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Military Self-Interest in Accountability for Core International Crimes

Morten Bergsmo and SONG Tianying (editors)

PURL: http://www.legal-tools.org/doc/d1e368/

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Military or Civilian Jurisdiction for International Crimes? An Approach from Self-Interest in Accountability of Armed Forces in International Law

Elizabeth Santalla Vargas*

16.1. Introduction

In the discussion concerning the adequate jurisdictional forum to try core crimes, while there has been quite a large consensus as to the inadequacy of military jurisdictions trying civilians,[1] it is more controversial when the

* **Elizabeth Santalla Vargas** received her first law degree from the Catholic Bolivian University and an LL.M. from the University of San Francisco, USA. She has undertaken additional courses at the Grotius Centre for International Legal Studies, Leiden University, the Netherlands; the Geneva Academy of International Humanitarian Law and Human Rights, Switzerland; the Erik Castrén Institute of International Law and Human Rights, University of Helsinki, Finland; the Inter-American Institute of Human Rights, Costa Rica; the Hague Academy of International Law, external session held in Peru; and the University of Rosario, Colombia. She has been an Associate Legal Officer at the International Criminal Tribunal for the former Yugoslavia, a legal adviser at the Implementing Agency in Bolivia of the United Nations High Commissioner for Refugees ('UNHCR'), Visiting Professional at the International Criminal Court ('ICC'), and has been a member of Bolivia's legal team in a case filed before the International Court of Justice. She has consulted, *inter alia*, for the International Committee of the Red Cross, Bolivia's office of the High Commissioner for Human Rights, Bolivia's Ombudsman, Peace and Justice Initiative and the Coalition for the ICC. She currently teaches public international law at the Catholic Bolivian University. The author wishes to thank the editors for their useful comments and insights.

1 For instance, the Human Rights Committee (1984) in relation to Article 14 of the Covenant on Civil and Political Rights reasoned that "[w]hile the Covenant does not prohibit such category of courts [military or special courts], nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14". Human Rights Committee, General Comment 13, Article 14, Twenty-first session, 1984, para. 4. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994). For an overview of relevant case law and national practice regarding the question of jurisdiction over civilian contractors in military operations acting abroad in relation to the Euro-

alleged perpetrator is a member of the military personnel, especially when victims are also from the military. This chapter will analyse this question from the premise that self-interest exists for armed forces in accountability. Mindful of the fact that the jurisdictional reach established by any legal system is inherent to the attribute of sovereignty, this analysis will draw on some fundamental tenets[2] that guide the discussion. Assisted by regional and international case law and practice, this chapter argues that human rights violations should be tried by civilian courts, even if they are committed by military personnel. It is further argued that regarding war crimes, although the choice of jurisdictional forum is more controversial, civilian courts are largely more suitable. In order to guarantee legitimacy and credibility at all times, the impartiality and independence of the court should be carefully scrutinised. Resorting to civilian courts is usually found to better serve military self-interests in such examinations.

pean context, see Stefano Manacorda and Triestino Mariniello, "Military Criminal Justice and Jurisdiction over Civilians: The First Lessons from Strasbourg", in Christine Bakker and Mirko Sossai (eds.), *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*, Hart, Oxford, 2012, pp. 559–81. As a matter of State practice, it is interesting to note that by virtue of the legislative amendments adopted in Swiss legislation, which entered into force on 1 January 2011, military jurisdiction that had exclusive jurisdiction over war crimes had actually been exercised on only two occasions with respect to civilians of foreign nationality (namely the *G* and *Niyonteze* cases). In fact, the latter constituted the first time a domestic jurisdiction exercised universal jurisdiction with respect to war crimes committed in a non-international armed conflict. See Luc Reydams, "International Decisions, *Niyonteze v. Public Prosecutor*", in *American Journal of International Law*, 2002, vol. 96, no. 1, pp. 231–36. It was limited to two instances, namely, when the offences have been committed: (a) by or against members of the Swiss armed forces; or (b) in the context of armed conflict to which Switzerland is or has been a party (Article 25 of the Code of Criminal Procedure in relation to Article 23(1)(g)). See Roberta Arnold, "Applying the Laws of Armed Conflict in Swiss Courts", in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects*, T.M.C. Asser Press, The Hague, 2014, pp. 318 ff.

2 Henry Wager Halleck, "Military Tribunals and their Jurisdiction", in *American Journal of International Law,* 1911, vol. 5, no. 4, pp. 960−61. Halleck, in relation to historical considerations of military jurisdiction within the confines of a country or territory, referred to the "great principles of natural right, deduced from the laws of war, and recognized in international jurisprudence, which must govern in times of insurrection, rebellion or invasion in the particular theatre of military operations, where the jurisdiction of civil courts is suspended or where their powers are entirely inadequate for the particular contingencies".

16.2. Dichotomy Regarding Jurisdiction in Wartime and Peacetime

The discussion concerning jurisdiction over war crimes and other core crimes finds its roots in the realm of jurisdiction in wartime. However, drawing back in history, no fixed rule can be found as to the nature of the jurisdictional fora in wartime scenarios. While the Roman military tribunals exercised jurisdiction in wartime, either in occupied territories or within the Empire, the scope of their jurisdiction varied over time and accommodated the prevailing circumstances. It was accordingly asserted that

> [t]he general principle to be deduced from law and history of those times was […] that no crime could be committed with impunity; and that, therefore, where the ordinary civil tribunals could not, or did not take cognizance of wrongs or offences, the military would do so, both within and without the limits of the empire.[3]

The maxim that in wartime the civil authorities yield to the military[4] was generally accepted throughout the Middle Ages until the recognition of civil rights gained ground, leading to an expansion of civilian jurisdiction and consequently the restraint and limitation of military jurisdiction.[5] Alongside this view, in *Palamara-Iribarne v. Chile*, the Inter-American Court of Human Rights ('IACHR') stressed that in peacetime the jurisdiction of military courts or tribunals "has tended to be restricted, if not disappear, whereby, where it has not it should be reduced to the minimum".[6]

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3 *Ibid*., p. 959.

4 Michael A. Newton, "Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes", in *Military Law Review*, 1996, vol. 153, p. 13. Newton points out that the practice of resorting to military commissions to adjudicate violations of international law dates back to at least 1688.

