

<b>Forum:</b>	Legal Committee (GA6)
<b>Issue:</b>	Improving the Administration of Justice by Military Tribunals
<b>Student Officer:</b>	Dionysios-Panagiotis Stathopoulos
<b>Position:</b>	Co-Chair

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## PERSONAL INTRODUCTION

Dearest Delegates,

My name is Dionysios-Panagiotis Stathopoulos and I have the outmost honor to serve as a Co-chair in the Legal Committee of the 12<sup>th</sup> PSMUN. This will be my first time serving as a Student Officer, and I am extremely grateful and excited to be a part of this conference.

The Legal Committee is one of the most interesting and demanding General Assembly Committees. The variety of topics, and the complicated positions of many Member States concerning national and international legislation, make this committee a bit more challenging than others, yet with fierce and enjoyable debate.

The topic I'll be examining in this guide is Improving the Administration of Justice by Military Tribunals. The complexity of their work, in conjunction with their importance in ensuring fair trials for those accused of war crimes, make this topic worthy of investigation.

Through this Study Guide, I hope to provide you with a solid foundation of knowledge which will help you dive deeper into the topic. On that note, I wish to stress that this guide should not be used as your only source of information, as personal research is vital for an in-depth understanding of the topic.

For any questions concerning this topic, please feel free to contact me via email, [dpstathop@gmail.com](mailto:dpstathop@gmail.com)

I sincerely hope that you find this guide to be helpful. Looking forward to meeting you all in March!

Kind regards,

Dionysis P. Stathopoulos

## INTRODUCTION

A military tribunal is a national or international military court of law, adjudicating on individuals who have committed violations of humanitarian, military, and international law in times of conflict or in peacetime. They are mostly used in peacetime or after a conflict has elapsed, but here are instances in which they are used in times of conflict, such as trying military personnel for criminal offence when in another country. There are many different variables in how military tribunals function in various judicial systems across the world, as they can either be institutionalized as a part of the justice system, and or established ad hoc, meaning for a particular instance.

Historically, at a national level, they were first established in the United States of America, throughout the American Revolution. They were first adopted at an international level with the establishment of the International Military Tribunal (also known as Nuremberg trials) in October 1945, in order to judge major Third Reich leaders for accusations such as war crimes and crimes against humanity. This was a breakthrough moment in international justice, as this was the first time anything similar was established; even more so, it created important context for the further creation of such tribunals. In 1993, the security council established tribunals for the military conflict in Yugoslavia (1993) and Rwanda (1994).



Figure 1: An image of the Judges of the International Military Tribunal established in 1945

Whilst many are not familiar with Military Tribunals and how they function, they are an important part of how military justice functions in many legal institutions. Furthermore, there are numerous issues that arise with the use and functions of

military tribunals, such as the legality of civilians being tried at military tribunals, how a fair and equal trial is guaranteed for all parties.

The issue at hand is worthy of a careful investigation and there has to be taken seriously. Military tribunals are an important part of military justice and the big differences in their function can result in the malfunction of the judicial system. As they most often try military personnel, their proper function is essential to ensure that a fair trial is ensured for them. Furthermore, the complexity in the function of Military Tribunals demands that a common framework for their use is agreed upon and that they act in an institutionalized and fair manner.

This topic also has a connection with the topic of the conference “Pacifism and Injustice”. While it is preferable that countries solve their issues via peaceful manners, such as diplomacy, there are, to this day, instances where military conflicts arise. In this instance, there has to be a fair and objective trial concerning war crimes, as to prevent injustice. Everyone is committed to a fairer world and ensuring that military tribunals function fairly is a step towards that direction.

The ongoing Russo-Ukrainian conflict has brought the question of an international tribunal back to the table. Potential war crimes committed throughout the war has commenced discussions for the creation of a new international military tribunal when fighting has elapsed. This is just an idea, however, and is nowhere near its practical application, as it has barely received some supporters, mainly from NATO. Its creation has been asked by the Ukrainian president himself<sup>1</sup>, and this occurrence highlights the importance of the issue at hand. While the idea of a specialized tribunal focusing on wars of aggression seems promising, and has gained a lot of supporters, it also puts forward the practical issues concerning the creation of specialized tribunals, such as the issue of the obtainment of evidence.

## DEFINITION OF KEY TERMS

### Ad Hoc Tribunals

The temporary creation of a tribunal to carry out a trial for cases arising under international criminal law.

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<sup>1</sup> “We Must Create a Special Tribunal on the Crime of Aggression against Ukraine - Address by President Volodymyr Zelenskyy to the Participants of the Public Debate.” Official Website of the President of Ukraine, 2022, [www.president.gov.ua/en/news/mayemo-stvoriti-specialnij-tribunal-shodo-zlochynu-agresiyi-78285](http://www.president.gov.ua/en/news/mayemo-stvoriti-specialnij-tribunal-shodo-zlochynu-agresiyi-78285). Accessed 29 Dec. 2022.

### Administration of Justice

The administration of justice is the process by which the legal system of a country is carried out. It includes all the systems and institutions in the legal system aiming to provide justice.<sup>2</sup>

### Courts Martial

A military court responsible for trying offenses in violation of army, navy or other armed service rules and regulations, made up of military officers, who act as both finders of fact (in effect, a jury) and as arbiters of the law (judges) applying to the case.<sup>3</sup>

### Criminal Code

A systematic and integrated statement of the rules and principles pertaining to criminal offenses<sup>4</sup>. It is a form of legislation that is set by each nation to set the standards for punishable crimes and their sentences. There are also separate criminal codes for military personnel, which are called Military Criminal Codes.

### Habeas Corpus

Latin for "you shall have the body." In the US system, federal courts can use the writ of habeas corpus to determine if a state's detention of a prisoner is valid. A writ (order) of habeas corpus is used to bring a prisoner or other detainee (e.g., institutionalized mental patient) before the court to determine if the person's imprisonment or detention is lawful.<sup>5</sup> It is, in essence, a written statement directed towards a court of law aiming to examine the lawfulness of the detention of a prisoner in a prison.

### Hearsay

An out-of-court statement offered to prove the truth of whatever it asserts.<sup>6</sup> They are statements that are used in a person's testimony in court, and refer to knowledge that has been acquired by hearing a third person telling it. They are usually inadmissible as evidence in a trial; however, exemptions apply according to the rules of procedure in order at the given legal system and/or court of law.

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<sup>2</sup> Macmillan English Dictionary. "THE ADMINISTRATION of JUSTICE (Noun) Definition and Synonyms | Macmillan Dictionary." Macmillandictionary.com, 2020, [www.macmillandictionary.com/dictionary/british/the-administration-of-justice](http://www.macmillandictionary.com/dictionary/british/the-administration-of-justice).

<sup>3</sup> "Legal Dictionary - Law.com." Law.com Legal Dictionary, [dictionary.law.com/Default.aspx?selected=384](http://dictionary.law.com/Default.aspx?selected=384).

<sup>4</sup> "Definition of Criminal Code | Dictionary.com." Wwww.dictionary.com, [www.dictionary.com/browse/criminal-code](http://www.dictionary.com/browse/criminal-code).

<sup>5</sup> "Habeas Corpus." LII / Legal Information Institute, 11 June 2017, [www.law.cornell.edu/wex/habeas\\_corpus](http://www.law.cornell.edu/wex/habeas_corpus).

<sup>6</sup> "Hearsay." LII / Legal Information Institute, 2019, [www.law.cornell.edu/wex/hearsay](http://www.law.cornell.edu/wex/hearsay).

## Jurisdiction

The power, right, or authority to interpret and apply the law.<sup>7</sup> It essentially means whether a court of law is responsible for or has the authority to try a case.

