs can guarantee that the accused will be tried by peers who own both the legal and field experience necessary to understand the special and sometimes difficult circumstances in which servicemen are called to act?

Another advantage is that thanks to their specialisation and focus on determined crimes, MT's can act far more expeditiously than other courts. Especially in the Swiss case, until the creation of the Swiss Criminal Federal Court, all the cases had to undergo a very long vertical hierarchy, passing through the courts of cantons which may have never ever had any experiences with military or war crimes.

Efficiency and celerity are particularly required in wartime. However, it is important that the MTs have the chance to train their competencies already in peacetime.[156]

Another widespread criticism is that there is no division of powers. In response to this it should be recalled that all the MT judges are elected by the political instances and not by military commando positions. Moreover, as said, they are called to apply the laws passed by the parliament.

Some argue that civilians should not be subject to military jurisdiction. However, as previously said, with their increasing involvement in the hostilities and participation in combat, national and international courts have initiated several war crimes proceedings against civilians, even if these had not link with any party to the conflict.[157] Until recently, the competence and the special knowledge on IHL and the laws of warfare was vested in the military tribunals. It should be once more recalled that the laws of warfare were drafted to first and foremost protect combatants during hostilities. Thus, violations of these laws, i.e. war crimes, were considered as military crimes. As long as fair trial procedures are enshrined in the Military Penal and Penal Procedure Codes, civilians who have decided to (unlawfully) engage in combat and to face the risk of being tried for war crimes, should also be ready to appear in front of a Military Tribunal.

But if on the one hand military justice can be considered to be just as good as the civil one, in some cases it may prove to be even better. For example one of its advantages is the possibility to execute disciplinary sanctions in military prisons, so that the accused does not have to mix with ordinary criminals.[158]

It should also be recalled that military personnel has a strong sense of the hierarchy and order. These are two characteristic elements which are at the basis of its functioning. On the basis of this principle, Military Criminal Law developed the principle of command responsibility. Not to find an easier scape goat, when the primary actor was impossible to find, but to warrant the respect of hierarchies and the fulfilment of a superior of his supervisory duties. Because of this strong respect of the hierarchies, a military justice system is preferable to an ordinary one, for the trial of servicemen. These will be readier to accept the authorities and judgements of a tribunal hierarchically set above them, than an ordinary court composed by lawyers with no whatsoever military experience. Due to the negative approaches of the civil society against the military, military tribunal seem to provide for better guarantees of fair treatment of military personnel suspected of having committed violations of international law. But these considerations hold especially true for the commission of purely military crimes, such as disobedience, cowardice, desertion, etc....

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[155] Arnold Koller, supra, note 153, at 52.
[156] Riklin, supra, note 89, at 39.
[157] On this see R. Arnold, supra, note 28.
[158] Arnold Koller, supra, note 153, at 55.

However, also in relation to so-called ordinary crimes, it makes sense to have a Military Justice System responsible for servicemen. For example in 1998 there was a draft proposal for the revision of the Federal Law on the use of drugs, suggesting the de-penalisation of the use of drugs. Although, according to some, this position may be acceptable under ordinary laws, in that every citizen should be self-responsible and decide about whether to take drugs or not, this cannot possibly be acceptable within a military framework. Therefore, shall, one day, the use of drugs become legalised under the ordinary Penal Code, it should remain an offence under the MPC. In fact, as observed by Dr. Flachsmann,[159] within military life there are several dangerous activities which require special concentration and lucidity of mind (in particular the use of weapons). Since the correct performance of these tasks may be jeopardised by a mind obfuscated by drugs, it would also create a danger for the comrades. In general, violations of the Federal Law on the use of drugs fall within the jurisdiction of ordinary courts (Art. 19a Federal Law on the Use of Drugs[160]). This provision applies also to the use of drugs during the military service. In fact, pursuant to Art. 7 MPC, servicemen are subject to the ordinary PC for criminal offences which are not contained in the MPC. Exceptions apply only pursuant to Art. 218(4) MPC, which provides for the jurisdiction of the Swiss Military Tribunals, *only* in the event of use of *small* quantities of drugs. The draft proposal for the legalisation of drugs has not been accepted, yet. However, this example proves that what may be considered as licit, or as an expression of personal freedom, in civil life, may not necessarily be licit within the framework of military life. For similar reasons, some human rights can be restricted within the military. This proves that the two situations cannot be meddled and that the continuing existence of a (fair) Military Justice System is to be supported. In conclusion, Prof. Koller observes that the 1979 CMPP can be considered a modern law, which fully complies with the European Convention on Human Rights and in which the right of the accused to defend him-or herself is fully guaranteed.[161]

