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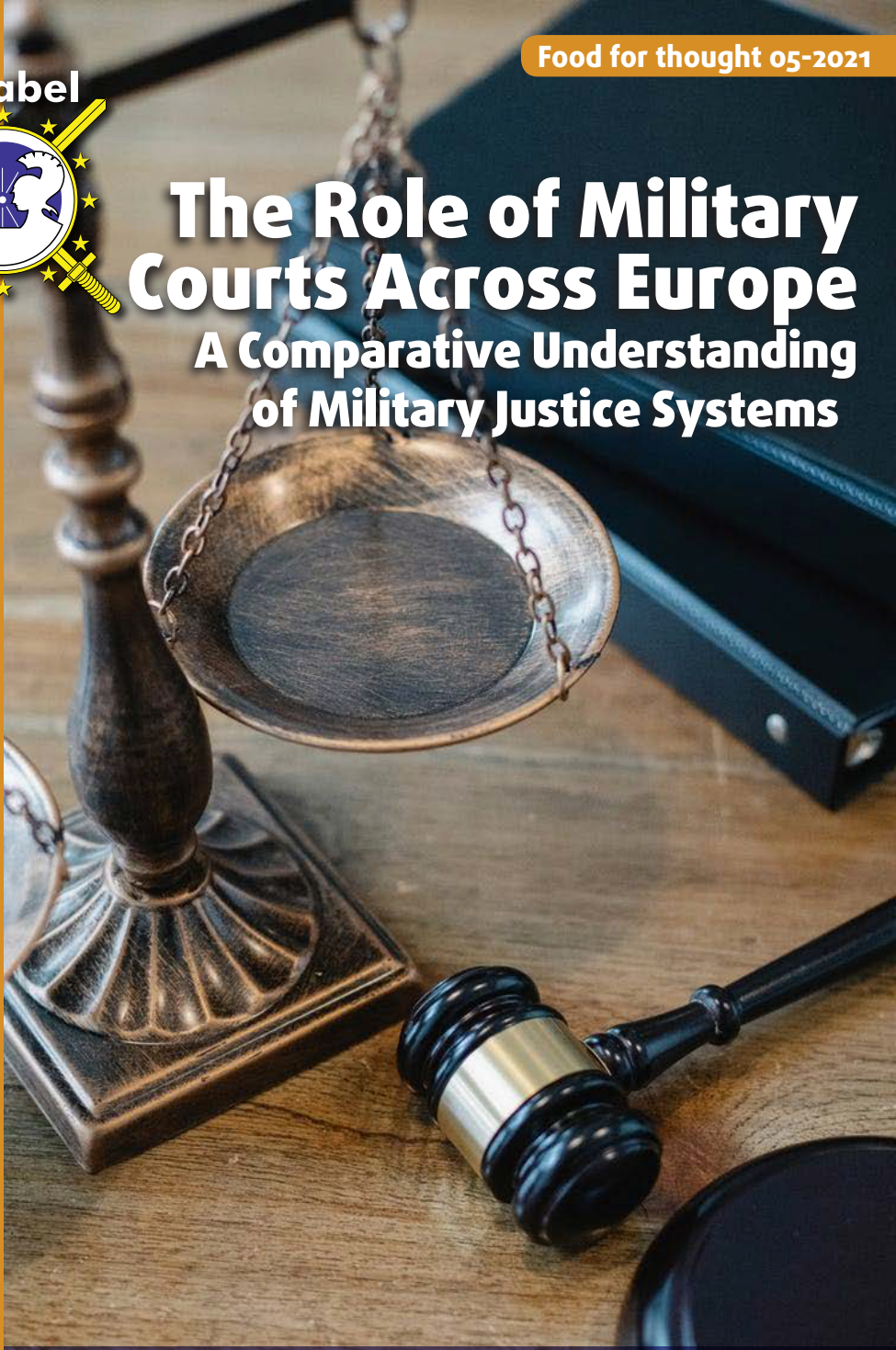
The Role of Military Courts Across Europe

A Comparative Understanding of Military Justice Systems



AN EXPERTISE FORUM CONTRIBUTING TO EUROPEAN ARMIES INTEROPERABILITY SINCE 1953

FINABEL
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This paper was drawn up by Daniela Cotelea, Alberto Pineda Alcántara, Cristina Tempera, Medeleine Brach, Cedric Foisseau and Giuseppe A. Ira under the supervision and guidance of Mr Mario Blokken, Director of the Permanent Secretariat.

This Food for Thought paper is a document that gives an initial reflection on the theme. The content is not reflecting the positions of the member states but consists of elements that can initiate and feed the discussions and analyses in the domain of the theme. All our studies are available on www.finabel.org

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INTRODUCTION

In the last decades, military justice systems have been subject to numerous reforms in different European states. The push for modernisation processes stems from the fact that military justice in some states needs to increase its fair trial guarantees within their legal framework. Recently, the existence of many traditional military tribunals has been put at stake. Many critics consider military justice is being called into question due to the alleged non-impartiality of military courts and international law developments. Some military courts no longer exist on their own, military judicial competences have been embedded into or transferred to civilian courts (Andreu-Guzmán, 2004, 161). A few standing military courts have been abolished, while others still exist, albeit their roles and responsibilities during peacetimes are very modest. Some states, such as Germany and France, allow the creation of *ad hoc* tribunals to face extraordinary situations such as the case of a war, and this is provided for by their respective constitutions.

Military justice and civil justice are considered two separate systems because they entail different procedures and different trials. However, in some countries, an overlap between the two justices can be found, resulting from either the victim's identity or even the location of the offence.

In addition to the domestic sphere, military justice shall also comply with International Human Rights Law (IHRL). Therefore, the European Court of Human Rights (ECtHR) jurisprudence and the practice of the United Nations Human Rights Committee (HRC) will be presented.

Exploring the nexus between military justice systems and civilian justice systems is paramount to ensure the rule of law is respected and enforced. By using a comparative transversal analysis of military law systems, this paper aims to highlight how military justice systems in selected European states have evolved, what their differences and commonalities are, as well as the challenges they will face in the future.

