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Toolkit - Legislating for the Security Sector

Guidebook

Understanding Military Justice

Mindia Vashakmadze

Geneva Centre for the Democratic Control of Armed Forces (DCAF)

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MINISTERIO DE ASUNTOS EXTERIORES Y DE COOPERACIÓN
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DCAF
Geneva Centre for the Democratic Control of Armed Forces (DCAF)

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The Geneva Centre for the Democratic Control of Armed Forces (DCAF) promotes good governance and reform of the security sector. The Centre conducts research on good practices, encourages the development of appropriate norms at the national and international levels, makes policy recommendations and provides in-country advice and assistance programmes. DCAF's partners include governments, parliaments, civil society, international organisations and security sector actors such as police, judiciary, intelligence agencies, border security services and the military. Further information on DCAF is available at: www.dcaf.ch

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Introduction to the Toolkit

Legislating for the security sector is a complex and difficult task. Many lawmakers thus find it tempting to copy legislation from other countries. This expedites the drafting process, especially when the texts are available in the language of the lawmaker, but more often than not, the result is poor legislation.

Even after being amended, the copied laws are often out of date before coming into effect. They may no longer be in line with international standards or they may not fully respond to the requirements of the local political and societal context. Copied laws are sometimes inconsistent with the national legislation in place.

In some cases, there is simply no model law available in the region for the type of legislation that is needed. This has been the case in the Arab region, where the security sector has only slowly begun to be publicly debated. It is thus difficult to find good model laws for democratic policing or for parliamentary oversight of intelligence services.

It is therefore not surprising that many Arab lawmakers have felt frustrated, confused, and overwhelmed by the task of drafting legislation for the security sector. They found it difficult to access international norms and standards because little or no resources were available in Arabic. Many of them did not know where to search for model laws and several were about to give up. Some eventually turned to DCAF for assistance.

The idea of a practical toolkit for legislators in the Arab region came when practitioners began looking for a selection of standards, norms and model laws in Arabic that would help them draft new legislation. Experts from the Arab region and DCAF thus decided to work together and develop some practical tools.

Who is this toolkit for?

This toolkit is primarily addressed to all those who intend to create new or develop existing security sector legislation. This includes parliamentarians, civil servants, legal experts and nongovernmental organisations. The toolkit may also be helpful to security officials and, as a reference tool, to researchers and students interested in security sector legislation.

What is in the toolkit?

The bilingual toolkit contains a number of booklets in English and Arabic that provide norms and standards, guidebooks as well as practical examples of model laws in various areas of security sector legislation.

The following series have been published or are being processed:

- Police legislation
- Intelligence legislation
- Military Justice legislation
- Status of Forces Agreements

Additional series will be added as the needs arise. The existing series can easily be expanded through the addition of new booklets, based on demand from the Arab region.

For the latest status of publications please visit: www.dcaf.ch/publications

What is the purpose of this toolkit?

The toolkit seeks to assist lawmakers in the Arab region in responding to citizens' expectations. Arab citizens demand professional service from police and security forces, which should be effective, efficient and responsive to their needs. They want police and security organisations and their members to abide by the law and human right norms and to be accountable for their performance and conduct. The toolkit thus promotes international standards in security sector legislation, such as democratic oversight, good governance and transparency.

The toolkit offers easy access in Arabic and English to international norms as well as examples of legislation outside the Arab region. This allows to compare between different experiences and practices.

The scarcity of Arab literature on security sector legislation has been a big problem for Arab lawmakers. The toolkit seeks to address this deficiency. One of its aims is to reduce time lawmakers spend on searching for information,

thus allowing them to concentrate on their main task. With more information becoming available in Arabic, many citizens and civil society groups may find it easier to articulate their vision of the type of police and security service they want and to contribute to the development of a modern and strong legal framework for the security sector.

Why is it important to have a strong legal framework for the security sector?

A sound legal framework is a precondition for effective, efficient and accountable security sector governance because:

- It defines the role and mission of the different security organisations;
- Defines the prerogatives and limits the power of security organisations and their members;
- Defines the role and powers of institutions, which control and oversee security organisations;
- Provides a basis for accountability, as it draws a clear line between legal and illegal behaviour;
- Enhances public trust and strengthens legitimacy of government and its security forces.

For all these reasons, security sector reform often starts with a complete review and overhaul of the national security sector legislation. The point is to identify and address contradictions and the lack of clarity regarding roles and mandates of the different institutions.

Understanding Military Justice

What does this guide contain?

The objective of this guide is to provide readers with essential information about the functioning and the main principles of military justice in a democratic society. It also focuses on policies and on the role of different stakeholders in shaping the legal and institutional framework for an effective and transparent system of military justice. It provides an overview of different military justice systems and outlines the challenges they are facing.

What is military justice?

Military justice is a distinct legal system that applies to members of armed forces and, in some cases, civilians. The main purpose of military justice is to preserve discipline and good order in the armed forces. Structures, rules and procedures in military justice can be substantially different from their civilian counterparts. Usually, military justice operates in a separate court system with stricter rules and procedures in order to enforce internal discipline and to ensure the operational effectiveness of the armed forces. This may lead to questions on the principle of civilian supremacy or issues of compliance with international standards, such as human rights and fair trial guarantees.

Box 1: The purpose of military justice systems: The case of the Supreme Court of Canada[1]

"The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and frequently, punished more severely than would be the case if a civilian engaged in such conduct. There is thus a need for separate tribunals to enforce special disciplinary standards in the military."

Why are military courts established in parallel to civilian courts?

Many of today's military justice systems were established a long time ago and have greatly evolved since their creation. The argument for military justice systems operating in parallel to their civilian counterparts is that civilian judges typically lack the necessary expertise in military affairs. The main rationale for a separate court system is the unique character of military life, where discipline, organisation and hierarchy play a crucial role. These are fundamental for maintaining the effectiveness and combat readiness of the armed forces. Cases must be dealt with quickly and sentences for certain offences can be severe.

Why and when to reform military justice systems?

Military justice systems are reformed to improve their effectiveness, the quality of justice delivered by military courts, and to adapt to the changing domestic legislation, to international standards or specific needs of the military institution. The reform can aim to enhance the independence of military judges and prosecutors and to ensure a better application of human rights and fair trial guarantees within the system.

Concerns regarding the compatibility of military justice systems with human rights standards may induce States to review their systems of military justice and to implement important reforms. This is the case in Europe, where the European Convention of Human Rights of 1950 has had an impact on national military law.

In Australia, New Zealand and South Africa, reforms are carried out to improve the effectiveness of military justice.