## Military Tribunals

A military tribunal is a tribunal that is responsible for the trial and punishment of an offence against military law.<sup>8</sup> They are often used to try war crimes in times of conflict, though their authority is not necessarily limited to them.

## War crimes

War crimes are those violations of international humanitarian law (treaty or customary law) that incur individual criminal responsibility under international law. They have to be committed in times of war.<sup>9</sup>

# BACKGROUND INFORMATION

## The Basics of Military Tribunals

### Defining Military Tribunals

Military tribunals are a category of military courts. They are considered part of military justice, as the name implies, and are created to try crimes that are punishable by military criminal codes or other military legislation. This means that criminal codes that are specifically created for military personnel and offences concerning the military are created by the state and are tried in military courts and tribunals. Often, serious humanitarian crimes, are also committed in war times. The variety in judicial systems concerning the military makes it very difficult to set forward a specific outline for all types of military tribunals. This also means that military tribunals can take multiple different forms in each nation, which adds confusion to the already complicated and bureaucratic legal system.

### The function of military tribunals

It is also very important to consider the variety in the systems of military justice and how they affect Military Tribunals. As It will be analyzed further down in the guide, there are some nations that completely lack dedicated military courts and affairs concerning military personnel are directed to civil courts.

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<sup>7</sup> “Definition of JURISDICTION.” Merriam-Webster.com, 2019, [www.merriam-webster.com/dictionary/jurisdiction](http://www.merriam-webster.com/dictionary/jurisdiction).

<sup>8</sup> Collins Dictionary of Law. 2006. W.J. Stewart 25 Nov. 2022 <https://legal-dictionary.thefreedictionary.com/military+tribunal>

<sup>9</sup> United Nations. “United Nations Office on Genocide Prevention and the Responsibility to Protect.” Un.org, 2022, [www.un.org/en/genocideprevention/war-crimes.shtml](http://www.un.org/en/genocideprevention/war-crimes.shtml).

There are also some systems of justice in which there is a heterogeneity in military courts, where there might be separate chambers for military courts or a trial synthesis in which only one part of the court is from the Military. Finally, there are the systems of justice that rely heavily on military courts and tribunals in general, such as Switzerland and the United States.

Moreover, Military Tribunals are in some nations characterized by a special Ad Hoc nature, unique to them, and making their work more targeted. Unlike traditional courts, where they are established as a judicial body and they try the cases upon which they have authority, Military Tribunals are, in this instance, created for the trial of a specific case or a family of cases, as it happened in the international tribunals for Yugoslavia and Rwanda, and once justice has been awarded, they are immediately dissolved.

### The cases of Military Tribunals

Military tribunals cover a wide range of cases. They cover mostly military crimes committed by military personnel, however, at times they have been instances when civilians have been tried by military tribunals, gaining a lot of criticism by NGOs.

Moreover, when looking at international Military Tribunals, their main function is to try war crimes committed by, inter alia, Military and Political leaders of Nations, crimes against humanity and others.

### The types of laws brought up and exercised by Military Tribunals

Military tribunals, as courts of justice usually adhere to set Military Criminal Codes that state what crimes are to be punished and Military Criminal Codes of procedure, in which there are specific articles or sections that define their function.

However, there is also the case in which military tribunals are set ad-hoc. In this instance, rules for the tribunals are set separately. This means that a tribunal is set for a specific case or topic of cases, where there are rules that are set by in order to regulate the work of the tribunal. They are often very similar with already enforced Military Criminal Codes.

### Main Types of military tribunals

#### Court-martial

This is the most common type of military tribunal and is used to try military personnel for a range of offenses, including violations of military law, the Uniform Code of Military Justice (UCMJ), and other regulations. Court-martial proceedings are generally conducted in a manner similar to civilian courts, with a judge, defense counsel, and prosecution.

One of the main issues with court-martial proceedings is the potential for bias or influence by commanding officers, who may have a vested interest in the

outcome of the case. Additionally, there is a concern that military justice may not be subject to the same standards of fairness and impartiality as civilian courts, which can lead to a perception of injustice among military personnel and the broader public.

#### Military commission

Military commissions are established by the executive branch to try individuals for violations of the law of war or other offenses. They are often used to try non-citizens who are suspected of terrorist activity or other crimes against the United States. Military commission proceedings are generally less transparent than court-martial proceedings, and may be subject to less rigorous standards of evidence and due process.

One of the main issues with military commissions is the question of their legality and legitimacy, particularly in cases where they are used to try non-citizens or individuals who are not combatants in a recognized conflict. Additionally, there is a concern that military commissions may be used to circumvent the rights and protections provided by civilian courts, and may be subject to undue influence by the executive branch.

#### Special court-martial

Special court-martial proceedings are used to try less serious offenses, such as minor infractions of military regulations. These proceedings are generally conducted in a more informal manner than general court-martial proceedings and may not involve a military judge.

One of the main issues with special court-martial proceedings is the potential for inconsistency in the application of military justice, particularly in cases where different personnel may be subject to different standards of evidence and due process. Additionally, there is a concern that special court-martial proceedings may be used to avoid more rigorous legal standards, particularly in cases where serious offenses may be charged as minor infractions.

### Problems with military tribunals: The victims' perspective

#### Impunity

The issue of impunity is another significant concern when it comes to the administration of justice by military tribunals. Impunity refers to the lack of accountability for violations of human rights and other abuses of power. Military tribunals may be susceptible to impunity due to the unique nature of military operations and the potential for abuses of power.

One of the primary ways that impunity can occur is through the failure to investigate and prosecute military personnel who are accused of committing crimes. This may be due to a lack of political will to hold military personnel accountable, or due to a lack of resources or expertise in investigating and prosecuting these crimes. As a result, military personnel may feel that they are

above the law and can act with impunity, knowing that they are unlikely to face consequences for their actions.

Additionally, military tribunals may be susceptible to undue influence by military commanders or other high-ranking officials, which can lead to biased or unfair outcomes. This can further contribute to a culture of impunity, as military personnel may feel that they can act with impunity knowing that the military tribunal will not hold them accountable.

To address the issue of impunity, it is essential to ensure that military tribunals are subject to independent oversight and are held to the same standards of accountability as civilian courts. This may involve working with civilian authorities to investigate and prosecute crimes committed by military personnel, or providing training and support to military personnel to ensure that they are aware of their legal obligations and are held accountable for any abuses of power.

#### Lack of experience

Military personnel may not have the necessary legal training and expertise to effectively administer justice in a trial setting. This can lead to errors in the legal process, which can lead to unjust outcomes. To address this issue, it is important to ensure that military personnel who serve on military tribunals receive appropriate legal training and are experienced in the administration of justice. This may involve providing additional legal training to military personnel or hiring civilian lawyers to work alongside military personnel in the tribunal.

#### Lack of jurisdiction

Military tribunals may not have jurisdiction over certain offenses, such as crimes committed by civilians. This can limit the effectiveness of military tribunals in administering justice, as they may not be able to address all types of offenses. To address this issue, it is important to clearly define the jurisdiction of military tribunals and to ensure that they have the necessary authority to address the types of offenses that they are designed to handle. This may involve working with civilian authorities to ensure that there is no overlap in jurisdiction between military and civilian courts.

#### Lack of representation for victims

Military tribunals may not provide adequate representation for victims of crimes. This can limit the ability of victims to seek justice and can lead to a lack of accountability on the part of the military tribunal. To address this issue, it is important to ensure that victims are provided with legal representation and that their rights are protected throughout the legal process. This may involve working with civilian authorities or non-governmental organizations to provide legal representation to victims, or providing training and support to military personnel who work with victims to ensure that they are able to provide



appropriate support and assistance. Additionally, it may be necessary to ensure that victims are provided with appropriate protections to ensure their safety and well-being during the legal process.

