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Gwenaël Guyon, Jean-Paul Laborde & Stéphane Baudens *(Eds.)*

Military justice. Contemporary Challenges, History and Comparison

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(1st International Military Justice Forum, Paris, 18-19 November 2021)

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Summary

PREFACE

By Alan Large[*]

I am honoured to be asked to write the Preface for this impressive and important publication. The articles which it contains take us on a journey from the 18th Century through to a future age of killer robots and autonomous weapons – although perhaps not so far in the future as we might wish. Prepare for a historical voyage from France through India, Belgium, South Africa, Italy, Denmark and Brazil, with articles covering a wide range of topics, but all focussing on military justice.

As the Introduction to this edition rightly observes, military justice is not simply of historical interest. Whichever model of the wide range of military justice systems is in place, it needs to be able to support the operational effectiveness of the armed forces by maintaining discipline through a fair, effective and efficient system of justice. Unnecessary delays, repeated unwarranted legal challenges, backlogs in listing cases in court and similar matters frustrate the very reason for having military justice and cause problems for victims, defendants, witnesses and commanders, all of whom have to endeavour to operate professionally whilst a case progresses through the system.

I was fortunate to be asked to speak at the first meeting of the International Military Justice Forum in Paris last year. The meeting gave me the chance to renew old friendships and meet new colleagues with a shared interest in military justice. The meeting also provided all who attend with an invaluable opportunity to discuss and share thoughts and to learn from the experience of each other. I like to think that military justice in the United Kingdom is, since its transformation in the Armed Forces Act 2006, in good shape. But there are always challenges to any system of justice, and as Judge Advocate General I need to able to listen and respond positively to constructive criticism, particularly if will result in improvement for those involved in the justice process. Learning how others have tackled similar issues, be they historical or contemporary, assists all of us involved in administering military justice in providing the best support for our armed forces. I have no doubt that you, like myself, will learn something from every article in this publication and enjoy reading them too.

I look forward to the continued success of the International Military Justice Forum and commend Professor Guyon and his colleagues for all they have achieved so far.

[*] Judge Advocate General of the United Kingdom.

INTRODUCTION

By Gwenaël Guyon[*]*, Jean-Paul Laborde*[**]*, Stéphane Baudens*[***]

The war in Ukraine, like all conflicts in the past, reminds us how significant are studies on military justice, particularly in wartime, and that those studies must not only be constant but also mutual. The contemporary challenges of military justice in peacetime and in wartime are indeed numerous. One of the main objectives of military justice is to ensure that the success of military operations is not overshadowed by wrong-doings and to strengthen the national security by maintaining discipline within the armed forces engaged in serving a state's interests, in compliance with international law. In the past, discipline was already regarded as 'the soul of an army' by Georges Washington or 'the first quality of a soldier' by Napoleon. That is why national military justice systems have been built by major legislations, generally drafted, approved, and promulgated in time of peace by civil authorities and parliaments – for instance the Gustavus Adolphus' code in Sweden (1621), the *Articles of War and Court-Martial Instructions* in Denmark (1683), the *Mutiny Act* and the *Articles of War* in England (1689, 1765), the *Code of Military justice* in France (1857) or the *Uniform Code of Military Justice* in the United States (1951). These codes of military justice have provided a range of criminal rules, including ordinary crimes and all crimes that affect good order and discipline in the military, punishments, courts organisation, and rules of procedure. At the origins of these founding texts, legislators have left their mark on the history of military justice, the latter being progressively structured, institutionalised, and integrated into State administration. In parallel with this growing legislation, military justice has also developed in practice, according to courts decisions and political debates. However, establishing a modern system of military justice is one thing. Ensuring it functions properly is another. And history has shown that on several occasions codes of military justice drafted in peacetime had to be amended or adapted in wartime - sometimes in a dramatic way especially during the two World Wars - because no one could foresee the nature, the course of events and the outcome of the war. The First World War has also shown that 'high-intensity' warfare and new technologies used by armed forces (heavy artillery, airplanes, tanks, machine guns, explosives, chemical weapons, *etc*.) have had consequences on discipline, on military command, and (as a combination of both) on the functioning of military justice. Nowadays, battlefield robotisation, augmented soldiers, artificial intelligence, and all other present and future technological developments, are transforming warfare and will

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continue to do it in the future. If those new technologies will undoubtedly have consequences on tactic, strategy, material capabilities or intelligence, it will also be necessary to control and regulate them by national and international laws. Factors are numerous: responsibility, consent, courts' jurisdiction, evidence, punishments, *etc.* In the same way, the current use of private military and security contractors (PMSCs) blurs the lines, undermines the respect of the law of armed conflict and makes difficult the application of national rules of military justice. In this regard, history has already shown many difficulties surrounding the use of foreign troops, auxiliaries, or mercenaries in the past. In other words, are our current military justice systems ready to deal with new forms of conflict and, overall, with the renewal (in Europe) of high-intensity warfare? What are the new challenges faced by military justice? What does the future hold for military law and military justice? How can we learn from history?

Another challenge is the courts' jurisdiction. Following the World War II, 'civilianisation' of military justice – *i.e.* the merging of military justice and civilian justice - has been in the air. Since ancient times and for centuries, the administration of military justice was the commanders' privilege. Military justice functioned as a system independent of the civilian judiciary; it had its own body of rules and procedures; it historically developed in parallel to civilian courts. Military justice was long brought by 'officers-judges' in the exercise of their command power. However, starting from the 17th century, in some European countries, civilian lawyers have started to play a role in courts martial, e.g. the Judge Advocate General in the UK. In 1790, the French revolutionaries abolished - for a short period - the officers' monopoly over military justice. Later, while codifying the French criminal law, Napoleon himself supported the merging of the two systems, when it was possible:

> There is only one justice in France; any French soldier is a French citizen before being a soldier; if, on the national territory, a soldier murders another, he has undoubtedly committed a military crime, but he has also committed a civilian crime. It is therefore necessary that all offences should first be submitted to the civilian jurisdiction, whenever it is present.[1]

Since then, due to the alleged non-impartiality or non-independence of military courts, civilian principles have progressively been integrated into most of military justice systems (jury, evidence, fundamental rights, fair trial guarantees, rules of procedure, *etc.*) - despite some specificities and some differences related to the nature of military service. In the 19th and 20th centuries, codifications have also contributed to the civilianisation of military justice. Codes of military justice are indeed legislations passed by civilian authorities, and only the Parliament can amend them. Over the last decades, some states went further towards civilianisation. In some 'completely civilianised' states, military courts no longer exist in peacetime, as their competences have been transferred to civilian

[1] Jean-Guillaume Locré, *La législation civile commerciale et criminelle de la France* (Paris, Treuttel et Würtz, vol. 29) 139.

courts - note that most states without military courts in peacetime allow for their convening in wartime. On the contrary, in other 'purely military' states, military justice operates in a separate court system, with 'uniformed judges' and exclusive competence over military cases in peacetime or in wartime. Finally, some other 'partially civilianised' states have a hybrid military justice system, in which competences of military courts and civilian courts overlap - depending on many factors such as the victim's identity, the seriousness of the offence, whether the offence was committed on the national territory or abroad, in peacetime or in wartime, *etc*. All these systems have their advantages and disadvantages. Nonetheless, nowadays, due to criticisms and international law regulations, pressure for more civilianisation has been stronger. What is at stake in these calls for reforms?

The purpose of military justice is also to promote justice within the overall framework of rule of law. In democratic states, and as a consequence of civilianisation, military justice guarantees a set of individual rights to military personnel, who never stop being citizens. With some exceptions – connected to special military obligations and duties – the legislator guarantees military personnel most of the rights that they enjoy as citizens in criminal courts, as, for instance, the right to counsel, the right to information, the right to an impartial trial, the presumption of innocence, the right to appeal, the right to a legal punishment, and in some cases, the right to a jury. However, once again, history gives us lessons. In peacetime, in wartime, in post-war eras or in periods of political transitions, difficulties often arose. Those difficulties hindered the proper functioning of military justice and in some circumstances basic legal rights were not always respected, for many reasons. Today and in the future, how to ensure the efficiency of military justice and the respect of the military personnel's fundamental rights before a court of justice? Is it possible to strike a good balance between the requirements of justice and the requirements of war and command? How to avoid the sacrifice of rights to military and political causes? This issue is even more important since some states in the world still use military courts to prosecute and try civilians. This leads us to another issue: the training of those who conduct military cases. For centuries, military justice has been brought by officers without any legal training. The growing movement for the civilianisation has furnished a variety of solutions: the transfer of all competences to civilian judges, the assistance of civilian lawyers (reservists or lawyers enrolled by conscription), the recourse to retired civilian judges, the appointment of legally trained military lawyers (like the famous JAG's corps in the United States), *etc*. But the reverse is also true: in completely civilianised systems, civilian lawyers must be trained in military matters, not only to get the expertise on military criminal law and disciplinary procedures but also, and overall, to understand the specific military culture and values.

Discussing these issues, among others, is precisely the purpose of the *International Military Justice Forum* (IMJF). The IMJF is an international congress dedicated to fostering scholarship and teaching in the fields of military justice and military criminal law. It aims at bringing together academics, professionals, military officers, students, and all those who share an interest in military justice. Its first objective is to highlight the diversity of

military justice systems, to expose their salient features, to explore their history and to underline their actual evolution. In a comparative way, the IMJF also aims to emphasise links and similarities that may have existed – or still exist – between national military laws. The IMJF must finally allow the Forum's participants to reflect together on what the future of military law could be, as our armed forces are transformed by new technologies and ever-changing threat perceptions. Its originality is to mix disciplines. Law, history, ethics, philosophy, political studies, and sciences are at the heart of our debates and discussions.

The first meeting of the *International Military Justice Forum* took place in Paris in 2021. It was co-organised by Saint-Cyr Coëtquidan Military Academy and the General Prosecution Service of the Cour de cassation. Its objectives were 1) to highlight contemporary military justice systems and to compare them *(Military Justice as it is*). This first part was used to deepen existing knowledge on military justice systems that exist in the world and to identify points of comparison and points of divergence. 2) to recount the history of military justice in the world (*Military Justice as it was*). This second part aimed at highlighting the main historical developments of military justice. 3) the circulation of military justice models in the world (*Military Justice compared*). It seems that many authors, lawyers or not, military or not, have in the past compared, and still compare, national military laws or military justice systems today. There are a variety of reasons for that: criticising a system, promoting, or rejecting reform, categorising, or classifying laws and procedures, or simply exposing diversity. It also seems that several national military laws have been models used to build other national legal systems. The aim was to review the circulation of military law models around the world, and to expose methods and motives of legal comparison. 4) propose future military law and military justice in connection with the use of new technologies on battlefield (*Military Justice as it could be*).

Twelve countries and four continents were represented in Paris, by civilians and members of armed forces, during the various sessions which took place at the Cour de cassation and at the Hôtel National des Invalides. This special volume of the *Revue Internationale de Droit Pénal* is the result of the Forum's exchanges.

Finally, the conclusions of the meeting were to express strong views on the necessity to continue this exercise on military justice as constant and mutual efforts, hence the second meeting of the International Military Justice Forum which will be hosted by the University of Stellenbosch in November 2023.

PART 1
MILITARY JUSTICE AS IT WAS
HISTORY OF MILITARY JUSTICE

BEYOND GOLD AND LOYALTY: THE DELEGATION OF ROYAL JUSTICE AS A PRIVILEGE TO FOREIGN TROOPS (1715-1791)

By Philipp Portelance[*]

Abstract

Even today, the French Fifth Republic has within its armed forces a contingent composed of foreigners: the French Foreign Legion. The latter, however, has traditions that date back to the Ancien Régime, when national identities were still in their in their developing state. Indeed, from the reign of Louis XIV, the kingdom of France raised a number of foreign regiments: these were Swiss, Germans, Irish, Scottish, Italian, Walloon, Liègois and Hungarian. Although contradictory to the idea that we have today of the formation of the modern military apparatus, characterized by citizenship and finally by compulsory military service in France until 2002, these troops were still needed for the French war effort. It helped to bolster the ranks, in addition to consolidating alliances with states in the French zone of influence. The Swiss and German regiments were not only the largest contingents, but they also had special privileges. Freedom of worship – they are the only corps in the French army to openly accept Protestants – and the delegation of justice to regimental colonels, one of the main royal rights, are not the least. The latter therefore became both a motivation for military service to the Most Christian Kings and an obstacle to the strengthening of military justice in the kingdom of France during the 18th century.

1 Introduction

The Early modern era is seen today in the Western World as the moment of transition between the medieval feudal state and what we call the Modern state.[1] This would have reached its peak during the absolutism of Louis XIV, before burning out completely in the fires of revolution at the end of the 18th century and at the beginning of the 19th century. Indeed, the era of absolutism evokes the formation of a centralized and bureaucratic state. At the same time as its formation, Western European States were in the process of forming state armies. Once established, most became permanent. The modern state allowed the levying of taxes to pay for these armies, whereas armies, which maintained in time of peace with increasingly considerable numbers, then demanded more money to support it. The standing army is therefore not simply a product of the modern state, but also one of its main driving forces.[2]

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[1] Sanjay Subrahmanyam, 'Connected histories: notes towards a reconfiguration of early modern Eurasia', [1997] 31 *Modern Asian Study* 734, 736.

[2] Jeremy Black, A Military Revolution? Military Change and European Society, 1550-1800 (Macmillan Press LTD 1991), IX.

This is what the concept of Military Revolution, introduced first by Michael Roberts and then established by Geoffrey Parker.[3] Although criticized, several other historians affirm that this revolution did indeed take place, though at least in a more punctuated and evolutionary way on a greater period.[4] They also affirm that the modern state, in particular the kingdom of France, would have gradually gotten rid of the military enterprise as it took over the monopoly of violence.[5] Becoming the only entity legitimately allowed to raise troops, the State would replace private entrepreneurs and powerful individuals.[6] Indeed, Richelieu, with his reason of state, would no longer accept the private war enterprise.[7] The link between the modern constructions of the state and standing armies would thus be almost mechanical.

Also, the emergence of national identities and the political nation in the 18th century brought back the figure of the soldier-citizen, defending the Greek *polis* or the Roman *Res publica*. In the 18th century, national wars followed cabinet wars, illustrated by the transition from volunteer armies to those of citizen-soldiers and national conscripts with the *levée en masse* of revolutionary wars. Traditional historiography still often presents this evolution as natural, even linear, and inevitable, referring to authors such as Machiavelli, the Chevalier d'Arc or Guibert, who make the link between the army and citizenship and advocate the training of a citizen army.[8]

Following this historiographical line, the French Revolution appears as the culmination of the moment where the last traces of mercenary armies are swept away from modern Europe's history.[9] Did the *levée en masse* of 1792 not give victory at Valmy? Does this battle not embody the victory of a national army over the royal armies of Prussia and the Holy Roman Empire, made up of professional soldiers, mercenaries, and foreigners?

However, the kings of France, from Louis XIV to Louis XVIII, maintained foreign contingents in their service. From the reign of Louis XIV until the end of the *Ancien Régime*, the royal army was made up of approximately 20 to 30% foreigners.[10] The revolutionary armies and the *Grande Armée*, often presented as wholly national ones, also included large

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[3] Michael Roberts 'The Military Revolution, 1560-1660' [1967] *Essays in Swedish History* 195 and Geoffrey Parker *The Military Revolution: Military innovation and the Rise of the West, 1500-1800* (2nd edition, Cambridge University Press 1996).

[4] Cf. Clifford Rogers (eds), The Military Revolution Debate: Readings on the Military Transformation of Early Modern Europe (Westview press 1995).

[5] Hervé Drévillon "Les Rois absolus : 1629-1715" in Joël Cornette (eds), *Coll. Histoire de France* (Belin 2011) 195.

[6] David Parrott The Business of War: Military Enterprise and Military Revolution in Early Modern Europe (Cambridge University Press 2012) 3.

[7] Cf. David Parrott Richelieu's Army: War, Government and Society in France, 1624-1642 (Cambridge University Press 2001). and John Lynn Giant of the Grand Siècle: The French Army, 1610-1715 (Cambridge University Press 1997).

[8] Nir Arielli and Bruce Collins, 'Introduction: Transnational Military Service since the Eighteenth Century' in Nir Arielli and Bruce Collins (eds), *Transnational Soldiers: Foreign Military Enlistment in the Modern Era* (Palgrave Macmillan 2013) 1.

[9] Hew Strachan, *European Armies and the Conduct of War* (3rd edition, Routledge 1992) 4 and 40.

[10] Lynn (n 7) 331.

foreign contingents.[11] Throughout the *Ancien Régime* in France, the formation of the nation-state only gradually erased the traces of the military system inherited from the Middle Ages. Despite its tendency to nationalize, institutionalize, and abandon the private enterprise in war, the formation of a standing army has not, therefore, eliminated extra-national recruitment.

The best known of these foreign troops in French service are undoubtedly the Swiss and, to a lesser extent, the Germans. These have built up a certain notoriety and infamy, due to these troops being qualified as 'mercenaries'. This is in part due to their pay, which is the most substantial in the infantry of the kingdom. This qualifier is however anachronistic in the 18th century, in the same way that today's France's Foreign Legion is not a mercenary unit, but a permanent body of foreign troops in the French army. Theirs was the same situation in *Ancien Régime* France.[12]

Monetary benefits were not the only privileges obtained by these foreign regiments: they had religious freedoms, where commanders could get a pastor of their specific worship, while all other units in the army had to be catholic, or these foreign units had the right to be accompanied by their families in garrisons and camp.[13] They also obtained special judicial privileges. Which in itself is paradoxical, as the State tried to standardize and centralize its justice and control on its army. Therefore, to what extent the privileges of justice granted to the German and Swiss regiments can constitute both a motivation for military service to the Most Christian Kings and an obstacle to the strengthening of military justice in the kingdom of France in the 18th century? It will at first be a question of presenting the constitution of the Swiss and German foreign regiments of the King of France. Then, the motivations of French monarchs to recruit foreigners into their army will be presented. The capitulations of these regiments will be discussed later as an object of delegation of royal power. Then, the various privileges of justice of these troops will be analyzed as a reason for recruitment, while putting them in parallel with the tensions of the establishment of the modern state.

2 *Fidelitate et Honore*: Foreign Regiments in the Service of the King of France

France had many foreign troops at its service. At their peak, these included the Irish and Scottish Jacobites, mostly regiments formed after the Flight of the Wild Geese.[14] There were also some Italian, Walloons and Liégois regiments.[15] Hungarian expatriates also

[11] Thomas Hippler "Les soldats allemands dans l'armée napoléonienne d'après leurs autobiographies : micro-républicanisme et décivilisation" [2007)] 348 *Annales historiques de la Révolution française* <http://journals.openedition.org/ahrf/9223> accessed 26 February 2018.

[12] Philipp Portelance, *'Au service d'un autre roi' : Les troupes étrangères allemandes au service du royaume de France (1740-1763)* (M.A. Thesis, Université de Montréal, Département of History 2019) 22-24.

[13] Christopher J Tozzi, Nationalizing France's Army: Foreign, Black, and Jewish Troops in the French Military, 1715-1831 (University of Virginia Press 2016) 51-52.

[14] Guy Rowlands, 'Foreign Service in the Age of Absolute Monarchy: Louis XIV and his Forces Etrangères' [2010] 17 *War in History* 141, 163.

[15] Tozzi (n 13) 35-37.

created the first hussar regiments in the French army.[16] Yet the more numerous and prestigious foreign regiments, who also had the most privileges, were the Swiss and German ones.

The first specific German and Swiss corps were raised by Louis XI.[17] The Swiss form the largest contingent in the service of the kingdom of France, particularly in terms of peacetime manpower, as well as the prestige associated with the various units of this nation. They were 'for two centuries [15th and 16th centuries] the mercenary soldiery of Europe *par excellence*.'[18] These are grouped among others in two bodies of the *Maison Militaire du Roi*, the *Cent-Suisses*, raised in 1481 by Louis XI, and the Swiss guards, raised from 1616 by Louis XIII, hence becoming the first foreign French regiment. Since the *Soldbündnis* of 1521, the Swiss were included in the permanent military establishment of the Kingdom of France. In addition, the good diplomatic relations between the Swiss Confederation and France from 1522 onwards benefited the recruitment of the Swiss.[19]

The Germans make up the second largest group of French foreign forces, but in wartime they are numerically superior to the Swiss. The first German corps, recruited in 1486, is that of the infamous *Landsknecht*. They were famous for their colorful clothing, their violence, and the sack of Rome in 1527.[20] Francis I of France had 23,000 *landsknecht* soldiers at his service during the Battle of Marignano (September 13 and 14, 1515), meaning almost all his infantry.[21] The Germans served in the French armies as early as the Helvetians, but they did not form permanent corps until 1656, with the creation of the first foreign regiment of foot, the *régiment d'Alsace*. The first Swiss regiments, besides the Swiss Guards, appeared only after 1672.[22]

While the Swiss only were part of the infantry, German troops also had their own cavalry, light troops, and hussars' regiments.[23] Although the latter were at first of Hungarian origin, they were gradually replaced by Germans during the 18th century.[24] At the height of the French army in the 18th century, during the War of the Austrian Succession (1744-1748), the Swiss had nine infantry regiments, not counting the Swiss Guards, which represented approximately 18,000 men, while the Germans had twelve regiments of infantry

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[16] Raymond Boissau 'La petite guerre et les hussards' in Collective works, *Combattre, gouverner, écrire. Études réunies en l'honneur de Jean Chagniot*, (Economica 2003) 161-182.

[17] Jacques Marie Ray de Saint-Géniés, *Art de la guerre pratique, tome 1* (Jombert, 1754) 60.

[18] V. G. Kiernan, 'Mercenaries and Absolute Monarchy' [1957] 11 *Past & Present* 66, 70.

[19] ibid. 19-20.

[20] Nicolas Handfield, *'Ehrliche Kriegsleute' : la construction de la représentation du lansquenet au royaume de France lors de la Renaissance (1486-1559)* (M.A. thesis, Université de Montréal 2018).

[21] David Potter, Renaissance France at war: Armies, culture and society, c. 1480-1560 (The Boydell Press 2008) 133.

[22] Eugène Fieffé, Histoire des troupes étrangères au service de France (Librairie Militaire 1854).

[23] Hussar regiments were sometimes recognised as German during the mid-18th century. Lancelot Turpin de Crissé would call his hussar regiment German. Cf. Lancelot de Turpin de Crissé, *Commentaires sur les Mémoires de Montecuculi, Tome second* (Lacombe 1769) 81.

[24] Jozsef Zachar, 'Les Hussards hongrois du roi de France 1692-1789' in Pierre Chaunu and Jean Berenger (eds), *Le soldat, la stratégie, la mort. Mélanges offerts à André Corvisier* (Economica 1989) 207-219.

making almost 26,000 men, in addition to three regiments of cavalry making 2,500 men and some light troops like the *chasseurs de Fischer*.[25] The hussars form seven regiments with nearly 5,000 men. Out of an army on a war footing of nearly 350,000 men, on paper figures at least, the Swiss and the Germans then alone represented more than 15% of the army of the Most Christian King, which is certainly not little for the most centralized state in Europe. It is therefore necessary to look at what drove the French monarchs to recruit these regiments from the Germanic populations.

3 'For Slight Profit Soon Makes People Change Their Minds':[26] Motivation For Foreign Recruitment

The large number of foreign contingents can be explained by several factors. First, arming the people was then potentially too dangerous, and only the State had the means to recruit an army.[27] As explained by Kiernan: 'Use of foreign troops, while it suffered from various drawbacks, had the great merit of being politically safe.'[28] This meant that foreign troops, which were levied by the king, were then loyal only to his person. The question of loyalty is indeed quite important to encourage this type of recruitment. This is noteworthy, as the Swiss and some Germans are of the last who defend Louis XVI during the Revolution.[29]

Also, there is the question of the saving bodies for the Kingdom of France. As Marshal de Saxe explained to Minister of War Argenson: 'They [foreigners] deprive the enemy of troops, provide subjects for us, and serve for the subjects of the kingdom; whereby a man serves you for three.'[30]

Indeed, to supply soldiers was the first of the needs of the armies, it was necessary to enlist the maximum of men and to ensure the replacement of the losses.[31] Mars hungered indeed. The French army, between 1701 and 1763, needed an average of nearly 25,000 recruits per year.[32] Recruiting foreigners then made it possible to fill out the manpower

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[25] J. B. V. État général des troupes de France, sur pied en Mai 1748 (Paris 1748).

[26] Hans Jacob Christoffel von Grimmelhause, *Simplicissimus: The German Adventurer* (1669, translated from German by John C. Osborne, Newfound Press, 2008) 776.

[27] Hervé Drévillon, L'individu et la Guerre : du Chevalier Bayard au soldat inconnu (Belin 2013) 66.

[28] Kiernan (n 18) 69.

[29] Cf. Gauthey des Gouttes, *Les Suisses au Service de la France* (Jouve 1917); Jérôme Bodin *Les Suisses au service de la France : de Louis XI à la légion étrangère* (Albin Michel 1988); Dominic Pedrazzini 'Le régiment des Gardes suisses d'après le « Livre d'ordres » de son commandant' in *La prise des Tuileries le 10 août 1792* (1993) 10.

[30] Letter of Marshal Maurice de Saxe to the Comte d'Argenson, May 15th 1748 at the camp in Maastricht, in Marquis d'Argenson, *Correspondance du comte d'Argenson, ministre de la Guerre, publiée par le marquis d'Argenson : Lettres des maréchaux de France* (first ed. 1748 A. Messin 1924) 293. Translated from French: 'Ils [les étrangers] ôtent des troupes aux ennemis, nous ménagent des sujets, et servent pour les sujets du royaume ; au moyen de quoi un homme vous sert pour trois.'

[31] Laurence Fontaine, 'Montagnes et migrations de travail. Un essai de comparaison globale (xve-xxe siècles)' [2005] 52 *Revue d'Histoire Moderne et Contemporaine* 26, 30.

[32] André Corvisier, L'Armée française de la fin du XVIIe siècle au ministère de Choiseul : le soldat (Presses universitaires de France 1964) 157-158.

need. In this way, the French subjects were then saved from service and could thus contribute to the war effort by plowing the fields and paying taxes, feeding and paying for the army at the same time.[33] In addition, recruiting abroad gave the French kings a possibility of 'emptying' the recruitment bases of enemy powers.[34] Since indeed, the Habsburgs, then Prussia and the British were also recruiting elsewhere throughout the Holy Roman Empire. The latter would therefore have fewer men to offer in battle against those of the kingdom of France. As an anonymous memoir explains:

> When in principle German regiments were raised in the service of France, we had two objects in view, one to keep the king's subjects in agriculture and the arts by employing some of the foreigners to defend their peace and the other to present to the French troops an object of emulation by the comparison of better disciplined and exercised foreign troops.[35]

The economy of bodies was thus one of the main reasons for this recruitment, but as the author mentioned above, there was also the question of discipline and its emulation. The latter then became primordial, as firepower and the thin order imposed themselves on the battlefields of Europe.[36] German discipline, including that of the Swiss, and its effects are well recognized in the 18th century since at least Machiavelli. Éléazar de Mauvillon wrote about the German greatness for arms: '*Aussi n'y a-t-il point de Troupes au Monde plus belles, ni mieux disciplinées*.'[37] Foreigners brought with them a discipline, certain specialist skills, and experiences that the French army needed. At the same time, foreign troops would contribute to the formation of regiment of French troops in the Royal Army, which would have facilitated the State's control over them. Richelieu even admitted that 'It is almost impossible to successfully wage great wars with Frenchmen alone.

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[33] Portelance (n 12) 85.

[34] Bernhard Kroener, 'Deutsche Offiziere im Dienst des „allerchristlichsten Königs" (1715–1792) : Aspekte einer Sozialgeschichte der Elite deutscher Fremdenregimenter in Frankreich im 18. Jahrhundert' in Jean Mondot, Jean-Marie Valentin, Jürgen Voss (eds), *Deutsche in Frankreich, Franzosen in Deutschland 1715-1789: Institutionelle Verbindungen, sozialen Gruppen, Stätten des Austausches. Allemands en France, Français en Allemagne 1715-1789 : Contacts institutionnels, groupes sociaux, lieux d'échanges* (J. Thorbecke 1992) 53, 55.

[35] Anonymous, *Mémoire sur les régiments allemands*, (1775) SHD, sous-série GR 1M, 1722, 1. Translated from french: 'Lorsque dans le principe on a ci devant levé des Régiments allemands au service de la France, on a eu deux objets en vue, l'un de conserver les sujets du roi à l'agriculture et aux arts en employant une partie des étrangers pour défendre leur repos et l'autre pour présenter aux troupes françoises un objet d'émulation par la comparaison de troupes étrangères mieux disciplinées et exercées'.

[36] Clément Oury, 'L'efficacié du fer et du feu dans les batailles de la guerre de Succession d'Espagne', in Bertrand Fonck and Nathalie Genet-Rouffiac (eds), *Combattre et gouverner : Dynamiques de l'histoire militaire de l'époque moderne (XVII^e^-XVIII^e^ siècles)* (Presses Universitaires de Rennes 2015) 44.

[37] Éléazar de Mauvillon, *Lettres françoises et germaniques* (Paris 1740) 261. Éléazar de Mauvillon was French Huguenot who was born in Tarascon in 1712. He became the private secretary of the Prince-Elector of Saxony before teaching French at the University of Leipzig, and later at the 'Carolium' in Brunswick from 1759 onwards. Cf. Krebs Roland, 'Les Lettres françaises et germaniques de Mauvillon et leur réception en Allemagne' (1982) 14 *Dix-huitième Siècle* 377.

Foreigners are absolutely necessary to maintain the army corps.'[38] France's alliance policies also contributed to the maintaining of foreign elements in the French army:

> The maintenance of foreign troops multiplies the political relations of a State with the nations which supply them, establishes its influence over them, extends its commerce by reason of their needs or their industry, finally inspires in them an attachment to this same State. which increases its preponderance in the general system.[39]

The policy of appointing members of German princely families to foreign regiments and giving to some even staff ranks and generalships showed how much effort the French crown put into maintaining a sphere of influence within the Empire.[40] For the myriad of small states of the Holy Roman Empire, the *Menschenhandel*, meaning the 'commercialization of labor manpower', the sale or rental of soldiers, was not only a lucrative business for its princes, which therefore indicates a pecuniary motivation, but it allowed these rulers to assert their power and their sovereignty towards the emperor and to play a role with the great power on the political European chessboard.[41]

By offering many special privileges to Swiss and German soldiers, these felt integrated in a society similar to their own. The army hence recreated German society within these regiments. France thus succeeded in creating a favorable social and cultural climate for these soldiers. These measures made it very attractive for German and Swiss men to enter as soldiers into its service, which the French Crown did capitalise, but at the same time they cannot make do without, as well as for their services and their expertise. To respect these privileges, the recruitment of Swiss and German soldiers by the kingdom of France was made by capitulated contracts, which were called capitulations.

4 Capitulations: A Tool of Royal Power Delegation

After the perpetual peace treaty of Fribourg of 1516 and the perpetual alliance of 1521 between the kingdom of France and the Swiss cantons, a general capitulation for the recruitment of the Swiss into the French armed forces was signed in 1553.[42] The latter would be in effect until 1671. At that moment, the new capitulations were signed with the various Swiss regiments that had been formed. A new capitulation would be made in 1702.[43]

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[38] Armand Jean Duplessis de Richelieu, *Maximes d'État ou testament politique, tome 2* (Paris 1764) 87. Translated from French: '[…] il est presque impossible de mener avec succès de grandes guerres avec des François seuls. Les étrangers sont absolument nécessaires pour maintenir le corps des armées.'

[39] N°10 (1780) SHD, sous-série GR 1M, 1722. Translated from French: 'L'entretien des troupes étrangères multiplie les relations politiques d'un État avec les nations qui les lui fournissent, établit son influence sur elles, étend son commerce en raison de leurs besoins ou de leur industrie, leur inspire enfin pour ce même État un attachement qui augmente sa prépondérance dans le système général.'

[40] Kroener (n 34) 65.

[41] Peter H. Wilson, War, State and Society in Wurtemberg, 1677-1793 (Cambridge UP 1995) 3.

[42] Tozzi (n 13) 30.

[43] Corivisier (n 32) 263.

Following the formation of the Alsace regiment in 1656, the capitulations with the various German regiments, which unlike the Swiss who had individual capitulations for every regiment included all of them in one document, were made in 1704, 1744, and 1760.[44] These capitulations, as well as those for the Swiss troops, continued to regulate their relations with the French state until the reorganization of the French army on January 1, 1791.

A capitulation is a contract between states, either between the kingdom of France and the Swiss cantons, or between France and the various colonels, in the case of German regiments, for the maintenance of a body of troops. These stipulate their pay and their maintenance, the services they would provide or be exempt of, such as guard or garrison duty, etc. They also described the various rights and privileges of the regiments, as well as their duty.

These types of contracts are quite ancient. In 1555, Albert II of Brandenburg-Culmbach signed such a contract with Henry II. In it is stipulated:

> The said colonels, captains and soldiers will be required to respond to the justice which is ordered by his said majesty without him being required to maintain them with other officers for its administration even though he [the King] separates some particular bands [the *Landsknecht*] from his charge.[45]

Although the monarch's royal justice has the prerogative and must be respected by the colonels by these capitulations, since the Crown had no real means of enforcing this justice within the German corps, they left justice to be dispensed by the officers of these corps and not by royal agents.[46]

During the Early modern era though, the French Crown tried to centralise its justice system and take full control of military matters. On July 1st, 1727, the French state published the *Ordinance of the King concerning crimes and military offenses.* With this, the State aimed to regulate all crimes committed by the army and their punishment, making them less arbitrary. In itself, foreign regiments were also subject these new regulations. However, as the monarchy needed those valuable regiments, similar lines as the ones in the 1555 capitulation can be read in subsequent ones. Thus, one may read in a capitulation of a Swiss company of 1744, that:

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[44] ibid 264.

[45] From the Articles de la capitulation faicte avec le Sir Albert le Jeune, marquis de Brandebourg, pour l'entretenement d'un regiment de gens de pié lansquenetz... Le XXVIIe jour de may, l'an 1555, Paris, BnF ms. fr. 3127, n° 6, fol. 72.. Translated from French: 'Lesdicts collonnel, cappitaines et soldatz seront tenuz de respondre a la jus-tice qui est ordonnee par sadicte majesté sans qu'elle soit tenue leur entretenir autres officiers pour l'administration d'icelle encores qu'elle separast quelques bendes particullieres de sa charge.'

[46] Handfield (n 20) 147.

> This [Swiss] Company will have its own Justice as the Swiss have everywhere else jointly with the other Companies of the Regiment in which it will be placed, that justice will of course be rendered according to the Military Laws of their High Powers.[47]

Indeed, as mentioned previously, the idea was to keep these soldiers that French state had put so much effort to acquire in a micro-society in which they recognize themselves. Thus, by maintaining the laws in effect in their country of origin, the soldiers recognized themselves in these systems of justice. Similarly, for the German regiments, a 'German code' was respected for almost all crimes. However, it is agreed that for the rest, the regiments must conform as much as possible to the ordinance of 1727.

In the *New capitulation for German infantry regiments* of 1760, officers held an important role as they were the highest tenors of justice. Indeed: 'The Colonels of the German regiments will continue to bestow the justice of the said regiments.'[48] This was a direct delegation of the sovereign and regal rights by the King of France towards the colonels of the German regiments, who became the highest instance of justice, though loyal to the King. These were mostly German princes, therefore the rulers of their own states within the Empire. As an example of a prominent family, were the rulers of Zweibrücken-Birkenfeld, a cadet line of the Wittelsbach family, which held the colonelcy of the Alsace regiment for more than a hundred years. They would also have the honour of a second regiment, the *Royal-Deux-Ponts*.[49]

Since some of the soldiers under these colonels' command were at times even some of their subjects, the colonel could then keep their princely rights as the soldiers were motivated to serve someone they knew. The right to pardon these men, which is also a right normally reserved for the king.[50]

Indeed, if the State streamed to progress towards uniformity and centralization on all its apparatus, it is also the guarantor of traditions and privileges.[51] This is one of the main paradoxes of *Ancien régime* state building. Moreover, the French monarchy, whishing to

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[47] Anonymous, *Capitulation d'une Compagnie Suisse* (National Library of the Netherlands, 1744). Translated from French: 'Cette Compagnie [suisse] aura sa propre Justice comme les Suisses ont partout ailleurs conjointement avec les autres Compagnies du Regiment dans le quel elle sera rangé, bien entendu que la justice sera rendu selon les loix Militaires de leurs Hautes Puissances.'

[48]Anonymous, *Nouvelle capitulation accordée aux régimens allemands à commencer du Premier mars 1760* 18 janvier 1760 SHD, sous-série GR 1M, 1M 1771. Translated from French: 'Les Colonels des régiments allemands continueront d'avoir la justice des dits régiments.'

[49] This family line would inherit the throne of Bavaria with the help of Napoleonic France, which is certainly not a coincidence. CF. Kroener (n 34) 65.

[50] Cf, Déborah Cohen, 'L'ordre public La procédure de grâce au XVIII e siècle : restaurer un ordre ou reconnaître l'innocence ?' [2007] 54-2 *Revue d'histoire moderne & contemporaine* 91; Reynald Abad, *La grâce du roi. Les lettres de Clémence de Grande Chancellerie au XVIIIe siècle* (Presses de l'université Paris-Sorbonne 2011).

[51] Benjamin Deruelle, 'Guerre, globalisation et interactions culturelles (XVI^{e} – mi XVIII^{e} siècle)' in Hervé Drévillon (eds), *Mondes en guerre, volume L'âge classique de la guerre (1490-1870)* (Passés composés 2019) 259-331.

maintain its foreign regiments for the reasons listed above, did not have the means to control everything. Delegating part of its sovereign functions allowed the monarchy to put its efforts elsewhere, most notably towards its 'national' regiments.

Although antithetical to the centralization of the modern state, these capitulations which delegated royal justice became a motivation for foreigners to join the armed forces of the kingdom of France.

5 The Privileges of Justice: Between Tension and Motivation

These privileges could sometimes seem harmful to the French crown. Indeed, for the Swiss in particular, these would permit them to refuse to serve in specific situations.[52] In the case of the Reinhach Regiment, its capitulation stipulated that it could not be used in wars against the pope, the emperor or even against the Swiss Confederation.[53] Difficult when the French kings were at war with the Habsburg for centuries. This therefore gave much more power to the foreign military *vis-à-vis* their French counterparts. Thus, the Swiss had an oath of fidelity:

> You swear to serve faithfully and in all honor His Most Christian Majesty the King of France, to procure in all his advantages, to turn with all your power what could be to his Justice, and to oppose all those who would be against our said King; we reserve nevertheless in this our sovereign lords and Fathers of the Cantons and their allies; so that it will be open to us, in accordance with our Capitulation, to return to our country at all times and when it pleases our sovereign to recall us.[54]

This oath showed the loyalty that the Swiss troops had towards the King of France. However, they reserved themselves the right to leave or not to enter the service against certain nations, which is a substantial privilege that French nationals or other foreign regiments do not have. In terms of justice, the Swiss, although subject to royal ordinances in theory, therefore only submit to the laws of the cantons.[55] In certain cases of oath breaking, such as mutiny, the Swiss thus judge that they are not mutinying, since they have never actually responded to the King of France, but to the Swiss cantons. They indeed use this argument during the Louisbourg mutiny of 1744.[56] The fact of being able to escape from military justice and its punishments then becomes a reason for men to consider joining

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[52] Tozzi (n 13) 51.

[53] Capitulation du regiment de Reinhcht, SHD Xg 37; René Haas Régiment suisse au service de France (Kerentree 1967).

[54] Letter of the 2nd of June 1759, SHD Xg 1. Translated from French: 'Vous jurerés de servir fidellement et en tout honneur Sa Majesté Très Chrétienne le Roy de France, de procurer en tous ses avantages, de tourner de tout vôtre pouvoir ce qui pourroit être à sa Justerete, et de vous opposer à tous ceux qui seroient contre nôtre dis Roy; nous nous réservons néanmoins en cecy nos souverains seigneurs et Peres des Cantons et leurs alliés; en sorte qu'il nous sera loisible, conformément à notre Capitulation de retournée en nôtre Païs touttes foict et quant il plaira à notre souverain de nous rappeler.'

[55] Tozzi (n 13) 51.

[56] Allan Greer, 'Mutiny at Louisbourg, December 1744' [1977] 10 *Histoire sociale* 304, 306.

these foreign regiments. It is not trivial to find subjects from other kingdoms, including French nationals, in these troops.[57]

For most of the armies of the *Ancien régime*, justice was expeditious and often done within the regiments, hence leaving no paper trail.[58] The Swiss and the Germans had even more rights in the matter, because justice dealt within the structure of the regiment was guaranteed by their capitulations. Only criminals caught in the act by general provosts and whose sentence, established on the spot, was death did fall out of the jurisdiction of the colonels.[59] Like all armies of the period, military men tried to protect their own again civil justice and magistrates,[60] especially in the case of abuse by the military. This protection was perhaps easier for the Swiss and German regiments, who could argue that they could only be judged by their own. For example, during the quartering of the Swiss troops of the Castellas regiment in Aix in 1712, soldiers accidentally killed the individual with whom they were billeted.[61] Indeed, the murderers were not seized, as it should have been, by civil magistrates, but were given to the justice of the regiment, to the great dismay of the inhabitants of the city. These were offended that the Swiss had their particular justice: '[…] the privileges that the Swiss regiments have should not prevail over the ordinary laws, which would give local judges authority in these matters.'[62]

It must be said that even if military discipline was very severe, the penalty within the regiment itself was often more minimal then what the actual sentences should be.[63] Recruiting soldiers was an expensive business and it was sometimes difficult to replace losses, especially in colonial of wartime contexts. For example, following the mutiny of the soldiers at Louisbourg, which was started by the Swiss soldiers of the Karrer regiment, no blood was shed, the regiment simply did not serve again in Île-Royale, but remained in the French army.[64] The choice was of course economic, but also respected the articles related to the privileges of justice of the capitulations.

Finally, there was a great difference in the composition of the councils of war between the Swiss and German regiments and those of the French regiments. In the German regiments, these were made up not only of officers, but also of non-commissioned officers

[57] Corvisier (n 32) 243.
[58] Arnaud Guinier, L'honneur du soldat : éthique martiale et discipline guerrière dans la France des Lumières (Champ Vallon 2014) 251.
[59] Nouvelle capitulation accordée aux régimens allemands à commencer du Premier mars 1760 18 janvier 1760 SHD, sous-série GR 1M, 1M 1771.
[60] Corvisier (n 32) 261-263.
[61] Tozzi (n 13) 52.
[62] Letter of the 7th of December 1712, SHD Xg 31. Translated from French: '[…] les privilèges que les régiments Suisses ont ne devraient pas prévaloir sur les lois ordinaires, qui confèrent aux juges locaux autorité dans ces affaires.'
[63] Guinier (n 58) 256.
[64] A. J. B. Johnstone, Endgame 1758: The Promise, the Glory, and the Despair of Louisbourg's Last Decade (University of Nebraska Press 2007) 27.

and privates.[65] One could read there a survival of the practices of being judged by their peers of the *landsknechts*.[66] For a soldier, it could then be more motivating to be judged by your leader, especially when sometimes the latter is his own sovereign, but also by their own peers and comrade in arms, often with the laws of their nation, that they would know. It could become, if not one of the reasons for the commitment of these troops, a motivation to remain within these foreign regiments. This, added to the laws that respect those of the place of origin, as well as the delegation of sovereign powers to the officers, were certainly grounds for engagement.

However, these privileges did cause strong tensions with civilians and the state itself, as seen above. There was also the question of the men who compose these foreign troops. Although mostly of foreign origin at the beginning, their standardization, as well as the difficulties of foreign recruitment changed their composition. Indeed, although the officers often remained foreigners in these regiments, the origins of the rest of the troops changed. Already in the mid-eighteenth century, nearly half of the soldiers of the German regiments were from Alsace and Lorraine, therefore already subjects to the French kings.[67] They therefore do not spare the subjects of the kingdom. The same goes for hussar regiments. On the eve of the Revolution, the regiments of Hussars were almost all made up of French natives.[68] Of what use were foreign regiments then, if they had lost all their foreign aspect except their special privileges?

6 Conclusion

In short, it is indeed paradoxical that the kingdom of France, the absolutist state by definition, which also became a model for the nation-state, maintained foreign troops with special privileges within its army. On the one hand, these regiments were necessary for the war effort, because they helped to fill out the need for manpower. They also have an expertise that would improve the French arms. These regiments, being raised by capitulations, had significant privileges, most notably that the King of France would have delegated part of his sovereign functions, in particular the right of justice and pardon. In addition, the use of the laws and customs of justice of the Swiss and German States motivated the men of these nations to join the French foreign regiments. Thanks to this special justice, they were subject to the judgment of their peers and not of the agents of the monarchy. However, these privileges would cause strong tensions. At the time of the French Revolution, was it not then their attachment, which we have seen, was reciprocal, and their loyalty to King Louis XVI, which made them strangers to the nation, worse, mercenaries.

[65] Nouvelle capitulation accordée aux régimens allemands à commencer du Premier mars 1760 18 janvier 1760 SHD, sous-série GR 1M, 1M 1771.
[66] Handfield (n 20) 147.
[67] Corvisier (n 32) 60-61.
[68] Zachar (n 24).

NATIVES, CRIMES AND MILITARY JUSTICE: THE FRENCH AND INDIAN WAR DISCIPLINED?

By David Gilles[*]

Abstract

The Amerindian allies during the French and Indian War were legally auxiliary troops, even illegal combatants in the minds of Europeans, thus stigmatizing the 'savagery' of their actions. The black legend characterizing the actions of the Native American allies in the dynamics leading to the Seven Years' War is well anchored in people's minds. The question of sanctioning their behavior and actions against it is, however, difficult to resolve. Faced with a certain ambiguity of civil justice as to their status, military justice is the legal vehicle favored by the French, to which is added a strong diplomatic weight. Among Europeans, the strong prejudices relating to the acts of war of the Amerindians, derogating from the honors and the laws of war, only exceptionally lead to councils of war, and rarely to sanctions. In the same way, rare are the behaviors of European soldiers against Amerindians sanctioned by justice. The lack of sanction for these acts is explained by the asymmetry between values and modes of warfare, and by the need to maintain military force at all costs and not to lose the support of troops, be they regular, militiamen or Native Americans.

> *'[...] If philosophy and justice were involved in the quarrels of men, they would make them see that the French and the English were fighting over a country over which they had no right'.*[1] (Voltaire)

1 Introduction

Since the second half of the 20th century, the issue of illegal combatants and civilian combatants has become a well-known issue for experts interested in military justice. Of course, the legal and material issues relating to this situation, and the need to decide whether it is a matter for civilian jurisdiction or military jurisdiction, is particularly significant in the context of the fight against post-terrorist terrorism. September 2001. To distinguish the enemy from the friend, sometimes physically, to have knowledge of the evolution of local alliances to avoid any treachery, how to judge the acts of combatants who are not part of a regular army, what to do with women and children who follow these combatants, should we organize local tribunals where judgments far from the theater of operations are all issues and contemporary questions whose issues are well known from Libya to Syria, from the Iraqi or Afghan conflict to Ukrainian conflict. However, the legal paradigm that encompasses the very notion of unlawful combatants or unlawful actions of civilians or combatants acting outside Western military law has been

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[1] François-Marie Arouet (Voltaire), 'Précis du siècle de Louis XV', *Œuvres complètes* (Garnier, 1878, vol. XV, c. 31) 337.

around for longer. In the context of the first colonial empires, the colonial powers, essentially French and English, were led to export the military justice born in the European context to a foreign theater, necessarily leading to an adaptation, if not a redefinition, of the frameworks of military justice, from a substantive, functional or application point of view.

The involvement of Aboriginal peoples in the conflicts of the 17th and 18th centuries took place indiscriminately between First Nations established in territories controlled by Europeans or nations present in territories without any real influence by Europeans. The relations between British and French regular troops and their various Amerindian allies in the context of the Seven Years' War have already brought to light these crucial issues of modern conflicts. This concerns the warriors, the European soldiers, but also their families, and in particular the squaws who occasionally follow the warriors or the Amerindian villages destroyed by the belligerents during the 'Indian and French War' or the annihilation of most of the Indigenous military forces after the War of 1812.[2] Richard White in 1991 already argued in his major work *The Middle Ground* that the meeting between Amerindians and French in the '*Pays d'en Haut'* had resulted in a sort of balance between the poles, each needing the other, and no not being able to impose itself durably on the other by force, this balance calling for a continuity of renunciations, adjustments, accommodations on both sides, the culture and the practices of some making honey for others[3]. Cultural choice plays an important part in this problem. From the earliest times of European Amerindian encounters, we find clashes of culture or values between the mores of the inhabitants of the North American territory. This does not only concern the military but goes beyond all strata of colonial society. Sometimes offered as a present to Western traveling hosts of the tribe, voluntarily or under social pressure, young Amerindian women, for example, also participate in the torture inflicted on prisoners, and can save one of them by choosing him as a husband or as a slave and he then replaces, for example, the deceased husband or brother to cultivate the land[4]. Several events or situations led the French and English armies to take positions regarding the behavior of the Aboriginal allies of one or the other army during the long 18th century. Of course, this was particularly exacerbated in the context of colonial conflicts where the regular troops, at least for one of the European contingents, found themselves outnumbered by the eyes of their Amerindian allies, as it was largely the case, for French troops in the context of the Seven Years' War[5]. This conflict, the first truly global conflict regarding theaters of

[2] See Matthew C. Ward, 'La Guerre Sauvage: The Seven Years' War on the Virginia and Pennsylvania Frontier' (Ph.D. diss., College of William and Mary, 1992), 267-77.

[3] Denys Delâge and Éric Gilbert, 'Les Amérindiens face à la justice coloniale française dans le gouvernement de Québec, 1663-1759 : I – Les crimes capitaux et leurs châtiments' [2003] 33-3 *Recherches amérindiennes au Québec*, 79–90, 86.

[4] Baron de Lahontan, *Œuvres complètes*, (Réal Ouellet (ed.), PU de Montréal, t. I, 1990), 720-722; Anthony F. C. Wallace, 'Woman, Land, and Society: Three Aspects of Aboriginal Delaware Life' [1947] XVII *Pennsylvania Archaeologist* 15. All French text in this article have been traduced by the author.

[5] Armstrong Starkey, *European and Native American Warfare, 1675-1815* (Norman, Univ. of Oklahoma Press, 1998) 43-44.

operation, takes on a necessarily 'indigenous' color when viewed through the North American prism.[6] This is well known - and relayed by many European officers, both French and English - the actions, the modes of combat, the versatile dimension, to use an Anglicism, of the troops allied with the French and the English, outside the traditional norms of the European fighters constituted a permanence throughout the conflict[7], rightly qualified by the British colonists then by the American academic world of 'French and Indian war'.[8] Just as we go beyond the framework of military engagement and the conduct of operations to build an Indian style of combat, we largely derogate from the fundamentals of traditional military justice, as well as from the Western reality of 'army'[9] : no or little hierarchy, absence of rigid subordination, absence of specific Amerindian military justice, absence of rapid sanction for any breach of an evanescent discipline, even non-existent. It should be kept in mind that the predetermined and fixed social hierarchy 'European style' was largely foreign to indigenous communities. More than the hereditary principle, it was social acceptance that founded the power of leaders,

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[6] Francis Jennings, *Empire of Fortune: Crowns, Colonies & Tribes in the Seven Years' War in America* (New York, WW. Norton, 1988) 155-165; R. Brian Ferguson and Neil L. Whitehead, *War in the Tribal Zone: Expanding States and Indigenous Warfare* (Santa Fe, School of American Research Press, 1992) 1-30; Michael N. McConnell, *A Country Between: The Upper Ohio Valley and Its Peoples, 1724-1774* (Lincoln: University of Nebraska Press, 1992); Gregory Evans Dowd, *A Spirited Resistance: The North American Indian Struggle for Unity, 1745-1815* (Baltimore: Johns Hopkins University Press, 1992); *War under Heaven: Pontiac, the Indian Nations, and the British Empire* (Baltimore: Johns Hopkins University Press, 2002); Eric Hinderaker, *Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673-1800* (New York, Cambridge University Press, 1997); Jane Merritt, *At the Crossroads: Indians and Empires on a Mid Atlantic Frontier*, 1700-1763 (Chapel Hill, University of North Carolina Press, 2000); Fred Anderson, *Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754-1766* (New York, Vintage, 2000); Timothy Shannon, *Indians and Colonists at the Crossroads of Empire: The Albany Congress of 1754* (Ithaca, Cornell University Press, 2000); Geoffrey Plank, *An Unsettled Conquest: The British Campaign against the Peoples of Acadia* (Philadelphia, University of Pennsylvania Press, 2001); Stephen Brumwell's, *Redcoats: The British Soldier and War in the Americas, 1755-1763* (Cambridge, Cambridge University Press, 2002) ; Jane T. Merritt, *At the Crossroads: Indians and Empires on a Mid-Atlantic Frontier, 1700-1763* (Chapel Hill, University of North Carolina Press, 2003); Michael McConnell, *Army and Empire: British Soldiers on the American Frontier, 1758-1775* (University of Nebraska Press, 2004) ; John Grenier, *The First Way of War: American War Making on the Frontier, 1607-1814* (Cambridge, Cambridge University Press, 2005) 86-112.

[7] See Peter E. Russell, 'Redcoats in the Wilderness: British Officers and Irregular Warfare in Europe and America, 1740 to 1760' [1978] 35 *William and Mary Quarterly* 629-652 ; Peter Way, 'The Cutting Edge of Culture: British Soldiers Encounter Native Americans in the French and Indian War' Martin Daunton and Rick Halpern (eds.), *Empire and Others: British Encounters with Indigenous Peoples, 1600-1850* (Philadelphia, University of Pennsylvania Press, 1999) 123-148; 'Soldiers of Misfortune: New England Regulars and the Fall of Oswego, 1755-1756' [2001] 3 *Massachusetts Historical Review* 49-88; Paul Moyer, '"Real" Indians, "White" Indians, and the Contest for the Wyoming Valley' William Pencak and Daniel K. Richter, (eds.), *Friends and Enemies in Penn's Woods: Indians, Colonists, and the Racial Construction of Pennsylvania* (University Park, The Pennsylvania State University Press, 2004) 221-37; Jon Parmenter, 'After the Mourning Wars: The Iroquois Allies North American Campaigns' [2007] 64 *William and Mary Quarterly* 39-82.

[8] For a recent and exhaustive bibliography, see Robert Martin Owens, *"Indian Wars" and the Struggle for eastern North America 1763-1842*, (Abingdon, Oxon, New York, Routledge, 2021).

[9] For France, see André Corvisier, *L'armée française de la fin du XVIIe siècle au ministère de Choiseul : le soldat* (Paris, Presses Universitaires de France, 2 vol., 1964).

especially in the warrior context.[10] Similarly, if the practice of torture is found among Europeans and Amerindians, it is procedural and aims at the discovery of accomplices in a criminal context, the confession of an act or the collection of information in a European military context. In the Native American context, torture is more of a collective ritual to sanctify death, or to obtain honor or inflict dishonor.

This conflict, from the indigenous point of view, the first occupants of the territory and defending their lands - it must be remembered - sometimes boils down to a succession of alliances, relatively stable contrary to what one might sometimes think, which involve a series of operation, relatively classic acts of war for the 'first nations', but most often viewed with horror by European officers, despite the pragmatic effectiveness of such events on the ground. Indigenous combatants, sometimes acting as armed bands following regular contingents, sometimes as nations in a warlike configuration, sometimes in a logic of defense of their villages and the civilian population, find themselves confronted with a certain incomprehension of the part of the regular troops, often tinged with contempt, despite - or perhaps partly because - of their formidable efficiency in the field. As underlined by Laurent Veyssière, whose numerous works are references in this field[11] - alongside those of Fonck for New France and of Preston, Jennins, Way or Ward for the British -,[12] during most of the conflict, the Amerindians of Canadian fighters alongside the French have a specific military agenda, waging a kind of parallel war, seeking fame, prestige, seeking to settle old quarrels, or more prosaically capturing prisoners, obtaining scalps,[13] and equipment. In New France, intendants or governors intervened vis-à-vis Amerindian communities, whether to enjoin them to participate in military conflicts or to adopt a common policy, for example regarding the support granted to the '*coureurs des bois*'.[14]

This article traces the formal codifications of conventions of war with Natives, and legal framework and common ground between Europeans empires and First Nations. It outlines to what extent these legal conventions in practice, particularly during the Seven'

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[10] [Anonymus], *Relations des Jésuites contenant ce qui s'est passé de plus remarquable dans les missions des pères de la Compagnie de Jésus dans la Nouvelle-France, 1611-1672* (1641, reed. 1858, Montréal, Éditions du Jour, 1972, vol. 2) 24.

[11] Laurent Veyssière, 'Combattre avec les Indiens durant la guerre de Sept Ans, « les plus redoutables à qui les craint' [2020] 300-3 *Revue Historique des Armées* 128-138.

[12] David L. Preston, '"Make indians of our white men": British Soldiers and Indian Warriors from Braddock's to Forbes's Campaigns, 1755-1758" [2007] 74-3 *Pennsylvania History: A Journal of Mid-Atlantic Studies* 281; Matthew C. Ward, '"The Indians Our Real Friends": The British Army and the Ohio Indians, 1758-1772', Daniel Barr (ed.), *The Boundaries Between Us: Natives and Newcomers along the Frontiers of the Old Northwest Territory, 1750-1850* (Kent, Oh., Kent State University Press, 2006) 66-88; Matthew C. Ward, 'Fighting the "Old Women": Indian Strategy on the Virginia and Pennsylvania Frontier, 1754-1758' [1995] *Virginia Magazine of History and Biography* 103, 297-320.

[13] Jean-François Lozier, 'Lever des chevelures en Nouvelle-France : la politique française du paiement des scalps' [2003] 56-4 *RHAF* 513-542.

[14] *Ordonnance qui fait savoir aux Iroquois du Sault, à ceux du lac des Deux-Montagnes, aux Abénakis de Saint-François et de Bécancour et aux Algonquins et Nepissingues domiciliés* […] 1734, may, 31 (BAC, MG8-A6, no Mikan 3060759) 335-336

years irregular warfare.[15] The aim subject is to examine how martial legal justice take place in the French and British legal framework when natives are implicated, and how European laws are applied, or not, to native's individuals. How natives' values or justice' concepts were enacted, challenged, or integrated by metropolitan and colonial leaders[16] in a global alliance military link, and, finally, to consider how those judicial acts, decisions or judgment affected French Indian relations, the culture or prejudged of French or English military elites. The trajectory of French and British colonial military initiatives, after 1750, show us how military justice was a bridge between Europeans' and natives' allies, sometimes crushing the link, when there's no real equal justice, sometimes taking place in the global alliance and intercultural history. As Christian Ann Crouch wrote, demographic disadvantage forced marines and Canadian colonial officials to accommodate Indian practices of gift giving and feasting in preparation for battle, adopt irregular methods of violence, and often work in cooperation with French allied indigenous peoples, such as Abenakis, Hurons, and Nipissings[17], or English allied' ones, like Six Nations tribes, Lenape or Chouanon. This hiatus between regular troops[18] and Amerindian allies, between European nations and First Nations, between hierarchical combatants and fluctuating bands is particularly expressed in the context of military justice. If crime linked to soldiers in New France has never been the subject of an exhaustive study,[19] most studies directly or indirectly related to crime provide a certain amount of information on these realities, but do not give any real specific place to the standards applying to the

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[15] D. Peter MacLeod, 'Microbes and Muskets: Smallpox and the Participation of the Amerindian Allies of New France in the Seven Years' War', [1992] 39-1 *Ethnohistory* 42-64.

[16] With the different texts or memoirs from European officers and captives, French or English : A.-J.-H. de Maurès, Comte de Malartic, *Journal des campagnes au Canada de 1755 à 1760* (Dijon, L. Damidot, 1890); [Anonymous], [Anonymous] 'A journal of the Siege of Oswego', *The Military History of Great Britain, for 1756* (London, J. Millan, 1757), 41-42; Robert Eastburn, *A Faithful Narrative of the many Dangers and Sufferings, as well as wonderful Delivrance of Robert Eastburn, during his Captivity among the Indians* (Philadelphia, William Dunlap, 1758); Peter Williamson, *French and Indian Cruelty; Exemplified in the Life and various Vicissitudes of Fortune, of Peter Williamson, A Disbanded Soldier* (York, N. Nickson, 1757) 98; Beverly W. Bond, Jr., 'The Captivity of Charles Stuart, 1755–1757' [June 1926] 13 *Mississippi Valley Historical Review* 58–81; William Pote, *Journal of William Pote Jr. during his captivity in the French and Indian war from may 1745 to August 1747* (New York, Dodd, Mead 1895); Richard Van der Beets (ed.), *Held Captive by Indians: Selected Narratives, 1642-1836* (Knoxville, University of Tennessee Press, 1973) 157; Titus King, *Narrative of Titus King of Northampton, Massachusetts: A Prisoner of the Indians in Canada, 1755-1758* (Hartford, Connecticut Historical Society, 1938); Howard H. Peckham (ed.), 'Thomas Gist's Indian Captivity, 1758-1759' [1956] 80 *Pennsylvania Magazine of History and Biography*, 294; John Knox, *An Historical Journal of the Campaigns in North America for the Years 1757, 1758, 1759, and 1760* (vol. 2, Freeport, New York Books for Libraries Press, 1970); Pierre Pouchot, *Memoirs on the Late War in North America Between France and England*, ed. Brian Leigh Dunnigan (Youngstown, New York, Old Fort Niagara Association, 1994).

[17] Christian Ayne Crouch, *Nobility lost: French and Canadian martial cultures. Indians and the end of New France* (Ithaca, Cornell University Press, 2014).

[18] See William J. Eccles, 'The Social, Economic and Political Significance of the Military Establishment in New France' [1971] 52-1 *The Canadian Historical Review* 1-22; Jay Cassel, *The Troupe de la Marine in Canada 1683-1760. Men and materiel* (Toronto, University of Toronto, 1987); Gilles Proulx, *La garnison de Québec de 1748 à 1759* (Ottawa, Parcs Canada, 1991).

[19] Philippe Ste Marie, *La criminalisation de la soldatesque* (M.A. His. [dactyl.] Udem, 2020).

Amerindians.[20] Three main angles lead to the intervention of European military justice vis-à-vis auxiliary troops, civilians or illegal combatants from the first nations: (1) The question of acts contrary to the 'laws' of European war committed by Amerindian nations and the issue of the difficulty of holding military tribunals to sanction them in the face of the necessary maintenance of diplomatic ties; (2) The question of captives and indigenous movements at the borders of combat zones; (3) The issue of judgments on individual acts committed by or involving indigenous combatants. After the completion of works published in both French and English on the involvement of Natives on the road of Seven Years War, two perspectives remain to be explored in this article. It is about the insertion of Native American soldiers and allies in the global colonial legal framework, and in particular the application of colonial military justice to those who are considered as Native American auxiliaries on the one hand. On the other hand, the question of the British view on these questions is little addressed in balance with the French reality, both in relation to the application of military and criminal justice to their allies and to the behavior of the French allies.

2 Military Structure, Criminal Law and Justice for Native: *'La justice du Gouverneur'*

Although the long-term goal was to subjugate Aboriginal peoples to French customs as subjects of the King, colonial authorities, throughout the 17th and 18th centuries, maintained nation-to-nation relationships with them, recognizing that the nations of the St. Lawrence Valley could only be subject to French laws and regulations by their consent. From another perspective, the colony administrators and the administrative and diplomatic staff at Versailles are aware of the vulnerability of the colony, making relations with the First Nations a key element. This situation, which was reinforced throughout the French regime, was due to the demographic pressure of the English colonies and the demographic weakness of the French settlement. To compensate for the demographic imbalance, relations with the Amerindian allies, and in particular the 'domiciled Indians' is crucial for the French, and this even more so when the military balance disintegrates.[21] Some scholarship on military campaigns has underscored British Officers failure to secure Indian allies and their imperious manner that ultimately alienated their potential friends. If diplomatic conciliation is put into practice, the balance of power being too favorable to the First Nations vis-à-vis the French, the will of the latter to impose their law is relatively clearly expressed, even if the King chooses the more often to temporize in favor of diplomatic considerations and strategic alliances.[22] As Jan Grabowsky affirms for Montreal, there is a desire on the part of the French authorities to set up a *common*

[20] André Lachance, *Crimes et criminels en Nouvelle-France* (Montréal, Boréal Express, 1984) 12-13.
[21] Denys Delâge, « Les Premières Nations et la Guerre de la Conquête (1754-1765) » [2009] 63 *Les Cahiers des dix* 1-67.
[22] « M. de Beauharnois et Hocquart au Ministre, 15 octobre 1730 » (BanQ-M., Fonds des Ordonnances des Intendants de la Nouvelle-France, bob. M-8145).

ground.[23] We can add that it is a 'legal middle ground', built around social and legal notions - if not common - at least understandable on both sides. The question is where the cursor is on these issues, and it can be said that it largely reflects the diplomatic and military preponderance of the First Nations, the balance of power being largely in their favor. Overall, there are several formulations in French jurisprudence aimed at the submission of Amerindians to French laws, either by affirming their quality of '*regnicoles*' - which means that they're national subjects of the King of France - or by the imposition of territorial empire of French law. Thus, in his *Memoir on the colonies of France in North America*, dating from 1750[24], the Marquis de La Galissonnière, Governor General of New France, affirms, in particular because of their military involvement, that the Abenakis can be regarded as subjects of the King of France.[25] As Delâge and Gilbert point out, the submission of Aboriginal people to French laws was affirmed as early as 1664 in the government of Quebec, during an assembly bringing together for this purpose the main representatives of the First Nations domiciled and 'the French colonial authorities'.[26] On 21 April 1664, on the occasion of the rape of Marthe Hubert by an Algonquin named Robert Hache, the Council called together the principal chiefs of several Amerindian nations to deliberate on this point and inform them that they would henceforth be liable to the penalties covered by the laws and ordinances of France.[27] Jan Grabowski's thesis work on the status of the Iroquois domiciled in Montreal before French justice amply demonstrates that, according to the author, the latter did not intervene directly '[...] on the territory of the natives who implemented home a system from their own traditions'.[28] Amerindians tried criminally before French courts are relatively few according to studies by Delâge and Gilbert (Québec), Grabowski or Desmond (Montreal), Morgan[29] (Louisiana). Few cases result in a full investigation and conviction. However, at least in broad outline, the criminal law flowing from the Criminal Ordinance of 1670 and doctrine[30] appears to be applied to the spirit, if not the letter and rigor of the law. Thus, Charles Marie said Carak8a after his arrest, accused of having thrown a passenger into the water, undergoes

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[23] J. Grabowski, *The Common Ground. Settled natives and French in Montréal, 1667-1760* (th. dactyl, Ph. D., History, University of Montreal, 1993) 147-149. See also Belmessous Saliha, *Assimilation and Empire: Uniformity in French and British Colonies, 1541-1954* (Oxford, OUP, 2013) 13-58.

[24] For a brief analysis, see Roland Lamontagne, 'La Galissonnière et ses conceptions coloniales d'après le "Mémoire sur les colonies de la France dans l'Amérique septentrionale" (décembre 1750)' [1961] 15-2 *RHAF* 163-170.