5. Conclusions

History may provide for some examples of national military tribunals failing to abide by international fair trial standards. Coupled with the intrinsic ‚secrecy' that usually surrounds military affairs, this may be the reason why the civil society has become very sceptical about the correct functioning of these institutions. The creation of several international tribunals (the ICTY, the ICTR, the ICC) and the issue of the prosecution of the Guantanamo Bay detainees by the US authorities, has contributed to further the debate. There are many opponents to everything that is military in character. There is often the assumption that the military is a closed family ready to cover up the misdeeds of its members, and to be harsh on those who do not want to accept its rules. This is a false vision and it can be demonstrated by the example of the Swiss Military Judicial system. Rooted in a centennial tradition, it has survived to many referendums calling for its abolition. This proves the confidence of the Swiss society in its system. This may be partly due to the fact that the Swiss Military is composed only in part of professionals, and in big part by civilians who, each year for several years, are called up to perform their military duties. Thus, also within the Military Justice, we find judge advocates, defence lawyers, court clerks, who, when off duty, perform their everyday legal activity in ordinary law firms. A typical example is provided by Judge Barbara Otto, who was recently elected as a judge of the newly constituted Swiss Criminal Supreme Court, and who was one of the leading examining magistrates in the *Niyonteze Case*. The Swiss system proves that

[159] Dr. Stefan Flachsmann, ‚Konsum von Betäubungsmittel im Militärdienst: Konsequenzen eines allfälligen Rückzugs der zivilen Behörden von der Strafverfolgung des Konsums von Betäubungsmitteln nach der Revision des BetmG', 1998 *Schweizerische Juristische Zeitschrift* 549, at 549.
[160] http://www.admin.ch/ch/d/sr/812_121/a19a.html
[161] Arnold Koller, supra, note 153, at 53.

military justice systems can be accountable to civil society, and that they can function in abidance of internal procedural standards. This was also recognised by the European Court of Human Rights. In order to fully implement the rights enshrined in the European Convention on Human Rights, the Swiss parliament decided to revise the Swiss Code of Military Penal Procedure in 1979. Several new legal remedies were introduced, to better protect the accused's judicial rights. Several decisions prove that these remedies are regularly adopted and that when an accused is falsely condemned, the compensatory measures do work. The functioning of this system was tested with Switzerland's' first war crimes trials. Although taken by surprise, the members of the Swiss Military Justice proved to be meticulous professionals, willing to abide by international procedural rights such as the presumption of innocence, the principle of *in dubio pro reo* and, in particular, the principle of non-retroactivity.

To abolish the military justice system would mean that to deny the civil society's faith into the work of a community created for the defence of the country, and its citizens, i.e. civilians. The creation of the international criminal tribunals has made fashionable a legal branch which, for many years, was exercised only by few enthusiasts and idealists. Humanitarian law has become very trendy and there is an increasing number of scholars and politicians who talk about war crimes, crimes against humanity and acts of aggression, without really knowing, or having ever experienced, the difficulties related to military life. It is not enough to consider the penal provision of humanitarian law with the myopic perspective of criminal law. The *whole* framework must be taken into account. A fair consideration of all the circumstances surrounding war crime situations is better guaranteed by someone who has both a legal and a military background. It would be a waste to destroy the specialised know-how of military tribunals. Moreover, servicemen have better respect for an insider authority like the Military Tribunals, than an external body composed by lawyers with little knowledge of their background. Last but not the least, these tribunals are a necessary subsidiary to the often overburdened civil courts.

The case of the Swiss military courts may be special, due to its strong democratic justification. But it may serve as an example for other military justice systems. And ultimately: what influences the respect of fair trial standards is always the political background. Democratic institutions will be probably more respectful of international human rights standards, than institutions of authoritarian regimes. But this has nothing to do with the military or civilian character of the judiciary.

Session: Armed conflicts and military tribunals

"U.S. Military Commissions and International Law" [162]

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The U.S. government is preparing military commissions authorized by President George W. Bush in November 2001 to try suspected international terrorists. The finishing touches being applied to a courtroom at Guantanamo Bay, Cuba mirror the completion of the military instructions detailing the applicable law and rules of procedure for the commissions. To date the President has designated six detainees – two British citizens, two Yemenis, an Australian and a Sudanese–for prosecution. Four of these have been provided military defense counsel, and two have been charged with conspiracy for their support of al-Qaeda in Afghanistan.

Despite the Bush administration's oft-repeated assurances that the "global war on terror" will affirm and protect basic human rights, the rules for the proposed commissions fall far short of international standards for a fair trial. The U.S. government has replaced the U.S. federal court and court-martial structures and procedures with a wholly new and untried system that assures Department of Defense control over the proceedings, the verdict, judicial review, and ultimately what the public can know about the trials. Such trials will undermine the basic rights of defendants to a fair trial; yield verdicts – possibly including death sentences – of questionable legitimacy; and deliver a message worldwide that the fight against terrorism need not respect the rule of law.

Under the President's directive, the U.S. Department of Defense has issued a series of orders and instructions governing most aspects of the commissions, from their basic organization, to the crimes to be prosecuted.[163] These rules incorporate certain due process safeguards into the commissions, including the presumption of innocence, proceedings open to the public, and the presentation of evidence and cross examination of witnesses. Important as they are, these provisions cannot overcome the cumulative impact of other provisions that militate against fairness. They provide a patina of due process to proceedings that are otherwise deeply flawed.

Under the Defense Department rules, the military commissions will:

- Deprive defendants of independent judicial oversight by a civilian court.
- Improperly subject criminal suspects to military justice.
- Try prisoners of war (POWs) in a manner that violates the 1949 Geneva Conventions.
- Provide lower due process standards for non-citizens than for U.S. citizens.
- Restrict the defendant's right to choose legal counsel.

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[162] This paper is drawn from briefing papers prepared by Human Rights Watch.

