MILITARY JUSTICE FOR WAR CRIMES IS NOT JUSTICE

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ABSTRACT

This Articles establishes that given the increasing international appreciation of military courts' inherent deficiencies, the Geneva Conventions' outdated presumption of. and preference for, military courts for the disposition of war crimes should be jettisoned in favor of civilian criminal justice systems. Such recalibration is necessary because, as highlighted by human rights courts, governments, and human rights bodies, military justice is inferior justice, at least in nations with independent and fair civilian courts. Civilian criminal justice systems are normatively preferable to military courts for the prosecution of war crimes, given the criticality of such prosecutions to international humanitarian law itself.

The immediate context for this Article's premise is the widespread recognition that military courts are inappropriate for trying serious human rights violations. Supplementing this realization is the growing acknowledgment that military courts are ill-suited for the fair disposition of all serious crimes, given such systems' inherent structural defects. Criminal justice systems operated within and by armed forces are best reserved, if maintained at all, exclusively for service members commission of minor, military-unique offenses that are directly linked to military discipline. It is time international humanitarian law is reconciled with human rights law to expressly exclude the use of military courts for the prosecution of grave breaches and other war crimes. They are deficient in peace time, and doubly so in war.

I. INTRODUCTION

The centerpiece of international humanitarian law, the Geneva Conventions of 1949 and its protocols, requires states[1] to prevent specific war crimes known as grave breaches, suppress them when they do occur, and to punish those involved in their commission.[2] Punishment means criminal prosecution. Accountability of grave breaches and other serious war crimes through fair penal sanction is considered central to the efficacy of international humanitarian law (the laws and customs of war).[3]

Given this prosecutorial mandate, war crime trials are surprisingly rare, at least relative to the frequency of armed conflicts around the globe.[4] When they do occur, they are typically conducted domestically.[5] Despite the media attention showered upon international courts such as the International Criminal Court (ICC) and the former International Criminal Tribunal for the former Yugoslavia (ICTY), international accountability for war crimes is not dominant. Rather, domestic prosecutions of grave breaches and other war crimes, committed by a state's own armed forces and by its enemies once captured, are the actual as well as paradigmatical norm.[6] Simply put, states' exercise of universal jurisdiction and international courts' wide jurisdictional sweep both take a back seat to domestic courts when it comes to responding to war crimes.[7]

The typical fulfillment of the Geneva Conventions' (Conventions) prosecutorial requirement is the domestic prosecution of war crimes (the other simply being the failure to prosecute).), Hence the *type* of domestic prosecutorial fora—specifically military versus civilian—warrants attention.[8] Part II of this Article outlines the Geneva Conventions' outdated presumption of military courts and situates this choice within international humanitarian law's accountability framework.[9] This Part also highlights the

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1. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I RULES (Cambridge Univ. Press 2009) [hereinafter ICRC STUDY] ("[W]hile the Geneva Conventions enjoy universal adherence today, this is not yet the case for other major treaties, including the Additional Protocols.").

2. *See infra* Part II (detailing the different legal frameworks of the Geneva Conventions).

3. *See infra* Part II (examining the accountability framework of the Geneva Conventions).

4. *See* Richard Wilson, *War Crimes: History, Basic Concepts, and Structures*, 37 CRIM. JUST. 3, 6 (2022), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2022/fall/war-crimes-history-basic-concepts-and-structures/ (explaining the general background on war and prosecution).

5. *Id.* at 4–6.

6. *Ukraine War Crimes Investigations and Prosecutions*, ABA WASH. LETTER (May 24, 2023), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may-23-wl/ukraine-0523wl/ (noting that Ukraine has convicted thirty-one Russians in domestic courts for war crimes during the current international armed conflict, as of May 2023).

7. *See infra* Part II (emphasizing the importance of domestic courts).