[25] 'Mémoire de La Galissonnière sur les colonies de la France dans l'Amérique septentrionale, décembre 1750' (BAC, C11A, fol. 248-270 on microfilm).

[26] Delâge and Gilbert (n 3) 81.

[27] 'Arrêt dans le procès contre Robert Hache, sauvage (amérindien), accusé du viol de Marthe Hubert, femme de [...] Lafontaine, habitant de l'île d'Orléans' (BanQ-Q., TP1, S28, P100).

[28] Delâge and Gilbert (n 3) 79.

[29] M. J. Morgan, 'Indians on Trial: Crime and Punishment in French Louisiana on the Eve of the Seven Years' War' [2009] 50-3 *Louisiana History: The Journal of the Louisiana Historical Association* 293-319.

[30] See major works of Pierre-François Muyart de Vouglans, *Les Loix criminelles de France* (Paris, Benoît Morin imprimeur-libraire, 1780); Guy Du Rousseau de La Combe, *Traité des matières criminelles, suivant l'ordonnance du mois d'août 1670 & les Édits, Déclarations du Roi, Arrêts & Règlements intervenus jusqu'à présent* (4t, Paris, 1741); Daniel Jousse, *Traité de la Justice Criminelle de France* (4 t. Paris, Debure Père, 1771).

the ordinary question, and without being judged, is released on parole[31] : 'Without proceeding to judgment, declaring that he should be further informed, the Council ordered that Charles Marie be released on condition that he stand again. It does not appear that a final judgment has been rendered'.[32]

Without permanent military tribunals, such as the Connetablie or the Prévôt des Maréchaux in metropolitan France, internal military justice within the troops is favored for crimes specific to military life or territories remote and more marked by military action, such as forts, whereas for usual crimes, it is the civil or military courts that investigate crimes and misdemeanors committed or involving soldiers, regardless of the circumstances.[33] In military matters, the Military Provost and the Court Martial have considerable latitude in the application of penalties, and what is more, in the colonial context, where they are often applied *in absentia*. It is therefore very logical that military judges be open to adapting sentences to reality, First Nations spirituality and mores. Similarly, if we observe the military procedure in the light of the Criminal Order, we are surprised at the role of the various officers within the framework of a court martial, and obviously, we do not find certain founding principles of the criminal justice, even under the Old Regime, such as the existence of a prosecution detached from the interests in question. The procedure is hybrid, between criminal framework resulting from the civil ordinance, military standards, maritime legal tradition,[34] since most of the regular troops are naval troops, and ad-hoc, sui generis procedure, to adapt to the distances, the distancing, or the proximity of the First Nations. Regular soldiers, Militia warriors, Natives were not used to be enforced, and forest, native's girl, alcohol, furs, all of this, are usually great temptations. Daniel-Hyacinthe-Marie Liénard de Beaujeu, the future hero of Monongahéla and commander of Fort Niagara, complained bitterly to Governor Taffanel de La Jonquière about his position, the garrison being made up of 'former drunkards from Montreal'[35]… and the fort was close to become a ruin. Since the 17th century, therefore, the powers and jurisdiction of the governor, the military 'commander-in-chief' of the colony for France, consist in two ways of 'commanding [...] soldiers [...] officers, ministers and subjects' in addition to 'judging all disputes that may arise between them' and 'punishing' offenders[36]. This formulation, without explicitly mentioning the natives, seems to exclude them except in penal matters.[37] In a letter of 1713, the governor and intendant

[31] André Lachance, *La justice criminelle du roi au Canada au XVIIIe siècle: tribunaux et officiers* (Québec, Presses de l'Université Laval, 1978) 79 and 107.
[32] Delâge and Gilbert (n 3) 84.
[33] Éric Wenzel, 'Justice et cultures militaires dans le Pays des Illinois au XVIIIe à travers une affaire de désertion 1752' [2014] 68 1-2 *RHAF* 85, 92.
[34] See Alain Berbouche, *Marine et Justice. La justice criminelle de la marine française sous l'Ancien Régime* (Rennes, Presses universitaires de Rennes, 2010) 89.
[35] 'Lettres de Daniel-Hyacinthe Liénard de Beaujeu, commandant au fort Niagara', [1931] XXXVII BRH 355–372.
[36] 'Provisions de la charge de Gouverneur et Lieutenant-Général du Roi en Canada, en faveur du Sieur de Lauzon, du 17e janvier 1651', *Complément des ordonnances et jugemens des gouverneurs et intendants du Canada* (Québec, E.R. Fréchette, 1855), quoted by Michel Morin(n 132) 16.
[37] *Id.*, note 133.

Vaudreuil and Bégon asked the king how to treat the Amerindians domiciled on the outskirts of Montreal, who replied:

> [...] With regard to the claim that the Indians have that they cannot be imprisoned except with their consent and that they are not subject to the laws of the country, the matter is very delicate and must be dealt with gently […] we can hope to accustom them to undergoing the laws, which must be done little by little with prudence and care, we must begin by trying to accustom them to undergoing military justice and then little by little we will accustom them to the same justice as the French inhabitants.[38]

Natives were less reluctant to face Military Justice because the sentences against them were generally lesser, weighted to a goal of preserving the covenant, and they were more familiar to military personnel. The forts spread throughout the territory were places of trade, where the Aboriginals could come to exchange their furs and pelts[39], or to collect presents provided by Onontio as well as strategic and logistical nodes. The Aboriginals were then subject to a so-called military justice, that described as 'governor's government'. Vaudreuil testifies, during the regency, to the possibility of using military justice "vis-à-vis" the Aboriginals, outside of any 'military framework', this justice being well accepted by the communities domiciled. He testifies to a case that occurred in 1719 where expeditious military justice proved effective in the context of the murder of a settler's wife by a domiciled Native.[40] The elders of the community collaborating in the justice of the governor, the latter uses his exorbitant powers of civil common law, but quite normal, by instructing the trial militarily and by proceeding to a sentence unusual under French law, military and civilian. The Governor does this in front of as many Natives as possible, thus exacerbating on this occasion the exemplary nature of the sentence to persuade Natives to prohibit such behavior.[41] The Huron Jacques Ouniahoul, living in the enclave of Lorette is said to be 'relative of our Iroquois of Sault-Saint-Louis'[42] and committed, as for him, the assassination of Pierre Chapeau[43], innkeeper in Quebec, under the influence of the alcohol, despite the many royal ordinances warning against such excesses.[44] 1669 ordinance made Native Americans liable for crimes they commit while intoxicated in addition to condemning to heavy penalties those who would be found drunk. The governor and the intendant asked for the pardon of the Native American and obtained the royal

[38] BAC, C11B, vol. 34, fol. 32-32v, '[E]xtrait du Mémoire du Roy au Sr. Marquis de Vaudreuil et Begon, Gouverneur Lieutenant général et intendant de la Nouvelle- France de l'année 1713', Versailles, March, 19, 1714.

[39] See Louis M. Waddell, 'Defending the Long Perimeter: Forts on the Pennsylvania, Maryland, and Virginia Frontier, 1755-1765 [1995] 62 *Pennsylvania History*, 171-95.

[40] 'Résumé d'une lettre de Vaudreuil datée du 7 novembre 1720', 1721, janvier, Conseil de Marine, MG1-C11A, microfilm, F-43, fol. 129-130.

[41] 'Résumé d'une lettre de Vaudreuil datée du 7 novembre 1720', 1721, jan., Conseil de Marine, MG1-C11A, microfilm : F-43, fol. 129-130.

[42] C11A, vol. 9, fol. 17v-18.

[43] RPQ, vol. 15, fol. 16v-17, quoted by Delâge and Gilbert (n 3) 84.

[44] Lachance (n 32) 16.

pardon.[45] Faced with the tense military context, intendant, and governor, Champigny and Denonville, decided to release the Amerindian so that he would get involved in the war to come, even asking for his forgiveness. In the letter addressed to the ministry of 6 November 1687 they argue the pressure of the Amerindian alliance of the Iroquois of Sault St Louis to obtain the pardon of Jacques Ouniahoul.[46] Taking up the analysis of Delâge and Gilbert on our behalf, the colonial authorities, and the King, considering the military role of the Amerindians, if they submitted an Amerindian who killed a colonist to French justice, allowed him, benefiting from the support of the Iroquois of the Sault, 'to escape justice'.[47] However, we must not frontally present a penal standard applied severely and to the letter for the settlers and appropriate adjustments for the Amerindians, essential military support. We find, in the case judged by Vaudreuil in 1719, adjustments relating to the Amerindian conception of what a punishment can be, and its relationship with an act, constituting a crime in the French legal system.[48] Some penalties are common, but do not apply on the same occasions. Thus, if French law applied in principle the death penalty for a murder, done in a premeditated manner, 'the tradition of the Algonquians rather favored the payment of compensation in the form of presents' in such a situation if the sanction did not strike flagrante delicto.[49] Penalties, and importance of hierarchy in the European conceptualization of justice, seems to be far from the indigenous values and understanding.[50] As Richard White points out for the *pays d'en Haut*, the sentences are arranged in this context of the spirituality and culture of the First Nations. The procedure then turns out to be original, and takes place in a diplomatic framework that involves the perpetual alliance between the French monarchy, symbolically represented by the Father, "Onontio" embodied in the person of the Governor General: Imprisonment was then imposed, partially derogating from French penal logic – the criminal ordinance not providing for this penalty for murder – but corresponding to the Algonquian tradition, 'the dead Amerindians and French were symbolically covered or resuscitated'.[51] This flexibility, this 'justice and equity'[52] does not necessarily work to the benefit of Aboriginal people. Military justice for the Amerindians seems very relative when it is Canadians who steal first, and it is a Canadian who must judge these crimes, in the person of Mr. de Vaudreuil. These are for:

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[45] See Gilles Havard and Cécile Vidal, *Histoire de l'Amérique française* (Paris, (reed.), Flammarion, 2019) 245-302.

[46] 'Brevet de Grâce pour le nommé Jacques Ouniahoul, Sauvage de Lorette', March, 6, 1688, [Jul. 1928] XXXIV-7 BRH 431.

[47] Delâge and Gilbert (n 3) 85.

[48] 'Résumé d'une lettre de Vaudreuil datée du 7 novembre 1720, 1721, janvier', (Conseil de Marine, MG1-C11A, microfilm F-43) fol. 129-130.

[49] Delâge and Gilbert (n 3) 86.

[50] Huron chief Adario, quoted by Teresa Carolyn Mc Luhan and Edward Sheriff Curtis, *Pieds nus sur la terre sacrée* (Paris, Denoël/Gonthier, 1971) 65.

[51] Delâge and Gilbert (n 3) 86; Richard White, *Le middle ground: Indiens, empires et républiques dans la région des Grands Lacs, 1650-1815,* (F. Cotton (trad.), Paris, Anarchis) 93.

[52] 'Instruction pour le Sieur de Courcelles au sujet des Indiens, mars 1665', *Collection de documents relatifs à l'histoire de la Nouvelle-France* (Québec, A. Côté et Cie, vol. I, 1888) 175.

[M]ost undisciplined, lazier than the Savages, and they are far from robbing them in war. Why not punish them? Some European will shout. Punish a Canadian! M. de Vaudreuil would rather see a battle lost, and he would not fail to write to the court, as he has already done, that people are treated harshly with whom they do whatever they want. With gentleness.[53]

3 Conduct Of 'Little' and 'Great Wat': A Blend of Cultures

As highlighted in the accounts of Europeans confronted with Amerindian attacks, the First Nations excelled in the '*petite guerre'* in the words of the French officers, made up of speed, mobility, dissimulation, and brutality. After an approach that we want to be as discreet and silent as possible, supported by scouts, the attack is then rapid, brutal and aims to be reduced in time.[54] The author of the *Relation par Lettres* makes the same observation regarding the Amerindian reluctance to attack the forts, a type of war which, according to them, has a cost-benefit ratio that may be interesting, given the risks incurred.[55] Natives' ways of life are rather peaceful. Within the First Nations, 'manifestations of aggression and hostility are very frowned upon, as is interrupting or contradicting an interlocutor.'[56] The crucible of violence was reserved for war, favoring on this occasion, '[...] bravery, ingenuity, resistance and skill'[57], and war having a particular function for the social group, by allowing 'the capture of women, the adoption of children, the exchange of prisoners'[58] and a strong genetic and demographic mix. The French and British regulars, provincial and militia troops learned how to fight and maneuver in the woods and imitate Indian tactics.[59] Cooperation between European's soldiers and Indian forces was the significant characteristic of North American's military activity during the Seven Years' War.[60] First Nations are aware of their weaknesses and strengths, and intend to be employed, to the best of their ability, as French Camp Marshall Desandrouins stated on the eve of the capture of Oswego, during a Grand Council.[61] If New France develop

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[53] L.-A. de Bougainville, 'Journal', in *Écrits sur le Canada. Mémoires, journal, lettres* (Sillery, Septentrion, 2003) 353; For the English version, see Edward Hamilton, (trans. and ed.), *Adventure in the Wilderness: The American Journals of Louis Antoine de Bougainville, 1756–1760* (1st ed., 1964, Norman, University of Oklahoma Press, 1990).

[54] [Antoine Silvy], *Relation par Lettres de l'Amérique septentrionale*, 1709-1710, Camille de Rochemonteix (éd.) (Paris, Letouzé and Ané, 1904) 86.

[55] ibid 86.

[56] M. Morin, *L'usurpation de la souveraineté autochtone: le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord*, (Montréal, Boréal, 1997) 25

[57] Denys Delâge, *Le pays renversé: amérindiens et européens en Amérique du Nord-Est, 1600-1664* (Montréal, Québec, Boréal, 1985) 75.

[58] Adrien Paschoud, 'Le monde amérindien au miroir des Lettres édifiantes et curieuses' [2008] 7 *SVEC* 17.

[59] Preston (n 12) 296.

[60] Timothy J. Shannon, 'French and Indian Cruelty? The Fate of the Oswego Prisoners of War, 1756-1758' [2014] 95-3 *New York History* 381, 383.

[61] Jean Nicolas Desandrouins, Charles Nicolas Gabriel (Abbé) (ed.), *Le maréchal de camp Desandrouins, 1729-1792: guerre du Canada 1756-1760* (Québec, Imp. Renvé-Lallemant, 1887) 35.

and flourish the most important numbers of Indian allies[62], British wasn't alone during the 'French and Indian's war'. British and French regular soldiers worked closely with Natives as scouts, admired their abilities, shared campfires and the 'same micoine'[63], and argued and disagreed with one another.[64] The clash between European and Native American military cultures was most famously illustrated in the 'massacre' at Fort William Henry in 1757, but it was a constant reality during the whole war. Conflicts between Amerindian nations, allied to British power, are also the subject of correspondence between military authorities, even if they are not, they cannot be, the subject of a court-martial *stricto sensu*.[65]

The arrival of French expeditionary forces in 1755 and 1756, as well as the constant dispatch of regular troops to the British side, heightened the tension between European officers, military justice and Native American allies. From 1756, the French alliances suffered, militarily - a little -, symbolically, more, logistically, a lot from the thrust of the British. The antagonisms between French officers and Amerindian allies thus crystallized even more strongly during the Chouagen sieges (1756) and especially at Fort William Henry in 1757.[66] As Bertrand Fonck underlines that officers are '[…] shocked by the violence of the savages during the fighting and their cruelty outside'[67], and this even if the behavior of European soldiers is far from the cliché of the '*guerre de dentelle*'.[68] There is 'a difficulty in appropriating the military culture of the Other'.[69] As late as 1759, in an almost hopeless situation, Ramezay asserted the militia and Native American forces at his disposal when considering action against Wolf.[70] Obviously, the objectives of the First Nations do not necessarily correspond, or even contradict those of the Europeans. No global geostrategic issue, but rather the will to defend one's land, to repopulate one's nation with captives, to obtain the recurrence of presents, food or weapons and gunpowder, to annihilate an ancestral adversary or to win opportunistically hunting, farming, or trading territories facing a neighbor.[71] Mutual learning is sometimes done with profit,

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[62] Preston (n 12) 301.

[63] See Michel Morin, 'Manger avec la même micoine dans la même gamelle : à propos des traités conclus au Québec avec les Amérindiens (1665-1760)' [2003] 33 *R.G.D.* 93.

[64] Preston (n 12) 282.

[65] See for example 30 Oct. 1767, Pensacola, *Correspondence with General Thomas Gage*, 1767-1768, 2 vol. (MG21-Add.MSS. -21663, National Library, London, Great Britain vol. 21663) 136

[66] See Ian Kenneth Steele, *Betrayals: Fort William Henry and the massacre* (New York, Oxford University Press, 1990).

[67] Bertrand Fonck, 'Joindre au système de tactique d'Europe l'usage à faire des "sauvages" : Le commandement des armées françaises en Nouvelle-France', L. Veyssières and B. Fonck (ed.) *La guerre de Sept ans en Nouvelle-France* (Septentrion, Québec, 2014) 162.

[68] Edmond Dziembowski, 'Guerre en dentelles ou guerre cruelle ? La représentation de la guerre de Sept Ans dans la littérature du XVIIIe siècle', André Corvisier and Jean Jacquart (eds), *Les Malheurs de la guerre*, t. I, *De la guerre à l'ancienne à la guerre réglée* (Paris, CTHS, 1996) 313-320.

[69] Gilles Havard, 'Le rire des jésuites. Une archéologie du mimétisme dans la rencontre franco-amérindienne, XVIe-XVIIIe siècle' [2007] 62-3 *Annales* 539-573.

[70] Jean-Baptiste Nicolas Roch de Ramezay, *Mémoire du Sieur de Ramezay, commandant à Québec, au sujet de la reddition de cette ville, le 18e septembre 1759* (Québec, 1861, J. Lovell) 39-40.

[71] Silvy (n 54) 94.

but also with its share of violence[72], racism and fundamental misunderstanding.[73] However, curiosity is mutual, encourages openness to others, and learning Indian warfare is fundamental for European troops.[74] The attraction for 'Amerindian life' was a constant in New France, and successive governors all fought against the will of the young people of the colony to settle in the woods, to live with the natives, and to marry Native Americans and freedom of morals synonymous with disorder for the authorities.[75] The arrival of Montcalm and a new expeditionary force in 1756, rather largely reinforces the internal prejudices of the French armies, the words of a Bougainville, yet largely integrated into his new life and even 'adopted' among the Amerindians domiciled (Iroquois) of Sault-Saint-Louis, are extremely severe towards those who are his allies. Bougainville denounces the 'small war', and rather than the Europeans influencing the natives in military matters, the opposite is happening.[76] Criticism will also be directed against the Canadians, their morals, and their savagery. In fact, what Bougainville denounces in the Canadians, it is especially the Savage who interfered there.[77] Bougainville has an appetite for the great war, war 'on the European foot'.[78] Bougainville, however, largely in contact with the Amerindians, cannot get used to their values, their mores, their games. Deploring the 2-day delay of a convoy of Canadians and Amerindians, he noted that it resulted from a game of lacrosse between Iroquois and Abenaki, for which 'there was the stake [of] 1000 crowns of porcelain necklaces.'[79] What Bougainville denounces, between the lines and almost unconsciously, is also the superiority of the Amerindians in the conduct of the war in North America.[80] 'Savages' make their law, impose their agenda, and this is what an officer of Louis XV, imbued with his caste superiority, cannot bear: 'When, in a detachment, the Savages are the most numerous, they give the law and decide without appeal'.[81] How could aristocratic red heels give way to native loafers?

However, Native Americans were the masters of wilderness warfare. Irregular tactics were already habitual to them, and they also became more refined as Native Americans

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[72] Cécile Vidal, 'Greater French Louisiana (1699-1769): A Violent Frontier Colony?' [2007] 23-2 *Le Journal* 1-9

[73] See James Axtell, 'The Indian Impact on English Colonial Culture' *The European and the Indian: Essays on the Ethnohistory of Colonial North America* (Oxford, Oxford University Press, 1981) 131-167, 272-315.

[74] Charles E. Brodine and Daniel J. Beattie, 'The Adaptation of the British Army to Wilderness Warfare, 1755- 1763'Maarten Ultee (ed) *Adapting to Conditions: War and Society in the Eighteenth Century* (University of Alabama Press, 1986) 56-83.

[75] 'Lettre de Denonville au ministre', november, 13, 1685, (BAC, MG-C11A, microfilm, fol. 86-106v) fol 90-90v. Nicole Goetz, 'A Country Dangerous for Discipline: The Clash and Combination of Regular and Irregular Warfare during the French and Indian War', *The Age of Gunpower- An Era of Technological, Tactical, Strategic and Leaderships Innovation*, *Emory Endeavors in History* (vol. 5, Emory, 2013) 100-115, 107.

[76] Bougainville (n 53) 347.

[77] ibid.

[78] ibid 349. See also Delâge (n 22) 38.

[79] ibid 347.

[80] ibid 343-362.

[81] ibid 349.

learned to defend themselves against the new European settlers.[82] Native American Warriors were highly skilled soldiers, masters of woodland warfare and experts at conducting '*La Petite Guerre*'.[83] The raids, ambushes, massacres, and farm burnings were normal practices for Natives, American colonists, and Canadian colonists, but horrified a French or English military used 'officially' to fighting in a 'civilized' manner and abiding by the Laws of War. Natives War Parties had specific purpose and were conducted to achieve important objectives. Long drawn-out battles were seen as a waste of resources when the objective could be accomplished with a short decisive engagement. Adversaries were given lines of retreat to allow for a quick end to battle. Native American soldiers were expected to retreat from the battlefield if engaging a superior enemy, there was no dishonor in the common sense of survival and consolidation. Unlike other French military or administrative leaders, and in line with Bougainville, Montcalm largely neglects his Native American allies, and his remarks prelude the diminishing importance of Native American auxiliaries in North American conflicts. As Denys Delâge rightly points out, Montcalm and Vaudreuil regularly clashed over the issue of Amerindian auxiliaries and the use of militias: 'classic European military school, Vaudreuil favorable to guerrilla warfare, to the autonomy of the Indians and Canadians, to the maintenance of terror on the enemy's borders'.[84] As most British general officers point out, as well as several French people, if they cannot accept or understand the customs and values of the Amerindians, allies or enemies, they observe, sometimes bitterly, '[…] that Indians were indispensable to victory'.[85] However, this was not a reality for all the officers of the English colonial troops, and the gradual victory over the French and their Native American allies persuaded many of them that the maintenance of Native American alliances should not be done at all costs.[86] The non-respect of the European rules of war, the practice of the scalp, the forms of 'cannibalism' among certain indigenous groups such as the humiliation of Native American prisoners are a subject of scandal and discussion within the military staffs.[87] Native American irregular warfare tactics were not lost for the American frontiersman and British officer Major Robert Rogers, who saw the genius of Native American Guerrilla warfare.[88] He attempted to render the art of wilderness warfare as a skill that one could teach and something that was transmittable as military doctrine. As

[82] Ruben Gold Thwaites (ed.), *The Jesuit Relations and Allied Documents: Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791* (Cleveland, Ohio Burrows Brothers, 1896-1901), quoted by Nicole Goetz (n 75) 105.

[83] De Faakto, 'Native American Warfare Culture, How It Influenced Small Wars, Modern Guerrilla Warfare and Special Operations', https://defaakto.com/2020/05/24/native-american-warfare-culture-how-it-influenced-small-wars-modern-guerrilla-warfare-and-special-operations/, accessed 5 sept. 2022.

[84] Delâge (n 22) 37.

[85] H. Bouquet, *The Papers of Col. Henry Bouquet*, D. H. Kent (ed) (Harrisburg: Department of public instruction, Pennsylvania Historical Commission, Frontier Forts and Trails Survey, 1940, 6 vol.) vol. 2, 136

[86] Amherst to Bouquet, June 7, 1762, Amherst Papers, bobine 33, quoted by Richard White (n 51) 362.

[87] Arnaud Balvay, *L'Épée et la plume : Amérindiens et soldats des troupes de la Marine en Louisiane et au Pays d'en Haut, 1683–1763* (Québec, Presses de l'Université Laval, 2006) 114, 274–276.

[88] De Faakto (n 83).

we have seen, penal practices as well as Amerindian warrior mores and customs are difficult to understand by Europeans.[89] When European officers discover those, they identify as 'savages', their culture, their language, their customs, their violence, this constitutes a crisis of conscience and what particularly shocks them is the violation of 'European rules of the war'.[90] Native's war acts, obviously, have a strategic utility and efficiency. British soldiers, perhaps seeing fewer Natives on a daily basis[91], seem to particularly fear the latter, the English being according to the French soldiers particularly 'afraid for his hair'.[92] Vaudreuil values, for his part, 'the wild cry of which the English are very frightened'.[93] We find in Bougainville's correspondence many derogatory considerations of his allies, and of the "Indian way of war".[94]

Native American warriors have always refused their integration into the troops and the European way of waging war, not understanding its interest in view of the circumstances, their own interests, and material conditions. The siege warfare of the various forts is not in their customs. Camp Marshall Desandrouins, involved in the campaign leading to Oswego, noted the lack of interest of the Amerindians - or the lack of confidence of the Europeans on this occasion - for siege activities, doing '[...] little or point of funds on the Canadians and Savages for a siege'[95], the Amerindians being 'unaccustomed to fighting against the entrenchments of stakes'.[96]

Where the French have Bougainville and Montcalm to describe the "Indian war" and depreciate both the military contribution, for which they cannot but, and the indigenous cultures which seem barbaric to them, the British have Braddock and Washington[97], to play roughly the same music. Thus, Braddock distrusted Native American troops, and his failure was largely attributable to the difficulties of fighting in a combined fashion with his Native American allies. British propaganda will nourish throughout the period

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[89] Desmond H. Brown, '"They Punish Murderers, Thieves, Traitors and Sorcerers": Aboriginal Criminal Justice as Reported by Early French Observers' [2002] 35 *Social History/Histoire Sociale* 365-393.

[90] Laurent Veyssière, 'Combattre avec les Indiens durant la guerre de Sept Ans, "les plus redoutables à qui les craint"' [2020] 300-3 *Revue Historique des Armées* 133. See Bougainville (n 53) 286. Hamilton, (n 53) 7 and 27-28.

[91] Laurent Nerich, *La petite guerre et la chute de la Nouvelle-France* (Montréal, Athéna, 2009) 199-200.

[92] Desandrouins (n 61) 50.

[93] Bougainville (n 53) 342.

[94] 'My eyes are still startled from the horrible sights they had. All the most abominable cruelty can imagine, these monsters of savages have made us witnesses to. Which country! What men! What a war!', Bougainville, (n 53) 377-378.

[95] Desandrouins (n 61) 49.

[96] ibid 39.

[97] On Military Justice, see George Washington, *The Writings of George Washington* (vol. I, New York and London, G.P. Putnam's Sons, 1890) 99-109, 133-137, 217-220 and on Natives, especially 52-59, 82-85, 89-91, 94-96, 100-105, 111-112, 116-119, 124. See J. Frederick Fausz, '"Engaged in Enterprises Pregnant with Terror': George Washington's Formative Years among the Indians' Warren Hofstra (ed), *George Washington and the Virginia Backcountry* (Madison, Wise, Madison House, 1998) 115-55; Colin G. Calloway, *The Indian World of George Washington: The First President, the First Americans, and the Birth of the Nation* (Oxford University Press, Incorporated, 2018) 69.

the So-called French barbarism and Canadian savagery, which will continue long after the conflict[98], even if these meetings also constitute moments of more "positive" cultural confrontation.[99] However, the British also rely on their Native American auxiliaries, and on a network of strong alliances with the 5 Nations in particular.[100] After all, throughout the main theaters of the Seven Years' War in America, provincial troops and French and British regulars 'lived, fought, bled, and died alongside Indian warriors'.[101] Generally discriminated, Native American warriors influence and drive certain operations, even if they do not lead the troops.[102] Obviously, the difficulty in distinguishing the Amerindians allied to the French or the British forces the use of distinctive signals, which can in turn be sources of military acts liable to sanction or, on the contrary, avoid 'friendly fire' which risks damaging relations between allies.[103]

4 Road to the Violence Climax: Military Justice Blind and Muted

In 1753, 'the French had rebuffed a summons written by Gov. Robert Dinwiddie and personally delivered by Washington warning them to leave the Ohio Valley'.[104] The escalation of the conflict builds along the western borders of the British colonies and along the French trading posts and forts along the 'Belle Rivière' Ohio.[105] Five acts of war have particularly marked the British and French imagination and have provoked, to varying degrees, consternation, and indignation among European regular troops, but paradoxically no real instructions from military justice or any real advice of war to judge the acts perpetrated in which the Amerindians are implicated, either as actors or as victims. The murder of Jumonville[106], the Massacres of Oswego and Fort William Henry, the attack and destruction of the Native American village of Saint François and finally Fort Pitt in 1763 and the dissemination of smallpox against the Native. But we must not believe that it is an act of cruelty necessarily carried out on the initiative of the Amerindians. Even if

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[98] Guy Frégault, *La guerre de Conquête (1754-1760)* (Montréal et Paris, Fidès, 1955) 32-33.

[99] See Elizabeth A. Perkins, 'War as Cultural Encounter in the Ohio Valley' David Curtis and State Skaggs (eds) *The Sixty Years' War for the Great Lakes, 1754-1814* (East Lansing, Michigan University Press, 2001) 215-25; Peter E. Russell, 'Redcoats in the Wilderness: British Officers and Irregular Warfare in Europe and America, 1740 to 1760' [1978] 35 *WMQ* 646-47.

[100] See Thomas Pownall, *Proposals for Securing the Friendship of the Five Nations* (New York, J. Parker and W. Weyman, 1756) and, on the Treaty negociated by Governor Pownall with the northern Indians at Penobscot, see Thomas Pownall, 'Journal of an Indian Treaty, May, 1759' [1857] 5 *MHSC* 365-387.

[101] Preston (n 12) 281 and 285.

[102] ibid 294.

[103] Paul Moyer, "'Real' Indians, 'White' Indians, and the Contest for the Wyoming Valley' William Pencak and Daniel K. Richter (eds), *Friends and Enemies in Penn's Woods: Indians, Colonists, and the Racial Construction of Pennsylvania* (Pennsylvania State University, 2004) 221-37.

[104] Preston (n 12) 152-153.

[105] Fernand Grenier, 'Pécaudy de Contrecœur, Claude-Pierre', *Dictionnaire biographique du Canada* (vol. 4, Université Laval/University of Toronto, 2003), http://www.biographi.ca/fr/bio/pecaudy_de_contrecoeur_claude_pierre_4F.html
accessed 3 november 2022.

[106] Washington (n 97) 119-120.

European officers pretend to ignore it, regular troops comment on numerous depredations and attacks on civilians, unsanctioned, during tolerated looting in European combat zones. The Europeans, French and British, know how to direct their troops, regular or allied, towards behavior going beyond the normal framework of the conflict, as is the case in Oswego, during the attack on Saint François and the destruction of the Abenaki village, or during the destruction of the village of immigrants from the Palatinate under the British Empire, by Picoté de Belestre in November 1757 and some three hundred Canadians and Amerindians.[107]

5 Military Justice on Natives: Edge, Fall, Collapse

In view of the behaviors sanctioned by the British authorities, discipline is difficult to maintain between the different troops and the norms hindering relations between soldiers, militiamen and natives multiply. The main risk, besides desertion within a Native American party for white soldiers, is the sale or exchange of alcohol for Native American fighters.[108] As F. B. Wiener shows, even if there were restrictions on military jurisdiction over non-military persons, a lot of civilian, Indians or settlers, were judged or object of military inquiry in the American wilderness, especially during the French and Indian war and the period from 1765 to 1775.[109] The first nations are obviously not the only ones to have a certain fragility in their alliances or promises. The British are known across the prairies for not keeping their promises, especially in terms of the absence of colonization and they do not hesitate, after having returned to their jacket and their alliance with the Cherokees, to pursue one of their leader, Attakullakulla - called Little Carpenter by the latter - who found himself taken hostage by the British after the Seven Years' War to answer for the murder of several settlers during armed conflicts.[110]

5.1 Ruling the Captives

The author of the Relation par Lettres develops an interesting letter on the question of captives, emphasizing that: '[…] if the savages treat their prisoners well on the way, it is only to be able to bring them alive to their village, because they change their behavior well when they are there'.[111] He adds that '[t]his council does indeed decide on the distribution of these prisoners whom they regard as slaves, but they do not decide on their life or their death; it absolutely depends on those to whom they are given, unless he who slew some warrior in combat was taken, in which case this advice would condemn him

[107] Delâge (n 22) 24-25.
[108] Preston (n 12) 296.
[109] Frederick Bernays Wiener, *Civilians under military justice: the British practice since 1689, especially in North America* (Chicago, University of Chicago Press, 1967) 35-78.
[110] Harriet Louisa, Simpson Arnow, *Seedtime on the Cumberland* (East Lansing, Michigan State University Press, 2013) 139; Gregory Evans Dowd, '"Insidious Friends": Gift Giving and the Cherokee-British Alliance in the Seven Years' War' Andrew R.L. Cayton and Fredrika J. Teute (eds.), *Contact Points: American Frontiers from the Mohawk Valley to the Mississippi, 1750-1830* (Chapel Hill, University of North Carolina Press, 1998) 114-150; Preston (n 12) 299.
[111] Silvy (n 54) 89.

first to fire'.[112] Concerning the diplomatic use of captives, the Amerindian communities use them in order to force certain alliances, or to interest certain nations.[113] In addition to the European rules of war regarding prisoners, there 'had emerged in colonial Canada an intercultural process for taking and redeeming prisoners of war and Indian captives'.[114] In some Native American nations, the distinction between prisoner of war, slave and adopted was relatively permeable, which made the restitution of these captives relatively complex.[115] The observation for the first European explorers therefore consists in the existence of forms of captivity among the Amerindians, even if slavery *stricto sensu*, as perpetual property of one person over another, is rare.[116] As Gilles Havard points out, '[a] "slave", in Amerindian diplomacy, was an object of mediation in the same way as a breadstuff of tobacco or a beaver fur; but his gift crystallized all the better the peace between the allies that he exalted the war against the common enemy'.[117] Thus in 1750, Loranger and Marin Leduc indicate, while traveling to Fort Miami, that Tête Blanche, leader of the 'Ouiatanons', came to Fort Miamis 'to ensure his inviolable loyalty and to bring a flat-headed slave with long hair. chicacha for Mr. General'.[118] Chief Tsonnontouans, Tanaghrisson for example, in the upper part of the beautiful river (Ohio river), belonged to the Flatheads (Catawbas), and came from the Lac des Deux-Montagnes, in the government of Montreal, but was captured young by the Senecas, and fully embraced their interests as chief.[119] The exchange of captives sometimes even made it possible to reconcile the English enemy when he intervened in return for British colonists captured by the Amerindian nations.[120] As David Gilles points out, the Native American slave is 'first a prisoner of war, and his possession can be the guarantee of future peace or eventual war'[121], and there is a great mobility of Native Americans in captivity on the

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[112] ibid 90-93.

[113] ibid 89-90.

[114] Shannon (n 60) 382-383, 391.

[115] Algonquin and Iroquoian peoples can adopt captives to quickly repopulate a village that has lost its inhabitants; B. Rushforth, '"A Little Flesh We Offer You": The Origins of Indian Slavery in New France', [Oct., 2003] 60-4 *The William and Mary Quarterly* 777-808, 784; Bruce G. Trigger, *Les Indiens, la fourrure et les Blancs : Français et Amérindiens en Amérique du Nord*, (Montréal, Boréal, 1992) 376-377. See William A. Starna et Ralph Watkins 'Northern Iroquoian Slavery' [1991] 38 *Ethnohistory* 34 and Roland Viau, *Enfants du néant et mangeurs d'âmes : Guerres, culture et société en Iroquoisie ancienne* (Montréal, Boréal, 1997) 137-199.

[116] Only the Native Americans of the North of the American Pacific coast seem to have condemned their captives to a state of perpetual slavery, however without hereditary; Leland Donald, *Aboriginal Slavery on the Northwest Coast of North America* (Berkeley, Univ. of California Press, 1997) 69-102.

[117] Gilles Havard, *Empire et métissage: Indiens et Français dans le Pays d'en Haut, 1660-1715* (Paris, Presses de l'Univ. Paris-Sorbonne, 2003) 174.

[118] 'État des effets de Loranger et Marin Leduc associés' (BAC, MG-C11A, vol. 119) fol. 109-109v.

[119] William A. Hunter, 'Tanaghrisson', *Dictionnaire biographique du Canada* (vol. 3, Université Laval/University of Toronto, 2003) accessed sept., 3, 2022, http://www.biographi.ca/fr/bio/tanaghrisson_3F.html

[120] On this question see E. Lewis Coleman, *New England Captives Carried to Canada between 1677 and 1760 during the French and Indian wars* (vol. 1, Portland, Southworth Press, 1925) 69-129.

[121] David Gilles, *Essais d'Histoire du droit. De la Nouvelle-France à la Province du Québec* (Sherbrooke, Les éditions de la RDUS, 2014) 287. See Nicolas Perrot, *Mémoire sur les mœurs, coustumes et religion des sauvages de l'Amérique septentrionale* (Montréal, Comeau & Nadeau, 1999) 96-98; Havard (n 117) 150-151, 155-158;

whole continent. For regular soldiers' prisoners and officers, 'European rules of war dictated that they were to be fed, clothed, and housed by'[122] the winner until they could be exchanged for their own prisoners. Captivity could be long, and take quite varied forms, from pure and simple assimilation within Amerindian communities, which lived relatively well, developing a Stockholm syndrome before its time, to the multiplication of escapes or escapes to the British colonies, with vary success.[123] The destiny of the captives in Montreal or Quebec can take three main forms: either the captives, civilian or military, are 'entrusted' to the Natives to compensate for the loss of warriors or family members. Captives can also, temporarily, be used or locked up in French settlements. Finally, in application of the laws of war, they were, in time, intended to be exchanged, released on parole for certain soldiers and officers, or transferred to Europe, if no exchange is possible in North America. Quebec prison was crowdy, but the prison keeper conducted toward the prisoners, 'more like A Father than an Enemy' according to Stephen Cross[124], and food good enough. Crimes can punctuate the journeys of captives, and officers and warriors, confronted with First Nations warriors, can be put in difficulty, even mistreated, in the tradition of Native American customs and the exposure of the defeated warrior to the torture stake, but overall, during the Seven Years' War, the European officers and a certain acculturation of the Amerindian wars makes the exposure of the European warrior to abuse by the natives relatively exceptional.[125]

5.2 Military Justice, Natives, Discipline and Martial Court in Action

For the British, the general correspondence, between the various general officers, such as Haldimand, Amherst, Gage or Carleton, fairly regularly mentions the establishment of courts-martial, even if the composition of the latter is often difficult, but these very exceptionally involve the Native American allies of the United Kingdom.[126] The archives relating to British military justice distinguish between martial courts as such and 'courts of inquiry', which are aimed more at a military investigation than a judgment strictly speaking.[127] It is the latter that see the appearance of Native Americans in greater numbers. For example, in September 1763, the military jurisdiction questions itself through

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Ian K. Steele, *Setting All the Captives Free: Capture, Adjustment, and Recollection in Allegheny Country* (Montreal and Kingston, McGill-Queen's University Press, 2013) 263–308.

[122] Shannon (n 60) 390-391.

[123] Way (n 7) 49-50.

[124] Stephen Cross, 'Journal of Stephen Cross of Newburyport - Up to Ontario, Activities in Canada, March 1, 1756-January 22, 1757', *Essex Institute Historical Collections*, 75 [Oct 1939] 334-357; 76 [Jan. 1940] 14-42

[125] 'Journal of the Siege of Oswego', *The Military History of Great Britain, for 1756-1757, Containing a Letter from an English Officer in Canada, taken Prisoner at Oswego; Exhibiting the Cruelty and Infidelity of the French, and their Savage Indians, in Times of Peace and War* […] (London, J. Millan, 1757) 43–45.

[126] See Major Hamilton to Haldimand, who has been acquitted at the court martial on the ground of the want of competency of the court, owing to its composition, mai, 26, 1774, 'Correspondence with Sir William Johnson and papers on Indian Affairs, 1759-177' (MG21-Add. MSS.-21670, National Library, London, Great Britain, vol. 21670) 171.

[127] See Lt General Humphrey Bland, *A Treatise of Military Discipline, In Which is Laid down and Explained the Duty of the Officer and Soldier* (1727 1st ed., London, D. Midwinter, J. and Knapton 5th ed., 1743) 196-197.

an 'inquiry court', to establish why an Amerindian named Andrew did not go to Presqu'isle with a package containing military documents.[128] This court gives an account of the movements of the Ottawa Indians and Chippewas reported to this Andrew by the Hurons, as well as an action by the Hurons of Detroit and directed by British officers against the Ottawas, which resulted in the death of five of the British officers.[129] Similarly, it is an 'inquiry court' which investigates the murder of an Amerindian in November 1764.[130] In British general strategy, military posts, as with the French, are the tools of military and diplomatic projection, the places of common law of military justice, and like the post of Tombecby, appear as essential in assisting in Indian quarrels. The need to apply military justice *in concreto* is also present, particularly as an object of the relational dynamic with the First Nations. As General Gage for example points out, in addition to the need to respect the establishment and execution of the decisions of courts martial, it is essential to put an end to the attempts '[…] to prevent the Nations from getting ammunition would cause a general Indian war'[131], inclinations present within the Department of Indian Affairs. The tension between the military and the representatives of the Department of Indian Affairs is a constant, and even once past the heart of the conflicts in North America, there are occasions for falling out between the two groups in contact with the First Nations. Thus, in 1786, Brigadier Hope, speaking to Haldimand, blamed Sir John Johnson for any conflict with the Aboriginal peoples that might result from an Indian council he had attended. He considers that the Department of Indian Affairs, through the latter, acts of insubordination[132] regarding the military hierarchy. European officers defeated by Amerindian troops were not brought before military tribunals, the defeat against Amerindians not proving more infamous than that before regular troops. After the Oswego Defeat, we find no evidence of a war council against John Littlehales[133], but the ministry made plans at the end of 1756 '[…] to break the 50th and 51st Regiments and to have their men drafted into other units. The decision was practical, but it was also a symbolic way of washing away the stain on British honor left by the hasty capitulation at Oswego'.[134]

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[128] 1 Sept. 1763, Fort Pitt, Papers Relating to Courts Martial, etc., 1758-1779 (MG21-Add.MSS. 21682, National Library, London, Great Britain, vol. 21682) 88

[129] ibid.

[130] Court of Inquiry, 7 Nov. 1764, Camp No16, 135, Papers Relating to Courts Martial, etc., 1758-1779, (MG21-Add.MSS-21682, National Library, London, Great Britain vol. 21682).

[131] General Gage to Brigadier Taylor, August, 14, 1766, New York, Correspondence with General Thomas Gage, 1764-1768 (vol. 1-2), (MG21-Add.MSS-21662, National Library, London, Great Britain, vol. 21662) 118.

[132] Brigadier Hope, 1786, August, 9, Quebec, Letter from Various Persons to General Haldimand after his appointment as Governor of Quebec, 1785-1787 (MG21-Add.MSS-21736, National Library, London, Great Britain, vol. 217361) 80.

[133] John Littlehales, 'Copy of the Returns of the 50th//51st Regts. & the Detachment of Royal Artillery Embark'd from Quebec for Old England 30th Sept. 1756' (LO 1539, Loudoun Papers), quoted by Shannon (n 60) 398.

[134] Shannon (n 60) 401.

As Philippe Ste Marie points out, soldiers are more particularly present in the case law concerning certain crimes, such as theft.[135] The works of Charland, Lachance and Ste Marie[136] show that this is one of the principal offenses committed in New France, and logically, it is a crime which is easily 'accessible' for the Amerindian auxiliaries, who no longer the same relationship to individual property, which can be a source of confusion and undue incrimination. In the early days of the colony, under direct royal government, the Huron wife of Mathieu 8rak8i (Ouiracouiti), Marie Magdelaine Ganhouentake, was killed by the soldier Robert Leclerc, dit Desrosiers.[137] Having murdered an Aboriginal woman, who is moreover pregnant, Desrosiers was only sentenced by the Provostship in a judgment of 18 April 1678 to banishment and a straightjacket for a period of one hour in Lower Town in addition to owing ten pounds of fine to the king and 60 pounds of civil interests to the children of 8rak8i..., which was completely outside the framework of the criminal ordinance.[138] Deeming the sentence insufficient, the Attorney General appealed to the Sovereign Council, which upheld the sentence and increased the penalty (£100 compensation and £10 fine), specifying the obligation 'to serve by force an inhabitant of the country' during the period of banishment.[139] The kidnapping, perhaps amorous, of Madeleine in 1726, a slave of the fox nation, from her master, the Sieur de la Pérade, also involves a soldier[140], and in June 1728, Lapalme, belonging to the Contrecoeur company, was accused of the murder of a Panis slave.[141] However, Lapalme obtained his pardon because of his presence in service at the time of the assassination. Usually, soldiers did enjoy some form of immunity while on duty under the 1727 ordinance.

These cases involve soldiers and Native Americans but are handled globally by the civil courts. Relying on the justice of the governor implied more openness to diplomacy and to pressure from Native American leaders. It's the case for the Huron Nicholas Tonabl8an, accused of attempted murder in 1684.[142] In a way more impressive, Jan Grabowsky reports for Montreal the presence of 400 Abenaki warriors around the city of

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[135] Ste Marie (n 27) 25.

[136] Out of a hundred charges brought against soldiers within the government of Montreal between 1700 and 1760, about forty are aimed at theft and concealment, see Stéphanie Charland, *Les soldats français à Montréal au XVIIIe siècle: activités et intégration sociale des soldats vues à travers les sources judiciaires* (PhD dactyl., M.A. Montréal, Université de Montréal) 2006; 24.37% of those accused of theft according to André Lachance's review were soldiers in the collections he consulted for the period from 1712 to 1759, Lachance, (n 32) 131; Ste Marie, (n 27) 43-44.

[137] Procès contre le nommé Robert Leclerc dit Desrosiers, […], April, 18, 1678, (BanQ-M, TL1, S11, SS1, D11, P5).

[138] ibid.

[139] If Delâge and Gilbert judge the sentence to be fair while Ste Marie considers that it is a question of proof of little value given to Aboriginal life, while obscuring however the most important part of the sentence, one can only note that this is a sentence well below what the letter of the criminal order imposed; See Delâge and Gilbert (n 3) 85; Ste Marie (n 27) 62.

[140] See Begon ordinance 17 juillet 1726 (Montréal, BanQ-M, E1, S1, P1749, M5/4) fol. 100-100v.

[141] Procès contre Lapalme, accusé du meurtre de Jacob, Panis, esclave de Julien Trottier, sieur Des Rivières, 13 juin 1728-18 juillet 1728 (Montréal, Juridiction royale de Montréal, BanQ-M, TL4, S1, D3433).

[142] ASSSM, Fonds Faillon, FF73, quoted by Grabowski (n 49) 151.

Montreal[143], when the governor of Montreal, Claude de Ramezay[144] decided to release three Natives who had committed a burglary and an assault under the influence of alcohol against the merchant Isaac Nafréchou in 1713. He condemned him to a traditional native reparation, by the compensation of 30 beaver skins and the payment of surgeon's fees.[145] The governor's decision here escaped any procedure of the civil courts and the examination of the case by the officers of justice of Montreal. However, we must be careful not to assess such a sentence in terms of the letter of the Criminal Ordinance of 1670, as some authors are tempted to do. It is true that the death penalty could punish burglary, but such a penalty was rarely applied to its full extent in the colony, except in absentia.[146] The *Tête de boule*, Pierre Ouiaouiasquesche (8aononasquesche) named Chevreuil, residing at the Deux Montagnes mission, killed a French soldier in 1735. He was arrested, and a military trial was initiated at the request addressed to the governor of Beauharnois, by René Gauthier de Varennes, the lieutenant commanding the Company of Leber de Senneville, to carry out 'military information concerning the assassination of soldier Noël Rimbau dit Poitevin.'[147] The order is then given to Louis de Lacorne, assistant major, who is a judge clerk, with the baron of Longueuil, to the functions of clerk public prosecutor to inform on the case. In this case, we find that the surgeon-major Joseph Benoît and the surgeon at the Hôtel-Dieu Boudard, visiting 'Rimbau's body' report the various injuries of the latter. Louis de Lacorne leads the military information assisted by Gaudron de Chevremont, clerk of the Council of War and hears Chevreuil on 3 July, with confrontation with witnesses, mostly civilians and reassembly the same day. The second interrogation of Ouiaouiausqueche on 15 July 1735 is done in the hot seat, under the presidency of Beauharnois, in the presence of the officers and of Bégon and with the help of Maurice Mesnard, interpreter usually stationed in Michilimackinac but opportunely present in the city.[148] The Council of War '[...] for reparation of what, sentenced him to be hanged and strangled to death and as there is no executioner in this city, the Council condemned to go through the arms until death follows'.[149]

5.3 Prevent Sexual Assault, Tendentious Mix and Military Disorder

The first crime of a sexual nature against the soldiers of New France is undoubtedly rape, where, in this regard, both regular soldiers and Native American warriors are unfortunately likely to commit such acts. If 'rape is an attack that is made indecently of a woman or girl, to abuse it by force & violence, without removing it'[150], it is often confused in

[143] Grabowski (n 49) 187.
[144] Lettre de Vaudreuil et Bégon au ministre, 15 novembre 1713 (BAC, MG1, C11A, bob. C2383-c2384, F-34) fol. 28.
[145] ibid fol. 27-29.
[146] Lachance, (n 21) 101-102.
[147] 'Procès devant le Conseil de guerre contre Pierre Ouiaouiausquesche dit Chevreuil', 12 juillet 1735 - 15 juillet 1735, (Juridiction royale de Montréal, BanQ-M, TL4, S1, D4257).
[148] 'Interrogatoire du 15 juillet 1735', ibid.
[149] Sentence du Conseil de guerre du 15 juillet 1735 (Juridiction royale de Montréal, BanQ-M, TL4, S1, D4257).
[150] Guy Du Rousseau De La Combe, 44-45

prosecutions with abduction, which induces kidnapping. If the sentences as well as the penalties are very contextual and vary according to the perpetrators, the victims, or the circumstances and violence that are committed during these crimes, the penalties incurred are banishment, death penalty or penalty of galley. Usually, military campaigns and the stationing of troops near Amerindian villages, or the establishment of Amerindian camps or villages near trading Forts makes the proximity of intercultural relations, friendly or sexual relations between soldiers and Amerindians more frequent: '[…] [t]hose encounters among soldiers and Indians demonstrate range of social, economic, and sexual interactions that often took place in the army.'[151] Stephen Cross, a civilian prisoner after Oswego defeat, wrote that 'French soldiers tried to sexually assault one of the women in his group, but she and her husband screamed "Murder" and drove them away.'[152] There was no appearance of *Conseil de guerre* or military discipline sanction for this act. Sexual mix and sexual attraction are always a risk for military discipline, in the eyes of religion ministry of officers. As Preston reports, on 10 May 1755, the 48th British Regiment, arrived near Fort Cumberland, were informed to not molest natives, or have, '[…] directly soon, for fear of affronting them'. Richard Peters, an Anglican clergyman '[…] discovered that the British officers' sexual relations with Native women were creating dissension': Indian families 'got frequently into high Quarrels, their Squa[w]s bringing them money in Plenty which they got from the Officers, who were scandalously fond of them.' Peters 'represented the Consequences of this Licentiousness to the General', who issued orders to limit Anglo-Indian contact'.[153] Few times after, the important Indian agent George Croghan[154], underlined that, before the Monongahela defeated, Braddock ordered that native women and children have to be kept from the Camp and 'no officer soldier or others give the Indians men women or children any rum or other Liquor or money upon any account whatever' and he imposed '[…] a draconian penalty of 200 lashes without a Court Martial for his recruits", to prohibit relations with Amerindian women, 'while offending officers would be court-martialed for disobedience of orders'.[155]

5.4 Fighting Illegal Treat and Present Corruption

As early as 1685, Versailles wanted to regulate the practice of military and diplomatic gifts made to Amerindians: 'The gifts made to the Indians on occasions must be made by the orders of the Commander and also with the participation of the intendant'.[156] Making the new governor aware of the problem of forts and trading posts, the prince insisted on

[151] Preston (n 12) 283.
[152] Shannon (n 60) 395.
[153] Preston (n 12) 284-285.
[154] See Albert T. Volwiler, 'The Imperial Indian department and the occupation of the great west, 1758-1766' [1925] 32 *ISHST* 100-107 and Nicholas B. Wainwright, *George Croghan: Wilderness Diplomat* (Chapel Hill, University of North Carolina Press, 1959) 151-52.
[155] Preston (n 12) 285.
[156] 'Mémoire pour servir d'instruction au marquis de Beauharnois, 7 May 1726' (MG1-C11A, vol. 125/2, microfilm, F-126) fol. 393-398v, fol. 397.

the crucial importance of the choice of commanders for the various posts 'in the upper country, convinced that it must be that the maintenance of savages in the party of the françois depends on the conduct of the capacity of the officers who command there'.[157] If they were counting on the diplomatic talents of the fort commanders to maintain an effective alliance network, the services of Versailles intended to prohibit any trade with the officers of these posts with prohibition to receive '[...] presents of pelts from the savages, for other presents that he would make to them, and prevent them from indirectly trading, it will also be necessary to forbid them to receive any'.[158] In general, the exchange of porcelain necklaces is a first gesture to open the discussion, show one's good intentions and the value that one gives to the interlocutor, an aboriginal diplomatic' instrument.[159] But many of these gifts are diverted, 'overcharged', or are the subject of fruitful exchanges for the soldiers present along the Ohio in particular. Prior to the Seven Years' War, the Louvigny and Laperottière affair clearly shows the difficulties in disentangling the question of trade, personal enrichment, diplomacy, the exchange of presents relating to the King's officers and justice.[160] The fight against prevarication on the part of French officers therefore occupies a significant part of councils of war or decisions aimed at military discipline, even if the will of the various governors to sanction such behavior is quite fluctuating. For the period leading up to the conflict of the Seven Years' War, it is certainly not insignificant to think that the fact that there was a Canadian governor and several Canadian officers in post could leave this question in the background of others, because they were all aware of the need to rely on the First Nations…and on fort commanders who were motivated by their duties and by maintaining good relations with the allied Amerindians. Regarding the wood runners, it should be noted that they enjoyed a strong impunity vis-à-vis their acts against the Aboriginal peoples. As Gilles Havard wrote, '[...] in 1710 of a man who scalped an Indian slave and left her to die in the woods' was not prosecuted. Similarly, Phillip Gilliard, a Huguenot '*Coureur des Bois'* trading in Appalachia, '[...] accused of forcibly taking a young [Native] woman into marriage, and whipping her and her brother', did not is more worried.[161]

5.5 Desertion, Betrayal, or Successful Captivity?

Desertion in New France[162] and the tempting 'Indian life' has always run through the military missives of North America and is quite well known, whether for Canada, the

[157] ibid fol. 397.

[158] 'Lettre du Conseil de Marine', 23 March 1701 (MG1-C11A, vol. 19, fol. 273-276 microfilm) fol. 274.

[159] ibid. For a balance illustration between presents and land claim according to the British allies, see F. Jennings, *The Delaware Interregnum, https://delawaretribe.org/wp-content/uploads/INTERREG.pdf,* accessed nov. 01, 2022, without pagination, note 29.

[160] 'Avis de Monsieur le Chevalier de Callières en l'affaire du sieur de Louvigny, capitaine d'une compagnie du détachement de la Marine, enseigne sur les vaisseaux du Roi et commandant au fort Frontenac accusé d'avoir traité avec les Sauvages', 27 October 1700 (Conseil Souverain, BanQ-M, TP1, S28, P6567).

[161] G. Havard, *Histoire des coureurs de bois: Amérique du Nord, 1600-1840,* (Paris, Les Indes Savantes, 2016) 226.

[162] See André Lachance, 'La désertion et les soldats déserteurs au Canada dans la première moitié du XVIIIe siècle', in *Mélanges d'histoire du Canada offerts au Professeur Marcel Trudel* (Ottawa, EUO, 1978) 151-

Pays-d'en-Haut or Louisiana. French and Indian way of war contribute to harass British militia, hurting morale and causing desertions. For European officers, the fear of seeing soldiers, of European or Amerindian origin, desert and take refuge in the woods is strong for the authorities, the whites not hesitating to make up their faces as Amerindians in order to better leave their comrades. Sometimes provincial troops adopted Indian dress for a desertion project.[163] When they decide to leave the regular troops or the militia, the Amerindian warriors, obeying their own imperatives, do not understand that their departure constitutes a military crime, desertion.[164] Before the capture of Fort Necessity, the troop commanded by Louis Coulon de Villiers, composed to avenge the murder of his brother, was accompanied by Indian allies, many of whom would later desert, without a military tribunal is subsequently set up, as this is a matter of diplomacy. Desertion was commonplace in colonial armies[165] and these phenomena is strengthened by bad relations with officers, contact with natives, and, of course, by defeats. Martial court and discipline sanction for desertion were part of the day-by-day life in the forts. The court-martial held at Winchester in May 1756 is both an illustration of these misunderstandings and is also symptomatic of the difficulties and justifications of the fighting carried out jointly by the regular forces and the Amerindian allies. Sergeant Nathan Lewis was accused of retreating with a party of Men without orders and not going to the Assistance of Capt. John Mercer when Engaged with the Indians the 18th April, night.[166] The testimony of John Whiffle, a regular military, shows the confusion between ally Indians, enemy Indians, and regular British military.[167] Against the testimony of his Lieutenant Lemon and using Indians military expertise as a justification, Serjeant Lewis, in Defense, said 'that Lieut. Lemon order'd him to go up a Valley on the right with Lemon; he there March'd and Expected to meet Mr. Lemon, as he had promised to join him at the Head of the Valley […] But when he came there, he went in Pursuit of an Indian Dog w[hi]'ch he saw'.[168] The bench of the Court-Martial unanimous opinion was that 'Serj't Lewis's conduct is a manifest Breach of the 12th Article of War, 14th Section and […] merits the punishment thereby inflicted', and 'shall suffer Death'.[169] Soldiers risked major reprisals

161 ; Nicolas Fournier, *Punir la désertion en Nouvelle-France : justice, pouvoir et institution militaire de 1742 à 1761*, (PhD, dactyl. M.A. History, Montréal, UQAM) 2013.

163 Quoted by Preston (n 12) 296.

164 ibid 292.

165 On desertion motivations see Arthur N. Gilbert, 'Why Men Deserted from the Eighteenth-Century English Army' [1980] 6 *Armed Forces and Society*, 353-367.

166 Court Martial Proceeding at Winchester, 2 May 1756, R. A. Brock (ed) *The Official Records of Robert Dinwiddie* (vol. II Richmond, Virginia Historical Society, 1884) 399, online, accessed sept., 03, 2022, https://archive.wvculture.org/history/frenchandindian/17560502dinwiddie.html

167 '[…] he and Lewis and the others march'd up the Pasture after Leaving Lieut. Lemon's party; there they heard some Guns fire, and Stop sometime, consulting what to do. Lewis was ask'd if they had not best join the party Engaged, to which he Answer'd 't[hat] was Dangerous, and they might be shot by their own Men as well as the Indians, as they knew not which side they were engaged upon. They afterwards, seeing a party come out of the Fort, the Deponent ask'd Lewis if he wou'd not join them, but he said it was too Late, and that they wou'd retreat before they cou'd join them […]', ibid.

168 ibid.

169 ibid.

for desertion.[170] Starving, without pay, Soldiers fled Oswego Fort by dozen. But if they don't have connection with natives outside the Fort, or been used to forest life, they will still suffer of lack of food and been caught easily. Martial Court usually sentenced men to a flogging of one thousand strokes pay Indians to capture them for 20$.[171] The crimes of sedition, the investigation of which is nevertheless common in the colony before the civil courts, do not implicate the military before them, these crimes being judged in priority by the councils of war, of which little trace has been preserved, such as the mutiny of the soldiers of Fort Niagara in 1730[172] studied by Allan Greer to which one can perhaps add the collective desertion of Fort de Chartres. According to him, the unequal treatment reserved by the command to the different companies or military group would be at the origin of the mutiny of 1744.[173] On the French side, throughout the period of French domination, the king asked his various governors to fight against deserters, as he had done from 1686 with Denonville, so that '[...] he would try to arrest some of the said French deserters in order to do them exemplary justice'.[174] Obviously, desertion constitutes the specific crime for militaries in New France as in Europe, as well as that of sedition.[175] The sanction is very heavy in principle, since it is the gallows, but many are the ordinances of amnesty and the granted pardons, if it is not a question of desertion for the benefit of the enemy, but simply leaving the regiment.[176] There is therefore a certain understanding, especially in New France[177], where the departure in the company of Amerindian auxiliaries, and desertion are two very close realities. Given the porosity of the Amerindian bands and the lack of control of the workforce by the French military authorities, very few individual accusations of desertion against Amerindians are found. European soldiers and officers may lament the collective departure of a band of Native American warriors or seek out a Native American tracker or interpreter suspected of desertion, but few trials sanction such behavior by a Native American auxiliary. In addition, the diplomatic protection phenomenon vis-à-vis Amerindian communities comes into full play here. Similarly, the chronic deficit of regular troops pushed the king to grant a general amnesty or individual pardons to deserters if they enlisted again. If the topography and the hostile environment are not conducive to desertion for soldiers freshly landed from Europe, for soldiers who have become accustomed to Amerindian ways, and who have

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[170] 'Christopher Porter of the 50th, for example, having deserted from Oswego in the summer of 1755 but not taken up until the following June, received a death sentence for his year of illicit freedom', Way (n 7) 55.

[171] See William Hervey, *The Journals of the Hon. William Hervey, in North America and Europe, from 1755 to 1814; with Order Books at Montreal, 1760-1763* (Bury St Edmund's, 1906) 13, quoted by Way (n 7) 55.

[172] See Correspondance Générale, MG C11A, vol. 52, fol. 118-126v, vol. 53, fol. 7-10v, fol. 54, fol. 258-263v, vol. 55, fol. 295-299 and fol. 288-289, vol. 56, fol. 41-43v and fol. 141-142v.

[173] See the transcript of the Court-Martial of Abraham Dupaquier, 9 December 1745, in Allan Greer, *The Soldiers of Isle Royale 1720-45* (History and archeology, Ottawa, Parks Canada, n 28, 1979) 64-71.

[174] 'Extrait des réponses du ministre aux lettres reçues du Canada [...]', 20 May 1686 (MG1-C11A, 66-113, microfilm, fol. 42-47v, fol. 44.

[175] See Jean-Pierre Bois, verbo 'Déserteur', *Dictionnaire d'Ancien Régime*, Lucien Bely (ed) (PUF, Quadrige, poches, Paris, 2010) 400.

[176] Muyart de Vouglans (n 31) 732.

[177] Fournier (n 163) 137.

developed contacts, even links with many Amerindians are the opportunities and supports for deserting, particularly compared to cantonment in Europe. Hierarchical value, and subordination, is inherently less important within Indigenous communities and military structures than within European armies[178], but desertion still need a strong and quick response to nourish discipline. One principal issue is the ambiguity between soldiers captured by natives during war and 'real' desertion. For example, months after the French surrender at the end of the war, Joshua Barnes, a young soldier from Massachusetts, was captured by the British along with his Abenaki (Wabenaki) captors. Captured four years earlier while on patrol along Lake George, he was arrested and tried for treason before a British court-martial. The prosecution argued that he was a renegade who willingly adopted the native life and took up arms against his king? Barnes and some witnesses argued instead for a form of adoption, of assimilation to the Abenakis close to what we know today as the Stockholm syndrome.[179] 'Toward the end of the French and Indian War, another group of survivors, long feared dead, returned home, having endured years of grim captivity among the native and French inhabitants of Canada. […] The fifteen survivors lived for years as prisoners of their native captors.'[180]

6 Conclusion

In view of the difficulties in judging Amerindian combatants on the fringes of the regular armies militarily, we can outline a broader lesson on military justice in the context of an armed conflict where the qualities of a combatant are not or only slightly defined, or in situations where regular contingents coexist with civilian combatants. In many situations, the choice is rather made to instrumentalize military justice at the scene of operations regarding diplomatic considerations, alliances, or local politics. In the context of the Seven Years' War, the military legal framework only scratches the surface of the indigenous reality, even if it manages the consequences of these military actions, almost without judging the perpetrators of acts contrary to European law. From the Amerindian point of view, the military, strategic and diplomatic shift takes place around the Treaty of Oswegatchie, and the devitalization of the military importance of the Amerindian alliances, embodied by the revolt of Pontiac and, ultimately, by the war of 1812 for the last Amerindian forces allied with the British, such as the Abenakis. If the British crown maintains after 1759 a policy of good understanding with the indigenous nations, there is a severe logic of downgrading for the nations formerly allied with the French. As Thomas Gage points out in his correspondence, the fact that the whole of North America is in the hands of a single power deprives them globally '[...] of their importance, their presents and their remunerations'.[181] The native capacity to resist to the legal domination

[178] André Corvisier, 'La société militaire française au temps de la Nouvelle-France' [1977] 10, 20 *Histoire sociale*, 220.
[179] See Len Travers, *The court-Martial of Jonathan Barnes*, (Massachusetts Historical Society, (on-line), accessed Aug., 10, 2022) https://www.masshist.org/events/court-martial-jonathan-barnes
[180] Len Travers, *Hodges' Scout: a lost patrol of the French and Indian War* (Baltimore, Johns Hopkins University Press) 2015.
[181] Gage to Gladwin, Feb. 19, 1762, *Gage Papers*, quoted in R. White (n 86) 362.

was severely reduced at the end of the 18th century. In 1763, the colonists were angered by the royal Proclamation creation of a boundary line running through the greater Appalachian Mountains of interior North America. After the Pontiac revolt, and even more so after the War of 1812 for Canada, aboriginals' communities experienced a severe downgrading in terms of their ability to play the role of arbiter between powers of European origin or in the face of American settlers. After the 1812's War, the lack of their military impact changes the relation with English colonial authority and the settlers, despite of their superiority, 'had difficulty in dealing with them because of their diversity and their environments and resources'.[182] Most of First Nations joined the British side and fought to defeat the American invasion of Canada in 1775-1776. Even during the Independence war, natives' actions will be subjects of disagreements and condemnation by both litigants. Some episodes of extreme brutalities of war, constitutive of potential 'war crime' were common.[183] During this period, there remained a strong cultural rejection of Native American fighters, and military acts committed by First Nations were widely classified as crimes, rather than conventional acts of war. The loss of the military importance of the Amerindian troops favored the jurisdictional swing of the acts of diplomacy and military justice 'adapted' to traditional criminal justice.

[182] Sara Carter, 'Aboriginal People of Canada and the British Empire', Philip Bruckner (ed) *Canada and the British Empire* (Oxford, Oxford University Press, 2010) 200-219.

[183] Native peoples near Detroit, such as the Ottawas, Wyandots, Ojibwas, and Potawatomis, expected the British to fulfill the traditional French Onontio's role by arbitrating Indian disputes, handing out generous gifts, subsidizing the costs of trade goods, and treating Native people with respect, including adhering to their protocols. In the same time, Delawares, Shawnees, and Senecas, also wanted the British to force their provincials to honor the boundaries of Native lands. Unfortunately, the British failed in all of these aspects and don't really try to realize them, See Colin G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (Oxford, OUP, 2007) 40-49.