[163] Since President Bush issued Military Order of November 13, 2001 authorizing military commissions, the Department of Defense has released several instructions setting out the applicable law and procedure: Military Commission Order No. 1 (MCO No. 1), issued March 21, 2002; a draft set of crimes and elements released on February 28, 2003 for public comment; and a set of nine final Military Commission Instructions (MCIs) released on April 30, 2003 and subsequently.

- Deprive defense counsel the means to prepare an effective defense.
- Place review of important interlocutory questions with the charging authority.
- Impose a "gag order" on defense counsel.
- Expose military defense counsel to improper "command influence."

In the end, few cases may proceed to full trials before the commissions. The lopsided rules plus the threat of capital punishment may compel many of those charged to accept plea agreements, even if harsh. This will permit prosecutors to declare victory, but the broader public will be deprived an important opportunity to assess guilt or innocence, and fill an important historical record.

Lack of Independent Judicial Oversight

The military commissions do not allow for review by a court independent of the executive branch of government. Review of the commissions' proceedings is limited to a specially created review panel appointed by the Secretary of Defense.[164] No appeal is permitted to U.S. federal courts or the U.S. Court of Appeals for the Armed Forces, a civilian court independent of the executive branch.[165] The President has final review of commission convictions and sentences.

The executive branch is thus prosecutor, judge, jury and – since the commissions can impose the death penalty – potential executioner. Persons tried and convicted by the commissions will have no opportunity for independent judicial review of verdicts, no matter how erroneous, arbitrary, or legally unsound. By skirting review by a civilian court, the military commissions depart from the well-established principle of civilian review in the U.S. military justice system.

Improper Use of Military Courts

President Bush's Military Order of November 13, 2001 authorizes the use of military commissions to try non-U.S. citizens who are or were members of al-Qaeda, who engaged in acts of international terrorism, or who knowingly "harbored" such persons. Military commissions are permitted under international law within the context of an armed conflict in place of civilian courts. But the military order encompasses civilians who had no connection to armed conflict as understood under international humanitarian law and, indeed, who are accused of acts committed far from any actual battlefield. Using military courts to try such persons violates their right to trial by an independent and impartial court.

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[164] Review panels will consist of three military officers, only one of which must have experience as a judge. The Secretary of Defense may include on the panel civilians who have been temporarily commissioned into the military, but there is no obligation to do so. MCO, (6)(H)(4). On December 30, 2003, Defense Secretary Donald Rumsfeld designated four members of the Review Panel: Judge Griffin Bell, former U.S. Attorney General and former U.S. Court of Appeals judge; Judge Edward G. Biester, Judge, Court of Common Pleas of Bucks County, PA and former Pennsylvania Attorney General; Hon. William T. Coleman, Jr., former Secretary of Transportation; and Frank J. Williams, Chief Justice of the Rhode Island Supreme Court. They are appointed for a term "which normally will not exceed two years." MCI No. 9 (Dec. 26, 2003), 4(B)(2).

[165] The U.S. Court of Appeals for the Armed Forces was established under Article I of the Constitution, which empowers Congress to make rules for the regulation of the armed forces. The court consists of five civilian judges appointed by the President and confirmed by the Senate to fifteen-year terms. The legislative history of the Uniform Code of Military Justice provides that the court is not subject to the "authority, direction, or control of the Secretary of Defense." Its decisions are subject to review by the U.S. Supreme Court.

According to the U.N. Human Rights Committee, the body that monitors compliance with the International Covenant on Civil and Political Rights,[166] the use of military courts to try civilians "could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice."[167] Such would seem to be the case with the U.S. military commissions. The Bush administration appears intent on evading the due process protections of U.S. federal courts by trying civilians for alleged military offenses that are in fact crimes that should be prosecuted in a regular criminal court.

Under the military commission rules, an offense prosecutable by the commissions must have taken place "in the context of and was associated with armed conflict."[168] The definition of an armed conflict under the commission rules is so broad, however, that virtually any terrorist act anywhere in the world would be within the commission's jurisdiction. The defendant's conduct need only be distantly or vaguely related to an armed conflict recognized under international law.[169]

This explanation leaves open the possibility that the Bush administration – which has stated it is engaged in a global war against terrorism – might well consider any criminal act by any suspected member of a perceived terrorist group anywhere in the world to be "associated with armed conflict." For instance, a non-U.S. national living in the United States could conceivably be tried by a military commission for the crime of "aiding the enemy"[170] if he sent funds to al-Qaeda, rather than being tried under federal anti-terrorism legislation. The question is not whether such conduct can properly be criminalized, but rather which court should exercise jurisdiction.

Under the commission rules, criminal acts that should be prosecuted by a U.S. civilian court can easily be deemed to have the necessary nexus to an armed conflict and thus be prosecutable by the military commissions. Such a misuse of military courts to try civilians would be an evasion of U.S. obligations to conduct fair trials under international human rights law.

Military Commission Jurisdiction over POWs

The U.S. military orders and instructions are inconsistent with provisions of the 1949 Geneva Conventions relating to the prosecution of prisoners of war (POWs). Under the

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[166] International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. The United States became a party to the ICCPR in 1992.

[167] U.N. Human Rights Committee, General Comment 13, art. 14 (Twenty-first session, 1984), U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994).