5 Halleck, 1911, see *supra* note 2.

6 Inter-American Court of Human Rights, Case of *Palamara-Iribarne v. Chile*, Judgment (Merits, Reparations and Costs), 22 November 2005, para. 132 ('Palamara-Iribarne v. Chile case'). Such an assertion finds echoes in various jurisdictions that have abolished military jurisdiction in peacetime during the 1980s and 1990s. This is the case, for instance, of the Netherlands (that paved the way for the abolition or limitation of military jurisdiction in the European context), Denmark, Slovenia, Estonia, France, the Czech Republic and Belgium (whose Constitution currently limits military jurisdiction to wartime, Article 157). By the same token, Article 126 of the Constitution of Slovenia of 1991 explicitly states: "Extraordinary courts may not be established. Nor may military courts be established in peacetime". Beyond the European context, see Senegal and Guinea. Article 99 of the Constitution of Guinea of 2010 explicitly allows for constitutional review of a military

The concurring opinion of Judge García Ramirez pointed to the fact that those supporting the pertinence of military jurisdiction do so with respect to its application in wartime, provided that it applies, *ratione materiae*, to "matters directly and immediately connected to the military performance, with the arms function, the military discipline".[7] Accordingly, the subject matter encompasses offences of a military nature: the so-called 'function crimes', that is, offences strictly related to the military function. In determining such a nature, a restrictive interpretation is to be applied in assessing the type of conduct that can be deemed to affect juridical military interests, which constitutes a laudable holding or position entrenched in the jurisprudence of the IACHR.[8] In this connection, it is interesting to note,

court's decisions: "The orders of the Constitutional Court are without recourse and impose themselves on the public powers and on all administrative, military and jurisdictional authorities, as well as on any natural or juridical (moral) person". See Federico Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, vol. 1, International Commission of Jurists, Geneva, 2004, pp. 159, 294. One jurisdiction where the jurisdictional distinction between wartime and peacetime has been less stringent – vesting jurisdiction mainly with civilian jurisdiction – has been the United Kingdom. Andreu-Guzmán's report (p. 348) points to the fact that the establishment of courts martial is allowed, in certain circumstances, in the theatre of operations (naval courts having some specific features). The jurisdiction *ratione materiae* bestowed upon courts martial by virtue of the Armed Forces Act of 2006 does not extend beyond disciplinary and service related offences. Indeed, the Act provides that the term "service offences" is to be understood in accordance with Part 1 which lists various types of conduct that are inextricably related to duties and conduct of a disciplinary and operational nature. Manacorda and Mariniello, 2012, p. 560, see *supra* note 1, highlight the expansion of military jurisdiction in the UK with respect to civilian contractors. Andreu-Guzmán's report also provides a detailed account of the regimes of various countries where the traditional distinction between wartime and peacetime is maintained.

7 Palamara-Iribarne v. Chile case, Concurring Opinion of Judge Sergio García Ramírez, para. 12, see *supra* note 6. The pertinence of military jurisdiction for adjudicating matters of a disciplinary nature had been earlier stressed in Inter-American Court of Human Rights, Case of *Castillo Petruzzi et al. v. Peru*, Judgment (Merits, Reparations and Costs), 30 May 1999, Series C No. 52, para. 128.

8 *Ibid*., paras. 13, 14, 16. Various previous cases endorsed such restrictive interpretation. Indeed, the holding coined in *Castillo Petruzzi et al.* and later in the case of *Durand and Ugarte v. Perú* was followed, for instance, in the cases of *19 Merchants v. Colombia*, *Las Palmeras v. Colombia*, *Cantoral Benavides v. Perú* and *Lori Berensson Mejía v. Perú* where the Court recalled that "[u]nder the democratic rule of law, the military criminal jurisdiction should have a very restricted an exceptional scope and be designed to protect special juridical interests associated with the functions assigned by law to the military forces. Hence, it should only try military personnel for committing crimes or misdemeanors that, due to their nature, harm the juridical interests of the military system". Inter-American Court of Human Rights, Case of *Lori Berenson Mejía v. Perú*, Judgment of 25 November 2004, para. 142. With fur-

as did the Inter-American Commission on Human Rights ('Inter-American Commission') in its thematic report on the right to truth,[9] the explicit reference made by the Inter-American Convention on Forced Disappearance of Persons as to the understanding that acts constituting forced disappearance under no circumstances could be deemed having been committed in the course of military duties. Accordingly, the said provision further states: "Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions".[10]

Ensuring impartiality and independence is at the heart of the restriction of the scope of military jurisdiction even in times of war. Indeed, in particular the requirement of impartiality is rendered illusory "since the members of the Army often feel compelled to protect those who fight alongside them in a difficult and dangerous context".[11] Bearing in mind that the qualities of impartiality and independence lie at the core of accountability systems that are well regarded and trusted by public opinion, the purported restriction of military jurisdiction – not only with respect to civilians but also in relation to military personnel when it comes to crimes under international law (including war crimes) – finds further support from the perspective of self-interest in accountability.

It is further interesting to note that the Inter-American Commission has adopted, on various occasions, the underlying rationale that had been advanced by the Constitutional Court of Colombia[12] as to the gravity of

ther references as to the jurisprudence of the IACHR upholding a restrictive interpretation of the remit of military jurisdiction (applicable with respect to military personnel and in relation to military offences), see Carlos Lascano, "Inter-American Court of Human Rights and Penal Military Justice", in Stefano Manacorda and Adán Nieto (eds.), *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions*, Ediciones de la Universidad de Castilla–La Mancha, Ciadad Real, 2009, pp. 281–82.

9 Inter-American Commission on Human Rights, *The Right to Truth in the Americas*, OEA/Ser.L/V/II.152, Doc. 2, 13 August 2014, p. 49.

10 Inter-American Convention on Forced Disappearance of Persons, 9 June 1994, Article 9.

11 Inter-American Commission on Human Rights, Report No. 2/06, Case 12.130, Miguel Orlando Muñoz Guzmán, Mexico, 28 February 2006, paras. 83–84.

12 For instance, Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, ch. V, para. 30. Application filed with the Inter-American Court of Human Rights in Case 12.449, *Teodoro Cabrera García and Rodolfo Montiel Flores v. Mexico*. In *19 Merchants*

crimes against humanity precluding any connection of such crimes with activity related to military service and thus falling beyond the reach of military jurisdiction. While not being the dominant criterion for determining the suitability of the jurisdictional forum, the consideration as to the gravity of crimes against humanity bears some connection with the nature of the offence, thus making relevant the analysis as to whether the same rationale applies with respect to war crimes. It may be noted in this connection that no difference in terms of gravity was found to exist in law between crimes against humanity and war crimes by the International Criminal Tribunal for the former Yugoslavia ('ICTY'), where the discussion in international adjudication as to the apparent disparity in the gravity threshold between both categories of core crimes emerged in the context of sentencing. The *Tadić* Sentencing Appeals Judgment held that no distinction could be found "between the seriousness of a crime against humanity and that of a war crime", not only in the statutory framework of

v. Colombia, the Inter-American Commission, in arguing the violation to the right to a fair trial and judicial protection, relied on a Judgment of the Constitutional Court of Colombia of 1997 which reasoned that "[t]he connection between the criminal act and the activity related to military service is broken when the offence is extremely serious; this is the case of offences against an individual. In those circumstances, the offence must be [submitted] to the civil justice system", Judgment of 5 July 2004, para. 157(g). The position or holding of the Constitutional Court of Colombia was reiterated as part of the precedent ruling against military jurisdiction with respect to crimes against humanity in the case of the *Mapiripán Massacre*: "[t]he tie between the criminal act and the service related activity is broken when the crime is unusually grave, as in the case of crimes against humanity. Under these circumstances, the case must be allocated to regular courts, given the total contradiction between the crime and the constitutional mandates of the security forces", Case of *Mapiripán Massacre v. Colombia*, Judgment of 15 September 2005, para. 205 (in reference to Judgment C-358 of 5 August 1997 of the Constitutional Court of Colombia). In *Pueblo Bello Massacre*, the Court, in finding that military jurisdiction was not the proper forum in addition of not constituting an effective remedy, the IACHR took into account the aforesaid holding of the Constitutional Court of Colombia; see the Case of *Pueblo Bello Massacre v. Colombia*, Judgment of 31 January 2006, para. 193. It may be noted, for further background, that the Inter-American Commission's Report on *Vélez Restrepo v. Colombia* disregarded the State's argument as to the purported suitability of military jurisdiction for violations of human rights law of not extreme gravity, by stressing that according to the IACHR's jurisprudence, all situations that breach the human rights of civilians fall beyond the remit of military jurisdiction. See Inter-American Commission Report on *Vélez Restrepo v. Colombia*, Report No. 136/10, Case 12.658, *Luis Gonzalo "Richard" Vélez Restrepo and Family, Colombia*, 23 October 2010, para. 155 ('Vélez Restrepo v. Colombia case').