### Problems with military tribunals: The defendants' perspective

#### Lack of transparency

Transparency is an important aspect of any legal system, as it allows the public to understand how justice is being administered and to hold those responsible accountable for their actions. However, military tribunals may lack transparency due to the classified nature of military operations and the need to protect sensitive information. This lack of transparency can make it difficult for defendants to mount an effective defense and for the public to understand the legal process. To address this issue, it is important to ensure that military tribunals are as transparent as possible without compromising national security. This can include providing regular updates to the public, providing access to transcripts of hearings, and ensuring that defendants have access to all evidence presented against them.

#### Limited due process rights

Due process is a fundamental aspect of any legal system, as it ensures that defendants are treated fairly and that their rights are protected throughout the legal process. However, military tribunals may provide limited due process rights, such as the right to an attorney or the right to a speedy trial. This can lead to unjust outcomes and a lack of accountability on the part of the military tribunal. To address this issue, it is important to ensure that defendants in military tribunals are afforded the same due process rights as those in civilian courts.

#### Potential for political influence

Military tribunals may be subject to political influence, particularly in cases that are seen as politically sensitive or that involve national security issues. This can lead to outcomes that are less fair and just, as political considerations may be prioritized over legal considerations. To address this issue, it is important to ensure that military tribunals are insulated from political influence and that decisions are based solely on legal considerations.

#### Evidence obtained for torture

The use of evidence obtained through torture is prohibited under international law, as it is considered a violation of the right to a fair trial. However, military tribunals may be more likely to use such evidence due to the nature of military operations and the need to obtain intelligence quickly. This can lead to unjust outcomes and can undermine the legitimacy of the legal process. To address this issue, it is important to ensure that evidence obtained through torture is not used in military tribunals and that defendants are afforded the right to challenge the admissibility of evidence presented against them.

### Lack of judicial independence

Judicial independence is a fundamental aspect of any legal system, as it ensures that judges are able to make decisions based solely on legal considerations and are not subject to external pressures. However, military tribunals may lack judicial independence due to the fact that military personnel may be subject to military discipline or may have a vested interest in the outcome of the trial. To address this issue, it is important to ensure that military tribunals are staffed with judges who are independent and impartial, and who are not subject to external pressures.

### Potential for unequal treatment

Military tribunals may be more likely to treat defendants differently based on their rank or status within the military hierarchy. This can lead to outcomes that are less fair and just, as defendants who are higher up in the chain of command may be treated more leniently than those who are lower down. To address this issue, it is important to ensure that all defendants in military tribunals are treated equally and that decisions are based solely on legal considerations, rather than on factors such as rank or status.

### Lack of transparency in plea bargaining

Plea bargaining is a common practice in criminal trials, but it can be problematic in military tribunals due to the lack of transparency in the process. Defendants may be pressured to accept a plea deal without fully understanding the consequences of their decision, which can lead to unjust outcomes. To address this issue, it is important to ensure that plea bargaining is conducted in an open and transparent manner, with full disclosure of the consequences of accepting a plea deal. This may involve providing defendants with legal representation during the plea-bargaining process, or requiring that any plea agreement be reviewed and approved by an independent judge or other legal authority.

### Lack of appellate review

Military tribunals may not have the same level of appellate review as civilian courts, which can limit the ability of defendants to appeal their convictions. This can lead to unjust outcomes and a lack of accountability on the part of the military tribunal. To address this issue, it is important to ensure that defendants have access to a fair and impartial appellate process that can effectively review the decisions of the military tribunal. This may involve providing for an independent review of military tribunal decisions by a civilian court or other independent body.

## General problems with the function of military tribunals

### The ad hoc tribunals

Ad hoc tribunals are temporary courts that are established to prosecute serious crimes such as genocide, war crimes, and crimes against humanity. They are set up specifically to deal with the aftermath of a particular conflict or situation and are often used to address situations where the national judicial system is unable or unwilling to prosecute these crimes.

While ad hoc tribunals have been successful in bringing some perpetrators of serious crimes to justice, there are also significant issues associated with their use. One of the main concerns is the question of legitimacy, as ad hoc tribunals are often seen as being established by external actors with no real connection to the situation on the ground. This can lead to perceptions that they are illegitimate or biased and can undermine their ability to effectively deliver justice.

Another issue with ad hoc tribunals is the question of their sustainability. As temporary institutions, they may lack the necessary infrastructure, resources, and capacity to effectively investigate and prosecute complex cases. This can lead to inefficiencies, delays, and a lack of accountability, which can undermine their ability to effectively deliver justice.

Additionally, ad hoc tribunals may face challenges when it comes to enforcing their judgments. As temporary institutions, they may lack the necessary authority or resources to enforce their decisions, particularly in cases where those convicted are high-ranking officials or individuals who are located outside of the tribunal's jurisdiction. This can lead to a lack of accountability and a perception that justice has not been fully served.

To address these issues, it is important to ensure that ad hoc tribunals are established in a way that is perceived as legitimate and impartial, and that they have the necessary infrastructure and resources to effectively investigate and prosecute cases. It is also important to ensure that they work closely with national judicial systems and other international bodies to ensure that their decisions are respected and enforced. By doing so, it is possible to create a more effective and sustainable system of international justice that can hold perpetrators of serious crimes accountable and ensure that justice is served.

### Variety of the types of Military Tribunals

One of the main issues with having different types of military tribunals is that it can lead to a lack of consistency in the application of military justice. Different types of tribunals may have different standards of evidence, due process, and judicial procedures, which can lead to confusion and inconsistency in the handling of cases. This lack of consistency can erode public trust in the military justice system and may also lead to disparities in the treatment of military personnel.

**Lack of transparency:** Different types of military tribunals may also have different levels of transparency and openness. For example, military commissions may be subject to less public scrutiny than court-martial proceedings, which can create concerns about the legitimacy of the process. This lack of transparency can also make it more difficult for outside actors, such as human rights organizations, to monitor the proceedings and ensure that justice is being served.

**Lack of accountability:** Having different types of military tribunals can also make it more difficult to hold military personnel accountable for their actions. For example, if a case is tried in a special court-martial rather than a general court-martial, the penalties may be less severe, which can reduce the deterrent effect of the justice system. Additionally, if different types of tribunals are used to try similar offenses, it can make it more difficult to ensure that the penalties are consistent and appropriate.

**Perception of unfairness:** The use of different types of military tribunals can create a perception of unfairness, particularly among military personnel who may feel that they are being subjected to different standards of justice depending on the type of tribunal. This perception of unfairness can erode morale and trust in the military justice system, which can have negative impacts on the effectiveness of the military as a whole.

### Time Delays-Bureaucracy

Bureaucracy can be an issue with military tribunals, and can lead to delayed justice, lack of efficiency, inflexibility, lack of transparency, and complexity. The complex bureaucratic processes that govern the military justice system can often create inefficiencies that delay the processing of cases, which can have serious consequences for defendants, victims, and witnesses. Furthermore, the inflexibility of bureaucratic systems can make it difficult to adapt to new challenges, and can lead to a lack of transparency, as well as a complex and difficult-to-navigate justice system. This can create a lack of trust in the system, making it difficult to improve its effectiveness.

To address these issues, it is important to simplify and streamline the military justice system where possible, while maintaining appropriate standards of due process and fairness. This may involve reducing bureaucracy by simplifying rules and procedures, providing adequate training and resources to those who work within the system, and increasing transparency and accountability to improve public trust. By simplifying the processes involved in military tribunals, it is possible to reduce delays, increase efficiency, and create a more effective and trustworthy military justice system that serves the interests of all stakeholders. By doing so, it is possible to ensure that the military justice system provides justice in a timely, efficient, and transparent manner.