8. Wilson, *supra* note 4, at 4–5; *Ukraine War Crimes Investigations and Prosecutions*, *supra* note 6.

9. *See infra* Part II (explaining the accountability framework).

fair trial and fundamental due process guarantees required by both the Geneva Conventions and international human rights law with regard to war crimes prosecutions.[10] Additionally, it explains the Conventions' prosecutorial non-discrimination requirement: the same criminal justice system must be used to prosecute enemy prisoners of war as for a state's own armed forces.[11]

Part III focuses on the leading modern military justice systemic reforms, highlighting the overall western movement away from military courts.[12] This diminution of military justice is largely fueled by recognition of military courts' structural deficiencies regarding independence and impartiality, a recognition best explicated by human rights bodies and tribunals.[13] Part III notes the trend to severely limit as well as in some states eliminate military jurisdiction, a contraction that started with the prohibition of prosecuting civilians in military courts, and has since spread to restriction of their jurisdiction *ratione materiare*, their subject matter jurisdiction. As this part notes, significant concerns remain regarding military courts' overall validity and compatibility with democratic norms and human rights principles.[14]

This Article emphasizes that the fundamental weaknesses of military justice *writ large* undermine the legitimacy and efficacy of international humanitarian law, thus contributing to battlefield impunity.[15] Connecting the dots between Parts II and III reveals that the factual predicate underlying international humanitarian law's presumption of military courts no longer exists: military courts are unnecessary in today's technologically-advanced era, and cannot comport with modern conceptions of fair trial and due process guarantees, at least not to the same extent as civilian systems.[16] The law of war's (international humanitarian law's) presumptive default to military courts is rebutted by such acknowledgments, and the normative preference for military courts that is the subtext of international humanitarian law's presumption should likewise be jettisoned.[17]

10. *See infra* Section II.C (describing the due process guarantees).

11. *See infra* Part II (stating that this requirement applies in an international armed conflict, such as the current one between Ukraine and Russia).

12. *See infra* Part III (describing the reasoning behind military justice and current trends).

13. *See infra* Section III.B (explaining this trend further).

14. *See infra* Section III.B (questioning the validity and compatibility of civilians in military courts).

15. *See infra* Section III.A (explaining the issues and weaknesses of military justice).

16. *See infra* Section III.A (discussing the general conclusion of issues with modern military justice).

17. *See infra* Part II (detailing the Geneva Presumption of military courts).

This Article extends the scholarly,[18] judicial,[19] and human rights bodies'[20] conversations regarding the inappropriateness of military courts—their inappropriateness for the trial of civilians, and for trial of serious human rights violations committed by military members—to war crimes.[21] This Article concludes by arguing that in the humanitarian law context, the prosecution of war crimes, along with other serious human rights violations (plus all criminal misconduct committed by law of war detainees) should be

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18. *See* 1 INT'L COMM'N OF JURISTS, MILITARY JURISDICTION AND INTERNATIONAL LAW: MILITARY COURTS AND GROSS HUMAN RIGHTS VIOLATIONS 13 (2004) [hereinafter MILITARY JURISDICTION], https://www.icj.org/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf (emphasizing that the military courts lack the independence and impartiality to fairly try serious human rights violators); *see also* Brett J. Kyle & Andrew G. Reiter, *Militarized Justice in New Democracies: Explaining the Process of Military Court Reform in Latin America*, 47 L. & SOC'Y REV. 375, 380 (2013) (emphasizing that, "[m]ilitary control over prosecution of its personnel when they are accused of human rights violations permits the institution to act with impunity"); Daniela Cotelea et al., *The Role of Military Courts Across Europe: A Comparative Understanding of Military Justice Systems*, FINABEL 12 (May 2021), https://finabel.org/wp-content/uploads/2021/06/20.-The-role-of-Military-Courts-across-Europ.pdf (agreeing with human rights bodies that have called for excluding human rights violations from military jurisdiction); Stefano Manacorda & Triestino Mariniello, *Military Criminal Justice and Jurisdiction over Civilians: The First Lessons from Strasbourg*, *in* MULTILEVEL REGULATION OF MILITARY AND SECURITY CONTRACTORS: THE INTERPLAY BETWEEN INTERNATIONAL NORMS, EUROPEAN AND DOMESTIC NORMS 559 (Bakker & Sossai eds., 2012) (explaining a brief history of military criminal justice and jurisdiction over civilians). *See generally* Juan Carlos Gutiérrez & Silvano Cantú, *The Restriction of Military Jurisdiction in International Human Rights Protection Systems*, 7 INT'L J. ON HUM. RTS. 74, 75 (2010) (examining cases where military jurisdiction is applied for civilians).