[168] MCI, No. 2, 5(C).

[169] Human Rights Watch, Letter to Department of Defense General Counsel Haynes, March 14, 2002, available online at: http://www.hrw.org/press/2003/03/us031403.htm. According to MCI, No. 2, 5(C), the nexus between the defendant and armed conflict:

> could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities…. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force.

[170] MCI No. 2, 6(B)(5).

Third Geneva Convention, a POW can be validly sentenced only if tried by "the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,"[171] and "shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him."[172]

Because U.S. military personnel are tried under courts-martial as established by the Uniform Code of Military Justice and have a right of appeal to an independent civilian court,[173] any POW held by the United States must also be tried by a court-martial and have a similar right of appeal. Military commissions are not the same as courts-martial – they were created precisely to preclude some of the procedural safeguards of courts-martial, and, as noted under the Military Order of November 13, 2001, persons tried before the commissions have no right of appeal to a civilian court.[174]

Detained Taliban soldiers (members of the regular armed forces of the then-government of Afghanistan) and perhaps other detained combatants should have been designated by the United States as POWs under the Third Geneva Convention. Moreover, all captured belligerents should have been treated as POWs unless a "competent tribunal" individually determined otherwise.[175] The Bush administration instead violated its clear obligations under the Third Geneva Convention and made a blanket ruling that no captured combatants in Afghanistan were entitled to POW status. Denying POW status without convening competent tribunals was not only unlawful, it contravened both past U.S. military practice and current practice in Iraq.

The failure of the United States to properly determine whether any persons held in connection with the armed conflict in Afghanistan are POWs does not obviate its legal obligation to ensure that any trials of persons entitled to POW status are conducted in courts-martial with a right of appeal to an independent civilian court. "[W]ilfully depriving a prisoner of war of the rights of fair and regular trial" is a grave breach of the Third Geneva Convention.[176]

The improper determination of the legal status of captured belligerents also bears on the propriety of charges brought against persons prosecuted before the commissions. Under international humanitarian law, so-called unprivileged or unlawful belligerents do not have any combatant immunity. That is, they may be prosecuted for conduct – such as shooting at U.S. forces – that is not criminal when undertaken by members of the armed forces. The military commission rules state that where an element of a crime requires the absence of combatant immunity, the prosecutor has the burden of establishing that the

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[171] Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 U.N.T.S. 135, entered into force Oct. 21, 1950.Third Geneva Convention, art. 102.

[172] Ibid. art. 106.

[173] See Uniform Code of Military Justice, U.S.C. Title 10, Ch. 47. Article 2(a)(9) specifically provides military court jurisdiction over "[p]risoners of war in custody of the armed forces."

[174] The Nov. 13, 2001 military order, states at sec. 7(b) that any person subject to this order:

> "(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."

[175] Third Geneva Convention, art. 5.

[176] Third Geneva Convention, art. 130.

accused was indeed an unprivileged belligerent.[177] The issue must be decided in each case based on a fair and independent assessment of the specific facts before the commission.

The U.S. government's high-level, public assertions that none of the persons captured during the international armed conflict in Afghanistan are entitled to POW status should not play any role in the determinations made by the military commission concerning the status of individuals being prosecuted before them. We are concerned, however, that it will be extremely difficult for a court under the direct authority of the executive branch to reach an independent and impartial finding on this issue.

Second-Class Justice for Non-Citizens

The President's Military Order authorizing the commissions restricts their jurisdiction to persons who are not U.S. citizens. U.S. citizens may not be tried before the commissions, regardless of whether they were combatants who committed war crimes. This exclusion presumably reflects a political judgment that the U.S. public would not accept the truncated justice of commission proceedings for U.S. citizens. International human rights law, however, does not permit countries to discriminate between citizens and non-citizens with regard to their fair trial rights.[178] The fact that a person is not a U.S. citizen should not be used as an excuse to weaken protections for their internationally recognized rights.

Right to Counsel of Choice

The military commission instructions provide for the mandatory appointment of a military defense counsel for the defendant. The defendant may also retain, at his own expense, private counsel, but military counsel would remain assigned to the defense team. As the instructions state, the "[a]ccused must be represented at all relevant times" by military defense counsel.[179]

The right to counsel of choice is an integral component of a fair trial – one recognized in international and U.S. law, including the rules for courts-martial. Nevertheless, the Department of Defense instructions for military commissions violate this fundamental right by requiring the defendant to accept a military lawyer and by denying the defendant the right to either represent himself or to be represented solely by private counsel.[180]

In the United States, low-income defendants who cannot afford to retain their own private counsel as a practical matter must accept lawyers assigned to them by a public defender or legal services organizations. Yet these lawyers are independent of the government. In the case of the military commissions, however, the defendants will be compelled to conduct a defense with counsel provided by, and under the ultimate authority of, the branch of government that is prosecuting and judging them.