the ICTY but also in the realm of customary international law.[13] Judge Shahabuddeen's Separate Opinion stressed the view of not being correct that "as a matter of law, the seriousness is necessarily greater where the same act is charged and proved as a crime against humanity".[14] In so doing, he concurred with Judge LI's Separate and Dissenting Opinion to the *Erdemović* Judgment on Appeal[15] and with Judge Robinson's Separate Opinion to the *Tadić* Sentencing Judgment in first instance, emphasising the view that crimes against humanity are not necessarily to be regarded as "more serious violations of international humanitarian law than war crimes".[16] Delving into history, the Separate Opinion further referred to the fact that the trials established after the Second World War did not treat both categories of core crimes as bearing a different threshold of gravity.[17] In fact, it has been asserted that the Judgment of the International Military Tribunal did not draw a difference in terms of gravity between crimes against humanity and war crimes, having rather applied a cumulative charging approach with respect to the same facts.[18] As was pointed by the Trial Chamber in its Judgment in *Kupreskić*, the legal framework of the International Military Tribunal did not provide for different penalties in relation to both categories of crimes.[19] The aforesaid holding in the *Tadić* Sentencing Appeals Judgment was later followed in *Furundžija*,[20] having

[13] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dŭsko Tadić* ("Tadić case"), Case No. IT-94-1-A and IT-94-1-A *bis,* Judgment in Sentencing Appeals, 26 January 2000, para. 69.

[14] *Ibid*., p. 41.

[15] Where Judge LI asserted that "the gravity of a criminal act and consequently the seriousness of its punishment, are determined by the intrinsic nature of the act itself and not by its classification under one category or the other". International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgment, Separate and Dissenting Opinion of Judge Li, 7 October 1997, para. 19.

[16] Tadić case, Separate Opinion of Judge Robinson, 11 November 1999, pp. 9−10, see *supra* note 13.

[17] *Ibid*., p. 4.

[18] See Andrea Carcano, "Sentencing and the Gravity of the Offence in International Criminal Law", in *International and Comparative Law Quarterly*, 2002, vol. 52, no. 3, p. 595.

[19] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kupreskić et al.*, Case No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 674.

[20] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Anton Furundžija*, Case No. IT-95-17/1-A, Judgment, 21 July 2000, para. 243.

remained a *jurisprudence constante* of the ICTY[21] and the International Criminal Tribunal for Rwanda ('ICTR')[22] Appeals Chamber that therefore rejected an abstract hierarchical construction of core crimes based upon its inherent gravity.[23]

Although the Inter-American Commission, in its aforementioned thematic report on the right to truth in the Americas, has only recommended the elimination of the use of military jurisdiction for cases involving human rights violations,[24] the underlying reasons advanced in support of such an emphatic recommendation can arguably also be extended to war crimes, as they cannot be regarded as falling within the military function or duties and thus entailing a violation of military criminal law. Indeed, the essence of war crimes is the establishment of penal consequences for conduct going beyond or falling short of what is permitted and prohibited under the laws of armed conflict[25] – obviously distinct from military criminal law. In view of the gravity of such violations, a special regime applies to core crimes, including war crimes − non-applicability of statute of limitations, blanket amnesties, provision of universal jurisdiction, and so forth.[26] Accordingly, it is difficult to reconcile

[21] See, for example, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006, para. 375. *Prosecutor v. Kunarać et al.*, Case No. IT-96-23 and IT-96-23-1-A, Judgment, 12 June 2012, para. 171.

[22] See, for example, International Criminal Tribunal for Rwanda ('ICTR'), *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment, 26 May 2003, para. 590.

[23] See Gideon Boas, James L. Bischoff, Natalie L. Reid and B. Don Taylor III, *International Criminal Law Procedure*, Cambridge University Press, Cambridge, 2011, ch. 10, "Judgment and Sentencing", p. 397. Advancing a critical view as to the detrimental effects posed by the lack of a hierarchical conception of core crimes towards the aim of attaining a coherent system of sentencing for international criminal trials, see Pascale Schifflet and Gideon Boas, "Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavšić and Miroslav Bralo", in *Criminal Law Forum,* 2012, vol. 23, nos. 1/3, pp. 135–59.

[24] Inter-American Commission on Human Rights, 2014, p. 114 (recommendation 4), see *supra* note 9.

[25] Antonio Cassese, interpreting the holding in para. 94 of the Appeals Chamber in the Interlocutory Appeal in *Tadić*, stressed that "a war crime is any serious violation of a rule of international humanitarian law entailing the individual criminal responsibility of the person breaching the rule". See Tadić case, Separate Opinion of Judge Cassese, para. 12, *supra* note 13.

[26] Stressing this point, see Elizabeth Santalla Vargas, *Bolivia ante el Derecho Internacional Humanitario: Estudio de Compatibilidad entre el Ordenamiento Jurídico Interno y las Normas del DIH*, CICR and Plural Editores, La Paz, 2006, p. 53. With additional consid-

the commission of war crimes with military duties. The fact that war crimes, as opposed to the other core crimes, are more closely related to military operations in armed conflict leads to consideration of whether they could be regarded as falling within military duties.[27] But even if that were considered to be the case, the nature of the offences at stake is not changed. Nor is it changed simply by the fact that the victims of war crimes allegedly committed by members of the armed forces may be civilians or military personnel. In fact, a similar situation unfolds in considering the status of victims of crimes against humanity, a question that has been initially addressed by the ICTY, and that has been proven to be relevant in various other contexts of international criminal law prosecution, including at the International Criminal Court ('ICC').[28] This is so as the emphasis on the construction of the notion of crimes against humanity has been placed in the *chapeau*, that is, a widespread or systematic attack on a civilian population, rather than on the status, if any,[29] of the individual victims of the underlying acts. Neither Article 7 of the ICC Statute nor the Elements of Crimes are specific in this regard, having the latter referred simply to 'persons' while describing the elements of the underlying acts.[30] Without entering into the details of the discussion, suffice it to say that the ICTY has held that there is no requirement nor is it an element of this category of crimes that the individual victims are necessarily civilians,[31]

erations on the jurisdictional forum for adjudicating core crimes, in particular war crimes, see pp. 49−57.