Changes in domestic law may also be a reason to modify the system: In Canada, the domestic human rights legislation had an impact on the efforts to reform military justice.

Military justice systems may be reorganised in a post-conflict situation, such as in the Democratic Republic of Congo. This reorganisation can also take place within a state-building process, like

in Afghanistan, or during a post-authoritarian transition, like in Indonesia.

What traditions of military justice exist?

There are significant differences between the systems based on common law (Anglo-Saxon tradition) and civil law (continental European tradition). The common law systems are based on *ad hoc* military tribunals that convene on a case-by-case basis, whereas standing military courts operate in civil law systems. However, common law countries are increasingly moving towards a system of standing military courts. One of the main reasons for this is to improve the flexibility of the system of military justice. For example, the UK revokes the need to obtain a convening warrant for each trial, and more than one Court Martial are able to operate at any time.[2]

Purely military justice systems, which mainly prevail in common law countries, are based on the exclusive jurisdiction of military courts over offences committed by military personnel. In some continental European countries, civilian courts have jurisdiction over military cases. For example, in Germany, there are no peacetime standing military courts. Administrative (disciplinary) tribunals deal with service offences, while civilian courts concentrate on crimes. Some eastern and central European countries have abolished standing military courts in peacetime, but their Constitutions still allow for the creation of such a system in wartime.

What is the role of civilians in military justice?

Some experts argue that the presence of civilian judges in military tribunals would reinforce the impartiality and independence of such tribunals, since they are not part of the military hierarchy. Those who oppose a bigger role for civilian judges in the military judiciary argue that the armed forces require judges who are familiar with the unique nature of military life. These judges should understand military culture and have experience in practicing military criminal law. However, it can

Table 1: Characteristics of two major legal traditions: Common and civil (roman) law

	Common law	Civil (roman) law
Origin	The common law systems are based on English common law. Judges enjoy a broad discretion to rule on the respective case.	Civil law is based on a Roman law system and constitutes a codified system of rules and procedures. Judges have to observe the letter of the "written" law.
Law development	The law is developed on a case-by-case basis.	The "written" law is fundamental. Case-law is an additional source to further develop the law.
Set up of courts	Until recently, *ad hoc* military courts dominated these military justice systems. However, some common law countries are moving towards a system of standing military courts.	Standing military courts: courts fulfilling their judicial function on a permanent basis.
Application of jury trial	In common law systems, the jury trial may be used for a defined class of more serious offences.	The jury trial is not usual in the civil law tradition.
Role of the commander	Commanders have a role in different stages of the case. They may be involved in discovery and can order as well as participate in an investigation. Further competences may include the referral of charges, and specific functions in trial and post-trial stage.	The role of the commander ends upon his discovery of the crime and initial investigation.
Examples	USA, UK, Australia, New Zealand, South Africa.	Germany, France, most European countries.

also be argued that civilian judges who are not subjected to the army hierarchy can be adequately trained to qualify. Table 2 presents four main models of jurisdiction over military offences.

In many military justice systems, the legislation establishes civil Appellate Courts and sometimes defers to the civil Supreme Court as its highest appellate authority. For example, in the United States, the military justice system is overseen by

Table 2: Different models of court organisation and jurisdiction[3]

	Purely civilian model	Structurally hybrid model	Jurisdictionally hybrid model	Purely military model
Characteristics	Civilian courts have jurisdiction over military judicial matters	Specialised chambers within the civilian courts deal with military judicial matters	Civilian and military courts may have overlapping jurisdiction Business may be divided between the courts according to various factors: such as the seriousness of the offence, where it was committed, the identity of the victim, and whether it was committed in peacetime or wartime.	Military courts have exclusive jurisdiction over military judicial matters
Examples	Denmark, Germany (in peace-time only), Sweden	The Netherlands (civilian courts try military criminal offences, military courts try disciplinary offences), Italy, Portugal	Belgium, France (civilian courts try offences committed on French soil, military courts offences committed abroad), United Kingdom (courts-martials try criminal offences between members of the armed forces, civilian courts try offences committed by members of the armed forces against civilians), United States	Azerbaijan, Belarus, Luxembourg, Poland, Switzerland, Turkey, Ukraine

Table 3: Advantages and disadvantages of purely military or purely civilian courts dealing with military offences

	Purely military courts	Purely civilian courts
Expertise and experience	+ Military judges possess expertise in military criminal law and disciplinary procedures. They understand the specifics of military life and culture.	- Civilian judges do not have specialist knowledge of military affairs and usually have limited experience of practicing military criminal law.
Independence	- Military courts often depend on the Ministry of Defence; military judges are subject to army hierarchy and may be tempted to follow the view of the superior of the case.	+ Civilian judiciary is independent from the executive branch of government; civilian judges are not subordinated to military hierarchy; the incentives to follow the view of government representatives are much weaker.

Efficiency	+ Fast procedures for minor offences and disciplinary infractions.	- There are no guarantees that minor offences will be dealt with rapidly.
Fair trial guarantees	- Courts do not always fully apply fair trial guarantees, mainly due to the above mentioned disadvantages. For example, the right to a public hearing, the right to legal assistance of own choosing and others may not be implemented.	+ A more consistent application of fair trial guarantees.

the Court of Military Appeals, which is composed of civilian judges serving for a fixed term of 15 years. In Canada, the civilian Supreme Court is the last instance after the Court Martial Appeal Court.

How to define court levels and types of procedures?

Systems of military justice may have three or more levels of courts. Trial courts usually constitute the first instance. Second level military courts deal with appeals that have been brought against first instance decisions. A special military chamber in a high court may constitute the third level of the military justice system. At this stage, the civil Supreme Court may deal with a wrong application or interpretation of the law. It may consider a decision of the lower courts which is based on unlawful procedures.

Summary trials are a separate system for minor or disciplinary offences. Summary courts generally use simpler procedures for dealing with minor offences in order to guarantee a fast process. The role of the commander is crucial at this stage, as he/she can initiate the investigations, decide to submit the case to the military prosecutor, or determine the punishment her/himself. Since the

Table 4: Composition of courts on different appeal levels

	Purely military systems	Hybrid systems	Purely civilian systems
Trial courts	Basic (first instance) military courts consisting of one or more military judges.	First instance military courts and procedures including civilian elements as outlined above.	Civilian courts including only civilian judges.
Appeals Court	Military Appeals Court (military judges of higher rank sitting on the bench).	Military Appeals Court which may include civilian elements; or Civilian appeals courts with military elements.	Civilian Appeals Court in-cluding only civilian judges.
Supreme Court	Supreme Military Court has jurisdiction over most serious military offences and can also deal with offences committed by military judges; it may also be competent to resolve the jurisdictional conflicts within the system of military justice.	Civilian Supreme Courts which may incorporate a military chamber dealing with military offences.	Civilian Supreme Court including only civilian judges.

commander is subject to the military hierarchy, there may be conflicts of interest. The principle of independence is thus particularly at risk in these types of procedures.