MILITARY HIGH COMMAND AS SEEN BY REVOLUTIONARY COURTS IN FRANCE: EVOLUTIONS IN THE JUDICIAL DOCTRINE OF WAR

By Renaud Faget[*]

Abstract

Between March 1793 and July 1794, when the French armies were undergoing a difficult period in a European war triggered in 1792, no fewer than forty-three generals were brought before the Revolutionary Tribunal and sentenced to execution. Among them, twenty-seven were found guilty for exclusively military reasons. They were not sanctioned for open treason but for decisions taken by military commanders in managing the army. The revolutionaries reckoned that mistakes by military command were not a matter of professional jurisdiction. Therefore, it was the Revolutionary Tribunal which was tasked with appraising the generals' conduct: in this case military justice was delivered by exceptional civil justice.

The method of referral to the court, proceedings, prosecution strategy, and verdicts provided the revolutionary authorities with an opportunity to define a doctrine of war. This set out the nature of military command, distinguishing between tactics and strategy (which fell outside the competence of a general), and operations (for which a general was responsible). It also defined victory in radical terms. Through its decisions, the Tribunal accredited the myths of military planning and of the decisive battle.

1 Introduction

The history of military high command over the first two years of the French Republic, when the country was at war against most of the great European monarchies, was characterised by massive purges of the upper ranks. These were ordered by the National Convention and its Committee of Public Safety, in the name of weeding out treachery in a context of acute military difficulties, since all France's borders were under threat and large portions of the country were either occupied (such as the town of Toulon) or in a state of open rebellion (such as the Vendée).

These destitutions led forty-three generals to the scaffold, including Custine, Chancel, Brunet, Biron, and Houchard, who were all former officers with experience in the Royal Army.

The Revolutionary Tribunal was the main judicial instrument for these purges. Out of the seventy generals put on trial during the years 1793 and 1794, sixty-seven were brought before the revolutionary court established by the law of 10 March 1793.[1] Article

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[1] The W series of the French *Archives nationales* (AN) includes the trial papers and rulings issued by the Revolutionary Tribunal. See, too, the *Bulletin du Tribunal criminel révolutionnaire établi au Palais, à Paris, par la loi du 10 mars 1793, pour juger sans appel les conspirateurs* (5 vol. Clément, avril 1793 – prairial an II); Émile

1 of this law states that the court 'shall be cognisant of any counterrevolutionary undertaking, of any attack on (…) the internal and external security of state.' The generals' treason was thus a matter for the Revolutionary Tribunal.

Scholarship on military history has long viewed this tribunal as the pitiless instrument for renewing the general officer corps, allowing for a new generation of officers to emerge, including Hoche, Jourdan, Bonaparte, and Desaix.[2] It tends to be admitted that revolutionary justice was a tool for policy decided by the Committee of Public Safety, but without examining in depth the arguments put forward by the Tribunal. This is wholly accurate considering the cases judged as of Prairial an II/ June 1794, during the period known as the 'Great Terror', in which the accused, including generals such as Beauharnais,[3] were sent to the scaffold after a summary trial of no interest concerning the arguments put forward by the prosecution.

However, prior to this period, the trials of generals were significant. Indeed, the cases were generally investigated, and the public prosecutor, Fouquier-Tinville, sought to substantiate the accusations.

Thus, it is between March 1793 and June 1794 that the historian may discover the traces of the revolutionary court's original and critical interpretation of military operations. This interpretation was established during trials to punish treason by officers accused of the crime of 'lèse-nation'. Thus, out of the forty-three generals executed during this period, twenty-seven were so for military deeds, that is, for decisions (not) taken revealing collusion with the enemy. In these precise cases, the military mistake was held to betray the officers' treason.

In judging such mistakes, the Tribunal and public prosecutor could not rely on any legal framework setting out the duties of military high command which might point to any infringements. As we shall see, the military penal code was insufficient in this respect. In other words, revolutionary justice drew on the ordinary criminal code to set out an interpretation of operations that it held against the generals.

Officers therefore had to subsume within their practice the lessons of the revolutionary judges, or else face the death penalty. The Tribunal thus defined a doctrine of military effectiveness, which was coherent with that being put together over the same period by

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Campardon, *Le Tribunal révolutionnaire de Paris* (2 vol. Plon 1866); Henri Wallon, *Histoire du Tribunal révolutionnaire de Paris avec le journal de ses actes* (6 vol. Hachette 1880-1882); Antoine Boulant, *Le Tribunal révolutionnaire – Punir les ennemis du peuple* (Perrin 2018).

[2] See André Corvisier, *Histoire militaire de la France – de 1715 à 1871* (Presses universitaires de France, 1992), Timothy C. W. Blanning, *The French Revolutionary Wars, 1787-1802* (Arnold, 1996), David A. Bell, *The First Total War: Napoleon's Europe and the Birth of Warfare as We Know It* (Houghton Mifflin Company, 2007).

[3] Sentenced to death on 5 thermidor an II/23 July 1794 in a ruling on the 'Carmes conspiracy' (Carmes being a prison in Paris) though arrested since January 1794 on suspicion of 'Custinism', that is, of having helped General Custine deliver Mainz. The vague incrimination of 'prison conspiracy' was used on several occasions in 1794 to reduce the number of prisoners held in Paris, with the accused being sent to the scaffold on grounds wholly unconnected to the reason they had been incarcerated.

the National Convention, the Committee of Public Safety, and the chiefs of staff.

This article specifies the content of this judicial doctrine. Above and beyond this, it emphasises the role revolutionary justice played in the military turnaround of 1794, heralding the French successes of 1794 to 1807.

To tease out the military significance of the decisions taken by the Revolutionary Tribunal, we shall start by examining questions of procedure, before turning to evolutions in Fouquier-Tinville's prosecution strategy and its significance for military high command.

2 Questions of Procedure: How Does One Judge a General?

Military historians of the French Revolution need to pay attention to judicial procedure, for it contains a definition of military command, just as court rulings do. Concerning procedure, we need to distinguish between two issues: the choice of court, and the method for referral to the Revolutionary Tribunal.

2.1 The Choice of Court

Proceedings against generals could have been taken before various courts. The revolutionary authorities thus made a choice in selecting the Revolutionary Tribunal, a choice which is informative about their definition of military command.

Three ordinary or extraordinary jurisdictions were ruled out—in practice though not on legal grounds—from hearing accusations of treason brought against the generals. The revolutionary authorities made virtually no use of military commissions (only three generals appeared before this extraordinary jurisdiction, used mainly for operations in Vendée to quash the 'rebellion'),[4] and the ordinary criminal courts (only one general was concerned, and this was before the Revolutionary Tribunal was established).[5] The exclusion of the military courts may seem more surprising: between 1793 and 1794 it only issued one ruling, in the case of Rossi of the Armée des Alpes, who was accused of having withdrawn too early in front of the enemy. However, the competence of the military tribunal could have been invoked in a great number of cases, for this court could also proceed against generals accused of acts of treason recognised under article 2, title 1, section 2 of the military penal code.

Four factors may explain why the military courts were not used.

First, the method of referral was very complex and could be dissuasive: three successive readings were required before any conviction, first by the military court, then by the

[4] Generals d'Aoust and Bernède were convicted by the Revolutionary Military Tribunal of the Armée des Pyrénées orientales. General Isambert was sentenced to death by the Armée du Rhin Commission established by Saint-Just and Le Bas.

[5] In October 1792, General Lanoue was brought before the Criminal Tribunal of the département du Nord accused of 'refusing to march'.

National Convention, and finally by a jurisdiction chosen by the Convention.[6]

The composition of the jury may also explain why these courts were ruled out,[7] as it was composed of eighteen soldiers including six of the same rank as the accused. Corporatism, constantly denounced by the Revolutionaries, could imperil the sincerity of the decision by such courts.

Furthermore, military courts were not a central body. There were two per army. That posed a series of problems. First, would the soldiers and officers on the jury be prepared to condemn one of their chiefs? Additionally, would officers, making up the majority of the jury in the case of a trial against a general, be able to judge the offending manoeuvres without denouncing their own complicity?

Consequently, in virtue of what may accurately be called 'custom', the Revolutionary Tribunal had a monopoly on trials of generals. Extraordinary civilian jurisdiction and the ordinary criminal code seemed more effective for purging military high command.

The decision to exclude military courts was made on technical and political grounds, but it also had doctrinal significance for it suggested a definition of military command. If the latter could not be adjudged by a professional court, it was so because a general's responsibility did not pertain to technical prescriptions set out by the military penal code or to tactical rules (such as the infantry regulations of 1791). As military high command was judged by a political tribunal, this meant that it was a public office escaping strictly professional definitions.

According to this definition, a general was not a mere agent of the executive obliged to observe regulations, which explains why, as for ministers, a decree needed to be issued by the Convention to put a general on trial.

A general was a *generalissimo*, a strategist in the full meaning of the term. He was thus aware of the political ends of a war and determined the means to reach them. It also meant his job was not a technique, recognisable by a mere military court, but an 'art' subjected to broader appreciation and political debate. The practice of French military high command in late 1792 and early 1793 confirmed this definition of what it was to be a general: Dumouriez invaded Belgium and conducted negotiations with the Austrians without systematically referring to the National Convention. Montesquiou went further: he entered into talks with the Swiss Cantons and refused to occupy Geneva despite ministerial instructions. However, this highly political definition of the function was rapidly brought into question.

[6] Décret d'organisation des tribunaux militaires, 1793, Titre III *Fonctions de l'accusateur militaire*, articles 8 to 11.

[7] ibid, Titre IV *Composition du juré de jugement*, articles 1 and 4.

2.2 Who May Bring Charges Against a General?

The question of referral to the Revolutionary Tribunal made it possible to bring about changes to the definition of what was expected of a general. One important change occurred on 5 April 1793 for brigade and division generals, and on 3 brumaire an II/24 October 1793 for senior generals. As of these dates, the National Convention lost its monopoly on referral to the Revolutionary Tribunal. In practice, it was the Committee of Public Safety which took the initiative in judicial proceedings, based on denunciations transmitted by its army representatives, that is, members of the Convention entrusted with monitoring the chiefs of staff and facilitating administrative operations.

By virtue of this new method of referral, military command was no longer a political activity subjected to the appreciation of the national representatives, but the activity of a mere government agent subjected to the authority of the National Convention's Committee of Public Safety, in the same way, that matter, as the Minister of War was marginalised by the principle of legislative centrality. Contrary to the implication of the generalissimo institution, strategic competence came to be seen over the course of 1793 as a prerogative reserved exclusively for the sovereign and his representatives: the separation of powers precluded entrusting this competence to the military.

Consequently, generals became agents of the executive restricted to implementing a national defence policy. They were responsible in relation to instructions received. They no longer took political decisions: strategy was defined by the Committee of Public Safety. Generals became mere cogs, henceforth adjudged on grounds of technical capacity.

However, as we have already pointed out, command technique was not a matter for the military courts. It was thus not a matter of tactics or of the decisional framework suggested by the military penal code.

The exact contour of this competence, which was neither tactical nor strategic, went on to be precisely defined by the Revolutionary Tribunal, which led to operational matters becoming the level of command specific to generals.

3 Jurisprudence of the Revolutionary Tribunal and the Definition of Military Command

We thus need to analyse the content of rulings by the Revolutionary Tribunal to understand how the operational level came to the fore. Before the *Grande Terreur*, there were four key phases in the revolutionary court's handling of affairs involving generals.

3.1 The 'Dumouriez Purge'

The 'Dumouriez purge' was a first test for the Revolutionary Tribunal. After the defeat against the Austrians at Neerwinden on 18 March 1793, the rout of the French army, and General-in-Chief Dumouriez's treason on 4 April 1793, the Revolutionary Tribunal

judged six of his accomplices. The three people accused of the defeat and rout of the French army were acquitted.[8] The Tribunal thus acknowledged it was incapable of recognising and categorising an error by military commanders.

However, the three officers accused of having played a part in the attempted putsch or having sought to follow Dumouriez and go over to the enemy were sentenced to death.[9]

It should be emphasised that in reaching these decisions, the Tribunal acted cautiously in not seeking to put forward a political and judicial interpretation of military operations.

3.2 The Custine Trial

The Custine trial in August 1793 marked a turning point in which the Tribunal, at the prompting of the Convention and in response to public opinion, asserted its competence to rule on military decisions.

Since 23 July 1793 and the loss of Mainz on the Rhine, sans-culotte opinion, Minister of War Bouchotte, and many Montagnards (the faction most committed to the revolution) had singled out Custine as the officer to take down. The Revolutionary Tribunal was instructed to adjudge his military decisions. The Custine trial was thus an opportunity for the justice system to put forward an interpretation of operations differing from that of the generals. The grounds used to incriminate Custine, then virtually all his peers, was article 4, section 1, title 1, part 2 of the 1791 penal code:

> Any manoeuvre, any collusion with the enemies of the Republic tending either to facilitate their entering and sojourning in the dependences of the French Empire, or facilitating their taking of towns, fortresses, magazines, and arsenals belonging to the Republic, shall be punished by death.

Over the course of the trial, Fouquier-Tinville sought to adhere strictly to this legal basis by setting out to demonstrate that there had been 'manoeuvres tending to facilitate the enemy's taking of towns'. Concretely, the public prosecutor wished to establish that operations conducted by Custine tended towards the loss of Mainz. This was a difficult task since the prosecution had to enter into operational detail in order to prove a deliberate mistake and a failure to implement means (the exact meaning of the expression 'manoeuvres tending to'). The prosecution thus reviewed Custine's campaigns.[10] But the latter had no difficulty in arguing against the public prosecutor: by entering into technical details about operations, Fouquier-Tinville ventured onto a field where the general excelled.

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[8] Miranda, held responsible for the defeat at Neerwinden, was acquitted on 16 May 1793. Lanoue and Stengel, accused of being responsible for the loss of Aix-la-Chapelle, were acquitted on 10 and 28 May.

[9] Generals Miaczynski, Deveaux, and Lescuyer were convicted on 17 May, 22 May, and 14 August 1793 for having sought to take Lille and Valenciennes, or for having sought to follow Dumouriez and go over to the enemy.

[10] AN, W 280, file no. 124, 'Affaire Custine'. Interrogation of Custine on 30 July and 13 August.

This tense judicial situation explains why the trial lasted so long, and accentuated the political crisis of summer 1793. General Custine was finally convicted on 27 August 1793 for his decisions relating to the artillery, decisions whose existence was established by certified documents. Legality was thus scrupulously observed since the prosecutor proved a manoeuvre tending to the loss of the town.

3.3 The Houchard Trial

With the Houchard trial, we may observe an important shift in Fouquier-Tinville's strategy and in the Revolutionary Tribunal's rulings. General Houchard was convicted not for what he had done but for what he had not done, namely win a decisive victory after the battle of Hondschoote against the English, on 6-8 September 1793, beneath the walls of Dunkirk. The battle had turned to the advantage of the French, but according to the Committee and the army representatives, the general should have encircled his adversaries and obtained a yet more crushing victory. Fouquier-Tinville thus altered his system of accusation: the general was subject not to an obligation of means but to an obligation of result. In other words, the result of the military operations sufficed to prove a 'manoeuvre tending to facilitate the sojourning of enemies' on French territory. If the victory was incomplete, it was necessarily because Houchard had sabotaged it in order to facilitate invasion by foreigners. Thus, the ease with which the English retreated after the battle was due to Houchard's 'refusal' to cut off the enemy's line of retreat: the general 'gave the enemy all means to withdraw from complete defeat.'[11] This new accusatory strategy reversed the burden of proof, since it was now up to the defence to show that there was no link between the result deemed obvious and the general's decisions. The Houchard trial was thus simpler for the prosecution: there was no longer any need to draw on analysis of a campaign to demonstrate that there had indeed been treason. The general was thus executed on 26 brumaire an II/16 November 1793 because of his—insufficient—victory.

3.4 The Success of the Houchard Jurisprudence

The fourth phase confirmed the success of the Houchard ruling. The principle according to which a general could be convicted for inaction and for not having obtained total victory rapidly became established for judging military command. General Rossi, despite having been acquitted by the military tribunal in July 1793, was finally convicted on 8 pluviôse an II/27 January 1794 for having withdrawn too soon after a successful offensive when he could have destroyed the enemy's stores, in this case the Sardinians'. One could provide many examples of convictions following the same principle: General Marcé spared the Vendéens and was for this reason sentenced to death on 9 pluviôse an II/28 January 1794. That same day, Bernède was convicted for having likewise spared the enemy, this time the Spaniards. In March 1794, during an examination of operations conducted in October 1793 in northern France, a new batch of officers was convicted: General O'Moran, who had remained inactive in Flanders instead of occupying Brabant,

[11] AN, W 296, file no. 250, 'Affaire Houchard', item 65: Fouquier-Tinville's case for the prosecution.

was sent to the scaffold on 16 ventôse an II/6 March 1794. Davaine had not occupied Ostend, and Chancel had not capitalised on the victory at Wattignies against the Austrians (15-16 October 1793): they were both sentenced to death on the same day.

4 The Military Significance of a Case of Jurisprudence

The conviction of generals for inaction or because of their incomplete victories, and primarily the conviction of Houchard, played a major role in the formulation of military doctrine. These rulings were of threefold military significance.

4.1 The Definition of Operational

The rulings helped define the art of operations.[12] Under the Houchard jurisprudence, the victory initially claimed by the generals became, after analysis in the trial, a non-event. The battle of Hondschoote was thus turned into the paradigm of a military sham. The Revolutionary Tribunal asserted that the army, the troop, may well have won a tactical victory, but the general had failed in not wishing to convert this success. For the work of command lay beyond the sphere of tactics, at a level that may be called operational, and which is the framework within which campaigns unfold. The battle, the Tribunal stated, had to be envisaged not as an event in itself or as a finality, but from the perspective of a campaign.

Revolutionary justice thus made a significant contribution to building military effectiveness by distinguishing between the tactical and the operational levels. This distinction supplemented the Convention's decision withdrawing strategic initiative from generals to confide it in practice to the Committee of Public Safety. Via this distinction, a definition emerged of the three levels of war, of which Napoleon's style was a brilliant illustration.

4.2 The Myth of the Plan

The second significance of the conviction of the generals was the conflation between means and results. If the latter constituted a proof, as asserted by the public prosecutor, then that meant that there was no difference in kind between the two. In other words, the Revolutionary Tribunal asserted through its rulings that war was not an open field of possibilities in which the sum of combinations and chance led to an indeterminate result. The dichotomic result (victory/defeat) was the mechanical outcome of the decisions taken. Ineffectiveness was thus not a sign of bad luck or of the talent of the adversary, but signalled treason.

In negating friction—the 'invisible and always active factor' as defined by Clausewitz—as explaining the gap between thought and action, between military projects and their realisation, the Tribunal accredited the myth of the plan according to which operations

[12] Edward Luttwak "The Operational Level of War" [1980-1981] 5 *International Security* 61-79; Shimon Naveh, *In Pursuit of Military Excellence. The Evolution of Operational Theory* (Frank Cass, 1997).

are the perfect image of military command's plan. This is the myth which lies at the origin of the image of the 'military genius', as used extensively by the propaganda of Frederick II and Napoleon I.

4.3 Destroying the Adversary

Finally, convicting the officers helped define the very nature of victory. According to the Tribunal, the generals had to 'destroy' their adversaries. Battles such as Hondschoote and Wattignies could thus not be classed as victories given that such total annihilation had not been secured. There was thus a radicalisation in the institution's interpretation of operations. Nevertheless, the rulings by the Revolutionary Tribunal should not be read as calling for the massacre of the enemy. Judges and politicians were prisoners of 'military language', a technical vocabulary characterised by hyperbolic violence and images of combat.[13] Basically, the judicial and political authorities were calling for effective action by the army, i.e., that the adversary be knocked out of action functionally but not physically. As suggested by the law and by Carnot in a circular of 22 October 1793, this 'destruction' was to be obtained by manoeuvres on the enemy's rear, as Bonaparte went on to successfully conduct through to 1809 at least.[14]

5 Conclusion

The Revolution removed military high command from adjudication by professional courts and handed it over to political jurisdiction. How are we to gauge the results? The requirement of absolute victory and existence of three levels or scales of command were the main outcomes of the Revolutionary Tribunal's jurisprudence. In bringing the threat of conviction to bear on the generals' heads, the Tribunal was instrumental in questioning their tactical practices and in steering their style of command towards operational effectiveness.

The posterity of this system stretched beyond 9 thermidor and the fall of the 'revolutionary government', for Napoleon Bonaparte's practice embraced all aspects of the revolutionary judicial doctrine of war.

[13] Renaud Faget, "Ce dont on ne peut parler, faut-il le taire? Le langage et la doctrine révolutionnaire de la guerre", in Benjamin Deruelle, Hervé Drévillon, & Bernard Gainot (eds.), *Les mots du militaire* (Publications de la Sorbonne, 2020) 95-113.

[14] Hubert Camon, *La guerre napoléonienne. Les systèmes d'opérations. Théorie et technique* (Chapelot, 1907).

FRENCH MILITARY JUSTICE FROM ONE WAR TO ANOTHER: REFORMS AND CONTROVERSIES (1870-1928)

By Gwenaël Guyon[*]

Abstract

The study of French military justice between 1870 and 1928 highlights a threefold observation: firstly, that there was, for some, a constant political desire to bring military justice and ordinary justice closer together. Secondly, that it was difficult for the French legislator, in peacetime, to provide for a functional and effective military justice system in time of war, given the uncertainty of the nature of the future conflict and the inability to predict its course and final outcome. Finally, the lack of respect by the military high command and the government for the principles of justice in dramatic military circumstances. Hence the improvised application of military justice, in practice, during the Franco-Prussian war and the First World War. What was intended to be modern, humane, and protective before the war became frightening, summary, and brutal during war. This raises the question of what military justice should be in war, or at least how to ensure that the principles of justice are respected during war. These reflections were at the heart of the post-conflict reforms and of the new code of military justice of 1928, a major step towards the civilianisation of French military justice.

1 Introduction

1870-1914. Two wars fought by the French army. But the army that came up against the German Kaiser in 1914 no longer had much in common with the one led by Napoleon III against the Prussians. In more than forty years, it had indeed gone from a small standing and largely professional army to a national army (*armée-nation*) whose mobilisation led to all citizens to take up arms to join the active army. However, these armies had one thing in common: from one war to another, it was the same code of military justice which has been used to maintain discipline in time of peace and in time of war. However, from one war to another, this code had also been strongly criticized, from a fundamental point of view: should a balance be struck between the requirements of justice and the requirements of war and command?

The *Code of Military Justice for the Army*[1], drafted by Victor-Adrien Foucher (1802-1866), advocate at the *Court de Cassation* and Victor Hugo's brother-in-law, was promulgated on 9 June 1857. At the time, the jurisdiction of military justice was much broader than it is today. Indeed, two main issues have driven the drafting of the French code of military justice: political order within the society and discipline within the armed forces. In fact, this code symbolized the political program Napoleon III projected for the future of France in 1849, and which he summed up as follows: 'The name of Napoleon is a whole

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[1] A *Code of Military Justice for the Army Of the Sea* was then adopted on June 4, 1858.

program. Inside: order, authority, religion, well-being of the people. Outside: national dignity.'[2] The code of 1857 was also the result of a reaction to the political riots of the first half of the nineteenth century. Victor Foucher wrote in his *Commentaries on the Code of Military Justice* published in 1858, ten years after the 'Spring of the Peoples' of 1848: 'The Revolution of 1848 has shaken society in its foundations and time has come to restore it to its true foundations.'[3] The conservative lawyer did not hide the eminently political character of his code:

> Since 1840, the serious problems which could still divide the most penetrating minds had to find their solution; under the powerful influence of events, all men truly desiring the public good ranged themselves under one banner, and, raising the principle of authority, they gave their support to the great and energetic measures taken for the salvation of France.[4]

In other words, the new French code of military justice was intended to strengthen a set of legislations passed in response to the riots and popular uprisings of 1848 and, among them, the 1849 statute on the state of siege. Almost a decade before, following the invasion of the National Assembly in May 1848, the French government promulgated the law of 9 August 1849, which established the state of siege and gave the army full powers to maintain order and restore authority in the event of imminent danger. This legislation provided that 'as soon as the state of siege is declared, the powers of the civil authority for the maintenance of order and the police are entirely transferred to the military authority.'[5] The law also stipulated that 'military courts may be seized of the knowledge of crimes and offenses against the security of the Republic, against the constitution, against public order and peace, regardless of the status of the main perpetrators and accomplices.'[6] The army therefore appeared as the last bastion against sedition. However, there was no code of military justice to guide the councils of war, but rather a scattered set of heterogeneous laws dating for the most part from the French Revolution.[7]

As Louis Tripier noted in his *Commentaries of the code* (1857), 'the military criminal laws were so numerous, so confused and so incoherent that there had long been calls for a code of military justice.'[8] That is why Victor Foucher was given the task to draft a new code of military justice. His mission: to provide military judges with an arsenal of penal-

[2] Message to the French National Assembly, 30 October 1849.
[3] Victor Foucher, *Commentaires sur le Code de justice militaire pour l'Armée de terre* (Firmin Didot Frères, 1858) 14.
[4] ibid.
[5] Act on state of siege 1849, s 7.
[6] ibid s 8.
[7] Jean-Yves le Naour, *Fusillés pour l'exemple, 1914-1915* (Tallandier, 2013) 149.
[8] Louis Tripier, *Code de justice militaire pour l'armée de terre expliqué par l'exposé des motifs* (Mayer-Odin, 1857) 5.

ties enabling them to dispense the exceptional justice expected of them and to fight effectively against any form of threat against the regime and the established authority. The government also asked Victor Foucher for an orderly, exhaustive, and up-to-date work.

To this end, Victor Foucher pointed out all formal and substantial defects of the existing law. First, he criticized the volume and obsolescence: 'the time has come to replace the chaos of such uncertain provisions with a single body of legislations, inspired by the same thought and becoming a guide as sure for the magistrate as it will be a truth for the litigant.'[9] According to Foucher, codification, a source of unity, accessibility and completeness, would guarantee legal certainty to the litigant and facilitate the judge's task. Then, the codifier questioned the penalties provided for so far: 'Sentences are, of all the parts of the existing legislation, the most flawed and those that required the most urgent reform.'[10] On the one hand, he asserted that the penalties were not proportional to the offences: 'For many offences, and the most serious ones, military law was not and could not be enforced, as the penalties enacted harmonized little with the nature and gravity of the crimes they punished.[11] On the other hand, he affirmed penalties were too harsh: 'For a long time, it was thought that the gravity of punishment would be a good remedy for indiscipline and disorder.'[12] But this severity was excessive and above all counterproductive, according to Foucher: 'Too often, these laws pronounced an invariable and inflexible sentence, ignoring the various degrees of crime, and they made the judge an instrument, pushed to impunity so as not to become cruel.'[13] That is why he decided to abolish several penalties. Finally, he regretted all legal omissions, which undermined the special nature of military penalties and offences: 'By its silence, the law obliged to refer to the ordinary law, whose punishments did not always respond to the true nature of the offence.'[14]

More significantly, the drafter of the code wanted to modernise, humanise, and 'civilianize' the criminal procedure of the French military. As early as 1826, when he was a young royal prosecutor, he wrote in his comparative work on French and English military justice: 'I have constantly sought to bring military justice and ordinary justice closer together, to make this part of legislation worthy of France.'[15] In 1857 his leitmotiv had not changed: he wanted to integrate into the procedure followed by the councils of war the mechanisms for the protection of the rights and freedoms guaranteed by ordinary law. According to him, a soldier could not cease to be a citizen; he could not give up all the rights that his citizenship granted him: 'The good and proper administration of justice, the first need of the people, the first duty of governments, is at least as necessary for an

[9] Foucher (n 3) 15.
[10] ibid 25.
[11] ibid.
[12] ibid.
[13] ibid 26.
[14] ibid.
[15] Victor Foucher, *De l'administration de la justice militaire en France et en Angleterre* (Anselin, 1826), vii.

army as for the nation itself.'[16] He added: 'I do not want to discuss all the provisions; I would only say that we have kept as much as possible those followed before the ordinary courts; that the military courts have been vested with all the powers granted by the general laws to the ordinary courts.'[17] The procedure before the councils of war was thus modelled on the ordinary procedure. The code of military justice therefore included the right to a fair hearing, the right to information, the right to counsel, the right to recourse to witnesses or the right to appeal. This first step towards the 'civilianization' of French military justice was undoubtedly the main innovation introduced by the 1857 code.

However, Foucher was aware that this rapprochement between military justice and ordinary justice was possible to a certain extent. To his eyes, military law had to remain a distinct body of law, as it was governed by specific legal questions: discipline, good order, and deterrence (to prevent any harmful effect that an offence can have on the troops). Hence his desire to maintain a separate court system and some exceptions to ordinary law. He was indeed convinced of the 'need for a special judicial law in relation to all the needs, all the requirements of military life.'[18] In concrete terms, legal deadlines were shorter than in ordinary procedure, especially in wartime. Similarly, sentencing depended on time and place (time of peace or time of war, facing the enemy or not, on the national territory or abroad, *etc*.). Finally, although the 1857 code referred to the ordinary penal code to punish ordinary offences, it provided for ancillary and infamous penalties aimed at aggravating the penalty, like degradation. Finally, the code refused to admit extenuating circumstances. 'In wartime, all circumstances are extenuating!'[19] said General Niel on behalf of the government during debates at the Parliament. This discrepancy between military justice and ordinary justice was fully assumed by Jacques Langlais, who introduced the bill before the National Assembly:

> The first condition of military justice is the need for speed; it is a question of punishing; but it is above all a question of intimidating, of preventing. The example must always be prompt, sometimes even instantaneous; and it is for this reason that this exceptional justice must not be embarrassed either in complicated rules that do not include the simplicity of the facts, nor the environment in which it acts, nor the character of its jurisdiction.[20]

Regarding courts system, the code established a hierarchized structure based on 'councils of war' (*conseils de guerre*, art 1), founded by Louis XIV in 1665 and maintained during the French Revolution and the successive political regimes. The law made a fundamental

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[16] Foucher (n 3) 26.
[17] Foucher (n 3) 24.
[18] ibid.
[19] Quoted in General Lamiraux, *Etude critique des projets de loi portant réforme du code de justice militaire pour l'armée de terre* (Lavauzelle, 1896) 51.
[20] Quoted in Odile Roynette, 'Les conseils de guerre en temps de paix entre réforme et suppression' [2002] 73 *Vingtième-siècle* 53.

distinction between permanent councils of war, which sat in each of the territorial military districts[21], and which were competent both in time of peace and in time of war, and temporary councils of war, which were comprised of two types: councils of war for armies (*conseils de guerre aux armées*), competent when an army corps was in movement on national territory or abroad (art 33) and councils of war in places of war, towns and departments under siege (art 33).

In peacetime, the 1857 code showed its terrible efficiency in the political repression of the Paris Commune in 1871. From 1871 to 1879, 26 councils of war were charged with judging the 'Communards'[22]. However, the code was strongly criticized during the Dreyfus affair (1894-1906), which raised a profound questioning of military justice and councils of war in peacetime[23]. In the early 1890s, public opinion was also informed about the terrible conditions of detention of soldiers with serious disciplinary records. At the time, the worst elements of the Battalions of Africa (exclusively composed of men with prison records who still had to do their military service or soldiers sentenced by councils of war) were sent to military prisons located in North Africa (Morocco, Algeria, Tunisia). These 'Biribis' were places where France got rid of undesirable and incorrigible individuals. In 1890, George Darien, a former inmate, published his *Biribi, Military Discipline*, which shocked and marked the French national conscience for decades[24]. At the National Assembly, Jean Jaurès, Edouard Vaillant or Anatole France, among others, called for reforms and rose a long-lasting campaign. 'It is necessary to reconcile military codes and discipline with the general law of a free democracy' stated Jean Jaurès in 1898. Edouard Vaillant wished to go further by abolishing military justice, which he described as a 'survival of barbarism'. Between 1898 and 1909, 21 bills on military justice in time of peace were introduced before the National Assembly. Step by step, the latest progress in the guarantee of the rights of the accused were incorporated into the code of military justice: the deduction of the duration of preventive detention from the sentence (1901), extenuating circumstances in time of peace (1901), and reprieve and reduction of prison sentence (1904). It has been accepted that, before a council of war in peacetime, the soldier deserved to enjoy the same rights and guarantees as a citizen before an ordinary court. This requirement was even more important since military service had become compulsory in 1872. 'When in France a citizen is born, he is born a soldier', said Léon Gambetta. And a French citizen must not be deprived of his rights before a council of war in time of peace.

In time of war, the 1857 code has not suffered any amendment until the Franco-Prussian war. The legislator felt confident: a good balance has been found between the need to

[21] The list is fixed by the decree of 18 July 1857: Paris, Caen, Lille, Mézières, Metz, Strasbourg, Lyon, Toulon, Toulouse, Brest, Oran, Bône.

[22] See Robert Tombs, *The war Against Paris, 1871* (Cambridge University Press, 1981).

[23] In 1894, Captain Alfred Dreyfus is convicted of treason and served many years in Devil's Island prison near French Guiana. He is finally exonerated, restored to duty, and promoted. The Dreyfus affair has long divided the French public opinion and reflects antisemitism.

[24] Dominique Kalifa, *Biribi* (Perrin, 2009).

punish any indiscipline with severity and the need to guarantee the accused a set of rights. But would this balance withstand the war? The 1870-1871 war was a truly baptism of fire for the 1857 code, and the least we can say is that it highlighted the difficulty of applying in time of war a code also drafted for peacetime. It has demonstrated that military justice must be perfectly adapted to wartime, and especially to the time of defeat and debacle. Following this war lost by France, the legislator and the military command wondered: should we reinforce military justice's derogatory nature in the time of war (and to which extent)? Or should we bring it even closer to ordinary justice? The debate was open. It will be long and intricate. Finally, the code was reformed considering the pitfalls of the previous war. But the First World War will again show its limits. In other words, the developments, and evolutions of French military justice from one war to another showed the difficulty of providing rules of law and procedure adapted to a future war, of which no one knew anything, and of which no one could predict the nature and the outcome.

2 The 1857 Code in the Turmoil of 1870-71 War

Indiscipline is often regarded as one of the causes of the French defeat in 1870[25]. Charles de Freycinet, Secretary of war in the Government of National Defense wrote for example in 1871: 'We noticed, especially at the end of the war, the indiscipline that reigned among the troops: not that it manifested itself in an open rebellion, but rather in a nonchalance, a softness to carry out the orders received, a general letting go. This indiscipline has increased with our disasters.'[26] General Charles-Gabriel-Félicité Martin des Pallières, who commanded the famous 2nd Brigade of the *Blue Division*, reported in his *Memoirs* published after the war: 'I now return to the most serious difficulty, with which I found myself struggling as soon as I arrived in Nevers, I mean the incredible indiscipline that reigned among the troops. This indiscipline existed even more among the troops we were trying to organize, it had to be triumphed at all costs or any hope of success had to be renounced.'[27]

In a same way, Lieutenant-Colonel Albert Senault wrote in 1878 in his *Notes on Military Justice*: 'After a lost battle, the defeated army was taken up behind; many men remained hidden in the farms, in the villages around the battlefield, or they withdrew in a direction other than that followed by the army; some exchanged their uniforms for gowns and trousers under the pretext of escaping the enemy.'[28] Do they exaggerate? Neither the sources nor the current bibliography allow us to know the statistics of indiscipline during the 1870 war. In any case, an interesting phenomenon appears from many testimonies:

[25] Joachim Ambert, *Histoire de la Guerre de 1870-1871* (Plon, 1873), Jean-François Lecaillon, *Les Français et la guerre de 1870* (L'Artilleur, 2020), Pierre Milza, *L'année terrible : La guerre franco-prussienne, septembre 1870 - mars 1871* (Perrin, 2009), François Roth, *La guerre de 70* (Fayard, 1990), Gustave Frédéric Thomas, *War of 1870: Metz* (Henri Oudin Editeur, 1871), Louis Vandevelde, *Commentaires sur la guerre de 1870-1871* (Henri Muzbach, 1872).

[26] Charles de Freycinet, *La guerre en province pendant le siège de Paris* (Michel Lévy, 1871) 335.

[27] Charles Gabriel Martin des Pallières, *Orléans: Campagne de 1870-1871* (Plon, 1872) 41.

[28] Albert Senault, 'Notes sur la justice militaire' [1878] 8 *Bulletin des officiers de Terre et de Mer* 634.

when acts of indiscipline are observed, officers do not feel legally equipped to deal with them.

First, French officers deplored the slowness of the procedure, which they considered unsuitable for wartime. General Martin des Pallières wrote:

> Every day this situation was getting worse, it was necessary to put an end to it as soon as possible. I was concerned about it beyond expression; it was shown to me by many examples, since the beginning of the campaign, how insufficient our law of military justice was, especially in times of setbacks and retreats. I had witnessed many acts of the most serious insubordination, which necessarily went unpunished, and whose influence had been most disastrous on the army's moral.[29]

Lieutenant-Colonel Albert Senault made the same observation: 'In a roof tile factory, an immense supply of wood disappeared in a few minutes, barns emptied, straw wheels removed in less than an instant. And if the higher authority wants to put an end to these disorders, it is stopped by the indulgence and slowness of the law.'[30] Both officers criticized the procedure provided for by the 1857 code, which apparently required time, and implied too many officers between the investigation phase and the trial phase. And when officers incriminated the 1857 code, they attacked the whole French system of military justice through it.

Let's have a look on the code. Criminal proceedings began with information. When an offence was committed, the military police – the equivalent of judicial police officers in ordinary proceedings – was responsible for gathering evidence and handing over the perpetrator(s) to the prosecuting authority before the military courts. Once this preliminary investigation had been completed, the investigation phase began. In time of war, the order to inform (or refuse to inform) was given by the General-in-Chief of the Army Headquarters, by the General Commanding the Army Corps, by the Commander of the Troop Detachment or by the Governor or Superior Commander in besieged or invested places of war (art 154).[31] The order to inform, which had to be justified, was transmitted immediately to a government commissioner (*Commissaire du gouvernement*), who was an officer – usually a captain – appointed by the Minister of War, and who performed the functions of a prosecutor (art 7). The government commissioner transmitted the order to inform and all legal documents to a reporting officer (*officier rapporteur*) – the equivalent of an investigating judge in civilian courts. He was also an officer, usually a captain. The reporting officer conducted the interrogation of the accused, heard witnesses, and could carry out most of the investigative acts aimed at the discovery of the truth and which were provided for by the ordinary Code of Criminal Procedure (art 102). Once the investigation completed, the file was referred to the government commissioner, who in turn forwarded it, together with his conclusions, to the authority that had given the order to

[29] Martin des Pallières (n 27) 41.

[30] Senault (n 25) 634.

[31] In peacetime, the order to inform is given by the general commanding the territorial district.

inform, and which was the only one authorized to convene a *conseil de guerre* (art 155). Then, notification of the trial was made to the accused twenty-four hours before the trial (three days in peacetime). The accused and his advocate could then communicate and have access to charges and accusations. Afterward, the authority convened the council of war and fixed the day and time of its meeting. Beforehand, he had drawn up a list of officers who may be called upon to sit (councils of war are composed of seven judges). Finally, the council of war met on the day and at the time fixed by the convening officer. The sittings were public except in cases where the case could be 'dangerous for order and morals' (art 113). The guilt of the accused and the sentence were decided by a majority of five votes to two. The judgment was then pronounced in public. Note that the accused had the right to appeal within twenty-four hours (art 156). In total, almost ten officers were required by military criminal procedure. General Martin des Pallières noted, bitterly:

> There were five or six cases pending, almost all of which carried the death penalty, and it was impossible to form a military court, both because of the shortage of officers who could properly perform the functions of rapporteur or government commissioners, and because of the difficulties of investigating these cases and the time they would have wasted, whereas they were indispensable in their corps.[32]

Likewise, during the war, officers also claimed that the code set up a military system modeled on the civilian system which was completely unsuited to the theater of operations: the code required that military justice be rendered in adequate and permanent places. How could these provisions be applied when troops moved, advanced or retreated? They also criticized the complexity and technicality of the code. By the way, as early as 1857, the Ministry of War was apparently aware of this, since a kind of forty-five-page abridged manual was sent to the generals commanding the territorial divisions, simplifying, and summarizing with pedagogy the 300 pages of the code[33]. Similarly, the code laid down several rules that could be difficult to apply in a time of war. For example, Article 113 required that copies of the Code of Military Justice, the Code of Criminal Procedure and the Criminal Code be deposited on the judges' desk! Time, officers and codes, three things that could be hard to find in wartime…

In addition, French officers also noted the shortcomings of the 1857 code: 'There are many crimes, very serious in their consequences, which can be committed in time of war, and which are not covered by the code of military justice. They are punished at most by disciplinary sanctions, and we know that those sanctions are almost illusory.'[34] Lieutenant-Colonel Senault gave the example of hunting game or firing shots inside military camps, both ignored by the 1857 code: 'Soldiers had fun, in 1870, shooting at any kind of

[32] Senault (n 25) 634.
[33] Ministry of War, *Instructions from Maréchal Vaillant*, 28 July 1857.
[34] Senault (n 25) 635.

game that rose in front of them; hence serious accidents, men killed or injured, not to mention the loss of ammunition.'[35]

More importantly, the Lieutenant-Colonel accused the severity of the code of being counterproductive. The 1857 Code established a graduated scale of penalties, ranging from capital punishment to confiscation of pay, and which depended on the seriousness of the offence, as in ordinary criminal law.[36] However, sentencing also depended on the time and place where the offence had been committed (in time of peace, in time of war, in the presence of the enemy, abroad or on national territory, on duty, in front of the troops, *etc.*). In addition, the law distinguished between ordinary and special penalties. In the case of an ordinary offence (an offence that can also be committed by a civilian), the Code of Military Justice included the penalties provided for in the civilian criminal code. This means that the councils of war must apply the same penalties as the civil courts. Capital punishment was provided for many military offences, described as serious, such as refusal to obey, absence without leave or desertion. Death penalty pursued a prophylactic and deterrent objective. It aimed at restoring order and discipline as well as deterring the accused's comrades. But capital punishment was also envisaged to exacerbate the sense of sacrifice and to serve the salvation of the homeland in danger. This was the spirit of the French Revolution. The person sentenced to death was shot by a platoon composed of non-commissioned officers and commanded by an officer (art 187). Generally, the penalties in military matters were therefore more severe than those provided for by the penal code in force at the time. Especially since the drafter of the code refused to admit extenuating circumstances, which 'could have serious disadvantages for the principle of authority' according to Victor Foucher.[37] The penalty in military matters was therefore invariable and inflexible, rigidly fixed by the 1857 code. During the war, some officers noted that, on the one hand, judges were reluctant to convict an accused because of the severity of the sentence incurred. Hence the 'indulgence' Colonel Senault mentioned or the 'impunity' to which General des Pallières referred. On the other hand, the soldiers would knowingly take advantage of this severity to escape their military obligations. For example, the Code of Military Justice punished drunkenness in service with six-month imprisonment when there was a recidivism. Colonel Senault believed that this six-month sentence was a good way to 'avoid the campaign' by a voluntary conviction…

These procedural burdens, these shortcomings and this technicality would finally explain the disillusionment of officers. General des Pallières stated:

> The restaurant in Bourges train station was looted by soldiers who were dissatisfied with a rise in the price of wine. Colonel Des Plas wanted to stop this scandal and

[35] ibid.

[36] Penalties provided for by the code are capital punishment, hard labor for life, transportation for life, hard labor, detention (between 5 and 20 years in a fortress), imprisonment (between 5 and 10 years in a jail), banishment (transportation out of France between 5 and 10 years) and degradation (art 185). Considering misdemeanors, the Code provides for dismissal, public works, imprisonment and fines (art 186).

[37] Foucher (n 3) 26.

addressed the officers of the regiment, who refused to assist him, each claiming that the troublemakers were not of their company, and therefore it did not concern them. The colonel had to withdraw very badly treated personally.[38]

He added: 'Energic officers were subjected to mistreatment by the troops, while the others were afraid of it.'[39] Once again, nowadays it is still difficult to evaluate indiscipline among French troops. It is therefore necessary to temper these arguments.

More importantly, General des Pallières incriminated the drafters of the 1857 code: 'It is the search for vain popularity, sacrificing the interest of the country to unsavory individual interests, which directed the legislator in the drafting of the code of military justice that governs us.'[40] On 30 September 1870, in the aftermath of the battle of Sedan and the capture of Napoleon III, General de Pallières wrote to the new Minister of War and urged him to disregard the 1857 code: 'I beg you to obtain from the members of the government that we be armed so as to be able to respond to the trust you have placed in us, otherwise our duty is to represent to you that we cannot absolutely count on the troops that you instruct us to organize.'[41] He himself would have written a draft for the attention of the new rulers.[42]

On 2 October 1870, the Government of National Defense at Versailles urgently issued a decree ruling out all the provisions of the 1857 code: 'Whereas the dignity or strength of armies depends on the maintenance or restoration of discipline, the current legislation do not contain provisions for the immediate punishment of crimes and offences committed by military personnel in the field'. Therefore, councils of war were replaced by courts martial (art 1[43]). In addition, the decree abolished the few guarantees provided for by the 1857 code. In other words, the government broke the last locks that prevented military criminal proceedings from being summary and justice from being expeditious and exemplary. In thirteen lapidary articles, the two hundred and seventy-seven articles of the 1857 code were trampled on: the investigation was abolished; a court martial could now be convened by 'the officer of the highest rank'; pleadings by advocates were prohibited; the jurisdiction of courts martial was extended to all criminal acts (even ordinary crimes); a civilian accomplice in the commission of a military offence was subject to court martial and was liable to the same penalty as the main perpetrator; unarmed stragglers were prosecuted for marauding (a crime punishable by death); in the event of a death sentence, execution was immediate. Considering death penalty, article 6 provided for fifteen offences punishable by death and authorizes summary executions: 'On the battlefield, any officer and non-commissioned officer is authorized to kill the man who gives proof of

[38] Martin des Pallières (n 27) 43.
[39] ibid 329.
[40] ibid 330.
[41] Quoted by André Bach, *Justice militaire 1915-1916* (Vendémiaire, 2013) 162.
[42] Martin des Pallières (n 27) 44.
[43] 'From the day of promulgation of this decree, courts martial shall be established, to replace the councils of war, until the cessation of hostilities'.

cowardice, by not going to the post indicated to him, or by throwing disorder by desertion, panic or other act likely to jeopardize the operations'. Finally, the right to appeal was abolished (art 2: 'there shall be no review of decisions brought by courts martial'). This decree was officially taken for 'maintaining or restoring discipline, on which depends the dignity or strength of armies'. All these measures were also imposed 'in the name of the invaded homeland', in the name of 'public safety'. As during the French Revolution, it seemed necessary to motivate men who had to obey out of patriotism and submission to the Nation. And eliminate those who did not respond to its sacred call. The decree established a special regime, characterized by the manifest disproportion between the gravity of the offence and the sanction imposed. In other words, war and order justified the sacrifice of justice for the sake of example. This decree was efficient, according to General de Pallières, satisfied: 'In a few days, it brought back the most complete order into the army.'[44] On the contrary, in his *Journal*, the non-commissioned officer Amédée Delorme did not hide his fear and incomprehension:

> At the station, there was an altercation between a corporal and a sergeant. The corporal grabbed his leader by the shirt, violently enough to tear off one of its buttons. Orders were given to seize the corporal and disarm him. The unfortunate man was charged with assaulting a superior. The accused was brought before a court martial, in which a battalion commander, two captains, a lieutenant and a non-commissioned officer sat, and the sentence could not be reviewed or quashed. The court martial did not hesitate. Its verdict: in the name of the invaded homeland, Corporal Tillot is sentenced to the death penalty. We did not know that there were not any more councils of war for us. We were only submitted to summary justice, that of courts martial.

Soldiers suddenly discovered that discipline justified the loss of all their rights…

3 The 1875 Reform: Debates, Controversies and Criticisms

Following the French defeat, the legislator made some changes to military justice in time of war by passing the statute of 18 May 1875, entitled *Loi portant modification du code de justice militaire*. The main aim was to adapt military justice to the recent statutes promulgated to reorganize the French army (the compulsory military service in 1872 and the redistribution of military territorial districts in 1873). The lessons of the past war and the balance between requirements of justice and those of war and command were at the heart of the debates.

Reforming the whole system was not an option for the rapporteur of the bill before the Parliament, General Pierre-Joseph Robert, senator for the *Seine Inférieure*. The reform was deliberately limited: 'We are not undertaking a complete revision of our code, we are just retouching a number of its articles', according to General Robert.[45] For him, it was only necessary to give justice in time of war the celerity that it had lacked in 1870:

[44]Martin des Pallières (n 27) 44.
[45] Journal Officiel (May 19, 1875) 3515.

> During the last war, the procedural formalities required by the code led to delays which held up the trial of cases at a time when it was in the greatest interest, from the point of view of discipline, that the punishment of crimes and offences should be as swift as possible. It is essential to consider how to accelerate judicial operations in wartime. We have not aggravated the penalties; we have proposed measures intended to make the repression more rapid, more secure, more effective, and easier to apply.[46]

On the contrary, the counter-project submitted by General Loysel, a former senior officer in the Army of the Rhine and senator for *Ille-et-Villaine*, aimed to increase penalties and make military justice more expeditious to meet the demands of war. He was an ardent promoter of the derogatory nature of military justice, and he called for the drafting of a special code for the time of war that would provide for courts martial:

> In all serious circumstances, courts martial have always been the preferred option. The recent experience of 1870 still confirms this. It has always been necessary; it will always be necessary to have recourse to these means. But it should not be used when the evil has already taken such deep roots that the remedy would no longer be effective. If the court martial is not incorporated into the law in advance, it will be impossible to create it in due course. At the time of conscription, it is only by inexorable measures that we will succeed in putting order and discipline in these masses of men who pass suddenly from ordinary life to the requirements of military life; humanity, the need to ensure success, imperiously command you the creation of courts martial.[47]

General Loysel was convinced courts martial were the best means to impose discipline within the troops in times of war, especially within troops of conscripts. During the debates, General Lebrun agreed: 'I see only one remedy to obviate the insufficiency of the councils of war, it would be that as soon as war is declared, it would no longer be councils of war, but courts martial which will be charged with the repression of all crimes and offences committed in campaign.[48] Nonetheless, General Loysel also believed that the code of military justice should provide for courts martials to avoid their organization in haste and urgency. Such summary justice must not be improvised: 'I will end with another consideration. It is in calm and peace that we must prepare such a jurisdiction, and not improvise it in time of war by means of decrees.[49] In addition, he did not hide his will to make military justice more severe when he proposed the abolition of the right of appeal and the generalisation of death penalty to the whole range of serious military offences.

A tug of war then began between the two generals, one wishing to maintain the spirit of the code and the guarantees it offered to the accused - which were still very meagre - and the other wishing for more expeditious and effective repression. General Robert replied

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[46] ibid 3516.
[47] Journal Officiel (March 4, 1875) 1629.
[48] Quoted in André Taillefer, *La justice militaire dans l'Armée de Terre* (Larose, 1895), 409.
[49] Journal Officiel (n 48) 1630.

to General Loysel and rejected the idea of a special code for the time of the war: 'We do not want to have a new act forming a special and separate text, superimposing itself on our military code and undermining many of its articles.'[50] General Robert extoled the virtues of the 1857 code – i.e. bringing military justice closer to ordinary justice:

> Our code of military justice was, it can be said, a great blessing for all those who are responsible for directing and carrying out the work of judicial repression and for the litigants themselves. You have witnessed, gentlemen, the great services which he has made possible in exceptional, important, and painful circumstances.[51]

He also rejected courts martial and denounced General Loysel's desire to increase the number of capital offences. The proportionality of crimes and punishment must be preserved: 'The code has, for each crime and each misdemeanour, established a scale of penalties broad enough to allow the punishment to be graduated according to the seriousness of the offence and its circumstances'.[52] Overall, considering the right of appeal, General Robert said: 'General Loysel's counter-project intends to prohibit, always and absolutely, the right of appeal, while we accept this measure only exceptionally and under certain special conditions.'[53] More generally, he accused General Loysel's counter-project of being 'modelled on the 2 October decree.'[54]

Parliament finally rejected General Loysel's project and adopted General Robert's bill. Paul Pradier-Fodéré, professor of public law at the *College Arménien de Paris*, then commented the issues at stake in the 1875 reform:

> The legislator had to consider two distinct aspects: he had to reconcile the needs of military justice with the guarantees that the accused, whatever his crime, is always entitled to demand. He also had to think that on the battlefield, the law of military justice is a law of common salvation. In times of war, it must be concerned above all with external circumstances, the effect produced, the influence that an appearance of impunity could exert, not only on the soldiers, but also on the inhabitants.[55]

Finding a compromise between the respect for a minimum of basic rights and the need to give military justice an 'energetic speed', especially within an army that had become national, was the purpose of the 1875 law. In concrete terms, 25 articles were modified in 1875. The composition of *conseils de guerre* in time of war was significantly changed. The number of judges was reduced from seven to five, to facilitate the formation and convening of military courts, even during the most active military operations. A single officer would be responsible for the functions of *rapporteur* and *commissaire du gouvernement*, to

[50] ibid 1630.
[51] ibid 1631.
[52] ibid.
[53] ibid.
[54] ibid.
[55] Paul Pradier-Fodéré, *Commentaire sur le code de justice militaire* (Dumaine, 1876) 855.

avoid mobilizing too many officers who were indispensable on the battlefield. The accused could be summoned directly before a council of war, without prior instruction. Conviction in time of war was decided by a simple majority (3 votes to 2) whereas in peacetime conviction was decided by 5 votes out of 7. Finally, a decree of the President of the Republic, or an order from the commander of a besieged place, could temporarily suspend the right to appeal.

Clearly, military criminal procedure in 1875 was more derogatory than it was in 1857. These reforms were desired and expected, wrote Pradier-Fodéré in 1876: 'They were inspired by the need to make military justice more expeditious, a need proclaimed by all writers and acknowledged by all officers.'[56] He commented:

> All the conditions for good legislation are now met in the 1857 code. The councils of war are organised in such a way as to guarantee the repression of acts contrary to discipline, to strengthen the independence of the judge and the rights of the accused. The voice of humanity has been listened in the graduation of sentences: the legislator has softened them whenever the interests of justice and command did not stand in the way. The separation of civil and military jurisdictions has been maintained, with the aim of protecting the army against those criminal attempts which, in times of trouble, seek to alter its spirit and to distance it from its duties.[57]

Captain R. (who apparently wished to remain anonymous) also wrote satisfactorily in 1899: 'Despite criticism, it can be said that the 1857 code still contains all the necessary elements for good and wise justice.'[58] The *Journal of French Officers* was satisfied and relieved: 'The new reforms considerably simplify the military procedure without going as far as the government of National Defence.'[59]

However, this feeling of satisfaction was not shared by everyone. General Lamiraux, commanding the French *Ecole de Guerre*, affirmed in 1896 that the reformed code was not adapted to the modern French Army:

> As a preparation for war, it is not enough to know how to walk, run, shoot, maneuver, ride a horse, endure fatigue; one must also be prepared for discipline, which is the first element of success. This is yet indisputable: the 1857 code was drawn up for a small standing army, with a limited number of soldiers each year, and therefore receiving only a relatively small proportion of annual contingents. Today, it applies to all Frenchmen, without exception, recognized as fit for military service.[60]

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[56] Pradier-Fodéré (n 56) 854.
[57] ibid xxvii.
[58] Capitaine R., *La réforme du code de justice militaire* (Chapelot et Cie, 1899) 3.
[59] Anonymous, 'Réforme de la justice militaire' [1875] 5 Bulletin de la réunion des officiers de terre et de mer 832.
[60] General Lamiraux, *Etude critique des projets de loi portant réforme du code de justice militaire pour l'armée de terre* (Lavauzelle, 1896) 48.

He added: 'The composition of this army is different; there are categories of soldiers serving for a longer or shorter period of time; there are reserves that have to carry out periods of training. Finally, there are hundreds of thousand men who can be led from one day to the next to take up arms to join the active army.'[61] Regarding the necessity to reform military justice in time of war, he argued that 'no one will deny that changes are needed. But we must avoid the imprint of present passions.'[62] Above all, General Lamiraux warned that the code, freshly reformed, was not adapted to the time of war. He wrote: 'It is necessary, with a view to war, to have a special law promulgated and known in time of peace. If it is not done, it will have to be done at the time of the war. It is better to do it immediately! We do not wait for the day of mobilization to put surgical instruments in the ambulance canteens.'[63] He therefore advocated that the code should make provision in peacetime for courts martials that might be decreed during the war.

In a same way, André Taillefer, advocate at the Paris Court of Appeal and reserve officer, did not beat about the bush when he stated in 1895 that 'the code of military justice of 1857, even if modified by the law of 1875, is not a wartime code.'[64] The aim of his book on military justice in the army was precisely 'to demonstrate the weaknesses of the current code of military justice for wartime.'[65] To his eyes, 'the 1857 code is a peacetime code, not a wartime code.'[66] Taillefer wrote that the 1857 code was highly effective in peacetime. Because in time of peace military discipline was sufficient to maintain order and the code was severe enough to punish the most serious offences. Nonetheless, in time of war the situation was quite different: acts of indiscipline were multiplied, and the usual peacetime means of disciplinary repression were ineffective. Taillefer then recalled the 1875 reform's objectives: to allow 'a more energetic and rapid repression of offences committed in the field and make it possible to have no recourse in the future to the summary justice of courts martial.'[67] Yet, the legislator had failed, according to Taillefer, who strongly criticized the procedure provided for by the code:

> According to the amended article 42, the permanent councils of war and permanent council of revision shall hear all the cases of councils of war in the armies as long as those councils have not been created. In this case, if for example a serious offence is committed from the first day of mobilisation, when the new councils have not been organized, the accused will be judged by the permanent council of war and the case will follow its regular course: complaint, order to inform, instruction, order for trial, judgement. Witnesses will have to be called at the headquarters of the corps, while their presence in their corps will be indispensable. They may even have already left for the battelfield. If there is a conviction, the condemned person will be able to appeal

[61] ibid.
[62] ibid.
[63] ibid 49.
[64] Taillefer (n 48) 409.
[65] ibid.
[66] ibid 396.
[67] ibid 398.

> for revision, the first judgement can be annulled... the war will be over without the case being finished.[68]

He continued:

> If one assumes that the councils of war for armies are immediately organised, the procedure is still too slow, even if one assumes that the appeal for review is suspended. If an offence is committed, for example, on the first of the month, the major general who is informed immediately (which will not always be possible) will immediately order the convening of the council of war. The order for trial being supposed to be notified to the accused without delay, the council of war will be able to meet after a period of twenty-four hours, that is to say, at the earliest on the third of the month. If there is a conviction, it can be executed on the fourth. There will therefore be at least three more days between the offence and the punishment. This is still too slow, especially as in practice it will never be possible to go as fast as we have assumed. Delays are inevitable. Besides, the offence may be committed far from the Major General. The president of the council of war may not be reached, nor may the judges. It will take a considerable amount of time to notify the order to convene a council of war and to find the witnesses. All these formalities will require several days; moreover, an army is most often on the march, or in combat, which complicates the situation, so it is not three days, but six, eight, ten, perhaps even more, that one must count between the offence and the punishment.[69]

Taillefer added: 'Meanwhile, the major general, the council's president, the judges, the rapporteur and the witnesses have time to disappear in a battle, while, safe and sound, the criminal will remain quietly at the headquarters' trailer.'[70] And he concluded regarding procedure: 'with the modified code, even under the most favourable conditions, repression therefore lacks one of its essential qualities: promptness.'[71] Following his demonstrations, Taillefer stated: 'Then, a new danger is to be feared, that the councils of war may not be able to do their job; this happened in 1870. From the beginning of the campaign, acts of indiscipline multiplied without being able to be remedied, and it was necessary, too late, to resort to courts martial.'[72] He took up General Loysel's proposal when he concluded, lapidary: 'An exceptional jurisdiction must not be improvised.'[73] Indeed, improvising during the war could be harmful, both for the litigant and for the judge. Regarding military judges, Taillefer wrote: 'The fulfilment of a rigorous and hitherto unknown duty worries the conscience of those who must enforce the law; they may

[68] Taillefer (n 48) 400.
[69] ibid.
[70] ibid.
[71] ibid 401.
[72] ibid 397.
[73] ibid 410.

be frightened by the new responsibility incumbent on them. The result is inequality in the application of the penalty.'[74] That is why he proposed

> a special code for wartime discussed in all its parts in peacetime, known by soldiers as well as officers, the former knowing in advance what awaits them if they fail in their duty; the latter, penetrated by the greatness of their mission, sustained by the idea of salvation of the fatherland, will know how to carry out their dreaded duty without weakness.[75]

Later, in 1911, Etienne Flandin, a senator, criticized the inexperience and the lack of legal training of officers serving in councils of war. He called for the establishment of a body of professional military judges (in vain):

> It is necessary to create military justice officials who are completely independent of the command, offering every guarantee of impartiality, justifying both knowledge of military regulations and aptitude for judicial functions attested by the diploma of a law graduate and by the completion of a practical training period.[76]

However, it was the 1857 code, made more expeditious in 1875, that remains applicable in 1914. The First World War was a second - and terrible! - test for the French code of military justice. On 2 August 1914, France was declared to be in a state of siege by decree of the French President[77]. The old law of August 1849 was applied. Quickly, the war turned to the advantage of the Germans. There was a fear of a new debacle while the country was open to invasion. This fear of panic and stampede, aggravated by the loss of many active officers, was particularly strong at the end of August 1914, when Joffre's whole plan collapsed, when the French were beaten at the Belgian borders and the British at Mons. 1870 was in everyone's memory. The French army retreated, as did the law. Indeed, in those circumstances, war and fear tended to seriously weaken the rule of law, which gave way to exceptional legislations. Once again, military justice became a terrific instrument used to restore order and discipline, for the salvation of the homeland. On 10 August, the government issues a decree which abolished a first fundamental right: 'The right to appeal for review of a judgement by a council of war is suspended. This measure will be brought to the attention of the troops.'[78] On 3 September, Maréchal Joffre sent a telegram to the Government, temporarily exiled in Bordeaux: 'The difficulty of observing regular forms in the current situation prevents making examples that are currently indispensable'. This telegram is doubly indicative: as in 1870, the 1857 code was regarded by the military command as a procedural burden. And as in 1870, the military command called for more expeditious measures, opening the way to errors, excesses and regrettable injustices, many for the sake of example, with a *laissez-faire* from the government. On 6 September, special councils of war (*conseils de guerre spéciaux* or courts martial) were

[74] ibid 410.
[75] ibid.
[76] Quoted in Humbert Ricolfi, *Code de justice militaire* (Lavauzelle, 1928) 29.
[77] See Dalloz, *Guerre de 1914 : documents officiels, textes législatifs et réglementaires* (Dalloz, vol. 1, 1915) 19.
[78] ibid 63.

organised by the *Decree on councils of war*: 'On a provisional basis and for the duration of the war, the councils of war in the armies may function in the form of special councils, to act in the event of flagrante delicto.'[79] Its article 3 provided: 'They are composed of three judges appointed by the commander of the army, corps, division, brigade, regiment or unit where they are located. The president must, if possible, be a general officer. The other two judges must, where the accused is an officer, be of a rank at least equal to that of the accused.' The special councils of war's competency were very broad as they could deal with all crimes under the Code of military justice as well as some crimes under the ordinary criminal code (art. 4). Overall, the procedure was oversimplified: legal deadlines and preliminary investigation are abolished while the punishment is decided by 2 votes out of 3… The requirements of war and command, swiftness and exemplarity, therefore, prevailed for a time. In total, 826 convicts were shot after judgment by a council of war.[80]

Nonetheless, from April 1915 onwards, behind the lines, many people, such as the lawyer Paul Meunier, called for military justice to be returned to the orbit of ordinary law:

> The courts martial, military tribunals with three judges, instituted in the army zone, judging without any prior information, condemning by a majority of two votes to one, rendering decisions that are not subject to any appeal. These jurisdictions, formally proscribed by the Code of Justice of 1857 itself, formally proscribed by all our laws, have functioned illegally for months and they have not yet been abolished today. They have pronounced sentences, some of which are irreparable.[81]

The defenders of rights in turn prevailed. In April 1915, a legislation allowed the judicial rehabilitation of those executed in 1914. On 27 April 1916, the legislator returned to the guarantees of the 1857 code. Its article 1 provided: 'All military tribunals, will in future, in time of peace and even in time of war, be able to admit extenuating circumstances for

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[79] ibid 137.

[80] French Ministry of Army, *Mémoire des hommes*, https://www.memoiredeshommes.sga.defense.gouv.fr. See also André Bach, *Fusillés pour l'exemple 1914-1915* (Tallandier, 2003) ; André Bach, *Justice militaire 1915-1916* (Vendémiaire, 2013) ; Jean Bastier, 'Les fusillés pour l'exemple (1914-1916) et la campagne des procès en révision' [1998] 2 *Études d'histoire du droit et des idées politiques* ; Jean Dintilhac, *Essai sur le fonctionnement de la justice militaire en période de guerre civile ou étrangère. Jugements rendus pendant la guerre de 1914-1918, leur révision par la Cour de cassation* (P.U.F., 1929) ; Jean-Claude Farcy, Droit et justice pendant la Première guerre mondiale. L'exemple de la France [2014] 66 *Ler Historia* ; Olivier Guillot, Antoine Parent, 'Les fusillés de la Grande Guerre sont-ils morts au nom de leurs idées pacifistes ?' [2021] 171 *Revue de l'OFCE* ; Jean-Yves le Naour, *Fusillés, enquête sur les crimes de la justice militaire*, (Larousse, 2010) ; Nicolas Offenstadt, *Les fusillés de la Grande Guerre et la mémoire collective (1914-1989)* (O. Jacob, 2002) ; Guy Pedroncini, *Les mutineries de 1917* (P.U.F., 1967) ; Emmanuel Saint-Fuscien, 'Enoncer, menacer, montrer : retour sur les exécutions pour l'exemple dans les pratiques de commandement de l'armée française de 14-18' [2013] 252 *Guerres mondiales et conflits contemporains*; Emmanuel Saint-Fuscien, 'La justice militaire française au cours de la Première guerre mondiale' in Jonas Campion (dir.), *Justices militaires et guerres mondiales* (Presses Universitaires de Louvain, 2013).

[81] Speech at the French National Assembly, December 10, 1915.

all crimes and offences'. The Act also restored the stay of execution (art.2), the preliminary investigation (art. 3), the right to counsel (art. 3) and the right to appeal (art. 4). Finally, it abolished the special councils of war (art. 7). Despite a last excess of severity in 1917, these provisions have remained unchanged until the end of the war.