27 Inter-American Commission on Human Rights, 2014, para. 23, see *supra* note 9, where the Commission rightly notes that "military jurisdiction should apply only in the case of violations of military criminal law alleged to have been committed by members of the military during the performance of specific duties related to the defense and external security of a State".

28 For a thorough analysis of the *Martić* Appeals Chamber Judgment and related jurisprudence in other Tribunals, see Joakim Dungel, "Defining Victims of Crimes against Humanity: *Martić* and the International Criminal Court", in *Leiden Journal of International Law*, 2009, vol. 22, no. 4, pp. 727−52.

29 Newton considers that since "crimes against humanity infringe on fundamental human rights, anyone can be a victim". Newton, 1996, p. 61, see *supra* note 4.

30 It may be noted that the Elements of Crimes describing in Article 7(1)(b) the elements of the crime of extermination additionally establish that "the conduct constituted, or took place as part of, a mass killing of members of a civilian population" (element 2).

31 This was recently confirmed by the Appeals Chamber of the ICTY in *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015, paras. 569 and 567, recalling its holding in *Prosecutor v. Milan Martić* ('Martić case'), Case No. IT-95-11-A, Judgment, 8 October 2008, para. 307; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*,

provided that the contextual element in which they occur is triggered by a widespread or systematic attack against a civilian population. The civilian character of the population not being affected by the presence within the group of individuals holding a non-civilian status – the exact number depending on the circumstances[32] – provided that the population targeted by the attack is predominantly civilian,[33] which implies that not the entire civilian population ought to be the target of the attack.[34] Within this framework, it is at odds to conceive military jurisdiction suitable to adjudicate war crimes committed by members of armed forces where the victims are also military personnel, as opposed to the situation where the victims may be civilians.[35] Such inconsistency is even more apparent if it is

Case No. IT-95-13/1-A, Judgment, 5 May 20009, para. 32 (see also paras. 28 and 31). Further confirmation of this jurisprudential line occurred in *Prosecutor v. Šainović et al.,* Case No. IT-05-87-A, Judgment, 23 January 2014, para. 549. See also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment, 12 November 2009, para. 58. These Appeal Judgments drew upon the previous holding in *Prosecutor v. Dragoljub Kunarac et al.,* Case No. IT-96-23/1-A, Judgment, 12 June 2002, para. 90, cited in *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, para. 95, as well as in *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, para. 105.

[32] It may be noted that the *Katanga* Judgment of the ICC, while accepting that the presence of non-civilians within the targeted group may not deprive it of its civilian character, considered relevant that a substantial number of civilians were victims of the attack for the predominant civilian nature of the population of the attack be asserted. Such a view seems to explain why an emphasis was placed on the factual analysis as to whether the victims of the crime of murder, as a crime against humanity, had not directly participated in the hostilities. See International Criminal Court, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-3436, Judgment pursuant to Article 74 of the Statute, 7 March 2014, paras. 1105 and 856. (The latter, while pointing out that the factual analysis prompted by the case did not require the Chamber to consider the question of persons *hors de combat*, shows the importance for the Chamber to establish that the victims of the charge of murder, who were soldiers, could not be regarded as directly participating in the hostilities when their deaths occurred).

[33] The exact number depending on the circumstances, see, for example, Martić case Appeal Judgment, para. 307, *supra* note 31.

[34] See, for example, *Prosecutor v. Blaškić,* No. IT-95-14-A, Judgment, 19 July 2004, para. 105, citing the *Kunarać* Appeal Judgment, para. 90; *Martić* Appeal Judgment, para. 307, see *supra* note 31, also *Prosecutor v. Naletelić and Martinović,* No. IT-98-34-T, Trial Judgment, 31 March 2013, para. 235; *Prosecutor v. Galić,* No. IT-98-29-A, Judgment, 30 November 2006, para. 136 (citing the Appeal Judgment in *Kordić and Cerkez*, 17 December 2004, para. 50).

[35] Such an approach has been adopted, for instance, by Mexico. The Mexican Military Criminal Code, in its latest amendment of 13 June 2014, vested its military courts with competence over offences not only of a disciplinary nature but also of a common nature

accepted that in both cases (war crimes and crimes against humanity) not only the alleged perpetrators but also the victims may be military personnel.

Perhaps further consideration as to whether certain war crimes may be deemed closer to the military function, and so impinge upon more strictly defined military interests, may provide a sounder justification for considering military jurisdiction suitable to adjudicate such offences. But even if such a justification were convincingly advanced, practical considerations may arise as to prosecutorial effectiveness where war crimes and crimes against humanity charges arising from the same factual situation fall under different jurisdictional fora.[36]

In the context of international humanitarian law, while the four Geneva Conventions of 1949 establish the *aut dedere aut judicare* obligation of States with respect to grave breaches of the Conventions, no indication or requirement is made as to the type of jurisdictional forum.[37] The only express reference to the jurisdictional forum is made in Article 84[38] of Geneva Convention III in relation to prisoners of war in the light of the principle of non-discrimination, so as to ensure that prisoners of war are tried by the same jurisdiction that is also competent with respect to members of the armed forces of the detaining power. It can be asserted that the type of offences contemplated by the provision concern the regime under

provided that the victim is not a civilian and the offence is committed by military personnel in active service or when the commission of the offence is service related (Article 57(I) and (II) (a)). It was further explicitly stated that in any event where joint commission of crimes allegedly committed by military personnel and civilians is at stake, only the former could be tried by military courts (Article 57).

36 For instance, murder as a war crime and as a crime against humanity, as charged and prosecuted in *Katanga* by the ICC, see *supra* note 32.

37 Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; and Geneva Convention IV, Article 146.

38 Article 84 reads:

> A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war. In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights an means of defence provided for in Article 105.

detention of prisoners of war. As pointed out by the commentary of the International Committee of the Red Cross ('ICRC') from 1960, it was deemed suitable to conceive military jurisdiction as the rule for adjudicating infringements of military law and regulations to which prisoners of war are subject to during detention pursuant to Article 82 of Geneva Convention III which allows for the application of disciplinary measures.[39] Accordingly, the express reference made in Article 84 to military courts as the suitable forum for trying prisoners of war should be read in the light of the aforesaid principle of non-discrimination – underpinning also the penalties applied (Article 87) – in view of the prevailing factual background at the time of the drafting and adoption of the Geneva Conventions and essentially in connection with offences of a disciplinary nature. Moreover, as stressed in the same provision (Article 84), under no circumstances whatsoever could a prisoner of war be tried by a tribunal or court devoid of independence, impartiality, judicial guarantees and, in particular, the defence rights provided for in Article 105.[40] The ICRC commentary makes clear that judicial guarantees are equally applicable to both civilian and military jurisdictions.[41]

The ICRC commentary further points to the fact that the second paragraph of Article 84 was inserted in attention to some countries where civilian jurisdiction applies to both military personnel and civilians.[42] Under the similar treatment to be afforded to prisoners of war in relation to members of the armed forces of the detaining power required by Article 84, that explicitly allows for the possibility that the detaining power's legislation may vest with jurisdiction civilian courts over members of its armed forces, and the fact that according to contemporary developments in international jurisprudence, particularly of the regional human rights systems that have been confronted with the question as to the proper reach of military jurisdiction, alleged violations of human rights law by members of the armed forces ought to be adjudicated by civilian courts. Accordingly, crimes against humanity allegedly committed by prisoners of war would also fall under such jurisdictional forum. Bearing in mind that crimes against humanity can be also committed in armed conflicts, should

39 International Committee of the Red Cross, *Commentary on Geneva Convention III*, 1960.

40 Geneva Convention, III, Article 84.

41 *Commentary on Geneva Convention III*, see *supra* note 39.