THE PARTICULARITIES OF MILITARY COURTS

A) Historic review about the creations of Military Courts

As presented in this paper, it is not unproblematic to declutter and classify the historical and political picture which impacted various military law systems (Nolte & Krieger, 2003, 23). This study draws inspiration from Prof. Heike Krieger and Prof. Georg Nolte's analysis of *European Military Law Systems* to help us determine the right framework and properly organise their respective commonalities

and differences. Since the late 1990s and early 2000s, many multinational units have been created and presented numerous legal hurdles when inner disputes arise. This has led to inefficiencies and difficulties in their smooth operationalisation. To address these issues, the German Ministry of Defence entrusted research to the University of Göttingen and various academics from other European states aimed at "comparing various European systems of military law." (ibid., V) According to Nolte, military traditions in Europe can be divided into three main categories mirroring their state organisation: small traditional democracies (Belgium, Denmark, Luxembourg, and the Netherlands); large traditional democracies (France, United Kingdom); and "post-authoritarian" democracies (Germany, Italy, Poland, Spain).

1. Small Traditional Democracies

An important commonality can be found in all four small traditional democracies. Each of these systems of government are constitutional monarchies with a parliamentary system whose traditions are rooted in the first half of the 19th century (ibid., 23).

The main development which came about was that the royal prerogative, which also included the military field, was no longer perceived as a personal prerogative of the monarch but that it has to be subordinate to the agreement of the government (ibid.). Later, at least until World War II, all these democracies pursued a policy of neutrality which was then discarded to be compatible with alliance within NATO. In all four countries, the constitutional loyalty of the armed forces towards the nation is implicit and time-honoured and has never embodied an independent political role (ibid.). That is to say that traditionally, these constitutions do not foresee special rules which are thought to guarantee the democratic legitimacy of the armed forces or a reserved role for the single soldier (ibid.).

2. Large Traditional Democracies

At first sight, the two large traditional democracies seem to be very different concerning the historical and political circumstances which have influenced their armed forces and their military law system. It is important to acknowledge that France, bound to its French Revolution, "traditionally conceives the armed forces as an emanation of the nation, while the United Kingdom, for the most part, relied on professional soldiers and not on conscripts" (ibid., 25). France traditionally is a land power in Europe, whereas the United Kingdom is conceived as the classical sea power (ibid.).

Traditionally, in both countries, there are no legal restrictions for the government, considering that both states traditionally lack legal restraints for the executive regarding the administration of the armed forces (ibid.). In France, the role of the parliament is quite reduced and is only in control of the military budget, whereas the presidential prerogative in military issues is foreseen by the constitution since 1958 (ibid.) Conversely, in the United Kingdom, the parliament has more autonomy in military matters and appears to influence and supervise governmental decisions (ibid.). Nevertheless, the prerogative which detains the governments in military questions is acknowledged and unchallenged in both states. This determinative role of the

executive is probably attributable to the traditional leaders of both nations as world powers with global military significance.

3. Post-authoritarian Democracies

The historical and political setting of the four post-authoritarian democracies has substantial differences regarding the democratic accountability of the armed forces and the establishment of a dignified role of the individual soldier (ibid., 26). To comprehend the different evolutions of the four post-authoritarian democracies, it is important to highlight the historical role of the armed forces and to understand what their role was when their corresponding democratic constitutions were brought into being.

In Poland, for instance, it can be noted that after 1989 the armed forces could not identify themselves ideologically with the past authoritarian system (ibid., 27). The communist regime was perceived as a foreign dominion, in fact, this is still a point of public debate how the Polish armed forces would have reacted in the case of Soviet intervention (ibid.). Since 1953, Polish military troops have operated as UN peacekeepers. Consequently, the establishment of the role of the armed forces was not a key issue to resolve for the new Polish democracy. Furthermore, all the attention was given to guaranteeing the neutrality of the armed forces (ibid.).

By contrast, in Spain, the armed forces were seen as an essential element for the previous authoritarian system. Overall, they could not be regarded as being loyal to the new democratic system since they still possessed a form of institutional strength that enabled them to influence and decide upon the new constitution (ibid.). Their main claim was the

source: https://www.pexels.com/nl-nl/foto/line-of-soldiers-walkin-408201/

Line of Soldiers walkin, Pixabay, February 4, 2016

introduction of a general clause that reserved a special dignified role for the armed forces. After the transition to democracy in 1976, "the threat of a *coup d'état*" endured for some years and caused a disharmonious coexistence between the civilian control of the military and the opposed claim of independence by the military (ibid.).

Differently from Spain, in Germany, the position of the armed forces was less clear. German armed forces were neither considered a fundamental component of the dismissed authoritarian system, nor to have been sufficiently neutral (ibid., 27). Thus, the former role of the armed forces seems to have been vague. On the one hand, the *Reichswehr* collaborated with the Soviet Red Army during the Weimar Republic and had revealed their will to escape civilian and parliamentary control. However, officers in 1944 had given proof that the armed forces were the only institution during the Nazi regime that was capable of putting forward an efficient resistance against Hitler. One further point to acknowledge is that, differently from Poland and Spain, the German armed forces no longer existed during the process of creating new constitutional rules. This gave more space to develop a new constitutional order free from already existing institutional habits and rules. Certainly, an important point of consideration was to analyse how to prevent a dictatorship, such as the Nazi Regime, to regain control (ibid., 27).

In Italy, the situation was analogous to Germany, where the armed forces were neither considered very loyal to the authoritarian system, nor considered very neutral towards the previous system. In 1999, the Italian constitutional court ruled that the constitution, in particular articles 11 and 52, ordains a conception of Italy's military organisation which is no longer rooted in a "power state" but on the liberal ideas of freedom of the people and the preservation of the national order (ibid., 28). The separation from an authoritarian past does not logically presuppose creating more fundamental and democratic rights for soldiers. The differences between the legal frameworks governing armed forces in the different post-authoritarian democracies stem form the difference in the historical context that shaped the role of the armed forces in the democratic reconstruction of the state and the armed forces. Namely, in Germany, the influence of the armed forces on this democratic reconstruction was shaped by their role in two wars, whereas in Poland, Italy, and Spain, the domestic role of the armed forces was the constitutive element (ibid., 29).