Military law should identify the authority to deal with disciplinary offences, the type of punishment and the appeal procedures. For example, in the United Kingdom, the members of the armed forces can appeal any decision taken by a commanding officer to a summary appeals court.

What are the current trends and challenges?

Several countries recently started limiting the scope of military jurisdiction. Two major trends can be identified. The first trend is to transfer judicial competences to civilian courts. The second one is to limit the military courts' jurisdiction over civilians.[4] Both the United Nations (UN) Special Rapporteur on the Independence of the Judiciary and the Working Group on Arbitrary Detention recommend to limit military jurisdiction. Their view is based on the current development of international law which is towards the prohibition of military tribunals trying civilians. The Paris Minimum Standards of Human Rights Norms in a State of Emergency of the International Law Association (1984) also indicate that "civil courts shall have and retain jurisdiction over all trials of civilians for security and related offences; initiation of any such proceedings before their transfer to

Box 2: Military trials of civilians: Recommendations of the UN Human Rights Committee[6]

"The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14." (For article 14 see Box 10)

Table 5: Trends of military justice: Towards civilian models[5]

Country	Trend
Czech Republic	The Czech Republic has abolished its military courts system in 1993 as a result of political and socio-economic changes in the country. Civilian judicial organs assume the tasks of military courts.
Finland	Finland reformed its military prosecution system in 2001. Prosecution tasks were shifted from the military legal advisers to the public prosecutors in order to avoid criticisms about the possible influence of military authorities in court proceedings.
Italy	The Italian military judicial system is facing a crisis. Since the abolishment of conscription, the number of cases has severely dropped. The concept of "military crime" eroded, and the government has proposed to reduce the size of military courts.
The Netherlands	In 1990, the review of the respective legislation completed the modernisation of the Dutch system of military criminal law and military disciplinary law. Lawmakers transferred jurisdiction over soldiers to civil courts and concentrated it at the Arnhem District Court and the Arnhem Court of Appeal. Nowadays the public prosecutor - a civil servant instead of a military officer - decides to initiate the prosecution of soldiers.
Tunisia	Tunisian lawmakers modified the Military Justice Code by an act of 13 June 2000. It shifts competence of the military tribunals to adjudicate breaches of the general penal code in case where one of the parties is not a military person to civilian courts, with a few exceptions.

a military court or tribunal shall be prohibited". Similar prohibitions are included in the Basic Principles on the Independence of the Judiciary approved by the UN General Assembly.[7]

One of the main challenges in military justice is to find ways to increase the independence of military courts. Many countries are modifying their military justice systems to include civilian elements that should ensure a higher degree of judicial independence. Public Prosecutors, instead of military legal advisors, are increasingly prosecuting soldiers.

In some countries, military courts are still dealing with grave human rights violations committed by the military institution or by security forces. This has led national and international actors to question the impartiality of military courts while dealing with such cases. Their criticisms imply that the human rights jurisdiction should be transferred from military to civilian courts.

International Human Rights instruments affect national military jurisdictions, especially in the case of the European Convention on Human Rights.

How to set the context for military justice reform?

How to assess the needs to establish or reform military justice?

A needs assessment should take place as early as possible and prior to any concrete reform plan. Such an assessment should clarify the different levels of issues identified in Table 6.

It is necessary to establish a consultation mechanism that guarantees a meaningful participation of all stakeholders. The costs and benefits of reform efforts should be analysed. The primary goals and necessary measures should be identified and publicised. The process of needs assessment should include representatives of the military institution, members of all branches of government, experts and civil society representatives. International experts can also be asked to participate if needed.

Box 3: Applicability of Human Rights principles to soldiers: The case of Great Britain[8]

"Members of the British armed forces are subject to UK jurisdiction wherever they are. […] As a matter of international law, no infringement of the sovereignty of the host state is involved in the UK exercising jurisdiction over its soldiers serving abroad."

"It is accepted that a British soldier is protected by the Human Rights Act and the Convention when he is at a military base. In our judgment, it makes no sense to hold that he is not so protected when in an ambulance or in a truck or in the street or in the desert. There is no sensible reason for not holding that there is a sufficient link between the soldier as victim and the UK whether he is at a base or not. So too, if he is court-martialled for an act committed in Iraq, he should be entitled to the protection of article 6 of the Convention wherever the court martial takes place."

What should be considered when preparing the budget?

The size of a military justice system depends on the size of the army. Moreover, the number of military courts and judges, and the structure of military courts may also depend on the existing model of military justice. For example, in hybrid systems, the number of "purely" military courts will be rather limited. The court levels and territorial organisation of military justice also influence the size and budget of military justice systems. Countries that are deploying troops abroad may consider establishing military courts within the military facilities abroad, although this can be a challenge in terms of resources and logistics. Particular situations, such as multilingualism, may also raise costs. The budget of a military justice system thus varies from country to country. However, the overall funding should cover the main issues related to the functioning of the military justice system. The funding should also create social guarantees for judges and ensure their financial independence.

The budgets for military justice systems are often included in the annual defence budget, especially in countries where military courts are part of the military institution. If the military justice system is

Table 6: Essential questions for establishing or reforming military justice

Level	Questions
The general situation and the national legal framework as well as international trends and obligations	• What are current trends and international standards in military justice? • How to ensure compliance with international standards and obligations? • What international human rights obligations of the country should be taken into consideration? • Who are the stakeholders of military justice in general and of the reform process in particular, and what is their role? • What is the degree of autonomy of the armed forces in the country? • What triggered the demand for reform? • Is there any particular national situation to be taken into consideration, such as post-conflict environment or state of war?
Civil-military cooperation	• What is the nature of civil-military relations? • How is formal and informal civilian oversight organised? • Is it realistic to subject members of armed forces to the ordinary judiciary? • What are the connections between civilian and military jurisdictions? • How can civilians be beneficial to military justice?
The legislation on military justice	• What is the legal tradition of the country? • Which laws and regulations on military justice currently apply? • What are the shortcomings of the current legislation? • Which other national legislation has to be taken into consideration? • What is the vision of justice, law and order of the country? How is it described in the constitution?
The organisation of military justice	• How to ensure the independence of the military judiciary? • What is the appropriate size and budget for military justice? • How many levels of military courts are appropriate? • Which territorial organisation is appropriate?
The operation of military justice	• How to ensure fair trial procedures? • Should civilians be involved? Are there enough qualified civil lawyers to sit on the bench of military courts? • What kind of training would be necessary for civilian judges to be able to effectively deal with military offences? • What are the main shortcomings in the administration and operation of military justice? • How to respond to these shortcomings?

subordinated to the civilian judiciary, the budget for military courts may be included in the general state funding for the ordinary judiciary.