There is no basis to question the ability or willingness of military defense lawyers to represent zealously and competently anyone brought to trial before the military commissions. Those appointed have to date acted as ardent advocates on behalf of their clients. But there is no lawful basis for denying a defendant tried before military

[177] MCI No. 2, 4(B).
[178] ICCPR, art. 14 ("All persons shall be equal before the courts and tribunals").
[179] MCO No. 1, 4(C)(4). The defendant would have the right to request a different military counsel.
[180] Article 14 of the ICCPR provides that everyone charged with a criminal offense shall have the right "to communicate with counsel of his own choosing." The Human Rights Committee has interpreted this to include a right of persons to defend themselves. See Human Rights Committee, *Hill and Hill v. Spain* (526/1993).

commissions the ability of conducting a defense without the participation of military defense lawyers.[181] The ability to represent oneself or to be represented solely by private counsel takes on added significance in the context of non-U.S. citizens who were taken into custody in Afghanistan or other countries and held as military detainees at Guantánamo. For reasons of culture, personal history, language and the conditions of their imprisonment, many of those detainees may never fully trust or cooperate with U.S. military counsel assigned to them. Such trust and cooperation are, of course, vital to an effective defense.

Forcing military defense counsel on the accused is not the only way to balance the right to counsel with protection of classified information. For example, the Department of Defense could permit civilian counsel to have access to classified documents subject to serious penalties if they in fact divulge protected information. Both civilian courts and courts martial can impose penalties for violating court orders to keep information confidential. Sensitive information can be protected by providing for such penalties in the commission rules. Moreover, existing rules of professional conduct preclude violation of confidentiality orders. The Department of Defense could also choose to use the procedures specified in the Classified Information Procedures Act[182] that balance the need to protect classified information and the right to a full and fair defense.

Restrictions on Effective Defense

The military commission rules impose important limitations on the ability of defense counsel – both military and civilian lawyers – to mount an effective defense of their clients. Many of these restrictions are spelled out in the affidavit civilian lawyers for the commissions are required to sign and with which military defense counsel must comply.[183] Most important is infringement of the confidentiality of attorney-client communications, which will deprive a defendant of that most fundamental of rights: to have a legal representative with whom one can have full and complete confidence.

Evidence Gathering: Counsel may only discuss or otherwise share information on the case with members of the defense team and commission members plus "potential witnesses" and "other individuals with particularized knowledge that may assist in discovering relevant evidence in the case." In cases of doubt, the defense lawyer must first make a request with the Appointing Authority (the Secretary of Defense or his designate) or Presiding Officer (head of a military commission).[184] The Appointing Authority is responsible for supervising the military commissions, including approving charges and plea agreements.[185] Although an improvement on a previous version of this rule, the provision leaves considerable doubt as to what constitutes "particularized knowledge" and places the burden on the defense lawyers to decide correctly, leaving them vulnerable to disciplinary action or loss of defense counsel status. Requiring approval in unclear cases may make a defense lawyer very reluctant to pursue a particular source of inquiry.

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[181] Persons tried by U.S. courts martial may conduct their defense *pro se* or proceed solely with civilian counsel if they so choose.

[182] Classified Information Procedures Act, PL 96-456, 96th Congress, Act of 15 Oct. 1980 - 94 Stat. 2025, 18 USC Appendix, as amended by Pub. L. 100-690, Title VII, Sec. 7020(G), Nov. 18, 1988, 102 Stat. 4396, available at http://www.fas.org/irp/offdocs/laws/pl096456.htm.

[183] Military defense counsel are directed to conduct their activities consistent with the "prescriptions and proscriptions" specified in the Affidavit and Agreement by Civilian Defense Counsel. MCI No. 4, 3(B)(4).

[184] MCI No. 5, Annex B, II(E)(2).

[185] The Appointing Authority is responsible for approving charges against terrorist suspects, appointing the commission members, revoking eligibility of attorneys to appear, approving plea agreements, and determining when to close cases to the media. See generally, MCO No. 1.

Attorney-Client Confidentiality: In February 2004 the Defense Department amended rules that permitted the government to monitor *all* communications between attorneys and defendants for "security and intelligence purposes."[186] Such conversations are traditionally covered by the attorney-client privilege of confidentiality, to encourage clients to confide openly with their attorneys.

The amended rules require that such monitoring be approved only upon a determination that it would "likely produce information" for security or intelligence purposes or that it "may prevent" communications facilitating terrorist operations. More importantly, military and civilian defense counsel must be notified in advance of any monitoring of their communications, and that communications solely among defense counsel will never be monitored. The new rules also detail the use and review of monitored communications.[187]

The ability to communicate candidly and effectively with one's attorney is inherent in the right to counsel, which in turn, helps secure the overarching right of due process and a fair trial. The U.S. government's willingness to profoundly compromise these rights is deeply troubling. Moreover, it forces attorneys who represent defendants before the military commissions to do so knowing the applicable rules are likely to impede the open communication essential for constructing a proper defense.

The commission rules state that "any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication."[188] Restricting the use of information obtained from monitoring attorney-client conversations does not fully mitigate the harm from such monitoring. The mere fact that conversation may be monitored will likely inhibit candid conversations between the accused (whether guilty or innocent) and his attorney. A defendant will rightly hesitate to name names, including those of relatives and friends who could support their claims, out of genuine concern that the U.S. government might then seek to apprehend those persons. Under the plain wording of the provision, information so gathered could also be used by the Appointing Authority prior to commission proceedings (regarding a plea agreement) and after proceedings (regarding early release or a pardon). The rights to counsel and to a fair trial are jeopardized when the officials who are the captors, jailers, prosecutors, and judges of the accused can listen in to all their conversations with their attorneys, regardless of the subsequent use to which information gleaned from those conversations is put.