B) Distinction between military criminal law and disciplinary law

1. Distinction about the offences

Offences inside the military can be broadly classified into two categories: military offences and breaches of discipline. In continental European system countries, including the countries of Eastern and Central Europe, criminal offences and disciplinary violations embody two different categories of offences and are supervised by different legal acts. The category of criminal military offences consists of offences listed as serious violations directed against military capability, discipline, and effectiveness of the armed forces (Vashakmadze, 2018, 25). Such offences directly affect military interests and are only committable by

members of the armed forces.

Disciplinary violations are minor offences governed by a military superior or a military court in summary proceedings or by disciplinary administrative tribunals (ibid., 26). This second group of offences relate primarily to military discipline. While the underlying conduct can be similar to some civilian offences, the military disciplinary system emphasises the gravity of the violation (Liivoja, 2014:331). In general, it can be said that military crimes represent more grievous offences than disciplinary violations. Each country's legislation operates differently when distinguishing between military crimes and disciplinary violations. However, it is more likely that minor offences are decriminalised only to be prosecuted as disciplinary violations (ibid.).

2. Special Proceedings Conditions

2.1 The example of the Military Prosecution Service in Denmark

In all countries, the judicial procedures of military courts are equally formal as those of the civilian courts. Generally, military courts operate with a number between three and eight judges, who are usually military officers and at least one lawyer, who is qualified for being a serving officer or a civilian. Furthermore, all countries allow the use of a qualified civilian legal counsel and guarantee a prerogative to appeal the decision of a military court to a superior military court (Nolte, 2003,160). In continental countries, a superior military court would be the court of review, and in Britain, it is a court-martial appeal court (ibid.).

Coherent with the democratic ruling, all countries established rules to avoid double jeopardy, *i.e.* that the same person is sanctioned with punitive measures by both civil and military criminal tribunals for the same act. Generally, civilian jurisdiction prevails over military jurisdiction whenever there is a circumstance to exercise civilian jurisdiction. Only Denmark, Germany, and the Netherlands do not have special military criminal courts, and the regular criminal courts have jurisdiction in cases concerning military criminal law. Since the Military Prosecution Service of Denmark is different from other military criminal justice system and is not included in the military command line, the example will focus on the Danish Military Prosecution Service.

The Danish Prosecution Service was constituted in 1919 with the enactment of the 1916 judicial reform (The European Judicial Network: 2). Previously, Denmark had a system of investigating judges and the assignments of tasks between the investigating judge, and the police and prosecution were ambiguous (ibid.). The judicial reform introduced a dedicated unit that was only in charge of prosecutorial decision-making and control of criminal investigations with the clear aim to be separated from the judiciary decision-making.

2.2. Organisation

The Military Prosecution Service in Denmark is different from other systems, in that it is an autonomous service and is not included in the military command line. Furthermore, the department is merely secondary to the Ministry of Defence. How the Danish Military Prosecution Service is structured and organised is

drawn out in the Military Administration of Justice Act and the (Civilian) Administration of Justice Act (Danish Ministry of Defence, 2005).

The Service is divided into two offices: The Office of the Military Prosecutor General (the Judge Advocate General) and the Office of the Military Senior Prosecutor (Judge Advocate) (ibid.). The workforce of the Military Prosecution Service incorporates prosecutors, investigators, and other legal and administrative staff. The military prosecutors are primarily employed by the Civilian Prosecution Service, whereas the investigators are hired by the National Police (Danish Ministry of Defence website, 2018:12). Finally, in criminal legal proceedings, decisions, and resolutions carried out by the Military Senior Prosecutor are subordinate to the Military Prosecutor General's approval (ibid.). The main duties and competences of the Military Prosecution Service are to investigate and conduct the prosecution of violations of the Military Penal Code, as well as other civilian legislation connected to the military service.

The key element of the Danish System is the separation between the work of the Military Prosecution Service and the military commanders, which was introduced by a law reform of 2005 (ibid.). The Prosecution Service oversees criminal cases while military commanders are responsible for disciplinary cases and sanctions. With a few special cases, the Danish Military Criminal Justice System is grounded on the same conditions and rulings as the civil criminal procedure. The founding criterion is objectivity. Additionally, the Military Prosecutor General's Office is at the helm of training the Danish Military Legal Advisors in the obligations under International Humanitarian Law (IHL). Lastly, it gives consultation to the Home Guard authorities on the membership of members pronounced guilty of a criminal offence (ibid.).

C) An expanding field of competence following the circumstances

1. Crimes and offences committed abroad

There are multiple situations in which states must adapt their approach to military justice. In any case, they may apply the system already in place to a situation out of the ordinary. For instance, offences and crimes committed outside the territory of the state, in times of war, and when civilians are nonetheless involved in a case under the court's jurisdiction. Despite all the differences across the European countries, their systems tackle certain situations similarly.

Extraterritorial military offences and crimes are usually dealt with either in the courts already established by the state at home or in tribunals set up in their bases expressly for this purpose. Most countries have National Investigation Officers (NIOs) deployed in large units abroad, and if needed, can send one to a smaller unit. Normally, this has to be requested by the officer in charge at the unit if they think a crime may have been committed. Austria (Army Disciplinary Act §5 of 2014), the Netherlands (Vashakmadze, 2011, p.14), and the Czech Republic (Sections 161/7 and 166/3 of the Criminal Procedure Code of 1961) have NIOs deployed within their units depending on the size of the contingent and work along with military police to bring these

investigations to fruition.

