Global Military Justice: Where does the road lead us?

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Data de recebimento: 15/03/2023
Data de aceitação: 15/03/2023
Data da publicação: 30/05/2023

Military criminal jurisdiction has been, for centuries, a common ground for quite a large number of states across the globe. Despite new trends and loud voices coming out of countries which have (totally or partially) abolished their military jurisdiction system, the overwhelming majority of states seem to be quite reluctant, at least at the moment, to follow this road.

Over the last years, certain countries announced that they have abolished their military jurisdiction system totally, others partially, others declared that they have modernised their system, others that they only have military prosecutors (no military courts or military judges) and others that keep in having military jurisdiction under the traditional structure, meaning officers-military judges and officers-military prosecutors. Among others, nations when asked to report on their military prosecution systems, they have revealed that there is a vast variety of prosecutors who are vested with the competence to put forward a public action. Nations have referred to ordinary military prosecutors, civilian prosecutors, judge advocates, disciplinary attorneys, military prosecutors belonging to a unified Judicial Corps of the Armed Forces, officers qualified as either barristers or solicitors, legally qualified commissioned officers, Prime Ministers, regular force legal officers or government's commissars. However, whatever the particular stance of the

nations on the issue might be, there is no question that there is a common denominator which should be underlined. Clearly, it is their common acknowledgement that the armed forces continue to play a very important role in the local societies, meaning, among others, that the members thereof deserve a particular judicial treatment, should they commit criminal acts. Even nations which have completely abolished military justice and military prosecution, as institutions, have reported that they have taken other measures, either by law or practice, for this "necessary particular treatment": They assign civilian prosecutors, investigators and policemen dealing, in principle, with cases of military nature, they have established particular mechanisms or specialized jurisdictions to ensure that the "civilian system over the members of the military" works properly and they provide for close relations between judges, prosecutors and military commanders, participation of the former in military exercises and attendance of refresher courses, in the military, in order that military judges and prosecutors remain in constant touch with military life. Nations take those measures, in order that judges, prosecutors and investigators remain updated on current military developments, despite that military justice or military prosecution does not exist, as such, therein.

Over the last two decades, a great number of nations have announced that they had introduced reforms to their domestic legislation and in certain countries there is still a thorough discussion on possible reforms. In Tunisia, for instance, due to the recent fundamental institutional reforms, the whole judicial system has been modified. Discussions in Australia deal with independence and impartiality of military courts. France is considering modifying wartime legislation and abolishing of "Tribunal des Armées" which deals with offences committed by French military during operations abroad, whereas Kenya has changed its municipal law in order to make it compatible with the constitution.

With reference to Military Jurisdiction and Military Prosecution, the situation is as follows, in accordance with the most recent information I have form the nations mentioned below:

Military Jurisdiction

On the question whether nations have specialized courts or chambers dealing with criminal offences committed by military personnel in peace time, Algeria, Australia, Bulgaria, Burkina Faso, Cameroon, Canada, France, Greece, Hungary, Ireland, Kenya, Morocco, New Zealand, Switzerland, Singapore, the Netherlands, Tunisia and the United Kingdom have answered positively, whereas Austria, Belgium, Czech Republic, Germany, Lithuania, Norway and Portugal have responded negatively. Hungary and the Netherlands have reported that they have military chambers in their civilian courts, whereas Austria, Belgium, the Czech Republic, Germany and Lithuania have announced that they have abolished their military courts in peace time altogether. In the latter countries, a civilian prosecutor is in charge for the prosecution of the military personnel.

It should be noted that almost half of above mentioned states have military criminal codes which make a clear distinction between peacetime and wartime. Mostly, the differences are related to either sanctions (more severe penalties are provided for wartime) or to the potential that military courts are established only in wartime (Belgium, France, Germany and Lithuania). Finally, in some countries wartime leads to a different composition of the courts.

Most countries apply the same rules to units in homeland as to units on exercises or operations abroad. However, the legislations of Austria, Australia, Ireland and New Zealand provide for more severe sanctions to the members of their military while they commit criminal acts abroad.

Greece was the only nation to report that each branch of its armed forces has separate courts. Everywhere else, military courts have a general jurisdiction over military personnel of all branches of the military, including police forces if they are linked somewhat to the military, such as the gendarmerie.

With the exception of the Greek military courts, being the only ones to also deal with civilian requests by victims, the military courts of all other countries only have jurisdiction on criminal law issues. In some countries, this jurisdiction is limited to military criminal law issues only; however, in other countries, the jurisdiction of the military tribunals is further extended to ordinary criminal law matters. In the latter case, in some nations, this extended jurisdiction is limited to cases where a member of the military personnel is involved in a particular case as either perpetrator or victim.