### Unclarity in Legislation

Unclarity in legislation can create numerous issues in the administration of military tribunals. Military laws are often complex and subject to interpretation, which can result in inconsistencies in their application. This can lead to different outcomes for similar cases and can make it difficult for defendants and their lawyers to understand their rights and obligations under the law. It can also create confusion, frustration, and errors that can impact the fairness and effectiveness of the military justice system. Additionally, unclarity in the law can result in unintended consequences that can be unfair or unjust to the parties involved.

To mitigate these issues, it is essential to ensure that the laws governing military tribunals are clear, unambiguous, and regularly reviewed. This includes providing adequate training and resources to those who work within the military justice system and increasing transparency and accountability to improve public trust. By clarifying the laws that govern military tribunals, it is possible to create a more effective and trustworthy military justice system that serves the interests of all stakeholders. Military tribunals should ensure that laws are enforced fairly and consistently, and that they remain up-to-date with changing legal norms and societal expectations. By doing so, the military justice system can earn the respect and trust of its stakeholders, and effectively fulfill its role of administering justice in a fair and impartial manner.

### The trial of civilians

The trial of civilians by military tribunals can also raise significant legal and ethical issues. One of the primary concerns with the trial of civilians in military tribunals is that it may violate their constitutional rights, particularly their right to a fair trial. This is because military tribunals may not provide the same level of due process protections as civilian courts. For example, defendants may not have the same rights to an impartial jury, access to evidence, or the ability to appeal a decision.

Another issue with the trial of civilians by military tribunals is that it may be perceived as an erosion of the civilian justice system. Civilian courts are designed to handle criminal cases involving civilians, while military tribunals are designed to handle cases involving members of the military. The use of military tribunals to try civilians may be seen as a sign that the civilian justice system is failing, and that the military is taking over its role.

To address these issues, some legal scholars have argued that the trial of civilians in military tribunals should be strictly limited, and that civilian courts should be the primary venue for trying civilians accused of crimes. This would ensure that defendants receive the full protections of the civilian justice system, while also preserving the integrity of the military justice system. Additionally, the use of military tribunals to try civilians should be subject to close scrutiny by the courts and the public, to ensure that their constitutional rights are protected and that the justice system operates fairly and impartially.

## The effects of limited administration of justice by military tribunals

### Military discipline and culture

When military personnel commit crimes, it is not just a legal issue, but it can also have a negative impact on the discipline and culture of the military. If individuals are able to get away with committing crimes without facing consequences, it can erode the sense of responsibility and accountability that is essential to military discipline. This can lead to a culture where individuals feel that they can ignore rules and regulations, which can have a negative impact on the overall effectiveness of the military.

### Negative impact on the victim

In cases of sexual assault and harassment, a lack of accountability within the military justice system can have a particularly negative impact on the victim. If they feel that they are not being heard or that justice is not being served, it can lead to feelings of disillusionment and betrayal. This can have long-term psychological impacts on the victim, and can also deter others from coming forward with their own experiences of sexual assault or harassment.

### Undermining public trust

A lack of accountability within the military justice system can also lead to a lack of public trust in the military. If the public believes that the military is not effectively investigating and prosecuting crimes committed by its members, it can erode the confidence they have in the institution. This can have a negative impact on the willingness of the public to support the military and can also undermine the legitimacy of military actions.

### Undermining international law and Human Rights

In cases where military personnel are accused of committing war crimes or other serious violations of international law, a lack of accountability within the military justice system can have a negative impact on the reputation of the country and its commitment to human rights. If military tribunals are not seen as impartial and effective, it can lead to international condemnation and damage the standing of the country in the international community.

### Undermining military morale and cohesion

If military personnel feel that the justice system is not working effectively, it can also lead to a negative impact on morale and cohesion within the military. This can lead to a sense of frustration and disillusionment, and can also erode trust and cooperation within the military unit. This can have a negative impact on the effectiveness of military operations, and can also impact the safety and well-being of military personnel.

### Lack of accountability and responsibility

Finally, a lack of accountability within the military justice system can lead to a loss of accountability and responsibility at all levels of the military hierarchy. If military leaders feel that they are not being held accountable for the actions of their subordinates, it can lead to a sense of complacency and a lack of willingness to take responsibility for the actions of the military as a whole. This can make it more difficult to address issues of misconduct and can also make it more difficult to implement changes to the military justice system.

To address these effects, it may be necessary to implement reforms to the military justice system that go beyond simply providing more resources and training. These could include changes to the structure of the military justice system, such as providing for greater civilian oversight, or changes to the legal framework that governs the military justice system. It may also be necessary to address broader cultural and systemic issues within the military, such as addressing issues of sexism and racism that may contribute to a lack of accountability within the military justice system.

### The right to a fair trial

The right to a fair trial is an essential human right, enshrined in international law. However, the use of military tribunals to try ordinary citizens has been a subject of controversy, as it is often considered a violation of the right to a fair trial. Article 14 of the International Convention on Civil and Political Rights guarantees the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law. While some debate has arisen over the competence of military tribunals to try civilians, it is now widely accepted that military tribunals should only have the jurisdiction to try military personnel.

Moreover, the public nature of hearings in military tribunals has also raised concerns, as all nations are obliged under international law to ensure that all hearings of courts and tribunals are made publicly. However, classified documents or information is often brought up in military tribunals, which could lead to the government being unable to keep the courtroom open. To ensure a fully impartial tribunal, any discrimination that may take place within military tribunals must be eliminated. People who are of different races, genders, ethnicities, religions, and backgrounds are more likely to receive unjust and prejudicial treatment. This issue must be addressed to ensure that military tribunals are an indispensable part of a nation's military justice system.

The public nature of military tribunals is crucial to prevent corruption and ensure transparency in the judicial system. However, the counterargument has been raised that since private military affairs are discussed in the trial, it should not be made public. It is necessary to strike a balance between these two opposing viewpoints to ensure that justice is served and the public's right to transparency is upheld. Ultimately, the administration of justice by military tribunals must be fair and impartial, and all individuals, regardless of their background, must be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.

## Case studies

### [The Guantanamo Military Commissions](#)

After the terrorist attacks that took place in the United States on September 11<sup>th</sup>, 2001, former U.S president George W. Bush made an order together with the U.S Congress ordering the creation of Military Tribunals for the trial of these suspected terrorists.

After their creation, serious concerns were raised about the legality of these tribunals. However, it was finally viewed by scholars that the \ trial of potential terrorists by military tribunals were not unconstitutional. On the other hand, there were significant unclarities on the fact that hearsay evidence was permitted, how the trials under the tribunals would be open to the public and the issue of the prohibition of the use of a habeas corpus writ, which is a document arguing for the unlawful detention of an individual. Some of these issues were improved with another supplementary order in 2002, the Military Commissions Act on 2006 and other improvements made by then US president Barak Obama in 2009. These reforms brought the tribunal closer to the function of a court martial, implementing most of their rules of procedure. They also took major steps in the protection of the detainees' human rights, though there is still no help.



Nevertheless, judgement has been made concerning the delays of the trial, as the trial of five suspected terrorists has yet to reach a verdict, with proceedings going on since 2013, with the five suspected terrorists being held on the Guantanamo Bay Military Camp. The commissions, while generally found to be aligned with the Decaux Principles, have still some factors that need improvement, for instance on the issue of military secrecy. Some have been even more judgmental and state that, because of the very close relation of the commissions with the US Congress, they cannot be considered as independent military tribunals, however, their function is in order with the key factors of military tribunals. Because of the US congress being tightly linked to the military commissions, there is the danger that they could be accused of altering the result in order to satisfy the political campaign of the party.