Some countries, like Belgium, have a system by which the case at hand is heard by a field court martial (Military Criminal Code of 1815; Code of Military Justice of 1870; Code of Military Criminal Procedure of 1899). Belgium has a hybrid model, in which military and civil courts have some jurisdictional overlap (Vashakmadze, 2011, p.12). While there are military courts in the Belgian territory that could deal with cases abroad, there are also field court martials for troops abroad during peacetime. Belgian magistrates and specialised police can be sent to these field court martials to bring a case to its full completion. A remarkable case tried by court martial in Belgium was that of Luc Marchal (Associated Press, 1996), the former senior officer of the Belgian peacekeepers in Rwanda who was declared 'not guilty' for the death of the 10 Belgian soldiers in Rwanda. States without permanent military courts in peacetime mostly deal with military cases in civilian courts and rarely the mechanism of field court martial. That is exactly what the Czech Republic does (UN Peacekeeping, 2016). As mentioned, Czech Republic also has NIOs deployed with units and military police that conducts investigations of the crimes and offences committed by members of the armed forces. A competent ordinary tribunal at home then examines these investigations.

Oftentimes, the duty of the investigation abroad falls on the commander of the unit where the crime or offence took place, as in Latvia (Section 387, Criminal Procedure Law as amended in 2007). While practically, this may incur some problems where the actions under investigation may require an outside party to make it easier to conduct an impartial investigation.

An atypical case is Germany, a country that normally does not have military tribunals. In 2013 it passed the Act for Venue for Armed Forces Especially Deployed Abroad. Military courts of service were established, to deal with judicial matters that occur abroad involving the German forces. This court does not only hear criminal cases, but it also has jurisdiction over disciplinary issues and can impose career sanctions (Britannica, *n.d.*).

2. Tribunals in times of war

Most states without military tribunals during peacetime allow for their creation in wartime. This situation, which ties in with conceptions of the state of exception and the derogation of political rights, is recognised in all European countries in different ways. In Europe, war is understood to be an exception to the norm of peace, a situation for which the normal mechanisms of law and justice are not prepared to work. These legal mechanisms change under a declared situation of war, as it is assumed that military courts would be better versed in issues of Humanitarian Law and the norms of armed conflicts.

Many countries create new tribunals to deal with the new situation, Article 96 of the German Constitution allows military tribunals to be established during wartime. Even countries that already have specialised chambers to deal with military cases have the possibility in their legislations to create new tribunals to deal with crimes and offences from a specific conflict, such as the case of France, which created le Haut Tribunal Militaire to deal with cases from the Algerian war (Décision du 27 Avril

1961 instituant un Haut Tribunal Militaire, JORF nº101 du 28 avril 1961, p.3947). On the other hand, some European constitutions outright ban the creation of exceptional or *ad hoc* tribunals, and thus they have to address the situations arising in wartimes through their ordinary justice system. Slovenia (Art.126 of the Constitution, 2013), Denmark (Grl, Lov nr. 61 af 5.6.1953), and Spain (Art. 116 C.E., 1978) are examples of this. When these countries are involved in an armed conflict, their ordinary tribunals may receive broader powers or a greater jurisdiction, but no new tribunal must be created. Spain relies on its already existing military courts, through the mechanisms laid down in its constitution, which contemplates the establishment of a "state of siege" formerly called a state of war, and by which military jurisdiction could be expanded and certain rights could be derogated or altered to fit the circumstances of war (Art.35, Ley Orgánica 4/1981).

Source: https://commons.wikimedia.org/wiki/File:Batalionul_265_politie_militara_24.jpg).

Batalionul 265 politie militara 24, Lieutenant-Colonel Dragoș Anghelache, May 14, 2010

A SIGNIFICANT DIVERSITY IN MILITARY COURTS THROUGHOUT THE EU

It is important to clarify the foundations of justice in the European continental tradition. Civil law can trace its origins to the Roman law system, which comprises a codified system of procedures and rules. Judges are obligated to keep to the letter of the "written" law, a fundamental component of the overall system. At times, case law can perform the role of a supplementary source to further develop the law. Standing military courts are a typical component of this system, wherein they fulfil their judicial function permanently. Within such structures exists an array of different military court systems throughout the EU, ranging from purely civilian to purely military models.

A) Various models of court jurisdiction and organisation

When considering various models of court jurisdiction and organisation within the EU, there are generally four main kinds: purely military, jurisdictionally hybrid, structurally hybrid, and purely civilian (Vashakmadze, 2011, p. 12).

In a purely military model, military courts are given exclusive jurisdiction concerning judicial matters of a military nature. Such a system can be found in Luxembourg and Poland (OHCHR, 2011).

The jurisdictionally hybrid model signifies that the jurisdiction of military and civilian courts potentially overlap. A plethora of factors may affect how matters are divided between the courts, such as where an offence is committed, its severity, the victim's identity, and if the said offence occurred during wartime or peacetime. Belgium follows such a model, and military courts try offences that occurred abroad while their civilian counterparts handle those committed on Belgian soil (Smis and Borght, 2017).

A structurally hybrid model comprises civilian courts that contain specialised chambers to handle matters of a military judicial nature. The Netherlands, for instance, has civilian courts that try military criminal offences. In contrast, their military courts are responsible for handling disciplinary offences (UN Peacekeeping, 2016). Italy and Portugal also practice a form of the structurally hybrid model (European Justice, 2020).

A purely civilian model indicates that military judicial matters are under the jurisdiction of civilian courts. This is the case in Denmark and Sweden (Andreu-Guzmán, 2004, 225). During peacetime, Germany also follows such a model as the country does not maintain military courts during such times (Tomuschat, 2019). Furthermore, administrative or disciplinary tribunals handle service offences, while their civilian counterparts focus on crimes. Following along such lines, several Central and Eastern EU Member States have similarly abolished standing military courts in times of peace, though their constitutions still sanction the creation of said system during wartime.

B) Stark differences between exclusively military and civilian court systems

Military and civilian courts differ in numerous ways, most primarily regarding expertise and experience, independence, efficiency, and, finally, fair trial guarantees.