Security Restrictions on Civilian Defense Counsel: The military commission rules deny civilian counsel with appropriate security clearance the same access to protected information as military counsel. They authorize the Appointing Authority or the Presiding Officer to close proceedings on broad grounds, such as to protect "intelligence and law enforcement sources, methods, or activities; and other national security interests."[189] Civilian defense counsel, unlike military counsel, may be excluded from closed military commission proceedings.[190] The commission rules also authorize the Presiding Officer to issue protective orders to safeguard "protected information" including orders to delete the information from documents made available to the

[186] MCI No. 5, Annex B, II(I).
[187] MCO No. 3 (Feb. 5, 2004).
[188] MCI No. 5, Annex B, II(I).
[189] MCO No. 1, 6(B)(3).
[190] MCI No. 4, 3(E)(4).

defendant or the defense team. The commission may not consider protected information unless it is presented to the military defense counsel. But civilian defense counsel may be denied access to such information even when it is admitted into evidence.

As noted, the rules require that attorneys who do not already possess a security clearance to pay the costs of processing the security clearance.[191] While requiring a security clearance is permissible, it is troubling that attorneys even with high-level security clearances are not guaranteed access to all materials presented in a case before the commissions. We note also that the rules do not commit the government to expedite security clearances for civilian attorneys seeking to represent defendants before the commissions.

The very basis for restricting access to evidence and proceedings by civilian defense counsel who already have undergone a rigorous security clearance is questionable. All persons with access to classified information, whether civilians or members of the military, must protect that information. Yet, under the rules, civilian defense counsel may be excluded from critical portions of the trial and be denied access to protected information admitted against the client, even if they have a high-level security clearance.[192] These restrictions impinge on the ability to provide effective representation. The Department of Defense should instead ensure that civilian counsel who have received a security clearance be given access to all commission proceedings, including closed sessions, and to all information necessary to their defense work.

Review by a Review Panel: All decisions of the military commissions will be reviewed by a review panel that will give the appearance of an appeals court, but whose structure and procedures will not ensure impartial and competent appellate review. The review panel will consist of three military officers (or civilians commissioned for this purpose) appointed by the Secretary of Defense.[193] While the review panel will issue a written opinion in all cases after reviewing the record of the trial,[194] only at its discretion will it review written submissions by the prosecution and defense and hear oral arguments.[195] It is thus not obligated to even consider procedural errors raised by the defense counsel after the trial or gain clarification of the issues though oral argument in a courtroom. The standard of review is also narrow in scope: the panel must disregard procedural errors that would not have "materially affected the outcome of the trial." Moreover, the rules require -- absent an extension -- that the panel issue its ruling within 30 days of receipt of the case. This gives defense counsel insufficient time to prepare an appeal and have it included within the review panel's deliberations.[196] Taken together, the review panel will present a façade of judicial review at the expense of providing defense counsel with a genuine opportunity to bring forth claims of procedural error and have them fairly adjudged.

Interlocutory Questions Reviewed by Appointing Authority

[191] MCI No. 5, 3(A)(2)(d)(ii).
[192] MCI No. 5, Annex B, I (B).
[193] MCO, No. 1, 6(H)(4).
[194] MCI, No. 9, 4(C)(5).
[195] MCI No. 9, 4(C)(4)(b). The Review Panel may at its discretion review amicus (friend of the court) briefs, "particularly from the government of the nation of which the accused is a citizen." Id. (4)(c).
[196] MCO No. 1, 6(H)(4).

The military commission rules allow for important legal issues occurring during the trial to be decided by the Appointing Authority, the Secretary of Defense or his designate[197] who brought the charges against the accused. The rules state that the head of the commission shall turn over for decision by the Appointing Authority "all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge." The Presiding Officer may also certify other interlocutory questions to the Appointing Authority as he deems appropriate.[198]

Thus important legal questions raised by defense counsel (or the prosecution) regarding such matters as the jurisdiction of the commission, the charges brought, or the elements of a crime would be decided not by a judge or judicial panel, but by the very same executive officer who initiated the charges and approved the prosecution, and who presumably believed he was acting in accordance with the law. This improper blurring of the functions of the prosecutorial and judicial roles violates the right to a trial by an independent and impartial tribunal under article 14 of the ICCPR. It also sharply contrasts with the U.S. military justice system, where convening authorities play a prosecutorial role (and may reduce sentences) but have no judicial authority whatsoever.

Rulings on interlocutory questions could presumably be overturned by the commission review panel following the commission trial. Given that the review panel is appointed by the Appointing Authority, however, it is likely to be extremely reluctant to overturn a case-dispositive decision on which the Appointing Authority has already expressed its views.