4 Conclusion

After the war, in 1921, Louis Barthou, Ministry of War, appoints a commission composed of two senators, René Besnard and Guillaume Poulle, and three members of the National Assembly, Robert Barillet, Joseph Gheusi and Humbert Ricolfi. The latter, lawyer, and veteran, publishes in 1928 his comments on the commission's works. Humbert Ricolfi knows how difficult it is for those who, in peacetime, are responsible for organising justice in time of war. It is up to the commission to find the new balance between respect for the rights of the accused and the need to fight against indiscipline. According to Ricolfi, 'what matters most is the future. How can we avoid the return of the tragic mistakes that the House has heard about on several occasions?'[82]

Louis Barthou, writes to the commission in 1921: 'The war has been a great lesson. We have paid dearly for its painful experience. It is necessary to reconcile discipline and justice, which are inseparable from each other, but which absolute theories risked, in different ways, sacrificing one to the other.'[83] The commission is asked to work mainly on military justice in time of war, because, as Humbert Ricolfi notes,

> it is in times of war that abuses become terrible, because of the exceptional gravity of the circumstances, the difficulty of the investigations and the lack of composure from those who can investigate or judge; it is also in times of war that these abuses risk going unpunished or being ignored because witnesses and evidence disappear.[84]

Nonetheless, despite this predominant desire to ensure that the principles of justice will be respected during a future war, the commission also makes several proposals to reform military justice in time of peace. Besides, the commission calls for the modernisation and humanisation of penalties: 'Some punishments, such as that of hard labors, accompanied by a parade of execution such as that of military degradation, a barbaric spectacle, humiliating for all, do not seem compatible, either with the modern feeling of the dignity of the human person, or with our French conception of soldiers-citizens.'[85] The commission drafts a new code in 1924. The new Ministry of War, André Maginot, thanks the commission for its achievements:

> For a long time now, the organisation of our military justice system has no longer met the needs of an army which, in contact with our democratic institutions, has become a national army. This archaic nature of our judicial organisation became even more

[82] Ricolfi (n 76) 11.
[83] ibid 4.
[84] ibid 12.
[85] ibid 13.

> apparent during the war, when the application of rules and procedures from another era was no longer in harmony with the great movement of the nation in arms and the new conception of the citizen-soldier. Incidents as painful as they were regrettable and which rightly moved public opinion, just as they raised the unanimity of veterans against the procedures of an excessively summary justice system, marked the end of a judicial system which it is no longer possible to defend today. It is no longer possible or acceptable to subordinate justice to example. After having undergone so much hardship and having made so many sacrifices to ensure the victory of law and justice, this country would not understand if certain errors were allowed to continue and if the guarantees granted to all citizens were denied to those among them who render the nation the service of defending it and watching over its security. Your commission has drawn up a draft code whose provisions are designed to reconcile the indispensable prerogatives of command with the concern for independent and enlightened justice. You have endeavored to reconcile the requirements of discipline, without which there is no army, with the requirements of law, without which there is no justice.[86]

Following long and intricate debates, the Parliament adopts a new code of military justice on 9 March 1928. The code abolishes the councils of war and replaces them with military courts (*tribunaux militaires*). More importantly, the law provides that in time of peace, these courts are presided over by civilian magistrates. In the same way, in time of peace, military courts are only competent for military offences, i.e. they can no longer hear ordinary offences: 'all crimes, offences and contraventions committed by military personnel or those assimilated in peacetime, will be judged by ordinary courts' (art. 2).

In time of war, on the contrary, the code provides that military courts may try all offences (art. 125). Moreover, military courts will be presided by an officer (art. 125). Nevertheless, the great innovation of the 1928 code is the establishment of a body of professional military judges. It was expected, as Guillaume Poulle stated before the Senate in 1926:

> The members of the military prosecution service, from whom the government commissioners and rapporteurs are appointed, are never required to have a title guaranteeing that they know the law. This is a truly singular and inexplicable thing. In the army the most modest corporal, before being appointed, is obliged to undergo special training: he must follow the platoon of student corporals, learn his theory, prove that he has the necessary aptitudes. To become a government commissioner or a rapporteur, nothing similar is required. It is enough to be an officer; it's do-it-yourself! With all its dangers and disadvantages.[87]

Humbert Ricolfi summarizes the commission's point of view: 'Procedure, instruction, accusation, and defense require not only knowledge of military regulations, but also of the entire law. They also require a legal sense that can only be acquired through study

[86] ibid 33.

[87] Journal officiel, *Débats parlementaires* (vol. 82, 1926) 1168.

and experience.'[88] In other words, if the 1928 code maintains the special character of military justice, it is regarded as one of the most important steps towards the civilianization of French military justice.

And the latter is undoubtedly the consequence of the chaotic functioning of military justice from one war to another.

[88] Ricolfi (n 76) 24.

THE GENDARME, THE CHIEF MILITARY PROSECUTOR, AND THE MINISTER: BELGIUM'S USE AND PRACTICES OF CAPITAL PUNISHMENT FOR ACTS OF COLLABORATION, 1944–1952

By Jonas Campion[*]

Abstract

Although it was not more executed under ordinary criminal law since 1863, the death penalty once again became a massive social fact in Belgium after the Second World War. Between 1944 and 1952, 242 people were executed in Belgium for collaboration or war crimes. Since they were judged by the military justice system (War councils and Military court), these individuals were shot. In newly liberated Belgium, the implementation of these executions was not an easy task. Judicial, practical, political, geographical or institutional issues confronted in deciding how it should be done. Many actors with sometimes divergent interests and priorities intervene during the process: the Justice or Defence ministers, the army, the Military justice and Chief Military Prosecutor as well as the gendarmerie. The aim of this paper is to understand the articulation of strategies and choices made to ensure that 'justice was done' during a political transition period, when military criminal law and ordinary criminal law became hybrids.

1 Introduction

In September 1944, the liberation of Belgium prompted an unprecedented drive to punish those suspected of collaboration with the enemy. By 1952, almost 400,000 legal proceedings had been initiated under articles 113 to 123 of the Penal Code, dealing with crimes against the external security of the state.[1] Nearly 57,000 cases went to trial, leading to some 54,000 convictions. A total of 2,940 defendants were sentenced to death (1,693 had participated in the proceedings 1,247 had been convicted in absentia).[2] In the end, between November 1944 and August 1950, 242 collaborators and war criminals were executed.

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[1] These articles had been amended several times during the two world wars. New offenses were introduced, the threshold of deceit adjusted in some cases, and the severity of penalties consistently increased. This is how the death penalty came into play. These articles mainly provided for the punishment of military (Art. 113), economic (Art. 115), and political (Art. 118bis) collaboration. They also covered espionage (Art. 120), betrayal to the enemy (Art. 121bis), and the harboring of persons accused of such offenses (Art. 121). For more on the topic, see Luc Huyse, Koen Aerts, Bruno De Wever, Steven Dhondt and Pieter Lagrou, *Onverwerkt verleden. Collaboratie en Repressie in Belgie 1942–1952. Een update na dertig jaar* (Tielt Lannoo 2020).

[2] To read some considerations about these data's, see Koen Aerts, 'La peine de mort dans la Belgique d'après-guerre: un sacrifice symbolique (1944-1950)?' [2008] 23 *Histoire & Mesure* 191. To question the last executions in Belgian history, see Xavier Rousseaux, 'Les derniers condamnés à mort dans la pratique pénale belge (1830-1962)' [2015] 1 *Beccaria. Revue d'histoire du droit de punir* 159.

The situation was remarkable given that Belgian judicial system had not imposed application of the death penalty sentences in matters of ordinary law since 1863[3], with the notable exception of soldier Émile Ferfaille. This Belgian soldier's trial took place in the context of the First World War, where the application of ordinary law was strongly influenced by political concerns and questions of sovereignty. He was executed in March 1918 in Free Belgian territory, following a conviction for the murder of his mistress.[4] In fact, the de facto abolition of capital punishment even applied to political crimes. Accordingly, none of the 42 death sentences issued starting in late 1918 against First World War collaborators—so-called *inciviques*—were carried out.[5]

The extensive use of capital punishment starting in the fall of 1944 reflected not only a widespread thirst for justice and vengeance in the newly liberated country but also an urgent need for the state to reaffirm its authority. In this way, executions highlighted the role of justice in 'purifying' Belgian society.[6] The process sparked bitter debates and increased tensions between actors in the criminal justice system. Beyond questions of law—which remained paramount for a state in the process of re-establishing itself—political realities, social issues and institutional interests also came into play. Under the watchful eye of the ministries responsible, the clash primarily involved the Office of the Chief Military Prosecutor (auditorat général)[7], led by Walter Ganshof Van der Meersch[8], and the Gendarmerie, which was given a central role in carrying out executions. This article draws on the archives of these two institutions to explore the meanings and operational difficulties associated with the use of capital punishment in liberated Belgium. The analysis of their quarrels provides a deeper understanding of not only the framework in

[3] The convicts were pardoned and sentences changed to imprisonment measures.

[4] Benoit Amez and Xavier Rousseaux, 'L'affaire Ferfaille en "Belgique libre" (27 octobre 1917–26 mars 1918). Excès de la justice militaire, laboratoire de la justice scientifique ou instrument de l'affirmation nationale?' in Margo De Koster, Hervé Leuwers, Dirk Luyten, and Xavier Rousseaux (eds) *Justice in Wartime and Revolutions: Europe 1795–1950* (Brussels AGR-PAI Just-his.be 2012).

[5] On the repression of collaborators in post-First World War Belgium, see Xavier Rousseaux and Laurence Van Ypersele (eds), *La Patrie crie vengeance! La répression des 'inciviques' belges au sortir de la guerre 1914–1918* (Brussels Le Cri, 2008).

[6] Marc Bergère, *Une société en épuration. Épuration vécue et perçue en Maine-et-Loire. De la Libération au début des années 50* (Rennes PUR 2004). About relation between State sovereignty and capital execution, see also Xavier Rousseaux, 'Les derniers condamnés à mort dans la pratique pénale belge (1830-1962)'.

[7] For an overview of the structure of Belgium's military justice system, see Rolande Depoortere, La juridiction militaire en Belgique (1796–1998), compétences et organisation, production et conservation des archives (Brussels AGR 1999).

[8] Previously a magistrate, he was appointed Chief Military Prosecutor (*auditeur général*) responsible for the Military Courts in April 1940. Accordingly, on May 10 of that same year, he began overseeing the arrest of persons suspected of posing a danger to state security. Incarcerated by the Germans, he was later freed and became a member of the Resistance network 'Comité Gilles'. This resistance organization sought to keep the Belgian Government in London abreast of local developments. After reaching London, Van der Meersch was named High Commissioner for State Security. His duties as both a Prosecutor and a Commissioner would give him a central role in both liberating the country and punishing its collaborators. Jacques Velu, 'Walter Ganshof van der Meersch', in *Nouvelle biographie nationale* (Brussels Royal Academies of Belgium 2003).

which law was developed and implemented during this exceptional period but also the idiosyncrasies of a military justice system tasked with processing a primarily civilian caseload.

2 Determining the Method of Execution and Selecting the Executioners

Although theoretically well defined in the relevant legislation, carrying out capital punishment in newly liberated Belgium was no simple task. To begin with, the authorities had to determine how, by whom, and where condemned prisoners would be put to death. Furthermore, measures had to be taken to ensure public order during the executions. In Article 8, the Penal Code of 1867 specified that individuals sentenced to death were to be beheaded, except for those tried and convicted by a military court. The latter were to face a firing squad instead. In July 1934, based on lessons from the First World War and in a tense international context, lawmakers decided to impose military justice on those accused of undermining external state security during wartime. As a result, between 1944 and 1950, both civilian and military convicts subject to capital punishment were shot to death. Based on tradition and applicable regulations, firing squads were to be composed of soldiers, whereas the Gendarmerie was to have only general responsibility for policing the area.

In November 1944, the first executions were fast approaching. Walther Ganshof Van der Meersch, in his capacity as Chief Military Prosecutor and High Commissioner for State Security, presented the government with his vision for the process. His proposal did not fundamentally deviate from the existing legislative framework, except with respect to executioners. He claimed that 'there seems to be no legal impediment to breaking with tradition in this regard, by giving the Gendarmerie responsibility for executing convicts as well as for maintaining order at the site.' In support of his argument, he emphasized 'that using firing squads composed of young Belgian army recruits in training would pose a major threat to morale.'[9] Essentially, his point of view held that the exercise of justice should be made to serve the ongoing war effort. As the Belgian army was being rebuilt, the important thing was to avoid lessening the patriotic fervor of eager recruits by transforming them into common executioners. In other words, the newly revived Belgian army should not be saddled with 'dirty work' that could undermine its resolve.

Instead, Ganshof believed the task should fall to 'volunteers' from the Gendarmerie. Granted, this institution was in a less-than-ideal state as it underwent wholesale reorganization amid a purge of collaborators.[10] Nevertheless, judicial authorities believed that the Gendarmerie was the appropriate tool for carrying out the task in question. Their only related concern was of a long-term nature. Indeed, in his initial proposal, the Chief

[9] Walter Ganshof to Minister of Justice Verbaet on the method of execution, 1 November 1944, AA 1882, A/1-5, 'Instructions générales de l'Auditorat,' CEGES, Brussels (hereafter cited as 'Instructions générales').

[10] On the challenges faced by the Gendarmerie during the war, see Jonas Campion, *Les gendarmes belges, français et néerlandais à la sortie de la Seconde Guerre mondiale* (Brussels André Versaille éditeur 2011).

Military Prosecutor was careful to note the risk 'that the public would continue to perceive those volunteers recruited for the firing squads as executioners, even after its thirst for justice had been quenched.' Still, Ganshof did not deem this issue reason enough to set aside his preferred solution.

On 6 November, in response to a dispatch from the Defense Minister[11], Gendarmerie Commander General Bourguignon informed the units under his control that executions were imminent. He asked them to identify locations that could be used for the purpose and to 'determine the size of the Gendarmerie detachment required to maintain order and police the execution sites.'[12] On the same day, Bourguignon also replied to the dispatch by reminding the minister that, 'during executions, the role of the Gendarmerie has to be limited to escorting condemned prisoners, along with maintaining order and policing the execution site.'[13] This passage can only be interpreted as a discreet objection (perhaps a last-ditch attempt at swaying opinion) to the Chief Military Prosecutor's proposal, which remained on the table.

Although the exact date is unknown, Ganshof's proposal was formally adopted by the government at some point between 6 and 17 November.[14] The Chief Military Prosecutor then began informing military prosecutors (*auditeurs militaires*) of the relevant provisions.[15] On 20 November, he issued the final directives required to carry out the first round of massive executions around the whole country.[16] His memorandum confirmed the central role to be played by the Gendarmerie, whose members would police the site as well as put the convict to death. For each condemned prisoner, the force was to provide a detachment of twenty men, twelve of whom would constitute the firing squad. Furthermore, gendarmes would be responsible for collecting condemned prisoners from their cells and maintaining order during the event. Developments in Liège show that military prosecutors began contacting local Gendarmerie units regarding the directives as early as 21 November.[17]

Because it mobilized large numbers of uniformed men who played a highly visible role, the Gendarmerie essentially came to personify the execution of justice and the authority of the state. By contrast, only a military prosecutor was on hand to visibly represent the

[11] Confidential note from the Minister of Defense concerning executions, 6 November 1944, 'Exécutions capitales,' Archives de la gendarmerie, AGR, Brussels (hereafter cited as 'Exécutions capitales').
[12] Note no. 1468/3 from the General Staff to units, 6 November 1944, 'Notes du corps,' AGR, Archives de la gendarmerie et de la police fédérale, Centre de documentation de la police fédérale, Brussels. See 'Exécutions capitales.'
[13] Note no. 1469/3 to the Minister of Defense, 6 November 1944.
[14] It must be noticed that the 2 first executions already occurred in Brussels on 13 November, with gendarmes acting as firing squad, probably in a grey zone.
[15] Memorandum no. 1003 A/1 from the Chief Military Prosecutor, 17 November 1944, 'Archives François Debroux,' AA 1848, no. 43, CEGES, Brussels.
[16] Memorandum no. 1004 A/1 from the Chief Military Prosecutor, 20 November 1944, 'Archives François Debroux,' AA 1848, no. 44, CEGES, Brussels.
[17] Note no. 60/P350-33 from the Office of the Military Prosecutor in Liège to the Commander of the Gendarmerie, 21 November 1944, 'Exécutions capitales.'

military justice system. Assisted by his clerk, he would read the sentence aloud before the shots were fired. In fact, both physically and symbolically, the presence of a military prosecutor was crucial to the entire process. But whereas its role had traditionally been peripheral, the Gendarmerie became the central player in the execution of condemned prisoners during the fall of 1944.

3 Gendarmes and Firing Squads: From Forced Acceptance to Clear Opposition?

In the medium term, although the Gendarmerie accepted its new role, it did so reluctantly. Concerned about the impact of executions on morale and what they could mean for the social integration of his men, the force's commander kept repeating his view that this legal aberration was merely a temporary measure. And as the Gendarmerie's reorganization process continued, he argued for relieving gendarmes of their responsibility for carrying out executions. When General Dethise took over command of the force in August 1945, he submitted a first emphatic request for the Gendarmerie to be relieved of this mission. If executions could not be carried out by the army, he proposed a more innovative approach involving 'professional executioners who would use special equipment, such as an "electric chair", or any other suitable and practical means more modern than shooting'. [18] Not having received a response, he made another attempt a month later, explaining how, 'now that many army units have been established and trained, the "major threat to morale" associated with "using firing squads composed of young Belgian army recruits in training", raised when the Gendarmerie was first given responsibility for executions, is no longer present'. [19] Steadfast in the face of another round of silence from the Defense Minister, General Dethise made a third appeal in March 1946.

The minister's initial response to this third request was to partially acquiesce, deciding that from then on, members of the military would be executed by members of the military, whereas civilians and gendarmes would be executed by gendarmes. [20] But in the face of Ganshof's renewed opposition to seeing army personnel replace gendarmes in firing squads—the foundation of efforts to punish collaborators[21]—he changed his

[18] General Dethise to Minister of Defense, 3 August 1945, 'Cabinet du ministre' (M5 1946), SGRS-archives, Evere.

[19] General Dethise to Minister of Defense, 12 September 1945, 'Cabinet du ministre' (M5 1946), SGRS-archives, Evere.

[20] It is important to note that in postwar Belgium, no gendarmes were executed for acts of collaboration, in contrast to countries such as France and the Netherlands.

[21] 'In reality, the Gendarmerie has essentially been called upon to administer judicial punishment, and the public, which greatly appreciate the force's sense of discipline, will in no way be surprised to see it entrusted with a task that is in keeping with this mission.' Chief Military Prosecutor to Minister of Defense, 19 March 1946, 'Cabinet du ministre' (M5 1946), SGRS-archives, Evere. A handwritten note on a document inviting participants to a meeting on the practical implementation of this potential new approach specifies that 'the Chief Military Prosecutor will be consulted but as of now it appears that the army does not have the required number of trained troops available in Belgium'. Might this note have served as a pretext for the minister's about-face? Note to General Dethise, 8 March 1946, 'Exécutions capitales'.

mind.[22] In June 1948, the new head of the Gendarmerie addressed the issue for a fourth time, focusing on the 'regret' expressed by some of his subordinates at having to carry out this responsibility (and especially having to deliver *coups de grâce*). He once again pointed out the extralegal nature of the assignment, emphasizing the risk of not finding enough firing squad volunteers among his gendarmes and needing to make compulsory appointments.[23] However, as he repeated these arguments, his tone was becoming less assertive.

Until the final execution was carried out in 1950, firing squads continued to be made up exclusively of gendarmes, despite other types of objections being made. For instance, the corporative press echoed the concerns expressed by the hierarchy:

Must we continue to degrade the handsome uniform of the Gendarmerie? The force's members have been called upon to provide escorts for the royal family, in addition to honor guards. On such occasions, gendarmes and their officers have donned gleaming ceremonial attire. When they dismount, should these same gendarmes be made to set aside their regalia and legendary fur hats in favor of an executioner's robes? Who could possibly come up with such an absurd and legally questionable idea? [24]

The matter tended to revolve around the question of whether enough volunteers could be recruited. Accordingly, it provides insight into not only the relationship between the Gendarmerie, the Defense Ministry, and the military justice system, but also that between the different components of the Gendarmerie itself. It also highlights how the circumstances and attitudes of gendarmes varied from one region to the next. Over the course of 1947 and 1948, the issue was addressed in administrative correspondence between individual Gendarmerie units and the General Staff. These documents reveal the peculiar position occupied by the force's commander, who was torn between the need to acknowledge his men's complaints, which he saw as being aligned with the best interests of the force as a whole, and the need to maintain respect for the chain of command.

In fact, the sources paint a mixed picture. Some regions reported having enough volunteers to carry out a single execution but not multiple ones. Elsewhere, finding enough volunteers appeared to be a more general problem. In Flanders, a junior officer blamed the lack of volunteers on executions being scheduled at dawn: his men were simply not interested in having to get up (so) early. Elsewhere, officers pointed to the 'normalization' of executions, whose growing lack of 'novelty' meant a growing lack of interest

[22] Defense Minister to Chief Military Prosecutor, 12 April 1946, 'Cabinet du ministre' (M5 1946), SGRS-archives, Evere. It should be remembered that there were various other issues capable of straining relations between Ganshof, the Gendarmerie and the Defense Minister. Meanwhile, in January 1945, Ganshof threatened to resign as High Commissioner for State Security. On these tensions and threats, see the High Commissioner's archives, especially file 659, at the AGR.

[23] Draft of a letter from Leroy to the Defense Minister, June 1948, 'Exécutions capitales'.

[24] Interestingly, the article closes with a (somewhat false) comparison to French and Dutch gendarmes, whom the text claims were spared from playing any direct role in executions; 'La mort par les armes', *Bulletin mensuel de la Fraternelle de gendarmerie* 68 (March 1948) 10,11.

among gendarmes.[25] Other junior officers took the opportunity to argue that the Gendarmerie should no longer be the only branch of the armed forces responsible for manning firing squads.[26]

In these exchanges, the Commander of the Gendarmerie sometimes rebuked his officers for their overly strong objections to delivering *coups de grâce*—a task volunteer gendarmes were apparently not required to perform, and that was sometimes described as we have already seen, as 'dirty work'. [27] But although he could be quick to censure his subordinates, the force's commander also selectively drew on this feedback from the field to strengthen his own arguments to the Chief Military Prosecutor and Defense Minister, as in the case of the missive sent in June 1948 (see above).

4 Justice and the Public Sphere

Looking beyond the question of how executioners were selected, there was a second source of conflict between the Gendarmerie and Ganshof. It concerned how the location, the conduct, and public awareness of executions influenced the capacity for achieving the fundamental aims of meting out exemplary punishment, restoring state authority, and maintaining public order. The Chief Military Prosecutor adopted a hands-on approach as soon as executions began, actively seeking to resolve various organizational issues brought to his attention. This involved considering diverse local experiences to identify best and worst practices. He considered the speed with which executions were carried out to be of primary importance, going so far as to share 'tricks' designed to ensure death came quickly. Leaving nothing to chance, Ganshof carefully noted the interest generated when coffins were stored near an execution site, as well as the advantage of assigning two carpenters per coffin when nailing the latter shut. And he maintained this level of supervision. In 1946, he expressed concern about how some condemned prisoners were being transported to execution sites, highlighting the potential for escape in cases where gendarmes failed to secure the vehicles used.[28]

The underlying message was clear: for the sake of legitimacy, justice had to be delivered under the best possible conditions.[29] There was no room for improvisation. The atmosphere was meant to be solemn, thereby underscoring the crucial role of executions in rebuilding Belgian society. As with executions conducted under ordinary law, careful ritualization was designed to foster a return to social harmony. Carrying out the punishment had a patriotic aim, namely that of uniting all Belgians in the elimination of a threat to their security. But in seeking to restore its authority, the state took the opportunity to

[25] Note on executions, [May 1948] 'Exécutions capitales'.
[26] Note no. 314/01 from the Commander of the 1st Squadron of the 4th Mobile Division, 16 April 1948, 'Exécutions capitales'.
[27] Reply from the Commander of the Gendarmerie to the Commander of the Liège-Luxembourg Region, 23 April 1948, 'Exécutions capitales'.
[28] Note from the General Staff, December 1948, 'Exécutions capitales'.
[29] File on execution sites in Brussels, A/1-4, 'Instructions générales'.

reassert its monopoly on the legitimate exercise of justice. Accordingly, the process could not be allowed to descend into tragicomedy.

The public nature of executions[30] proved to be one of the most discussed issues, giving rise to new tensions. In his memorandum of 20 November 1944, Ganshof recommended adopting a 'strictly legal' approach to managing public awareness of capital punishment, with a view to resisting any pressure to transform the events into spectacles, 'in the vulgar sense of the word'. Ganshof's views are in the strict continuity of the end of the 19th Century practices.

Ganshof gave strict instructions for keeping details of an execution secret for as long as possible. Also, the public was to be prevented from entering the site until 'the arrival of the police wagon' or until 'the Gendarmerie detachment goes to collect the condemned prisoner from his cell'. Finally, the crowd was to be restricted to a small area that was well supervised by gendarmes.[31] During November 1944, the force was tasked with identifying sites that met these selection criteria.[32] In Jumet, in the province of Hainaut, the most suitable location was at the back of the Gendarmerie barracks. The situation was different in Charleroi, where the fact that Belgian patriots had been shot by German forces in the city's jails and barracks ruled out these sites. However, one gendarme suggested that the grounds of a château might be suitable because they were 'isolated'. In Brussels, the courtyard of the Saint-Gilles Prison was quickly organized for the purpose.[33]

Over the longer term, new difficulties emerged. Some issues were of a purely practical nature, such as the nearby presence of unexploded ordnance or the challenge of providing adequate lighting for executions carried out at dawn. At other times, security concerns led to changes. In mid-1945, the warden of the Saint-Gilles Prison in Brussels requested that executions no longer be carried out within the institution's walls. He feared that the presence of firing squads would spark disorder among the inmates, stressing the need for 'humanity' in justifying his point of view. Although the Chief Military Prosecutor did seek out an alternate location, none could be found. Only private spaces, whose future was uncertain, were available. There was a real risk of such locations becoming pilgrimage sites, tourist destinations, or venues for political gatherings by those with

[30] A provision of Article 9 of the Penal Code. Although, the Article didn't change, the public character of executions was discussed during the 19th century. About the 'depublicization' of death Penalty along the 19th century, see Jérôme De Brouwer, 'Répondre aux exigences de l'ordre et de la moralité publique ? La dépublicisation de l'exécution capitale (Belgique, 19e siècle)', *Annales de droit de Louvain*, 2 (2011) 97.

[31] In some cases, this led to complaints from the public. For instance, a report on an execution carried out in 1945 noted that the area reserved for some 200 observers 'provided a very poor view of the proceedings; most of those present expressed strong disappointment or dissatisfaction'. Note no. 725/1 from Captain-Commandant Engels to the Commander of the Brussels Territorial Division, 22 March 1945, 'Exécutions capitales'.

[32] The relevant file, 'Exécutions capitales', contains the reports submitted from the field.

[33] File on execution sites in Brussels, A/1-4, 'Instructions générales'.

nostalgic views of collaboration.[34] Clearly, far from fostering social cohesion, executions that were not properly managed could easily work against it. Faced with this risk, the military justice system once again turned to the Gendarmerie. Might its barracks be available?

Not unexpectedly, those responsible for the force were rather ambivalent to the idea. Above all, the hierarchy sought to avoid exposing the many young recruits in the capital to such a 'spectacle', fearing they might be 'swayed one way or the other'. As for Chief Military Prosecutor, he failed to see the problem. Recruits would simply need to be sent away for off-site military exercises on days when executions were held at the barracks. But the Gendarmerie was not so easily swayed. One officer shared his view that the buildings in question failed to meet 'protocol'. He pointed out that the barracks were easily accessible, and therefore 'have the drawback that they are not hidden from public view'. This officer also emphasized that 'the Wiertz Quarters occupy a building destined to become a natural history museum that Brussels schoolchildren will visit for classes'. Given these facts, he firmly insisted that 'one does not execute prisoners in quarters housing more than 500 recruits and closely surrounded by civilian homes.'[35] The Gendarmerie subsequently attempted to change the conversation entirely by proposing that British forces make some of their barracks available.[36] For a time, the status quo prevailed. However, the issue reared its head again in early 1946. The Gendarmerie relented and, in February, the Chief Military Prosecutor informed the military prosecutor concerned that executions would begin taking place at the Ixelles Barracks. He ordered that this new situation be taken into account when drafting judgments.[37]

Meanwhile, the situation in Brussels reflected a broader phenomenon. Over time, despite the reluctance of the force's officers and men, the Gendarmerie barracks came to be seen as the ideal location for carrying out executions, given the ease of limiting access and confining the public to an assigned area. Indeed, these buildings could be closely and easily monitored, not only on the day of execution but in the future as well. By late January 1948, firing squads were operating to Gendarmerie barracks in Ixelles, Turnhout, Ypres, Charleroi, and elsewhere.[38]

Debates on public perceptions of executions also addressed the actions of gendarmes. To begin with, judicial authorities lamented the leaks and problems that occurred on several occasions. They blamed firing squad members, whose tips to the press supposedly gave

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[34] Military Prosecutor Paes to Gendarmerie Major Bernier on execution sites, 18 May 1945, A/1-4, 'Instructions générales'.
[35] Report from Captain-Commandant Hallaux on execution sites, 29 May 1945, A/1-4, 'Instructions générales'.
[36] Military Prosecutor Paes to the Chief Military Prosecutor on execution sites, 22 June 1945, A/1-4 'Instructions générales'.
[37] Chief Military Prosecutor to the Military Courts on execution sites, 22 February 1946, A/1-4, 'Instructions générales'.
[38] Inspection report from *maréchal-des-logis* Schiettecatte on execution sites, 30 January 1948, A/1-4, 'Instructions générales'.

journalists an opportunity to report on executions or take photos (1948).[39] Furthermore, gendarmes were sometimes criticized for their behavior during and after executions. Take the article published by a defense attorney in a 1949 edition of the *Journal des Tribunaux*.[40] The author condemned the attitude of a group of gendarmes accused of examining an executed prisoner's body and loudly commenting on its state. Although the case worked its way up the chain of command of both the Gendarmerie and the military justice system, no action was taken[41]. Nevertheless, this affair serves to highlight the delicate position in which postwar executions placed the Belgian Gendarmerie: as an institution, it bore the brunt of any blowback from these events. Gendarmes found themselves simultaneously instrumentalized and scrutinized, and at the heart of debates on decisions over which they often had little control.

5 Conclusion

The conduct of executions—that ultimate form of military justice—in liberated Belgium reflected issues that cut across society as a whole. Granted, capital punishment was carried out within a strict legal framework. Nevertheless, it sometimes required an innovative approach, set by the Chief Military Prosecutor and imposed on the Defense Minister and the Gendarmerie. Indeed, the latter found itself, through no choice of its own, playing a central role. Amid efforts to 'purify' Belgian society, the circumstances under which collaborators were executed illustrate how the justice system—through its efforts to promote social cohesion and punish those who violated social norms—variously ensured public order and security, supported military renewal, and affirmed the authority of the state. However, preparations for carrying out executions led to a clash of institutional logics and political dynamics involving groups and individuals with public responsibilities.

Although the Gendarmerie initially accepted the situation as a temporary necessity, the force was nevertheless reluctant to take on its new and burdensome responsibilities. And although its objections became increasingly loud, they largely fell on deaf ears. To begin with, in a democratic society where most of their police work involved close contact with the population, ordinary gendarmes were uncomfortable with being the only ones assigned to carry out executions. Meanwhile, from an institutional perspective, commanders found themselves caught between a desire to maintain morale in the force and the need to enforce internal discipline. Finally, the Gendarmerie was conscious of operating in a legal gray area, one that amplified and prolonged the underlying crisis sparked by the war and based on the relationship between legality and legitimacy in the exercise of the force's official duties.

[39] Note no. 1214/3 from the General Staff, 24 April 1948, and note from the Military Prosecutor of Mons, 28 June 1948, 'Exécutions capitales'.

[40] Copy of an article titled 'Les exécutions capitales', June 1949, Archives de la gendarmerie, AGR, Brussels.

[41] File on executions carried out in Liège during June 1949, 'Exécutions capitales'.

HIGH TREASON, POLITICAL MEDDLING, AND THE POST-WAR HUNT FOR SOUTH-AFRICAN TRAITORS AND COLLABORATORS (1945-1948)

By Evert Kleynhans[*]

Abstract

The post-war hunt for known South African war criminals, as well as those who committed treasonable acts by assisting the Axis war effort, remains largely undocumented. However, this historiographical gap does not mean that South Africa did nothing to prosecute and punish those responsible for war crimes and treason. From 1945 the Union Defence Force (UDF), along with the Departments of External Affairs and Justice, made a concerted effort to determine South Africa's exact position regarding the prosecution of wartime offences. In due course the Rein and Barrett missions were established, which collectively formed the Union War Prosecutions Section. These missions scoured post-war Europe to interview suspects and collect as much evidence as possible with the view of charging the known South African war criminals and collaborators. These investigations, one civilian and the other distinctly military in nature, ultimately met with varying degrees of success. This article specifically explores the nature, extent and effectiveness of the post-war investigations conducted by the Barrett Mission to build a treason case against Hans van Rensburg and members of the Ossewabrandwag.

1 Introduction

During the Second World War, the Union of South Africa became the target of German espionage activities. The German Foreign Office and the *Abwehr* (military intelligence service) in particular realised that well-placed agents could provide Berlin with sought-after naval intelligence from South Africa. These spies could also collect and transmit political intelligence on the internal situation within the Union. However, such an undertaking could only be successful if the German agents collaborated with one of the local opposition movements. As a result, the German government reached out to the main South African opposition party, the National Party, and to the *Ossewabrandwag* (Ox-Wagon Sentinels) – a militant and vehemently anti-British, Afrikaner cultural movement. A number of German agents operated in South Africa from 1940-1944 with varying degrees of success. The counterintelligence operations of the British and South Africans, however, soon picked up on the illicit espionage activities, and through signals intelligence and the deciphering of coded messages managed to obtain an accurate picture of the extent of the German intelligence activities in the Union. They were also able to pin the leader of the *Ossewabrandwag*, Hans van Rensburg, and his inner circle, as the main

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culprits providing the German agents with political and military intelligence and support during the war.[1]

By May 1945, however, there was an interesting turn of events within the Union. Harry Lawrence, the minister of justice, had contacted the British intelligence services and requested them to disclose all available information on Van Rensburg and his known associations with Germany before and during the war.[2] In hindsight, this very move signalled the start of a determined drive by the Smuts government to collect all possible evidence of treasonable wartime activities committed by Van Rensburg and his inner circle. Moreover, in due course, this move coincided with the determined move from the Allied powers to prosecute and punish the major war criminals of the Second World War after the end of hostilities in Europe in 1945.[3]

While the post-war drive to arraign known Union war criminals, traitors and collaborators remains largely undocumented in the South African historiography, this does not mean that South Africa did nothing to prosecute and punish these individuals. On the contrary, as early as November 1945, there were discussions in Pretoria, South Africa, about amending the mandate of the South African Search Officers then deployed in Germany. With an amended mandate, these officers could assist the Union government in collecting evidence and interrogating South Africans abroad who had willingly collaborated with the enemy.

Given that Van Rensburg and the inner circle of the *Ossewabrandwag* had acted as a nodal point for German agents operating in wartime South Africa, they were a major focus of the subsequent Rein and Barrett missions. These missions would collectively build up case files against all suspected South African war criminals, collaborators, and traitors. Their investigators would also scour post-war Europe with the view of interviewing all possible suspects and accomplices, and to collect as much documentary and oral evidence as possible.

Unfortunately, this episode of South African history has been largely neglected. The gap in the historiography persists, despite the existence of a wealth of primary archival material available in South Africa and the United Kingdom. One reason for this state of affairs is the fact that the final Barrett Report, which detailed the post-war hunt for South African traitors and collaborators at length, was basically removed from public circulation during 1948. Apparently, the documentary evidence, and all subsequent copies of the report, were handed to the then State Archivist, but with the passage of time these documents appear to have 'disappeared'. Repeated attempts to locate the Barrett Report and its substantiating documentation at the National Archives and Records Service of

[1] For an in-depth discussion of the intelligence war in South Africa during the Second World War, see Evert Kleynhans, *Hitler's Spies: Secret agents and the intelligence war in South Africa* (Jonathan Ball 2021).
[2] The National Archives of the United Kingdom (hereafter TNA), KV3/10. German Espionage in South Africa, 1939–1945. *German intelligence activities in South Africa during the Second World War*.
[3] National Archives and Records Service of South Africa (hereafter SANA), JUS, Box 1621. File – Part 2. *Agreement for the prosecution and punishment of the major war criminals, 31 Oct 1945*.

South Africa in Pretoria have proved totally unsuccessful.[4] This partly explains the evident gap in the historiography.

However, several secondary sources refer to the matter only in passing, or remain silent altogether, the most notable works being those of Van Rensburg[5], Piet van der Schyff[6], DF Malan[7], HB Thom[8], and Christoph Marx.[9] The 1976 publication of George Visser's *OB: Traitors or Patriots?*[10] provides a counterpoint. He was the only individual who was intimately involved in the post-war investigations that recorded the events in writing. Visser's book, despite being historically accurate, obviously did not go down well with the old guard of the *Ossewabrandwag*, and thus received stern criticism.

The article considers the nature, extent and effectiveness of the post-war investigations conducted by the Barrett Mission to build a treason case against Van Rensburg and members of the *Ossewabrandwag*. It does so through the recourse to the documentary evidence of the Union War Prosecutions Section preserved at the National Archives and Records Service of South Africa, and through the fortuitous location of a 'lost' copy of the Barrett Report at the Archive for Contemporary Affairs, housed at the University of the Free State in Bloemfontein. In doing so, this article addresses an evident gap in the South African historiography.

2 The Rein Mission

By the end of December 1945, the UDF, along with the Departments of External Affairs and Justice, attempted to determine the Union's exact position vis-à-vis the prosecution of wartime offences committed by South African ex-prisoners of war, Union nationals and enemy war criminals. For offences committed by ex-prisoners of war, as well as for South African nationals who had committed acts of high treason, the Department of Justice would assume overall responsibility for the investigations. All such cases would also be referred to special civilian courts. All other charges against former prisoners of war and enemy war criminals would be dealt with by the UDF.[11]

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[4] Kleynhans (n 1) 215-216.

[5] Hans van Rensburg, *Their Paths Crossed Mine: Memoirs of the Commandant-General of the Ossewa-Brandwag* (Central News Agency 1956).

[6] Piet van der Schyff, *Die Ossewa-Brandwag en die Tweede Wêreldoorlog* (PU vir CHO, 1983); Piet van der Schyff, Geskiedenis van die Ossewa-Brandwag (PU vir CHO, 1984).

[7] Daniël François Malan, *Afrikaner Volkseenheid en my Ervarings op die Pad Daarheen* (Nasionale Boekhandel, 1959).

[8] Hendrik Bernardus Thom, *DF Malan* (Tafelberg, 1980).

[9] Christoph Marx, *Oxwagon Sentinel: Radical Afrikaner Nationalism and the History of the Ossewabrandwag* (Unisa Press, 2008).

[10] George Visser, *OB: Traitors or Patriots?* (Macmillan, 1976).

[11] SANA, JUS, Box 1621. File – Part 2. DCS (DMI) Memorandum on discussion over the prosecution of varying classes of South African wartime offenders, 18 Dec 1945.

By February 1946 the Rein Mission had been appointed to travel to Europe and start the process of gathering documentary and oral evidence relating to treasonable acts committed by South Africans. The mission, formed at the behest of the Department of External Affairs, was headed by Rudolph Rein, a lawyer, and the professional assistant to the attorney general of the then Transvaal. For the purpose of his new assignment, Rein was awarded the temporary rank of colonel. Captain Stonewall (Bushy) Jackson, a detective chief constable serving in the South African Police (SAP), joined the mission as a special investigator.[12]

After arriving in Britain during the first week of February, Rein and Jackson entered into lengthy discussions about their forthcoming task with the British Security Service (MI5). They also met the members of a special section of the British Foreign Office that was examining the archives of the German Foreign Ministry. These preliminary meetings gave Rein and Jackson access to much documentary evidence that had a bearing on the cases that they would focus on. Copies of this documentary evidence were forwarded to the Union in due course.

However, in due course the Rein Mission realised that they were not authorised to detain any Union nationals in Europe suspected of wartime collaboration and treason. They were further hampered by their lack of capacity to prepare the required evidence for eventual prosecution in South Africa, and thus requested the Department of Justice to intervene and dispatch suitably qualified personnel.[13] While the scope of the Rein Mission was particularly wide, the focus of this article is exclusively on the treason case that was built against Van Rensburg and his co-conspirators.

The Rein Mission arrived in Germany by mid-February to begin their investigations. They were aided by the fact that a substantial amount of documentary evidence from across Germany had been made available at the Anglo-American Documentary Exhibition Hall in Berlin for examination by various interested parties. Between March and April, Rein and Jackson collected a wealth of incriminating evidence from the Anglo-American Documentary Exhibition Hall, as well as from a nearby pulp mill and a salt mine near Helmstedt, in Lower Saxony. From the material collected, several key documents came to light, which were catalogued and microfilmed. In total, around 700 doc-

[12] SANA, JUS, Box 1621. File – Part 2. Memorandum from Secretary of Justice to Commissioner of South African Police, 31 Dec 1945; SANA, JUS, Box 1621. File – Part 2. Telegram from High Commissioner, London, to Secretary for External Affairs, Cape Town, 2 Feb 1946.

[13] SANA, JUS, Box 1621. File – Part 2. Telegram from High Commissioner, London, to Secretary for External Affairs, Cape Town, 2 Feb 1946; SANA, JUS, Box 1621. File – Part 2. Telegram Political Secretary South Africa House, London, to Secretary for External Affairs, Cape Town, 15 Feb 1946; SANA, JUS, Box 1621. File – Part 2. Letter from Secretary for External Affairs, Cape Town, to Secretary for Justice, Cape Town, 6 March 1946.

uments relating to the treasonable activities committed by Van Rensburg, the *Ossewabrandwag* and other Union nationals were retrieved.[14] Some months later, Lawrence Barrett, a deputy attorney-general, commented on the significance of their findings:

> Seven hundred documents were discovered in Germany dealing not only with cables received from Lourenço Marques which are of the utmost value if it ever came to a prosecution against the [Ossewabrandwag], together with other political matters of interest to South Africa. Naturally we cannot undertake any thorough investigation into [Ossewabrandwag] matters until these documents, which are in German, are translated.[15]

Following the discovery of overwhelming documentary and oral evidence in Germany, the Union government had to determine a suitable way forward. In a secret report dated 19 March, which was presented at a meeting chaired by Lawrence, the minister of justice at the time, the government was advised whether prosecutions relating to high treason could be instituted against Union nationals. With specific reference to the possible case being built against Van Rensburg and his co-conspirators, the report stated:

> I have dealt with papers, including statements, containing matter which, it is suggested, would furnish a basis for cases of High Treason against certain well-known civilian persons in South Africa. The only individual against whom there is a possible case at present is Dr [Hans] Van Rensburg. In his case [these] allegations amount to suggestions of communicating from the Union with the enemy in Germany. It is very doubtful as the matter stands at present whether this evidence can be classed as reliable. In any event it would have to be considerably amplified and strengthened before there could be any hope of a successful prosecution for High Treason.[16]

A further substantiating report was submitted to Lawrence by GC Jarvis, the then assistant law adviser in the Cape, at the end of April. He stressed the following points regarding the possible charges that could be brought against Van Rensburg and others:

> I wish to emphasise that witnesses like [German agent Walter] Kraizizek, [German agent Hans] Masser and [consul general Luitpold] Werz (said to be detained in the United Kingdom) must be interviewed personally, to ascertain whether they are credible and reliable and whether their combined stories provide the necessary proof of overt acts of High Treason.

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[14] Visser (n 10) 178; For some of the documentary evidence that was collected, see for instance: SANA, JUS, Box 1621. File – Part 2. Notes for the Reichsminister for Foreign Affairs, 22 Nov 1940; SANA, JUS, Box 1621. File – Part 2. Notes for the Herr Reichsminister for Foreign Affairs, 29 Mar 1940; SANA, JUS, Box 1621. File – Part 2. Excerpt from the report by Herr Hans Denk on his journey to South Africa, undated.

[15] SANA, JUS, Box 1622. File – Appendix. Letter from Law Officer Union War Prosecutions to Maj Du Plooy, South African Police, 29 Jul 1946.

[16] SANA, JUS, Box 1621. File – Part 2. Secret report on cases of High Treason, 19 Mar 1946.

> I have above referred to the necessity for the personal interrogation of certain witnesses by Mr Barrett. In this connection, I recommend strongly that Mr Barrett be flown to England for that purpose. I would point out that a further very useful purpose to be achieved by such a visit would be a discussion with the members of the Rein Mission before their return to England. By this means, Mr Barrett could ascertain from Colonel Rein and Captain Jackson exactly what evidence has been collected by them. With his knowledge of the files here, he could assess the strength of the individual cases and, while in the United Kingdom, take steps to fill any important gaps.
>
> [M]ay I venture to stress the importance of leaving no stone unturned to build up good genuine cases, if it is the policy of the Government to ensure that those who have been proved to be traitors to their country shall not go unpunished.[17]

Prior to drafting this report, Jarvis and Barrett had perused the available documentary evidence against Van Rensburg and other *Ossewabrandwag* members. However, they were fully aware of the fact that it would be necessary to prove, through confessions, the testimony of German secret agents or other documentary sources, that Van Rensburg and his inner circle had indeed:

> [taken] part in the despatch from the Union of information which was calculated to assist the enemy in the prosecution of the war or assisted such agents in their espionage work or communicated directly to such agents or to Germany such information.[18]

Jarvis and Barrett subsequently drafted a further report based on information taken from the MI5 interrogation reports of Werz, Masser and Kraizizek, forwarded to them by Rein from Germany.[19] They also had access to a rather extraordinary statement made to the SAP by Hans Rooseboom – a known German spy that operated in the Union.[20] Hereafter, Jarvis and Barrett were able to draft detailed breakdowns of each individual interrogation report, with the aim of indicating the extent to which Van Rensburg and his associates were implicated in wartime treason. The evidence was quite damning, since Van Rensburg's name surfaced several times throughout the various interrogation reports. Their report also stressed that experienced and efficient officers, such as those who had handled the high treason case of Robey Leibbrandt in 1943, [21] needed to travel to Europe

[17] SANA, JUS, Box 1621. File – Part 2. Secret report on cases of High Treason, 26 Apr 1946.
[18] SANA, JUS, Box 1621. File – Part 2. Case against Dr Van Rensburg, Adv Jerling and other OB Leaders and Members, 26 Apr 1946.
[19] For more information on Werz, Masser and Kraizizek, see Evert Kleynhans (n 1) 54-56, 177-178.
[20] Evert Kleynhans, 'The Rooseboom operation: uncovering the embryonic German intelligence network in South Africa, 1940-1942' [2022] *Intelligence and National Security* 38-56.
[21] For an more recent in-depth discussion on Robey Leibbrandt, see Albert Blake, *Robey Leibbrandt: 'n Lewe van fanatiesme* (Jonathan Ball, 2019).

to further interrogate Werz, Masser and Kraizizek.[22] The release of this third report ultimately led to the establishment of the Barrett Mission.

3 The Barrett Mission

During May 1946, the commissioner of the SAP, Major General Robert Palmer, summoned George Visser, a member of the special branch, to report to his headquarters in Pretoria. Upon his arrival, Visser was detached to a section headed by Major Hendrik du Plooy, where he was employed on special duties in collaboration with Barrett. From here on out, Barrett and Visser would comprise the so-called Barrett Mission. As part of their preliminary investigations into Van Rensburg, Barrett and Visser worked through several documents detailing the alleged wartime subversive activities of South African nationals. This grouping included radio broadcasters, stool pigeons and even members of the British Free Corps – a unit of the infamous *Waffen SS*.[23] They were also privy to the interrogation reports of Werz, Masser, and Kraizizek. Several other MI5 case files further confirmed the close wartime contact between Van Rensburg, the *Ossewabrandwag* and a number of German agents. However, after a careful study of the documents, Barrett and Visser concluded that the officers who had initially interrogated the afore-mentioned Germans had little to no working knowledge of the *Ossewabrandwag*. Therefore, the Germans had shied away from implicating Van Rensburg and the *Ossewabrandwag* altogether. In due course, they compiled a detailed list of matters that needed to be cleared up in any future interrogations.[24]

In mid-May, and following their examination of the available documentary evidence, Barrett submitted a detailed report to the office of the attorney general regarding the allegations of treason against Van Rensburg and other *Ossewabrandwag* members. His report provided the first real insights of the possible allegations that might be levelled against Van Rensburg and his associates:

> The allegations against Dr Van Rensburg appear to be, in general, that he assisted the enemies of the King. The assistance given took, broadly speaking, three forms:
>
> (1) Transmitting information of a military value to the enemy or assisting German agents to so transmit;
> (2) Assisting German escapees to evade recapture or to cross into Portuguese East Africa;
> (3) Harbouring German agents.

[22] SANA, JUS, Box 1621. File – Part 2. Case against Dr Van Rensburg, Adv Jerling and other OB Leaders and Members, 26 Apr 1946.
[23] Visser (n 10) 176–177.
[24] ibid. See also SANA, JUS, Box 1621. File – Part 2. Case against Dr Van Rensburg, Adv Jerling and other OB Leaders and Members, 26 Apr 1946.

> It will immediately be seen that, if the Honourable Minister desires a prosecution there is a vast field for investigation. The allegations, if true, reveal treachery of a wicked, base and heinous nature.[25]

In the conclusion of the report, Barrett further emphasised the most important matters that needed further detailed investigation:

> The interrogation of Werz, Masser and Kraizizek are in narrative form and considerable further interrogation is necessary on vital points, such as the two messages on Leica films conveyed to Werz by Rokkebrandt and Kraizizek respectively, and the question of the various transmissions either at the express instigation of Van Rensburg or with his knowledge, connivance and consent.
>
> Masser and Kraizizek must also be asked to explain the nature of the codes found in their possession and in whose handwriting [they] are. In addition it must be ascertained whether Werz, Masser and Kraizizek are willing to give evidence and if so an impression must be formed of the quality and credibility of these witnesses. Then again there is a great number of [other] witnesses to be interviewed and interrogated. In the foreground stand names such as Sittig, Pasche, Rooseboom … and many others.[26]

In June 1946, Barrett and Visser met with Lawrence, who informed them that the prime minister, Jan Smuts, had authorised a detailed investigation into the allegations of wartime treason committed by Union nationals. The Barrett Mission, however, faced a daunting task. Lawrence subsequently ordered them to travel to Europe and to gather further evidence relating to the allegations of treason. Barrett and Visser hence comprised the embryonic Union War Prosecutions section, with Barrett acting as law officer and Visser as special investigator.[27]

As part of their briefing, Barrett and Visser were ordered to liaise and cooperate with the Rein Mission since their tasks were broadly similar, yet quite distinct. With the assistance of British and American investigators, the Rein and Barrett missions would eventually collect a wealth of documentary evidence between them, detailing the wartime subversive activities of Union nationals. The sensitive nature of the evidence collected, however, prompted Barrett to later on state: 'If true, they disclosed treason of a most flagitious nature.'[28]

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[25] SANA, JUS, Box 1621. File – Part 2. Letter from Attorney General to Secretary for Justice, 13 May 1946; SANA, JUS, Box 1621. File – Part 2. Report in connection with allegations against Dr Van Rensburg and other Ossewabrandwag Personnel, 13 May 1946.
[26] SANA, JUS, Box 1621. File – Part 2. Report in connection with allegations against Dr Van Rensburg and other Ossewabrandwag Personnel, 13 May 1946.
[27] SANA, JUS, Box 1621. File – Part 2. Telegram from High Commissioner, London, to Secretary for External Affairs, Cape Town, 21 May 1946; Visser (n 10) 177.
[28] Visser (n 10) 178.

By the end of June, the Barrett Mission had arrived in London. Once in Britain, Barrett and Visser met up with Rein and Jackson to determine the way forward. The Barrett Mission worked through a wealth of further documentary evidence recovered by the Rein Mission in Germany. After their initial meeting, Barrett and Visser were introduced to the various departments and agencies who they would cooperate with during their investigations – principally MI5, the Foreign Office and Scotland Yard.[29]

After an initial period in Britain, the Barrett Mission travelled to Germany. Once the Barrett Mission arrived at Gatow airport in Berlin on 22 August, they joined Rein and Jackson who had made certain administrative and accommodation arrangements for them. Once settled in their new surroundings, Rein introduced Barrett and Visser to the acting head of the Advanced Headquarters Intelligence Division in Berlin, as well as the head of the American Political Division, during which several official matters relating to the purpose of the Barrett Mission were discussed.[30] With the formal introductions out of the way, Barrett and Rein discussed the plan of action. From the outset, Rein argued that Barrett and Visser should establish their temporary headquarters in Frankfurt in the American zone, where most of the people they wanted to interrogate were located. However, it later transpired that the most important individuals who needed to be interrogated, especially Werz, Masser, and Kraizizek, were actually located further south near Munich.[31] After arriving in Munich on 1 September, Barrett and Visser established their field office and started arrangements for the questioning of the main German witnesses.[32]

On 4 September, the Barrett Mission interviewed their first key witness. Werz, the former mastermind of the German espionage network[33] that operated from Portuguese East Africa, was interrogated over a period of ten days. The result of his interrogation was an affidavit of nearly 50 pages long that provided key evidence on the nature and extent of Werz's contact with Van Rensburg and the *Ossewabrandwag* during the war.[34] Visser described the interrogation in some detail:

> Werz, typical of his race and training, volunteered little information but readily answered questions put to him when he well knew that I was in possession of documentary evidence and information that he could not deny. We went through German Foreign Office documents and he identified 370 as being copies of decoded telegraphic reports he had dispatched to Berlin. The Werz telegrams did not all relate to the Ossewabrandwag or Van Rensburg. Of all the documents we studied, only 32 were connected with or mentioned Van Rensburg and the Ossewabrandwag, He told me what the policy of his office was towards the antiwar factions in South Africa. He expressed the opinion that he had been against interference in the quarrels among the

[29] ibid.
[30] SANA, JUS, Box 1621. File – Part 3. Rein Mission Progress Report No 15, Aug/Sept 1946.
[31] ibid. For more on Elferink see Kleynhans (n 1) 144-145.
[32] ibid.
[33] For more on the Trompke Network, see Kleynhans (n 1) 55-56.
[34] SANA, JUS, Box 1621. File – Part 3. Letter from Law Officer Union War Prosecutions to the Secretary of Justice, Pretoria, 24 Sept 1946.

> antiwar groups … [but that the] German [Radio Zeesen], however, often followed a different line, probably influenced by South African members of its staff with strong personal sympathies for the Ossewabrandwag.
>
> It was quite clear from what Werz told me that he had never had any personal correspondence with Van Rensburg during the war, nor did he see or speak to him during that period. Thus he could not directly testify to any treasonable activities attributed to Van Rensburg. All communications reached him either through couriers purporting to come from the leader of the Ossewabrandwag or through the Felix transmissions.[35]

After taking stock of Werz's interrogation, Barrett and Visser were convinced that his affidavit held strong evidential value for the treason case being built against Van Rensburg. This was because it provided a hereto unrivalled account of the wartime German espionage activities in the Union. Moreover, Werz had supplied the Barrett Mission with detailed information on the nature of the political and military intelligence passing between South Africa, Lourenço Marques, and Germany. Werz's statement subsequently corroborated the documentary evidence examined by the Rein Mission earlier on.[36]

The next key witness to be interviewed was Kraizizek, who had been located at Civilian Internment Camp No 29 at Dachau. After the cessation of hostilities, Dachau was repurposed as a detention centre, where several senior Nazis were held for processing and interrogation by the Allied authorities.[37]

On 18 September, Visser started his interrogation of Kraizizek. He had decided to conduct the interview on his terms, and therefore only addressed Kraizizek in Afrikaans – since he was well aware that he understood Afrikaans and spoke it fluently. He also offered Kraizizek a South African cigarette and a slice of Springbok biltong. These gestures seemingly broke Kraizizek's reserve, and over the next three days he provided the Barrett Mission with a great amount of detail. He also swore to the accuracy of his statements before a judge of the war crimes branch of the American Third Army. Kraizizek provided a detailed account of his relationship with Van Rensburg. After the outbreak of the war, Kraizizek had been arrested and interned in the Union. He had been interned until April 1943, whereafter he escaped and made his way to Van Rensburg's farm near Pretoria. Here he received a welcome reception from Van Rensburg and his wife, where he remained for a few days.[38] Thereafter, Kraizizek was dispatched to Lourenço Marques to act as a courier between Van Rensburg and Werz:

> Van Rensburg then made arrangements for him to journey to the Mozambique border and, before he left, handed him two rolls of Leica film with instructions to hand them

[35] Visser (n 10) 180–181.
[36] SANA, JUS, Box 1621. File – Part 3. Letter from Law Officer Union War Prosecutions to the Secretary of Justice, Pretoria, 24 Sept 1946.
[37] Visser (n 10) 181–182.
[38] ibid 182–183.

> to Werz. Kraizizek made his way through Swaziland over the Lebombo Mountains to Ingwavuma, North Zululand, from where a state employee guided him further to the Kosi Bay area and then left him to make his own way to the border … Kraizizek had a tough time and nearly died of exhaustion and exposure, but he struggled on and managed to cross the Usutu River into Mozambique. He arrived at Lourenço Marques on 26 June.[39]

After Kraizizek had come forth with this information, Visser probed him even further about the Leica films handed to him by Van Rensburg. Unfortunately, Kraizizek could offer up no further information, apart from the fact that he confirmed the delivery of the films to Werz. Once more the Barrett Mission was fortunate, since the details of the messages conveyed via the Leica films were also found among the German Foreign Ministry documents collated by the Rein Mission.[40] Moreover, Kraizizek also indicated his willingness to return to South Africa and testify against Van Rensburg in person if required.[41]

After successfully interrogating Werz and Kraizizek, Barrett and Visser turned their attention to questioning further witnesses who could provide crucial evidence to the case against Van Rensburg and the *Ossewabrandwag*. The next witness to be interviewed was Paul Kolb, who had worked at the German consulate in Lourenço Marques during the war. Kolb was responsible in particular for the reception and decoding of the wireless transmissions sent by German agents in South Africa to Lourenço Marques.[42] During his interrogation, Kolb confirmed certain key facts relating to the case, and also his willingness to travel to the Union and act as a witness in the case against Van Rensburg if required.[43]

Thereafter, Masser was the next witness to be interviewed. After being expelled from Lourenço Marques in October 1944, Masser was forced to return to Germany. After the end of the war, he was interned in Civilian Internment Camp No 5, near Paderborn, for further questioning.[44] This is where the Barrett Mission found him. During his interrogation, Masser furnished Visser with some interesting material that directly implicated Van Rensburg in treason. He was cooperative throughout his interrogation and also perfectly willing to return to South Africa as a witness in any case that might be brought against Van Rensburg.[45]

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[39] Visser (n 10) 183.
[40] SANA, JUS, Box 1621. File – Part 2. Secret report on cases of High Treason, 19 Mar 1946.
[41] SANA, JUS, Box 1621. File – Part 3. Letter from Law Officer Union War Prosecutions to the Secretary of Justice, Pretoria, 24 Sept 1946.
[42] SANA, JUS, Box 1621. File – Part 3. Letter from Law Officer Union War Prosecutions to the Secretary of Justice, Pretoria, 5 Sept 1946.
[43] SANA, JUS, Box 1621. File – Part 3. Letter from Law Officer Union War Prosecutions to the Secretary of Justice, Pretoria, 24 Sept 1946.
[44] TNA, KV 2/941, Rooseboom, Hans. 43a – Copy of Interim Report on MASSER, Hans Hubert 26 Oct 1945.
[45] Visser (n 10) 184.

After they had wrapped up their scheduled interrogations in Germany, the Barrett Mission travelled to the Netherlands. They were particularly interested in questioning Lambertus Elferink, code name Hamlet, since the Union authorities were aware that he had undertaken large-scale wartime espionage activities in South Africa. Moreover, the preliminary investigation by the Rein Mission had confirmed that Elferink had been in close contact with Van Rensburg and his inner circle. Apparently, he had also smuggled key political and military intelligence from the Union to the Trompke Network in Lourenço Marques.[46]

On 5 October, Barrett and Visser interviewed Elferink at the Dutch security headquarters in Amsterdam. Visser spoke to Elferink in Afrikaans and informed him of the purpose of the interview. He also cautioned Elferink that if he refused to cooperate, the Barrett Mission would turn over all evidence on him to the Dutch authorities, who would then treat him as a war criminal. At first, Elferink was entirely uncooperative. However, when his interrogators produced overwhelming evidence that proved his complicity, Elferink simply 'smiled and shrugged his shoulders, saying he was not prepared to make any statement'.[47] Elferink's reply took Barrett and Visser by surprise, partly due to the fact that all of their previous interrogations had been largely successful:

> Hamlet heard me out politely and then said: "I don't care what happens to me, but I refuse to make any statement or say anything against Van Rensburg or any other person in South Africa who sheltered me. I will betray no one." That was that and the more I argued with him, the more stubborn he became. I left Holland a disappointed man because Hamlet was one of the most important witnesses in any case that I might build up against Van Rensburg.[48]

Once their principal investigations in Europe had been completed, the Barrett Mission returned to the Union towards the end of 1946. After the unsuccessful interrogation of Elferink, Barrett and Visser realised that it would be crucial to locate, arrest and interrogate Lothar Sittig, the main German spy in the Union during the war, in order to build a watertight case of treason against Van Rensburg and his inner circle.[49] However, Sittig was still at large at that time.

Shortly after their return to the Union, Barrett and Visser reported back to Du Plooy, the head of the SAP's special section investigating subversive matters. They provided him with a full debrief of their investigation thus far and planned the way forward. The men agreed that the location of Sittig was still a high priority. In due course, a special staff

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[46] SANA, JUS, Box 1621. File – Part 3. Letter from Law Officer Union War Prosecutions to the Secretary of Justice, Pretoria, 24 Sept 1946.
[47] SANA, JUS, Box 1621. File – Part 3. Letter from Law Officer Union War Prosecutions to the Secretary of Justice, Pretoria, 10 Oct 1946.
[48] Visser (n 10) 184.
[49] ibid 185.

was mobilised to track down Sittig and his known accomplices, whose location and arrest would prove crucial if the Union government wanted to charge Van Rensburg and his inner circle with treason.[50]

At the beginning of 1947 the British Royal Family toured South Africa. Unfortunately, the royal tour, for the meanwhile, halted the wide-scale treason investigations in the Union. This was mainly due to the fact that Smuts wanted to avoid any arrests, detentions or trials related to alleged wartime treason during the Royal Family's visit. However, once the royals had departed, there was a renewed drive to locate Sittig.[51]

While Barrett and Visser travelled to Portuguese East Africa to interrogate certain Germans who still resided there, and who had links with the Trompke Network, the search for Sittig went on.[52] Visser once more emphasised the importance of locating him; in fact, he regarded Sittig as 'Priority One':

> [W]ithout Hamlet to testify, he had to be located because of his close association with Van Rensburg. I knew that he could tell us a lot but also that efforts would be made to hide him and keep him out of our hands – and even, if need be, to "liquidate" him.[53]

In the end, however, the Barrett Mission failed to locate and arrest Sittig. He only surfaced during 1948 after the National Party's electoral victory. By that time, the changing political landscape in the Union meant that the Barrett Mission was no longer in a position to bring Sittig and his associates, or Van Rensburg and his inner circle, to justice. Even though the police docket by then contained a wealth of evidence against Van Rensburg, Visser reasoned that 'it … [remained] questionable whether there was sufficient [evidence] to establish a prima facie case and whether the Minister of Justice would authorise a prosecution.'[54]

Nevertheless, by the end of 1947 the Barrett Mission had completed its investigation. Their search had taken them across Europe and southern Africa, in a determined effort to build a watertight case of treason against Van Rensburg and several others. In 1948 the matter would come under close scrutiny, but a change in political power within South Africa would ultimately derail all of their investigative efforts.

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[50] ibid 184–185.

[51] Visser (n 10) 186–187; SANA, JUS, Box 1622. File – Appendix. Letter from Law Officer Union War Prosecutions to the Secretary of Justice, Pretoria, 20 Jun 1947.

[52] SANA, JUS, Box 1622. File – Part 6. Letter from Law Officer Union War Prosecutions to the Secretary of Justice, Pretoria, 26 Jun 1947; SANA, JUS, Box 1622. File – Appendix. Letter from Law Officer Union War Prosecutions to the Commissioner of the South African Police, 21 Aug 1947.

[53] Visser (n 10) 187.

[54] ibid 193.

4 Public Enemy Number One

By December 1947, after months of investigations, and the compiling of an incriminating dossier of high treason, Barrett and Visser drew up their final report. The report of the Barrett Mission on the wartime subversive activities of South African nationals was submitted to the minister of justice for further action. The concluding report of the Law Officer for the Union War Prosecutions, also sometimes referred to as the Barrett Report, was titled 'Rex versus Johannes Frederick Janse van Rensburg and others – Final Report of the Law Officer for Union War Prosecutions'.[55] The lengthy report primarily focused on Van Rensburg and dealt in great detail with the alleged acts of wartime treason committed by him and the *Ossewabrandwag*.[56] The principal findings were:

The charge against the organisation known as the Ossewabrandwag is one of treason in that broadly speaking they:

> (1) Communicated with the enemy by means of couriers carrying messages of a treasonable nature from the Union to the German Consulate at Lourenço Marques;
>
> (2) Communicated with the enemy by transmitting matter of treasonable nature both to Lourenço Marques and to Berlin;
>
> (3) Conspired and agreed with the German authorities and other persons in the Union to make war and rebellion against the government of the Union of South Africa;
>
> (4) Did acts or gave advice with a view to assisting the enemy.[57]

The addendum to the report also included numerous excerpts from wireless transmissions that were intercepted and deciphered at Britain's Government Code and Cypher School at Bletchley Park, outside London, and collated by MI5 during the war, as well as from documentary evidence collected by the Rein and Barrett missions. The so-called Werz telegrams, for instance, directly implicated Van Rensburg and the *Ossewabrandwag* in committing acts of high treason. Moreover, the Barrett Report also addressed aspects such as the relationship that existed between the *Ossewabrandwag* and Germany. The concluding remarks of the report are extremely insightful, and covered a wealth of information for Lawrence to consider in deciding whether to charge Van Rensburg with treason:

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[55] NWU, RAM Div, OB Archive, Universiteit van Stellenbosch Collection, File: 2/8. *Verslae oor die OB Organisasie. 19 Mei 1947*. The title of the document is entirely misleading. It is a condensed version of the Barrett Report, officially titled 'Rex versus Johannes Frederick Janse van Rensburg and others – Final Report of the Law Officer for Union War Prosecutions' – dated 24 December 1947.

[56] Van der Schyff (n 6) 136.

[57] NWU, RAM Div, OB Archive, Universiteit van Stellenbosch Collection, File: 2/8. *Verslae oor die OB Organisasie. 19 Mei 1947*.

(1) I appreciate that this is a most important matter for the Minister to decide, as there is no doubt that Dr Van Rensburg has committed treason of a most heinous and flagitious nature. For many reasons it is desirable that a decision be made as soon as possible as to whether the investigations should continue, as naturally with the passage of time the case must dim and the availability of the witnesses will become more difficult.

(2) The evidence, prima facie, does disclose a conspiracy between certain members of the Ossewabrandwag organisation, at whose head was the Commandant General Dr JHJ van Rensburg, and other persons including German Nationals, to commit high treason against the South African State.

(3) The evidence is present, and the telegrams tell the whole story, a story which without any doubt is an extremely shocking one when it is considered that whilst South Africa and her allies were fighting for their very lives and freedom such shameful acts of treason were committed in order to assist a most powerful and aggressive enemy.