What role for Parliament?

Under the norms of good governance, Parliament should have the power to pass military justice legislation and to approve the related budget. The parliamentary defence committees should be involved in the military legislative process. During the drafting process, these committees can improve military legislation in cooperation with representatives of the military and civilian judiciary and of the executive branch. At that stage, Parliament may also invite military law experts and civil society representatives to participate in drafting the law.

There may be two levels of control. In general, Parliament may ask questions about the independence of the military judiciary if, for example, a report of the military or parliamentary Ombudsman or Inspector General raises serious concerns. Parliament may discuss the budget and other general policy issues, as well as the

Box 4: The budget of the Swiss Office of the Armed Forces Attorney General and the military justice system[9]

In Switzerland, administration and oversight of the military justice are separated from jurisprudence. The Office of the Armed Forces Attorney General takes care of adminstration, quality control, education and oversight. The military justice conducts judicial procedures and instructs commanders regarding disciplinary concerns.

Total budget of the Office of the Armed Forces Attorney General: **2.8 million Swiss Francs (1.8 million Euro)**. This includes: salaries of 17 employees, 6 temporary investigating magistrates, education, training and travel costs. All office related costs (rent, maintenance, electricity, etc.) are covered by the Federal Department for Buildings and Logistics.[10]

Total budget of the military justice system: **1.4 million Swiss Francs (0.92 million Euro)**. This includes: the costs of the legal proceedings, experts' participation, training, travels, pay and board for about 400 militia officers.[11]

need to reform the existing military justice system. Parliamentary committees may discuss some specific questions in greater detail. The parliamentary judicial committee, the defence and security committee, and the Human Rights committee may deal with the functioning of the military justice system within the framework of their mandate. If the activities of military courts involve questions of national security, a group of deputies who have special legal powers on security issues can deal with it.

What role for military ombudsman institutions?[12]

The institution of military ombudsman, or Inspector General, operates separately from the military justice system. However, it can substantially contribute to protecting soldiers' individual rights. Military ombudsman institutions promote accountability and administrative effectiveness by supporting civilian oversight of the military.

A military ombudsman usually deals with individual grievances submitted by members of the armed forces. He/she investigates possible human rights violations by the military and issues recommendations to prevent further violations and to improve the functioning of the military institution. Such recommendations usually are not legally binding, but can put considerable political pressure on the military institution.

Box 5: Military Ombudsman: The case of Australia[13]

"The Inspector General of the Australian Defence Force (IGADF) was established by the CDF [Chief of the Defence Force] to provide a means for review and audit of the military justice system independent of the ordinary chain of command. It is also an avenue by which failures of military justice may be exposed and examined so that the cause of any injustice may be remedied.

In relation to the military justice system, the IGADF:

- receives submissions and investigates complaints;
- conducts performance reviews;
- provides advice; and,
- contributes to awareness and improvement.

Submissions may be received by any person on any matter concerning military justice, for example:

- abuse of authority/process;
- denial of procedural fairness;
- avoidance of due process;
- cover up and failure to act;
- unlawful punishments;
- victimisation, harassment, threats, intimidation, bullying and bastardisation; and
- suggested improvements to Military Justice."

What is the relation between military ombudsman and military justice?

The ombudsman follows a cooperative approach to conflict resolution. He/she acts as a mediator between the complainant and the administration. However, the ombudsman can not act as a substitute for the judiciary. While the judiciary's mission is to uphold the rule of law, an ombudsman deals with certain "non-legal" issues.

He/she may focus on the efficiency and fairness of public administration, rather than on the implementation of the existing legal framework.

The military ombudsman has the power to monitor the implementation of his/her recommendations and to issue public statements and reports. Since the military ombudsman is often accountable to Parliament, he/she is in a position to contribute to an effective democratic control of the military institution.

What role for Constitutional Courts?

Constitutional Courts have the power to interpret the constitution, to examine the constitutionality of legislative acts and to resolve constitutional disputes between the branches of government. If there is such a court, it may greatly contribute to clarifying military law issues. In some countries, the constitutional courts played a prominent role in limiting military jurisdiction with regard to human rights (Colombia). In other countries, such courts have significantly narrowed down the notion of service-related offences and even declared specific acts of military law unconstitutional (South Africa). This type of court decisions may trigger efforts to reform military law.

How to draft appropriate legislation?

The conceptual framework for military legislation must be clarified in advance. The objectives of the new legislation should be defined. The following points should be addressed early on in the drafting process:

- The need for a new regulation;
- Its legal and institutional repercussions; and
- Its economic and social effects.

This should include:

- An analysis of the problem and its objectives;
- The identification of costs, benefits and impacts;
- Consultations with stakeholders; and
- Compliance with human rights standards.

Consultations are essential to the legislative drafting process. They enhance the transparency of policy development and give legitimacy to new legislative initiatives.

The procedures for submitting a legislative initiative must be defined by law and can vary from country to country. Any stakeholder, including civil society organisations, can ask for legal reform based on well-founded arguments and make constructive proposals. Executive agencies or parliamentary committees can draft legislation. Independent think tanks and representatives of the judiciary may offer suggestions to improve the draft. The expectations and opinions of different stakeholders should be taken into account.

Governmental agencies and non-governmental organisations can cooperate in a more or less formal way during the drafting process. For example, they can hold several consultations and workshops on the draft. International institutions and experts may be required. Contemporary trends in the development of military justice and international human rights law should be taken into account in order to improve the draft.

Moreover, the process of legislative drafting should follow certain norms of technical and linguistic quality.[14] The language of legal texts should be as clear as possible. It should be consistent, comprehensible and accessible to all users. In some countries, military justice laws are concise and general; they comprise only the most necessary provisions and refer to other relevant national legislation and international standards. In this case, separate regulatory texts address specific issues. In other countries, national legislative acts on military justice are very detailed. The level of detail in military justice legislation varies from country to country, depending on legal traditions.

Is a regular review necessary?