Gag Order for Defense Counsel

While the commission proceedings are presumptively open to the public and media, the commission rules nonetheless contain various provisions that prevent defense counsel from speaking publicly about their cases or commission proceedings. Collectively these rules impose a gag order on defense attorneys, a dictate of silence that contradicts the fair trial purposes of open proceedings.[199]

One commission rule, discussed above, prevents defense counsel from discussing information about the case with anyone except the defense team, potential witnesses and experts. In addition to constraining defense investigations, this rule precludes defense counsel from talking to the media or public at large about the case. Another commission rule prohibits defense counsel – both defense and civilian counsel – from making statements about military commission cases or other matters relating to the commissions to the news media, unless they have received approval from the Appointing Authority or the General Counsel of the Secretary of Defense.[200]

There is no basis for giving the Defense Department control over what civilian counsel say outside of court. We know of no precedent in either civilian courts or the rules of military

[197] Defense Secretary Rumsfeld initially appointed Deputy Defense Secretary Paul Wolfowitz as the Appointing Authority. In December 2003, as trials became more imminent, former Judge Advocate General John Altenburg was named to the post.
[198] MCO No. 1, 4(A)(5)(d); MCI No. 8, 4(A).
[199] As the Manual for Courts-Martial states, opening proceedings "to public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence." RCM 806(b) (discussion).
[200] MCI No. 4 (5)(C). In courts martial, military defense lawyers may speak with the media about a case in accordance with professional rules of legal ethics.

justice for such a gag order. Judges sometimes impose gag orders on attorneys in individual cases to protect the interests of justice, for example, to ensure fair proceedings before an unprejudiced jury. Prohibiting attorneys from revealing protected or classified information to the public is also a familiar concept in the U.S. criminal justice system. As written, however, the commission rule is not limited to protecting sensitive information nor is it necessary to further the interests of justice.

The only apparent purpose of the gag rule is to control what the public may learn and understand about commission proceedings. Such a purpose is inconsistent with right of the public to have access to information about what its government is doing, a right that is particularly significant in the context of such nationally and internationally important proceedings. Limiting defense counsel's ability to speak to journalists can only impede the media's -- and hence the public's -- understanding of the significance of developments during the proceedings.

Additionally the military commission rules prohibit defense attorneys from ever making any public or private statements regarding any closed sessions of the proceedings.[201] Admittedly, counsel's right to speak and the public's right to know must be balanced against the legitimate Defense Department goal of protecting national security information. Indeed, one of the commission rules commits attorneys to never make public or private statements regarding classified or protected information.[202] But the rules imposed on defense attorneys silence far more than the disclosure of such information. For example, the rule would prevent defense counsel from ever commenting on whether the exclusion from closed sessions affected the counsel's ability to mount an effective defense or whether the rulings during closed sessions were fair -- even if no classified or protected information would be disclosed in such comments. The press and the public will not have access to closed sessions; their only ability to evaluate whether justice was served in those sessions will be through comments made by defense counsel or the prosecution.

While the rules suggest defense attorneys may seek prior approval for public statements that would otherwise be prohibited, they do not contain any criteria to guide military authorities considering such requests. There is, for example, no requirement that any such request must be granted as long as protected national security information is not revealed.

"Command Influence" and Military Defense Counsel

Under existing U.S. military law, military defense counsel are protected by various means from undue command interference in representing clients. Crucial is the requirement that they report to a defense counsel chain of command that is distinct from the normal military chain of command, and serves to distance defense lawyers from senior military or Defense Department officials. Additionally, Article 37 of the Uniform Code of Military Justice prohibits command influence in the judicial process by superior officers.[203] This

[201] MCI No. 5, Annex B, II (F).
[202] MCI No. 5, Annex B, II (F).
[203] UCMJ, art. 37 on "Unlawfully influencing action of court," states:

> (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member

article effectively prevents a convening authority or other commanding officer from pressuring defense counsel in cases before military tribunals.

Under the military commission rules, military defense lawyers remain directly in the military chain of command.[204] They report to the Chief Defense Counsel who reports to a Deputy General Counsel who reports to the Defense Department General Counsel (a political appointee who reports to the Secretary of Defense).[205] These officials are responsible for supervising and preparing fitness and performance evaluation reports.[206] Even without any overt pressure, which the rules prohibit, this command structure could significantly affect the work of military defense counsel. For instance, anything a military defense lawyer tells a superior officer, such as regarding an ethical issue, could be communicated up the chain of command. And this chain of command will limit a superior officer's ability to assist subordinate military defense counsel and complicate matters in the event of disciplinary hearings, despite provisions in the military tribunal rules to protect defense counsel.

Conclusion

Absent significant changes in the structure and rules of the military commissions, the United States would be in violation of its obligations under international law to try anyone before them. The United States should instead take all the necessary steps to ensure that those tried before military commissions receive trials that meet international due process standards.

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thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. … (b) In the preparation of an effectiveness, fitness, or efficiency report on any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member, as counsel, represented any accused before a court-martial.

[204] To date, the Department of Defense has appointed five military lawyers to serve full-time as defense counsel for detainees tried before the military commissions.

[205] See MCI No. 6, 3(A).

[206] MCI No. 6, 3(B).

"Armed conflicts and military tribunals"

Gabor RONA
Legal Adviser
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Clémenceau said that military justice is to justice as military music is to music, so I'd like to talk about military music. What do we mean by military music? Music written by soldiers for soldiers? By soldiers for civilians? By civilians for soldiers? Music played by soldiers for soldiers? By soldiers for civilians? By civilians for soldiers? Must it be 4/4 timing? Can't it be a waltz or bossa nova? Must it be for brass and percussion instruments but not strings? Without consensus on these questions, how can we say if military music is good or bad? You get the point.