#### The case of Ratko Mladic

In 1993, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in order to try the alleged war crimes that were committed in the period of the Yugoslav war in the final decade of the 20<sup>th</sup> century.

The most notable military case was the one of Ratko Mladic. Mladic was the Colonel general of the Bosnian army. He was indicted initially in July 1995; however, he was only transferred to the ICTY on May 2011; his trial lasted from May 2012 until November 2017. Mladic was charged with five counts of crimes against humanity, namely persecutions, extermination, murder, deportation, and inhumane acts against the enemy. Moreover, he was charged with multiple murders, acts of terror, attacks on civilians and the taking on hostages.

The tribunal consisted of three judges and two counsels for the prosecution and the defense respectively. The prosecution managed to prove through the concept of Joint Criminal Enterprise (a system through which proof of a common purpose is enough to judge the persons responsibility) that Mladic was guilty of the crimes mentioned above. This innovative system played a major part in the success of the tribunal, as it managed to prove his guilt despite the time gap between his actions and the trial.

Mladic was found guilty of the above, as well as the crime of genocide. He was convicted to a lifetime imprisonment sentence. Generally, the ICTY has been reviewed by the international and legal community as an organ that stood as the example for future similar circumstances, and it was the basis upon the International Criminal Court which was established a few years later.

## MAJOR COUNTRIES AND ORGANISATIONS INVOLVED

### United States of America (USA)

The United States of America are perhaps the most noteworthy nation concerning the issue of military tribunals. They were one of the very first nations to use military tribunals back in the American Revolutionary War<sup>10</sup> and created the International Military Tribunal together with the UK and the USSR.

In the US system of military justice, military tribunals, also known as Military Commissions, are established ad hoc, and were established with the Military Commissions Act in 2006, and with the Military Commissions Act of 2009. They usually try war crimes, whilst they are not limited to military personnel, but also to any US citizen and citizen of another country. Moreover, many were concerned over the military order of President George W. Bush ordering the trial of potential terrorists that participated in the September 11 attacks in 2001, with questions arising for the improvements that could be made concerning the procedures of evidence and trial. It has raised serious causes of concern, however, some of the accused terrorists have still not been tried, over 20 years after the September 11 attacks, and are still held in Guantanamo Bay.

In this instance, there have been plenty of mistakes made by the United States and illustrate some key problems of the administration of justice through military tribunals. The issue of the uncertainty concerning procedural manners, even after the 2009 MCA, certainly has been decisive in the delay of trials, depicting the bureaucratic goliath created in the process. Moreover, the fact that from the eight convictions produced by the commissions by 2019, only one “survived” a post-conviction appeal to the Court of Appeals for the D.C circuit<sup>11</sup>, speaks volumes about the quality of the delivery of justice by the Military Commissions.

### Germany

Germany is also a very interesting case concerning the use of Military Tribunals, as their approach on the domestic level, as well as the historical background and, of course, the Nuremberg Tribunals, make for a very important case study on Military Justice. The example of a country whose leaders started one of the most brutal military conflicts in human history and was split into two countries for over forty years, managed to create healthy and functioning institutions is impressive. They were established with the Charter of the International Military Tribunal in 1945, set for the

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<sup>10</sup> “History.” [www.mc.mil](http://www.mc.mil), [www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx](http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx).

<sup>11</sup> Feldman, Noah. “Justice Comes so Slowly to Guantanamo, It May Never Arrive.” [Bloomberg.com](http://Bloomberg.com), Bloomberg, 17 Apr. 2019, [www.bloomberg.com/opinion/articles/2019-04-17/terrorism-trials-at-guantanamo-are-challenged-by-extreme-delays](http://www.bloomberg.com/opinion/articles/2019-04-17/terrorism-trials-at-guantanamo-are-challenged-by-extreme-delays)

trial of the Third Reich's<sup>12</sup> political and military leaders throughout the second world war. About twenty-four individuals were sentenced to death and hundred others to prison time.

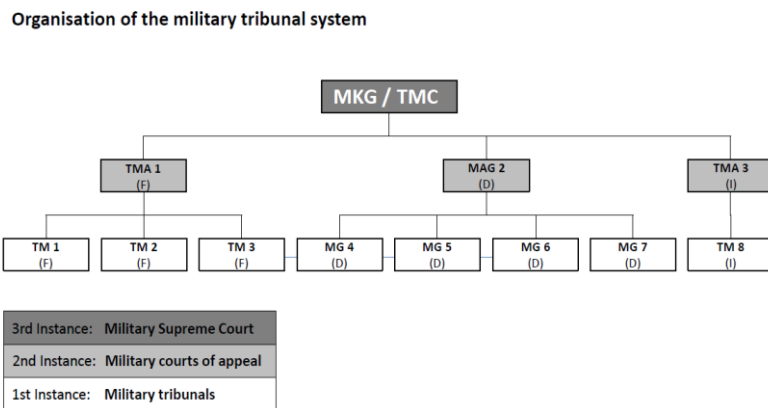
Nowadays, the Military Justice system is quite unique, as it follows a pattern seen throughout the world, and especially countries of the European Union. There is not a specialized judicial system dedicated to the German military and its branches. Instead, members of the German army are tried upon two Federal Administrative Court divisions dedicated to military affairs, and three military disciplinary courts (that fall under the category of civil courts) and are subject to the civil criminal code. With this practice there is not any military criminal codes in order, which equals to the treatment of soldiers as civilians, without any special treatment by justice. There are twenty-nine chambers in total in the disciplinary courts, each one of them being presided by a civil judge and assisted by honorary military judges.<sup>13</sup> There were some minor reforms concerning the disciplinary proceedings of soldiers in 2008, however, they did not add any significant difference in the topic, as they did not have an impact on the criminal prosecution of soldiers.

This system, apart from being common in Europe, has been relatively successful for Germany. There have been opinions stated that because of the intensification of a human-rights oriented approach justice has had since the end of the second world war, there is overlapping jurisdiction between military courts and civil courts, and thus, the former should be abolished. On the other hand, there are still plenty of arguments in favour of a separated military justice system. Its supporters' main argument concerns the close relationship of a well-disciplined and functioning military system with a separated justice system.

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<sup>12</sup> Third Reich: official Nazi designation for the regime in Germany from January 1933 to May 1945 ("Third Reich | Facts & History | Britannica." Encyclopædia Britannica, 2023, [www.britannica.com/place/Third-Reich](http://www.britannica.com/place/Third-Reich).)

<sup>13</sup>



**Figure 2:** Organizational Chart of the Military Tribunal system in Switzerland<sup>14</sup>

### Switzerland

Switzerland, formally known as the Swiss Confederation, has a very unique system of organization for military tribunals. Specifically, their entire military justice system is based upon military tribunals.

As it is evident from the Organizational Chart of the Military Tribunal system (Figure 2), act as courts of first instance, as there are eight overall in Switzerland, trying military personnel for crimes according to the Military Criminal Code (MStG) and the Federal Military Criminal Procedure Code. They are cantonal (regional) courts, meaning that they have jurisdiction over the matters taking place in that specific canton. While this means that there is decentralization of the military legal system, which ensures equal access to military justice for all regions, some tribunals might have more cases to try than it can handle, while others might have none. Cases tried can be sent for appeal in one of the three standing Military Courts of procedure, and finally, as a court of last resort, to the Military Supreme Court. Via this system, the military has a completely separated system of justice from the civil world, which ensures that military personnel has the best treatment possible.