The implementation of the legislation should be monitored on a regular basis. There should also be an assessment of the existing legislation to determine whether it has achieved its intended aim. There are typically two types of reviews: an initial review and a regular review. The initial review aims to identify problems in the system of military justice and to offer recommendations for further improvements. A regular review mechanism seeks to determine the most pressing needs of the military justice system. It offers recommendations to improve the functioning of military justice and to adapt it to a changing legal and political context. Such a review can

ensure that both national and international legal developments are taken into consideration.

Parliamentary committees (in cooperation with external experts) or independent commissions composed of military law experts and practitioners can lead such reviews (see Box 6).

Both military and civilian officials should be involved in the regular review. Independent and non-governmental organisations can also provide relevant contributions.

Box 6: Review mechanisms for military justice: the cases of Australia, Canada and the US

Australia:

In 2005, the Senate Foreign Affairs and Trade References Committee conducted a review of the military justice system and issued a report on "The Effectiveness of Australia's Military Justice System". The aim of the review was to assess the changes and to determine whether further reforms were required. The work plan of the review team was:

- to examine the implementation of all accepted recommendations;
- to look at the adequacy of recourses;
- to examine the structural suitability of the military justice system;
- to identify any systemic disciplinary and administrative irregularities in the delivery of military justice; and
- to assess the ability of the system to deliver impartial and fair outcomes.

As a result, the government commissions regular independent reviews on the state of the military justice system. Such reviews are headed by a "qualified eminent Australian".

Canada:

The Minister of National Defence conducts an independent review of the provisions and operation of the National Defence Act every five years. He also has to present a report of the review to Parliament.

The Minister of National Defence appoints the person who conducts an independent review of the Bill. The Appointee has unrestricted access to the Canadian Forces and interviews individuals who have remarks on the military justice system. He/she requests comments on how the changes set out in the Act are affecting the functioning of the military justice system.

USA:[15]

An independent commission offers a forum for the study of current issues in military justice. Its Chair is selected by the National Institute of Military Justice and by the Military Justice Committee of the American Bar Association's Criminal Justice Section. The commission examines the operation of the military justice system and determines whether the Uniform Code of Military Justice meets the needs of the military service to ensure good order and discipline in a fair and efficient way. The commission submits its report to the President, Congress, the Department of Defence, and its sponsoring organisations.

The commission invites ideas and suggestions from civilian and military attorneys, military commanders and non-commissioned officers, bar associations, law schools and groups with special interest in military matters, as well as from the general public.

The commission discusses topics such as the role of the military judge, the defence, court reporters, trial court arrangements, crimes, offences and punishment, and appellate reviews of court-martials. The commission also deals with international human rights issues related to the military justice system.

How do military and civilian justice systems interact?

The military and civilian authorities (police and ordinary courts) need to cooperate in the arrest, detention and transfer of people falling under either military or civilian jurisdiction. They also need to coordinate their action on legal issues (see Table 7 for examples of cooperation).

Table 7: Civil-military cooperation: The case of Morocco

Issue	Extracts from the Moroccan military justice law[16]
Mutual grant of access to facilities and information (for instance during pursuit or investigation)	Article 40: When military police officers are called to investigate inside facilities that do not belong to the national defence ministry , such as private properties, […] they address their access request to the (civilian) judicial authority. […] The (civilian) judicial authority is advised to agree […].
Arrest and transfer of defendants	Article 41: The same request (as in article 40 above) is made by civilian authorities to military authorities in order to ascertain an offence or arrest a person under civilian jurisdiction in a military establishment.
Joint investigation or prosecution	Article 42: Military criminal investigation officers may not enter a private house without the assistance of a civilian criminal investigation officer.
Temporary civil or joint command over military forces or vice versa (this if often the case for the Gendarmerie)	[Not addressed by the law]
(Temporary) accommodation of military detainees in civilian facilities or vice versa	Article 198: Deprivation of liberty pronounced against military personnel will be undergone: 1. In military prisons, or in special quarters of civilian prisons, if they have been sentenced by the military court. 2. In civilian prisons, if they have been sentenced by ordinary courts.
Coordination of prosecution when a person falls under both civil and military law for one or more offences	Article 7: A person accused under civilian and military jurisdiction for different offences at the same time will first be brought before the tribunal that expects the more serious penalty and subsequently to the second.
Harmonisation of legislation in terms of procedures and punishment	Article 7: In case of double punishment (by civilian and military courts) only the more severe penalty applies. Article 190: Offences by military personnel which are not provided for in the present code, but which are included in the (civilian) penal code, are punished according to the provisions of the (civilian) penal code.
Promotion of civil-military cooperation at the legislative and policy-development levels.	[Not addressed by the law]

However, the mutual distrust that characterises the relations between the military and civilian justice systems can put the safeguard of basic rights at risk. The military and ordinary civilian systems of justice should apply comparable standards with respect to training, judicial independence and career prospects. The military justice system should not be completely isolated from its civilian counterpart. The interaction between civilian and military systems can prevent the overlap of jurisdictional competences.

The legislation must clarify when and under what circumstances an accused person should be transferred to ordinary courts for trial. When in doubt, the courts should presume that the civilian courts have jurisdiction.

If a person is charged with several offences, some subject to the military and some to the ordinary courts, the Military Prosecutor may transfer the whole case to an ordinary tribunal. However, the same offence should never be tried by both civil and military courts.

If there is a dispute over jurisdiction, an independent and impartial court (for example the civilian Supreme Court) must decide which court has jurisdiction. In some cases, the special military chamber within the ordinary Supreme Court settles jurisdictional conflicts.[17]

Box 7: Examples of civil-military cooperation: The cases of Canada and Slovenia[18]

Slovenian Law on Defence

Article 68 (Military police actions)

Should the military police catch a civilian in a criminal act on a facility or surroundings which are of special importance to defence, or in the camp area, they must immediately notify the police. In such a case, the military police shall have the power to use only absolutely necessary measures and means of restraint to detain him/her until the arrival of the police and to successfully deter any attack on persons or facilities and property that they protect.

Canadian National Defence Act

Article 103 (Withholding delivery over or assistance to civil power)

Every person who neglects or refuses to deliver over an officer or non-commissioned member to the civil power, pursuant to a warrant in that behalf, or to assist in the lawful apprehension of an officer or non-commissioned member accused of an offence punishable by a civil court is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

Article 219 (Custody pending delivery on committal and during transfer)

A service convict, service prisoner or service detainee, until delivered to the place where that convict, prisoner or detainee is to undergo punishment or while being transferred from one such place to another such place, may be held in any place, either in service custody or in civil custody, or at one time in service custody and at another time in civil custody, as occasion may require, and may be transferred from place to place by any mode of conveyance, under such restraint as is necessary for the safe conduct of that convict, prisoner or detainee.