(4) The organisation known as the Ossewabrandwag, which according to the information in the documents annexed to this report began its career as a cultural movement developed after the control was taken away from Col Laas by Dr Van Rensburg into a militant force designed, if possible, to subvert and overthrow the government of the Union, and to render every possible aid and assistance to Germany. From the information available it appears that Dr Van Rensburg was one of those in control of the Ossewabrandwag as '*Kommandant Generaal*'.[58]

With the submission of the final report, the Barrett Mission also effectively ceased to exist. However, the members of the Barrett Mission would be recalled if the Smuts government decided to prosecute Van Rensburg in 1948. In such an event, Visser and a squad of detectives would return to Germany, round up the required witnesses, and accompany them to the Union to testify. Despite these arrangements and long-term plan, Visser had several concerns about the way forward. In fact, he became increasingly sceptical of the Smuts government's lack of political will to order a full-scale investigation into the matter. It also soon became evident that Smuts was extremely wary of the political consequences of such an investigation. Thus, despite the wealth of incriminating documentary evidence collected, for the moment nothing further materialised.

There are several indications that Smuts at some stage considered publishing a White Paper on the Barrett Report. He was, however, ultimately dissuaded from doing so by some of his key advisers,[59] who warned the prime minister that a White Paper would have serious implications. Smuts was cautioned that such a move would basically condemn Van Rensburg and his co-accused without the due process of law. This could not

[58] NWU, RAM Div, OB Archive, Universiteit van Stellenbosch Collection, File: 2/8. *Verslae oor die OB Organisasie. 19 Mei 1947*.
[59] SANA, JUS, Box 1621. File – Part 2. Letter from Department of External Affairs to Secretary for Justice, 11 Jun 1946.

only be politically damaging in post-war South Africa, but could of course drastically influence the outcome of the looming general election scheduled for May 1948.[60] According to Visser, the writing was already on the wall:

> It soon became obvious from the activities of the various ministers, who were never available for consultation about our future actions against our "suspects", that no decision would be made until after the election.[61]

5 The End of the Road

The victory of the National Party in the 1948 general election was a watershed moment in South Africa's long and contested history. The South African electorate had ultimately decided to reject Smuts and his United Party. In their place, DF Malan and his National Party came to power – with Malan appointed as the new prime minister and CR Swart as his minister of justice.

Soon after their electoral victory, the National Party started contemplating the release of individuals convicted of politically motivated crimes during the war and imprisoned thereafter. On 11 June, Swart issued an official statement to this effect, which ordered the immediate release of a number of so-called 'political prisoners' who had been placed in custody by special courts during and after the war. The statement was accompanied by a list of names, which included that of Leibbrandt – by then he had only served five years of his life sentence for treason.[62] According to Swart:

> [The Malan] Government [wanted] to relieve the people of the Union from the strain of the war years and to endeavour to end all the unpleasantness and rancour that flowed from it. I trust that this step of the Government will be taken up in the same spirit in which the decision was taken, and that calm will be established in the mind of the people with a view to cordial cooperation in the future between all true citizens.[63]

The National Party's decision was met by a storm of protest from the parliamentary opposition. However, Malan and his followers appear to have been unphased and took no notice of the uproar and criticism. In fact, by October 1948, the majority of the men who had sympathised, supported, and collaborated with Germany during the war were released from incarceration – though some individuals were apparently overlooked during the process.

The National Party had for some time also been aware of the existence of the Rein and Barrett missions and their high-level investigations into wartime collaboration and treason. After assuming power, they were informed that Van Rensburg in particular was the prime suspect, and that an incriminating police docket had been assembled with the aim

[60] Visser (n 10) 194.
[61] Visser (n 10) 194.
[62] ibid 196.
[63] ibid.

of charging him with high treason. Moreover, the new prime minister himself had also been implicated in the matters of treason and collaboration. During the war, the Germans had twice sought to establish contact with Malan through Will and Marietjie Radley. He had also been involved in the so-called Denk affair, when an apparent German agent had contacted him in 1940.[64] Thus, as soon as Swart took office as the new minister of justice, there was a frantic hunt to locate the final Barrett Report, since it could not be located among the Department of Justice's administrative documents.[65]

In due course, Visser was contacted by Du Plooy about the matter. Visser was queried as to how many copies of the Barrett Report had been issued, and to whom in particular. His reply was: 'Original and five copies, carbons burnt and distribution as follows: General Smuts, 1; Minister of Justice [Lawrence], 1; Police docket, Rex versus Van Rensburg, 1; General Palmer, 1; Barrett, 1; Self, 1.'[66] Visser also confirmed to Du Plooy that Lawrence still had the tentative police docket in his possession. Since Swart wanted to see a copy of the report as soon as possible, Du Plooy ordered Visser to bring his personal copy to the Police Headquarters in Pretoria. Visser vividly describes the process that unfolded:

> I took my copy from my safe, and also my copies of the 11 volumes of the decoded telegrams from Werz to the German Foreign Office. I paged through the documents, saying to myself that the end of my investigations had come at last. I had now come to the conclusion that the Government would not prosecute Van Rensburg and, still talking to myself, I said that the Prime Minister and members of his Cabinet would be pleased to see the introduction to the report, which, to the best of my recollection, now read like this: 'Throughout our investigations in the Union of South Africa, Mozambique, the United Kingdom and Germany, we failed to find any evidence to the effect that any member of the Shadow Cabinet had, directly or indirectly, been in touch with the enemy.'[67]

Hereafter, it was imperative for the Malan government to prove that the National Party was in no way complicit in any subversive or treasonable activities committed during the war. Thus, on 16 August, and only after perusing the findings of the Barrett Report himself, Malan informed the House of Assembly that neither the Rein or Barrett missions had found any substantial evidence to link the National Party to wartime subversion or treason.[68] Thereafter Malan summarised the main findings of the Barrett Report that had a bearing on him and his party:

> There is not a single deed that they committed that is unconstitutional or treasonable – nothing at all. It is also rather evident that we did not want anything to do with

[64] Van der Schyff (n 6) 123–126.
[65] Visser (n 10) 196–197.
[66] ibid 197.
[67] ibid.
[68] Van der Schyff (n 6) 125. See also NWU, RAM Div, OB Archive, Universiteit van Stellenbosch Collection, File: 2/8. *Verslae oor die OB Organisasie. 19 Mei 1947*.

wartime contacts with Nazi Germany, that we did not want anything to do with National Socialism, and that we did not want to part from democracy.[69]

However, since the Barrett Report focused almost exclusively on Van Rensburg and the *Ossewabrandwag*, Malan's comments on the main findings against Van Rensburg prove insightful:

> The [Smuts government] kept dockets [of high treason] against several prominent Ossewabrandwag leaders at the ready in case they would move forward with the prosecutions. I had personal insight into the most prominent of these dockets after becoming Prime Minister, and, to state it rather bluntly, from a judicial point of view they were extremely damning.[70]

Following the subsequent release of incarcerated political prisoners, the United Party, now the official opposition, opened up the matter for debate in the House of Assembly. Lawrence duly challenged Swart over the release of men like Leibbrandt, specifically since he believed it set a dangerous precedent, 'where the law can be discarded, sabotage committed, and treasonable activities discarded without the necessary punishment'.[71] However, Swart did not waver, and in turn questioned Lawrence over the whereabouts of and return of all copies of the Barrett Report to the Department of Justice. At that point, only Visser's copy had been returned to Swart.[72]

The so-called 'German Documents' and the Barrett Report were only very briefly debated in the House of Assembly on 17 September.[73] Hansard reported the following on the debate:

> The Minister of Justice:
>
> Subsequent to my taking over my office as Minister of Justice, I discovered that certain important documents of a top secret nature which had been entrusted to my Department were not available. I was obliged, therefore, after careful investigation, and in view of certain information at my disposal, to [make] enquiries in connection with this matter to be directed to my predecessor in office … On the afternoon of 9 September, when during the debate on my Vote I felt obliged to lay the matter before the House, the friendly request had not yet been complied with. Subsequently, during the evening session, a number of files and documents were delivered to the head of my department by the Honourable Member for Salt River (Lawrence). The documents returned by the former Minister of Justice consisted of the following:
>
> * The original and signed final confidential report of the Director of War Prosecutions concerning certain alleged subversive and treasonable activities of a number

[69] Van der Schyff (n 6) 127.
[70] Malan (n 7) 222–226.
[71] Van der Schyff (n 6) 128–129.
[72] ibid.
[73] Visser (n 10) 197–199.

of persons in the Union before and during the war years, which was marked Top Secret.

* One copy of this report.
* A file containing 50 affidavits which can be used as evidence to substantiate the allegations in the report.
* A file with certain original and photostatic exhibits.
* A file containing 11 volumes with copies of translated documents which were found in the offices of the German Ministry of External Affairs, and which relate to Union matters.

I have been advised that one copy, of which only six existed, of the final report of the Director of War Prosecutions is still missing from Government Offices.[74]

During the coming days, the final missing copy of the Barrett Report was returned. Swart subsequently took great pleasure in informing the House of Assembly that the missing copy had indeed been found in the possession of Smuts. With all copies of the Barrett Report and its substantiating documents returned and in the possession of the Malan government, the National Party could take stock of the documentary evidence relating to treason and wartime collaboration and make an informed decision on the way forward.[75]

Nearly a month earlier, Malan had summoned Van Rensburg to his residence at Groote Schuur, in Cape Town, since he wished to discuss the treason charges that were being levelled against the leader of the *Ossewabrandwag*. It appears if Malan wanted Van Rensburg to defend himself against the accusations contained in the Barrett Report, specifically the allegations that he had maintained contact with both Smuts and Germany during the war. However, Van Rensburg only admitted to his wartime contact with Germany. He reacted strongly to the accusations tabled by Malan. He went as far as to confirm that he would be willing to appear in court, but cautioned Malan that in the event of a show trial being held, he would take Malan down with him.[76]

After the showdown at Groote Schuur, and the recurring debates around the matter in the House of Assembly throughout September, the entire debacle suddenly disappeared from the national discourse for good. Perhaps Van Rensburg's threats may actually have persuaded Malan to drop the entire matter, or the new prime minister might also have lacked the political will to go through with treason trials. After all, Malan was to some degree implicated in the Barrett Report due to his known contacts with German agents and couriers during the war. Moreover, if the treason trials had taken place, and Malan was cross-examined, his image as the new prime minister of the Union would suffer irreparable damage. In hindsight, it is also clear that the post-war drive towards greater

[74] Visser (n 10) 198; Union of South Africa, Debates of the House of Assembly, 1948, Volume 64. Documents removed from Office of Department of Justice, Columns 1918, 1934, 1979, 1990.
[75] Visser (n 10) 199.
[76] Van der Schyff (n 6) 139.

Afrikaner unity and the establishment of an Afrikaner republic were the chief objectives of the National Party at this stage. Unsurprisingly, Van Rensburg was never arraigned on charges of high treason. In due course, the entire episode would all but vanish from the South African historiography.[77]

6 Conclusion

The post-war hunt for Union war criminals, traitors and collaborators remains an understudied and largely unknown part of South African history. Nevertheless, the Rein and Barrett missions secured a wealth of documentary evidence and oral testimony, including a trove of substantiating wireless messages deciphered by Government Code and Cypher School at Bletchley Park and collated by MI5, which undeniably confirmed that Van Rensburg and his co-accused were indeed guilty of high treason. In fact, it had been proven beyond doubt that Van Rensburg and his co-conspirators had had definite contact with Germany during the war, and that such contact had taken place on a regular and intensive basis over a set period of time during the war. However, despite this wealth of evidence, there was an evident lack of political will on the part of the Smuts government to move ahead with the criminal case against Van Rensburg by the end of 1947. The looming general election of 1948, including the potential political fracas and electoral fallout that such a show trial could cause, was enough reason for the Smuts government to withhold the charges against Van Rensburg until after the election. However, Smuts was defeated by Malan and his National Party in the subsequent election. After the electoral victory, Malan decided to release and pardon a number of so-called South African 'political prisoners' who had been placed in custody by special courts during and after the war. This included several individuals convicted of wartime treason and serving lengthy sentences. Unsurprisingly, the treason case against Van Rensburg and his co-accused never went to trial. The fact that Malan himself had been implicated in treasonable, wartime contact with Germany, and that the post-electoral focus was now fixed on creating greater Afrikaner unity and the establishment of an Afrikaner republic, were the main reasons why Van Rensburg was never arraigned on charges of high treason. After 1948, the final report of the Barrett Mission, as well as all of its substantiating documentary evidence, was removed from public circulation and supposedly 'deposited' at the State Archives. Whether or not this was a deliberate attempt to sanitise the South African collective memory surrounding these investigations remains a contentious issue and is of course open for debate. Nevertheless, as the research in this article proves, the large existing gaps in the South African historiography are entirely surmountable since enough substantiating documentary evidence was preserved in archival repositories in South Africa and the United Kingdom to reconstruct these events. This article also proves that the existing large historiographical gaps surrounding the post-war hunt for known Union war criminals, traitors and collaborators can be overcome, especially if academics

[77] Van der Schyff (n 6) 116–120.

start to critically engage with the wealth of available primary archival material and limited secondary sources. Only then can the record be set straight surrounding these turbulent times in South African history.

MILITARY JUSTICE AND CIVILIAN CRIMINAL JUSTICE IN ITALY DURING THE TRANSITION FROM FASCISM TO REPUBLIC (1943–1948)

By Raffaella Bianchi Riva[*]

Abstract

One of the main issues debated by liberal scholars after Italian unification regarded the extension of military criminal law to civilians. It is a well-known fact that, in the second half of the 19th century and first half of the 20th, the need to ensure rapid and rigorous justice in exceptional circumstances often led Italian governments to subject civilians to military jurisdiction, even though military criminal trials provided fewer guarantees for defendants than ordinary trials.
After the fall of fascism in Italy, one of the main issues to address was which courts would be called to punish fascist crimes.
Instead of extending the special jurisdiction of military courts, a complex system of relationships was created between military jurisdiction and civilian criminal jurisdiction, with the choice of jurisdiction depending on both the demand for punishment and the need for pacification that emerged during the transition from fascism to republic.
This paper provides insight into the interaction between ordinary courts and military courts when punishing Fascist crimes during the overthrow of illiberal rule by democracy.

1 Introduction

This paper focuses on the relationship between military justice and civilian criminal justice in Italy during the transition from fascism to republic – which necessarily entails a broader reflection on the issue of extending the scope of military law to include civilians – and the light it sheds on the overall intersection between justice and politics in the 19th and 20th centuries.[1]

The political nature of both substantive and procedural military law is undeniable.[2] Furthermore, it is a well-known fact that military law was widely used to punish political crimes in the 19th and 20th centuries, given the greater flexibility it offered in terms of the punishments that could be handed down.

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[1] On this issue, Carlotta Latini, *Cittadini e nemici. Giustizia militare e giustizia penale in Italia tra Otto e Novecento* (Le Monnier, 2010); Carlotta Latini, '"Una società armata". La giustizia penale militare e le libertà nei secoli XIX-XX', in Floriana Colao, Luigi Lacchè, Claudia Storti (eds), *Giustizia penale e politica in Italia tra Otto e Novecento. Modelli ed esperienze tra integrazione e conflitto* (Giuffrè Editore, 2015) 29-60.

[2] Giuseppe Ciardi, *Trattato di diritto penale militare*, vol 1 (Bulzoni, 1970) 30; Renato Maggiore, *Lezioni di diritto e procedura penale* (Renzo Mazzone Editore, 1973) 16; Vittorio Veutro, 'Diritto penale militare', in Guido Landi, Vittorio Veutro, Pietro Stellacci and Pietro Verri (eds), *Manuale di diritto e procedura penale militare* (Giuffrè, 1976) 121-125.

After Italian unification, the need to ensure rapid and rigorous justice in exceptional circumstances often led Italian governments to subject civilians to military jurisdiction, despite the fact that military criminal trials provided fewer guarantees to defendants than civilian trials.[3]

During the liberal period, Italian governments often resorted to the French notion of *état de siège* (state of siege) in order to cope with emergencies, despite the notion not being explicitly regulated. In other words, they used a military notion to address domestic political needs (state of political or fictitious siege).[4]

A state of siege entailed the suspension of constitutionally guaranteed rights and the establishment of courts-martial. In any case, it did not automatically result in civilians being tried for common offences before courts-martial: that was up to the government to decide on a case-by-case basis.

A state of siege was declared in order to suppress brigandage in the southern provinces following Italian unification,[5] thereby introducing what would become a constant feature of the evolving Italian criminal justice system;[6] one would then be declared in 1894 and again in 1898 in order to suppress public riots and maintain public order.[7] In 1908, after a disastrous earthquake struck Southern Italy, a state of siege was declared in the affected areas, thereby further extending its scope.[8]

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[3] On criminal military procedure in 19th and 20th centuries, Rinaldo Vassia, *Lineamenti istituzionali del nuovo diritto penale militare* (Cedam, 1943) 193-217; Renato Maggiore, *Diritto e processo nell'ordinamento militare. Contributo allo studio del processo penale militare* (Jovene, 1967) 161-258; Piero Stellacci, 'Procedura penale militare', in Guido Landi, Vittorio Veutro, Pietro Stellacci and Pietro Verri (eds), *Manuale di diritto e procedura penale militare* (Giuffrè, 1976) 501-716; Vittorio Garino, *Manuale di diritto e procedura penale militare. Parte generale* (Cetim, 1985) 243-407.

[4] Giovanni Motzo, 'Assedio (stato di)', in *Enciclopedia del diritto*, vol 3 (Giuffrè, 1958) 250-268.

[5] Carlotta Latini, 'Tribunali militari e repressione del brigantaggio nell'Italia dell'Ottocento', in Maria Pia Paternò (ed), *Figure dell'altro tra politica, storia e diritto. Alterità e politica dei diritti dall'esperienza giuridica romana all'età contemporanea* (Nuova Arnica Editrice, 2008) 53-115.

[6] Mario Sbriccoli, 'Caratteri orginari e tratti permanenti del sistema penale italiano (1861-1990)', in Luciano Violante (ed), *Storia d'Italia, Annali*, vol 14, *Legge Diritto Giustizia* (Giulio Einaudi, editore 1998) 485-551

[7] Carlotta Latini, 'La sentenza "dei giornalisti". Repressione dle dissenso e uso dei tribunal penali military durante lo stato d'assedio nel 1898', in P. Marchetti (ed), *Inchiesta penale e pre-giudizio: una riflessione interdisciplinare. Atti del convegno, Teramo, 4 maggio 2006* (Edizioni Scientifiche Italiane, 2006) 243-277; Claudia Storti, 'Stato d'assedio a Milano. Maggio 1898', in Andrea Ciampani and Domenico Maria Bruni (eds) *Istituzioni politiche e mobilitazioni di massa* (Rubbettino Editore, 2018) 51-66.

[8] Carlotta Latini, 'L'emergenza e la disgrazia. Terremoto, guerra e poteri straordinari in Italia agli inizi del Novecento' (2018) 13 *Historia et ius*. After the earthquake in 1908, the government ceased its practice of resorting to states of political siege; nonetheless, military jurisdiction over civilians was increasingly extended with World War I, not only because of civilians' vast participation in military matters but also because of wartime needs that legitimised the suppression of civil liberties; see Carlotta Latini, 'Il governo legislatore. Espansione dei poteri dell'esecutivo e uso della delega legislativa in tempo di guerra', in Francesco Benigno and Luca Scuccimarra (eds), *Il governo dell'emergenza. Poteri straordinari e di guerra in Europa tra XVI e XX secolo* (Nazionalità editore, 2007) 197-219; Carlotta Latini, 'I pieni poteri in Italia durante la

Between the end of the 19th century and the beginning of the 20th, liberal scholars – in reflecting on individual freedoms – debated whether the principle of 'natural jurisdiction' established by the Statute of 1848 would be respected if military courts were maintained to try members of the armed forces and, above all, if the scope of military court jurisdiction were extended to include civilians. It was agreed that, for special jurisdiction such as military jurisdiction, having military courts try military personnel was formally compatible with the Statute, even though the system used to appoint military courts was unconstitutional in some significant respects; having military courts try civilians, however, was considered a blatant violation of the guarantees provided by the Statute, which could be justified only if the need to maintain public order outweighed the need to guarantee civil liberties.

The Fascist regime did not resort to military courts to cope with political dissent. However, in 1926, it established the Special Tribunal for the Defence of the State (*Tribunale speciale per la difesa dello Stato*), which mainly comprised military judges and operated in accordance with the military procedural rules prescribed for wartime. Compared to the practice of the liberal period, the Fascist Special Tribunal for the Defence of the State was established without declaring a state of war, not even a fictitious one; –rather, it was established solely to punish political crimes (for which, among other changes, the death penalty was reintroduced, which in Italy had been abolished for common offences by the criminal code of 1889).[9]

In breaking from previous practice, military justice was not extended to civilians during the transition from fascism to republic – namely, in the period between the fall of fascism in July 1943, which led to the creation of the Italian Republic in June 1946, and the adoption of the Italian Constitution in 1948 – even though the need to cope with exceptional circumstances could have justified it. On the contrary, it was mostly civilian criminal jurisdiction (both ordinary and extraordinary) whose scope was extended to include members of the military.

As we will see, this was the result of a series of choices that were affected by the opposing demands for punishment and pacification that characterised Italy after the fall of the Fascist regime.

Prima guerra mondiale', in *Un Paese in guerra. La mobilitazione civile in Italia (1914-1918)* (UNICOPLI, 2010) 87-103.

[9] Even though military in composition and procedure, the Special Tribunal for the Defence of the State was essentially political in nature – not surprising given the political essence of military criminal law; see Stefano Vinci, 'La politica giudiziaria del fascismo italiano nella giurisprudenza del Tribunale speciale per la difesa dello Stato (1926-1943)' (2016) 10 *Historia et ius*; Leonardo Pompeo D'Alessandro, 'Per una storia del Tribunale special: linee di ricerca', in Luigi Lacchè (ed), *Il diritto del duce. Giustizia e repressione nell'Italia fascista* (Donzelli Editore, 2015) 151-173; Alessandra Bassani and Ambra Cantoni, 'Il segreto politico nella giurisprudenza del Tribunale special per la difesa dello Stato', in Luigi Lacchè (ed), *Il diritto del duce. Giustizia e repression nell'Italia fascista* (Donzelli Editore, 2015) 175-206; Leonardo Pompeo D'Alessandro, *Giustizia fascista. Storia del Tribunale speciale (1926-1943)* (Il Mulino, 2020).

This paper looks at both legislation and caselaw to examine – from a military justice standpoint – the relationship between military law and civilian criminal law during the changeover from Fascist regime to republic, in an effort to highlight-how the relationship between politics, public opinion and justice affected the transition.

2 Italian Transitional Justice

During the transition from fascism to republic, the issue of the relationship between military justice and civilian criminal justice came to the fore as part of a reckoning with the former regime and in the punishment of Fascist crimes – especially crimes of collaborationism committed during the German military occupation of Northern Italy after September 1943.

The issue can be examined within the framework of recent studies on transitional justice.[10] Indeed, over the last few decades, the issue has received increasing attention from scholars in different countries. Italy is no exception: many studies have examined the overthrow of illiberal rule by democracy between 1943 and 1948 and delved into the relationship between law and politics during that period.

One of the main problems to address after the Fascist regime collapsed concerned the appointment of courts to punish Fascist crimes. It became immediately apparent that the effectiveness of punishments would depend on the courts appointed to hand them down.

Essentially, three options were under consideration: give ordinary civilian courts jurisdiction, give military courts jurisdiction, or establish extraordinary courts. Each option entailed a choice of whether to maintain continuity or break with the previous regime. All of them, however, had the main objective of preventing – or at least limiting – revenge, thus striking a balance between the population's demands for justice and the need to legally punish Nazi-Fascist crimes.

[10] On transitional justice (the notion of which emerged in the late 1980s concerning measures to deal with the past like prosecution, reconciliation or restitution during the changeover from dictatorships into democracies and nowadays broadly referring to all questions about the violation of human rights) and on the distinction between retributive (which includes both criminal justice and administrative justice in order to punish the perpetrators) and restorative justice (aiming at providing redress to the victims and maintenance of peace), see Ruti G. Teitel, *Transitional Justice* (Oxford University Press, 2000); Peter Malcontent (ed), *Facing the Past. Amending Historical Injustices through Instruments of Transitional Justice* (Intersentia, 2016); Olivera Simić (ed), *An Introduction to Transitional Justice* (Routledge, 2017). Per alcune esperienze storiche di giustizia di transizione, see Jon Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge University Press, 2004); Luca Baldissara and Paolo Pezzino (eds), *Giudicare e punire. I processi per crimini di guerra tra diritto e politica* (L'ancora del mediterraneo, 2005); Danilo Zolo, *La giustizia dei vincitori. Da Norimberga a Baghdad* (Laterza, 2006); Pier Paolo Portinaro, *I conti con il passato. Vendetta, amnistia, giustizia* (Feltrinelli, 2011); Marcello Flores (eds), *Storia, verità, giustizia. I crimini del XX secolo* (Bruno Mondadori, 2001); Nico Wouters (ed), *Transitional Justice and Memory in Europe (1945-2013)* (Cambridge Unversity Press, 2014).

The two Badoglio governments adopted some specific measures concerning the punishment of Fascist crimes in 1943 and 1944, but the two Bonomi governments would address the issue much more comprehensively through the issuance of Legislative Decree No. 159 of 27 July 1944 and Legislative Decree No. 142 of 22 April 1945.

Indeed, Decree No. 159 of 1944 laid down the first systematic set of rules on the punishment of Fascist crimes, in particular crimes of collaborationism.

On the one hand, the decree punished crimes of collaborationism under the wartime military criminal code of 1941, which meant that it therefore applied also to civilians. Indeed, the decree specified that the penalties established for military personnel could also be applied to civilians. In this respect, it is important to bear in mind that the wartime military criminal code continued to call for the death penalty in some cases, even though capital punishment had been abolished after the fall of fascism (Legislative Decree No. 224 of 10 August 1944).[11]

On the other hand, the decree ruled that military personnel were to be tried by military courts and civilians by ordinary courts, in accordance with the usual division of jurisdiction.

However, Decree No. 142 of 1945 subsequently established extraordinary courts of assizes, which thus took jurisdiction over crimes of collaborationism away from both military and ordinary courts.

The establishment of extraordinary courts of assizes was a compromise between creating extraordinary courts and giving jurisdiction to the ordinary courts: indeed, the former option would have ensured radical punishment of crimes of collaborationism but entailed violating the fundamental freedoms that the new government instead wanted to uphold, especially following their blatant trampling by the Fascist regime; whereas the latter option would have guaranteed adherence to general principles but appeared very unreliable, given that the judiciary had not been purged of Fascists.

[11] The provision gave rise to a broad debate and cast doubt on whether the reference to the wartime military criminal code concerned only penalties or extended to the entire military justice system; see Raffaella Bianchi Riva, 'Per superiori ragioni di giustizia e di pubblico interesse'. Legislazione eccezionale e principi liberali dal fascismo alla repubblica', in Floriana Colao, Luigi Lacchè and Claudia Storti (eds), *Giustizia penale e politica tra Otto e Novecento. Modelli ed esperienze tra integrazione e conflitto* (Giuffrè, 2015) 155-179.

Indeed, the extraordinary courts of assizes were composed of a professional judge as president and four jurors chosen with the assistance of the National Liberation Committee[12]: this setup thus responded to the need – greatly felt during the transition from fascism to republic – for a democratisation of the justice system and, at the same time, ensured that the courts would remain under the ordinary judiciary's control.

The procedure for trials before the extraordinary courts of assizes was also the result of a compromise, in this case between the need for speedy trials and the safeguarding of defendants' main rights. A summary preliminary investigation phase was adopted as opposed to a formal one, thus making trials more rapid but offering defendants fewer guarantees. That said, trials in the extraordinary courts of assizes did partially adhere to due process. In particular, defendants had the right to counsel, even if only at hearings (the code of criminal procedure of 1930 excluded lawyers from the entire preliminary investigation phase). Decisions of extraordinary courts of assizes could be appealed (though only within three days) before the temporary special division of the Court of Cassation established in Milan, which was composed mainly of anti-Fascist judges. Suing as a civil party was not admitted.

The nature of the extraordinary courts of assizes (which, in theory, were to have fully performed their duties within six months but, in practice, continued to operate for two years[13]) was the subject of much debate among legal scholars and legal practitioners of the time: scholars denounced their composition and procedure as typical of political justice, while the Court of Cassation considered them ordinary courts adapted for the transition's exceptional circumstances, thus legitimising their sentencing as far as public opinion was concerned.[14]

Many studies have examined the extraordinary courts of assizes and their decisions.[15] However, no studies have fully examined Italian military courts and their decisions on

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[12] In addition, the National Liberation Committee could choose prosecutors from a pool of anti-Fascist lawyers. The decree was based on the French *cours de justice*, established in 1944 in order to sentence Vichy government members and composed of a judge and four jurors chosen by the Resistance.

[13] Legislative Decree No. 625 of 5 October 1945 transferred their jurisdiction to the special divisions of the ordinary courts of assizes (which maintained, however, the same composition as that of the extraordinary courts of assizes) and to the second division of the Court of Cassation in Rome (which is also where the judges from the temporary special division of the Court of Cassation of Milan were assigned).

[14] Bianchi Riva (n 11) 179.

[15] Most of these studies have focused on the results of the anti-Fascist purge, with the general consensus being that, on the whole, the purge was unsuccessful. It was found that courts progressively adopted a less rigorous attitude towards collaborators: cases of acquittal increased, changes in the classification of offenses became more common, and extenuating circumstances were granted with increasing frequency; on the contrary, a reduction was seen in the number of cases wherein the death penalty or long prison sentences were imposed. It should also be mentioned that the general amnesty of 22 June 1946 was broadly enforced. These results were generally blamed on the fact that, on the whole, the judiciary had not been purged after the fall of fascism, which in turn meant that sanctions against fascism were not enforced. Marcello Flores, 'L'epurazione', in *L'Italia dalla liberazione alla repubblica, Atti del Convegno internazionale (Firenze, 26-28 marzo 1976)* (Feltrinelli, 1977) 413-467; Roy Palmer Domenico, *Processo ai*

collaborationism. Indeed, although military justice has received greater attention in recent years as part of studies on transitional justice, the role of military courts continues to be overshadowed by the role of extraordinary courts of assizes.[16]

Military courts certainly made a more limited contribution to Italian transitional justice than that of the extraordinary courts of assizes. However, it is important to bear in mind that, even though the relationship between military justice and civilian criminal justice was not always consistent over time or throughout Italy (because of the different measures adopted in different areas of the country), military courts nonetheless remained responsible for punishing crimes of collaborationism until the extraordinary courts of assizes began operating – and even after the extraordinary courts of assizes were established, military courts were still called on to try Fascist crimes for various reasons.

An examination of the work of military courts is thus intertwined with a reflection on the administration of justice in exceptional circumstances such as the transition from fascism to republic, when a political response was needed to meet society's demands for justice.

3 The Punishment of Fascist Crimes in Southern and Northern Italy

As is well known, Italy was divided into two occupation zones between September 1943 and April 1945: Southern Italy was controlled by the Allies with the legitimate royal government, which was in exile in Brindisi; while Northern Italy was subject to German military occupation with the Italian Social Republic puppet state, which represented Mussolini's last attempt to reconstitute the Fascist regime. Northern Italy was where the anti-Fascist movement created the National Liberation Committee, which coordinated the Resistance at both political and military level.

In Southern Italy, the Italian government began its reckoning with fascism against the backdrop of its complex relations with the Allies. In the autumn of 1944, the first trials for Fascist crimes began, though not without their share of difficulties (especially when it came to finding uncompromised judges). As mentioned above, the trials were to be held before ordinary courts and military courts, in accordance with Decree No. 159 of 1944.[17]

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fascisti. 1943-1948: storia di un'epurazione che non c'è stata (Rizzoli, 1996); Romano Canosa, *Storia dell'epurazione in Italia. Le sanzioni contro il fascismo 1943-1948* (Baldini&Castoldi, 1999); Mimmo Franzinelli, *L'amnistia Togliatti. 22 giugno 1946. Colpo di spugna sui crimini fascisti* (Feltrinelli, 2006); Paolo Caroli, *Il potere di non punire. Uno studio sull'amnistia Togliatti* (Edizioni Scientifiche Italiane, 2020).

[16] Cecilia Nubola, Paolo Pezzino and Toni Rovatti (eds), *Giustizia straordinaria tra fascismo e democrazia. I processi presso le Corti d'assise e nei tribunali militari* (Il Mulino, 2019).

[17] This paper does not examine the Allied military courts set up in Italy to try civilians accused of war crimes or common offences, as they did not try Fascist crimes or crimes of collaborationism or handle cases concerning the purging of Fascists; see Ilenia Rossini, 'Le Allied Military Courts: gli alleati e la giustizia di guerra in Italia' (2015) 24, 2 *Geschichte Und Region/Storia e Regione*, 122-146.

Overall, trials before the ordinary courts for crimes of collaborationism appeared to result in discouragingly unsatisfactory results up to the spring of 1945 – although it is still not known with certainty how many trials were initiated, how many passed the preliminary investigation phase, how many reached the sentencing phase, and what penalties were imposed. If much remains to be investigated concerning the operations of the ordinary courts, especially at local level, even less is known about the operations of the military courts.[18]

In any case, Southern Italy punished Fascist crimes based on Decree No. 159 of 1944. In not-yet-liberated Northern Italy, however, in the absence of the legitimate government, it was up to the National Liberation Committee to discuss how the justice system would have to function once the zone was liberated from German occupation.[19]

As the partisans fought against the Nazi-Fascists, different options were debated within the National Liberation Committee. The intention was to avoid forms of political justice but, at the same time, ensure that crimes of collaborationism were adequately punished without having people take the law into their own hands.[20]

The first option – supported by the judge Domenico Riccardo Peretti Griva, for example – was to entrust the ordinary courts of assizes with trying Fascist crimes, in order to ensure the continuity of the State. This option included providing for some corrective measures in the courts' composition or procedure so as to make punishment more effective, such as tasking the National Liberation Committee with forming lists of jurors, or excluding the appeal of sentences.

The second option aimed at breaking with the past by establishing extraordinary courts as people's courts. This option – which envisaged a sort of revolutionary justice – was an expression of people's distrust of the judiciary, which had not been purged following the fall of fascism.

In order to avoid the establishment of extraordinary courts, which would have violated the core principles of the Italian legal system, the third option – supported by the judge Giovanni Colli, for example – was to have the military courts continue to function after liberation until the war ended and jurisdiction was returned to the ordinary courts. In fact, partisan courts had been set up in every military unit for the immediate and exemplary punishment of crimes committed by the Nazi-Fascists.

In order to ensure immediate punishment of the crimes that had most upset the public, the National Liberation Committee would have transformed the limited, ad hoc system

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[18] Hans Woller, *I conti con il fascismo. L'epurazione in Italia 1943-1945* (Il Mulino, 1997) 187-333.

[19] Even in the Italian Social Republic, special courts were set up to exact 'revenge' on those who had betrayed the Mussolini regime; as mentioned, this had the effect of weakening republican fascism, including in the eyes of the public.

[20] Guido Neppi Modona, 'Il problema della continuità dell'amministrazione della giustizia dopo la caduta del fascismo', in Luigi Bernardi, Guido Neppi Modona and Silvana Testori, *Giustizia penale e guerra di liberazione* (Franco Angeli 1984) 11-40.

of partisan courts into a complex, stable system for the post-liberation period. In derogation from the regulations in force, the National Liberation Committee thus gave these courts jurisdiction over proceedings for crimes that normally fell within the ordinary judiciary's jurisdiction. Furthermore, it was permitted to amend wartime military criminal procedure and the military justice system in order to expedite the administration of justice.[21]

As a result, in addition to military jurisdiction in accordance with the wartime military criminal code, the wartime military courts under the third option would have tried crimes normally falling under the jurisdiction of civilian judges. Moreover, the procedure – which, as is well known, already contained harsher provisions than in peacetime – could be subject to further exceptions, with serious violations of individual liberties.

Subsequently, the idea of establishing an extraordinary jurisdiction prevailed – not least because of the difficulties that the National Liberation Committee would have encountered after liberation in making the military courts work. In order to allow the military courts to return to their normal duties, the National Liberation Committee decided to set up people's courts for the immediate punishment of not only crimes of collaborationism committed during the occupation but also Fascist crimes committed during the 20 years of fascism.[22] However, the Allied powers prevented the idea from being implemented. Although the related decree never came into force because of Allied opposition, it nevertheless undermined the legitimacy of military courts to punish Fascist crimes in the eyes of the public.[23]

In the meantime, Decree No. 142 of 1945 was issued in April, which, as mentioned above, established extraordinary courts of assizes to try crimes of collaborationism. However, the extraordinary courts of assizes would not begin operating until May because of organisational problems that delayed their operations in many liberated areas.

Therefore, in the weeks immediately following liberation – during which numerous episodes of summary justice were carried out, fuelled by widespread demands for revenge among the population and aided by the political and judicial power vacuum that had formed – it was up to the military courts to punish crimes of collaborationism.

4 Military Justice and Public Opinion

First of all, it must be pointed out that not many military courts were actually established after liberation and that, even then, they were often resorted to only for individual cases. Indeed, military courts with a president and four judges that operated on a stable, continuous basis were established in only a few cities, namely those where the Resistance's political and military organisation was more consolidated.

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[21] Giovanni Colli, *Pagine di una storia privata* (Fratelli Palombi 1989) 8-17.
[22] Gaetano Grassi (ed), "Verso il governo del popolo". Atti e documenti del CLNAI 1943/1946 (Feltrinelli 1977), pp. 324-328.
[23] Woller (n 18) 343-354.

The work of the military courts in the weeks immediately following liberation has been heavily criticised. Though many questions remain about the defendants tried and the sentences imposed – which only local research can clarify – the biggest issue concerns the courts' very legitimacy. Indeed, they have been accused of having been excessively severe, and many doubts have been raised about whether they respected substantive and procedural guarantees.

Their work can be reconstructed (at least in part) through newspaper reports, which also shed light on certain aspects of the relationship between military justice and public opinion in the years of transition from fascism to republic.

The press felt the need to highlight the due process aspects – and, conversely, to attenuate the political overtones – of the trials against collaborationists. In this way, the press tried to reassure the population that defendants were guaranteed the right to counsel, the right to be heard and the right to a public trial (which the press itself helped to achieve), in an attempt to make the work of the military courts – and, subsequently, that of the extraordinary courts of assizes, which would ultimately be entrusted with Italian transitional justice – appear legitimate.

The intention was twofold: to convince the public (which was crying for summary justice against those responsible for Fascist crimes) of the need to proceed – albeit quickly and severely – in accordance with the law in order to satisfy the public's legitimate demands for justice without resorting to retaliatory practices or private vendettas; and to emphasise the break from the judicial practices of political repression adopted not only during fascism but also, as mentioned above, in the liberal era.[24]

One example was in Como – a city in Lombardy that was one of the hardest hit by the civil war's brutality, partly because of its proximity to Switzerland, a frequent destination for fleeing partisans, Jews and deserters. A special military war court operated there between the end of May and the beginning of June, despite the fact that an extraordinary court of assizes had already begun to operate in the city, albeit only a few days before. The extraordinary court of assizes was in fact due to start operating as early as mid-May[25]; however, probably because of organisational problems, the first trial that it should have handled was in fact held before the military court (again with some delay, likely due to difficulties in the preliminary investigation phase).[26]

The special military war court in Como was convened by General Raffaele Cadorna – commander of the Volunteers of Freedom corps during the Resistance who was later appointed to be the Italian army's chief of staff – under Art. 283 of the wartime military criminal code and in relation to Art. 4 of Royal Law Decree No. 668 of 29 July 1943. The

[24] Bianchi Riva, 'Prime note sulla giustizia di transizione nel territorio di Como (1945-1947)', in Claudia Biraghi (ed), *Fonti per la storia del territorio varesino e comense*, vol 2, *Età contemporanea (secoli XIX-XX)* (Insubria University Press, 2013) 265-283.
[25] 'L'istituzione della Corte Straordinaria d'Assise' *Il Popolo Comasco* (Como, 8 May 1945).
[26] 'Il processo Saletta davanti al Tribunale Militare' *Il Popolo Comasco* (Como, 14 May 1945).

chief of police (*questore*) had requested that the court be convened in order to try war criminals who had been active in Como and its province during the German occupation.[27]

The first trials for collaborationism thus took place before military courts. It was only once the extraordinary courts of assizes began to operate regularly that jurisdiction was finally passed over to them for all civilian and military defendants – although, as examined below, some military defendants continued to contest the jurisdiction of the extraordinary courts of assizes. That said, it cannot be overlooked that after the extraordinary courts of assizes came into operation – and perhaps solely to buy some time – even military defendants on trial before the military courts still in operation sometimes objected that the military courts lacked jurisdiction (objections that were in any case rejected).

The special military war court in Como was presided over by General Giambattista Nicolini, who had just returned from Switzerland after having taken refuge there to escape persecution by the Fascists. It was composed of four officers from Como's military units – all patriots or partisans[28] – and, over the course of 4 trials, tried 8 defendants: 6 were sentenced to death, and 2 to prison terms of over 20 years.

More than any others, it was the first trial – against the former chief of police and other Como police officers accused of torture and murder – that was the subject of propaganda in the press. Indeed, it was a way for the press to prepare public opinion for the start of a reckoning with fascism.

As pointed out by *Il Popolo Comasco*, an organ of the Como National Liberation Committee, the trial was to be public. To facilitate participation to the greatest extent possible, the trial would be broadcast on the radio, and loudspeakers would be placed in the city's main square so that everyone could follow the proceedings.[29] For perhaps the very first time, military justice emerged from the isolation to which it had always been confined and came to be seen as legitimatein the eyes of the public.

A weekly newspaper published by the Action Party called *La disfida* specified that, although the trial would take place before a military court (and not before an extraordinary court of assizes, which, perhaps thanks in part to propaganda already spread by the newspapers, appeared to be more respectful of civil liberties), the right to counsel would still be guaranteed:[30] a circumstance that was certainly not to be taken for granted given

[27] Special military war court could be convened by a commander if an immediate trial was needed for exemplary purposes in relation to offences punishable by death and the accused was arrested in flagrante delicto. The commander had broad discretionary power when it came to assessing whether the court could be justifiably convened; see Stellacci (n 3) 558-561.

[28] The duties of public prosecutor – a role that was part of the staff of ordinary military war courts – were performed by Mario Antonio Leca, an anti-Fascist who had been arrested and sent to confinement in the 1930s.

[29] 'Pozzoli Saletta Borghi Giussani e Brunati saranno processati domani' *Il Popolo Comasco* (Como, 20 May 1945).

[30] 'Processi e difese', *La disfida* (Como, 20 May 1945).

its systematic violation in Fascist-era special courts. Indeed, defendants' right to counsel became a symbol of the guarantees ensured in trials against Fascist crimes, reassuring public opinion that the special military courts were operating within the law.

According to *L'Ordine*, a Catholic newspaper based in the province of Como, the trial took place in a perfectly legal way, in compliance with all procedural guarantees and in an environment of due serenity. And the newspaper specified that all this was especially thanks to the presence of lawyers[31].

Nonetheless, this did not stop the press from expressing displeasure – in harmony with the popular conscience – at sentences that were considered too lenient. Such was the case following the military war court's last trial, against a Black Brigade officer accused of round-ups and shootings, which ended with the court granting the defence's request for a sentence of 30 years' imprisonment instead of the public prosecutor's request for the death penalty[32].

The war courts eventually ceased operations in most areas between May and June, given the need to bring military jurisdiction back within its ordinary limits. It was ordered that complaints related to military offences be submitted to military prosecutors and those related to other offences to the prosecutors with territorial jurisdiction.

Jurisdiction over crimes of collaborationism was thus definitively transferred to the extraordinary courts of assizes.

5 Conflicts of Jurisdiction

The extraordinary courts of assizes had jurisdiction over both civilians and members of the military: a situation that was upheld by the Court of Cassation starting from the very first decisions and subsequently reiterated in legislation.

In the absence of specific legal provisions on jurisdiction, many defendants who were members of the armed forces and charged with crimes of collaborationism often argued that the extraordinary courts of assizes lacked jurisdiction and that they should thus be tried before the military courts.

The argument was generally rejected.

According to the Court of Cassation, first of all, Decree No. 142 of 1945 did not reproduce the provision of Decree No. 159 of 1944 whereby it was expressly established that civilian courts had jurisdiction over civilians and military courts over members of the military.

[31] 'Le udienze al processo Saletta', in *L'Ordine* (Como, 21-22 May 1945). However, it must be pointed out that few lawyers were prepared to take on the cases of Fascist and Nazi collaborators. As a matter of fact, lawyers who took on such cases were seen to be supportive of their clients and, for this reason, the public openly disapproved of these lawyers, including by insulting and threatening them.
[32] 'In margine al processo Noseda', in *La disfida* (Como, 10 June 1945).

Second, the extraordinary courts of assizes' exclusive jurisdiction over crimes of collaboration with the Germans was confirmed by the fact that Decree No. 142 of 1945 expressly provided that senior officers in the Italian Social Republic's armed forces were to be tried before those courts.[33]

Similarly, extraordinary courts of assizes had exclusive jurisdiction over minors when it came to crimes of collaborationism – this despite the fact that juvenile courts had been in operation since 1934.[34]

The issue of the relationship between military justice and civilian criminal justice was subsequently resolved by Legislative Decree No. 466 of 2 August 1945, which, notwithstanding Art. 49 of the Italian criminal code, extended the jurisdiction of the extraordinary courts of assizes to crimes of collaborationism. Only if issues of a particularly complex military nature arose could a trial for crimes of collaborationism be referred to a military court.

Legislative Decree No. 625 of 5 October 1945 modified the relationship between military justice and civilian criminal justice by establishing that jurisdiction would have to be shifted to the military courts if issues arose which entailed a trial of a military nature. It also established that, in that case, ongoing investigations into possible crimes of collaborationism would be carried forward by the same investigating judge or prosecutor (depending on whether a summary or a formal preliminary investigation was being carried out) but the hearings would have to be held before the extraordinary courts of assizes.[35]

The doubt on jurisdiction was resolved by Legislative Decree No. 201 of 12 April 1946, which reaffirmed the provision attributing jurisdiction over crimes of collaborationism to the courts of assizes even if military personnel were involved, thus specifying that military courts had no jurisdiction over such matters and that Arts. 49 and 50 of the Italian criminal code did not apply.

Needless to say, the relationship between the extraordinary courts of assizes and the military courts was an issue, as evidenced by, for example, a decision handed down by the Supreme Military Court in May 1950.

It started in February 1946, when two individuals accused of collaborationism were brought to trial before the territorial military war court in Rome. The court acquitted them in May 1946, citing insufficient evidence. The public prosecutor, however,

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[33] Court of Cassation, Special Division, 18 June 1945 n. 7; Court of Cassation, Special Division, 17 August 1945 n. 129; Court of Cassation, Special Division, 29 August 1945 n. 162.

[34] Raffaella Bianchi Riva, '"Una saggia politica criminale". I "ragazzi di Salò" nella giurisprudenza della corte di cassazione' (2019) 5 *Italian Review of Legal History* 384-436.

[35] The Court of Cassation ruled that, if the preliminary investigation was being conducted by the military judicial authority, that authority was to continue the investigation; however, in the case of a formal preliminary investigation, the military investigating judge could not order a committal for trial, and in the case of a summary preliminary investigation, the military prosecutor could not issue a summons. See Court of Cassation, Joint Divisions, 4 May 1946.

requested that the decision be annulled and that the trial documents be forwarded to the ordinary courts, as he did not see any issues in the case that would require a military trial or justify giving jurisdiction to a military court as provided by law. The Supreme Military Court upheld the public prosecutor's appeal, setting aside the acquittal for lack of jurisdiction of the military court and ordering that the proceedings be transferred to the ordinary courts.[36]

After the abolition of the extraordinary courts of assizes in 1947, military courts returned to having jurisdiction over crimes of collaborationism committed by members of the armed forces, even though most of the trials relating to this matter had already been held.

6 The Court of Cassation vs the Supreme Military Court

Under Decree No. 159 of 1944, jurisdiction over military personnel accused of collaborationism belonged to the territorial military courts (which were war courts until 15 April 1946, when the state of war officially ceased); that situation lasted until Decree No. 142 of 1945 transferred jurisdiction to the extraordinary courts of assizes.[37] However, in the areas of Italy where the extraordinary courts of assizes did not come into operation, the military courts continued to try crimes of collaborationism under Decree No. 159 of 1944, despite extraordinary courts of assizes having come into operation elsewhere.

In many collaborationism cases, this led to conflicting rulings between military courts and extraordinary courts of assizes and, at the top, between the Court of Cassation and the Supreme Military Court.

Rulings handed down by territorial military courts could indeed be appealed before the Supreme Military Court, which was made up of military and ordinary judges. Appeals to the Supreme Military Court – which was functionally equivalent to the Court of Cassation – consisted of a request to annul the ruling, thus excluding the possibility of a review on the merits.[38]

One of the issues that most challenged ordinary and military courts was how to legally classify collaborationism-related facts submitted to them for adjudication.

Indeed, Decree No. 159 of 1944 referred only to the provisions of the wartime military criminal code of 1941 on crimes against loyalty and military defence of the State.

It was up to the courts to identify which provision of the wartime military criminal code that theoretically referred to collaborationism (among those on crimes against loyalty

[36] Supreme Military Court, 5 May 1950 n. 653.

[37] Supreme Military Court, 6 July 1945 n. 2233. According to the peacetime military criminal code of 1941, the common code of criminal procedure applied also to military courts unless the law provided otherwise, with the aim of speeding up trials. Unlike common criminal trials, for instance, in military trials no civil action for damages was allowed; furthermore, no appeals were allowed – only requests to annul rulings before the Supreme Military Court. See Stellacci (n 3) 519-528. On the operation of military courts during the state of war, see *ibidem*, 555-558.

[38] Stellacci (n 3) 561-575.

and military defence) to apply. The choice often depended precisely on the penalty envisaged under the provision.

The Court of Cassation generally classified acts of collaborationism as aiding the enemy under Art. 51 (punishable by death), sharing intelligence or corresponding with the enemy under Art. 54 (also punishable by death, unless no damage was caused by the offence), or aiding the enemy in its political schemes under Art. 58 (punishable by 10–20 years' imprisonment).[39]

On the other hand, Art. 56, which punished communicating or corresponding with the enemy without the intent of aiding and abetting it (punishable by 1–7 years' imprisonment), was scarcely taken into consideration by the extraordinary courts of assizes and the Court of Cassation, except – according to Giuliano Vassalli's study – for one case in which the latter ruled it was inapplicable to collaborationism. Indeed, the Court of Cassation annulled a sentence handed down by an extraordinary court of assizes that had convicted a defendant under Art. 56, holding that this provision was applicable only to the military.[40]

It was only natural, therefore, that Art. 56 would come into greater prominence before the military courts (although even here, the more prevalent charges remained those relating to providing military or political aid to the enemy or sharing intelligence with the enemy).

The territorial military war courts sometimes held that the facts submitted to them for adjudication did not constitute intent to aid the enemy and that such intent was thus to be excluded, leading them to classify the facts as unlawfully communicating with the enemy instead of aiding the enemy or sharing intelligence or corresponding with the enemy – even if such a classification was different from the original charge.[41] This obviously made it possible to give defendants more lenient sentences.

As to the applicability or non-applicability of Art. 56 to collaborationism, the Supreme Military Court ruled in several respects.

In October 1945, for example, the Supreme Military Court upheld a sentence handed down in April 1944 by the territorial military war court in Bari, in which a member of the Volunteer Militia for National Security had been sentenced to one year of imprisonment. The defendant's defence argued that, in the days immediately following the armistice – when the events of the case had taken place – the Germans could not be considered enemies. But the Supreme Military Court held that the fact that they were enemies, which

[39] Raffaella Bianchi Riva, 'L'ordine del superiore gerarchico nella giustizia di transizione italiana: diritto, etica e politica' (2019) 16 *Historia et ius*.
[40] Giuliano Vassalli, 'La collaborazione col tedesco invasore nella giurisprudenza della cassazione' (1945-1946) L-LI *La Giustizia penale*.
[41] Supreme Military Court, 30 November 1945 n. 3258; Supreme Military Court, 1 March 1946 n. 576; Supreme Military Court, 15 March 1946 n. 754; Supreme Military Court, 12 July 1946 n. 1092.

is precisely what had made the defendant's actions a crime, could be deduced not only from the order issued by the Italian High Command on 11 September 1943 but also from the veritable acts of war that the German army had committed against the Italian army.[42]

When it became clear that the Germans were to be regarded as enemies, defence lawyers began to argue that Art. 56 had been designed with reference to the experience of World War I in order to punish what could be described as 'brotherly pacts with the enemy in the trenches': such pacts presupposed the deployment of two opposing armies on the same front and thus could not occur in enemy-occupied territory.

Initially, the Supreme Military Court accepted this defence argument: it held that the crime of unlawfully communicating with the enemy could be committed only when opposing armies were facing each other in the trenches or when the national army had invaded enemy territory, and that it could not be committed when the enemy had invaded national territory, as was the case with the German occupation after September 1943. Indeed, in the latter case, it was very difficult to avoid contact with the enemy, which on the contrary was often a necessity; consequently, communication with the enemy (in the absence of intent to aid and abet it) did not constitute a crime. For example, in March 1946, the Supreme Military Court annulled a sentence handed down by the territorial military war court in Rome that had sentenced two captains from the Corps of Engineers to 2 years and 11 months' imprisonment.[43]

Furthermore, for communication to constitute a crime under Art. 56, it had to be carried out without authorisation or in the presence of a ban against it established by regulations or superiors. The Supreme Military Court thus held the provision could not apply to collaborationism because, among other things, no military body existed in occupied Italy after the armistice that was capable of issuing such a ban. In November 1945, for example, the Supreme Military Court rejected the appeal of a public prosecutor who argued that a ban on communicating with the enemy was implicit in a declaration of war, ruling that it conflicted with the letter of the law, which required an express ban; it thus upheld the sentence in question, handed down by the territorial military war court in Rome, which had acquitted the defendants on the grounds that no crime had been committed.[44]

This interpretation allowed many defendants to be fully acquitted.

In a rather sudden change in practice, however, the Supreme Military Court subsequently held that Art. 56 was applicable to collaborationism. Indeed, according to the Court, it was up to the the judge to adapt the rule to changing conditions – to distinguish the circumstances surrounding the introduction of a law (*occasio legis*) from the law's purpose (*ratio legis*). Though the German occupation had led to a de facto situation not envisaged by Art. 56, it could not be denied that a ban on communicating with members of an invading enemy's armed forces remained. There was thus no reason

[42] Supreme Military Court, 12 October 1945 n. 2738.
[43] Supreme Military Court, 1 March 1946 n. 576.
[44] Supreme Military Court, 20 November 1945 n. 3123.

to limit application of the law to 'brotherly pacts with the enemy in the trenches' and deny its application in other cases of contact with the enemy[45]. Based on this interpretation, in March 1946, the Supreme Military Court upheld a sentence handed down by the territorial military war court in Rome against an air force colonel who had had personal contact and telegraphic correspondence with a German command post: although the sentence had acquitted the colonel of the charge of unlawful communication with the enemy because of insufficient evidence, it had acknowledged that Art. 56 was applicable to his case. And in July 1946, the Supreme Military Court upheld another sentence handed down by the territorial military war court in Rome, this time against an air force marshal who had carried out an espionage mission in favour of the Germans and had been sentenced to one year of imprisonment for unlawful communication with the enemy.

Although this interpretation made it possible to convict more soldiers for collaborationism, the fact remained that application of Art. 56 still led to much lighter sentences (if the defendants were not acquitted) than those resulting from application of Arts. 51, 54 and 58.

7 Conclusion

In the 19th and 20th centuries, the need to cope with emergencies often led Italian governments to extend the scope of military justice to include civilians in order to ensure prompt and effective punishment of crime. Why, then, during the transition from fascism to republic, did the government decide to do the contrary – that is, to resort primarily to extending the scope of the civilian criminal justice system to include members of the military – notwithstanding the desire to immediately and severely punish Fascist crimes?

Several factors contributed to this decision, all of which were affected by the political and social issues that emerged after the fall of fascism.

Though the situation saw justice of an extraordinary nature being administered with political overtones, the establishment of extraordinary courts of assizes accomplished the goal of legitimising the punishment of Fascist crimes in the eyes of the public. It guaranteed the people's participation in the administration of justice, thus playing a fundamental role in building the foundations of democratic order during the transition from fascism to republic.

Conversely, the public was hardly interested in the military justice system[46]. Thus, the frequent public disregard of military justice, along with the widespread prejudice that the military justice system gave scant regard to a fair trial (fuelled precisely by previous governments' frequent recourse to military justice to repress political dissent), probably

[45] Supreme Military Court, 15 March 1946 n. 754; Supreme Military Court, 12 July 1946 n. 1092.
[46] Fabio Ratto Trabucco, 'Sorella minore o "minorata"? La giurisdizione speciale militare fra antistoricità, autoconservazione ed incostituzionalità' (2020) CLII, 1 *Archivio giuridico* 153-242.

contributed to the government's decision to establish extraordinary courts of assizes during the overthrow of illiberal rule by democracy.

That said, the role played in those years by military courts both before and after the establishment of extraordinary courts of assizes was not irrelevant. Indeed, they were at the centre, together with the extraordinary courts of assizes, of an intense propaganda campaign that not only helped highlight the due process aspects of military criminal trials but also enabled the population to become aware of the problem of special military jurisdiction. Indeed, they helped give rise to a debate that, during the Republican era, would focus on the adaptation of substantive and procedural military law to constitutional values.[47]

In any case, the practice of subjecting civilians to military justice in exceptional circumstances was not over. As a matter of fact, Legislative Decree No. 234 of 10 May 1945 reintroduced the death penalty for robbery committed in certain circumstances and established a special military court composed of an officer of the armed forces, an ordinary judge and a lay judge[48], thus demonstrating that military justice retained its characteristic special nature, which would long contribute to the widespread suspicion of it and would lead to delays and difficulties in adapting it to the Italian constitution.

[47] Rodolfo Venditti, 'Il percorso evolutivo della giustizia militare nell'ultimo cinquantennio', in Nicola Labanca and Pier Paolo Rivello (eds), *Fonti e problemi per la storia della giustizia militare* (Giappichelli, 2004), 253-264.

[48] Floriana Colao, 'La pena di morte in Italia dalla giustizia di transizione alla crisi degli anni Settanta. In memoria di Mario Da Passano e Mario Sbriccoli, a dieci anni dalla morte' (2016) 10 *Historia et ius*.

PART 2
MILITARY JUSTICE AS IT IS
CONTEMPORARY CHALLENGES

DISCIPLINE AND THE RULE OF LAW. MILITARY JUSTICE IN DENMARK

*By Lars Stevnsborg**

Abstract

The Kingdom of Denmark still maintains a separate justice system for the Armed Forces although a number of European countries has abolished such systems. The Danish Military Justice was forged after the Peace Treaty of Westphalia more than 350 years ago and was further developed and reformed in the following centuries, most recently in 2005. The current Danish Military Justice System is structured as a dualistic system with a clearly defined separation between the military criminal justice system operated by the independent Military Prosecution Service and the administrative summary proceedings operated by the military chain of command. The system is compliant with the European Convention on Human Rights.

1 Military Justice as it was - The Evolution of the Danish Military Justice System

1.1 Introduction

A formal military law enforcement has existed in most countries for as long as there has been some organization of the armed forces. Not least in connection with the use of enlisted, mostly foreign, troops, there was a need for a – sometimes very strict – law enforcement system. Various forms of court-martial arose in this connection.[1]

Although the Danish Military Justice System has its origins in the 16th century[2], its development was accelerated in the late 17th century. Around the introduction of absolute monarchy in 1660, a proper Office of the Judge Advocate General was established. On 3 June 1659, King Frederik III[3] appointed the first Danish Judge Advocate General in peace and wartime.[4] The Judge Advocate General had direct access to the King and oversaw the enforcement of the military rules and regulations.

> The establishment of the office of Judge Advocate General in 1659 [came] to point towards a more modern society which, with increasingly detailed rules and laws,

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[1] Military Prosecutor General*, The Military Prosecution Service 350 Years Jubilee Publication 1659-2009* (2009).

[2] The 1564 War Articles of King Frederik II (1559-88).

[3] King Frederik III ruled 1648-70.

[4] Royal Decree of 3 June 1659. The Danish title *Generalauditør* has the equivalent rank as Major General, and would today be translated to Military Prosecutor General.

sought to place limits on the use of organized violence, or at least bring it under effective state control.[5]

Later an extensive codification of civil and military law was adopted when King Christian V established parallel jurisdictions, one for the citizens in general and one for the military personnel and their dependants. With Christian V's articles of war and court-martial instructions, an independent military jurisdiction with its own courts-martial was established – as a parallel to civil society.[6] The democratic Constitution of June 1849, which rested on Montesquieu's principles of separation of powers, stipulated that 'the administration of justice shall be to be separated from the administration according to the rules laid down by law.'[7] However, it took another 70 years before the provisions were implemented by the Administration of Justice Act, which came into force in 1919. In the intervening period, reform efforts remained futile[8]. Thus, the military administration of justice remained largely unchanged until 1919. Some years later, the Judge Advocate General and Judge Advocates[9] became subordinated to the military chain-of-command, and this arrangement existed until 1919, when the military administration of justice was radically changed.[10]

1.2 The Judicial Reform of 1919

The judicial reform of 1919 fulfilled the promise of the establishment of independent courts, and the prosecutor's function was separated as an independent Civilian Prosecution Service headed by a Prosecutor General. This reform abandoned the so-called inquistorial process, in which the same judge conducted police investigations, interrogated the accused and any witnesses, and adjudicated the case.

Although it was argued[11] that special jurisdictions for parts of society would be inconsistent with the principle of equality of law, the military justice system was maintained as a commander-centric system due to the need to secure order and discipline in the military. However, the courts-martial were abolished, and jurisdiction in military cases was transferred to the civilian courts. Nevertheless, the prosecuting authority remained with the military commanders, and the existing right to impose punishment without conviction and to use disciplinary means instead of punishment was maintained. It was

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[5] Knud J.V. Jespersen, "Around the establishment of the Office of Judge Advocate General in 1659" in Military Prosecutor General (ed.) *The Military Prosecution Service 350 Years Jubilee Publication 1659-2009* (2009)

[6] King Christian V Articles of War and Court-Martial Instructions of March 9, 1683. The King ruled 1670-1699. Special rules applied to the Navy, cf. Frederick V Naval War Articles of 8 January 1752. The King ruled 1699-1730. Civil society was regulated in King Christian V's Danish Code Civil of 15 April 1683.

[7] Constitution of the Kingdom of Denmark of 5 June 1849, art 76.

[8] The Administration of Justice Act, Act No 90 of 11 April 1916.

[9] The Danish title *Auditør* translates into Military Chief Prosecutor, who has the equivalent rank of Colonel.

[10] The Act on the Administration of Justice in the Army and Navy, Act No 542 of 4 October 1919.

[11] Draft Bill on the Administration of Justice in the Army and Navy of presented by the minister of Defence on 27 August 1919.

also stipulated that the Judge Advocates would assist the military commanders in the exercise of their prosecuting authority, conduct the investigation in criminal cases and act as prosecutors in the district courts and the courts of appeals.

The Judge Advocate General and Judge Advocates now became independent officers *outside* the chain-of command, but remained military personnel, which is still the case. The Judge Advocate General's area of service was to conduct military criminal cases before the Supreme Court and oversee the activities of the Judge Advocates. The Judge Advocate General was directly subordinate to the Minister of Defence, assisted in supervising the exercise of the prosecution authority and acted as the minister's legal adviser in matters relating to the administration of military justice. This remains the case today.

1.3 Later Amendments

Under the Military Administration of Justice Act 1973, the military criminal jurisdiction was transferred from the military commanders to the Judge Advocate General and Judge Advocates. However, before deciding on an indictment, the Judge Advocate had to consult the military commander.[12] This rule was intended to ensure that military considerations and local knowledge would form part of the Judge Advocate's deliberations. In the event of disagreement, the military commander could request the submission of the case to the Judge Advocate General and the Minister of Defence for review. The final separation of jurisdiction in military criminal cases did not come until the judicial reform in 2005.[13]

2 A brief overview of Military Justice as it is

2.1 The 2005 Military Justice Reform

The key driver for the 2005 Reform was the issue of whether military personnel would be subject to the (stricter) military criminal law in peacetime. A select committee appointed by the Minister of Defence had submitted a report based on lengthy and thorough deliberations proposing to uphold a system in peacetime but in the form of a new model separating military *criminal* cases from military *summary* proceedings.[14]

The division between the two strands of military justice would limit criminal liability to *only* aggravated acts committed intentionally or as a result of gross negligence, thus resulting in a significant decriminalisation. The view was that minor offences and lesser

[12] The Military Administration of Justice Act, Act No 216 of 26 April 1973, section 9 (in force at the time).
[13] The Military Penal Code, Act No 530 of 24 June 2005; The Military Code of Procedure, Act No 531 of 24 June 2005; The Military Disciplinary Act, Act No 532 of 24 June 2005. The three acts entered into force on 1 January 2006. The three acts are available here (in English): http://www.fauk.dk/english/Pages/default.aspx. After the abolition of the power to administer arbitrary punishments in 2006, the English term for the Danish military prosecutors have been *Military Prosecutor General*, *Military Chief Prosecutor* and *military prosecutors*.
[14] Report No 1435 (2004) on the military penal code, the military administration of justice act and the military disciplinary act by the select committee on the Military Justice System, Copenhagen 2004.

degrees of negligence would *not* constitute a criminal offence but might be sanctioned within a non-criminal, administrative, framework of summary proceedings. Further, arbitrary punishments were abolished. The purpose of military justice remained the same: to safeguard the efficiency and readiness of the armed forces through maintaining order and discipline in compliance with international law.

The Minister of Defence presented three bills to the Danish Parliament based on the recommendations of the Select Committee on Military Justice. With a few adjustments, the bills were adopted by Parliament, and the new system, which fully complies with the European Convention on Human Rights, entered into force on 1 January 2006.[15]

With the comprehensive reform the need for a separate military criminal justice system to support the operational *effectiveness*, *discipline* and *order* in the Armed Forces in particular with a view to current international operations was affirmed.[16] Further, the reform entailed the fundamental change, that the competences of the armed forces and the prosecution were finally separated. The Military Prosecution Service became the sole competent authority to conduct military *criminal* cases, while *minor offences* and lesser degrees of negligence were to be addressed within the chain-of-command in a framework of summary proceedings characterized by a speedy, non-judicial *administrative* process.[17]

However, the two strands of military justice – criminal and disciplinary – while strictly separated between the Military Prosecution Service and the military commanders – are interconnected. *Firstly*, they serve the same purpose: to maintain discipline in the armed forces; *secondly*, they extend to the same personnel; *thirdly*, the Military Prosecution Service makes the final decision on whether a case must be dealt with as a criminal case or a disciplinary case; and *fourthly*, a disciplinary case may be opened *after* charges in a criminal case have been dropped or there has been an acquittal in court.[18]

2.2 The current Danish Military Criminal Justice System

The Danish Military Criminal Justice System is an integral part of the general criminal justice system and abides by its fundamental principles of justice. The military criminal justice procedures follow those applied in civilian criminal law with some specific differences due to the nature of military service. These include inter alia certain limitations to public access to information, additional rules on arrest and detention on disciplinary grounds and collective search in military barracks.[19]

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[15] The draft Bill of 29 October 2004 in fact comprised three parts, the draft bills on the military penal code, the military administration of justice act and the military disciplinary act. Due to a Parliamentary election on 8 February 2005, the Bill had to be presented to Parliament once again on 23 February 2005.