In terms of expertise and experience, unsurprisingly, military judges are well versed on matters concerning military disciplinary procedures and criminal law. Critically, they have an in-depth understanding of the specific nature of military culture and life. Civilian judges, in contrast, are at a disadvantage as they do not possess specialist understanding concerning military affairs and customarily have only limited experience regarding the practice of military criminal law (Norton, 2020).

Independence wise, military courts usually rely on the Ministry of Defence. As such, military judges are part of the army hierarchy, which could have potential ramifications should they feel inclined to adhere to the view of the superior on the case. Due to their in-

dependence from the executive branch of government, the civilian judiciary and their judges are not subordinated to the military hierarchy. Therefore, the incentives to adhere to the viewpoint of government representatives are considerably weaker (OHCHR, 2013).

Concerning efficiency, military courts can handle the procedures for minor disciplinary infractions and offences rapidly. A similar degree of efficiency cannot be expected if such matters are dealt with through a civilian court model (Andreu-Guzmán & Marshrons, 2004, 227). However, military courts cannot always be relied upon to fully apply fair trial guarantees. This is due to the disadvantages concerning independence (Duinhof, 1984). Critical rights, such as those to a public hearing and legal assistance of one's own choosing, risk being neglected during military trials. Conversely, due to the increased independence that civilian courts enjoy, consistent adherence to fair trial guarantees can more readily be assumed (Andreu-Guzmán, 2004, 279).

C) The composition of different court systems in relation to the assorted levels of appeal

Customarily, systems of military justice contain three or more levels of courts. The first instance is handled by trial courts. The second level military courts address appeals brought against first instance decisions. The third level manifests as a special military chamber in a high court. The civil supreme court may handle a wrong interpretation or application of the law at this juncture and has the jurisdiction to review a decision made by lower courts founded upon unlawful procedures.

For a purely military system, trial courts are basic, or first instance, military courts consist of one or more military judges. Hybrid systems consider trial courts to be first instance military courts. Yet, they differ in that they practice procedures that include civilian elements. Purely civilian models only contain civilian courts with civilian judges (Dahl, 2008, 23).[1]

In an entirely military mode, the second level consists of higher-ranking military judges presiding over military appeals courts. As with the trial courts found in hybrid systems, military appeals courts within the same system potentially practice civilian elements, or conversely, civilian appeals courts that include military components. Only civilian appeals courts contain exclusively judges of a civilian nature.

The third level is the Supreme Court. In exclusively military systems, the Supreme Military Court holds jurisdiction over most serious military offences. They can also review offences committed by military judges and preside over jurisdictional conflicts within the military justice system. In a hybrid model, the civilian supreme court may incorporate a military chamber with jurisdiction over military offences. Whereas, in purely civilian systems, civilian supreme courts are composed of civilian judges in their entirety (European Justice, 2013).

1. Summary trials

Summary trials exist as a separate system to the appeals courts and serve to handle disciplinary or minor offences. Customarily, they employ simpler processes to guarantee more efficient dealings about minor offences. It is

important to note that the function of the commander is imperative at this juncture, as they have the power to initiate an investigation, decide whether to present the case to the military prosecutor or decide upon the punishment themselves. However, as the commander is subject to the military hierarchy, conflicts of interest may arise. As such, the principle of independence is especially in jeopardy in these kinds of procedures. Accordingly, it is prudent that military law recognises the authority to handle disciplinary offences, the kind of punishment and the appeal process (LexisNexis, 2020).

2. Prosecution Systems

As with the sections above, there are many variations to how the EU systems of prosecution are structured. However, generally, the region's prosecution systems follow a similar overall model to one another. The prosecutor must charge the suspected offender to initiate a court proceeding wherein they are convicted and receive a sentence. In practice, however, procedures do not always play out precisely in such a way. Attrition can occur in every step of the process, from identifying a suspected offender to the eventual sentence. This may be a result of technical issues, legal reasons, and/or efficiency considerations. Especially for the former two, variations to the normal process may occur due to insufficient evidence to begin a prosecution. The suspected offender could also be acquitted in court. Besides, many countries allow the prosecution and/or police the jurisdiction to end a proceeding themselves. This can occur with or without consequences for the suspected offender. Such deviations result in a more efficient process as a whole because a court hearing is no longer necessary. On the state level, these processes can vary. (Aromaa & Heiskanen, 2008, 118).

THE PROGRESSIVE DISAPPEARING OF MILITARY COURTS

A) Disappearance of military courts

In the last few years, a process of "civilianisation" of military jurisdictions can be observed (Andreu-Guzman, 2018, 125). This process entails the reduction of the jurisdiction of military courts. Several states even decided to abolish their military courts (ibid.). For instance, Slovakia, Latvia, and the Czech Republic are countries that have abolished their specialised military courts (ibid., 126). At the same time, states like Germany, Austria, Belgium, Denmark, Slovenia, Estonia, France, Sweden, Norway, the Netherlands, and Portugal have decided to abolish their military courts in times of peace (ibid.).

This whole process was highly influenced by International Human Rights Law (IHRL) and by the activity of international organisations that aim to protect these rights (ibid., 125). Due to the extensive case law of the ECHR, various countries have prohibited the trial of civilians by military courts, making the necessary adjustment in their national law (i.e. Romania) (ibid., 126). Italy is one of the states that have prohibited this practice in times of

peace (Constitution of the Italian Republic, art 103; Andreu-Guzman, 2018, 126).

1. Due Process and Military Justice

Contemporary discussions focus on the compatibility of military justice with due process obligations and guarantees of international law (Leigh & Born, 2008). This issue became questionable in light of the recent developments leading to the subjection of the military justice systems to civilian standards of judicial review (Liivoja, 2014: 327; Rowe, 2006, 100). The compatibility of military court proceedings with art. 14(1) of the International Covenant on Civil and Political Rights (2011) mentioning the principle of a "fair and public hearing by a competent, independent and impartial tribunal established by law" has caused much debate. Certain states have decided to transfer the prerogatives of military courts to ordinary criminal courts. For instance, Austria, Denmark, Estonia, Germany, and Sweden are just some of the states opting for this arrangement (Liivoja, 2014, 337).