The case of Switzerland is often brought up as an example of how independent and fair military tribunals can exist in the judicial system of a country and against the “fighters” of the inexistence of a military justice system and just the reference to a civil court.

### Former Yugoslav States

The Former Socialist Federal Republic of Yugoslavia (also known as Yugoslavia for simplicity) is a historical nation that existed in the region of the Balkan Peninsula. It existed from 1923 until 2003, when its remaining parts became a state known as Serbia and Montenegro, which also dissolved in 2006. Its dissolution began in 1991,

<sup>14</sup> Military Tribunal System.” *Office of the Armed Forces Attorney General / Military Justice*, [www.oa.admin.ch/en/organisation/die-organisation-der-militaerjustiz.html#ui-collapse-406](http://www.oa.admin.ch/en/organisation/die-organisation-der-militaerjustiz.html#ui-collapse-406).

and quickly turned into a violent conflict between Yugoslavian forces and Pro-Serbian fighters. This caused the reaction of the United Nations, ordering UN Peacekeeping forces to be entered into the region. The fighting pursued until 1999, when a peace settlement was agreed upon between NATO and the Serbian forces. Yugoslavia was finally dissolved into Croatia, Kosovo<sup>15</sup>, Serbia and Montenegro, North Macedonia, and Slovenia.

The conflict caused a serious humanitarian crisis and raised concern for the human rights violations in the area. Over 140.000 individuals died in the 8-year-long conflict and about four million people had to be displaced<sup>16</sup>. As a result, the United Nations Security Council, with its resolution 827 established the International Criminal Tribunal for Yugoslavia (ICTY) in 1994, whose aim was to try the alleged war crimes that took place in that conflict. Amongst some of the 161 individuals that were tried in ICTY Was the former President of Yugoslavia, Slobodan Milosevic for a large catalogue of war crimes allegations, and the Commander for the Bosnian-Serbian army Ratko Mladic was found guilty of genocide, five counts of crimes against humanity, and four counts of violating the laws or customs of war. He was sentenced to life imprisonment (case study).

The ICTY has three main branches, the three-trial chambers, which conduct the trial proceedings of a case indicted by the prosecution, the Office of the Prosecutor which undertakes the research and preparation concerning the cases and the Registry, which mostly has an administrative role. After the investigation of a potential case, the prosecutor sends an indictment to a judge for approval. If it's approved, the arrests are made and trial commences. The defendant can enter either a plea of guilty or non-guilty, where in the former the trial continues with the trial to prove guilt, while in the latter it continues with the sentencing of the person. In both cases, the defense has the right to an appeal.

The organ of the ICTY responsible for the research and the creation of evidence is the Office of the Prosecution. They obtain evidence through oral questioning of potential suspects which must be recorded by the prosecutor and ensure that there is a translator on site ensuring that the questioning is made in a language they understand, should it be necessary. They also obtain evidence through on-site investigations and the collection of documents, or with the collaboration of a state or the International Criminal Police Organization (INTERPOL). Before their admission into evidence the responsibility of the investigation's safety lies with the prosecution. The admission of

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<sup>15</sup> Kosovo remains an observer state to the United Nations and there is still controversy concerning the topic.

<sup>16</sup> International Center for Transitional Justice. "Transitional Justice in the Former Yugoslavia." *International Center for Transitional Justice*, 25 Apr. 2011, [www.ictj.org/publication/transitional-justice-former-yugoslavia](http://www.ictj.org/publication/transitional-justice-former-yugoslavia).

findings into evidence is done by the chamber, which withstands the right to deny to include a finding drawn from a potentially uncredible source or is of doubted credibility.

There have been many views expressed about the ICTY. While it has been praised for being the first international ad-hoc tribunal after the Nuremburg Trials, it has also been generally recognized for achieving the delivery of justice for the Yugoslav Wars. On the other hand, its critics note its slow procedures and especially the apprehension (arrest) of suspects. Nevertheless, the ICTY achieved its purpose in delivering justice, though after multiple years of action and created a new wave of change in the delivery of international justice. Over 160 individuals were charged by the ICTY, including heads of state, prime-ranked military individuals and other high-ranked officials.

### Rwanda

In 1994 the international community drew their eyes to Rwanda, as the genocide that came in the aftermath of the assassination of the President of Rwanda Juvenal Habyarimana on April 6, 1994. In just one hundred days, approximately 800.000 to one million people were murdered in this genocide. This once again caused the reaction of the United Nations. Thus, with the resolution 955, the Security Council established the International Criminal Tribunal for Rwanda (ICTR). This, together with ICTY, was the first international tribunal with the jurisdiction to try alleged war crimes after the Nuremburg tribunals.

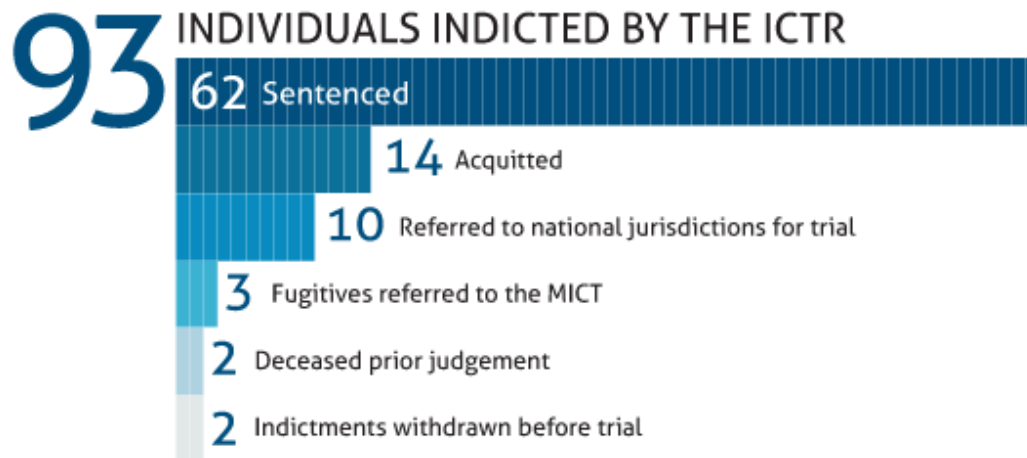
The formation of the ICTR was very similar to the ICTY, consisting of three chambers and 25 judges total, including another chamber for appeals, the office of the prosecution and the registry. The rules concerning the rules and procedures as well as the handling of evidence are almost identical to the ICTY, while their main difference is that the ICTR mainly focuses on the domestic conflict with Rwanda and only has jurisdiction over crimes committed throughout 1994.

Quite like the ICTY, there is a multitude of opinions on ICTR. While the tribunal was a milestone in international criminal justice, especially concerning the crime of genocide, it was also the first criminal court to hold media broadcasters accountable for the promotion of the act of genocide. On the contrary, it has also been criticized for undergoing procedures very slowly, only trying fewer than 70 people in 20 years(!), and costing overall about 2 billion USD<sup>17</sup>. All in all, it has also generally managed to deliver justice concerning the crimes committed in Rwanda, though the problem of slow procedures must be tackled in future similar tribunals for their better function.

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<sup>17</sup> Cascais, Antonio. "ICTR: A Failed Tribunal for Genocide Victims and Survivors." Dw.com, Deutsche Welle, 8 Nov. 2019, [www.dw.com/en/ictr-a-tribunal-that-failed-rwandan-genocide-victims-and-survivors/a-51156220](http://www.dw.com/en/ictr-a-tribunal-that-failed-rwandan-genocide-victims-and-survivors/a-51156220).

The ICTR was officially closed in 2015, and was the first international tribunal in history to have the crime of genocide in its jurisdiction, although it would be later included in the jurisdiction of the International Criminal Court.