[16] Denmark had participated in a number of international operations since the Gulf War in the early 1990s.

[17] Under the supervision of the Ministry of Defence Personnel Agency. See section 8.

[18] See section 8.

[19] See the publication (in English) *The Danish Military Justice System* (2020), published by the Military Prosecutor Generals' office. Available here: www.fauk.dk.

The Danish Criminal Justice System is based on the *adversarial* process. The Administration of Justice Act sets out a wide range of detailed provisions aiming to facilitate a *fair trial* for the defendant as well as protecting the rights of victims and witnesses. The aim is also to strike a fair balance between the rights of the individual and the interests of society, including the necessary efficiency of the criminal justice system.

The basic principles are the presumption of innocence - *in dubio pro reo*, the right of the defendant to remain silent in accordance with the prohibition against self-incrimination, the right of a defendant to be brought promptly before a judge when arrested and equality of arms between the prosecution and the defence counsel. Further, the burden of proof is placed on the prosecution. The courts' assent of evidence is free, i.e. not bound by specific legal rules.[20]

The Administration of Justice Act sets out the overarching guiding principles for all prosecutors – whether civilian or military – that the Prosecution Service shall, at all times, proceed with timeliness and ensure that those liable to punishment are prosecuted while those innocent are not. This is the fundamental principle of *objectivity* and *fairness*.[21]

The European Convention on Human Rights (ECHR) is incorporated into Danish law.[22] Which thus, complies with the legal guarantees set out in this Convention, as well as those of the International Covenant on Civil and Political Rights (ICCPR). All military criminal cases are heard by the ordinary courts in compliance with the rules and procedures set out in the Administration of Justice Act and the Military Administration of Justice Act. Transparency forms an essential part of the justice system and the courts are generally open to the public.

2.3 The Military Prosecution Service of Today

The Military Prosecution Service is a military organization and the military prosecutors and investigators have formal status as 'military personnel outside the chain of command'.[23] The key responsibility of the Military Prosecution Service[24] is to enforce the law with integrity and impartiality in accordance with the rules set out in the civilian and military Administration of Justice Acts.

The organisation of the Military Prosecution Service is set out in the Military Administration of Justice Act as well. The Military Prosecution Service is a two-tier organization headed by the Military Prosecutor General and comprises the Office of the Military Prosecutor General and the Office of the Military Chief Prosecutor. Decisions of the Military

[20] ibid.

[21] Administration of Justice Act, Consolidated Act No 1835 of 15 September 2021, section 96.

[22] Act No 285 of 29 April 1992 on the European Convention of Human Rights. The jurisprudence from Strasbourg obviously has had an impact on the Danish Justice System.

[23] The Military Personnel Act, Consolidated Act No 667 of 20 June 2008, section 2.

[24] In Danish *Forsvarsministeriets Auditørkorps*, which translates as The Ministry of Defence Prosecution Service.

Chief Prosecutor in criminal cases are – in accordance with the general principle in Danish law – subject to review by the Military Prosecutor General[25]. Further, the Military Prosecutor General supervises the casework of the Military Chief Prosecutor.[26] Apart from investigating and prosecuting military criminal offences, the Military Prosecution Service has a number of responsibilities outside the realm of Criminal Justice as well. These include *inter alia* providing legal advice to the Ministry of Defence and other military authorities pertaining to international humanitarian law[27] and military justice.

3 Military Criminal Jurisdiction

The Military Penal Code[28] and the Military Administration of Justice Act[29] define the military criminal jurisdiction. The *personal* jurisdiction of the military justice system extends to all military personnel in active service[30], including officers and personnel with military status outside the chain of command – such as military prosecutors and investigators, musicians and chaplains – as well as civilians with temporary military status.[31] Discharged military personnel are subject to the military justice system in regards to military duties imposed after discharge. Civilians are not subject to the military justice system in peacetime. During armed conflict the military criminal jurisdiction extends to anyone serving in the armed forces, including civilians, and anyone who commits an offence against the efficiency of the military forces, which includes foreign citizens and prisoners of war.[32]

In 2018, the Parliament adopted an amendment to Military Penal Code in order to accommodate a new scheme for military assistance to the police following a series of amendments to the Police Act.[33] These amendments establish that the Military Penal Code is not applicable to criminal infractions committed by military personnel *when* assisting the national police. The reason is that this type of assistance is under the direction of the police and consequently it was decided that the same legislation, *i.e.* the Civil Penal Code, should apply to both police officers and military personnel assisting the police.

Accordingly, possible infractions are investigated by the Independent Police Complaints Authority (IPCA) and the provisions of the Military Penal Code and the Military Administration of Justice Act are not applicable in such circumstances. Although investigation

[25] A decision taken by the Military Prosecutor General in first instance, which rarely happens, may be appealed to the Ministry of Defence.
[26] The Military Administration of Justice Act, section 7, cf. Administration of Justice Act, section 99.
[27] The Military Legal Advisory Service was created in 1997 to fulfil the legal obligation, in particular in the field of international humanitarian law, as prescribed by API Article 82 of the Geneva Conventions of 1949 to facilitate legal advice to military commanders.
[28] The Military Criminal Code, Act No 530 of 24 June 2005 with later amendments.
[29] The Military Administration Act, Act No 531 of 24 June 2005 with later amendments.
[30] As defined in the Military Personnel Act.
[31] Military Criminal Code, section 1.
[32] Military Criminal Code, section 2.
[33] Act No 708 of 8 June 2018 on the amendment of the Police Act, the Defence Act and the Military Criminal Code.

and prosecution of such cases is not under the jurisdiction of the Military Prosecution Service, the Service assists the IPCA and the civilian prosecution service as required. Further, upon the request of the IPCA, the Military Prosecution Service may conduct a case as a military criminal case 'if knowledge of military conditions or regulations are of particular relevance to the case at hand, and if the military and civilian prosecutor so agrees.'[34]

The *subject matter* jurisdiction extends to violations of the Military Penal Code, i.e. classical military offences not reflected in the Civil Penal Code such as desertion, insubordination, neglect of duty, including a set of specific 'War Articles'. Further, the jurisdiction extends to civilian crimes, or so-called *ordinary criminal offences,* such as assault, theft, allegations of sexual abuse, manslaughter and rape, when the offence is committed by military personnel and there is a *nexus* to the service i.e. the offence relates to or is committed as part of the execution of military duties or is committed in a military zone, or in military barracks, as this would have an impact on the service, and there would be 'no hesitations as the cases would be heard by the ordinary courts.'[35]

The *territorial* scope of the Military Penal Code includes violations committed both within and outside Danish territory.

4 Substantive Military Criminal Law

4.1 The Military Penal Code

The Danish Military Penal Code comprises a series of specific offences against the duties of service personnel. As mentioned above, the 2005 law reform introduced a substantive decriminalization of military offences and accordingly since its enactment in 2006, the Military Penal Code covers *only* violations of a more severe nature that have been committed either with intent or by gross negligence. Lesser degrees of negligence do not constitute a criminal offence but might be sanctioned within the framework of summary proceedings.[36]

The current Military Penal Code includes several service offences that are unique to military service such as disobedience of a lawful command, mutiny and absence without leave. It also comprises a number of offences that would be prejudicial to good order and discipline such as insubordinate behaviour, abuse of position, degrading rituals, abuse of alcohol and controlled substances as well as a general provision that covers breaches of obligations arising from various written rules, oral orders and rules or principles 'in the form of unwritten but generally accepted minimum requirements for his or her daily work.'[37] Further, it contains a specific set of 'War Articles' applicable in armed conflict

[34] Draft Bill No 159 of 28 February 2018, Act No 708 of 8 June 2018, cf. note 34.
[35] Draft Bill on the Administration of Justice Act, Act No 542 of 4 October 1919.
[36] See section 8.
[37] Draft Bill on the Military Criminal Code, section 27; Supreme Court Judgment 25 April 2012, published in the Law Review 2012, page 2387. See Lars Stevnsborg, 'The Principle of Thruth in Danish Military Law'

only that include violations of the Law of Armed Conflict (LOAC) as set out in applicable treaties to which Denmark is a party, including the Hague Conventions, the Geneva Conventions and their Additional Protocols as well as relevant rules of customary international law.[38]

In 2008, Parliament introduced legislative amendments to both the Military Penal Code and the Civil Penal Code comprising parallel provisions increasing sanctions for offenses committed by torture as defined in the 1984 UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment, or Punishment.[39]

While the period of limitation relating to a specific offence generally depends on the maximum penalty of the crime in question, there is no limitation period for the criminal prosecution of torture in national Danish law due to the gravity of this particular crime.

4.2 Other Penal Legislation

As mentioned above, the military criminal justice system comprises violations of other general, penal legislation including the Civil Penal Code and specialized legislation such as the Traffic Act and the Weapons Act. The most frequent such military cases prosecuted include theft and other property offences, assault, violations of the Weapons Act and traffic offences.

5 Military Criminal Proceedings

In a democratic justice system, several authorities are involved in the three separate stages of the criminal proceedings: the investigation phase, the prosecution phase and the adjudication phase.

5.1 Investigating and Prosecuting Military Criminal Cases

The organization of the Danish police and prosecution service differs from that of most countries in that the local prosecution service is integrated into the police districts headed by the police directors.[40]

The Military Prosecution Service is configured in the same way and is the sole competent body to investigate and prosecute military criminal cases. With this in mind, the Military Chief Prosecutor's office is organized as an interdisciplinary body comprising both prosecutors and investigators.[41]

in Navdeep Singh and Franklin Rosenblatt (eds.), *March to Justice: Global Military Law Landmarks* (Occam, 2021).

[38] This issue is further developed in section 7.

[39] Act No 494 of 17 June 2008 (increased sanctions for torture).

[40] Norway has a similar system.

[41] The fact that the prosecutor *directs* the investigation facilitates an efficient cooperation as well as quality- and legality control in the pre-trial phase.

The Military Prosecution Service has the power to launch investigations *ex officio* when there is a reasonable suspicion that a criminal act has been committed and does not rely on referrals from other bodies. However, in practice the majority of the annual caseload[42] is based on reports by military commanders, including military police units, or individuals, including whistle blowers. Further, investigations into serious service-related accidents, i.e. when servicemen are seriously injured or killed in connection with the service, are initiated *ex officio.* The same applies - as a matter of policy – in cases of alleged civilian casualties.

Investigations are conducted independently of the chain of command by an investigation team from the Military Prosecution Service. As stipulated in the Military Administration of Justice Act, the Military Prosecution Service may rely on the assistance of military authorities – in particular military police units. In such circumstances, military police officers act upon the direct instruction and responsibility of the Chief Military Prosecutor. In certain limited circumstances, the military authorities are not only authorized but obliged to conduct any necessary urgent investigative steps and report immediately to the prosecutor's office for further instructions.[43]

A case may be subject to a *preliminary examination* prior to the initiation of an investigation. Based on such a preliminary examination, a formal criminal investigation may be launched, or in case there is no basis for such an investigation, the case may be closed immediately.

In other circumstances, an investigation may furnish the evidence necessary for a decision on whether or not to indict. According to the Administration of Justice Act[44], the purpose of a criminal investigation is to clarify whether the conditions for imposing criminal responsibility are present and to provide information for the purposes of the criminal proceedings. When the investigation gives rise to a certain qualified level of suspicion, formal charges may be brought. This allows for the appointment of a defense counsel. However, protection against self-incrimination applies for all individuals who are questioned, whether or not formal charges have been brought.

Once the investigation is complete, the prosecutor decides whether there are grounds for indictment. If the investigation does not support an indictment, the prosecutor will close the case and inform the parties and others with the necessary legal interest in the outcome of the case. This decision is subject to appeal to the Military Prosecutor General.

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[42] Currently some 700-800 cases. For further information, see the Annual Report of the Military Prosecution Service (in Danish) available at www.fauk.dk

[43] The Military Prosecutor General's Guidelines No 2 (2016) on quality, legality and supervision of military criminal cases ensures that military police officers act upon the command and control of the Chief Military Prosecutor and maintain an independence from the chain-of-command. Available (in Danish) at www.fauk.dk

[44] Administration of Justice Act, section 743.

On the other hand, if the case is ready for an indictment there are several different ways in which the case may proceed. In certain cases a fine is appropriate and if the accused pleads guilty and is willing to pay the proposed fine, the case may be concluded outside the court system. However, in the absence of a guilty plea, the case goes to court with an indictment. In cases where the Military Prosecution Service requests a term of imprisonment, the case is brought to court with an indictment or in case of guilty pleas a request for a court hearing.[45]

5.2 Cooperation with Military Authorities, the National Police and the Civilian Prosecution Service

Military authorities as well the National Police *must* assist the Military Prosecution Service upon request. When assisting, these authorities act upon the command and control of the prosecutor. In certain situations, these external authorities are obliged to take any necessary urgent investigative steps and report immediately to the prosecutor's office. The Military Prosecution Service has a close relationship with the National Police and is for example provided access to the forensic departments of the National Police. Further, in certain, rare, cases it may be suitable for the National Police to conduct interviews on behalf of the Military Prosecution Service.[46] The relations to the Civilian Prosecution Service are informal and efficient with regular meetings between the Civilian and Military Prosecutor Generals and other key players. The transfer of a military case to the Civilian Prosecution Service is only possible in limited circumstances (so-called *mixed* civilian/military cases) and requires that a transfer agreement between the Services is in place. These cases are quite rare.

5.3 Adjudiction

Military cases are tried before ordinary civilian courts[47] and the procedural rules correspond to those of other criminal cases with a few exceptions due to the nature of military service. Contrary to the Anglo-American systems, defence lawyers in military cases are civilian and not military. In the first instance, cases are heard by the district court either by a single judge presiding alone, by a single judge presiding with two lay judges or by three judges presiding with six jurors depending on the nature and severity of the case. A district court ruling may be subject to appeal[48] to a court of appeals that would, again

[45] *The Military Justice System* (2020) published by the Military Prosecutor General's office. Available at www.fauk.dk (in Danish).

[46] In a high-profile case in 2009, the Minister of Defence was interviewed as a witness. The case concerned the publication of a book entitled *Ranger - At war with the Elite* - on a special forces deployment to Afghanistan.

[47] All court cases are heard in Denmark as the Danish courts cannot deploy abroad.

[48] Administration of Justice Act, section 902, specifies that minor cases require a permit from the the Appeals Permission Board.

depending on the nature and severity of the case, sit either with three judges presiding alone or with a panel of lay judges or jurors.[49]

Bringing a judgment of a court of appeals before the Supreme Court of Denmark requires a special leave from the Appeals Permission Board. Such permits are rare and presuppose a legal issue of a fundamental nature.[50] Under Danish criminal law, offences are subject to imprisonment, fine or an alternative sanction in the form of community service. Further, a court may order an offender to be deprived of the proceeds of crime or it may order the payment of compensation to the victim of the crime. A court may also impose an additional sentence such as the suspension of a driver's license. The Military Prosecution Service is responsible for the enforcement of penalties and orders imposed by the courts in military cases[51]. A prison sentence imposed in a military criminal case is served in the ordinary prisons as service prisons or detention barracks have been abolished in Denmark. Contrary to some military justice systems, demotion of rank or involuntary discharge is not a sanction in a military criminal case.[52]

5.4 Lessons Learned

A number of the investigations carried out by the Military Prosecution Service contain information and conclusions that may be useful to the military authorities or identify issues that should give rise to changes in procedures, etc. The Chief Military Prosecutor therefore regularly informs military authorities of the outcome of investigations in order to ensure that the relevant processes of the Armed Forces are adjusted or adapted to reduce or avoid similar future incidents.

6 International Investigations and Armed Conflict

6.1 Introduction to International Criminal Investigations

During recent decades, Danish armed forces have continually been deployed to a variety of armed conflicts abroad, both of an international and non-international character[53]. Accordingly, there have been incidents outside Danish territory necessitating criminal in-

[49] Three lay judges or nine jurors.

[50] These cases are quite rare. In the last decade, only two military criminal cases have been brought before the Supreme Court of Denmark.

[51] According to Ministry of Defence circular No 9893 of 13 October 2006 on notifications in military criminal cases, the Military Chief Prosecutor *inter alia* notifies the Ministry of Defence Personnel Agency on charges, judgments etc. to facilitate issues pertaining to employment law.

[52] For further information, see section 8.3.

[53] Defence Command Denmark & Ministry of Defence, *Danish Military Manual* (ed. 2020), chapter 2, section 1.1.: 'During the period from 1999 to 2015, Danish forces were continually deployed to a variety of armed conflicts, both international armed conflicts with Serbia, Libya, and Afghanistan and non-international armed conflicts with non-State actors in Iraq and Afghanistan'. Manual available here: -military-manual-updated-2020-2.pdf (forsvaret.dk) accessed 14 September 2022.

vestigations by the Danish Military Prosecution Service, which may deploy to such operational areas and conduct investigations under the Status of Forces Agreement (SOFA) applicable in the particular mission.

The Danish Military Prosecution Service determines when circumstances require an investigation and whether to deploy to the operational theatre. Certain criminal investigations are launched *ex officio* as required by international law[54] and international investigations are, as any other criminal investigation, conducted independently of the chain of command by an investigation team from the Military Prosecution Service. As mentioned above, the Military Prosecution Service may rely on the assistance of military components, in particular military police units, and in such cases, military police officers act upon the direct instruction and responsibility of the Chief Military Prosecutor. In certain limited circumstances, military components are authorized and obliged to conduct any necessary urgent investigative steps and report immediately to the prosecutor's office for further instructions.

The Military Prosecution Service has regularly conducted investigations in relation to military operations outside the Danish territory, including international conflict zones, most recently in Iraq and Afghanistan. Such investigations may arise from suspected violations of the Military Penal Code in military missions abroad and charges pressed have included insubordination, desertion, manslaughter, rape and violations of the applicable Rules of Engagement (ROE).

Further, the Military Prosecution Service conducts *ex officio* investigations into all incidents pertaining to Danish soldiers killed-in-action, including by *friendly fire*, and – as a matter of policy - into all cases relating to the suspicious death or serious injury of civilians as a result of use of force by Danish military personnel abroad, so-called *collateral damage*.[55]

Thus, the Military Prosecution Service has investigated a number of cases of civilian deaths in connection with hostilities, notwithstanding that a direct duty to do so is not found in international law. The purpose is to establish the sequence of events and determine whether Danish forces have acted within the applicable rules on the use of force, including ROE and the rules of International Humanitarian Law. In none of the cases, Danish soldiers have been found to have acted in breach of use-of-force directives or other rules.

Investigations in international conflict zones are by their nature often executed under very difficult security conditions and they are therefore, not rarely, extremely challenging. Although some less serious cases may not differ much from domestic investigations, many international investigations entail a series of legal and practical issues. A SOFA will usually determine that criminal investigations fall under the national jurisdiction of

[54] There are different thresholds for when investigations are required by international human rights law and international humanitarian law.

[55] Often referred to as CIVCAS (i.e. civilian casualties).

each troop contributing country and practical agreements between coalition partners with a view to mitigate conflict of jurisdiction when an incident involves military personnel of two or more nationalities will often, but not always, be in place before deployment.

In reality, national investigations may be carried out in parallel by the countries involved with assistance from coalition partners. However, such mutual assistance remains informal and would be additional to the investigative processes required by the legal systems of the involved nations. The use of any evidence gathered in this process may well present a challenge.
Interviewing local witnesses and conducting other investigative steps in the host country may pose even greater challenges as the troop contributing country's investigators may have no enforcement jurisdiction over host nation nationals.

Apart from these cross jurisdictional issues, practical challenges such as constraints due to difficult security conditions, gaining access to the crime scene, evidence gathering, and safety measures for investigators, just to mention a few, may occur.

6.2 The Duty to Investigate

Under Additional Protocol I to the Geneva Conventions[56], the States Parties are obligated to establish an internal disciplinary system within their armed forces inter alia to enforce compliance with international law applicable in armed conflict. International humanitarian law and international human rights law further contain rules requiring states to conduct *ex officio* investigations in the event of a suspected violation of certain rules of international law.

In the context of international human rights law, Denmark is bound by the ECHR, which, according to the jurisprudence of the European Court of Human Rights contains a procedural obligation to conduct effective investigations into arguable claims of breaches of inter alia articles 2 and 3 of the Convention.[57]

According to the Court's case law, this procedural obligation under ECHR Article 2 continues to apply even in 'difficult security conditions, including in a context of armed conflict', although the specific circumstances in which the use of force took place must be taken into consideration when evaluating the investigation.[58]

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[56] Additional Protocol 1, art 43.

[57] Art. 2, the right to life; art 3, the prohibition of the use of torture. For further details on this matter, see section 3.4.2 of the Danish Military Manual, which is available here: https://forsvaret.dk/en/publications/military-manual/. These rights apply equally for members of the armed forces, Council of Europe Recommendation 24 February 2010 on Human Rights for Members of the Armed Forces.

[58] *Al-Skeini and Others v. The United Kingdom* App no. 55721/07 [2011], para 164. In *Hanan v Germany* App no. 4871/16 [2021] pertaining civilian casualties in connection with the bombing of stolen fuel tankers ordered by a German Colonel, the Court accepted a broad margin of appreciation as 'the deaths occurred

The Court has in several judgments defined what constitutes an effective investigation in terms of *objectiveness, promtness, thoroughness, reasonable expedition* and has in several cases convicted member states for breaches of the procedural obligation under article 2.[59] The requirement of *effectiveness* entails that an investigation must be capable of leading to a decision as to whether the use of force was justified and, as appropriate, to the identification and punishment of those responsible.[60] The Court has further established that to be effective the authority conducting the investigation must be *independent* both hierarchically, institutionally and practically of those who are the subject of the investigation.[61] Further, the requirement of effectiveness entails that investigations are instituted *promptly*, carried out with *reasonable expedition* and that the investigation is transparent.[62] As a matter of policy, the Military Prosecution Service strives to comply with these requirements in all investigations whether or not the standard of ECHR applies as a matter of law. In practice, the Military Prosecutor ascertains whether the military personnel that may assist the Military Prosecution Service in conducting an investigation in each case meet the criteria of independence, i.e. that the military personnel in question not only is, but is seen to be, operationally independent from the military chain of command.[63]

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in active hostilities in an (extraterritorial) armed conflict' (para 200), which 'constitutes a significant difference to Al-Skeini and Others and Jaloud, where the deaths to be investigated did not occur in the active hostilities phase of an extraterritorial armed conflict' (para 223). Although the German civilian prosecution authorities did not have legal powers to undertake investigative measures in Afghanistan, the Court did not consider that the fact that the German military police were under the overall command of the German ISAF contingent affected their independence to the point of impairing the quality of their investigation (para 224). Overview over jurisprudence, see inter alia Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, Effective Investigations into Death or Ill-Treatment Caused by Security Forces, July 2020.
https://rm.coe.int/thematic-factsheet-effective-investigations-eng/16809ef841; Guide on Article 2 of the European Convention on Human Rights Right to life, Updated on 31 August 2022. Guide on Article 2 - Right to life (coe.int); See also UN International Covenant on Civil and Political Rights (ICCPR), Article 6.

[59] The European Court of Human Rights that has passed judgments in several cases, in particular pertaining to art 1 (application of the Convention) and the interpretation of art 2 (the Right to Life), inter alia in *Al-Skeini v The UK* and *Jaloud v The Netherlands.* In *Jaloud v The Netherlands* App no. 47708/08 [2014], pertaining to a shooting incident at a checkpoint, the Court found that the Dutch authorities had breached the procedural duties under art 2 of the Convention. The Court inter alia criticized the investigation because the Dutch authorities had used an Iraqi physician to perform an autopsy, which was not *state of the art* paras 212-216. However, six judges in their Joint Concurring Opinion, paras 5-6, expressed regret that the Grand Chamber 'also found it appropriate to scrutinize the investigations in Iraq in such a painstaking way that eyebrows may be raised about the role and competence of our Court'.

[60] *Al-Skeini v The UK*, para 166.

[61] *Al-Skeini v The UK*, para 167.

[62] ibid.

[63] Military Prosecutor General's Guidelines No 2 (2016) on quality, legality and supervision of military criminal, section 3.2.5. Available (in Danish) at www.fauk.dk

6.3 Armed Conflict in the Context of the Military Penal Code

The Military Penal Code contains a number of provisions which are only applicable 'when Danish forces in or outside the country are involved in an armed conflict'.[64]

In practice, the assessment as to whether or not an *armed conflict* exists is conducted by the Government, e.g. in connection with a submission to Parliament on the deployment of Danish Armed Forces to an international operational theatre.[65] In relation to the application of the Military Penal Code, the determination that an armed conflict exists has the following legal ramifications:

- the jurisdiction under the Code extends to anyone serving in the armed forces or accompanying a unit thereof, including civilians,
- the jurisdiction under the Code extends to anyone committing an offence against the efficiency of the military forces as well as other types of crimes during armed conflict,
- a specific set of substantive provisions on armed conflict are activated, and
- increased sanction levels are activated for certain ordinary offences related to the dereliction of military duties.

6.4. The War Articles of the Military Penal Code

The main provisions applicable in armed conflict are found in the Military Penal Code, Sections 28 to 35 on 'crimes against the effectiveness of the military forces' and Sections 36 to 38 on 'other types of crime during armed conflict'.

The provisions on 'crimes against the effectiveness of the military forces' prohibit conduct considered particularly harmful to the armed forces. These provisions include: war treason (section 28), espionage (section 29), intentionally altering or replacing ammunition or other types of war equipment (section 30), cowardice (section 31); intentional disclosure of military secrets harmful to the armed forces (section 32), intentional omission to prevent mutiny etc. (section 33), intentionally causing the dispiriting of forces (section 34); and intentional unauthorised contact with the adversary (section 35).

The provisions on 'other types of crime during armed conflict' are intended to protect individuals during armed conflict. Section 36(1) prohibits a specific violation of international humanitarian law, namely intentional misuse or disrespect of protected distinctive emblems and signs designed to protect religious or medical personnel, units and establishments, e.g. misuse of the Red Cross emblem. Section 36(2), on the other hand, is more generally formulated and prohibits the intentional use of methods of warfare and weapons contrary to international law. Other crimes during armed conflict are pillage (section 37) and intentional looting of the property of the dead (section 38).

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[64] Military Criminal Code, section 10.

[65] The Danish Constitution of 5 June 1953, art 19 (2).

7 Independence

7.1 Introduction

The separation of powers is the *cornerstone* of government in a democratic society based on the Rule of Law. The independence of the prosecution service – whether military or civilian – constitutes a cornerstone of justice and is equally important. Independence entails inter alia that the prosecution service is able to conduct investigations and prosecutions fairly and without undue influence by Government or any other organs, and perform its professional duties freely, impartially and objectively as well as with due respect of human rights. A number of international instruments have been adopted to that effect.[66]

7.2 The Issue of Independence in the General Danish Justice System

The Danish legal system differs from that of a number of, but not all, EU countries, as both the civilian and the military prosecution services are subordinate to the Ministry of Justice and the Ministry of Defence, respectively.[67] This means that the respective ministers may issue instructions to their subordinate prosecution service as to the conduct of specific cases. However, in 2005, legislative amendments on form and notification were adapted into the Administration of Justice Act with a view to supporting transparency as a safeguard against undue influence.[68] The amendment requires that when a minister issues an order in a specific criminal case, the minister is required to issue the order to the Prosecution Service in writing and further inform the Speaker of Parliament in writing.[69] To date, this has only happened once.[70] The amendment was introduced on the basis of statements in the Parliamentary Committee on Legal Affairs and was intended to 'help prevent the creation of myths about, for example, the reasons why an indictment has been or has not been brought' and was inspired by elements in foreign justice systems.[71]

[66] The UN Guidelines on the Role of Prosecutor (1990) and the Council of Europe Recommendation (2000) on The Role of Public Prosecution in the Criminal Justice System.
[67] The Administration of Justice Act, section 98, and the Military Administration of Justice Act, section 1, cf. the Administration of Justice Act, section 98.
[68] Act No 368 of 24 May 2005 (form and notification on the minister of Justice's orders to the prosecution service in criminal cases).
[69] The Administration of Justice Act, section 98 (3).
[70] On 5 January 2022, the Minister of Justice announced the dismissal of charges in the case of three of four suspected pirates captured by the Danish Navy in the Gulf of Guinea thereby applying the rules for the first time.
[71] Presentation of the Bill 13 2004 by the minister of Justice on 23 February 2005.

7.3 The Issue of Independence in the Military Justice System

In Denmark, the Danish Military Prosecution Service (MPS) is responsible for investigating and prosecuting military criminal cases. MPS has authority to prosecute all military criminal cases. MPS is independent of the military command system and, therefore, cannot receive instructions therefrom. In other words, the Military Prosecution Service decides at its own discretion whether there are valid grounds for commencing a case.[72]

The Military Prosecution Service is *independent* from the military command system and does not form part of the military chain-of-command. As expressed in an answer to the Parliamentary Military Committee, the Minister of Defence is very much aware of the sensitive issue of independence and adopts an *arms-length principle*.[73]

On the other hand, the Military Prosecution Service is, as mentioned, organizationally a part of the Ministry of Defence, which facilitates an easy liaison between the Military Prosecution Service and the Ministry, the military commanders and other agencies under the ministry. The independence of the Military Prosecution Service is widely recognized in the community, and the daily cooperation between the authorities is characterized by an understanding of the authorities' various roles. This may be illustrated by the then Chief of Defense's statement to the media in connection with a specific case that gave rise to considerable media coverage some years ago:

> The most important thing is that we have an independent authority like the Military Prosecution Service outside the armed forces that can investigate and handle military criminal cases. And that the independence of the audit corps can never be called into question. That's how it should be in a democracy with an independent judiciary. [74]

Nevertheless, the issue of independence in relation to the Armed Forces has often been brought into play in public debate. The WikiLeaks leakage of confidential documents in 2010 spurred a debate both in media and Parliament relating to the independence of the Military Prosecution Service from the military, in particular in connection with investigations pertaining to civilian casualties in Afghanistan.

As mentioned above, it is true, of course, that in particular military police units have been valuable assets in international settings and have acted in a number of cases as first responders to serious incidents abroad. But, as mentioned above[75], the Military Prosecution Service, as a matter of policy, ascertains whether the military personnel that may assist in conducting an investigation in each case meet the criteria of independence, i.e. that the

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[72] Danish Military Manual, chapter 15, section 4.4.

[73] Statement from Defense Minister of 26 November 2007 to the Parliament's Military Committee regarding a case of blue-on-blue deaths in Afghanistan (www.fmn.dk).

[74] Article in the news media *Politiken* (Copenhagen 8 November 2012) on a case from Afghanistan. Nevertheless, is has been suggested by certain scholars and others that the Military Prosecution Service is *not really* independent of neither the minister nor the military and that *the military investigates itself.*

[75] See section 6.2.

military personnel in question not only is, but is seen to be, operationally independent from the military chain of command.[76]

However, the Military Prosecution Service is both effectively and functionally independent of the Armed Forces. With regard to the Ministry of Defence, the notification procedure described above in relation to orders directed to the Military Prosecution Service in specific cases is an effective safeguard against undue influence. The constant news coverage from the media outlets and social media place great demands on adequate communication. The Service has therefore seen it fit to focus on an approach that, on a daily basis, actively and clearly conveys the role as independent military prosecution supporting military discipline as well as the rights of the individual in a fair process.[77]

8 A Brief Introduction to Summary Proceedings

8.1 The Concept of Summary Proceedings

As mentioned above, the Danish Military Justice System also comprises a system for addressing offenses of a *minor* nature, disciplinary offences, by way of summary proceedings as established by the Military Disciplinary Act. The purpose of a system of summary proceedings is to ensure discipline within the armed forces. Summary proceedings are non-criminal proceedings based on the inquisitorial process with a view to addressing minor offences expediently and orally. The process is governed by the Military Disciplinary Act[78], which sets out provisions facilitating *fair proceedings* for the accused soldier. The jurisdiction in summary proceedings extends to personnel covered by the military criminal jurisdiction as described above. Summary proceedings are initiated by a military commander[79] and are subject to the jurisdiction of the chain-of-command. The military commanders are responsible for the enquiry, and in accordance with a general principle of Danish administrative law it is their duty to establish all relevant facts before a case is decided. In case of doubt whether a specific case should be pursued as a disciplinary case or investigated as a criminal offense the military commander refers the matter to the senior commander.[80] In case of doubt the senior commander refers the matter to the Military Chief Prosecutor, who is competent to make the *final* qualification of the case as criminal or disciplinary. A commander does not have discretion to transfer a disciplinary case to military criminal proceedings. However, repeated minor offences may constitute a criminal offence, and as such, they will be addressed in the criminal rather than the disciplinary system.

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[76] Military Prosecutor General's Guidelines No 2 (2016) on quality, legality and supervision of military criminal, section 3.2.5. Available (in Danish) at www.fauk.dk.

[77] *Appearance* is an inherent part of the issue of independence; Lord Hewarts' well-known statement 'Justice … must also be seen to be done', in *R v Sussex Justices Ex parte McCarthy* [1923], KB 1924-1-256.

[78] Act No 532 of 24 June 2005 with later amendments.

[79] Usually a company commander (captain/OF2 level).

[80] Usually a regimental commander (colonel) or naval captain (OF5 level).

8.2. The Disciplinary Sanctions

The disciplinary sanctions available to a military commander serve two purposes, which should be considered, when selecting the sanction in question: the sanction is a penalty for the dereliction of duties, but it also serves educational purposes.The disciplinary sanctions available are defined in the Military Disciplinay Act as *reprimand*, *additional work and exercise*, *additional service* or a *disciplinary fine* of up to a maximum of 1/10 of the monthly salary of the person in question for each offence. Contrary to some military justice systems, the sanctions available do *not* include detention, demotion or involuntary discharge.

The legal remedy to a disciplinary sanction imposed by a military commander is a request for review by the senior commander. The senior commander's decision may, in turn be appealed to the Military Disciplinary Board for judicial review. Such an appeal may not as stipulated by the prohibition on *reformatio in peius*, result in the alteration of a decision to the detriment of the appellant soldier.

The Military Disciplinary Board is presided over by a district court judge and is composed of a representative of the armed forces appointed by the Chief of Defence[81] and a representative of the ranks of the subject of the disciplinary measure.[82] The Disciplinary Board's decisions may be brought before the ordinary courts by the subject of proceedings in accordance with the Danish Constitution.[83] In such cases, the prohibition on *reformatio in peius* also applies to the effect that the appeal to the court may not result in the alteration of the decision to the detriment of the appellant. The limitation period for initiating summary proceedings is two years after the commission of the offence, but the limitation period may be suspended in certain situations. Summary proceedings may be initiated following an acquittal in a criminal case.

8.3. The Interplay between the Military Criminal Code, the Military Disciplinary Act and the Civil Servants Act

As already noted, demotion in rank and involuntary discharge of an officer from military service is, contrary to the case in some military justice systems, not a sanction available within the Danish Military Justice System. However, in certain cases, demotion or reduction in rank and involuntary discharge would be the appropriate consequence of an action and in such cases, the disciplinary sanctions set out in the Military Disciplinary Act would therefore be deemed inadequate. In this situation, disciplinary proceedings prescribed in the Civil Servants Act[84] may be relevant. Notably, such proceedings may also

[81] Presently an OF5 (colonel/naval captain).
[82] Statutory Order No 1118 of 23 November 2005 on the Disciplinary Board. I.e. a representative from the personnel organizations of the officers, the non-commissioned officers, the privates and the conscripts.
[83] The Danish Constitution of 1953, Article 63.
[84] Consolidated Act No 511 of 18 May 2017.

be initiated following a conviction in a criminal case as they do not constitute legal proceedings for the purposes of the principle *ne bis in idem*.[85] However, if a disciplinary offence has been the subject of summary proceedings in accordance with the Military Disciplinary Act, a case may *not* be initiated pursuant to the Civil Servants Act. Consequently, subsequent to an acquittal in court or to the disposal of charges in a criminal case, a decision must be made either to institute disciplinary proceedings under the Military Disciplinary Act *or* whether to launch proceedings under the Civil Servants Act.

9 Concluding and Looking Ahead

The Danish Military Prosecution Service has endured in changing times for more than 350 years. With the robust 2005 legislative reform, a fair, balanced and legitimate system has been established. A system that on the one hand supports the effectiveness and combat capability of the armed forces and on the other hand offers the same procedural safeguards for the personnel that apply in the civilian justice system.

In many countries, a debate has emerged whether to *abolish* the military jurisdiction and *transfer* military cases as a whole, or partly, to the civilian justice system. For instance, there seems to be an appetite in some countries with military courts to transfer certain *civilian crimes* such as sexual offences and rape from the military justice system to the civilian justice system.[86] In Norway, the military justice system is presently under scrutiny and is likely to be abolished.[87]

In 2014, the Danish Military Prosecution Service was subject to a review and deliberations as to whether to transfer military criminal cases to the civilian justice system.[88] However, in the end Parliament decided to maintain a specific military criminal jurisdiction under the Ministry of Defence. Instead of abolishing the Military Prosecution Service, it was decided to strengthen the independence of the Service in handling military criminal cases *inter alia* by merging the operational offices into one unit and relocating the offices from military barracks to civilian facilities.[89]

In recent years, we have witnessed a change in operational patterns. Terrorist activities in many European countries have sent *soldiers in the streets* cooperating closely with the national police forces.[90] New legislation has been adopted in several countries, including

[85] The prohibition on »double jeopardy«.
[86] See for instance the Global Military Justice Reform blog edited by professor Eugene R. Fidell, available here: http://globalmjreform.blogspot.com/ accessed 14 September 2022.
[87] Report (2021) from a Ministry of Defence working group on the Act on Military Disciplinary Authority, the Act on the Police Authority in the Armed Forces and Prosecution of Military Criminal Cases (in Norwegian).
[88] The review formed part of the political decision of 10 April 2014 on the reorganization of the Defence Command Denmark and the Ministry of Defence.
[89] The political agreement on the reorganization of the Military Prosecution Service of 3 September 2014. Further the name of the service was changed from 'The Armed Forces' Prosecution Service' to the 'Ministry of Defence Prosecution Service'.
[90] Examples: France: *Opération »Sentinelle«;* Italy: *Operazione »Strade Sicure«;* Denmark: *Operation »Gefion«.*

Denmark, with a view to dealing with post-incident investigations during military assistance to the Police. This legislation has transferred 'a chunk' of the military justice system to the civilian system.[91]

Further, political focus and operational reality has shifted from large scale operations in armed conflict in distant countries such as Afghanistan to deployments in less distant regions, such as the NATO operation *enhanced Forward Presence* (eFP). In this connection, the character of investigations and the legal and practical problems involved are altered and 'international investigations' conducted abroad become more akin to those of a 'domestic nature'.

Whether these trends might have an impact on military justice systems, and to what extent, is an open question and much depends on political developments ahead.

Meanwhile it is essential to preserve an independent, transparent and legitimate military justice system contributing to the maintenance of military discipline and order and staying tuned to the continuing developments of society – for the benefit of both the armed forces and its personnel and society as such.

[91] *Inter alia* Norway and Denmark. Further, see section 3.

THE MILITARY JUSTICES IN BRAZIL. AN ANALYSIS OF THE FEDERAL AND STATE MEMBERS SPECIALIZED CRIMINAL JURISDICTION UNDER THE AEGIS OF THE 1988 CONSTITUTION

*By Maria Elizabeth Guimarães Teixeira Rocha**

Abstract

The Federal Military Justice is the oldest justice in Brazil, instituted on April first, 1808. Formed by a Superior Military Court, Audits and military judges, it is retaining absolute jurisdiction over the national territory. The States members Justice, in turn, are formed by the Audits and the Appellation Courts and have jurisdiction only over the federation states in which they are instituted: São Paulo, Minas Gerais and Rio Grande do Sul. They try military police officers and firefights who commit military crimes defined by law and disciplinary infractions, unlike the Federal Court which has competence to try militaries of the Armed Forces and civilians who perpetrate only military crimes.

1 Introduction

The Superior Military Court, as referred in Brazilian history, originally named Supreme Military and Justice Council[1], was instituted on April first 1808 through a royal binding ordinance by the Prince Regent D. João VI. Circa 1891, the extinctic Court was instituted, having the same competencies as the Supreme Military and Justice Council and, after the advent of the Constitution of 1946, was officially named as it is currently known: the Superior Military Court. Over the years, the composition of the Military Court in Brazil was altered several times until it reached its current number of fifteen members among civilians and military. Despite the numerical changes in its quorum[2], the mixed composition has always been a feature. Indeed, the institution of '*escabinato*', as it is named in

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[1] The Supreme Military and Justice Council aimed to maintain the order and the discipline within the military ambience. 'This institution had two functions: the first was administrative, supporting the government in requisitions, letter patents, promotions, wages, compulsory retirement, nominations, the use of emblems, for which they counseled; the second was only judicial. As the Supreme Court of Military Justice, the Supreme Council judged, as a last resort, the criminal processes of defendants subjected to military forum. The Supreme Military Council was composed of the Admiral and War Councils and of some other high rank officers who were occasionally nominated, having most of them gone on to covet a position as War Counselors. The Supreme Council of Justice has the same formation, featuring, however, three judges, one of whom to report the processes'. See Paulo César Bastos, The Supreme Military Court. 173 years of History (Brasília, 1981) 21.

[2] The composition of the Federal Military Justice has varied throughout Brazilian history. It was originally composed of 13 magistrates, according to the royal binding ordinance institutes on 1st April 1808. In 1850, the number of magistrates rose to 15, which was maintained with the Republic by Decree n. 149, on 18 July 1893. Afterwards, Decree n. 17.231-A, on 26 February 1926, would reduce this number to 10 and later increased to 11 by the Constitution of 1934, which also brought the Military Justice to the Judiciary's

Portuguese or *escabiner* as named in France, was affirmed in the Military Justice, in view of the peculiarities of military life from which stems the need to combine the experience of commanders with judicial knowledge of judges.[3] Consubstantiating 214 years of history, the Military Court was integrated into the Judiciary in the Constitution of 1934 according to the sovereign will of the Constitutional National Assembly.

As a specialized branch of justice, it encompasses a special category of agents: the armed forces - the Navy, the Army and the Air Force – and judges only military crimes defined by law, which is a tenet deriving from article 124 of the Federal Constitution. The Constitution establishes two sorts of Military Justice: the federal and the state-members', *ex vi* from articles 122 to 124 and 125 §§ 3, 4, 5, respectively, listed in Title II, Chapter III, of the Judiciary - Section VII – of the Military Courts and Judges. As for the federal scope, according to article 122 of the Brazilian Constitution, the Federal Military Justice is comprised of the Superior Military Tribunal, the Audits, Tribunals and military judges; institutions created by law. The constitutional provision is regulated by Law 8.457, created on September 4th, 1994, which organized the Federal Military Justice and regulates the operative structure of its auxiliary services.

Retaining absolute jurisdiction over the national territory, the Superior Military Court is on the top of the hierarchical structure of the Military Judiciary and is composed of 15 tenured Ministries among whom three Naval Generals, four Army Generals and three Air Force Generals, all on active duty and in the highest rank in the career; and five civilians – three lawyers of outstanding judicial knowledge and immaculate conduct, working effectively as lawyers for more than ten years; one assigned among federal military judges and another chosen among members of the Military Public Attorneys. All judges are nominated by the President of the Republic of Brazil after the assent of the Federal Senate.

The current Constitution has maintained the institution of *escabinato*, by which military and civilian judges join into the same Court of Judgment. It was maintained as it allowed to combine the experience of top-ranked commanders, amassing over forty years of military life experience, with the indisputable judicial knowledge of civilian ministers.[4] By and large, the Military Justice ensures 'fair and human enforcement of the military law.'

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structure. With the promulgation of law AI-2, on 5 November 1965, the High Military Court featured again 15 long-life members. This composition was kept by the Constitutions of 1967/69 and the current Constitution of 1988. Throughout Brazilian history, the Military Justice was presided by remarkable figures such as Marshals Deodoro da Fonseca and Floriano Peixoto.

[3] As Astor Nina de Carvalho Junior states: 'the good military magistrate is not the one who knows his juridical system perfectly well, but one who knows the military law, the functioning and the everyday life of a barrack very well, as the judge, even being impartial, cannot be distant from the wishes and social values, at the risk of misjudging and not translating duly the noble ideal of justice'.

[4] See Justice Lieutenant-General of the Air Force Henrique Marini de Souza, *The Federal Military Justice. Conference held for Generals and High Rank Officers of the Armed Forces of the Republic of Angola*, 19 July 2006.

Regarding the competence, it is the audit's and Superior Military Court's duty to prosecute and judge the military crimes defined by the law, under the aegis of article 124 of the Federal Constitution.[5] The law invoked in the light of the *Lex Magna*, is the Military Penal Code promulgated in 1969, whose articles 9 and 10 fine military crimes in wartime and peacetime[6], and also the Law nº 13.491/2017.[7] It is therefore a sort of justice designed to judge exclusively military crimes committed not only by the military but also civilians.

[5] It is worth remembering the words of João Barbalho about the Military Justice, whose is competent to prosecute and judge military crimes and not crimes committed by the military: '(…) the special forum is for the soldier, ut miles, in the words of the roman jurist (…). For crimes established by the military law, a special jurisdiction must exist, not as a privilege of individuals who commit them, but focused on the nature of these crimes and on the need to a prompt and firm punishment, with summary ways. The existence of military forces is linked to the existence of the nation as a guarantee of its independence and security, and without an exact and constant discipline, they can not fulfill their role. There is no subordination or security without discipline; it is the life and the force of the armies, and without their own, private and also military jurisdiction, this discipline would be impossible. There is no better judgment for military infringements than that made by the military themselves; they are know how to understand the gravity of a situation as well as the circumstances to change it, therefore, the special forum is a condition for the good administration of justice. See João Barbalho, *Constituição Federal Brasileira – Comentários* (Rio de Janeiro, Briguiet e Cia. Editores 1924) 466.

[6] Military Crimes are transgressions that undermine the basic and specific foundations of the order and military discipline, which erode, as they develop, the obligations and duties of the military. This reasoning is exposed by Célio Lobão when he states that 'military crime is the penal infringement established by the penal military law and such a violation harms the property and interests linked to the constitutional purpose of military institutions, to its legal attribution, to its functioning, to its own existence, in its particular aspect of discipline, hierarchy, protection to military authority and military service'. See Célio Lobão, *Direito Penal Militar* (Brasília, Brasília Jurídica, 2006) 56. It is important to highlight that the doctrine and jurisprudence stress the difference between military crimes, dividing them into typical and untypical military crimes. According to Esmeraldino Bandeira, the classification of a crime as typically military is understood as being committed exclusively by a soldier, inasmuch as it relates to military life when this is considered within the functional attitude of the perpetrator, the type of violation and the peculiar nature of the object damaged, *i.e*. the service, the discipline, the administration or the military economy. See Esmeraldino Bandeira, *Direito, Justiça e Processo Militar* (Rio de Janeiro, Francisco Alves, 1919) 26. As for the untypical military crimes, Célio Lobão states that '(...) it is the penal violation established by the Military Penal Code and, in not being 'specific or functional of a soldier's profession'; it damages military property or interests related to the constitutional and legal purpose of military institutions.' See Célio Lobão n 6) 98.

[7] Law 13.491/2017. *Verbis:* 'Art. 1º. Art. 9 of Decree-Law nº. 1001/1969 - The Military Criminal Code, becomes effective with the following changes:

Art. 9. omissis

II - the crimes provided for in this Code and those provided for in criminal law, when committed:

§ 1º The crimes referred to in this article, when intentional against life and committed by military personnel against a civilian, shall be under the jurisdiction of the Jury Court.

§ 2º The crimes referred to in this article, when intentional against life and committed by soldiers of the Armed Forces against civilians, shall be under the jurisdiction of the Military Justice of the Union, if committed in the context:

I – the fulfillment of attributions established by the President of the Republic or by the Minister of State for Defence;

II – action involving the security of a military institution or military mission, even if not belligerent; or

Considering the Superior Military Court, this Court acts as the original and appellation forum. As a Court of Appeal, it is its duty to analyze the lawsuits brought to it against low court's decisions. Its sentences are categorical; however, there is the possibility of using extraordinary appeal in the Supreme Court - the highest Federal Court of Justice in Brazil -, when it refers to constitutional matters - article 102, III (a, b, c) of the Federal Constitution – and ordinary appeal in *habeas corpus* or in writ of injunction, when it is a denial sentence – article 102 (II, a).

Originally, it is the Superior Military Court's responsibility to prosecute and try the Generals of the armed forces who have been indicted on penal actions – article. 6, I, Law n 8.457/92 -, as well as to judge injunctions against its own acts, against those of the High Courts' President and the act of other authorities of the military justice. It is also its duty to analyze and decide on the representations to declare an officer's indignity or his incompatibility with the armed forces – art. 142 (§ 3, VI) of the Federal Constitution - and the lawsuits of the Justification Councils – art. 142 (§ 3, VII) of the Federal Constitution.

The low court is composed of twelve Judicial Military Circuits (JMC) and in each one there is an audit, except at the 1st JMC located in Rio de Janeiro, which has four; at the 2nd located in São Paulo, which has two; at the 3rd JMC located in Porto Alegre, which has three and at the 11th JMC located in Brasilia, which has two. The territorial areas of the JMC are equivalent to the Military Regions that have most of the contingents of the Brazilian Army. There is also a Disciplinary Audit Unit[8] located in Brasilia, competent to carry out overall proceedings or procedural mistakes in the process of the judgment *a quo* in order to correct them, as well to communicate the President of the Superior Military Court a fact demanding prompt solution and to make writs and audit registers uniform.

The Councils of Justice, which function within the Audits, can be of two types: permanent and especial.

The Permanent Councils of Justice try the low rank military of their respective forces – soldiers, corporals, sergeants, sergeant majors, cadets and also civilians involved in military crimes defined by law. Hence, there are Permanent Councils of Justice for the Navy, the Army and the Air Force. They are composed of four military judges, one of them being a high rank officer and another a federal military judge who preside it. The military

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III – activities of a military nature, peace operations, guarantee of law and order or subsidiary attribution, carried out in accordance with the provisions of art. 142 of the Federal Constitution and in the form of the following legal diplomas:
a) Law nº. 7.565, of December 19, 1986 - Brazilian Aeronautical Code.'

[8] Law n. 8457/92 defines Disciplinary Audit Unit, its composition and competence. *Litteris*: 'Article 12. The Disciplinary Audit Unit is headed by the Administrative Judge Advocate, who exercises jurisdiction throughout the national territory. Article 13. The Disciplinary Audit Unit, a legal-administrative enforcement and guidance body, is composed of the Administrative Judge Advocate, the Secretariat Director, and the staff assistant's provider for by law.'

judges serve the Council for a three-month stint and, as a rule, they are not entitled to a subsequent term. They are designated by draw among the officers located in the jurisdiction areas of each Military Judicial Circuit.

The Special Councils of Justice, in turn, judge the high rank officers – from lieutenants to colonels indicted for committing military crimes, as well as the civilians' accomplices - and work in the same way as the Permanent Councils. In such Councils, the positions and ranks of the military judges must be higher than the officer accused and Councils last as long as the military trial requires, not being renovated for a further three-month period.

It is important to inform that in each audit there are two federal military judges, one having tenure and the other a substitute, entering the career by means of civil service examinations and diploma contest, and performing the same judicial functions.[9] The Audits where the Councils take place, are composed of four military *ad hoc* judges and a civilian federal military judge, who presides the audiences.

It is the Military High Court's duty to nominate and promote the federal judges and, in case of a promotion to tenure positions, the substitute makes their decision taking into account seniority criteria and merit, alternatively, according to the wording of art. 36 of Law n 8.457/92. The Court can only reject the most senior judge by two-thirds of its members' votes, repeating the voting until the judge is finally appointed. In the event of a simultaneous investiture, the promotion by time will be firstly conferred on whom had the best position in the civil service examination. On the other hand, it is compulsory the promotion of a judge who have been considered three consecutive times or five alternately on a list of merit, if he has been working effectively for two years and is included in the first one-fifth part of the list. Promotion by merit complies with the criteria of prompting and safety in the exercise of law, as well as assiduousness and the judge's performance at improvement courses, which are assessed while he holds that position.

Among the incompatibilities, the diploma states that judges, public attorneys, and lawyers who are consorts, next-of-kin or any other direct relatives, being apart in up to three generations or having adoption bonds cannot serve jointly.

Such incompatibilities are to be solved as follows: before investiture, against the last nominated or against the least old, if the nominations are on the same date and, after

[9] As Celso Ribeiro Bastos and Ives Gandra Martins highlight: 'The first investiture in the Military Justice career is in the position of a substitute auditing judge, through civil service examinations and diploma disputes managed by the Superior Military Court. The participation of the Brazilian Bar Association (art. 33, Law n. 8.457/92) is required in all phases. Candidates must be Brazilian, be between 25 years old and 40 years old (except if they already hold a public function), be exercising their political rights plainly, be graduated in law, have practiced, for at least three years in the last decade, law, magistracy or any other activity that provides forensic practice, be morally capable and be physically healthy. The examination will be valid for two years from the legal confirmation, extendable for only two more years (art. 34, Law n 8.457/92).' *See* Ribeiro Bastos and Ives Gandra Martins *Comentários à Constituição Brasileira promulgada em 5 de outubro de 1988* (São Paulo, Saraiva, 2000, vol. 4, t. III, arts. 92-126) 484.

investiture, against who has given him cause and against the youngest, if the incompatibility is imputed to both. Ultimately, if the incompatibility befalls the lawyer, he must be substituted.

Military Public Attorneys who act in causes as *custos legis* or *dominus litis*, lawyers and public defenders or magistrate-appointed defenders work together with the first instance, as well as with the Supreme Military Court.

It must be emphasized that the penal action is public, initializing with the indictment by the Military Public Attorney. There is no cost for the process. The indictment is usually premised on a record of prison *in flagrante delicto*, on a provisional proceeding of desertion or refractoriness, or on a military judicial inquiry.

In brief, this is how the Military Justice works in peacetime, however acting differently in wartime.[10]

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[10] Articles 9 and 10 of the Military Penal Code define military crimes in wartime and in peacetime. Verbis: 'Art. 9 – In peacetime, Military crimes are considered:

I – crimes addressed in this code, when diversely defined in the common penal law, or not established by it, whoever the perpetrator is, except if there is a special law for it.

II – crimes addressed in this code, although they are equally defined by the common penal law, when they are perpetrated:

a) by a military on active duty or military-like individual against another military or military-like individual in the same situation;

b) by a military on active duty or military-like individual in places subjected to military administration, against retired military or a military-like individual or civilian;

c) by a military individual on duty or acting in this function, commissioned in military activity, standing in line, even if he is in a place of non-military administration, against a retired military individual or civilian;

d) by a military individual during maneuvers or exercises, against retired military, military-like individuals or civilians;

e) by military or military-like individual on active duty, against military-administered property or the military administrative order;

III - crimes perpetrated by retired military or civilian against military institutions, considering military crimes not only those listed in section I but also in section II, in the following cases:

a) against military-administered property or against military administrative order;

b) at places subjected to military administration against a military or military-like individual or against the Military Ministry's or Military Justice's staff, when exercising his function;

c) against military individual standing in line or during the period of duty, surveillance, observation, exploration, exercise, camping, cantonment or maneuvers;

d) at non-military-administered places against a military individual exercising his function or when in vigilance, guaranteeing and preserving public order, administrative or judicial, when he is legally required for that purpose, or in obedience to a superior legal order.

Willful Crimes

Sole Paragraph – crimes addressed in this article, when willfully perpetrated against life and civilians, must be judged by the common justice.

Art. 10. In wartime, military crimes are considered:

I – those specially established by this code in wartime;

II - crimes established by this code in peacetime;

It is like that because the legislator instituted a double system of organizing the Military Justice in peacetime or wartime. Within this context, the Military Penal Code typifies the crimes committed in wartime or peacetime. It can be undoubtedly affirmed that military law is the only type of norm which is partially efficacious once its enforcement is conditioned to the situation the country is in.

Justice Marcos Augusto Leal de Azevedo observes that in wartime, the auditing judges, the Councils of Military Justice and the High Councils of Military Justice (art. 89 of Law 8.457/92), together with the operational forces, compose the Military Justice. These institutions prosecute and judge crimes perpetrated in theatres of war or in foreign territories militarily occupied by Brazilian forces, except for what has been agreed in covenants or in international treaties of which the country is signatory. It is up to the gowned judge to preside the criminal proceedings at which low rank military, civilians or officers up to the rank of commander or colonel are defendants, as well as trying civilians and low rank military.

The Council of Justice is composed of an auditing judge or a substitute auditing judge, both graduated in Law, and two officers who are longer in the rank than the convicted person. Like the Special Councils (in peacetime), the Council of Justice is composed for each prosecution and dissolved shortly after the trial. It is also responsible for judging officers, excepting generals.

The High Council of Justice is the institution of second appeal, composed of two generals, on active service or retired, and an auditing judge, all appointed by the President of the Republic. The presidency is exercised by the most senior military judge. In brief, it is this Council's responsibility to prosecute and try generals as well as assessing appeals issued by the Councils of Justice.

An attorney and a public defender work together with the council, who are also appointed by the President of the Republic among the members of the Military Public Attorney and the Federal Public Defender respectively.

III – crimes established in this Code, although they are also established by the common or special penal laws, when perpetrated, whoever the perpetrator is;

a) in the national or foreign territory, when militarily occupied.

b) at any other place, if they compromise or possibly compromise preparation, efficiency or military operations or, in any other way, attempt on the country's external security or expose security to danger;

IV – crimes defined by the common or special penal law, although they are not established by this Code, when perpetrated in zones of effective military operations or foreign territory, when militarily occupied.'

Broadly speaking, these are the characteristics of the Military justice in wartime[11], remembering that, in Brazil, the structure designed for peacetime still working regularly during periods of conflict.

2 The Federal Military Justice and the Constitutional Amendment N 45/2004

Art. 12 (§§ 3, 4 and 5) of the Federal Constitution states that state-members of the Brazilian federation are entitled to institute the state military justice to judge military crimes defined by law, which are committed by members of the auxiliary forces (policemen and firemen), and judicial actions against disciplinary military acts.[12] Contrary to how the

[11] In *The Chain of Command and how it interacts with the Brazilian Military Justice, Lecture given by Justice Fleet Admiral Marcos Augusto Leal de Azevedo at the Human Rights International Seminar and the Administration of Justice by Military Tribunals, held by the UN High Commissioner for Human Rights, the Brazilian Ministry of Foreign Affairs and the Brazilian Superior Military Court in Brasília, Distrito Federal*, 28 November 2007.

[12] 'The state-members' Military Justice was not created recently. Since 1892 the state of São Paulo had the Audit of Public Force, composed of an Auditor and Councils of Justice. Decisions of this institution were revised by the state's President, who is currently known as the State Governor of São Paulo. This situation lasted until 1936. With the advent of federal law n. 192, on January 17, 1936, the Military Justice was created in all states of the federation. In São Paulo, the government of the state-member created the Military Justice Tribunal, through State Law n 2.856, on January 8, 1937, thenceforth called High Military Justice Tribunal. It is presently called Military Justice Tribunal of the state government of São Paulo, and since amendment n.2 added to the state Constitution, the tribunal is composed of 5 judges, being three civilians and two military individuals. In Rio Grande do Sul, federal law n 3.351 of 3 October 1917, authorized the trial of high rank and low rank policemen for typically military crimes. Based on this same law, the state Military Justice was created by decree n 2.347-A, on 28 May 1918, which established the Councils of Discipline, extraordinarily organized, the Military Council, for the first hearing and as a reviewing instance, and the Council of Appeal, composed of five members: the General-commander of the Brigade (who should preside it), three military officers summoned by the latter and a gowned judge, designated by the Governor of the State of Rio Grande do Sul. Federal Law n 192, of 17 January 1937, sought to systematize the subject matter, explicitly authorizing state-members to institute the sate Military Justice. For that reason, Decree n 47, of 19 November 1940, established the Law of the Military Justice for the State Government of Rio Grande do Sul, converting the Council of Appeal into a Court of Appeal and finally granting its member the privilege given to magistrates such as lifetime job and irreducibility of wages. The Court is still composed of five members, however, all of them were designated by the Governor of the State. In the first-degree court, two Councils were instituted: the Special, to judge high rank military officers, and the Permanent, to judge low rank military. Law n 6.156/70, maintained the Court of Appeal with five members, being one a civilian. The Organizing Judicial Code of the State of Rio Grande do Sul (state law n 7.356/80), of 1st February 1980, fixed the composition of the Military Justice Tribunal of the State of Rio Grande do Sul in seven judges, four of them being military and three civilian, all designated by the Governor, being that the current composition. In Minas Gerais, the military Justice was created by Law n 226, on 9 November 1937. At that time, it was composed of only one auditor and special or permanent Councils of Justice. In case there was no second-degree court, jurisdiction was exercised by the Crime Chamber of the Court of Appeal, which is currently known as the Tribunal of Justice. In 1946, it was revamped by the Law of the Judicial Organization of the State and the Regiment of Costs (Decree-law n 1.630, 01/15/46) by the creation of the High Court of Military Justice, located in the Capital as an institution of second degree of jurisdiction, composed of one civilian judge and two military judges. Law n 1.098, on 22 June 1954, increased the number of judge members of the Military Justice Tribunal by five, being three military and two civilians. Resolution n 61, of 8 December 1975, of the Tribunal of Justice,

Federal Military Justice operates, it is not the state-member military justice's duty to prosecute and try civilians, but the military. However, likewise the Military Federal Justice, it is a specialized branch of the Judiciary, being experienced and having knowledge to handle military-like conflicts, whose pillars are hierarchy and discipline.

The state-member's Military Justice, however, was substantially modified by constitutional amendment n 45/2004. For instance, the district judge was included as an institution of the Military Justice, the presidency of Councils was transferred to a gowned judge, the competence was extended to judge acts of punitive-disciplinary nature and the judgment of willful crimes committed by the military against a civilian's life was transferred to the jury.[13] However, prosecuting and judging deliberate crimes committed by the military against a military's life or the civilian against military's life, still lies within the competence of the Military Court.

As a matter of fact, the legislator limited his action to the federal state-member's sphere, thereby not altering the constitutional devices regarding the federal scope. As a result, there was an asymmetry with reference to the competencies of the court since, according to art. 124 of the Federal Constitution, the Federal Military Justice does not assess the military disciplinary punishment in the scope of the armed forces

In order to correct that omission, the constitutional amendment proposal 358/2005 is being analysed by the National Congress, with a view to continuing the reform of the Judiciary.

The text proposed modifies the composition of the Superior Military Court and extends its competence, allowing it to judge disciplinary punishment meted out to members of the armed forces.[14]

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kept the same number of judges as yet.' *In:* Lecture given on 09/28/2006, at the Juridical Seminar ESPMU/MPM- Paraná and Rio Grande do Sul.
Performing as a Court of Appeal, there are three State Military Tribunals in São Paulo, Rio Grande do Sul and Minas Gerais, instituted according to paragraph 3, of art. 125 of the Federal Constitution, to wit; the respective states count on more than twenty thousand military members. In the other federal states, policemen and firemen are tried by Military Audits, with appeals to the State Tribunals of Justice.

[13] In the Federal Military Justice, Law n 9.299/1996, transferred to the Jury Court the jurisdiction to judge willful crimes committed by the military against a civilian's life.

[14] As Jéssica da Silva Rodrigues observes: '*the same normative document, specially that which is the foundation of other Federal Constitution laws, should not encompass this disparity of competences, in which the same subject matter can be analyzed by the special or common justice, being contingent on the party involved: whether he is a member of the armed forces and of the auxiliary forces. Doubtless, if the constitutional amendment bill n 358/2005 is approved, several adjustments will be needed such as the exigency of prepayment of costs, once this jurisdiction will not be gratis, bringing the need to an immediate adaptation of the Law of the Judicial Military Organization. Moreover, the Military Public Attorney will no longer play its categorical penal role in order to act in its many attributions constitutionally enshrined in art. 127*.' See Jéssica da Silva Rodrigues, *The judicial control of the military disciplinary act within the armed forces. Monograph presented at the Law Faculty of Brasilia University*, (Brasilia, 2008) 71.

Extending the Federal Military Justice to exercise the judicial control over the disciplinary punishment[15] will undoubtedly have the merit of solving conflicts presented to the Federal Justice that, according to art. 109 of the Federal Constitution, must judge them as the military is functionally linked to the Federal Government.[16] Undeniably, the fragmentation of competences has weakened the Judiciary, insofar as it jeoparding the efficiency and the juridical security of the jurisprudence. The standardization of decisions stemming from special justice, more prepared to deal with cases involving its members, enhances the exercise of jurisdiction.[17]

Indeed, being a specialized type of Justice, just like the Labor and Electoral, the Military Justice has expertise in assuring the integrity of judicial decisions and protecting penal law, as well as in assessing the legality of the exercise of disciplinary military power.

In addition to this, the judicial expedition of the Military Justice is paramount to preserve hierarchy and discipline in barracks.

In fact, the longer justice takes to be served, the less likely it is to succeed. As to Military Penal Law, the delay of judicial decision could be detrimental to the integrity of the armed forces, permanent national institutions, as the constitution informs. They are the only forces responsible for the defense of the country, which is a more elevated value

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[15] Law n 6.880/80 – the Statute of the Military – defines the legal concept of discipline in art. 14, paragraph 2. Disciplinary punishment is applicable when military obligations and duties are violated. Within the scope of each armed force, the military administration classified and specified in its *Disciplinary Regulation* the circumstances under which the said punishment can be executed. See Decree n 88.545, on 26 July 1983 (Navy's Disciplinary Regulation, art. 6), Decree n 4.346, of 26 August 2002 (Army's Disciplinary Regulation, art. 14) and Decree n 76.322, of 22 September 1975 (Air Force's Disciplinary Regulation, art. 8). The punishment listed in the *Military Disciplinary Regulation* for transgressions are as follow, though slightly distinct: admonition, reprehension, detention, imprisonment, leave and exclusion for the sake of discipline. Despite its peculiarities, disciplinary sanctions are types of administrative sanctions, which aim to safeguard the values that conduct public Administration as a whole.

[16] About the discussion, Supreme Court's decision, reported by Justice Ricardo Lewandowski:
Emendation: appeal in *habeas corpus*. Penal Processing.
Disciplinary transgression. Punishment meted out to an armed forces' member. Constriction of liberty. Habeas corpus against the act.
Judgment by Federal Military Justice. Impossibility. Incompetence. Subject matter related to the Common Federal Justice's jurisdiction. Interpretation of articles 109, VII, e 124, § 2º.
I – It is the Federal Military Justice's responsibility to only prosecute, and judge military crimes defined by law, not including actions against punishment with respect to infringements against disciplinary regulations (art.124, § 2º, Federal Constitution) in its jurisdiction.
II – The legal imposition of a constricting punishment of liberty, in a military administrative proceeding, can be discussed by means of habeas corpus. Precedents.
III- If the act is not subjected to military jurisdiction, the Federal Justice is entitled to judge the action which seeks to undo it (art. 109, VII, Federal Constitution).
IV – Penalty, however, entirely carried out.
V - HC hindered." 1st Team. RHC nº 88543. DJ de 27.4.07.