2. Criticising military justice's probity in Poland

At the same time, some countries are still preserving their military courts. However, some of their practices have raised a lot of criticism from international bodies concerned with applying fundamental principles such as fair trial and impartiality.

The military justice system of Poland was criticised on several occasions. A former Polish General, interviewed by *Human Rights First* in November 2018, classified Poland's military justice system as being "in chaos and lacking a clear military strategy by respected security experts" (Human Rights First, 2019). Once *Law and Justice* obtained the majority of the parliamentary power after the 2015 national elections, as controller of the executive branch, a series of anti-democratic actions have been deployed (ibid.). The Party's attempts to weaken Poland's separation of powers by undermining its judiciary meant transforming the state into an illiberal one. For instance, Poland's Constitution was violated to compel the constitutional tribunal to "rewrite the rules governing the highest constitutional court" and to "illegally appoint new judges" (ibid.). Furthermore, 149 regional court heads and 1000 high level prosecutors were forced out or compelled to retire for disagreeing with the Law and Justice party's ideology (ibid.).

One of the most criticised of their actions was the "systematic purge of the Polish military and intelligence agencies of individuals" for reasons of lacking devotion and faith to the governing party (ibid.). Therefore, dozens of high-profile military officers, generals, colonels, and commanding officers were dismissed or demoted in 2016 and 2017 (ibid.). The leaders of the party invoked corruption and communist aspirations as main justifications for all the dismissals.

Consequently, the effectiveness of the operation of the Polish military army operating as one fighting force has considerably diminished since only inexperienced and illegally appointed commanders remained in charge of the armed forces.

Accordingly, all these reforms were met with a lot of criticism from the EU Member States and the international human rights bodies.

itary police of Estonia, Wandering Trad, February 14, 2018 (Source: https://commons.wikimedia.org/wiki/File:Military_police_of_Estonia.jpg

Military Police Day celebrated by the 265th Military Police Battalion of the Romanian Land Forces

In 2016, the UNHRC finished its Periodic Report on Poland, another reviewing process scheduled for 2021. In its last report, the UNHRC expressed its concerns over the politically driven disciplinary actions against members of the Polish military system (ibid.). As mentioned by one former Polish general, not only do these measures 'harm interoperability', but they also "make Poland weaker" in front of enemies (ibid.).

The European Commission also used the Rule of Law Framework to open a dialogue with the Polish Government in 2016 to little avail (European Commission, 2016). However, the situation was referred to the Court of Justice of the EU, which ordered in April 2020 the suspension of this Disciplinary Chamber as an interim measure while it works on a final judgement (Commission v. Poland, 2020).

3. Criticising military justice's probity in Romania

As a general rule, the military justice system is based on the assumption that the defendant is a serviceman. However, Romanian law provides for a military-like status for police officers who are accountable to the Military prosecutor, thus escaping civilian control (Macovei, 2010, 110). In the case of *Bursuc v Romania* (2004), where several police officers were accused of inhumane and degrading treatment towards a counsellor, the ECtHR has ruled on the impartiality of the military prosecutor as an authority.

When it comes to the accountability of Romanian police officers, the lack of impartiality on the part of prosecuting authorities was criticised on various occasions. The continuous, unjustified delay of investigation reports has raised questions on the independence of the functioning of the judicial system (Predica v. Romania, 2011). Other issues with military

justice in Romania are further related to the general situation of the judiciary in Romania, as the Ministry of Justice has "significant influence […] over the judicial appointments (Coman & Dallara, 2012: 836).

Currently, one of the main challenges facing the military justice system of Romania is the abolition of specialised military courts in favour of the civil courts (Stoian, 2016, 381-382). "Given the very low volume of cases pending before military courts", the transfer of prerogatives from military courts to "other components of the judicial system" is seen as a positive element by specialists (ibid., 382).

Source: https://www.pexels.com/photo/people-wearing-green-and-brown-camouflage-military-suit-while-standing-holding-rifles-194764/

People Wearing Green and Brown Camouflage Military Suit While Standing Holding Rifle, Somchai Kongkamsri, May 31, 2016

Reports of 2014 showed that Romanian military courts had to deal with only 46 cases per year, whereas civil courts counted on 918 cases (Raportul Grupului de lucru, 2015).

The demilitarisation of officials and their acquisition of a civil servant status makes another argument for abolishing military courts since these officials are no longer tried in military courts.

Moreover, since the military judges are deemed to have a "hybrid status" (thoroughly discussed in Section II.A), which means they are representatives of the justice system while, at the same time, they are following a military career and are accountable to the Ministry of National Defence, their independence cannot be guaranteed (ibid.).

The reforms concerning the reorganisation of the courts and the justice system of Romania are bringing into question the abolition of the specialised military courts. Even if it constitutes a controversial matter, for now, further developments will clarify the issue.

B) Submitting the military justice systems to global juridical standards

In the last decades, military justice has shown two visible trends. The first is to attribute the judicial competences of military courts to civilian courts (Andreu-Guzman, 2004,161). The second trend excludes civilians from the scope of military courts' jurisdiction, thus limiting it to servicepersons (ibid.).

One of the main areas of concern with military courts is their adherence to European and international standards for the administration of justice and their ability to guarantee fair trial rights (Vashakmadze, 2018, 44).

The States of the European Union strive to achieve these standards and implement them in their systems, and multiple mechanisms point out flaws. The current developments of IHRL point to the necessity of limiting military jurisdiction when it comes to trying civilians (ibid., 9). This view is based on the recent jurisprudence of the European Court of Human Rights and the practice of the UN Human Rights Committee (ibid.).