[Figure 4:](#) Statistics concerning the ICTR<sup>18</sup>

#### United Nations Human Rights Council (HRC)

Ever since the 1990s, the UNHRC has issued many reports over the administration of justice, issuing guidelines for policy makers.

Those reports were vital for the progress in the research and legal framework concerning military tribunals. They ordered the then United Nations Special Rapporteur on the question of administration of justice by the military tribunals, Professor Emmanuel Decaux, to issue reports on the topic, concerning the vital points concerning the topic, which later led to the creation of the draft principles governing the administration of justice by military tribunals.

Furthermore, they ordered the United Nations High Commissioner for Human Rights (OHCHR) to organize an expert consultation on the topic, in order for an exchange of opinions on the topic to be made. They, then, issued a report summarizing what was discussed during the consultation (A/HRC/28/32). The report summaries of all speakers, who, *inter alia*, mentioned the importance of the independence, impartiality and competence of the military tribunals, the right to trial before a fair and impartial tribunal and the personal and subject matter jurisdiction of military tribunals<sup>19</sup>.

#### International Criminal Court (ICC)

The International Criminal Court is the first, and only one to this day, permanent international court concerning criminal affairs. It was established in 1998, in a diplomatic conference in Rome. Its jurisdiction has not been recognized by many nations, including the United States of America. The recognition of its jurisdiction

<sup>18</sup> UNICTR. "The ICTR in Brief | United Nations International Criminal Tribunal for Rwanda." Irmct.org, 2013, unictr.irmct.org/en/tribunal.

<sup>19</sup> A/HRC/28/32

comes from the ratification and the participation in of Rome Statute which established the ICC, which 123 countries have done so to this day.<sup>20</sup>

The two UN created criminal tribunals for Yugoslavia and Rwanda respectively laid the foundation for the creation of the ICC, a court that has the jurisdiction to try war crimes, the crime of genocide, crimes against humanity, and crimes of aggression, which all constitute allegations tried in the IMT and both ICTY and ICTR. Although the ICC is not limited solely to military defendants, there have been instances in which military leaders or personnel have been brought before it. Some note-worthy cases that the ICC has handled over the years has been the case of the Congolese war crimes suspect Thomas Lubanga, that of the former leader of Ivory Coast Laurent Gbadgo and the former finance minister of Kenya Uhuru Kenyatta former minister William Ruto, Kenyan radio presenter Joshua arap Sang and the head of Kenya's civil service, Francis Muthaura for post-election violence<sup>21</sup>.

The ICC is one of the most important international institutions on this topic. It is currently standing as the only general international criminal tribunal with set jurisdiction and rules of procedure. It has managed to intervene on civil wars and conflicts that have happened in the nations that fall into its jurisdiction, such as the one in Kenya. However, it has only managed to complete one trial (!) without sentencing, and there are setbacks from the lack of support of the Security Council due to the Veto right of the USA, the poor funding and the unwillingness of the nations to cooperate with it. All in all, though a necessary organ, the ICC has not reached its full potential, thus further improvements have to be made.

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<sup>20</sup> "The States Parties to the Rome Statute | International Criminal Court." Icc-Cpi.int, 2022, [asp.icc-cpi.int/states-parties#:~:text=123%20countries%20are%20States%20Parties,Western%20European%20and%20other%20State](http://asp.icc-cpi.int/states-parties#:~:text=123%20countries%20are%20States%20Parties,Western%20European%20and%20other%20State)

<sup>21</sup> "High-Profile ICC Cases - ABC News." ABC News, 14 Mar. 2012, [www.abc.net.au/news/2012-03-14/cases-before-the-icc/3888680](http://www.abc.net.au/news/2012-03-14/cases-before-the-icc/3888680)



## TIMELINE OF EVENTS

DATE	DESCRIPTION OF EVENT
8 August, 1945	The London Charter of the International Military Tribunal is established.
25 June, 1991	Slovenia becomes the first nation to officially leave former Yugoslavia, igniting the Yugoslav wars.
16 December, 1966	The International Convention on Civil and Political Rights is adopted by the General Assembly referring to the right of all individuals to an equal trial upon a court or tribunal (Part II, Article 14).
25 May, 1993	The United Nations Security Council establishes the International Criminal Tribunal for Yugoslavia with Resolution 827.
8 November, 1994	The UNSC establishes the International Criminal Tribunal for Rwanda with Resolution 955.
17 July, 1998	The Rome Statute is implemented, which resulting in the creation of the International Criminal Court.
11 September, 2001	The terrorist attacks on United States of America by the terrorist organization Al Qaeda occur.
26-28 January, 2004	A conference by the International Commission of Jurists on “Human Rights and the Administration of Justice Through Military Tribunals” takes place.
27 June, 2003	The first issue of the Decaux Principles is released.
28 September, 2006	The United States Congress passes the Military Commissions Act 2006, which legislates a new system of military commissions giving the government authorization to try non-citizens before military tribunals <sup>22</sup> .
28 October, 2009	The US Congress passes the Military Commissions Act 2009, which provided amendments that brought Military Commissions closer to the function of Courts-Martial.
December 2010	The UNSC establishes through its resolution 1966 the International Residual Mechanism for Criminal Tribunals.
10 April, 2014	The Human Rights Council ordered the OHCHR to organize an expert consultation on the issue of the Administration of Justice by Military Tribunals through Resolution 25/4 <sup>23</sup> .

<sup>22</sup> “Q and A: Military Commissions Act of 2006.” *Www.hrw.org*, [www.hrw.org/legacy/backgrounders/usa/qna1006/usqna1006.htm#\\_Toc148852442](http://www.hrw.org/legacy/backgrounders/usa/qna1006/usqna1006.htm#_Toc148852442).

<sup>23</sup> OHCHR: Office of the United Nations High Commissioner for Human Rights

24 November, 2014	The OHCHR organizes an expert consultation on the issue of the Administration of Justice by Military Tribunals.
29 January, 2015	The United Nations Human Rights Council issues Document A/HRC/28/32, titled “Summary of the discussions held during the expert consultation on the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations”.

## PREVIOUS ATTEMPTS TO SOLVE THE ISSUE

### The Decaux principles

Perhaps the most notable piece of work concerning Military Tribunals are the Decaux principles. They were first created by the Special Rapporteur of the Sub-Commission on the Promotion and protection of Human Rights, Professor Emmanuel Decaux.

Those were issued as reports after the order of the Sub-Commission on Human Rights in 2003 (E/CN.4/Sub.2/2003/4), with Mr. Decaux revising the principles in 2004 and 2005. The final version of these principles was issued in 2006 (E.CN.4/2006/58), with the Title of “Draft Principles Governing the Administration of Justice through Military Tribunals”. To this day, this is the report of reference when discussing the issue, as they were conducted after in-depth research on the topic, after gaining helpful insight from the previous versions of the report and the issue as well as the consideration of the use of military tribunals by nations around the world. It is also important to note that they are generally accepted by the legal community of scholars.

There are twenty of these principles in total, which state that military tribunals must be set under the nation’s constitution or law, respect international humanitarian law and provide for the guarantee of an impartial, public, and independent tribunal. They must also have the function of habeas corpus, as to manage that no individual is to be kept unlawfully in prison. It also covers other issues concerning military courts, such as the right of a person who has a conscientious objection to military justice **not** to be tried upon a military court, that a military tribunal shall only have the jurisdiction to try military personnel and not civilians and adults, not minors. A common practice done by military tribunals is the trial of minors and/or child soldiers that fight beyond their will, though it is not permitted by human rights law.<sup>24</sup> An example of that is the case of Israeli forces arresting and trying Palestinian minors, while applying violence

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<sup>24</sup> “Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.” *OHCHR*, 2023, [www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-involvement-children](http://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-involvement-children)

to them upon arrest. While Israel introduced a military juvenile court in 2009<sup>25</sup>, there are still concerns, such as the fact that parents are not allowed to be present in the proceedings.