What is the scope of military jurisdiction?

The military jurisdiction may be status-based (covering only members of the armed forces), service-connected (covering only crimes related to military service) or based on the notion of "purely military crimes" (covering only crimes of military character). In practice, military justice systems often combine elements of these different types.

Status-based military jurisdiction means that all members of the armed forces and personnel with a comparable status are tried by military courts, irrespective of the offence. This jurisdiction can be limited to military personnel on active service.

Service-connected jurisdiction means that military courts deal with all offences related to military life and to the functioning of the military institution.

The definition of a service-connection is difficult to base on an objective criterion. The goal of legislation should be to prevent the extension of military jurisdiction to civilians. If the legislation is unclear, constitutional courts can play a crucial role in clarifying legal issues and in limiting the scope of military jurisdiction.

The list of serious human rights violations that are excluded from military jurisdiction should be as inclusive as possible. There is no reason to include torture in such a list and to leave out, for example, extrajudicial killings committed by members of the military.

If the notion of "purely military crimes" is fundamental for determining jurisdiction, military courts will be competent to deal with offences of strictly military nature. The concept of military crimes may be narrower than the concept of service-connected offences, which can easily be interpreted as including offences that are not of military nature (if there is no clear legislative framework).

It is difficult to define what a purely military crime is, and what criteria should be applied for such a definition. There is indeed no universally accepted definition of the term. Its definition varies from country to country. Because of these difficulties, the jurisdiction of military courts is rarely based on the concept of purely military crimes only. The following questions should be used to determine the scope of military jurisdiction:

- Should military jurisdiction be limited to military personnel on active duty?
- How should the offence be connected to military service?
- Should military jurisdiction be limited to violations of a service duty?
- What is a service-duty? Where and how should it be defined?

Clear answers to these questions may help limit the scope of military jurisdiction.

What is a military offence?

There are two categories of military offences: criminal offences and breaches of discipline. However, some countries make no distinction between them. For instance, in the United States, the concept of "service offence" covers both criminal and disciplinary offences, and military courts try both types of offences.

Military crimes can be defined as serious violations directed against military capability, combat readiness and discipline and effectiveness.

Military crimes may include, but are not limited to:

- Avoiding military service;
- Absence without leave;
- Desertion;
- Treason;
- Murder; and
- Crimes committed during wartime, such as:
  - Surrendering to the enemy;
  - Violations of international humanitarian law.

These offences can only be committed by members of the armed forces and are directly linked to service. However, as the International Commission of Jurists emphasised in a recent study on military law, "different systems of military criminal law criminalise different kinds of unlawful behaviour and there is no consistency in terms of what is meant by a military offence". [19]

Military criminal punishments may be harsher than civilian ones. Thus, it is advisable to apply the civilian standards of punishment in peacetime. Criminal punishment may have negative consequences for the military careers of service personnel: they may be excluded from the armed forces or subject to other administrative measures.

What is a breach of discipline?

Disciplinary violations are typically minor offences that can be dealt with by a military superior or military court in summary proceedings or by disciplinary tribunals. In general, military crimes constitute more serious offences.[20] However, the circumstances of the offence may be relevant to determine the jurisdiction: when certain minor offences are committed in wartime or repeatedly, and seriously disrupt the functioning of the armed forces, they may be characterised as military crimes. For example, it is clear that absence without leave is not an infraction as serious as desertion (especially if committed during wartime). However, both of them may constitute military crimes.

Disciplinary offences may include but are not limited to:

- Failure to salute;
- Quarrelling with another member of the armed forces;
- Drunkenness on duty; and
- Insubordination.

The level of differentiation between military crimes and disciplinary violations depends on each country's legislative framework. Human rights experts recommend decriminalising minor offences.

Disciplinary (non judicial) punishments may include, but are not limited to, deprivation of liberty (such as arrest in quarters), financial punishment (deprivation of pay), reduction in rank, and reprimands. As a rule, the military commander has the power to award the punishments.

Who should fall under military jurisdiction?

The law should clarify who is under military jurisdiction: Are reservists, students in military schools or retired military personnel under military jurisdiction? Or, should military jurisdiction be limited to military personnel on active service?

As a matter of principle, civilians must be excluded from military jurisdiction. One of the means to exclude civilians from military jurisdiction is to limit the jurisdiction of military courts to military personnel on active duty. However, in many countries, civilians (e.g. employees of ministries of defence or of the armed forces) are tried by military courts for certain crimes that are related to military service. Nevertheless, international human rights law is increasingly supporting the exclusion of civilians from military jurisdiction, even in cases of emergency. Recent international developments in military justice also indicate that civilians (including civilian employees of defence ministries or of the national armed forces) are increasingly excluded from military jurisdiction. According to the UN "Principles Governing the Administration of Justice through Military Tribunals", conscientious objectors and minors should also be excluded from military jurisdiction (Principles 6 and 7).

In some countries, the police and intelligence officers are under military jurisdiction. This is difficult to justify because the civilian police and intelligence are not a fundamental element of the military establishment in democratic societies.

How to address human rights violations?

The notion of a "service-linked" offence is so vague that it may lead to interpretations that extend military jurisdiction to violations of individual rights that are not of a military nature. These types of violations should not fall under military jurisdiction. Military servicepersons who violate basic rights should be subject to civilian jurisdiction.

What is the distinction between war and peacetime?

Military tribunals are often created during wartime. Moreover, the peacetime military jurisdiction is usually extended in wartime and during a state of emergency. The military jurisdiction created in wartime should be suspended when the state of war ends.

Table 8: Different approaches to define jurisdiction of military justice

	Status-based offences	Service-related offences	Purely military offences
Concept	Jurisdiction over offences committed by people having the status of member of the armed forces.	Offences that are related to military service.	Offences of military character that can only be committed in and by the armed forces.
Advantages	The jurisdiction is limited to military personnel.	Non-service-related offences, even if committed by military personel, can be tried by civilian courts.	A relatively restrictive approach of military jurisdiction; in line with human rights standards and modern aspirations to limit military jurisdiction to purely military offences.
Disadvantages	The military status is sometimes defined very broadly in legislation, or the definition is unclear.	It allows for a broad interpretation of military jurisdiction. This might allow for military courts to try civilians.	It is difficult to clearly define jurisdiction and to draw a line between purely military and non-military criminal offences.

The establishment of military tribunals during wartime can be authorised by the Head of State and subsequently approved by Parliament. The Parliament may also have special wide-ranging legislative competences regarding any emergency modification of individual rights.