1. The jurisprudence of the European Court of Human Rights

Many states have undergone a process of civilianisation after a half century of critical debate stemming from international human rights organisations. As a result, other states have decided to abolish military courts, whereas others have preserved the separated specialised military courts while introducing civilian elements. At the same time, some countries restricted the jurisdiction of the military courts to try offences of a disciplinary or duty-related nature. This way, the trying of civilians was also limited. However, these restrictions have influenced the "associated civilians" deploying with the military forces abroad (ibid.). Therefore, some states have expanded the military to cover associated civilians (ibid., 82). The criticism concerning the principle of fair trial applies to military criminal proceedings of "civilian defendants" and other issues must be considered (ibid.). The trial of civilians before military courts is not prohibited *per se* by the international human rights law. Certain principles and standards are allowing such trials to occur in specific circumstances (ibid.). In Europe, military trials of civilians are governed by Article 6(1) of the European Convention on Human Rights enshrining that: "*In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

There are two conditions to satisfy the justification test of a military trial of a civilian. The first one enshrines the necessity to analyse the "objective and serious reasons" (HRCtte) or "compelling reasons" (ECHR) in a specific case (ibid., 100). The second condition is fulfilling the standard test, namely, meeting all the fair trial safeguards enshrined in art. 6 of the ECHR, where the state bears the burden of proof (ibid.).

Most of the relevant case laws are cases brought against Turkey (see Ciraklar v. Turkey, 1998, para 39; Incal v. Turkey, para 67-72; Şahiner v. Turkey, 2001, para 33-47) and UK (see Findlay v. UK, 1997, para 74-78; Coyne v. UK, 1997, para 58; Cable and Others v. UK, 1999, para 21; Wilkinson and Allen v. UK, 2001, para 24; Mills v. UK, 2001, para 25). Even if these states are not part of the European Union (EU), the ECtHR and its jurisprudence serve as important tools to shape the "domestic judicial design" of other Member States of the EU (Kosar, 2017: 117). In the very recent case of *Mustafa v Bulgaria (2019)*, the ECtHR found a new violation of art. 6(1) ECHR in respect of a civilian having no links with the army tried by a military court just because his colleagues were servicemen. The defendant argued that his conviction lacked independence and impartiality from the part of the courts (ibid). Bulgarian law provides for the exclusive jurisdiction of military courts for offences related or not to

military activities committed by servicemen or civilians jointly (Penal Procedure Code of the Republic of Bulgaria, 2006: art 396). Nevertheless, as specified in the case law of the ECtHR, "compelling reasons" are needed to justify the trial of a civilian by a military court (ibid., para 45). In the present case, the Court observed no "compelling reasons" for the conviction of the civilian and ruled on the impartiality and lack of independence of the military courts.

There are multiple examples of other issues of timely justice, such as the *Case of Qing v. Portugal* decided by the ECtHR in 2016, or the case of racial discrimination in the administration of justice (HRC: Concluding observations on the fifth periodic report of the Netherlands, 1997). These are worrying flaws of otherwise correct judicial mechanisms. Nevertheless, there are deeper concerns about the erosion of such mechanisms in some states, namely Poland and Romania, as discussed in the previous sub-section.

2. The work and declarations of the UN

During the last 30 years, the United Nations Human Rights Committee (HRC) has registered a substantial evolution when it comes to the trial and conviction of civilians by military tribunals (Andreu-Guzman, 2018: 69). In several of its observations and recommendations, the Committee has ruled on the strict limitation of the jurisdiction of military courts to military offences and offences committed by servicemen (ibid.). Therefore, the Committee has repeatedly urged states to prohibit the trial of civilians by military tribunals (ibid.).

In its final Observations on Slovakia (1997), the United Nation HRC expressed its concerns in the context of Slovakian law providing for the trial of civilians in cases of "betrayal of State secrets, espionage and State security". Consequently, the HRC recommended to revise the Slovakian Criminal Code to exclude civilians from the scope of military courts' jurisdiction (ibid.). Therefore, in 2009 Slovakian military tribunals were abolished with the right changes made to the national law (Act no. 757/2004 Coll. on Courts as amended).

At the same time, in its final Observations on Poland (1999, para 21), the HRC noted that, despite the limitations introduced to military criminal procedure, it does not accept "that this practice is justified by the convenience of the military court dealing with every person who may have taken some part in an offence primarily committed by a member of the armed forces". Consequently, HRC recommended amending or repealing the Polish Criminal Procedure Code (ibid.).

Many States invoke the "state of emergency" to bring civilians under the jurisdiction of military courts (Andreu-Guzman, 2018: 77). In this regard, the Committee has mentioned in its General Comment No 29 on States of Emergency (Art .4) that even in times of war or emergency "only a court of law may try and convict a person for a criminal offence" (International Covenant on Civil and Political Rights, 2001: para 16). Moreover, the Committee has considered that Member States cannot invoke Article 4 of the Covenant to justify violations of human rights or norms of international law, namely the fundamental principle of fair trial and the presumption of innocence (ibid.). Therefore, since the international humanitarian law explicitly guaran-

tees the right to a fair trial in a time of armed conflict, the Committee finds "no justification for derogation from these guarantees during other emergency situations" (ibid.).

C) The multiplication of recent reforms of the military courts

Recently, among the Member States, a common tendency seems to emerge as military courts are seeing their existence at stake. Due to the influence of critics and international law previously developed, military courts seem to slowly see their existence put into question. These reforms take different paths showing how different the military tradition could be from a country to another.

Some countries decided to bring closer to a civilian judicial system the traditional military courts without suppressing them. For example, Finland's reform of 2001 shifted prosecution tasks from military legal advisers to public prosecutors to end any possible criticism about the probity of these agents and military influence during the proceeding (Dahl Arne Willy, 2011). In the same way, Ireland decided to review the Irish military law in 2007 due to the European Convention of Human Rights and relevant decisions of the European Court of Human Rights. They slightly modified the texts to create standing courts with permanent judges to hear the cases (Ibid.).