[17] Marga Inge Barth Tessler, *The competence of the Federal Military Justice after the possible approval of Constitutional Amendment Bill N. 358/2005* [2005] 62 *Revista Direito Militar* 16-18.

than life itself, since under certain circumstances the military are duty bound to kill or to die. Very special values correspond to very special rules that must be strictly observed, at the risk of compromising the Democratic Rule of Law State itself.

Moreover, mobility, which is another intrinsic characteristic of Military Justice, is imponderable when it comes to the Common Federal Justice. The moving of this Justice to theatres of war is not established by law, precisely where the military disciplinary power is more important. Firstly, because the commander cannot exercise it in an abusive nor illegal way and, secondly because crimes committed in such a dramatic situation require a prompt, active and expedite judicial structure that allows the investigation of criminal acts and the punishment of the guilty individuals as soon as possible.

3 The Challenges to the Federal Military Justice

The Federal Military Justice, the oldest justice in Brazil, still has challenges and perspectives to face.

The first challenge is overcoming the stigma to being a 'corporate justice'. The statistics about the Federal Military Justice reveal the severity of its law enforcement, not admitting the impunity of the accused when the responsibility and the offense are effectively proven. Hence, the judicial scope aims at protecting the military institution and the principles that conduct it: hierarchy and discipline. And it could not be any different from this. The military, unlike the civilians, hold the arms of the nation; its contingent is estimated at 310.000 individuals – 220.000 in the Army, 55.000 in the Air Force and 55.000 in the Navy. Democracy is at risk when the rigid paradigms of conduct are not observed and the armed forces are disorganized, thus rendering them impotent to fulfill its constitutional duty to defend the state sovereignty and the stability of the political regime. It refers to unique values and for that reason being protected by the Constitution and the legislator as judicial property to be safeguarded by law and social order. That is the reason why Military Justice is so important as a specialized type of justice.

Although the Superior Military Court is relevant and bicentennial, society and, more gravely, law operators know little about its competence and performance. Usually mixed up with the state-members' military justice, one generally supposes that the Federal Military Justice is responsible for trying the auxiliary forces (policemen and firemen), together with the members of the Armed Forces. Furthermore, it is common to label it as a military tribunal submitted to a political regime, specially under dictatorial regimes experienced in Brazil. Nothing is further from the truth.[18] Brazilian history register the impartiality of the military justice system in memorable rulings such as the one made by

[18] Last but not least, it is important to emphasize that the Federal Military Justice practically complies with all the principles established by the United Nations for the military jurisdictions in the world. The Military Justice was instituted by the Federal constitution and regulated by law, being incorporated into the Judiciary Power's structure since the Brazilian Constitution of 1934. In its judgments, the Court observes rigorously the due process of law, which is indeed a constitutional requirement - art. 5, LIV- Federal Constitution. In peacetimes, as well as in wartimes, it applies International Treaties, specially, the

the Superior Military Court when it reformed the sentence given to João Mangabeira, the leader of the Socialist Party, by the National Security Tribunal during President Getúlio Vargas' authoritarian political regime, granting him the *habeas corpus* – HC n 8.417, June 21, 1937.[19]

Unfortunately, such a lack of knowledge caused the Constitutional Amendment n 45/2004 to omit the seat to which the Federal Military Justice is entitled in the National Council of Justice. That mistake is intended to be repaired by the Constitutional Amendment bill 358/2005. Indisputably, the inclusion of the Federal Military Justice in the National Council of Justice is a way of repairing the unconstitutional treatment that goes against the unity of justice and against the Judiciary as an institution of the State.

The importance of the military penal jurisdiction is imperative to preserve the military authority in the observance and submission to orders within the corporation. After all,

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Humanitarian Treaty and the Geneva Convention relative to the Treatment of Prisoners of War. The under-18 individuals are not tried nor prosecuted by this Special Justice, respecting the International Covenant on Human Rights and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), as well as on the strength of the Statute of the Child and Adolescent, into force in the Brazilian juridical system since 1990. The Military Penal Code does not exempt an individual from responsibility for crimes resulting in violation of human rights, genocide or crimes against humanity when he invokes the legal duty to obey. Indeed, Brazil is signatory to the Rome Statute and the Federal Constitution establishes categorically in § 4, art. 5, that the State is submitted to the International Penal Court, to which it has adhered. Yet the *habeas corpus* and the writ of injunction can be requested in the Military Jurisdiction and, in case they are refused, an ordinary appeal can be brought to the Supreme Court of Brazil. The hearings and trials are public and the judicial decisions founded – Federal Constitution art. 93 (IX) -; the magistrates and public attorneys are civil servants who enter the career through diploma contests. The Justices of Superior Military Tribunal are appointed by the President of the Republic and their names are approved by the Federal Senate. Additionally, the victims can communicate the infringement to the Force's Commander or to the Public Attorney Office and will be represented by the Attorneys in Court. Death penalty is admitted solely in case war is declared – art. 5 (XLVII, a) – Federal Constitution. Finally, a Commission of Reform of Military Penal and Procedural Codes was created, whose aim is to update and adjust such codes to suit the functional needs of the armed forces and society's claims. Once the work is concluded, the proposals will be submitted to the National Congress for discussion and approval.

[19] Other examples could be mentioned to illustrate the distinguished course of the Federal Military Justice. The case of the prohibition of communication between lawyers and prisoners during the first 30 days of imprisonment, under the military regime established in 1964, must be recalled, insofar as it was a correct and precursor solution provided by the historical decision of Representation n. 985, in which the principles of the right of defense and due process were observed. Likewise, the Supreme Military Court decided in the 1970s that a strike pursuing a wage improvement, even when it is deemed illegal, would not translate into crime against national security, according to RC n 5385-6. Still, in RC n 38.628, the Military Court affirmed that the mere offense to authorities, though it could be characterized by offensive language, was no longer typified as a crime against the security of state. The decisions referred in this paper, among many others, provided undoubted solutions and the exact juridical dimension on themes that have constantly admitted dubious interpretations. Doubtlessly, it is a distinguished jurisdiction that, in resisting political pressure, has left an important legacy to future generations and to the democratism of the Judiciary. Ultimately, it is important to highlight that federal public defender's first performance was in the Federal Military Court.

as Chief Justice Carlos Alberto Marques Soares states 'discipline is the force and life of military institutions, together with the preservation of the hierarchical principles.' Such values need their own legislation or specialized jurisdiction that can assure its maintenance. This special forum is the condition of a good administration of Justice.

Another important measure in the enlargement of the competence of military jurisdiction, which is decisive for the unification of thematically pertinent subject matters, such as crime and military transgressions, especially because not only crime but also the violation of military discipline are offences to hierarchy and discipline.

Facing the said challenges meets the needs of a Brazil that experiences moments of 'institutional redefinitions and judicial reconstruction in search of new paradigms, which sustain Justice as a social value, accountability as the mark of state institutions' role, expedition, prompting, efficacy (…) of the judicial action and the very enforcement of law as collective construction.'

In this sense, Magistracy has played a crucial role as it contributes decisively to value the principles of citizenship and the dignity of human life, renewing also its judicial role, neutralized by several scourges that compromise its conceptual and axiological identity.

The legitimacy of public power, in all areas, involves fundamentally all its judicial institutions. Elevating its role means valuing cohesion, congruence and the identity of the constitutional system, taking into consideration what Lassale called 'the real factors of power'.

Within this context, the bicentennial existence of the Federal Military Justice, whose institutional development amalgamates Brazilian history, projects the State's affirmation as the *ethos* and the permanent commitment of the Judiciary to the development of legitimacy and democracy.

COLLECTING EVIDENCE ON THE BATTLEFIELD

*By Jean-Paul Laborde**

Abstract

With the involvement of Military Forces in several regions of the world, evidence collected by them in the battlefield is critical. Hence, the dilemma is the following one: could the international community consider that, amongst the various tasks of the Military Forces, collecting evidence and information for the purpose of criminal trials could be one of them? Criminal trials are essential after massacres, war crimes, crimes against humanity or even massive series of common crimes (looting, etc.). Of course, collecting evidence are not the primary tasks of Military Forces. However, while the prioritization of those tasks should be respected, collecting evidence in the battlefield should be taken into consideration for the benefit of the peacebuilding process and the postwar era. It should also be noted that ultimate goals of the military actions could, eventually, converge with the ones of the criminal justice in sentencing war criminals, including the political leaders, for instance those of terrorist organizations such as ISIS, who have provided directives and instructions about them and allow victims to get support, counselling and fair compensation. Finally, forensic or cyber evidence is key in any criminal trial. Not using the information in the battlefield, especially against terrorist organizations may imply that those criminals will be in the position in a very short period of time to go back to the battlefield and inflict new civil and military losses. Even more at the time of the Ukrainian war, those evidence are key to protect future generations from horrible war criminal acts that should never been gone unpunished.

1 Introduction

The focus of this article is related to the role of Military forces in collecting penal procedure evidence in the battlefield. This is independent of peace time or war time. Currently, with the involvement of the Military Forces in the Sahel region, France is not considered at war, still evidence collected in the battlefield by Military Forces in that region is critical. Hence, could the international community consider that, amongst the various tasks of the Military Forces, collecting evidence and information for the purpose of criminal trials coud be one of them and that Military forces could be also considered as supporting the work of the penal courts, whatever the Courts are, Military or Regular Penal Courts?

In my previous capacity of Executive Director of the UN CTED, I had to face thisproblem when the Islamic State of Iraq and Syria (ISIS) was strongly established as a proto state located in several parts of Iraq and Syria. While the coalition forces as well as the Iraqi army were battling against it, and especially when ISIS was defeated, the Coalition's Military Forces were collecting intelligence; they had a huge amount of information which was essential for the fight against ISIS; however, if it was clear that this information was critical for fighting properly ISIS, it was also clear that those elements could also constitute a solid basis for a penal trial of the main ISIS actors. Indeed, it should not be forgotten that, during the occupation by ISIS of large portions of territories of Iraq and Syria, its members committed an enormous number of atrocities, including war crimes, crimes

against humanity and genocide, in particular vis-a-vis Yazidis.[1] A few of those crimes were already judged in Iraq; however, many others have not been submitted to a Court yet due to the lack of evidence. We should recall that the Nuremberg Trial, which founded the International Criminal Law of our present times, started on 20 November 1945.

Meanwhile, it is not possible to forget that ISIS is a terrorist organization thatwas listed as such under the Chapter VII of the Un Charter on Peace and Security by the United Nations Security Council.[2] It should also be recalled that, as a follow-up to the Al Qaida terrorist attack of 9/11 in the United States, the United Nations Security Council adopted Resolution 1373 (2001)[3] according to which 'every person who participates in financing, organizing, preparing, or perpetrating a terrorist attack *shall be brought to justice*.' It should also be noted that it is never stated that according to that resolution those who committed terrorist acts should be judged either by a civil or military court. The only obligation is that people who are suspected of terrorist acts shall enjoy all the rights of a fair trial and the other defence rights. One should know that there are many contradicting articles on the Military Courts jurisdiction versus the regular Penal Courts jurisdiction for terrorist cases in many states of the world including in some of Permanent Members of the UN Security Council. However, what is important to keep in mind with regard to the implementation of Resolution 1373 (2001), despite those disputes among various possible jurisdiction, is the intangible rule on the basis of which 'every person who participates in financing, organizing, preparing, or perpetrating a terrorist attack *shall be brought to justice*.'

To complement that rule, and as a follow-up to the emergence of the Foreign Terrorist Fighters phenomenon in Iraq and Syria, Resolution 2396 (2017)[4], also adopted under Chapter VII of the UN Charter:

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[1] Yazidis constitute a religious minority in Iraq which was horribly persecuted by ISIS actors.

[2] https://scsanctions.un.org/h9473en-all.html#alqaedaent **A.k.a.: a)** AQI **b)** al-Tawhid **c)** the Monotheism and Jihad Group **d)** Qaida of the Jihad in the Land of the Two Rivers **e)** Al-Qaida of Jihad in the Land of the Two Rivers **f)** The Organization of Jihad's Base in the Country of the Two Rivers **g)** The Organization Base of Jihad/Country of the Two Rivers **h)** The Organization Base of Jihad/Mesopotamia **i)** Tanzim Qa'idat Al-Jihad fi Bilad al-Rafidayn **j)** Tanzeem Qa'idat al Jihad/Bilad al Raafidaini **k)** Jama'at Al-Tawhid Wa'al-Jihad **l)** JTJ **m)** Islamic State of Iraq **n)** ISI **o)** al-Zarqawi network **p)** Islamic State in Iraq and the Levant F.k.a.: **na** Address**:** na Listed on**:** 18 Oct. 2004 (amended on 2 Dec. 2004, 5 Mar. 2009, 13 Dec. 2011, 30 May 2013, 14 May 2014, 2 Jun. 2014, 24 Nov. 2020) See also**:** *Review pursuant to Security Council resolution 1822* (2008), concluded on 25 May 2010, *Review pursuant to Security Council resolution 2368* (2017), concluded on 24 November 2020 and INTERPOL-UN Security Council Special Notice web link: https://www.interpol.int/en/How-we-work/Notices/View-UN-Notices-Entities .

[3] https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf

[4] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/460/25/PDF/N1746025.pdf?OpenElement

> Calls upon Member States…. to share best practices and technical expertise, informally and formally, with a view to improving the collection, handling, preservation and sharing of relevant information and evidence, in accordance with domestic law and the obligations Member States have undertaken under international law, including information obtained from the internet, *or in conflict zones*, in order to ensure foreign terrorist fighters who have committed crimes, including those returning and relocating to and from the conflict zone, may be prosecuted.

This specific resolution was adopted to face the Foreign Terrorist Fighters threat in the conflict zones, especially in Iraq and Syria but is, actually, applicable outside of that specific context. Hence, as a follow up to this resolution, the Security Council Counter-terrorism Executive Directorate has issued a series of guidelines aiming at facilitating the use and the admissibility in the penal procedures whatever the type of military or regular courts' jurisdiction would be, of information collected in the battlefield by the Military Forces. That is a huge task for all the various partners involved in that process, starting from Military Commanders to Judicial Police Officers, Prosecutors up to Judges and Courts.

One can understand the huge amount of work thatshould be done in this perspective. On the one side, as already demonstrated by the Nuremberg Trial, criminal trials are essential after massacres, war crimes, crimes against humanity or even massive series of common crimes (looting etc..). On the other side, however, one should understand that those tasks are not the primary tasks of Military Forces. However, while the prioritization of those tasks should be respected, collecting evidence in the battlefield should also be taken into consideration for the benefit of the peacebuilding process and the postwar era. Hence, the military targets shall not be achieved just at the expense of essential criminal trials, especially against those who, in ISIS, are responsible of acts of aggression, war crimes and crimes against humanity as well as terrorist crimes and even common crimes. It should be noted, in this context, that ultimate goals of the military actions could, eventually, converge with the ones of the criminal justice in sentencing war criminals, including the political leaders who have provided directives and instructions about them and allow victims to get support, counselling and fair compensation.

Actually, the most important is to collect all possible examples allowing to get information in the battlefield and convert it into criminal trial evidence.

2 Necessary Distinctions

Before collecting the relevant information, it is necessary to determine what kind of information can be converted into evidence.

Still, it shall be underlined that evidentiary elements are not only used by the criminal justice system. In that regard, the *Guidelines to facilitate the use and admissibility as evidence in national criminal courts of information collected, handled, preserved and shared by the military*

to prosecute terrorist offences,[5] produced by the Counter Terrorism Executive Directorate, can be expanded to war crimes, crimes against humanity as well regular crimes. Thus, the military staff will be trained to collect and make the analysis of the collected information; it could have a key role in assisting in countering the terrible impact on Military Forces of the Improvised Explosive Devices (IED), preventing their use and, at the same time, in arresting and adjudicating those who are responsible for manufacturing those IEDs as well as the traffickers who sell them.

This is exactly the objective of the *Watchmaker Project*[6] from Interpol. Of course, the methodology used for collecting and using the battlefield information changes often from one state to the other. Some states have established specific forces such as in France with the Special Military Police of the Gendarmerie.[7] Nevertheless, in other states, and, especially in case of emergency; in many states, it should also be possible to request the fighting forces to collect that information in the battlefield. It should be stressed that, in such a situation, that information shall be collected according to the international rules of fait trial or the ones of international criminal, human rights and/or humanitarian laws. Thus, it implies basic training in that field for some of the Military Forces Personnel, especially the way to preserve the information to be converted in criminal evidence, to apprehend properly cyber material or to proceed with some hearings directly in the battlefield.

3 The CTED Military Evidence Guidelines

As per a joint initiative of the United Nations Counter-Terrorism Executive Directorate and the International Centre for Counter-Terrorism, a series of recommendations were made in the document entitled *The CTED Military Evidence Guidelines*.[8] A few of them would be quoted here in order to show how much the process is already advanced and that the principle of converting a military information in court evidence is not just a dream, but that it has been utilized in numerous cases of successful prosecution and at the same time protected the Military Forces of new terrorist or even military attacks in the battlefield. The mutual interest and benefit for the Military Forces and the Criminal Justice Systems all over the world looks very clear after a thorough review of the Guidelines.

One of the main recommendations of this document is for UN Member States to enact a legislation exactly on that topic, which would allow Military Forces to collect that information in the battlefield. This legislation should include that collecting information and evidence in the battlefield for the possible use of criminal proceedings is part of the mandate of the Military Forces both within its national territory and outside of that territory.

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[5]https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Jan/cted_military_evidence_guidelines.pdfthe

[6] https://www.interpol.int/fr/Infractions/Terrorisme/Terrorisme-chimique-et-attentats-a-l-explosif/Projet-Watchmaker

[7] « Gendarmerie prévôtale »

[8] For its reference, see foot note n°6

Indeed, guidelines for the Military Forces would be mandatory including training in connection with criminal procedure, human rights and humanitarian law. In the case SARDAR/United Kingdom, it can be noted that while Sardar was part of a terrorist unit manufacturing IEDs in Iraq, an American Military Unit was able to collect evidence in the battlefield on the basis of which Sardar was sentenced by English Court and had to serve 38 years of imprisonment.[9]

The key recommendation is to establish proceedings allowing military information to become criminal evidence. The first project on this topic was launched through an Interpol initiative called the Vennlig project. It allows Military Force to declassify military information in order to use it in a penal proceeding. The project's tool is offered at the use of Military Forces belonging to States Members of Interpol.[10]

Another important recommendation is to provide legal guarantees for storing all the data and other type of source in a place where they can be saved properly and legally. Indeed, legal guarantees should be in place to keep all data related to laptops, cellphones etc. An example of that capacity of preserving evidence can be found in the Guidelines with a special procedure among Lake Chad Basin States to keep the information and ultimately the evidence safe.[11]

Using information provided by the Military Forces to the Criminal Justice System without going through all those heavy procedures. Several examples of short-cut procedures are also given in the Guidelines, providing that basic defense rights and the fair trial principles are kept intact.

4 Conclusion

One could say that those procedures of collecting evidence in the battlefield are too difficult to establish and that there lies a too heavy burden on the shoulders of the Military Forces, which is then then too difficult to integrate in the criminal proceedings.

It should still be underlined that:

- First, the advantages for the Military Forces in terms of protecting them from ISIS terrorists are one of the goals that could be reached through that process.
- Second, Justice is always part of the Peace Process and without Justice and Fair Trials the ultimate objective of the war cannot be achieved.
- Third, several examples of converting battlefield information in Criminal Courts evidence are already used around the world and it works well.
- Fourth, practitioners would underline that law enforcement agencies can always use the elements provided by the Military Forces as a simple piece of information and it

[9] Guidelines (n 6) 15.
[10] Guidelines (n 2) 22.
[11] Guidelines (n 2) 32.

would be up to them to use an essential information properly and to get clear penal evidence during the course of the proceedings based on that information. It should be emphasised that preservation of information and evidence, especially in the battlefield, should be very quick and everything should be done to avoid the loss of those elements to happen.

Indeed, this provides a double benefit: it is beneficial to the Military Justice and to the regular Criminal Justice System.

Nowadays, forensic or cyber evidence is key in any criminal trial. Not using the information in the battlefield, especially against terrorist organizations may imply that those criminals will be in the position in a very short period of time to go back to the battlefield and inflict new civil and military losses. This is not what should happen.

Even at the time of the Ukrainian war, the evidence is crucial, as it can be seen, to protect future generations from horrible war criminal acts that should never go unpunished.

This is a new challenge beforethe international community, which has not only amoral but also an international obligation to protect its citizens, bring terrorists and criminals to justice as well as to preserve the Military Forces of its Member States from any attack when it is possible to avoid it.

THE CRIMINAL RESPONSIBILITY OF THE ENHANCED SOLDIER

*By Sarah Badari**

Abstract

The criminal responsibility of the enhanced soldier is a subject that is part of the need to reflect on the legal consequences of some military technologies. Legal anticipation is essential in order to allow technologies to be accompanied. This would prevent the development of technologies, often requiring significant resources, which would subsequently be restricted or even legally rejected. The study of the enhanced soldier cannot be considered without taking into account the consequences it may have. One of the consequences of the use of new technologies is the issue of responsibility. The aim is to identify 'who' would bear the responsibility, in the current state of the French law, and what consequences this would have for the roles of each party. It is therefore necessary to study the consequences of the implementation of means of enhancement in the armed forces on the law of liability. This raises the question of determining the individual responsibility of the soldier who will be the beneficiary of the enhancement, in other words the holder and the recipient. Once the soldier has been enhanced, the risks to himself or to others do not disappear. There remains the possibility that the proposed means of enhancement may not only be harmful to the soldier's health, but may also cause harm to civilian individuals. Such damage could give rise to individual criminal responsibility of the soldier. This would be the case, for example, if the enhanced soldier caused damage in which the enhancement played a decisive role. The enhanced soldier could use the means of enhancement to commit offences off duty (in the case of irreversible enhancements or enhancements diverted from their original purpose) or during the performance of his mission, for example in military operations. This article deals with the consequences of enhancement on the criminal responsibility of the soldier in case of intentional offence, according to French law. In particular, it examines the legal implications of an impaired or abolition of discernment caused by the enhancement on the engagement of such individual responsibility. It also stresses the need to add to this individual dimension of responsibility the possibility of engaging the administrative responsibility of the Army, which plays a decision-making role in the acquisition of technological means and their operational use.

1 Introduction

Considering the legal implications of the enhancement of soldiers' skills on their responsibility is particularly important in a forward-looking logic, especially with regard to the consequences that it may have on their lives and careers. This includes the criminal and disciplinary responsibilities of military personnel, but also the administrative responsibility of the armed forces and international responsibility in the context of external operations. These are vast themes that require an in-depth study for each of them. Among them is the issue of the criminal responsibility of the enhanced soldier, for which the following question may be asked: What responsibility for the enhanced soldier and in which context? The developments that follow seek to highlight the options to be explored and the various lines of thought.

Maximizing one's capabilities, performance, or strength is a kind of constant myth that is renewed today with the evolution of technologies and the search for operational superiority. First of all, it is necessary to briefly summarize the definition of enhanced soldier and enhancement. The enhanced soldier can be defined as 'a soldier whose capabilities are increased, stimulated or created with the aim of reinforcing his operational effectiveness.'[1] Enhancement, on the other hand, is an action that serves the efficiency of the military. It may involve physiological or psychological changes, but also simply the use of means on the soldier. Thus, the enhancement can be used to reinforce or encourage the acquisition of capabilities through technical or non-technical means, which will be referred to as 'means of enhancement. Enhancements effects may be time-limited, prolonged or irreversible. This temporality does not affect the definition of enhancement. However, it will affect the classification of the means and the degree of protection that must be provided.

This definition process seems necessary to avoid the fantasy of the superman. Unrealistic technologies that could raise interesting ethical and legal questions, but which would not be of great practical interest, will therefore not be considered. Pharmacological substances will be taken as an example in this review of criminal responsibility issues, as they easily illustrate the problem of discernment in criminal law, but other means could be mentioned, such as man-machine hybridisation, the BCI (brain control interface) or implants.

It should be remembered that these means of enhancement must be seen as tools serving the soldier, who will have to keep his or her expertise and ability to decide under uncertainty. It is also likely that these enhancement tools will not be generalised to all soldiers, but will potentially concern, at least initially, the most specialised soldiers.

This paper will first address some general considerations concerning the criminal responsibility of enhanced soldier committing off-duty offences on national territory (1). This paper will then outline the legal implications of enhancements on the criminal responsibility of enhanced soldiers in military operations (2), and conclude with considerations closely related to the criminal responsibility of soldiers as state agents: the prospective consequences of the use of enhancements on the legal liability of the Armed Forces (3).

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[1] Gérard de Boisboissel and Jean-Michel Le Masson, 'Le soldat augmenté : définition', in Les cahiers de la Revue Défense Nationale (ed) *Le soldat augmenté : les besoins et les perspectives de l'augmentation des capacités des combattants* (CREC Saint Cyr 2017) 22

2 General Considerations Concerning the Criminal Responsibility of Enhanced Soldier Committing Off-Duty Offences on National Territory

Military personnel may be held criminally liable if they have committed various offences, whether under ordinary law or military law. In French law, a distinction must be made between peacetime and wartime. This qualification entails legal effects[2] that will result in the enforcement of certain rules and a particular regime. In wartime, the Government may decide, by decree, to establish military courts to judge violations committed by soldiers. In peacetime, however, a further distinction is made between offences committed on national territory and those committed outside national territory. Offences committed outside national territory are those of any kind, regardless of whether they were committed on or off duty. They will be judged by a court called the *Juridiction de Droit Commun Spécialisée* (JDCS) *of Paris* (article 697-4 of the French Code of Criminal Procedure). On the other hand, for those committed on national territory, the JDCS is only competent for those committed during duty (Articles 697 and 697-1 of the French Code of Criminal Procedure). This concerns those in Book III, Title II of the French Code of Military Justice entitled 'Offences of a military nature', as well as those under ordinary law that are facilitated by the duty. A further specificity of contemporary conflicts should be added. Today, France's external operations are described as 'military operations outside the territory of the Republic'. However, as Mr Ronan Doaré points out, 'it is neither politically nor legally a wartime situation. However, it is not, in fact, a time of peace either.[3]' Nevertheless, this does not impede the law applying in peacetime.

The military use of enhancement means raises the question of their liability for off-duty offences committed either as a result of their enhancement or aggravated by their enhancement. I personally doubt that this will be the main issue in the near future. Indeed, it would mean that there would be means of enhancement such as to enable or facilitate offences that would not be possible without them. In my introductory words, I stressed the need to remain realistic, both in terms of the current state of research and in terms of what the military could enable. Moreover, the military personnel concerned will probably be the most specialized. Consequently, it is logical to underline the practical fact that if these people wish to commit offences, the enhancement will not be a determining factor but a facilitator. Thus, the question that really arises is whether or not the increase is a determining factor in the commission of the offence.

However, this will not exclude the individual criminal responsibility of the military perpetrator. However, the enhancement may work against him in that it may constitute a ground for aggravation of the sentence. In this case, the intervention of the legislator to create this new ground for aggravation is necessary. The question that will then arise, in a more practical way, is whether, in the case of an offence under ordinary law committed

[2]Aurélie De Andrade, 'La distinction temps de paix/temps de guerre en droit pénal militaire : quelques éléments de comprehension' [2001] 10(2) *Les Champs de Mars* 155-170.

[3] Ronan Doaré, 'La judiciarisation des activités militaires : quelles réponses ?' [2015] 28(1) *Inflexions* 128-141.

off duty but in which the enhancement played a role, this act should always be considered as a personal fault engaging only the responsibility of the soldier. Will the administrative accountability of the army, which will be the provider of these means, be increased tenfold[4] ?

Therefore, another question follows concerning so-called reversible means of enhancement, i.e. those that would require reinstatement at the end of the exercise or mission. What about a soldier who does not reinstate such a means to misuse it for the commission of an offence? Personally, I believe that in the same way as a soldier diverts military equipment from its original use, he would be held liable under individual criminal law. I will not develop this question further, but I submit it to you, because I think that a field of research is opening up on this aspect, particularly on the regime applicable to means of enhancement. Will they be considered as military equipment?

3 The criminal responsibility of enhanced soldiers in military operations

With regard to possible offences committed during operations, the soldier is criminally liable for any offence, whether it is an ordinary or military offence. However, it does not matter what the nature of the offence is. Under French law, in order to incur criminal liability for a military offender, it is necessary to have all three elements of the offence: the legal element, the material element and the mental element. Enhancement could raise questions about the mental element of the offence. In order to try to understand it, it is necessary to look at the notion of intentional offence. Non-intentional offences cannot be addressed here for reasons of clarity and time, but it will be necessary to consider this issue as well, since non-intentionality can also characterise the mental element.

First of all, according to Article 121-3 of the French Penal Code, 'There is no crime or offence without the intention to commit it'. Intention must then be demonstrated in the case of an intentional offence (also known as a voluntary offence). Intention (also known as general intent) implies the will to commit the offence, i.e. the proof that the perpetrator has shown the will to commit the act. As Carole Lefranc-Hamoniaux particularly points out in her review on the intentional offences, the perpetrator must have understood and wanted to commit the act in order for it to be accountable to him. The mental element may not be characterised when it is proved that the perpetrator did not have free will during the commission of the offence.[5] In this case, the act cannot be attributed to him because the perpetrator, without free will or discernment, could not have understood or wanted the act.

These thoughts on the mental element of the offence are important because some means of enhancement could have an impact on the mental element, and therefore on the criminal liability of the military personnel involved. Depending on the role they played in the

[4] See below.

[5] Carole Lefranc-Hamoniaux, 'Les infractions intentionnelles et non intentionnelles', in Ronan Doaré and Philippe Frin (eds), *La responsabilité des militaires* (Economica, Guerres et Opinions 2013) 80.

commission of the offence, they could constitute an additional burden for military personnel with regard to the risk of being held liable. On the contrary, they could also be a factor in mitigating liability, if it is proved that they impaired or abolished the discernment of the military personnel. The means I will take as an example to illustrate this are pharmacological substances.

First of all, it is important to clarify the interest of the armed forces in using pharmacological substances for the benefit of their personnel. The quest for performance in the army is not new and has its origins in the use of substances, however diverse. Indeed, ancient peoples such as the Greeks, Assyrians, Persians, Vikings, Amerindians and others used drugs quite intensively. Excitants (alcohol, cocaine, amphetamines) or tranquillizers (alcohol, opium, opiates, marijuana) were prescribed or encouraged by some military authorities. All these elements show a sort of old dream that is being renewed thanks to scientific progress. The use of drugs was poorly supervised and led to undesirable effects that are even unacceptable today. Pharmacology, as a means of enhancement, can be seen as a countermeasure to the degradation of combatants' performance in an operational environment. Indeed, in an operational environment, cognitive and physical performance can deteriorate rapidly due to the accumulation of unfavourable factors such as fatigue, stress, climatic conditions, injuries, the difficulty of the mission, etc. Thus, the use of pharmacological substances that act on wakefulness, sleep, or anxiety makes it possible to overcome the obstacles linked to these constraints.

Faced with the desire to combat the degradation of cognitive performance linked to operational circumstances, the armed forces are interested in the development of 'mental capacities.'[6] The capacities of the mind that are targeted may be self-confidence, resistance to stress, attention, concentration or efficiency of reaction time to situations. These capacities can be improved or even enhanced by psychostimulant pharmacological substances. Most of these are so-called *smart drugs*[7]. This is the case for amphetamines, antidepressants or Modafinil. For example, Modafinil is a psychostimulant that reduces fatigue and significantly enhances attention. It is considered a smart drug because it is normally intended for people with narcolepsy. Research into enhancement is also turning to substances prescribed to combat neurodegenerative diseases such as Parkinson's or Alzheimer's. This is the case, for example, of Donepezil, prescribed for Alzheimer's disease, which would be of interest for improved performance in emergency situations.[8] Some substances have already been used to enhance alertness in operation (Modafinil, Extended Release Caffeine called *CLP* in French) or to promote sleep (Zopiclone, Zolpidem).

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[6] Vincent Guérin , 'Le dépassement de soi porté par les nouvelles technologies : état de l'art', in *Le soldat augmenté : regards croisés sur l'augmentation des performances du soldat* (Fondation pour l'innovation politique 2019) 28.

[7] ibid.

[8] ibid and see also Jerome A. Yesavage, Martin S. Mumenthaler, Joy L. Taylor and others, 'Donepezil and flight simulator performance: effects on retention of complex skills ' [2002] 59(1) *Neurology* 123-125.

Of course, in the light of history, armies will not wish to develop or use substances that would have the side effect of abolishing the free will of the soldier. Maintaining free will is an absolute necessity for soldiers on operations. However, it is important to ask the question, with regard to criminal responsibility, of what would happen if a member of the military enhanced by a pharmacological substance committed an offence while on duty because of an impairment or abolition of his or her judgement caused by the substance taken. Indeed, although the means of enhancement will necessarily be tested prior to missions, it is not possible to guarantee 100% that the effects of the substances will be the same under real stress or real operational conditions.

In the case of the study of the possible criminal responsibility of a military person enhanced by a pharmacological substance, it is appropriate to recall Article 122-1 of the French Criminal Code:

> A person who, at the time of the act, was suffering from a psychic or neuropsychic disorder that has abolished his or her discernment or control of his or her actions is not criminally responsible.
>
> A person who, at the time of the offence, was suffering from a mental or neuropsychological disorder which impaired his or her judgement or control of his or her actions shall remain liable. However, the court shall take this circumstance into account when determining the sentence and fixing the regime.[9]

According to this article, the mere impairment of discernment does not prevent criminal liability. In order for the enhanced soldier to be exempted from criminal responsibility, it will be necessary to prove a complete abolition of his or her discernment or control over his or her actions. This seems unlikely, insofar as proof of such an abolition would be difficult to provide. Indeed, how to prove the preponderant role of the substance in the commission of the act?

In this case, the enhanced soldier would remain criminally responsible and would have to accept the personal risk of taking substances in operation. It is conceivable that the actual intake of substances, authorized above missions and given to members under medical supervision, would be done on his own initiative when he feels the need to do so. The risk to engage criminal responsibility would then be entirely borne by the enhanced soldier. There is also a legal concept that could be extended in this sense: the fact that so-called voluntary intoxication (by alcohol or substances) cannot constitute an exemption from liability under the abolition of discernment.[10] Likewise, the Act of 24 January 2022[11] on Criminal Responsibility and Internal Security considerably limits criminal irresponsibility in the case of voluntary intoxication by substances. In the case of a total abolition of discernment, criminal irresponsibility cannot be pronounced if this abolition

[9] Personal translation of article 122-1 of the French Criminal Code.

[10] Carole Lefranc-Hamoniaux, 'Les infractions intentionnelles et non intentionnelles', in Ronan Doaré and Philippe Frin (eds), *La responsabilité des militaires* (Economica, Guerres et Opinions 2013) 80.

[11] Criminal Responsibility and Homeland Security Act 2022 n°2022-52.

results from the consumption, in a time very close to the action, of psychoactive substances with the aim of committing the offense or to facilitate its commission (article 122-1-1 of the French Criminal Code). In other words, voluntary intoxication by substances causing an abolition of discernment or control of one's actions cannot constitute a cause of criminal irresponsibility. In other words, voluntary intoxication with substances causing an abolition of discernment or control of one's actions cannot constitute a cause of criminal irresponsibility. In the case of impaired judgement, the mitigation of responsibility of article 122-1 of the French Criminal Code cannot be pronounced if the impairment is due to a voluntary consumption, in an illicit or manifestly excessive manner, of psychoactive substances (article 122-1-2 of the French Criminal Code).

In the light of all these elements, the enhancement would therefore constitute an additional risk of being held criminally liable, in the case that the enhancement plays a role in the commission of the offence. However, in the event of military necessity, particularly in the event of an emergency for the survival of the individual, the group or the mission, it could also be taken on the basis of a hierarchical order, namely by the head of the mission. In the latter case, maintaining the burden of responsibility on the enhanced soldier would risk leading him to refuse such means of enhancement. How can this be combined with the duty of obedience? What might be the consequences of such a refusal on their career? Also, how can the principle of autonomous consent be guaranteed?

But at the same time, could the responsibility of the military chief be engaged, knowing that the pre-mission tests may not have detected a possible impairment of free-will increased by the actual operational stress? Shifting the burden of responsibility from the enhanced soldier to the superior would only shift the problem, which could lead superiors to refuse to request such intake.

4 Exploring the Prospective Consequences of the Military Use of Enhancements on the Armies' Responsibility in the Case of Damage to Civilians Caused by an Enhanced Soldier

According to French law and in the case of damage suffered by civilians due to enhancement (during peacetime) a plurality of responsibilities could be expected. The interest for the victim is that the state authorities are always creditworthy. The army's responsibility would then be engaged in two cases:

- If there are two distinct faults: a personal fault of the soldier and a professional misconduct; or
- If the personal fault is related to the army's capabilities (for example, an offence permitted by military equipment).

The Army may have to compensate the civilian victim's loss under the state liability (called administrative responsibility in French law). However, this does not exclude the criminal responsibility of the perpetrator. The Army may then request that the actual responsibilities of each party be determined, either through an action in warranty or

through a recourse action. This possibility has been admitted by two decisions of the French *Conseil d'Etat* of 28 July 1951: the *Laruelle* Case *and Delville* Case.

> The Conseil d'Etat admitted the possibility for the State administration to initiate a recourse action against its agent when it has been ordered to pay compensation for a fault committed by him and, reciprocally, the possibility for an agent to be refund by the administration of part of the sums to which he has been sentenced to pay, in the case of shared responsibility.[12]

The Army will only be able to exonerate itself from liability if the fault is not related to the army's capabilities and was committed off-duty. Therefore, Professor Jean-Christophe Videlin, during a conference on the enhanced soldier in 2017, questioned the durability of this statement with the arrival of military enhancements, as enhancements would be permitted and carried out by the Army, so there would always be a link with the army's capabilities.[13]

Thus, the current state of the law would lead to a presumption of responsibility which is not favourable for the armies, but which would above all be inacceptable to them. Indeed, it is almost sure that the Army will not be interested in developing means of enhancement that would create an automaticity in the engagement of its liability. The challenge is therefore to imagine what could be done to prevent the arising of such a presumption and to strike a balance between automatic responsibility and total irresponsibility, which would not be appropriate either.

So, what solutions can be considered for the armed forces? Which exemptions are conceivable?

In my opinion, there are two possible ways of thinking about this, and I will conclude with this. If there is a reversible enhancement, i.e. that the soldier reintegrates at the end of the mission, State liability could be incurred cumulatively with the criminal responsibility of the soldier in the classic way. The damage caused to a civilian would result from an act committed during his or her duty and by the means of the army.

On the other hand, in the case of an irreversible enhancement, the mere fact of having increased the soldier would constitute a permanent link with the army (on the condition, of course, that the damage resulted from this enhancement). To mitigate this automaticity in the liability of the armed forces, they could initially ask the soldier concerned to sign a waiver of liability at the time of the enhancement. This waiver would exonerate

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[12] Personal translation of the review: Conseil d'Etat , 'Responsabilité des agents publics : l'action récursoire de l'administration et de son agent' (Les grandes décisions depuis 1873, 28th July) <https://www.conseil-etat.fr/decisions-de-justice/jurisprudence/les-grandes-decisions-depuis-1873/conseil-d-etat-28-juillet-1951-laruelle-et-delville> accessed May 2020.

[13] Jean-Christophe Videlin, 'Besoins et perspectives de l'augmentation des capacités du soldat' in Les cahiers de la Revue Défense Nationale (ed) *Le soldat augmenté : les besoins et les perspectives de l'augmentation des capacités des combattants*, (CREC Saint Cyr 2017) 142.

the army from any liability if the damage were caused by an enhanced soldier to a civilian off-duty in an irreversible manner. However, this would not seem to be the ideal solution and could be seen as the easy way out for the army, which is driving the military enhancement.

The other possibility would be to establish the rule that if an enhanced soldier is able to get a personal benefit from the enhancement, any damage he or she might cause as a result of the enhancement, out of duty, would only engage his or her individual responsibility (criminal and civilian). In the latter case, the enhancement could not have been made compulsory by the Army and the soldier would have to consent to this kind of irresponsibility clause from the Army, if he could get a personal benefit from the enhancement he will receive.

On these last prospective considerations, and throughout my speech, you may have noticed that I am submitting more questions than answers. This theme is part of my doctoral research and I wanted to make it clear that the law, about these future technologies, will necessarily evolve and will lead my research to evolve with it. It is this evolving character of the law that gives the legal study of military technologies its interest.

LETHAL AUTONOMOUS WEAPON SYSTEMS: A COMPLEX ATTRIBUTION OF CRIMINAL RESPONSIBILITY

*By Eric Pomès**

Abstract

The robotization of the battlefield is accelerating in recent years. This phenomenon should lead to the deployment of Lethal Autonomous Weapon Systems (LAWS). This deployment raises many questions both legal and ethical. Regarding the legal dimension, the questioning focuses on criminal liability because the introduction of LAWS would imply that machines 'decide' to kill human beings. This reality would lead to the non-existence of liability for violations of IHL. However, this conclusion seems excessive. While the imputability of criminal responsibility may be complex, the legal vacuum feared by some does not exist.

1 Introduction

What do a crossbow, nuclear weapons and Lethal Autonomous Weapon Systems (LAWS) have in common? A similar concern at the time of their creation or their implementation: each new type of armament seems to contemporaries first revolutionary and then dangerous. This concern frequently gave rise to attempts to ban or limit the use of these new means of combat. LAWS are no exception to this historical cycle.

The theme of battlefield robotization is highly topical. The robotization of the battlefield must be placed in the context of the evolution of modern conflict. Armed engagements are evolving with the virtual disappearance of inter-state conflicts and the correlative multiplication of intra- or trans-state conflicts that result from the loss by states of the monopoly of armed violence. The type of engagement, the decrease in defense budgets and the desire to spare the lives of soldiers explain, in part, the development of autonomous systems. If this technological evolution is only the latest avatar of the improvement of weapons in military history, the technological utopia nevertheless underlines the specificity of the phenomenon. The belief that war can be waged exclusively with systems, without the need for men, motivates a number of thinkers. Yet the nature of war necessarily implies the loss of human beings, if only as targets of these systems. Far from being a simple utopian hypothesis, the deployment and development of these systems is today a reality confirmed by the Iraqi and Afghan conflicts or the war against terrorism. Countless questions arise in the face of this reality. The deployment of unmanned systems raises the central question of the interaction between man and machine. Indeed, how to position the machine in relation to the man and make this interaction clear, understandable and predictable, so that its result (the action produced by the system) is legally and morally acceptable? Many points have been raised in the literature and in the debates in Geneva about them. A common point that emerges from all of these discussions is that in order to answer these questions, it is necessary to clarify the concept of autonomy on the one hand and addressing the sharing of authority and the feasibility of programming

the principles of international humanitarian law on the other. The design and deployment of SALA show that autonomy is a constraint that affects the allocation of responsibilities, particularly because of the complexity of implementing the rules of international humanitarian law. This article will be limited to the question of criminal liability.

In this article, the questions related to autonomy and man-machine authority will only be approached from the point of view of criminal liability. Indeed, this new generation of weapons allows, on the one hand, a geographical and therefore physical distance between the target and the military personnel using the weapon, and on the other hand, to exclude, as technology advances, humans from their use. It is this latter reality that lies at the heart of the debates surrounding LAWS. Therefore, the 'autonomy' and the theme of the 'killer robots' highlight this question in case of violation of international humanitarian law (IHL) during the actions of these weapon systems.

In an attempt to address the challenges raised by the introduction of SALA on the battlefield, this article will first address the debate on the supposed non-existence of responsibility for violations of IHL. However, this conclusion seems excessive. While the imputability of criminal liability may - under constant law - prove complex, the legal vacuum feared by some does not exist. This debate about the absence of liability seems rather symptomatic of the political use of international law.

2 The Alleged Non-existence of a Liability Argument for a Preventive Ban on SALA LAWS

The literature and arguments on the preventive prohibition of LAWS emphasize the lack of accountability for LAWS violations of IHL. This supposed lack of liability is explained by the impossibility of attributing the actions of LAWS to a human being due to their autonomy.

A taxonomy of increasing levels of autonomy regarding the functions of selection and engagement of critical targets by LAWS has been proposed by Noel Sharkey[1]. This author established the following scale:

L1. A human engages and selects targets and launches an attack,
L2. A program suggests alternative targets, and a human chooses which one to attack,
L3. A program selects targets, and a human must approve before the attack,
L4. A program selects and engages targets but is supervised by a human who retains the power to override its choices and call off the attack,
L5. A program selects targets and launches an attack based on the mission objectives as defined at the planning/activation stage, without further human intervention.

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[1] Noel Sharkey, 'Staying in the Loop: Human Supervisory Control of Weapons' in Nehal Bhuta and others (eds), *Autonomous weapons systems: law, ethics, policy* (Cambridge University Press 2016).

The L5 level would illustrate the culmination of the evolution of so-called autonomous weapons, understood as robotic weapon systems which, once activated, could select and attack targets without additional intervention by a human operator.

Autonomy is thus the central element of this definition and structures the current debates. However, the definition of the term "autonomy" causes difficulties, thus distorting the questions about these weapons of the future.[2]

First of all, according to Professor Raja Chatila, it is necessary to distinguish between operational autonomy and decision-making autonomy. In the former, the system acts autonomously to move etc., while in the latter, the system interprets data to make a decision (designate a target, perform a shot). Only this second type of autonomy is the subject of the present contribution.

If decision-making autonomy implies that the system makes decisions, it does not refer to the philosophical concept of freedom of choice for the agent. In this sense, only humans are autonomous. In the acronym LAWS, autonomy must be understood as the fact that the system's response is not predetermined as in an automated system. Therefore, the system, from a consideration of its environment by its sensors, adopts the response that is the most appropriate to its programming. The decision is thus made between several possibilities without supervision or human control but from algorithms, software designed by Man. It is therefore the human being who has designated the characteristics of the mission and the data to be taken into account, while leaving a certain degree of freedom to the machine. The behavior of the system remains predictable even if its actions, at time *t*, are not automatically known in advance.

However, for some, this unpredictability of outcome would preclude attributing LAWS actions to human being.

The human being who deploys a LAWS, in fact, may be unable to anticipate all the actions of the robot. Such a situation makes it difficult to establish a guilty intent (actus reus) and thus the criminal liability of the human being who uses it.

This argument has led to endless discussions about the implementation of a meaningful human control.[3] The functions of this control would be multiple. Meaningful human control would play the following roles:

- Provide a safety feature to prevent a weapon malfunction from leading to a direct attack on the civilian population or excessive collateral damage,

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[2] Dominique Lambert, 'Éthique et Autonomie, La Place Irréductible de l'humain' (2019) 820 Revue Défense Nationale 162; Heather M Roff, 'Killing in War. Responsibility, Liability, and Lethal Autonomous Robots' in Fritz Allhoff, Nicholas G Evans and Adam Henschke (eds), *Routledge handbook of ethics and war: just war theory in the twenty-first century* (Routledge 2015).

[3] Merel Ekelhof, 'Moving Beyond Semantics on Autonomous Weapons: Meaningful Human Control in Operation' (2019) 10 Global Policy 343.

- Ensure the legal conditions for assigning responsibility in the event that a weapon follows a course of action contrary to international law,
- Allow for the respect of human dignity by ensuring that decisions affecting the life, physical integrity and property of persons are not made by artificial non-moral agents.[4]

However, if the functions of meaningful human control are not really debated, its exact definition is subject to debate. There are two main opposing definitions. For some, meaningful human control is defined as requiring an operator to approve every action to be taken by a weapon[5]. For others, meaningful human control is understood as the power of the operator to withhold approval for particular actions while allowing the weapon to operate in a largely autonomous mode for the rest.

Regardless of which formula is chosen, the literature defines meaningful human control as imposing three dimensions:

1. Human operators make informed and conscious decisions when using the weapon,
2. The human operators have sufficient information (on the target, the weapon, the context of the action) to ensure the legality of the planned action,
3. The weapon is designed and tested, and human operators are properly trained, to ensure effective control during use of the weapon.[6]

The idea of introducing meaningful human control seems reasonable. However, such an idea is not without risk. The operator in charge of meaningful human control could approve almost by reflex the strikes recommended by the weapon system. This risk of overconfidence in automation is well known: the operator tends to defer to the 'decisions' of the Automation Bias machine.[7] Therefore, one could argue that there is control, but little judgment. The operator could therefore be held criminally liable for not properly implementing meaningful human control.

In the debate about the supposed lack of criminal liability, the difficulty lies initially in the language used. Discussions about LAWS are indeed obscured by the use of anthropomorphic vocabulary.[8] This explains the difficulty in establishing definitions that are accepted by all actors. Addressing the issue of criminal liability related to the use of LAWS with this reality in mind helps to support the possibility of assigning responsibility.

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[4] Daniele Amoroso and Guglielmo Tamburrini, 'Autonomous Weapons Systems and Meaningful Human Control: Ethical and Legal Issues' (2020) 1 Current Robotics Reports 187, 189.

[5] Such a definition means that at best a weapon system can be semi-autonomous.

[6] James Kraska, 'Command Accountability for AI Weapon Systems in the Law of Armed Conflict' (2021) 97 International Law Studies 407.

[7] Mary L Cummings, 'Automation and Accountability in Decision Support System Interface Design' [2006] Journal of Technology Studies 23.

[8] Noel E Sharkey, 'The Evitability of Autonomous Robot Warfare' (2012) 94 International Review of the Red Cross 787.

3 A Plural Criminal Liability

The following discussion will focus on the question of accountability in the event of a violation of IHL during a LAWS action.[9] At first glance, the accountability of the criminal act could be aimed either at the machine or at individuals involved in the process of using LAWS.

3.1 The Unlikely Responsibility of the Machine

To examine the hypothesis of LAWS responsibility, consider the following example: a child who approached a military camp with a dummy weapon during a game was considered a target by the system responsible for monitoring the site; for LAWS, the weapon was real and therefore identified the child as a threat.

The operator has neither participated in the realization of the act nor had the intention to commit the infraction. It is the autonomous machine that has 'decided' alone on the actions to be taken according to its environment.

Can the responsibility of the machine be considered?

Such recognition would require that it be granted a legal personality, albeit a lesser one. Two arguments militate in favour of rejecting such a responsibility. First, the machine is not a person but a thing[10], so it cannot be responsible. Such a recognition would have little meaning, since the consequences of the recognition of such a responsibility would remain rather theoretical. Since it has no assets, it could not repair the damage. Finally, the most probable consequence would be a reprogramming or even a destruction.

In addition, Article 25 (1) of the Rome Statute on individual criminal responsibility specifies that the Court has jurisdiction only over natural persons.

Second argument, the machine does not have free will, it only executes actions according to its program, therefore the intentional element is missing.

All these arguments militate in favor of the search for human responsibility.

3.2 The Difficult Determination of Human Agent Accountable

The difficulty lies in determining exactly who is involved in the use of LAWS. It is clear that the implementation of these systems involves many people whose precise involvement must be established in order to determine the basis for criminal liability.[11]

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[9] Thompson Chengeta, 'Accountability Gap: Autonomous Weapon Systems and Modes of Responsibility in International Law.' (2016) 45 Denver journal of international law and policy 1.

[10] The robotic system having a material reality and being susceptible to appropriation is a thing which, depending on the situation, will be movable or immovable property.

[11] Dan Saxon, 'Autonomous Drones and Individual Criminal Responsibility' in Ezio Di Nucci and Filippo Santoni de Sio (eds), *Drones and responsibility: legal, philosophical and sociotechnical perspectives on remotely controlled weapons* (Routledge 2016).

Following the architecture of criminal responsibility adopted by the Rome Statute, the following hypotheses are possible:

- Individual criminal responsibility of the principal perpetrators under Article 25 of the Statute,
- The criminal responsibility of military leaders and superiors provided for in Article 28 of the Statute.

Whatever the hypothesis considered, the engagement of the criminal responsibility of a person requires the meeting of two elements: the material element, namely, the criminal conduct (*actus reus*) and the psychological element, namely, the knowledge or the general intention with regard to the conduct (*mens rea*). The mental element has several levels, ranging from knowledge to negligence and in some cases to specific intent.

However, the existence of these elements could be problematic in the case of IHL violations through a LAWS.

3.3 A Multitude of Human Agents Responsible for the Actions of LAWS

Article 25 of the Rome Statute allows for the direct responsibility of different individuals involved in the implementation of a LAWS. The criminal act may be attributed to several individuals because of their actions at different stages of the implementation of the autonomous system.

In order to better define the hypothesis of direct criminal liability, it is necessary to distinguish between cases in which the system is merely the instrument of the violation and those in which the very operation of the system is the cause of the violation.

In the latter case, holding the operator, his superior or the programmer responsible for the war crime seems at first sight difficult to envisage since the intentional element is lacking. Thus, for example, in the case of an attack by the machine on civilians not directly participating in the hostilities, article 8 (2) (b) (i) of the Rome Statute requires that the perpetrator intended to target these persons with his attack. However, in our hypothesis, none of the human beings wanted to, nor did they behave in a way that proves the intention to commit this crime. There are two ways to proceed. The first is negligence. One and/or the other of the individuals having participated in the implementation of the system can see his responsibility engaged because he should have foreseen or known the commission of the act, because the act was foreseeable.

The second way open in French law is the way of unintentional torts. These are cases in which there is indirect causality, i.e., a situation in which a person has not directly created the damage but has either created or contributed to creating the situation which allowed the damage to occur, or has not taken the necessary measures to avoid it. As regards military personnel, article L. 4123-11 of the French Defence Code requires, in order to engage their liability, that it be shown that they did not take the normal care required by their competence, their powers and the means at their disposal and the difficulties of the

mission. These objective criteria invite the judge to make an assessment *in concreto* of the behaviour of the soldier with regard to the specificity of the profession of arms and the particular situation and not by identifying him with the ordinary man. Article L. 4123-11 of the Defence Code thus invites the judge to assess the conduct of the soldier by detecting, in the conduct of the missions or functions carried out, in the exercise of the attributed competences, as well as in the use of the devolved powers and means, all the signs of normal diligence prohibiting the fault from being considered as criminally constituted, or, on the contrary, those of an insufficiency. The court should not, however, define what the duties and mission of the soldier should have been, but should verify whether he or she had taken normal care in the circumstances of the case. In other words, the judge will have to determine whether the conduct for which the accused soldier is being prosecuted can be linked to the damage due to an insufficiency in the conduct of his missions or in the exercise of his powers and competences. The normality of the diligence can then be deduced by comparing these faculties with the initiatives actually taken. It will be necessary to determine what an average officer would have done in such a situation and to compare the result of these investigations with the behaviour of the accused. In the case of damage caused by the machine, for example, the soldier could be accused of not having taken sufficient account of the weather as a factor in the machine's error. The operator should have known that the weather on the day of the damage was predictable.

Liability based on the negligence of the agent must be distinguished from cases where the basis for liability will arise from the use of the system as an instrument for the violation. This is an assumption in which the capabilities of the machine are not actually used; it is merely an extension of the operator. This hypothesis reminds us that the decision of the mission and therefore of the actions are taken or initiated in the first place by humans. The act is therefore attributable to a human agent.

The criminal courts will be faced with the complex question of whether the evidence demonstrates criminal intent on the part of a human agent. It will have to be shown that, even if the final initiation of the action was by the software controlling the autonomous weapon system, it was human commanders or operators who used the weapon system with the intent to conduct an unlawful attack. Therefore, regardless of the autonomous nature of the system, accountability will be similar to that of, for example, a commander who plans or orders indiscriminate attacks with conventional artillery.

Far from preventing criminal liability, LAWS increase the number of people who can be held accountable for a crime.

The primary perpetrator could be the programmer of the weapon who knowingly programmed it in a way that violates IHL. The difficulty will lie in the collection of evidence, since it will be necessary, unless there is an express document, to show the lines of code at the origin of the violation and to prove that they are the work of the accused.

The second responsible party could be the operator who did not fulfill his role of meaningful human control by knowingly allowing an action to take place that he knew was contrary to IHL.

The third responsibility could be the superior officer for his decision to employ a LAWS even though he knew that the system used did not comply with the law or for violating the precautionary principle. Article 57 (2) (ii) of Additional Protocol I requires military commanders who launch an attack to "take all feasible precautions" to minimize collateral damage. In order to comply with this obligation, the commander must, prior to deploying a LAWS, ensure that:
(1) The use of LAWS is based on the precautionary principle,
(2) Once programmed, the LAWS software has the ability to determine and carry out the necessary precautions to comply with Article 57, paragraph 2.

However, a violation of the precautionary principle should not be confused with an internal system error. This distinction is an inherent aspect of all technologies used on the battlefield. For example, a commander may use a satellite-guided bomb to attack a target because the technology has been designed and tested to provide precision attacks. If there is an unexpected error in the guidance system, this bomb may accidentally strike a civilian asset near the military target. This scenario would likely not be a violation of IHL because the commander and pilot did not intend to target the civilian asset and reasonably relied on the bomb's precision guidance technology as a means to avoid or minimize accidental loss of civilian life.[12]

In addition to this direct responsibility under Article 25, the superior may also be held criminally responsible under Article 28 of the Rome Statute.

3.4 The Criminal Responsibility of the Military Commander for the Acts of the SALA

Article 28 allows for the criminal responsibility of superiors for crimes committed not by themselves but by the troops under their command. This article provides that

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to

[12] Matthew Miller, 'Command Responsibility: A Model for Defining Meaningful Human Control' (2021) 11 Journal Of National Security Law & Policy 544.

prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The military commander may thus be held liable for the prohibited conduct of his subordinates for failing to prevent or repress their unlawful conduct or to report it to the appropriate authorities. This is a form of vicarious liability based on a failure to act ("omission").

To be criminally responsible, the military commander had to exercise effective command and control, or effective authority and control, over his subordinates who committed the crime(s)[13]. These crimes must have resulted from the failure of the military commander to exercise proper control over his subordinates. Furthermore, the military commander will only be held responsible if he knew or, due to the circumstances, should have known that his subordinates were committing or about to commit one or more violations of international humanitarian law. This means that he must have known or should have known that his forces were going to engage, were engaging or had engaged in conduct constituting the crimes.

Engaging the responsibility of the superior requires that the superior exercises effective control over his or her subordinates pursuant to a *de jure* or *de facto* relationship. The Čelebići judgment states that "the determining factor is whether or not the superior has real power of control over the actions of subordinates"[14]. This power of control consists in the power to give orders and to have them carried out, the power to impose disciplinary sanctions, etc.

Again, the military commander could not be held responsible for the actions of the LAWS due to the lack of effective control. The speed of data processing and the multitude of operational variables involved prevent military leaders from effectively controlling the machines. Furthermore, the notion of punishment necessarily linked to the power of control is meaningless in the case of a violation of IHL by machines[15].

However, when crimes are committed as a result of the misuse of autonomous weapon systems, the doctrine of superior responsibility may be appropriate. For example, if a military commander becomes aware that a subordinate officer is using LAWS to perpetrate unlawful attacks, the military commander has a duty to prevent the attack, prevent the commission of further violations of IHL, and punish the subordinate.

A final possibility is that Article 28 of the statute does not restrict the superior officer doctrine to military commanders, but also applies it to civilian superiors who have de-

[13] Vivek Sehrawat, 'Autonomous Weapon System and Command Responsibility' (2020) 31 Florida Journal of International Law 315.
[14] Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement), case n° IT-96-21-T, 16 November 1998, par. 370-371.
[15] Miller (n 12) 533.

liberately disregarded information. Article 28 opens the way to prosecute civilian (political) leaders for their decisions, for example, to deploy such weapons in a given conflict.

4 Conclusion

The preceding developments show that the determination of responsibilities will be *in concreto* and not *in abstracto*. Moreover, in the case of multiple responsible parties, the responsibilities will not be alternative but cumulative. Finally, it is also possible to imagine the intrusion of "hackers" into the machine to alter its programming, which will have consequences for the determination of responsibility. The difficulty of establishing proof of such hacking in cyberspace suggests the difficulties that judges will face when determining who is responsible for damage or when convicting an individual for the "facts" of a machine.

The debates about the impossibility of attributing LAWS acts to individuals are part of the idea of *lawfare*, which testifies to the weight of the law for political and military decision-makers in 21st century conflicts. Law should not be seen as a mere criminal risk, but as an integral part of the strategy and conduct of hostilities. *Lawfare* seeks to influence legal paradigms for strategic, operational and tactical purposes. *Lawfare* thus implements the concept of politicization of law, whereby actors make politics through and in law.

Lawfare thus corresponds to the use of all legal means enabling an actor to achieve his objectives or to constrain the behaviour of another actor.

Reflection on *lawfare* highlights the inadequacy of the purely technical approach to law. Its understanding requires an instrumental approach in which the political objectives of the actor guide the interpretation of the rule.

In order to avoid a watertight compartmentalization of law and legitimacy, a strictly positivist view must be abandoned. This must be one of the lessons of *lawfare* applied to the issue of accountability in the use of LAWS. These debates reveal that the actors rely more on a value-based approach than on the rule. *Lawfare* is thus a perfect manifestation of the discursive, instrumental and political dimension of law. It can be used to influence perceptions and as part of actors' legal discourses and counter-discourses. The idea of *lawfare* thus breaks with a neutral, objective and technical vision of law in favor of a "legitimizing" function of the latter.

This vision, which is based on the idea of a humanitarian order defined as "a set of norms, discourses and institutions that legitimize and legalize the intervention of states and non-state actors in order to preserve human life"[16], exposes the fragility of states whose legality and legitimacy of actions can be questioned due to accusations of non-compliance with international law.

[16] Michael N Barnett, *The International Humanitarian Order* (Routledge 2010) 2.

The above analyses show that the use of LAWS could be problematic with regard to IHL principles, although none of these difficulties are insurmountable. Going further, one may ask whether it would not be possible to consider illicit any production of LAWS that could potentially violate human rights? This is the idea behind the various campaigns against "killer robots", notably that of *Human Right Watch*. The weakness of this line of reasoning, despite its interest, is that it suggests that LAWS are, in the end, robotic killers, even though they are controlled by human beings through software and programming. Indeed, LAWS are not reasoning agents, they do what they are programmed to do.

KILLER ROBOTS AND MILITARY JUSTICE INNOVATION: PREPARING ACCOUNTABILITY MECHANISMS FOR THE FUTURE OF AUTONOMOUS WEAPONS

By Brian L. Cox [*]

Abstract

Despite a decade of focused diplomatic negotiations, consensus among states regarding meaningful constraints on the development and implementation of autonomous weapons systems for use in armed conflict remains elusive. A foundational impediment to achieving consensus is persistent discord regarding whether existing rules of international law involving responsibility for the conduct of hostilities are adequate. This article presents and develops the 'Comparative Approaches to National Implementation of International Law' model to categorize existing accountability practices among states and subsequently applies relevant provisions of the Rome Statute of the International Criminal Court to the context of autonomous weapons. In doing so, the article pursues enhanced clarity involving the applicability of existing rules related to accountability for autonomous weapons systems in support of ongoing regulatory endeavours.

1 Introduction

Advances in the means and methods of warfare made possible by technological developments have long tested the capacity of the laws and customs related to armed conflict to effectively regulate the conduct of hostilities. The Second Lateran Council, for example, famously professed, 'under penalty of anathema', an ultimately unsuccessful prohibition on the employment of crossbows and arrows against Christian soldiers in the year 1139.[1] Centuries later, 'as a result of the development of modern technical science,' the First World War led to inventions and improvements such as no previous war [had] ever witnessed'.[2] Some of these developments of (then) modern science, such as the utilization

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[1] Fordham University, 'Medieval Sourcebook: Tenth Ecumenical Council: Lateran II 1139' <https://sourcebooks.fordham.edu/basis/lateran2.asp> accessed 20 September 2022. This particular prohibition was likely an attempt to restrict the utilization of highly effective 'Saracen' crossbows and archers against Christians who answered the call to arms to fight Roger II of Sicily. For background on the conflict between Roger II and the Church, including the effective use of Saracen slingers and archers by Roger II, see, eg, Graham A. Loud, *Roger II and the Creation of the Kingdom of Sicily: Selected Sources Translated and Annotated* (Manchester University Press, 2012) 253, fn 8. As historian David Nicolle notes, crossbows 'had probably been known in the Islamic world for some time, but were first recorded in Europe' during this period, while efforts by the Church 'to ban or restrict the use of crossbows in warfare' were unsuccessful. David Nicolle, *Medieval Warfare Source Book, Volume 1: Warfare in Western Christendom* (Brockhampton Press, 1999) 130.

[2] Baron von Freytag-Loringhoven, *Deductions from the World War* (The Knickerbocker Press, 1918) 74. When *Deductions* was published, Freytag was a Lieutenant General and the Deputy Chief of the German

of asphyxiating gases, would later be the subject of successful regulatory efforts[3], while others, such as rules restricting aerial warfare, would not.[4]

Although limitations inherent in endeavours to constrain the 'modern technical science' involving the development of means and methods of warfare are by no means a novel phenomenon, one specific category of currently emerging weapons for which successful regulation remains elusive demonstrates the potential to fundamentally transform the very nature of armed conflict. For the first time in history, emerging technology may soon remove direct human involvement from the process of identifying, selecting, and attacking targets. This article explores current challenges associated with ongoing attempts to regulate emerging autonomous weapons technologies and seeks solutions to some of the most obstinate and enduring challenges inherent in existing regulatory efforts.

The pursuit of meaningful limitations on the development and use of autonomous weapons systems (AWS) can be summarized by two general questions: 1) How do *existing* rules constrain the development, procurement and implementation of autonomous weapons?; and 2) Are existing rules adequate? A fundamental unsettled issue inherent in the initial query is determining what entity should assume responsibility for the use of autonomous weapons and under what theory of criminal or pecuniary liability. The relevant queries to this end are: Whom should be held accountable when targeting operations carried out by autonomous weapons go wrong, and on what basis?

Addressing these issues can contribute to current endeavours in pursuit of consensus regarding constraints on the development and implementation of emerging AWS technologies by clarifying the present composition of existing rules of international law. Achieving enhanced clarity involving existing rules related to accountability for AWS is a necessary antecedent in support of the aspiration to achieve consensus related to effective constraints in the future. This is the inspiration and animating aspiration of the present examination.

The substantive inquiry begins, in Section 2 of the present article, by charting some of the most prominent unsettled issues involving accountability for AWS in order to de-

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Imperial Staff. As the introductory note to *Deductions* observes with a debatable degree of ostentatiousness, Freytag was 'the most distinguished soldier-writer of Prussia', and 'since none will dispute Prussia her militarism, he [was] the most distinguished living writer on militarism in theory and practice' of his time.

[3] See, eg, Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare [1925] and the later and more comprehensive Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction [1993].

[4] See General Report on the Revision of the Rules of Warfare, Part II, Rules of Aerial Warfare (1923). Although the aim of the Commission of Jurists involved was to develop a draft code to be considered and ultimately adopted by States in a multilateral agreement, the rules were never adopted in treaty form and, therefore, did not directly materialize as a component of conventional international law.

velop a conceptual frame for the inquiry that follows. Section 3 then examines and categorizes existing modes of achieving accountability for violations of the law of armed conflict (LOAC) from a comparative perspective and suggests the model reflected in the Rome Statute of the International Criminal Court as a method by which to harmonize the divergent comparative approaches. Section 4 applies relevant substantive components of the Rome Statute – involving the definition of crimes and general principles of criminal responsibility in particular – in the context of autonomous weapons to assess the effectiveness of current international law. Finally, Section 5 concludes the examination by summarizing the substantive analysis and briefly situating the accountability assessment in the context of future regulatory endeavours and potential military justice innovations. For now, the substantive analysis begins by bringing focus to current unsettled issues involving accountability in the context of autonomous weapons.