During wartime, military jurisdiction can be extended to include, for example, offences against State security or espionage, or infractions against members of the military. Some offences may be deemed more serious during wartime and harsher punishments may apply.

Can military courts be established abroad?

Yes, countries that are deploying troops abroad may consider establishing military courts abroad. However this can be a challenge in terms of resources and logistics. Troops participating in multilateral military operations remain in principle under the jurisdiction of the sending State. For minor violations, members of the military can be tried by a military judge attached to their unit. For a more serious military offence, military personnel can be transferred to the sending State and tried before a military court.

Box 8: Limiting the scope of military jurisdiction: The case of Honduras

The Constitution of Honduras

Article 90:
"Under no circumstances shall military tribunals extend their jurisdiction to include persons who are not on active service in the Armed Force."

Article 91:
"When a civilian or an off-duty military is implicated in an offence or breach of military order, the case shall be heard by the competent authority under ordinary jurisdiction."

How to ensure judicial independence?

Military justice legislation should define legal guarantees to protect the independence of the military judiciary in relation to the executive and legislative branches of government. The individual independence of military judges should also be ensured.

The way military judges are appointed is a good indicator of the independence of military courts. Other indicators include the security of tenure and

other institutional and procedural guarantees of independence and impartiality. These guarantees comprise the conditions of qualification and promotion, transfer and cessation of judicial functions, and the disciplinary accountability of military judges.

How to select and appoint judges?

The legislation or regulations on military courts should define rules for the selection and appointment of military judges. It is essential to ensure that the procedure for appointing judges does not exclusively depend on the chain of command and includes formal criteria defined by law. However, judges should be selected by persons who have some knowledge of the armed forces and their mission. The selection should be based on merit and qualifications. Military judges should have appropriate training, knowledge and experience in military criminal justice. The criteria for selecting appellate judges can be different. For example, candidates may need to have prior experience as trial judges.

As a matter of principle, the judges should not be concerned about their professional advancement and they should not be subject to army assessment reports, which would affect their judicial activities.

How to hold military judges accountable?

When military judges exclusively report to the ministry of defence, their judicial independence can be compromised. In some countries, there is no clear separation between the judicial functions and military activities of officers serving on the bench of a military court. Military officers may thus feel compelled to issue rulings that are in line with a superior officer's view of the case. For this reason, the performance of military judges as members of military courts should not be assessed by their military superiors. Military judges should not be promoted on the basis of their court duties either. Moreover, military judges should not report to the same chain of command as the accused. One way to ensure the independence of military judges is to select candidates of higher rank. High ranking officers would less likely feel compelled to comply with the interests of their chain of command in their judicial activities.

Disciplinary sanctions shall not constitute a way of a selective punishment of military judges for their judicial activities. The institution that has the power to discipline or remove a judge should be independent. Such an institution should be composed of representatives of the military judiciary, of the ordinary courts and members of the military or civilian prosecution. Its rules and procedures can be comparable to the rules and procedures of its civilian counterpart.

Why the term of office matters?

A way of promoting judicial independence is to set a fixed term of office for the judicial office. If military judges have sufficient tenure, they will less likely be influenced by their command's interests.

How to prevent the misuse of judicial immunity?

Military judges cannot be required to testify on matters related to the exercise of their judicial functions. However, the law must guarantee that their immunity cannot be misused in order to achieve impunity.

How to deal with conflicts of interest?

The legislation should define the circumstances under which military judges should not try a case because there is a reasonable suspicion of bias. For example, if the judge previously participated in proceedings as a military prosecutor or was involved in preliminary investigations, he/she should not try the same case. The same applies if there is a kinship or other close link between the military judge and the accused.

Why financial and security guarantees are important?

Judicial assignments should be sufficiently appealing to attract highly competent candidates. The State should provide adequate financial resources for an effective administration of justice and for the protection of military judges. The law should ensure the safety and adequate remuneration of military judges. Each country may apply a different standard in this respect.

Box 9: Salary of military judges: The case of Canada[21]

The Canadian Military Judges Compensation Committee

Its purpose is to periodically inquire into the adequacy of the remuneration of military judges. The following elements are taken into account:

- the prevailing economic conditions in Canada, including the cost of living, the overall economic and current financial position of the federal government;
- the role of financial security of military judges in ensuring judicial independence;
- the need to attract outstanding officers as military judges; and
- any other objective criteria that the Commission considers relevant.

In its 2008 Report on the Compensation of Military Judges, the committee finds that an adequate salary for the military judges should be set at CAD 225'000 (145'000 EURO), as of September 1, 2007. In comparison, whereas the salary of Chief of Defence Staff represents between CAD 199'700 and CAD 234'000, the average salary of Canadian provincial judges amounts to CAD 200'000.

How to plan for the professional development of judges?

Military judges should be professionally trained, like their civilian counterparts. Military judges and prosecutors should undergo both initial and continuous training. They can also integrate international cooperation programmes and networks for training and knowledge exchange. Any evaluation of the performance of judges should only be carried out by other judges.

What is the structure of criminal proceedings for military personnel?

Military law usually contains provisions regarding the discovery, investigation and prosecution of military crimes. It also defines the competences of the different authorities involved in this process. The commander or the military (civilian) police may be required to conduct the initial investigations and to submit the case to the prosecutor.

The law should include provisions on the competences (rights and duties) of the prosecutor, on the collection of evidence, on the presence of a defence counsel and on the conclusion of the investigation. The law should also define time limitations on criminal proceedings and on the period of custody and detention.

The investigation process should be both independent and fair. If the investigation process lacks objectivity or impartiality, it may undermine the integrity of the military justice system.

In common law systems, commanders are involved at different stages of the case, including during the investigation; the referral of charges; and the trial and post-trial stage. In civil law systems, the role of the commander usually ends after the initial investigation. The commander is required to hand the case to the prosecutor for further investigation and for the charging decision.

The military prosecution is usually in charge of initiating criminal proceedings. It also has some investigative competences and presents the charges in court. The prosecutors should not be part of the military hierarchy. In some countries, the functions of the military prosecutors have been transferred to civilian prosecutors in order to avoid any doubts about their independence from the chain of command. This is the case in Finland.

Both the accused and the prosecutor should have the right to appeal rulings made by first instance military courts to the Court of Military Appeals, and to the (civilian) Supreme Court.

The right to a fair trial is a fundamental guarantee enshrined in international human rights law. It protects individuals from arbitrary and unlawful restrictions of their liberty. The right to a fair trial should also be guaranteed in military courts. The defence should enjoy the same ability to present the case as the prosecution does.