In other countries, the will to bring the military judicial system closer to the civilian one has taken a much deeper path. For example, France has overtaken its traditional system to transfer the military court system into the hands of classical civilian justice. This reform started in 1982 with the suppression of special courts. It suited the professionalisation of the French Army by creating a specific tribunal for the army, the *Tribunal Aux Armées de Paris* (TAAP). The remaining tribunal was only hearing cases that implied the army in foreign countries (Rwandese genocide, killings of French militaries in Ivory Coast). With the final suppression of the TAAP in 2012, the last step is made towards Military Justice in the hand of the Civilians Judges (Salles Alain & Guibert Nathalie, 2010). Nonetheless, a specificity is kept as militaries are judged in specialised chambers present in regional courts of *Grande Instance*.

These reforms are pushed by the rise of Human Rights concerns. Slovakian reform of 2009 was pulsed by the United Nations Human Right Council observations (Comisión Internacional de Juristas, 2018). Since this reform and the Amendment to the Slovakian Law no.757/2004, it has now a fully integrated system in the civilian judicial system.

Among the Union, some military judicial systems remain in the hands of specialised courts handled by military jurisdiction. But these cases remain exceptional, and reform can be expected in the future for improved compliance with the need to respect Human Rights and the principle of independence of justice. Romania and Poland are among these countries that keep justice handled by military institutions. In Poland, although a recent reform has slightly changed the hierarchy and given a new option for an extraordinary appeal, the last UNHRC Periodic Report finished in 2016 pointed out concerns about the independence of judges. Multiple other organisations have raised doubts about the widespread and politically motivated actions

that lead against some members of the armed forces too.

D) A remaining importance of specific jurisdictions in "War times"

As stated above in the paper, most of the systems that abrogate military court as a specific court for militaries, an amendment keeps the possibility of recreating a special court in cases of war. This tradition of special justice is founded on strict discipline and respect of the rules that apply in those times. Once again, the study of the martial court system shows how much EU systems can differ from one another.

Belgian military courts were abolished at the beginning of 2004 for peace times as the former law was considered incompatible with the European Convention on Human Rights. This law contains a disposition that allows the return of militaries jurisdiction in the form of martial court during times of war (article 3 of this law, no. 2003009370). Following the King's decisions and his relating decision about the modalities, permanent military tribunals are put in place during wartime. This possibility, understandable for this kind of context, did not escape from criticism as in September 2014, the Committee of forced disappearing (Decaux Emmanuel, 2014) declared that those tribunals were not guaranteeing the conditions of independence and impartiality required by the Convention about Violations of Human Rights and its Article 11.

The Finnish model is based on the same logic. Finnish military jurisdiction is fused with classic civilian jurisdiction and tribunals; military

Source: https://commons.wikimedia.org/wiki/File:Ma%C5%82a_sala_rozpraw_Trybuna%C5%82u_K

Small courtroom of the Polish Constitutional Tribunal, Adrian Grycuk, January 22, 2016

procedures are heard by ordinary tribunals as envisioned by the first article of the Finnish law about military judiciary procedure. However, in chapter six of this law, a special procedure is planned in times of war. Considering the good administration of justice and in the case of a territory attacked, an *ad hoc* martial court can be instituted to afford the work that the classic tribunal cannot do anymore. For putting such a procedure in place, a governmental decree is needed, and there is a control from the Parliament to validate and possibly end this special jurisdiction.

Another expression of the specific dispositions related to times of war is the transfer of competences from civilian courts to military ones. In Spain, military courts still exist despite the principle of jurisdictional unity provided by Article 117.5 of the Spanish constitution. These military courts have a strictly delimited field of competences. They are mainly competent for cases concerning troops deployed in a foreign territory and are subdued to the Supreme Court that possesses a specialised room for military justice to preserve the unity of judicial decisions. During times of war, the military courts' competence is expanded and include crimes determined in treaties with allied forces or even common crimes normally included in Spanish legislation is decided by the Congress or the Government

For other countries, the abolition of military courts also implies abolishing ad hoc martial court, even looking at the specificities that come from war times. Indeed, the return of ad hoc jurisdiction with a larger field of competences and an increased power raised concerns about the respect of International Human Rights. It is always an equilibrium between efficiency in respect of law and protection for people.

CONCLUSION

Contemporary military justice systems of European states have experienced various alterations and reforms over the previous decades. There has been a general push Union-wide to modernise court processes due to inadequate legal frameworks, predominantly regarding ambiguous fair trial guarantees. Beyond the domestic sphere, military justice systems have also made concerted efforts towards aligning their processes to better comply with IHRL. As such, this paper is concerned with individual state developments and moves to touch upon the state of the region by analysing the jurisprudence of the ECtHR and the UNHRC.

Because military justice and civil justice apparatuses predominately employ different procedural and trial processes, they are customarily regarded as two separate entities within the overall system. However, as shown above, numerous states employ a more complex, hybrid system composed by varying parts of the two due to the overlap experience in terms of the identity of the victim concerned, as well as the territory in which an offence is committed, in addition to a multitude of other factors.

Notably, the existence of numerous traditional military tribunals has been jeopardised due to the evolution of international law and accusations of alleged non-impartiality directed towards said courts. Regarding the former, many states no longer maintain independently existing military courts. As a result, the competencies of said courts have instead been transferred to or even embedded within civilian courts. Some military courts of a standing nature have even been abolished. Often those that have continued to exist have had their responsibilities and jurisdiction highly circumvented during times of peace. Conversely, several exceptions exist, such as in France and Germany, wherein *ad hoc* tribunals are generated in light of extraordinary circumstances, such as in the case of war.

For such systems to be as effective as possible, the rule of law must be regarded and implemented appropriately. As such, the complex interplay between civilian and military justice systems must be considered and understood, not just at the regional level, but also with the characteristics of individual states in mind. To tackle this subject, the authors of this paper employed a comparative multidimensional analysis of military law systems. Through their study, they were not only able to glean the notable similarities and differences between the various European countries, but also to track the unique ways in which a selected number of them have evolved, and ultimately, bring to the fore the very real challenges the region may find itself facing in the future because of past and current military court system trends.

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