42 *Ibid*., with reference to the UK.

the prisoner of war be also allegedly responsible for war crimes, he/she would have to be tried in different jurisdictional forums for crimes allegedly committed in the same situation or even in the same incident. Not only do the principles of indivisibility of trial but also practical considerations ensuing from the rights of the defence, the gathering and assessment of evidence, among others, militate against such possibility. This dilemma would be avoided if the detaining power's legislation vests with jurisdiction its civilian or ordinary courts over all core crimes, including war crimes, also if the alleged perpetrators are members of armed forces. In the event that the offences falling under Article 84 may be deemed to encompass other offences beyond the disciplinary purview, the second part of the provision would allow for such a possibility.

Another reference to military jurisdiction appears in Article 66 of Geneva Convention IV as part of the regime of occupation. The provision enables military courts for the purpose of adjudicating offences against security regulations adopted by the occupying power pursuant to Article 64. The provision establishes three requirements, namely the regular constitution of military courts, their functioning in the occupied territory and their non-political nature. As pointed out by the ICRC commentary, the latter derives from the Second World War where sometimes the judicial machinery was used with political motivations or as a means of persecution on racial grounds.[43] While the competence of military courts acting in occupied territories may arguably be deemed to be limited to security offences by virtue of the aforesaid provisions,[44] it is nonetheless useful to consider that from a practical standpoint the military mission may be hampered if commanders and soldiers are focused on investigating and adjudicating human rights violations.[45] Practical considerations lead also to consider the danger of resorting to military courts for enforcing interna-

[43] International Committee of the Red Cross, Commentary on Geneva Convention IV, 1958.

[44] Newton, 1996, p. 91, see *supra* note 4, advancing a different view as to a purported requirement under international law for a commander to undertake prosecution of core crimes during occupation as a means of ensuring civil order.

[45] Supporting this view with practical examples, see *ibid.*, pp. 9 ff. The ICRC commentary of 1960 on Article 66 acknowledges the fact that military courts may be constituted in occupied territory to deal with "the offences committed by the members of the army of occupation", being thus practically feasible to extend their competence under the regime of occupation. See, ICRC Commentary on Article 66, Part III: Status and Treatment of Protected Persons, Section III: Occupied Territories, point 2(a).

tional humanitarian law.[46] While the chances are that the deterrence effect of criminal prosecution – albeit mindful of its limitations – could enhance compliance with international humanitarian law in the midst of an ongoing conflict, prosecution of foreign nationals of hostile forces by courts martial of one party to the conflict entails a strong presumption of victor's justice or at least the impression of lack of impartiality and independence.[47] By the same token, when a party to the conflict prosecutes its own armed forces, practical issues arising out of the application of the doctrine of command responsibility and superior orders prompt further reflection as to the suitability of military jurisdictions during armed conflict scenarios. What is more, when war crimes and other core crimes are allegedly committed by the occupying power in the course of occupation, prosecution by the same State may raise concerns with respect to the impartiality and independence in particular of military tribunals.[48]

From a practical standpoint, tactical and operational concerns also come into play. It has been averred that a potential short-term escalation of hostilities or other operational concerns may in turn conflict with the concern of ensuring investigation and prosecution. Accordingly, turning over suspects to ordinary judicial authorities may help to accomplish the military mission from a tactical and operational perspective.[49]

Under the aforesaid considerations, the dichotomous approach to military jurisdiction in wartime and peacetime renders perfunctory or perhaps becomes a matter of pragmatism in dealing with crimes in the midst of armed conflict (including situations of occupation). In this vein, the arguments advanced in support of the proposition of curtailing military

46 Newton, 1996, p. 8, see *supra* note 4.

47 Arguing to the contrary in support of prosecution of foreign nationals of hostile forces, see *ibid*., p. 85.

48 The issue has been raised in relation to the Gaza Strip conflict where war crimes have been allegedly committed by the occupying power (Israel). The investigation advanced by the occupying power has been put into question on the basis of, *inter alia*, resort to the so-called military "operational debriefings" which detract from contributing to an effective and impartial investigation mechanism. Furthermore, the internal character within the military structure of such investigations has been deemed to render those investigations unable to fulfil the requirements of independence and impartiality by a UN mission reporting on the investigation undertaken by Israeli legal authorities into the Gaza Strip conflict. With further details, see Farhad Malekian, "Judging International Criminal Justice in the Occupied Territories", in *International Criminal Law Review*, 2012, vol. 12, p. 847.

49 Newton, 1996, see *supra* note 4.

jurisdiction with respect to all core crimes (including war crimes) cannot wholly be deemed applicable to one scenario as opposed to the other.

16.3. The Scope of Military Jurisdiction through the Human Rights Lens

It is widely accepted that military jurisdiction *ratione materiae* is predicated upon 'military offences', offences of a military nature or service-related offences. The intricacies in determining what a military offence is, however, lie at the heart of the discussion, as already noted. The question of whether crimes under international law could ever be equated to military offences has been mainly addressed in the context of State responsibility litigation and the implementation of the ICC Statute. In the former scenario, it can be fairly asserted that the debate has gained the upper hand in the context of regional State responsibility. In the Inter-American human rights system, the Inter-American Commission has asserted that human rights violations do not constitute military or police offences, thus falling beyond the purview of military jurisdiction. Adjudication of alleged violations of human rights by military courts, not only with respect to civilians but also to military and police forces, was deemed by the Inter-American Commission incompatible with the right to an effective judicial remedy, an independent and impartial court and due process of law.[50] It has accordingly issued specific recommendations to States aiming at the adoption of necessary internal measures "to ensure that *all* cases of human rights violations are submitted to the ordinary courts".[51] It is fair to note that the Human Rights Committee has also pronounced along the same line of reasoning, for instance, while analysing the situation in Colombia observed that the transfer from civilian to military jurisdiction of cases involving human rights violations by military and security forces contributed to the institutionalisation of impunity as the impartiality and

[50] For instance, in *Masacre de Riofrío* (Colombia), *Carlos Manuel Prada González and Evelio Antonio Bolaño Castro* (Colombia), and *Leonel de Jesús Isaza Echeverry and others* (Colombia), referred to by Andreu-Guzmán, 2004, pp. 142 ff., see *supra* note 6, with additional case law.