Box 10: Fair trial and rights of the accused: Article 14 of the International Covenant on Civil and Political Rights of 1966

"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre publique) or national security in a democratic society, or when the interests of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.[22]

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   - To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   - To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   - To be tried without undue delay; [23]
   - To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;[24] to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   - To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [25]
   - To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   - Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.[26]

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law, unless it is proven that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

How to proceed?

This guidebook provides an overview and first insight into the set up, functioning and reform of military justice systems. However, the actual setup or reform military justice systems requires more in-depth expertise, substantial support and cooperation with a broad range of actors. This guidebook should be used in combination with workshops and consultations with peers from other countries facing similar challenges and with international experts.

A set of additional booklets in this toolkit series on military justice has been developed to facilitate legal drafting processes and the implementation of military justice legislation.

DCAF remains available to support national efforts to establish or reform military justice systems in line with democratic values and international standards.

Resources and further reading

International Standards

Emmanuel Decaux, E/CN.4/2006/58, Issue of the administration of justice through military tribunals (Geneva: United Nations, 13 January 2006), also available in English and Arabic in DCAF's "Legislating for the Security Sector" – Toolkit

Monographs and studies

Jeanine Bucherer, *Die Vereinbarkeit von Militärgerichten mit dem Recht auf ein faires Verfahren gemäß Art. 6 Abs. 1 EMRK, Art. 8 Abs. 1 AMRK und Art. 14 Abs. 1 des UN-Paktes über bürgerliche und politische Rechte* (Berlin: Springer, 2005)

Elisabeth Lambert Abdelgawad et al., *Jurisdictions militaires et tribunaux d'exception en mutation: Perspectives compares et internationals* (Paris: Editions des archives contemporaines, Agence Universitaire de la Francophonie, 2007)

Lawrence Morris, *Military Justice, A Reference Handbook* (Greenwood Publishing Group, 2009)

Georg Nolte (ed.), *European Military Law Systems* (Berlin: de Gruyter-Recht, 2003)

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Articles

Arne Willy Dahl, 'International Trends in Military Justice', Presentation (Garmisch: January 2008), http://home.scarlet.be/~ismllw/new/2008-01-International%20Trends%20in%20Military%20Justice-UK.pdf

Handbooks and tools

Hans Born and Ian Leigh, *Discipline and Military Justice, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (Geneva: OSCE and DCAF, 2008)

International Society for Military Law and Law of War, *Seminar on Military Jurisdiction,* Seminar proceedings of seminar on 10 to 14 October 2001 in Rhodes (Brussels: International Society for Military Law and Law of War, 2001)

DCAF Legislating for the Security Sector serie – *Toolkit on Military Justice and Backgrounders on Military Ombudsman and Military Justice,* www.dcaf.ch/publications

Endnotes

1. 'R. v. Généreux, [1992] 1 S.C.R. 259', *Canada Supreme Court Reports*, No. 1 (13 February 1992), 259.
2. Armed Forces Bill Team, UK Ministry of Defence, *An Overview of the Service Justice System and the Armed Forces Act 2006* (UK: Armed Forces Bill Team, 2006), http://www.mod.uk/NR/rdonlyres/5833E2F0-B21C-4073-BE13-BE63506119CD/0/20091006AnoverviewoftheSJSandAFA06u_2_.pdf.
3. Hans Born and Ian Leigh, *Discipline and Military Justice, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (Geneva: OSCE and DCAF, 2008), 226-227.
4. Federico Andreu-Guzman, *Military Jurisdiction and International Law,* Part II (Geneva: International Commission of Jurists, 2004), 161.
5. Arne Willy Dahl, 'International Trends in Military Justice', Presentation (Garmisch: January 2008), http://home.scarlet.be/~ismllw/new/2008-01-International%20Trends%20in%20Military%20Justice-UK.pdf.
6. UN Human Rights Committee, *Compilation of General Comments and General Recommendations, General Comment No. 13* (2003), http://www1.umn.edu/humanrts/gencomm/hrcom13.htm.
7. UN General Assembly Resolution 40/32 (29 November 1985) and 40/146 (3 December 1985), Article 5: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."
8. England and Wales Court of Appeal (Civil Division) Decisions, 'R (Smith) v Secretary of State for Defence [2009] EWCA Civ 441' (London: 18 May 2009).
9. Office of the Armed Forces Attorney General, telephone interview, 25 May and 5 June 2009, Geneva and Berne.
10. The budget and administration of the Office of the Armed Forces Attorney General is integrated into the General Secretariat of the Ministry of Defence. Therefore, some of the costs are not broken down to the office level.
11. In Switzerland, the so called military "militia system" is based on non-professional armed forces personnel (practicing military service alongside their civilian jobs).
12. See DCAF, *Military Ombudsman*, DCAF Backgrounder (Geneva: March 2006).
13. Australian Government, Department of Defence, Organisations within the military justice system that can provide assistance to ADF members: http://www.defence.gov.au/mjs/organistations.htm.
14. Checklists or legislative drafting guidelines how to achieve this could be helpful in this respect.
15. US National Institute of Military Justice, Public Announcement of the Establishment of a Commission on Military Justice (Washington: 26 January 2009), http://www.wcl.american.edu/nimj/public_announcement.cfm.
16. Moroccan Military Justice Code, 'Dahir n° 1-56-270 du 6 rebia II 1376' (10 November 1956), translated from the original French version by DCAF.
17. If there is a conflict of jurisdictions within the system of military justice, the Military Supreme Court may settle it.
18. Official Gazette of the Republic of Slovenia, No 103/2004, Slovenian Law on Defence (2004) Canadian National Defence Act (R.S., 1985, c. N-5) (1985).
19. Federico Andreu-Guzman, Military Jurisdiction and International Law, Part I (Geneva: International Commission of Jurists, 2004), 157.
20. Most European countries make a distinction between disciplinary offences and military crimes (more serious violations).
21. Canadian Military Judges Compensation Committee, *Report on the Compensation of Military Judges*, (September 2008), http://www.forces.gc.ca/site/reports-rapports/mjcc08/mjcc_report2008_eng.pdf.
22. According to the principle of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt.
23. There should be certain time limitations on criminal proceedings.
24. The accused shall have the right to choose a civilian defense lawyer to represent his / her interests.
25. The accused shall have the right to contest the evidence. The evidence gathered in violation of the law and by using illegal means (for example, torture) shall be inadmissible in the proceedings.
26. Review of the decisions of a military court shall not be conducted by a non-judicial authority.

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