In short, the Decaux Principles cover issues of the application of international and humanitarian law by the military tribunals, as well as issues concerning their jurisdiction and function. These are all mentioned throughout the course of the twenty principles, which are analyzed by Mr. Decaux.

Although these principles are of the utmost importance, it is important to note that they have not yet been enforced in all judicial systems where military tribunals are present, though there has not been any formal rejection of them. Moreover, there is still plenty of development to come for the topic, as there is not a definite consensus on topics such as the jurisdiction of military tribunals.

### [Conference on Human Rights and the Administration of Justice by Military Tribunals](#)

In the period between January 26<sup>th</sup> and January 28<sup>th</sup> 2004, the International Commission of Jurists held a conference in Geneva concerning the issues of Human Rights and the Administration of Justice through Military Tribunals. Topic experts from around the world, including Professor Emmanuel Decaux rejoined in Geneva in order to discuss and exchange points of view concerning the topic.

The conference was considered very productive, as it achieved its initial purpose in commencing a conversation on the topic and demonstrating the vast differences between various military justice systems. However, it also illustrated that more discussion need to be done for a consensus to be reached concerning issues such as the jurisdiction of military tribunals and the establishment of a legal framework concerning their function.

The discussion that took place in the conference brought to light some of the topics that needed further exploration, such as the clarifications in standards concerning the jurisdiction of military tribunals, its role within the state's organization etc. There were not any formal guidelines released but reports were uploaded with the transcripts of their use and a summary report by the ICJ.

### [A/HRC/28/32](#)

In April 2014, the United Nations Human Rights Council called upon the United Nations High Commissioner for Human Rights to hold an expert consultation on the topic of the administration of justice by military tribunals, via its resolution 25/4. Indeed, this

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<sup>25</sup>“Military Court Watch.” Militarycourtwatch.org, 2023, [www.militarycourtwatch.org/page.php?id=6a06ck7Rnqa26628AAapuBpjuFE](http://www.militarycourtwatch.org/page.php?id=6a06ck7Rnqa26628AAapuBpjuFE). Accessed 13 Feb. 2023.

conference was organized in Geneva in November of the same year. Apart from the High Commissioner who opened the discussion, there were a multitude of speakers, including the Special Rapporteur on the independence of judges and lawyers, law professors, military analysts, former members of national governments, members of the Human Rights Committee and other qualified specialists with adequate knowledge on military justice.

The topics that were discussed were the independence, impartiality and competence of the tribunals, the right to a fair trial under courts (including military courts) and the jurisdiction of the tribunals. The discussion did not produce any important guidelines or create a breakthrough in the topic, the conclusions drawn by the discussion highlight some key issues, like the lack of independence or institutionalization of the tribunals by the state and the failure of some nations to implement the right to a fair trial (e.g. USA; Guantanamo Commissions). It also reaffirmed the fact that civilians should not be tried by military tribunals unless the state proves that it is done for specific and justifiable reasons. Finally, the High Commissioner for Human Rights issued a report on the consultation (A/HRC/28/32), summarizing its contents, for the UNHRC.

#### [United Nations International Residual Mechanism for Criminal Tribunals](#)

The United Nations International Residual Mechanism for Criminal Tribunals is an independent organ, established by the United Nations Security Council in December 2010 through resolution 1966. It was created to serve as a supportive organ during the function of the ICTY and ICTR as well as after their closure in 2017 and 2015. Its main functions include the handling of four remaining cases that have not yet closed, the appeals of the cases and the preservation of the case and evidence files.

Though it was introduced as a temporary solution, it has been a rather effective solution to the problem of the closure of the ad-hoc criminal tribunals. Through this organization some of the procedures that had to be done by the tribunals are done by the organization as it also ensures that any unfinished affairs were taken care of. This example could be a valuable piece of experience should there ever be another criminal tribunal established by the UNSC.

## POSSIBLE SOLUTIONS

### Increase transparency and public access to military tribunals

In order to increase transparency and public access to military tribunals, governments should strive to ensure that military tribunals are held in public as much as possible. While there may be circumstances in which classified information must be protected, efforts should be made to minimize these circumstances and to ensure that, wherever possible, military tribunals are held in a public setting. This would help to increase accountability and transparency in the military justice system and would promote public confidence in the fairness and impartiality of military tribunals.

Another way to increase transparency and public access to military tribunals is to provide for independent monitoring and oversight of the military justice system. This could involve the establishment of an independent commission to monitor and evaluate the operation of military tribunals, to investigate allegations of human rights abuses or other violations of due process, and to make recommendations for reform where necessary. Such oversight mechanisms can help to ensure that military tribunals are conducted in a fair and transparent manner and can also provide a mechanism for redress for victims of abuses.

### Ensure due process rights

One of the most important ways to improve the administration of justice by military tribunals is to ensure that all defendants are afforded due process rights. This includes the right to a fair and impartial trial, the right to be informed of the charges against them, the right to legal representation, and the right to appeal any decision made by the tribunal. To ensure that these rights are respected, governments should establish clear rules and procedures governing the conduct of military tribunals, and should provide training to military personnel to ensure that they are able to conduct trials in a fair and impartial manner.

It is also important to ensure that defendants have access to legal representation. In some cases, this may require the provision of free legal aid to ensure that all defendants are able to mount a strong defense. In addition, governments should ensure that military tribunals are staffed by well-trained and experienced personnel, including judges and legal advisers, who are able to ensure that due process rights are respected.

### Strengthen independence of military tribunals

Another potential solution is to strengthen the independence of military tribunals, both in terms of their institutional autonomy and the impartiality of individual judges. This could involve providing greater funding and resources to military tribunals, as well as establishing clear rules and procedures for the appointment and removal of judges. Additionally, training and education programs for judges could help to reinforce their independence and ensure that they are able to make fair and unbiased decisions.

### Ensure accountability for human rights abuses

Another important way to improve the administration of justice by military tribunals is to ensure that there is accountability for human rights abuses. This includes ensuring that all allegations of abuse are thoroughly investigated, and that those responsible for such abuses are held accountable. In addition, governments should take steps to prevent future abuses from occurring, such as by ensuring that military personnel receive adequate training on human rights and international humanitarian law.

To ensure accountability for human rights abuses, governments should establish clear rules and procedures governing the conduct of military personnel, including guidelines on the use of force and the treatment of prisoners. They should also establish mechanisms for the investigation of allegations of abuse, and should ensure that such investigations are conducted by independent and impartial bodies. Finally, governments should ensure that those responsible for human rights abuses are held accountable, including by bringing criminal charges against them where appropriate.

### Reform military law and legal procedures

Another solution is to reform military law and legal procedures to better reflect the principles of due process and human rights. This could involve amending existing laws to remove provisions that allow for the trial of civilians by military tribunals, as well as ensuring that legal procedures are transparent, accessible, and fair for all parties involved. Additionally, more robust legal representation for defendants could help to ensure that they are able to effectively defend themselves and receive a fair trial.

### Establish international standards and oversight

The establishment of international standards and oversight for military tribunals could help to ensure that they operate in accordance with the principles of due process and human rights. This could involve creating international guidelines or codes of conduct for military tribunals, as well as establishing international oversight mechanisms to monitor their operations and hold them accountable for any breaches of human rights. Such oversight could involve international human rights bodies, such as the United Nations Human Rights Council, as well as civil society organizations and other stakeholders.

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