In a number of states, military courts, apart from their main responsibilities, act as appeals courts to disciplinary offences.

Military criminal law is normally applicable to all active members of the military, including reservists and, in certain cases, also to civil servants being assigned in the defence departments of the nations. This jurisdiction, in some countries is becoming wider during wartime and it is being extended to prisoners of war, to civilians accompanying troops, to civilians working with "important institutions" (e.g. in Switzerland) and to nationals of the enemy (e.g. in France).

In wartime the jurisdiction is normally enlarged, more severe punishments are in place, the time schedules for the proceedings are shortened and there may be extension of jurisdiction to civilians.

The members of the military courts (judges) are normally military (sometimes within a specialized "military judges corps"); however, they also may be civilians, preferably former military personnel or reservists, becoming personnel on active duty when acting as judges.

The independence of military justice is guaranteed by several means. It may be protected by law, by permanent appointments of judges and members of the military courts or by the particular statute of the military members of those courts. Disciplinary rules may apply to those members of the military; however they do not have to obey orders given by members of the military hierarchy. Further, they may no longer be evaluated by the military chain of command. However, in some cases, the method of appointment or promotion of the members of the military courts may interfere with their administrative independence. For instance, in Canada and Morocco the military judges are appointed for a limited period of time (five and one year, respectively), in Kenya and Singapore military courts are established ad hoc and their members are appointed on this occasion only, whereas in Morocco military judges continue to be evaluated by the military chain of command.

With the exception of Germany, in all countries the proceedings are open to the public. Restrictions (trials behind closed doors) may only be imposed due to security reasons, morality, public order or security of witnesses. In Germany, the public may be allowed to attend the proceedingson demand of the accused or where there are legitimate interests to do so.

In most countries, the judgements of military courts may be appealed. In Burkina Faso, however, there is no appeal. The parties may only proceed to the Supreme Court. It would be noted, though, that a reform is on the way in order to have the right of appeal introduced also in this nation.

With reference to the jurisdiction of the courts in cases where there are accused, some of which are military and others civilians, the nations' positions vary. In some nations, all accused are get tried in military courts, in other nations each accused is tried in the respective court (the civilians in civilian courts and the military in military courts), whereas in other nations, all accused are tried in civilian courts.

Finally, as regards the jurisdiction of the military courts in cases where a non military crime has been committed together with a military offence, it would be noted that, in most cases, military courts deal with both military and non military offences; however, in some cases, non military offences may be tried in civilian courts. In two countries (Morocco and Tunisia) all offences are tried by the same court depending on the gravity of the offence: The gravest offence determines the court where the whole of the offences would be tried and if several offences have the same degree of gravity, military courts get the priority.

Military Prosecution

There is no doubt that prosecution constitutes "the heart" of the whole of the criminal proceedings. Without the so called "criminal demand" of the state the whole process would not exist at all. Thus, particular attention is to be attached on what nations are doing.

On the question whether military prosecution systems exist, Algeria, Australia, Bulgaria, Burkina Faso, Cameroon, Canada, Greece, Hungary, Ireland, Kenya, New Zealand, Norway, Switzerland, Singapore, the Netherlands, Tunisia and the United Kingdom have responded positively, whereas Austria, Belgium, Czech Republic, France, Germany, Lithuania, Morocco and Portugal have reported that military prosecution systems, as institutions, do not exist therein.

As already indicated, the organization and structure on such an important institution, as prosecution is, remains really dissimilar in the various nations. Most nations have a military prosecution structure, in the traditional sense, whereas others do not. This picture is directly linked to the internal situation of the various nations, location, security interests, tradition and potential to amend municipal law without constitutional or other legal difficulties in order to follow international developments.

A common denominator has been thoroughly indicated, that nations have taken a variety of measures, mostly under the form of statutory provisions and structural command arrangements, in order that military prosecutors and investigators remain free from command influence when performing their tasks. Thus, in most cases, they enjoy functional and personal independence, however, in general, they remain subject to military disciplinary regulations.