[51] For instance, see Inter-American Commission of Human Rights, Report on the Situation of Human Rights in Ecuador, ch. 3 (fourth recommendation), OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997 (emphasis added).

independence of those tribunals could be reasonably put into question.[52] A similar pronouncement was made with respect to the establishment of military tribunals in Guatemala asserting jurisdiction over military personnel for serious violations of human rights.[53]

By the same token, the jurisprudence of the IACHR has pronounced on the question of impartiality and independence of military jurisdictions trying members of the armed forces for serious violations of human rights law. In *Palamara-Iribarne v. Chile*, the IACHR, while recalling that military jurisdiction is to be confined to offences where the protected legal value is of a military nature, clarified that those kinds of offences can be only committed when military personnel perform specific duties related to the defence and external security of the State.[54] In a more recent Judgment, *Vélez Restrepo v. Colombia*, the IACHR noted that its jurisprudential line as to the inadequacy of military jurisdiction over human rights violations was construed in relation to the type of cases referred to its jurisdiction, that were mainly concerned with situations entailing grave human rights violations, and thus could not be interpreted as limiting ordinary jurisdiction to cases of such a nature. This is in line with its earlier case law where it had held that it is not the gravity of the offences but more importantly their nature and the protected legal value that deprive certain offences from falling under military jurisdiction.[55] A sound basis can thus be claimed to be found in the Inter-American system of human rights in support of the proposition that military jurisdiction cannot be regarded a proper forum for adjudicating violations of human rights[56] committed by members of armed forces even if acting in armed conflict scenarios. The extent to which the aforesaid rationale – conflating the nature of the offence and of the protected legal interest – lends itself to an analogy with respect to violations of humanitarian law merits consideration.

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52 Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, Martinus Nijhoff Publishers, Leiden, 2008, p. 271.

53 *Ibid.*, p. 308.

54 Palamara-Iribarne v. Chile case, para. 132, see *supra* note 6.

55 Vélez Restrepo v. Colombia case, para. 244, see *supra* note 12.

56 See also Inter-American Commission of Human Rights, 2014, see *supra* note 9, where the Commission recommends abolishing the use of military jurisdictions for cases involving human rights violations. It further contains references to relevant jurisprudence of the IACHR on the matter.

Indeed, as pointed out by the IACHR, its jurisprudence ought to be read in light of the cases submitted to its jurisdiction and its competence.[57]

In view of such compelling case law and pronouncements, military jurisdictions exercising jurisdiction over military personnel for core crimes (including war crimes), at least in the Inter-American context, take the risk of not only rendering judgments that could eventually be overturned at the international level but also of being perceived as illegitimate or devoid of confidence by public opinion.[58] In such a scenario, the self-interest in accountability of armed forces is better accomplished if jurisdiction over military personnel is exercised by civilian jurisdiction in all cases entailing core crimes under international law. This proposition is further reinforced if one considers that due process rights and judicial guarantees of military personnel could be better guaranteed by civilian jurisdictions, in which the intricacies inherent to trials conducted by the same comrades of an institutional structure, where hierarchy is firmly anchored as in the military, are less likely to prevail.[59] The idea of a military forum entailing a privilege for the armed forces vanishes, therefore, or at the very least leads one to wonder if it is really so, as the accused is likely to be deprived of a trial conducted by an independent and impartial tribunal. In this connection, it has been further put into question whether the constitutional mission of armed forces – commonly ascribed to the defence of external security of the State – justifies the need of such a special

[57] For further discussion on this point, see Section 16.4.2.

[58] Roberta Arnold points out that civil society has a general negative perception concerning military jurisdiction and its capability of being respectful of fair trial principles and thus favouring civilian jurisdiction that can be subject to public scrutiny. By resorting to the Swiss military jurisdiction, Arnold argues that such a general assumption is devoid of foundation. See Roberta Arnold, "Military Criminal Procedures and Judicial Guarantees: The Example of Switzerland", in *Journal of International Criminal Justice*, 2005, vol. 3, pp. 750, 776–77.

[59] The Inter-American Commission has taken into account the rank and discipline in which military jurisdiction operates, for instance, in the individual petition of *Aluisio Cavalcante*; see Annual Report of the Inter-American Commission on Human Rights 2000, OEA/Ser./L/V/II.111, doc. 20 rev., 16 April 2001, Report No. 55/01, *Aluisio Cavalcante et al.*, para. 149. In the context of the European Court of Human Rights, in *AD and Others v. Turkey*, the Court found that the deprivation of liberty (of 21 days) involved in the penalty imposed upon the applicant, a sergeant in the Turkish armed forces, for the offence of military disobedience applied by the military superior, lacked the required independence taking into account the hierarchical structure in which such exercise of authority operated. See Manacorda and Mariniello, 2012, p. 569, *supra* note 1.

forum.[60] These considerations are further echoed by the test of objective impartiality propounded by the European Court of Human Rights ('ECHR'),[61] which requires that a court or tribunal need not only be vested with apparent or formal impartiality, but must also provide such an impression so as to be perceived as such and exclude any legitimate doubt about its independence and impartiality.[62] Such a test does necessarily require a casuistic analysis. In fact, in assessing whether those characteristics exist in a given case, the ECHR has mainly relied on the manner of appointment of the tribunal members, the existence of guarantees and safeguards against outside pressures, and whether the tribunal presents an appearance of independence.[63] While all these elements, in general terms, militate in favour of depriving military jurisdiction over core crimes, the latter is particularly relevant from the self-interest of armed forces in accountability approach, as also reflected in the following section.

[60] On these issues with particular reference to the Peruvian case that draws the jurisdictional distinction between wartime and peacetime, see Yolanda Doig Díaz, "La Justicia Militar a la Luz de las Garantías de la Jurisdicción", in José Hurtado Pozo and Yolanda Doig Díaz, *La Reforma del Derecho Penal Militar*, Pontificia Universidad Católica del Perú and Universidad de Friburgo, Lima, 2002, pp. 39−41.

[61] Manacorda and Mariniello draw attention to the fact that unlike the IACHR, the ECHR has not addressed the question of independence and impartiality of military tribunals in connection with the exercise of jurisdiction over military personnel for alleged violations of human rights, but rather in relation to civilians or servicemen allegedly responsible for the commission of military offences. See Manacorda and Mariniello, 2012, p. 569, *supra* note 1.

[62] See Alicia Gil Gil, "El Derecho a un Juicio Justo como Elemento Normativo del Crimen de Guerra de su Privación y su Definición a través de la Jurisprudencia del Tribunal Europeo de Derechos Humanos", in Kai Ambos, Ezequiel Malarino and Gisela Elsner (eds.), *Sistema Interamericano de Protección de los Derechos Humanos y Derecho Penal Internacional*, vol. 1, Fundación Konrad Adenauer, Montevideo, 2010, p. 438, citing Martínez Cardoz Ruiz and the Case of *Piersack*, Judgment of 1 October of 1982 and the Case of *De Cubber*, Judgment of 29 October 1984. Also Manacorda and Mariniello, 2012, p. 572, see *supra* note 1.

[63] Manacorda and Mariniello, 2012, p. 572, see *supra* note 1.