Likewise with military justice, one must look at the 1) structure and 2) execution of a particular process or example in order to judge, so I won't be stating any general opinions about military justice.

I will talk about the law of armed conflict as applied to the trial of persons detained in armed conflict.

This may sound like I'm going to talk about judicial guarantees, the due process required by international humanitarian law (IHL) - but I'm not. I'm going to talk about the phrase "in armed conflict." Why? Because to comply with international or domestic law, before looking at what judicial guarantees are required for military trials in armed conflict, you will first want to determine that the rules of armed conflict are, in fact, applicable. Why is that important?

In armed conflict, things that would otherwise be criminal, like killing, destruction, detention without trial and trial with a reduced menu of judicial guarantees are, to a limited degree, lawful. Thus, while humanitarian interests are best served by respect for humanitarian law where it applies, they are not well served by invoking humanitarian law where it does not belong, namely beyond the bounds of armed conflict.

In connection with military justice, this means taking care not to call something a war crime if it is not a crime committed in the context of armed conflict. And since war crimes are crimes committed in war, which is synonymous with "armed conflict," it means taking care not to call "war" that which is not "armed conflict." These points are critical to avoiding improper assertion of both subject matter and personal jurisdiction.

President Bush's Military Order of November 2001, which provides for trials of terrorism detainees by military commission (MC), and the subsequent MC Instruction #2 which details the crimes that are subject to trial by MC, are consistent with the oft stated US position that the term "global war on terror" is not merely a rhetorical device: it suggests the view that all alleged terrorist criminality undertaken by non-US nationals may be subject to MC jurisdiction as being within the bounds of, or having a "nexus to" armed conflict. It does not matter whether your crime occurred anywhere near a battlefield, or even whether you actually took up, or sought to take up arms.

And in this respect, the US MC scheme, like the entire "global war on terror" concept of which it is a part, misapplies international humanitarian law, the law of armed conflict (IHL). How so?

There are only two categories of armed conflict in IHL. International armed conflict is armed intervention by one state against another state, regardless of how much or how little violence there may be. Occupation even without resistance triggers the IHL of international armed conflict.

Non-international armed conflict is state vs. rebels or rebels vs. rebels. Here, thresholds of violence, including considerations of intensity and protracted nature count, so as to distinguish from convenience store hold-ups, riots, and in the words of the International Criminal tribunal for the former Yugoslavia, even from acts of terrorism. Which is not to say that terrorism or the efforts to combat it (however they may be defined) cannot amount to armed conflict. Of course they can. They simply must first meet the threshold criteria.

And another thing you need for it to be armed conflict is parties. In armed conflict, there are rights and responsibilities. They are effectuated through the parties. Terror or terrorism cannot be a party to an armed conflict. Grammarians with a politically mischievous streak have had a field day with terrorism. One says it's an adverb masquerading as a noun, or, if I may paraphrase, a method rather than an entity. Another suggests that going to war against a common noun is a losing proposition. Proper nouns like Germany and Japan can surrender and promise not to do it again. You'll never get that out of drugs or corruption or terrorism.

Coming back from the edge of glibness, this means that when the "war on terror" amounts to armed conflict, you apply the law of armed conflict, including that aspect of it governing the trial of detainees. In addition to the judicial guarantees that I said I would not discuss, this means taking care to distinguish between two categories of belligerents: combatants and civilians, as required by Geneva Convention III for the protection of prisoners of war. Why is this important? Two reasons:

• One, because a lawful combatant, normally but not necessarily someone entitled to prisoner of war status, may not be tried for the mere fact of having taken part in hostilities, while a civilian can be so tried.

• Two, because a lawful combatant, if tried for, say, war crimes, may only be tried by the same courts using the same procedures as are applied against members of the detaining powers' own military, according to Geneva Convention III. In the case of the US, this means courts martial pursuant to the Uniform Code of Military Justice. And I suggest that if US Supreme Court precedent is construed otherwise (namely, the Quirin case), it is moot since that decision precedes the ratification of Geneva Convention III by the US.

By the way, there is no third category known as "unlawful combatant." A civilian who unlawfully takes part in hostilities is still a civilian and does not thereby loose whatever protected status he may have had under Geneva Convention IV for the protection of civilians. He may be prosecuted for his mere participation, but he is still a civilian.

But when the war on terror does not amount to armed conflict, you may not apply the law of armed conflict. In such cases, you must stick with the provisions of domestic and international criminal and human rights law.

One clarification: while it is true that IHL applies in armed conflict, and that criminal and human rights law apply in peacetime, this is not to say that human rights law has no role in armed conflict. I know some suggest that IHL is a *lex specialis* that completely displaces human rights law. In my opinion, this view cannot be squared with the fact that human rights law contains provisions that are derogable in times of emergency, such as war, but also contains provisions from which no derogation is permitted, even in times of war.

The great danger of a military tribunal that purports to apply only to crimes committed in the context of armed conflict, but in fact goes beyond the boundaries of war by stretching the concept of war, is not only that it seeks to legitimise trials for crimes not cognisable as war crimes using procedures not cognisable in civilian judicial processes, but also, that it feeds a vision of all war, everywhere, all the time, quite in contradiction to what the laws of war have to say about the limited scope of their own application.