2 Charting Unsettled Issues and Framing the Topic of Accountability

The present endeavour of exploring existing military justice and accountability frameworks in the context of emerging autonomous weapons exists in a landscape of similarly unsettled issues of international and comparative domestic law. The current contribution is necessarily limited in scope to the challenge of assessing accountability for the development and implementation of AWS. However, the topic of accountability does not function in isolation from related issues, and a wide range of divergent perspectives involving accountability and associated matters are apparent in current official and public discourse. At the outset of the substantive inquiry, then, it is useful to briefly outline some of the more significant unsettled issues and then to frame the specific topic of accountability within this general landscape.

2.1 Defining 'Autonomous Weapons' and 'Meaningful Human Control'

One enduring and foundational challenge involves achieving consensus regarding a definition for autonomous weapons. Then-Lieutenant Colonel Alexander Bolt of the Canadian Armed Forces succinctly noted in 2013, 'There is no obvious definition of "autonomous weapons", but the definition is key to a meaningful discussion of legal advice in autonomous weapons use'.[5] Nearly a decade hence, consensus related to a specific definition for AWS remains just as elusive.[6] Although developing a precise and more detailed

[5] Alexander Bolt, 'The Use of Autonomous Weapons and the Role of the Legal Advisor' in Dan Saxon (ed), *International Humanitarian Law and the Changing Technology of War* (Martinus Nijhoff Publishers, 2013) 123, 126.

[6] See eg, Ariel Shapiro, 'Autonomous Weapons Systems: Selected Implications for International Security and for Canada (In Brief)' (2020) Library of Parliament Publication No. 2019-55-E, 1 <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/InBriefs/PDF/2019-55-e.pdf> accessed 21 September 2022; Chair, Cabinet External Relations and Security Committee, 'Autonomous Weapons Systems: New Zealand Policy Position and Approach for International Engagement' (2021) Office of the Minister for Disarmament and Arms Control, para 3 <https://www.mfat.govt.nz/assets/Peace-Rights-and-Security/Disarmament/Autonomous-Weapons-Systems-Cabinet-paper.pdf> accessed 21 September 2022.

definition for AWS is an ongoing endeavour for the present author, a general characterization of 'weapons systems that, once activated, can select and engage targets without further human intervention'[7] is sufficient for present purposes.

At present, however, a lack of consensus regarding a definition of AWS is a foundational impediment to the pursuit of meaningful regulation of autonomous weapons. The categorization method of 'human-in-the-loop', 'human-on-the-loop' and 'human-out-of-the-loop' initially described in 2013[8] remains widely cited today, but this classification framework is not sufficiently nuanced to adequately account for the diverse concerns involved in the development and future use of autonomous weapons. Even so, a viable alternative categorization method capable of accounting for the full range of technical and functional characteristics of emerging autonomous weapons systems has not been widely agreed or adopted. In the absence of a widely accepted definition of autonomous weapons systems, consensus on significant constraints will remain elusive.

A related definitional challenge is confirming precisely what it means in practice to ensure 'meaningful human control' of an autonomous weapons system. Michael Horowitz and Paul Scharre noted in a 2015 working paper that, as early as 2014, this concept 'emerged as a major theme' in discourse involving AWS, though today, as was the case in 2015, there remains 'no clear definition or agreement at this point'[9] regarding what exactly constitutes 'meaningful' human control. According to Horowitz and Scharre, 'There are at least three concerns raised by those who have written on this issue, that they argue are not explicitly addressed in existing law of war principles and that meaningful human control might address'.[10] Those three topics identified by the authors are: accountability, moral responsibility and controllability.[11]

2.2 Applying Existing Rules and Accountability Frameworks to Emerging AWS

Picking up on the 'existing law of war principles' aspect of these concerns, yet another foundational contemporary challenge is developing consensus related to what body or bodies of law, if any, apply to the development and implementation of autonomous weapons. The final report of the U.S. National Security Commission on Artificial Intelligence, for example, asserts, 'Provided their use is authorized by a human commander or operator…[autonomous weapons] have been and can continue to be used in ways which

[7] New Zealand Policy Position (n 6) para 3.
[8] Human Rights Watch and Harvard Law School International Human Rights Clinic (IHRC), 'Losing Humanity: The Case against Killer Robots' 2 (19 November 2012) <https://www.hrw.org/sites/default/files/reports/arms1112_ForUpload.pdf>.
[9] Michael C. Horowitz and Paul Scharre, 'Meaningful Human Control in Weapon Systems: A Primer' (March 2015) *Center for a New American Security* 6.
[10] ibid 8.
[11] ibid.

are consistent with' existing rules of the law of armed conflict'.[12] However, the introductory condition – simply that the use of autonomous weapons is *authorized* by a commander – does not clarify what entity, if any, is responsible if the targeting operation that is conducted by an autonomous weapon after the commander authorizes the engagement does not go according to plan.

On the topic of responsibility for an attack, the Commission presents two seemingly irreconcilable claims. First, the report indicates, 'Human accountability *for the results* of lethal engagements does not necessarily require human oversight of every step of an engagement process'.[13] In the very next sentence, the Commission asserts, 'Once a human authorizes an engagement against a target or group of targets, subsequent steps in the attack sequence can be completed autonomously without relinquishing human accountability'.[14] These observations appear to be internally inconsistent, as the theory of 'human accountability' for an operator who does not provide 'human oversight of every step of an engagement process' is not explained.

Indeed, a recent policy paper published by the New Zealand Ministry for Disarmament and Arms Control alludes to this potential accountability gap that may exist in current international law. According to this paper, 'There are significant concerns about the ability of future AWS to comply with international law'.[15] After briefly describing foundational LOAC rules such as distinction, proportionality and the requirement to take feasible precautions in the attack, the paper observes, 'It is not readily apparent how accountability for violations of IHL involving AWS would be established'.[16]

This overview of divergent perspectives illustrates two broad areas of tension related to the development and potential implementation of autonomous weapons. The first is whether existing rules of international law genuinely are adequate in the context of emerging autonomous weapons. The second, which is a foundational aspect of the first, is clarifying the conceptual and practical processes by which human operators are to be held accountable for targeting decisions made autonomously by machines. Against this backdrop of yet unresolved tension, identifying and describing the general motivations underpinning currently divergent perspectives can contribute to the aspiration of reconciling potentially competing interests on the related topics of applying existing rules of international law and developing suitable accountability frameworks.

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[12] Final Report, National Security Commission on Artificial Intelligence (2021) 92 <https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf> (NSCAI Report).
[13] ibid 93 (emphasis added).
[14] ibid.
[15] New Zealand Policy Position (n 6) para 13.
[16] ibid.

2.3 Consolidating Divergent Perspectives on Applying Existing Rules and Developing Accountability Frameworks

Although any number of individual factors can inform a particular State's motivations, perspectives and ultimate objectives related to the debate involving constraints on the development and implementation of autonomous weapons, one central factor appears to be an assessment of that State's role in the future of geopolitical competition. In one cohort, a substantial number of States, including a group of 125 or so that has collectively become known as the 'non-aligned movement' (NAM), have coalesced in a coalition of sorts to advocate in favour of a new treaty to supplement existing rules on the basis that the latter are ostensibly inadequate in the context of AWS.[17] One State that invests heavily in defence spending, China, has maintained a calculatingly ambiguous position on the prospect of binding constraints.[18] Meanwhile, a group of at least ten States that invest heavily in defence and that is likely to be actively involved in shaping geopolitical competition well into the future has remained consistently indisposed to the prospect of a treaty that would constrain the development and use of autonomous weapons.[19]

The cohort of States advocating in favour of supplementing existing rules tend not to be especially actively involved in endeavours to shape current and emerging geopolitical competition. In a statement submitted in 2021 on behalf of the NAM and other States to the chair of the Group of Governmental Experts (GGE) of the High Contracting Parties of the Convention on Certain Conventional Weapons (CCW) related to emerging technologies in the area of AWS, for example, Venezuela calls for the development of a 'legally binding instrument' that would take into account, among other elements, '[m]ilitary technology and risk of an arms race of fully autonomous weapons, and the technology gap amongst States'.[20] Assessing a representative sample listing[21] of States associated with this cohort – including Algeria, Djibouti, Ghana, Argentina, Bolivia, Cuba, Ecuador and the Holy See – suggests these States may be motivated by a common belief that an

[17] Human Rights Watch and IHRC, 'Crunch Time on Killer Robots: Why New Law Is Needed and How It Can Be Achieved' 3 (December 2021) <https://www.hrw.org/sites/default/files/media_2021/11/Crunch%20Time%20on%20Killer%20Robots_final.pdf>. For the reported count of NAM members, see Campaign to Stop Killer Robots (CSKR), 'Country Views on Killer Robots' (25 October 2019) 3, <https://www.stopkillerrobots.org/wp-content/uploads/2019/10/KRC_CountryViews_25Oct2019rev.pdf>.

[18] For an insightful analysis of China's developing and current strategic ambiguity related to the development and implementation of autonomous weapons, see Putu Shangrina Pramudia, 'China's Strategic Ambiguity on the Issue of Autonomous Weapons Systems' (July 2022) 24 *Global: Jurnal Politik Internasional* 1.

[19] CSKR Country Views (n 17) 3. As CSKR notes, these identified states are: Australia, France, Israel, Republic of Korea, Russia, Turkey, United States and United Kingdom.

[20] Geneva Chapter of the Non-Aligned Movement, 'Statement on behalf of the Non-Aligned Movement (NAM) and Other States Parties to the Convention on Certain Conventional Weapons (CCW) by the Delegation of the Bolivarian Republic of Venezuela to the United Nations Office in Geneva' (2021) 3 <https://documents.unoda.org/wp-content/uploads/2021/12/NAM.pdf>.

[21] See CSKR Country Views (n 17) 1.

arms race and technology gap would be contrary to their own strategic national objectives in the context of current and future geopolitical competition.

In conjunction with this concern related to the 'risk of an arms race' and a 'technology gap amongst States', another factor that should be taken into account by a new legally binding instrument, according to the NAM statement, is '[h]uman responsibility, as well as accountability' for the development and use of AWS.[22] This apprehension related to responsibility and accountability is similar in substance to the concerns expressed in the New Zealand policy position 'about the ability of future AWS to comply with international law' in that it is 'not readily apparent how accountability for violations of IHL involving AWS would be established'.[23] For this cohort, then, emphasizing misgivings regarding the ability of *existing* rules of international law to effectively establish responsibility and accountability for the development and use of autonomous weapons is consistent with the objective of avoiding a costly arms race that may well be detrimental to collective geopolitical strategic interests.

This strategic interest in constraining the development and implementation of AWS aligns with a vast array of advocates and academics active in civil society who are equally keen to limit utilization of autonomous weapons. The Campaign to Stop Killer Robots, for example, is described as 'a global coalition of more than 180 international, regional, and national non-governmental organisations and academic partners working across 66 countries to ensure meaningful human control over the use of force through the development of new international law'.[24] Likewise, the venerable International Committee of the Red Cross (ICRC) has, since at least 2015, supported 'initiatives by States aimed at establishing international limits on autonomous weapon systems that aim at effectively addressing concerns raised by these weapons'.[25] This campaign is consistent with the ICRC organizational understanding of the foundational purpose of the law of armed conflict, which, according to this formulation, 'is a set of rules that seeks, for humanitarian reasons, to limit the effects of armed conflict'.[26]

Although a coalition of concerned States and civil society advocates has pursued a concerted and vocal campaign for over a decade in support of new restrictions on the development and implementation of autonomous weapons, meaningful consensus related to legally binding rules remains elusive still today. Opposition expressed by States such as Israel, Russia and the United States, which are today and will likely be involved in shaping the contours of geopolitical competition well into the future, suggests existing rules are sufficient and that no new binding restrictions are necessary. A central component of

[22] Statement on Behalf of the NAM (n 20) 2-3.
[23] New Zealand Policy Position (n 6) para 13.
[24] CSKR, 'Our Member Organizations' <https://www.stopkillerrobots.org/a-global-push/member-organisations> accessed 22 September 2022.
[25] International Committee of the Red Cross, 'ICRC position on autonomous weapon systems' (12 May 2021) <https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems>.
[26] ICRC, 'What is international humanitarian law?' (6 April 2022) <www.icrc.org/en/document/what-international-humanitarian-law> accessed 22 September 2022.

the persistent discord remains the issue of accountability for damage to civilian or properties caused by autonomous weapons without direct or continual human involvement.

One proposed solution for addressing the enduring impasse involving existing legal and accountability frameworks was proposed by Portugal in the CCW GGE forum for the second session of 2021. The suggestion presented by Portugal encourages the CCW High Contracting Parties to develop a compendium or working paper 'on existing international (positive and negative) obligations applicable' to AWS 'and on good practices useful for implementing such obligations, with a view to contribute to the clarification, consideration and development of aspects of the normative and operational framework'.[27] As the report by Human Rights Watch and IHRC on this session of the CCW notes, 'several opponents of a new treaty latched onto the proposal as a way forward', while '[o]thers firmly dismissed it'.[28]

Whether in favour of developing new binding restrictions on the development and utilization of autonomous weapons or opposed, clarifying whether and how existing rules of international law are adequate in the AWS context remains a central impediment to achieving consensus in fora such as the CCW and indeed in public discourse more broadly. The related issue of accountability for the use of AWS has thus proven to be just as intractable, as it is not clear precisely *how* human operators should be held accountable for targeting decisions made by autonomous systems. Due in no small part to persistent divergence in perceived strategic and geopolitical interests, solutions to these controversies remain seemingly as elusive as when current debates initially began taking shape roughly a decade ago.

With this consolidated assessment of persistently competing perspectives thus in focus, the present inquiry transitions now to the pursuit of potential common ground. Consensus that has thus far remained vexingly elusive may yet be fostered by developing enhanced clarity regarding the application of existing legal and accountability frameworks to the context of AWS. That endeavour begins, in Section 3, by harmonizing the rich diversity in current state practice related to achieving accountability for the conduct of hostilities in armed conflict.

3 Mapping Divergent Approaches to Accountability and Seeking Common Ground

The pursuit of common ground regarding the substance and implementation of international law in the context of autonomous weapons is necessarily complex in large part because there is not precise alignment among the community of States regarding the substantive content and necessary application of international law in general. Even foun-

[27] 'Proposal by Portugal for a Consensus Recommendation by the GGE LAWS' (September 2021) 1 <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2021/gge/documents/Portugal_sept.pdf>.
[28] Human Rights Watch and IHRC, 'Crunch Time on Killer Robots' (n 17) 5.

dational, universally ratified multilateral treaties such as the Charter of the United Nations do not stimulate uniform interpretation and application. In the context of AWS, the controversy involving whether existing international law is indeed adequate must necessarily begin with agreement on the substance and application of international law as it currently exists.

While a fairly common approach is to cite directly to the text of a widely ratified source of conventional international law, typically Additional Protocol I (1977) to the 1949 Geneva Conventions because of its scope, as an authoritative and binding source of positive law, treating Additional Protocol I (AP I) as a 'codification'[29] of existing international law misrepresents the method by which the law is actually developed and identified. Although approximately 4 out of 5 countries in the world have ratified or acceded to AP I, making it 'among the most widely accepted legal instruments in the world',[30] the plain text of the treaty does not represent customary international law such that it is directly binding on all States, including those not Party to the convention.

Even among High Contracting Parties to AP I, analysis of existing reservations and declarations reveals rich diversity in interpretation and application of a number of central provisions.[31] States that have not ratified or acceded to the Additional Protocols, of course, remain bound by the conventional text only to the extent that it reflects customary law – extensive and virtually uniform State practice that is conducted out of a sense of legal obligation (*opinio juris*).[32] The rather mainstream practice of relying directly on the text of AP I as a 'codification' of international law that is universally binding on all States, then, is problematic in any context – including the present endeavor of identifying

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[29] See, eg, ICRC, 'What are the Geneva Conventions and their Additional Protocols?' (13 August 2017) <https://blogs.icrc.org/ilot/2017/08/13/geneva-conventions-additional-protocols> accessed 23 September 2022 (asserting that AP I 'codified several rules on protection for the civilian population against the effects of hostilities'); Marco Sassoli, 'Challenges and Opportunities to Increase Respect for IHL: Specificities of the Additional Protocols' in Fausto Pocar (ed), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives* (International Institute of Humanitarian Law 2018) 259, 259 (noting, 'One of the greatest progresses, if not the greatest progress, brought about by the Additional Protocols has been the codification of the rules on the protection of the civilian population against the effects of hostilities'); Giovanni Mantilla, 'The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols' in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?* (OUP 2017) 35, 56 (observing that the Additional Protocols of 1977 'are not merely small additions to the original Conventions but rather codify principles and concepts that are today viewed as central to IHL').

[30] Legal Information Institute, 'Geneva Conventions and their Additional Protocols' (*Cornell Law School*) <https://www.law.cornell.edu/wex/geneva_conventions_and_their_additional_protocols#:~:text=At%20present%2C%20168%20States%20are,legal%20instruments%20in%20the%20world> accessed 23 September 2022.

[31] For a valuable collection of the various reservations and declarations, see ICRC, 'Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470#panelReservation> accessed 23 September 2022.

[32] For a foundational and widely cited description of the formulation of customary law, see North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, para 74.

and describing the current state of international law as it applies to the context of autonomous weapons.

The same concerns apply if the rather more concise, and later in time, formulation of international law developed in the Rome Statute of the International Criminal Court is adopted for present purposes. At current count, fewer States have ratified the Rome Statute than have AP I or AP II.[33] Additionally, States that could be considered militarily significant, such as Russia, China, Israel, Turkey, Iran and the United States, are not among the Member States. Whether one endorses what might be described as frequent military adventurism of such countries, regular transnational military involvement does make these 'States whose interests are specially affected'[34] such that their perspectives regarding the present composition and application of international law especially relevant in identifying current customary law involving the use of force and conduct of hostilities. Given that the Rome Statute cannot be described as universally ratified, and indeed many specially affected States are among the non-Member States, referring to the text of the treaty as a direct representation of customary law as it currently exists is problematic.

Nonetheless, the text of the Rome Statute does present a reasonably comprehensive formulation of substantive international law involving the conduct of hostilities. As such, utilizing relevant provisions of the text as an indication of existing customary law that applies to all States – even those that have not ratified the Rome Statute – could facilitate the present endeavor of applying the law to the context of autonomous weapons. Indeed, Section 4 below of the present article does just that.

However, before the relevant text of the Rome Statute can be applied as at least a persuasive specimen of customary international law, State practice must be examined in order to determine whether the text is indeed persuasively customary. That is the undertaking pursued in the present Section. In support of this conceptual task, the inquiry turns now to the pursuit of a comparative method by which to harmonize current divergence in domestic accountability models.

3.1 Systematizing and Categorizing Comparative Domestic Accountability Models

The widely (though not universally) ratified character of the Rome Statute of the International Criminal Court makes the text of the treaty a tempting starting point in the endeavor to conclusively describe the current substance of customary international law that applies to the context of development and implementation of autonomous weapons systems in armed conflict. Before that status can be conceptually conferred for present pur-

[33] The Assembly of States Parties reports that 123 countries have ratified or acceded to the treaty. Assembly of States Parties to the Rome Statute, 'The States Parties to the Rome Statute' <https://asp.icc-cpi.int/states-parties#:~:text=123%20countries%20are%20States%20Parties,Western%20European%20and%20other%20States> accessed 23 September 2022.
[34] I.C.J., North Sea Continental Shelf Judgement (n 32) para 74.

poses, it is prudent to consider whether the relevant provisions adequately reflect extensive and virtually uniform State practice with an accompanying *opinio juris*. Doing so requires an assessment of existing State practice involving the implementation of accountability mechanisms in the context of the conduct of hostilities.

Although the widely-ratified character does infuse the Rome Statute with an appreciable harmonizing function from a comparative perspective, Hiromi Satō succinctly (and accurately) notes that 'the basic instruments of international judicial organs do not oblige States to implement their rules in whole within national jurisdiction'.[35] Even among Member States, then, developing a method by which to systematize and categorize various models of *domestic* enforcement is necessary to assess the character of relevant provisions of the Rome Statute as an expression of customary *international* law. This pursuit animates the present inquiry.

The process of developing a standardized comparative categorization model begins by recalling the three general types of jurisdiction exercised by States: prescriptive, adjudicative, and enforcement. As Jens Ohlin summarizes, prescriptive jurisdiction 'involves the state's capacity to issue regulations, such as when its legislature passes a statute'.[36] Adjudicative jurisdiction, in contrast, 'involves the court's capacity to entertain a legal dispute or resolve a particular legal controversy'.[37] Finally, Ohlin summarizes that enforcement jurisdiction 'involves the state's capacity to enforce the law by, say, sending its policy or other officials to arrest an individual or to enforce a monetary judgment'.[38]

In the context of international criminal law, the 'designate and extend' model previously developed by the present author in academic literature[39] illustrates the character of the Rome Statute in relation to national jurisdiction. According to this model, delegates of States involved in negotiating and drafting the text of the Rome Statute (to remain with the present context) were collectively involved in exercising prescriptive jurisdiction on behalf of the international community in general. Upon ratifying or acceding to the treaty, States endorse the prescriptions – the substantive law – reflected in the text while collectively extending (in contradiction to delegating) adjudicative and enforcement jurisdiction to the international tribunal established by the treaty.

Notwithstanding the harmonizing function of the collective (though not universal) exercise of prescriptive jurisdiction reflected in the Rome Statute, Member States are not

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[35] Hiromi Satō, 'Modes of International Criminal Justice and General Principles of Criminal Responsibility' [2012] 4 Goettingen J Intl L 765, 806.

[36] Jens David Ohlin, *International Law: Evolving Doctrine and Procedure* (Foundation Press, 2018) 685.

[37] ibid.

[38] ibid.

[39] Brian L. Cox, 'Recklessness, Intent, and War Crimes: Refining the Legal Standard and Clarifying the Role of International Criminal Tribunals as a Source of Customary International Law' [2020] 52 *Georgetown J Intl L* 1.

obliged 'to implement [the] rules in whole within the national jurisdiction'.[40] Just as importantly, the International Criminal Court is not conferred with direct authority to exercise adjudicative or enforcement jurisdiction *within* the territorial boundaries even of Member States. That is, States Party to the Rome Statute are able to determine individually how to domestically implement the measures of prescriptive jurisdiction reflected in the treaty, and thereafter States retain authority to exercise adjudicative and enforcement jurisdiction domestically.

As such, developing a model that adequately describes the comparative methods by which States exercise national jurisdiction of relevant aspects of international law can confirm the potential customary nature of the prescriptions reflected in the Rome Statute. While the harmonizing function of the widely-ratified treaty is useful in that endeavor, confirming the practice of States that have *not* ratified or otherwise acceded to the Rome Statute is arguably even more essential. This is the intended function of the model proposed and developed herein.

In an effort to categorize comparative State practice, two separate factors are queried and then combined. The first is whether the national model of a particular State directly refers to the conventional text of the Rome Statute. Those that do are conferred with the initial label of 'conventional'; those that do not are classified as 'customary'.

For States in the 'conventional' category, the second inquiry is whether the text of the treaty is adopted directly by reference or, instead, if the prescriptions of the Rome Statute are incorporated by way of example. The former method results in a combined categorization of 'conventional-direct'. The latter, by contrast, is assigned to the descriptive category of 'conventional-variable'.

Turning next to the 'customary' initial category – States that do *not* refer to or incorporate the text of the Rome Statute directly into national legislation – the second query is whether the State implements relevant provisions of international law by way of a statutory code designed specifically for that purpose or, instead, whether an existing code is utilized. The former method results in a category that can be labeled 'customary-specific'. In contrast, the latter group is conferred with the description of 'customary-general'.

To consolidate the classification in the order described immediately above, the individual categories are: conventional-direct, conventional-variable, customary-specific and customary-general. This standardized Comparative Approaches to National Implementation of International Law (CANILL) model suggested and developed herein is applied immediately below. To do so, a brief description of each category is presented for each category along with a representative sampling among current State practice for each.

[40] Satō (n 35) 806.

3.1.1 Conventional-direct

The conventional-direct category is perhaps the simplest and least complex model to describe in the present classification scheme. This style of national implementation is based upon the conventional text of the Rome Statute, which is incorporated without modification directly into domestic legislation. One example of the conventional-direct method is the UK International Criminal Court Act 2001, which adopts the meanings of genocide, crimes against humanity, and war crimes by incorporating the definitions established in Articles 6, 7, and 8(2), respectively, of the Rome Statute.[41] Other examples of the conventional-direct method include legislation adopted by Scotland[42] and New Zealand.[43]

While each State is able to individually determine how to incorporate the substance and procedure of international law involving armed conflict into domestic legislation, the conventional-direct method engages a minimal degree of national discretion. Of course, there is no absolute requirement to ratify or accede to the Rome Statute before incorporating the substance established therein into a national jurisdiction. However, it is reasonable to anticipate that a State electing to incorporate the substance of the Rome Statute by direct reference to the treaty will also be a Member State.

In any event, by adopting this model, the relevant provisions referred to in domestic legislation are in essence an exact facsimile of the conventional text presented in the Rome Statute. A primary advantage of adopting this model is simplicity in incorporation and subsequent interpretation and application. In contrast, a potential disadvantage is inflexibility of the domestic legislation in case conceptions of existing customary law on a particular point change over time given that consensus among States Party to the Rome Statute may prove to be challenging to achieve in pursuit of requisite amendments.

With the substance of the Rome Statute (typically the prescriptive aspects, as in the UK ICC Act) adopted into domestic legislation without modification, it is reasonable to expect the exercise of adjudicative and enforcement jurisdiction by the State pursuant to the conventional-direct method to implement the substance likewise directly adopted. This expected alignment of prescriptive, enforcement, and adjudicative jurisdiction with the content of the Rome Statute has a harmonizing effect among the States that do implement this model. In the absence of individual national discretion, the plain text of the treaty becomes amplified uniformly and with no divergence as the standard for accountability for the conduct of hostilities among conventional-direct jurisdictions.

3.1.2 Conventional-variable

Like the previous approach, States adopting the conventional-variable method of incorporating relevant provisions of international law into the domestic jurisdiction make specific reference to the Rome Statute. Unlike the previous approach, however, the substance

[41] International Criminal Court Act of 2001, c 17, s 50 (1).
[42] International Criminal Court (Scotland) Act 2001, ASP, c 13, s 1(4).
[43] International Crimes and International Criminal Court Act 2000 (NZ), 2000/26, s 11(2).

incorporated domestically by this approach is not necessarily constrained by the text of the treaty. Instead, select aspects of the Rome Statute are adopted domestically without tethering the national provisions directly to the text of the treaty.

One illustrative sample of this approach is the Crimes Against Humanity and War Crimes Act of 2000 adopted in Canada. According to this legislation, the 'crimes described in Articles 6 [genocide] and 7 [crimes against humanity] and paragraph 2 of Article 8 [war crimes] of the Rome Statute are…crimes according to customary international law.'[44] The definitions and interpretations established in the Act likewise describe each offense as a component of customary international law, while the definitions copied from the text of the Rome Statute are presented as examples incorporated for 'greater clarity'.

A different variation of the conventional-variable model is reflected in the Netherlands International Crimes Act of 2003. The Dutch approach notes in the introduction of the Act 'that it is necessary, partly in view of the Statute of the International Criminal Court, to adopt rules concerning serious violations of international humanitarian law.'[45] This reference in the introduction confirms that the foundation for the legislation is built upon the Rome Statute as a conventional source. However, the substantive aspects of the Act draw upon the text of the treaty but are independently established by the legislation, rather than merely incorporating the substance by direct reference as the conventional-direct model does.

One significant advantage to this approach of domestic implementation is flexibility. If the relevant State determines that a nuanced but important development in interpreting customary international law has occurred that is not reflected in the current version of the legislation, a relatively minor amendment can be adopted to accommodate the change. The flexibility also allows the national implementation of international law to be tailored to the individual customary interpretations of the State, including any understandings, reservations or declarations published in connection with any relevant conventional sources.

Perhaps the most significant disadvantage to this approach is the degree of specialization required to establish the details of the legislation during the initial development and then in monitoring to ensure the details remain current. As a general matter, legislators are typically not particularly well versed in the potentially intricate nuances involved in interpreting customary international law. Simply tying the substantive aspects of national

[44] Crimes Against Humanity and War Crimes Act, SC 2000, c 24, s 6(4). This provision applies for crimes committed outside of Canada. Section 3 of the same Act adopts the same approach and definitions for crimes committed *within* Canada.

[45] International Crimes Act of 2003, c 270. Official version available <https://zoek.officielebekendmakingen.nl/stb-2003-270.pdf> accessed 23 September 2022, English language translation available <https://documents.law.yale.edu/sites/default/files/netherlands_-_international_crimes_act_english_.pdf> accessed 23 September 2022.

implementation to the conventional text of the Rome Statute by direct reference requires less expertise initially and throughout the lifecycle of the legislation.

3.1.3 Customary-specific

Unlike the two models described immediately above that refer to the Rome Statute to establish a conventional foundation for the legislation, the customary approaches do not indicate that the domestic substantive provisions are built upon or otherwise drawn from a source of conventional international law. However, the current approach can be distinguished from the customary-general category described below in that the customary-specific method implements a separate code that is specifically adopted for the purpose of establishing domestic offenses based upon international law. One example of this approach is the Code of Crimes Against International Law (CCAIL) adopted by Germany in 2002 (last amended in 2016).

The CCAIL (or VStGB if the German language title is abbreviated) does not make direct reference to the Rome Statute, or any other source of conventional international law for that matter, even though Germany ratified the treaty in December 2000, a year and a half before the CCAIL was adopted. The absence of a reference to some conventional foundation leads to the 'customary' designation for this approach. However, as might be expected, the substantive provisions of the Act closely resemble relevant text of the Rome Statute.

Given that the substantive provisions of the CCAIL, as the example under present consideration, are substantially similar to corresponding components of the Rome Statute, it is reasonable to expect accountability decisions reached in domestic proceedings to be consistent with determinations that would result from applying the text of the treaty directly. However, since the legislation does not refer directly to the Rome Statute, it is worth pausing to assess, by way of a brief case study, whether national implementation of the CCAIL closely resembles an outcome that might be expected from one of the conventional approaches described herein. That case study can be developed from the attack authorized by a German military commander that resulted in civilian casualties in Kunduz, Afghanistan in 2009.

This attack was the first (and to the present author's knowledge, remains the only) investigation involving a targeting mishap 'in the history of the Federal Republic of Germany which involved the application of international criminal law in a conflict.'[46] As Wolff von Heinegg and Peter Dreist note, because Germany had 'enacted domestic legislation implementing the Rome Statute of the International Criminal Court and there were reasonable grounds for assuming that war crimes might have been committed by these members of the German armed forces, the Prosecutor-General began its investigation on the

[46] Wolff Heintschel von Heinegg and Peter Dreist, 'The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings Against Members of the German Armed Forces' [2010] 53 German YB Intl L 833, 833.

basis of' the war crimes section of the CCAIL.[47] After applying a provision of the CCAIL that is substantially similar to corresponding text reflected in the Rome Statute, the Prosecutor-General determined that the attack did not constitute an offense pursuant to the CCAIL.[48] This determination went on to be upheld by the Federal Court of Justice (Bundesgerichtshof, or BGH) in Germany[49], and a complaint alleging that the domestic investigation was inadequate was ultimately rejected by the European Court of Human Rights.[50] Based on the outcomes of these various levels of judicial review, it is reasonable to conclude that the application of the domestic CCAIL by the Prosecutor-General was consistent with the international legal obligations adopted by Germany upon ratification of the Rome Statute in 2002.

In any event, a primary advantage of the customary-specific approach is that it permits a significant degree of customization and adaptability related to the domestic application of international criminal law, much like the conventional-variable method. However, like the conventional-variable method, the customary-specific approach requires a significant degree of expertise and specialization to develop initially and to maintain thereafter. Indeed, von Heinegg and Dreist point to a translation error that could potentially be consequential when applying the proportionality rule and that was introduced as German legislators adapted text of conventional international law sources for domestic implementation in the CCAIL.[51] If there is a significant divergence between existing international law and domestic implementation, the national jurisdiction introduces an avoidable risk that officials correctly applying domestic law may fail to comply with international legal obligations. This is of particular concern for countries, like Germany, that have ratified the Rome Statute.

3.1.4 Customary-general

The final approach to be described and examined herein is the customary-general method. Like the customary-specific, this latter approach does not refer directly to a source of conventional international law as the foundation for the domestic legislation. However, the customary-general approach, unlike the method described immediately above, does not utilize specific legislation to implement international law in domestic accountability processes. Instead, the customary-general approach implements a general purpose *domestic* code that is in practice adapted to apply to conduct that would constitute a violation of *international* law.

Two particularly prominent examples of the customary-general approach are the Uniform Code of Military Justice (UCMJ) utilized by the United States[52] and the Military

[47] ibid 841.

[48] ibid 843-45.

[49] BGH, III ZR 140/15 (6 October 2016) <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=1&nr=76401&pos=35&anz=487>.

[50] *Hanan v. Germany*, 4871/16, Judgment (16 February 2021).

[51] von Heinegg and Dreist (n 46) 843-44, 848-49.

[52] See Uniform Code of Military Justice, 10 U.S. Code c 47.

Justice Law employed by Israel.[53] Although the United States adopted the War Crimes Act (WCA) in 1996[54], long-standing practice of the U.S. military is to 'ordinarily' charge personnel subject to the UCMJ 'with a specific violation of the UCMJ rather than a violation of the law of war.'[55] Notwithstanding the availability of the WCA, in the applied context the U.S. military, like the Israeli Defense Force[56], adapts the same code of service discipline that applies to military members in a general domestic setting to pursue accountability for violations of international law when necessary.

Like the brief assessment of the 2009 Kunduz attack examined above while describing the customary-specific approach, there is value in assessing whether these examples of the customary-general model achieve outcomes in practice that are similar to determinations that might be expected if the Rome Statute were implemented instead. Unlike the 2009 Kunduz attack involving the German military, however, there exists an overabundance of potential examples of attacks conducted by the U.S. and Israeli military, respectively, that have been investigated as potential serious violations of international law. While an in-depth study of these incidents is necessarily beyond the scope of the present inquiry, analyses conducted separately by the present author involving the 2021 attack on the al-Jalaa tower in the Gaza strip by Israeli Defense Forces[57] and the 2015 attack on the *Médecins Sans Frontières* (MSF) trauma center in Kunduz, Afghanistan[58] can be consulted for illustrative purposes.

In general, disposition decisions following incidents such as those cited immediately above are consistent with disciplinary outcomes that might be expected if the known facts were applied to relevant aspects of the Rome Statute. When official findings determine that personnel involved in an attack that results in incidental damage did not intentionally direct an attack 'against the civilian population as such or against individual civilians not taking direct part in hostilities'[59] or launch an attack 'in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian…which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'[60], for example, a criminal proceeding is not initiated. These

[53] See Military Justice Law, 5715–1955.
[54] See War Crimes Act 1996, 18 U.S. Code s 2441.
[55] U.S. Manual for Courts-Martial, Rules for Court-Martial, 307(c)(2), Discussion (2019).
[56] *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, Turkel Commission 2nd Report (February 2013) 271.
[57] See Brian L. Cox, 'The IDF Attack on Al Jalaa Tower: Criticisms Are Correct on the Law, But Mistaken in Applying It' (*Just Security*, 28 May 2021) <https://www.justsecurity.org/76681/the-idf-attack-on-al-jalaa-tower-criticisms-are-correct-on-the-law-but-mistaken-in-applying-it> accessed 25 September 2022.
[58] See Brian L. Cox, 'The Attack on the MSF Trauma Center in Kunduz and the Limitations of a Risk-based Approach to War Crimes Characterization (Part 1)' (*Opinio Juris*, 3 October 2020) <http://opiniojuris.org/2020/10/03/the-attack-on-the-msf-trauma-center-in-kunduz-and-the-limitations-of-a-risk-based-approach-to-war-crimes-characterization-part-1> accessed 25 September 2022.
[59] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), art 8(2)(e)(i).
[60] ibid art 8(2)(b)(iv).

disposition decisions developed from the customary-general accountability approach, then, are generally consistent with outcomes that might be expected if the substantive provisions of the Rome Statute were applied rather than the military justice code of general applicability.

Before describing some advantages and disadvantages inherent in this approach, it is apposite to briefly consider a method of critique that often accompanies disposition decisions following incidents such as those cited immediately above. Criticisms related to disposition decisions involving the attack on al-Jalaa tower[61], the MSF trauma center[62] and those involving targeting processes in general[63] are often centered on the *outcome* of an incident with little regard or even direct knowledge of the actual *process* that led to an attack. While unquestionably prevalent, this analytical approach is generally inconsistent with assessments that inform actual disposition decisions that transpire in practice and, indeed, with determinations that might be expected from applying relevant provisions of the Rome Statute.

To borrow again from the text of the treaty, the decision to refrain from initiating disciplinary proceedings is typically consistent with a finding that the attack was not intentionally directed against 'the civilian population as such or against individual civilians not taking direct part in hostilities.'[64] Refraining from initiating disciplinary processes under these circumstances does not represent an accountability gap as it is often portrayed in public discourse, including those examples cited immediately above. Rather, these disposition decisions constitute a doctrinal application of relevant provisions of international law in the domestic military justice setting.

In any event, perhaps the most notable advantage to implementing the customary-general approach is that no specialized familiarity with the operation of international law is

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[61] Adil Ahmad Haque, 'The IDF's Unlawful Attack on Al Jalaa Tower' (*Just Security*, 27 May 2021) <https://www.justsecurity.org/76657/the-idfs-unlawful-attack-on-al-jalaa-tower> accessed 25 September 2022; Lubna Kamal, 'Amnesty Calls for Investigation into Israeli Bombing of Gaza Media Tower' *Anadolu Agency* (17 May 2021) <https://www.aa.com.tr/en/middle-east/amnesty-calls-for-investigation-into-israeli-bombing-of-gaza-media-tower/2244396> (quoting social media post by Amnesty International asserting that 'attacks on civilians are war crimes' and claiming that the 'attack on al-Jalaa building' and other strikes must 'be investigated as a war crime'); Amnesty International, 'Pattern of Israeli Attacks on Residential Homes in Gaza Must be Investigated as War Crimes' (17 May 2021) <https://www.amnesty.org/en/latest/press-release/2021/05/israelopt-pattern-of-israeli-attacks-on-residential-homes-in-gaza-must-be-investigated-as-war-crimes> accessed 25 September 2022.

[62] Médecins Sans Frontières, 'Statement on Kunduz Hospital Bombing' (4 October 2015) <https://www.doctorswithoutborders.org/latest/statement-kunduz-hospital-bombing> accessed 25 September 2022.

[63] See eg, International Commission of Jurists, 'Perpetuating Impunity: Israel's Failure to Ensure Accountability for Violations of International Law in the Occupied Palestinian Territory' (April 2022) 29-34 (para 3.5) <https://www.icj.org/wp-content/uploads/2022/04/PalestineIsrael-accountability-and-impunity-briefing-paper-2022-ENG.pdf>; Larry Lewis, 'Hidden Negligence: Aug. 29 Drone Strike is Just the Tip of the Iceberg' (*Just Security*, 9 November 2021) <https://www.justsecurity.org/78937/hidden-negligence-aug-29-drone-strike-is-just-the-tip-of-the-iceberg> accessed 25 September 2022.

[64] Rome Statute art 8(2)(e)(i).

required to develop and implement a separate code addressing violations thereof. However, both in practice and in the context of public discourse, the absence of specialized provisions related to the domestic application of international law creates a potential incongruity between the armed conflict context in which targeting operations occur and the criminal code of general application that is utilized to assess that conduct. This is a fundamental shortcoming of which the present author has taken note in the context of the U.S. military[65] and for which a high-level commission has recommended reevaluation in the context of the Israeli Defense Force.[66]

3.2 Consolidate and compare to RS

The categorization scheme suggested and developed in the present section is not intended to be a comprehensive analysis of comparative approaches to national implementation of international law through military justice frameworks. A wide-ranging analysis that systematically categorizes current military justice approaches using the Comparative Approaches to National Implementation of International Law model or a similar methodology would constitute a valuable contribution to the theory and practice of contemporary comparative military justice, and indeed resources from which to draw the underlying data to support such a systematic classification endeavor are reasonably available.[67] For present purposes, however, it is sufficient to observe that military justice disposition decisions are generally consistent with what might be expected if national jurisdictions were directly implementing the relevant text of the Rome Statute of the International Criminal Court, and this conclusion applies even for national jurisdictions such as the United States and Israel that have not ratified the treaty.

This phenomenon supports the assertion that the text of the Rome Statute constitutes a credible starting point for articulating relevant provisions of international law that apply to national military justice approaches regardless of the comparative methods of domestic implementation. While every provision of each substantive article of the treaty may not qualify as an authoritative expression of customary international law such that it is binding even on States that have not ratified the Rome Statute, it is reasonable to at least adopt a rebuttable presumption that each does so. This suggests the conventional text of the Rome Statute is a useful resource as a starting point for articulating relevant provisions of international law that apply to national jurisdictions regardless of divergent comparative methods of implementing international law in the domestic setting.

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[65] Brian Lee Cox, 'Military Justice Reform, Accountability, and the Legitimacy Imperative: The Kunduz Example' (*Lawfire*, 3 October 2020) <https://sites.duke.edu/lawfire/2020/10/03/guest-post-brian-cox-on-military-justice-reform-accountability-and-the-legitimacy-imperative-the-kunduz-example> accessed 25 September 2022.

[66] Turkel Commission 2nd Report (n 56) 362-66.

[67] See eg, ICRC, 'National Implementation of IHL; By State' <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCountry.xsp> accessed 25 September 2022; Equipo Nizkor, 'National implementation of International Criminal Law', *National Implementation of International Criminal Law for Serious Crimes* <https://www.derechos.org/intlaw> accessed 25 September 2022.

4 Applying Rome Statute As the Current Customary Model for Accountability

The categorization endeavour pursued in the previous section takes aim at the first of two foundational unsettled issues, identified initially in the introduction, involving applying international law to the context of emerging autonomous weapons – determining the precise substantive content of international law that applies among a vast divergence of national implementation approaches. With the substantive provisions of Article 8 (war crimes) of the Rome Statute selected as presenting at least a rebuttable presumption of customary status, the subsequent inquiry involves determining whether existing international law is indeed fit for purpose in the context of the development and use of emerging autonomous weapons. While a comprehensive analysis related to the latter concern is necessarily beyond the scope of the present inquiry, this section addresses some of the central components of Article 8 of the treaty to provide context for the challenges ahead for both international law and domestic implementation thereof.

To frame the assessment of the suitability of the conventional text of the Rome Statute, it is useful to note that the provisions of primary importance relate to what is often referred to as the Hague stream of the law of armed conflict, rather than the Geneva stream. The former is generally focused on international law as it applies to targeting operations, while the latter is centred generally on victims of armed conflict in the traditional sense – the wounded and sick in the field or shipwrecked at sea, prisoners of war, and civilians in occupied territory. Despite the contemporary tendency to merge the streams into consolidated conventional texts, such as the Additional Protocols and the Rome Statute, divergence in the conceptual foundation and practical implementation of the two streams remains extant. Application of existing international law to the context of AWS is centred primarily on provisions related to targeting, and this focus on the Hague stream of LOAC in the context of autonomous weapons considerably narrows the range of war crimes consulted in the present inquiry.

Also of note is that the central focus of this inquiry is substantive, rather than procedural, aspects of the Rome Statute. As Hiromi Satō succinctly explains, 'The substantive aspect of international criminal law basically comprises two components – definition of crimes and general principles of criminal responsibility.'[68] As such, the range of Rome Statute provisions selected for the present assessment of the applicability of existing international law to the context of autonomous weapons is centred on those provisions related to the Hague stream of the law of armed conflict that involve defining crimes or establishing general principles of criminal responsibility.

[68] Hiromi Satō, 'Modes of International Criminal Justice and General Principles of Criminal Responsibility' [2012] 4 *Goettingen Journal of International Law* 765, 768.

4.1 Rome Statute and the Distinction Rule

The distinction rule reflected in Article 8 of the Rome Statute is expressed both in general and specific manners. The general prohibits intentionally directing attacks against civilian persons not taking a direct part in hostilities[69] and civilian objects.[70] The specific method proscribes intentionally directing attacks against particular groups of persons and objects, such as medical and humanitarian assistance workers and peacekeepers[71], fighters who are *hors de combat*[72] and buildings of cultural significance.[73] It is worth noting that expressions of the distinction rule are more extensive in the context of international armed conflicts (IAC) as compared to the non-international armed conflict (NIAC) context. This suggests delegates negotiating the text of the treaty were more amenable to restrictions on the conduct of hostilities in the context of fighting against military forces of other States, when reciprocal enforcement is presumably more probable, than when fighting against non-state armed groups with no formal governance structure to assist with enforcing LOAC obligations.

Widespread concern often expressed in relation to the distinction rule generally objects to the prospect of a machine, or algorithm guiding the operation of the machine, making life-and-death decisions during targeting operations.[74] However, this general apprehension misconstrues the method by which autonomous weapons would function in practice. Human programmers develop and install the code that causes machines to function, and human operators will subsequently provide the mission parameters an AWS will implement in the targeting cycle. Contrary to the general apprehension involving algorithms taking lives, in fact humans *are* making these decisions by programming and employing AWS. Even if the machine carries out the intent of the operator without additional human involvement, it is the human making the targeting decision while the machine carries out that intent.

While the role of AWS 'making' life-and-death decisions in armed conflict is, at most, an ethical concern, the actual *legal* matter involves whether an AWS intentionally directs an attack against civilians or objects (in the general or specific categories) or against fighters who are *hors de combat*. If a programmer or operator deliberately utilizes an autonomous

[69] Rome Statute art 8(2)(b)(i), (e)(i).
[70] ibid art 8(2)(b)(ii), (v).
[71] ibid art 8(2)(b)(iii), (xxix), (e)(ii), (iii).
[72] ibid art 8(2)(b)(vi).
[73] ibid art 8(2)(b)(ix), (e)(iv).
[74] See eg, Frank Sauer, 'Why Multilateral Regulation of Autonomy in Weapons Systems Is Difficult, Yet Imperative and Feasible' [2020] 102 *Intl Rev Red Cross* 235, 254; Human Rights Watch and IHRC, 'Making the Case: The Dangers of Killer Robots and the Need for a Preemptive Ban' [2016] 24 <https://www.hrw.org/sites/default/files/report_pdf/arms1216_web.pdf> accessed 26 September 2022; Peter Maurer, 'We Must Decide What Role We Want Human Beings to Play in Life-and-Death Decisions During Armed Conflicts' (12 May 2021) *ICRC* <https://www.icrc.org/en/document/peter-maurer-role-autonomous-weapons-armed-conflict>.

weapon to attack a group of civilians, the human operative commits a war crime (pending consideration of the proportionality rule, immediately below). However, if a primary concern is that the AWS will inadvertently classify a civilian or object as an adversarial fighter or military objective, the resulting targeting mishap would not constitute a war crime pursuant to existing international law – at least not for a human operator.

4.2 Rome Statute and the Proportionality Rule

As noted above in Section 3, the expression of the proportionality rule reflected in the Rome Statute prohibits intentionally directing an engagement 'in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian…which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.'[75] This rule is expressed only in the IAC section of the war crimes article, indicating yet again that the prospect of reciprocal enforcement is a determinative factor regarding whether States are willing to accept and implement the rule as a binding legal requirement. Nonetheless, the present inquiry proceeds, for the sake of analysis, with the assumption that the proportionality rule applies in both the IAC and NIAC context.

The general concern often expressed regarding operation of the proportionality rule is that a machine will not be capable of adequately making a value judgement regarding what degree of anticipated incidental damage is 'excessive' in relation to the concrete and direct military advantage expected from an attack.[76] However, assuming the AWS is capable of identifying the extent of incidental damage anticipated from a potential attack before an engagement, the autonomous weapon could be programmed to seek input from a human operator if a pre-determined threshold for anticipated incidental harm is projected to be exceeded. Using this operational setting, a human operator would make the initial value judgment for the weapons system to implement autonomously, and an additional human assessment would be required before exceeding that preset threshold.

This potential setting demonstrates one of many shortcomings associated with the widely-utilized 'loop' method[77] of categorizing autonomous weapons. When developed and employed, autonomous weapons will presumably be capable of operating with multi-modal functionality. An autonomous targeting process that begins in a 'human-out-of-the-loop' setting may transition to a 'human-on-the-loop' function based on preset programing parameters. Ambiguity that exists based on the absence of a widely-agreed definition for autonomous weapons is a primary impediment to achieving consensus on potential restrictions on the development and use of AWS, and failure to account for multi-modal functionality is but one factor contributing to the prevailing ambiguity.

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[75] Rome Statute art 8(2)(b)(iv).

[76] See eg, Sauer (n 74) 253-54; Human Rights Watch and IHRC, 'Making the Case' (n 74) 6-8; ICRC, 'International Committee of the Red Cross (ICRC) Position on Autonomous Weapon Systems: ICRC Position and Background Paper [2020] 102 Intl Rev Red Cross 1335, 1345-46.

[77] See eg, Human Rights Watch and IHRC, 'Losing Humanity' (n 8) 2.

In any event, violating the current expression of the proportionality rule would require an AWS to be intentionally programmed or implemented in a manner such that the anticipated incidental damage is excessive in relation to the concrete and direct military advantage expected. If an animating concern is that the use of AWS may *result* in excessive damage, this scenario would not constitute a war crime if it were a human operator, rather than a machine, that conducted the attack. As such, this apprehension involving the development and use of AWS is not adequately addressed by existing international law.

4.3 Rome Statute and Inherently Indiscriminate Weapons

The final defined offense to be considered in the substantive evaluation of the Rome Statute is the prohibition against utilizing weapons that are 'inherently indiscriminate in violation of the international law of armed conflict.'[78] Like the proportionality rule, this criminal provision applies, pursuant to the text of the treaty, only in the context of an IAC. Although the text does not define the term 'inherently indiscriminate', Additional Protocol I presents three criteria that are useful in defining 'indiscriminate attacks'. The one component that is most relevant to the context of AWS is the prohibition against employing 'a method or means of combat which cannot be directed at a specific military objective.'[79]

While this provision is of central importance for the conduct of a legal review of weapons during development and before fielding, in the targeting context it is less relevant. Presumably, a State will assess if an AWS is capable of being directed at a specific military objective before the system is utilized in armed conflict. The fielding State will have an ongoing obligation to monitor the performance of the weapon to ensure continuing compliance with the 'inherently indiscriminate' rule. However, an individual operator who utilizes an AWS in the inventory in a manner consistent with its intended use would presumably comply with this LOAC rule.

4.4 Rome Statute and Individual/Superior Responsibility

Continuing with the substantive assessment of the Rome Statute while transitioning from the definitions of offenses to general principles of criminal responsibility, the text of the treaty establishes specific conditions by which a person can be held individually accountable for actions taken during the conduct of hostilities. These conditions include directly committing the crime, whether individually or jointly with co-perpetrators; ordering, soliciting, or inducing the violation; aiding and abetting the crime; or contributing to an offense with the aim of furthering the crime.[80] This mode of individual responsibility would apply, for example, if an operator employed an AWS to intentionally direct an attack against a group of civilians. However, concern has been expressed in

[78] Rome Statute art 8(2)(b)(xx).
[79] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977 art 51(4)(b).
[80] Rome Statute art 25.

public discourse that holding an AWS directly accountable for the conduct of hostilities is not possible since a machine cannot be punished in the same manner as a human operator.[81]

An alternative solution that has been suggested is to hold human operators accountable on the basis of command or superior responsibility.[82] This solution is unlikely to be adequate given that the Rome Statute establishes superior responsibility for those with effective control of subordinates who know or should know the subordinates will commit an offense and either do not take adequate measures to intervene or do not submit the matter to proper authorities for investigation or prosecution.[83] A threshold requirement for this mode of responsibility is that the subordinate – here an autonomous weapon – commits an offense the commander should either repress or investigate/report. As noted immediately above during the analysis related to application of the distinction and proportionality rules, an AWS would not commit an actual offense unless it were programmed or utilized to intentionally direct an attack against civilians.

Suggesting there is a 'credible possibility' that autonomous weapons 'may carry out *unlawful* attacks as a result of performing in an *unintended* manner'[84], for example, is not consistent with the doctrinal offense of *intentionally* directing an attack against civilians. Concern related to an 'unintended' function carried out by an autonomous weapon is centered on the outcome of an engagement rather than the process that led to the attack. An AWS that functions in an unintended manner and inflicts incidental damage, then, would not constitute an unlawful attack and would not, therefore, give rise to individual or superior responsibility for the human operator.

4.5 Mental Element and the Rome Statute

The final substantive component of the Rome Statute to be examined herein involves the mental element required for each offense. The standard mental element for all relevant violations requires the violation to be committed with intent and knowledge.[85] The text defines 'knowledge' as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.[86] Because the offenses that are relevant to the context

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[81] See eg, Human Rights Watch and IHRC, 'Making the Case' (n 74) 11; ICRC, 'Position on Autonomous Weapons' (n 76) 1341-42.

[82] See eg, Chantal Grut, 'The Challenge of Autonomous Lethal Robotics to International Humanitarian Law' [2013] 18 *J Conflict and Security L* 5, 18; Heather Roff, 'Killing in War: Responsibility, Liability and Lethal Autonomous Robots' in Fritz Allhoff et al. (eds) *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century* (Routledge, 2013) 14; Christopher P. Toscano, 'Friend of Humans: An Argument for Developing Autonomous Weapons Systems' [2015] 8 *J National Security L and Policy* 1.

[83] Rome Statute art 28.

[84] Tetyana Krupiy, 'Unraveling Power Dynamics in Organizations: An Accountability Framework for Crimes Triggered by Lethal Autonomous Weapons Systems' [2017] 15 *Loyola University Chicago Intl L Rev* 1, 2 (emphasis added).

[85] Rome Statute art 30(1).

[86] ibid art 30(3).

of autonomous weapons involve conduct, rather than a consequence, 'intent' requires 'that person means to engage in the conduct.'[87]

One common trepidation involving the use of autonomous weapons is that, as a joint Human Rights Watch and IHRC report suggests, the weapons 'would likely fall into an accountability gap' because AWS 'could not be held responsible for their own *unlawful* actions.'[88] This report next correctly notes, 'Any crime consists of two elements: an act and a mental state.'[89] However, the next assertion from the report illustrates the fundamental conceptual flaw associated with the apparent 'accountability gap' created by the mental element. That is, the report cautions that an autonomous weapon 'could commit a criminal act (such as an act listed as an element of a war crime), but it would lack the mental state (often intent) to make these *wrongful* acts prosecutable *crimes*.'[90]

This assertion is unsustainable in both concept and practice. As a conceptual matter, the wrongfulness of an act is what causes it to be criminalized, so absence of the requisite mental state would render the act both *not* wrongful and *not* a crime. This critical conceptual analysis is supported by applying the text of the Rome Statute in practice. Article 30 of the treaty imposes the requirement of intent and knowledge for *all* offenses '[u]nless otherwise provided'[91], so if an autonomous weapon, say, inflicts incidental damage but without the requisite mental element (knowledge and intent), that conduct does not constitute a 'criminal act' that could be a 'prosecutable crime' – even for the human operator.

It appears that this perspective supposes that an attack *resulting* in incidental damage constitutes a 'wrongful act' that should also be a 'prosecutable crime' regardless of the process that led to the attack. While this view is prevalent in contemporary public discourse, it is also mistaken. As Geoff Corn and Sean Watts succinctly observe on the topic, 'While it is often instinctive to assume an immediate correlation between civilian casualties and illegality, it is essential to rigorously consider how compliance and violation are credibly and objectively sorted from one another.'[92] The professors then emphasize that 'the focal point of inquiry related to targeting operations must be the attack *judgment*, not the attack *outcome*.'[93]

Applied to the context of AWS, a malfunction or inadequate performance that results in incidental damage, even excessive harm, is not necessarily a wrongful act *or* a crime. If a programmer or operator knowingly sets an AWS to, for example, attack the civilian population, that person has indeed used the weapon to commit a crime pursuant to existing international law. The same is true for a programmer or operator who intentionally sets

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[87] ibid art 30(2)(a).
[88] Human Rights Watch and IHRC, 'Making the Case' (n 74) 11 (emphasis added).
[89] ibid.
[90] ibid (emphasis added).
[91] Rome Statute art 30(1). It is worth noting that none of the relevant offenses provide otherwise.
[92] Geoff Corn and Sean Watts, 'Effects-based Enforcement of Targeting Law' (*Articles of War*, 2 June 2022) < https://lieber.westpoint.edu/effects-based-enforcement-targeting-law> accessed 26 September 2022.
[93] ibid (emphasis in original).

or uses an autonomous weapon to engage in an attack when the *anticipated* incidental damage is clearly excessive in relation to the concrete and direct military advantage *expected*. Neither example, though, is focused on the result of the attack.

If a central apprehension animating calls to constrain the development or utilization of autonomous weapons is that the systems will *result* in unexpected, or even excessive, incidental damage, at present this is not a legal concern. Excessive incidental damage is morally objectionable, but not in itself wrongful as a matter of international law. This is the case whether a human or a machine is responsible for the attack, and failure to hold either liable for the outcome of an attack, rather than the process that led to the attack, does not constitute a gap in accountability.

4.6 Exclusion of Feasible Precautions Rule from Rome Statute

Although the preceding aspects of the examination here in Section 4 are centered on relevant textual components of the Rome Statute, the final portion of the substantive analysis must digress from the text of the treaty. This departure is necessary because one component of the law of armed conflict central to assessing application in the context of AWS that is not reflected in the text is the requirement to take feasible precautions in the attack. Absence of the feasible precautions requirement from the catalogue of war crimes reflected in Article 8 of the Rome Statute indicates that failure to comply with the obligation does not constitute a *serious* violation of international law. Nonetheless, the requirement is without question a vital LOAC component, so the substantive analysis concludes here with a brief assessment of the feasible precautions requirement in the AWS context.

As an initial matter regarding the feasible precautions' requirement, it is useful to note that this is an example of a LOAC rule for which citing and referring to the text of Additional Protocol I as a 'codification' of an authoritative and binding expression of customary international law is unsatisfactory. Even among States that have ratified AP I, the conventional text applies only in the context of an international armed conflict.[94] That is, a conflict 'between two or more of the High Contracting Parties', to borrow the text from Common Article 2 to the 1949 Geneva Conventions[95] and to which AP I refers directly. The feasible precautions requirement is not reflected in the text of Additional Protocol II, which addresses the NIAC context. So as a matter of conventional law, the text of AP I – including the requirement to take feasible precautions in the attack reflected in Article 57 – applies only to States that have ratified the treaty and, only then, when a State Party is in an armed conflict with another State Party.

Even among States that have ratified AP I, the extensive collection of reservations, declarations, and understandings published upon or after ratification expands upon the text

[94] Additional Protocol I art 1(2).

[95] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 Aug 1949) 75 UNTS 31 art 2. The first three articles of all four 1949 Geneva Conventions are identical, which leads to the description of this provision as 'Common Article 2'.

of the treaty in a manner that tempers the practical application of the conventional text.[96] The notable absence of the United States among the list of States that have ratified AP I likewise casts doubt on the status of Article 57 of AP I as an authoritative expression of customary law. As Bill Boothby remarks on the subject, the text of AP I is 'of considerable importance in determining the existence of terms of customary rules, and ought not therefore be departed from in expressing such a customary rule without good legal reason.'[97] Making note that the United States has not ratified AP I, however, Boothby continues by observing, 'a declared contrary view by the, at the time of writing, only existing global superpower which is not a party to that treaty would likely constitute at least a basis for doubting the customary status of the rule.'[98] The obligation to take feasible precautions in the attack, reflected in Article 57 of AP I, is indeed one such rule.[99]

Whatever the precise composition of the obligation to take feasible precautions in the attack as a matter of customary law, the general requirement that 'constant care shall be taken to spare the civilian population, civilians and civilian objects'[100] described in the initial textual provision of Article 57 qualifies without contention. However, as the *DoD Law of War Manual* succinctly notes when describing practical application of the LOAC rule, 'what precautions are feasible depends greatly on the context.'[101] Because determining what precautions genuinely are feasible is highly contextual – both before an attack and while assessing compliance with the requirement afterward – and indeed because the specific content of the actual rule is unclear, the obligation to take feasible precautions in the attack is of only marginal utility in the pursuit of meaningful constraints on the development and use of autonomous weapons.

4.7 Applying Rome Statute as Current Customary Model for Accountability in Context of AWS

The above assessment of substantive provisions of the Rome Statute that are of central relevance to the context of autonomous weapons, along with the slight digression from the treaty to consider the feasible precautions rule, casts considerable doubt on the practical effectiveness of applying existing components of the law of armed conflict in the context of emerging AWS. Contrary to the assertion presented in the final report of the U.S. National Security Commission on AI, for example, that AWS 'can continue to be used in ways which are consistent' with existing LOAC rules '[p]rovided their use is

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[96] See eg ICRC, Treaties, States Parties and Commentaries, Additional Protocol I, entries submitted by Austria, Australia, Canada, Italy, New Zealand and the United Kingdom <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470#panelReservation> accessed 27 September 2022.

[97] William H. Boothby, *The Law of Targeting* (OUP, 2012) 57.

[98] ibid.

[99] See eg 'U.S. View of Additional Protocol I', *Law of Armed Conflict Documentary Supplement* (The Judge Advocate General's Legal Center & School 2022) 249-53; Office of Legal Counsel, *Department of Defense Law of War Manual* (3rd edn, Lieber & Sons 2017) para 5.11 (*DoD Law of War Manual*).

[100] Additional Protocol I art 57(1).

[101] *DoD Law of War Manual* (n 99) para 5.11.

authorized by a human commander or operator'[102], the primary concern animating LOAC compliance by human actors is fundamentally different than that involving the AWS context. For humans involved in the conduct of hostilities, compliance with relevant LOAC rules is centered on the process that led to an attack, while the effects of the strike are almost entirely irrelevant when assessing compliance afterward.

In the context of prospective increasing autonomy of emerging weapons technologies engaging in attacks during armed conflict, the animating concern is reversed. Assuming an autonomous weapon is not utilized by a human operator to, say, intentionally direct an attack against the civilian population, presumably any engagement conducted by an AWS will comply with relevant LOAC rules. This will be the case even if 'unintentional' incidental damage is routinely assessed to be excessive, and indeed even catastrophic, in outcome.

Unlike for human operators who are under the direct supervision of a chain of command that can constantly monitor the results of attacks to identify and implement lessons to improve outcomes even when the attacks are LOAC compliant, however, emerging autonomous weapons create the prospect of routinely catastrophic outcomes with no corresponding human involvement or evaluation. If this prospect is deemed unsatisfactory, which is a circumstance for which broad consensus among States and civil society alike is not unimaginable, existing provisions of international law are not adequate to apply in the context of emerging autonomous weapons. As the conclusion for the present inquiry transitions now to suggest, bringing clarity to these inadequacies in existing law can facilitate the pursuit of presently elusive consensus related to restrictions on the development and use of autonomous weapons as well as domestic implementation of prospective aspects of consensus.

5 Conclusion

Given the misalignment between relevant aspects of existing international law, which are centered on the process that leads to an attack, and the concerns animating the pursuit of meaningful constraints on the development and use of autonomous weapons, governments and civil society advocates alike should pursue consensus related to binding requirements for post-strike monitoring and assessment. Autonomous weapons can be developed to require operational performance data to be stored, transmitted, analyzed and reviewed after engagements. Even for attacks that would comply with existing LOAC rules, trends involving the implementation of AWS in combat operations may reveal persistently unacceptable outcomes that require adjustments to programming and utilization parameters.

Comprehensive and robust post-strike analytics of this scope and degree are not required pursuant to existing LOAC rules. As the *DoD Law of War Manual* notes, post-strike assessments may currently 'serve a number of useful purposes', but 'the actual results of

[102] NSCAI Report (n 12) 92.

an attack do not always provide useful information in assessing' compliance with LOAC obligations such as the proportionality rule because compliance is 'not to be assessed on the basis of information known only after the fact.'[103] In the context of AWS, consistent and comprehensive post-strike analytics will be required in an effort to assess compliance with expected performance parameters since human operators will not be directly involved in all, or perhaps any, phases of the attack.

This post-strike emphasis is inconsistent with the *ex ante* focus of existing LOAC rules. The corresponding deficiency in existing obligations can, and indeed should, become a primary focus of efforts in pursuit of consensus involving meaningful limitations on the development and implementation of autonomous weapons. Contrary to one prevailing perspective, existing rules of international law are inadequate in the context of emerging AWS. Clarifying precisely *why* existing rules are inadequate, as the analysis above seeks to at least partially accomplish, is a necessary predicate to the pursuit of prospective consensus among States with divergent interests.

Whether or not broad consensus can ultimately be achieved on a multilateral basis, individual States can take measures to impose specific requirements related to operational monitoring and post-strike analysis and assessment of autonomous weapons by revising existing military justice frameworks. The particular process by which States can pursue such innovation will depend on the method by which each State implements international law through domestic legislation and, specifically in this context, the individual military justice framework. The Comparative Approaches to National Implementation of International Law model suggested and developed herein, or a similar approach, can be utilized to guide individual and comparative reform efforts.

By systematizing and categorizing comparative approaches the domestic implementation, the CANIIL (or similar) model can facilitate the synchronization and harmonization of divergent national processes. If existing rules of international law indeed are not fit for the purpose of fostering meaningful restrictions on the development and implementation of emerging autonomous weapons, both international law and comparative domestic implementation thereof will need to be reassessed and revised in order to turn the ambition of widespread consensus into reality. Clarifying the limitations inherent in existing international law and harmonizing domestic implementation of relevant rules of the law of armed conflict can facilitate the pursuit of multilateral consensus. The substantive analysis conducted in this article is intended to support both lines of effort in the endeavour to cultivate consensus involving constraints related to the development and implementation of emerging autonomous weapons systems.

[103] *DoD Law of War Manual* (n 99) para 5.11.1.3.

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The success of military operations, the safeguarding of national interests and the discipline of the troops within the overall context of the rule of law have always presented great concerns for national armed forces. Nowadays, military justice faces several issues and criticisms. The prospect of 'high-intensity' warfare in Europe, battlefield robotisation, augmented soldiers, artificial intelligence and other present and potential future technological developments are new contemporary challenges for military justice and military criminal law. Also, the constant pressure for the 'civilianisation' of military justice systems since the 17th century, which implies bringing civilian and military justice closer together or even merging the two legal systems, is another issue to be addressed. A further challenge involves using mercenaries and auxiliaries on the battlefield, which blurs the lines and undermines the respect of the law of armed conflict as well as makes the application of the national rules of military justice difficult.

What are the legal and political foundations of military justice? How does it function? How to improve it and reform it? What does the future hold for military law and military justice? What can we learn from history?

Indeed, historical research can help us understand the different ways in which military justice systems have been constructed, have evolved and functioned, particularly in wartime, while comparative law may be useful in understanding the great variety of military justice systems around the world.

This volume brings together major contributions to the 1st International Military Justice Forum, which convened on 18 and 19 November 2021 in Paris, hosted by the Court of cassation, the French Judicial Supreme Court, and the Hotel des Invalides, a historical place for the French Military Forces.

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