16.4. Military Self-Interests in Applying a Reliable Jurisdictional Forum

16.4.1. Minimising Risks of Superior Responsibility

Additional considerations arising from the interpretation and application of superior responsibility, a fundamental principle of international humanitarian law and international criminal law inextricably related to the military function, may lead to answer the question as to the preferable forum for adjudicating core crimes in a similar way. As pointed out by Jo Stigen, the likelihood exists that military jurisdictions (a court martial or another kind of military tribunal) may not involve genuine prosecution.[64] From the perspective of the advocated interest in self-accountability of armed forces, the entrenched component of the superior responsibility of a military commander or superior under international humanitarian law of ensuring investigation and prosecution[65] for alleged violations of humanitarian law committed by subordinates, that under international criminal law entails criminal responsibility ensuing from its breach,[66] is to be fulfilled not merely by referring the case to the competent jurisdictional authorities,[67] as prescribed by domestic law, but rather referring to a jurisdictional forum capable of conducting genuine proceedings.

Indeed, from such a pragmatic perspective, a military commander or superior is not interested in discharging his superior responsibility only from a formalistic viewpoint, but in significantly contributing to ensure that criminal accountability is fairly attained. In this vein, depending on the institutional, political and the rule of law situation prevailing in a

64 Stigen, 2008, p. 206, see *supra* note 52.

65 As pointed out by Mettraux, the so-called "'duty to punish' is somewhat of a misnomer". Guénaël Mettraux, *The Law of Command Responsibility*, Oxford University Press, Oxford, 2009, p. 250.

66 In the context of the ICC Statute, Article 28 provides a different *mens rea* for military and civilian superior responsibility, which has triggered both critical as well as supporting views. For the latter see, for example, James Levine, "The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court have the Correct Standard?", in *Military Law Review*, 2007, vol. 193, pp. 54 ff.

67 The supervisory duty of ensuring punishment under international humanitarian law has been interpreted by the ICTY and ICTR jurisprudence in the sense of being fulfilled by the transmission of the *noticia criminis* to the competent authorities to trigger investigations. See ICTR, *Bagosora and Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Appeals Chamber Judgment, 14 December 2011, para. 510.

given country, a civilian jurisdiction may be preferable with a view to guaranteeing proceedings of such kind.

Pursuant to Article 87(1) and (3) of Additional Protocol I to the Geneva Conventions, military commanders are under the obligation "to suppress and report to competent authorities breaches of the Conventions and of [the] Protocol" and "where appropriate, to initiate disciplinary or penal action against violators thereof", respectively. This conventional obligation applies to all those who exercise command responsibility, from "commanders at the highest level to leaders with only a few men under their command" and with respect to all those who fall under their control (not only members of the armed forces). As further explained by the ICRC commentary on Article 87:

> As there is no part of the army which is not subordinated to a military commander at whatever level, this responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier who takes over as head of the platoon to which he belongs at the moment his commander officer has fallen and is no longer capable of fulfilling his task.[68]

Interestingly, the ICRC commentary on Article 87 pointed to the fact that during the course of the discussions prior to the adoption of Additional Protocol I, some delegations had expressed their concerns with respect to the drafting of paragraph 3, considering that it could give place to inappropriate prosecutions and the unwarranted substitution of judicial functions by military commanders. The commentary, however, made it clear that such worries were unjustified as the purpose of the provision was to ensure that military commanders would fulfil their superior responsibility by adopting the most suitable measures depending on the particular circumstances, which could include drawing up a report in case of a breach and submitting the case to a *judicial authority* with such evidence as it was possible to find.[69]

In interpreting the superiors' duty to punish under international humanitarian law, the jurisprudence of the *ad hoc* tribunals can be read as

[68] ICRC, Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1987, para. 3553.

[69] *Ibid*., para. 3562.

allowing for the possibility of reporting the *noticia criminis* to civilian jurisdiction (also in relation to military superiors). In *Halilović*, the Appeals Chamber held that the necessary and reasonable measures for fulfilling the duty to punish, that involves the undertaking of genuine investigative measures to the extent it renders feasible in light of the prevailing circumstances, could be met by reporting the incidents and evidence, if so, for prosecution to the competent authorities "if the superior has no power to sanction".[70] It goes without saying that the nature and remit of the competent authorities are dictated by domestic law. In *Strugar*, the Trial Chamber Judgment pointed to the fact that the military tribunals constituted after the Second World War had interpreted the superior's duty to punish as requiring the undertaking of an effective investigation and ensuring that the perpetrators would be brought to justice.[71] The necessary casuistic analysis as to what constitutes in a given case and situation the adoption of necessary and reasonable measures for fulfilling the statutory and customary law obligation of ensuring accountability for the crimes allegedly committed by subordinates[72] was emphasised in *Boškoski and Tarčulovski.* In fact, the scenario where the superior, knowing that the competent authorities are not functioning, does not discharge his duty by merely communicating the *noticia criminis* or referring the case to such jurisdictional forum was provided as an example by the Appeals Chamber of the casuistic approach.[73] A comparable scenario may exist where the jurisdictional forum is not capable of conducting genuine proceedings or such capability can be seriously put into question. The quality of jurisdictional proceedings and the perception of its legitimacy ought therefore to be of interest for military superiors.

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70 International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Chamber Judgment, 16 October 2007, para. 182 (confirming the reasoning of the Trial Chamber Judgment with further references to previous case law).

71 International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber Judgment, 31 January 2005, para. 376.

72 The ICRC Study on Customary International Humanitarian Law includes in Rule 153 the duty to punish the persons responsible when war crimes have been committed by subordinates, applicable in both international and non-international armed conflicts, as a norm of customary international law. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Vol. I: Rules*, ICRC, Cambridge University Press, Cambridge, 2005, pp. 558−63.

73 International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82, Appeals Chamber Judgment, 19 May 2010, para. 234.

16.4.2. Fulfilling Requirements of the Complementarity Test

The underlying purpose of complementarity, the cornerstone of the ICC Statute, embodies an old conception related to the duty of States to undertake investigation and prosecution for the most serious offences and violations of international law that can be traced back to Hugo Grotius's ideas.[74] The complementary intervention of the ICC is thus predicated upon the two-pronged test underpinning the admissibility criteria, that is, inability and/or unwillingness of a State to genuinely investigate and/or prosecute. Whether proceedings conducted by a military jurisdiction are capable of fulfilling the test, and thus allowing adjudication by the ICC, is a question that does not have a conclusive or generic answer falling under the necessary casuistic analysis.[75] At the outset, while complementarity does not dictate the type of jurisdictional fora, it is concerned with the effectiveness of domestic proceedings in terms of being capable of complying with due process and fair trial requirements, while entailing genuine proceedings. This allows drawing a parallel with the rule of exhaustion of domestic remedies central to the Inter-American system of human

[74] Michael Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court", in *Military Law Review*, 2001, vol. 167, p. 26 (with further references).