Georges Clémenceau was saying that "military justice is to justice what military music is to music". It means that it is one with justice, an important part of it. As already indicated, militaries throughout the world (of course with exceptions) operate their own service tribunals to prosecute military crimes, such as insubordination, which are not part of civilian criminal codes. Certain states have traditionally extended this jurisdiction to cover all crimes committed by their personnel, no matter if they are military crimes or not. The reason behind this seems to be that those states want to secure a rapid conclusion of the criminal proceedings and to ensure that more severe penalties are imposed to perpetrators. This is quite normal and absolutely acceptable. The difficulty lies in states where the reason for this extension is different and is related to a long standing effort from the part of the administration to prosecute and try itself offences committed by its own military personnel (ultimately, to try its own actions) with the purpose to cover their criminal character and to have punishments escaped. This is a quite an anomalous situation and cannot be seen in democratic societies where the principle of equality before the law cannot be eroded, the civilian control over the military cannot be threatened, and a culture of impunity cannot be fostered. Those thoughts bring us to the point to underline the importance of the functional and personal independence of military judges and prosecutors. The question whether the whole structure of military jurisdiction in a certain country is subordinate to either the Ministry of Defence or to the Ministry of Justice, is not an issue; nor if both civilian and

military criminal codes and codes on criminal jurisdiction, very modern in character and very democratic, are in force in a certain country. What really counts is that states must have absolutely secured and safeguarded the independence of military judges and prosecutors. On this concern, states normally report that independence is properly secured, by law and practice; however nobody may have a clear picture on this, unless he is himself a member of the military in this country, particularly a military judge or a military prosecutor. Reforms are always necessary, since the law always must follow the current trends of the local societies, but everybody understands that, apart from trends on military jurisdiction, reforms on military courts in certain countries are the result of the relative balance between the extent of military autonomy and the strength of the civilian reform movement.

I am entering now into the more sensitive questions having to do with military jurisdiction: Do we really need military jurisdiction? Was Georges Clémenceau right? Do we need military justice to justice, as military music to music? Who may answer with a yes or a no? And if we need it, what kind of political oversight would we have over it?

Each country has its own approach on those questions. If I would start with the latter question, I would say that the common ground seems to be that states recognize that definitely there would be a political oversight over the military, the so called "democratic control of the military". But what would be the substance of this with reference to military jurisdiction? Of course, the answer is not one and only. Some nations, after years of debates and popular demands for change, tend to conclude that the military should always be subsumed under civilian life. It means that civilians would also judge the military's actions as well, since life needed to be purged from politically motivated actors and unlawful attacks against civil societies. Other countries show a different approach, however. Colombia, for instance, has spent great periods of time debating whether civilian oversight of alleged military crimes was actually a good idea. What I would simply say on that is

that each nation's answer and its content would be unique, since, by all means, it would be based on factors such as history, experience, location of the country, tradition, internal situation and security interests.

I am now, and finally, returning to the initial question of this final part. Do we need military justice? Again, there is no identical stance from the part of the nations. One might say that since the members of the military, by the nature of their capacity, are exposed to such high risks in combat and they live the whole of their professional life in a military environment, they should never be tried by judges who would not understand what it entails to be a member of the armed forces. This position might be answered on the ground that this concern seems to have reasons only if it would be related to military crimes; however, once again, the answer is directly related to what the particular state in question wants to do with military jurisdiction.

What I have to underline is that there are practical issues to be taken into account, together with questions of substance. For instance, countries which no longer maintain a military judiciary and they do not recognize investigation rights and duties to the officers of the military, encounter major difficulties. In those cases, investigations are being assigned to civilian investigators. Unavoidably, it would cause delays in gathering substantial evidence at the preliminary stage. In certain criminal cases this hot evidence will be definitely lost, if vanished in the meantime. Similar difficulties exist in cases where a member of the military carries out a crime abroad, at a location where there is a weak or non existent military presence. In those cases, a civilian investigator will conduct the investigation at home, with the serious disadvantages already mentioned.

The questions of substance are, of course, more serious and would determine the stance of the nations against military jurisdiction. Does the state in question recognize that members of the military, due to their different and quite heavy professional life deserve a different treatment when they commit criminal offences? If the answer is positive, what would be the

different treatment? If we say that criminal proceedings should, by all means, be concluded quickly, in order that the necessary discipline is safeguarded and justice is rendered properly by independent military judges and military prosecutors, with more severe penalties on military crimes, perhaps, then, military jurisdiction is necessary. On the other hand, if the approach is that the members of the military are nothing else than normal citizens of the country, therefore they would be tried under the ordinary criminal laws being in force for every citizen, no matter if it entails into delays, possible loss of evidence and possible improper rendering of justice (by judges who are unfamiliar with military life), that state may consider abolishing the military justice system, totally or partially.

What it counts is always the substance: All those who take decisions of this character in the nations, must have constantly in mind that there really can be no peace without justice and that there can be no justice without truth. Further, they should never forget that the way to a powerful future can be found in the non-negotiable demands of human dignity. Dignity requires the rule of law, limits on the power of the state, equal justice, respect for women, private property and religious tolerance. No nation owns these principles. No nation is exempt from them. All of them should be carried out by all of us and, in so doing, offering people hope for a better day.