[75] Such an approach was emphasised by the Office of the Prosecutor ('OTP') of the ICC, for instance, in relation to the preliminary examination of the situation in Colombia. See Office of the Prosecutor of the ICC, *Report on Preliminary Examination Activities 2013*, November 2013, para. 138: "Under Article 17 of the Statute, the Office's analysis of national proceedings is case specific, and there is no assumed preference for national proceedings to be conducted in civilian as opposed to military jurisdictions *per se.* The Office will evaluate whether specific national proceedings have been or are being carried out genuinely". The statement is particularly relevant with respect to the situation in Colombia where the military justice reform vested military jurisdiction with competence to adjudicate violations of international humanitarian law other than genocide, crimes against humanity, torture, enforced disappearance, forced displacement, sexual violence and extrajudicial killings when allegedly committed by active members of the military and police forces, initially accomplished with an amendment, mainly of Article 221, of the Colombian Constitution of December 2012. As pointed out by the reports of the OTP in the context of the preliminary examination, civil society, international organisations and international non-governmental organisations have put into question the pertinence of expanding the reach of military jurisdiction *vis-à-vis* the alleged lack of independence and impartiality of military courts. Pursuant to Article 221, military tribunals are composed of members of the public forces in active service or under retirement. See *ibid.*, paras. 134−38. Also Office of the Prosecutor of the ICC, *Report on Preliminary Examination Activities 2014*, 2 December 2014, paras. 116−18.

rights, since the rule operates on the basis of evaluating the effectiveness and genuine character of national proceedings. In such analysis the existence of an effective domestic remedy plays a pivotal role. Accordingly, the question of whether military jurisdiction constitutes an effective remedy in a given case is relevant for both the determination of the exhaustion of domestic remedies rule and the admissibility analysis in the context of the ICC,[76] although in practice diverse results may exist in both scenarios.

Under that approach and by virtue of the role of human rights case law under Article 21(3) of the ICC Statute, as part of the sources of applicable law for the ICC, the jurisprudence of the regional courts of human rights may be relevant for the analysis of admissibility.[77] Indeed, the interpretation advanced by such jurisprudence, as pointed out in the preceding section, could provide useful insight in the event that the compatibility of military jurisdiction with the admissibility requirements under the ICC Statute is at stake. The fact that the Inter-American system's jurisprudence and pronouncements, as mentioned, have been confined to the analysis of compatibility of military jurisdiction with respect to violations of human rights law may be explained by the very same competence bestowed upon the system by virtue of the American Convention on Human Rights and the fact that it does not directly contain rules of international humanitarian law, preventing the declaration of international responsibility directly on the basis of this body of international law in cases entailing an armed conflict.[78] Divergent views have emerged between the Inter-

[76] Drawing such a parallel and arguing on its relevance, see Elizabeth Santalla Vargas, "Agotamiento de Recursos Internos y Principio de Complementariedad: ¿Dos Caras de la Misma Moneda?", in Kai Ambos, Ezequiel Malarino and Gisela Elsner (eds.), *Sistema Interamericano de Protección de Derechos Humanos y Derecho Penal Internacional*, vol. 2, Fundación Konrad Adenauer, Montevideo, 2011, pp. 517−41.

[77] In fact, the case law of the ICC has resorted on various occasions to the jurisprudence of the regional systems of protection of human rights on the basis of Article 21(3). See, Gilbert Bitti, "Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Koninklijke Brill N.V., Leiden, 2009, p. 301.

[78] Along the same lines, Shana Tabak observes "that institutional and procedural constraints within the human rights system had led to a favouring of HRL over humanitarian law"; see Shana Tabak, "Armed Conflict and the Inter-American Human Rights System: Application or Interpretation of International Humanitarian Law?", in Derek Jinks *et al*., 2014, p. 221, see *supra* note 1.

American Commission and the IACHR as to their competence for resorting to the law of armed conflict when faced with situations where the factual background amounts to armed conflict scenarios. While the Inter-American Commission has found to be competent for applying international humanitarian law rules in such cases, the IACHR has considered that the law of armed conflict could only be applied for interpreting the American Convention on Human Rights and thus being precluded of directly applying international humanitarian law norms. However, the distinction between interpretation and direct application has become blurred with time or at least not so clear-cut as both fields of international law are intrinsically related.[79]

16.5. Concluding Remarks

From an international law standpoint, the question of the adequate jurisdictional forum (civilian or military) is central to the debate posed by the requirement, under conventional and customary law, of a fair and impartial tribunal or court. In this context, the self-interest in accountability of armed forces is necessarily linked to such understanding, and poses additional considerations moving the discussion beyond the purview of a purely 'legalistic' debate that, informed by the confluence of human rights, humanitarian law and international criminal law, arguably supports a general preference of civilian jurisdiction over human rights and international humanitarian law violations. This by no means overrides the necessary casuistic analysis supported by the fact that the operational environment and internal structure of military judicial systems vary greatly from country to country, which may result in material discrepancies as to the quality of military trials. The position advanced in this chapter ascribes, therefore, to an overall international law perspective that considers various relevant factors as a whole when addressing the question of the adequate jurisdictional forum. Such an approach applies equally to both wartime and peacetime scenarios, reducing the relevance of the traditional

[79] Alejandro Aponte draws attention to *Kononov v. Letonia* where the ECHR resorted to international humanitarian law rules in tandem with domestic provisions to analyse whether a breach of Article 7 had occurred. Commentary on the case has regarded such an application compatible with the doctrine of *renvoi*, which is embedded in Article 7. With references and further details on the discussion, see Alejandro Aponte, "El Sistema Interamericano de Derechos Humanos y el Derecho Internacional Humanitario: Una Relación Problemática", in Ambos *et al*., 2010, pp. 129−33, see *supra* note 62.

differentiated treatment when it comes to assessing the proper jurisdictional fora through the lens of the underlying rationale of self-interest in accountability.

FICHL Publication Series No. 25 (2015):

Military Self-Interest in Accountability for Core International Crimes

Morten Bergsmo and SONG Tianying (editors)

Is it in the enlightened self-interest of armed forces to have perpetrators of core international crimes brought to justice? This anthology adds the 'carrot' perspective of self-interest or incentives to the common rhetoric of 'stick' – legal obligations and political pressures. Twenty authors from around the world discuss why military actors themselves often prefer accountability: Richard Saller, Andrew T. Cayley, William K. Lietzau, William J. Fenrick, Arne Willy Dahl, Richard J. Goldstone, Elizabeth L. Hillman, Bruce Houlder, Agus Widjojo, Marlene Mazel, Adel Maged, Kiki A. Japutra, Christopher Mahony, Christopher Jenks, Franklin D. Rosenblatt, Roberta Arnold, Róisín Burke, Elizabeth Santalla Vargas, Morten Bergsmo and SONG Tianying.

The self-interests presented in this book are multi-dimensional: from internal professionalisation to external legitimacy; from institutional reputation to individual honour; from operational effectiveness to strategic stakes; from historical lessons to contemporary needs; from religious beliefs to aspirations for rule of law; from minimizing civilian interference to pre-empting international scrutiny. The case is made for long-term self-interest in accountability and increased military 'ownership' in repressing core international crimes. In his foreword, William K. Lietzau observes that of "all the international community's well-intended endeavours to foster accountability and end impunity, none is more important than that addressed in this book".

ISBN 978-82-93081-61-6 (print) and 978-82-93081-81-4 (e-book).