19. *See, e.g.*, Durand v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser C) No. 68 (2000) (finding that human rights offenses are not of a military nature and cannot be prosecuted in military courts, as not constituting independent or impartial courts as required by the American Convention on Human Rights); *see also* Radilla Pacheco v. Mexico, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 273 (Nov. 23, 2009) ("[M]ilitary criminal jurisdiction is not the competent jurisdiction to investigate and, in its case, prosecute and punish the authors of violations of human rights but that instead the processing of those responsible always corresponds to the ordinary justice system. . . . The judge in charge of hearing a case shall be competent, as well as independent and impartial").

20. *See, e.g.*, Emmanuel Decaux (Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights), *Draft Principles Governing the Administration of Justice Through Military Tribunal (Decaux Principles)*, ¶ 32–35, U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006) [hereinafter *Decaux Principles*] (emphasizing that, consistent with voluminous human rights bodies' findings, that "serious human rights violations" are not for military courts given they fall outside the scope of military duty); *see also* Organization of American States, Inter-American Convention on Forced Disappearance of Persons art. IX, June 9, 1994, O.A.S.T.S. No. 68 ("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. The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties.").

21. *See*, *e.g.*, Elizabeth Santalla Vargas, *Military or Civilian Jurisdiction for International Crimes? An Approach from Self-Interest in Accountability of Armed Forces in International Law*, *in* MILITARY SELF-INTEREST IN ACCOUNTABILITY FOR CORE INTERNATIONAL CRIMES 401, 413–14 (Morten Bergsmo & Song Tianying eds., May 29, 2015), https://www.corteidh.or.cr/tablas/r33827.pdf (arguing that neither war crimes or human rights violations should be tried in military courts, regardless of perpetrator). *But see* Geoffrey S. Corn & Rachel E. VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309, 337–38 (2020) (arguing that military courts are best situated, at least in the United States, to provide accountability for service members' war crimes, a position this author was leery taking then and is adamantly opposed to now).

conducted exclusively in civilian courts.[22]

Military criminal courts should be reserved for military-unique offenses for those in uniform only if civilian courts are incapable of trying such crimes, and only if such military systems are able to be structured with sufficient independence and impartiality, a difficult task.[23] The long-term goal should be the elimination of military courts *in toto*, even as exceptional measures—at least in functioning democracies that prize human rights and civilian control of the military over military parochialism and arbitrary military power.[24]

II. GENEVA CONVENTIONS' ACCOUNTABILITY FRAMEWORK

A. Compliance Requires Enforcement

Recognizing the need to protect human rights[25] in the wake of the atrocities of World War II, the 1949 Geneva Conventions built upon its predecessors to establish comprehensive rules regarding behavior during armed conflict.[26] To ensure compliance, the Conventions established an accountability framework for violations of its regulatory provisions.[27] Its drafters recognized what is true for all legal regimes: compliance with its rules requires consequences for violations; rules require enforcement.[28] Law

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22. *See infra* Part IV (arguing that human rights cases should not be heard in military courts).

23. *See infra* Part IV (distinguishing when it may be appropriate for cases to be heard in military courts).

24. *See infra* Part IV (discussing the elimination of military courts as a whole).

25. *See generally* Boyd van Dijk, *Human Rights in War: On the Entangled Foundations of the 1944 Geneva Conventions*, 112 AM. J. INT'L L. 553, 567 (2018) (describing the 1949 Geneva Conventions as furnishing "a new interpretation of humanitarian law" that layered human rights conceptions onto previous humanitarian, or law of war, paradigms).

26. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter GC IV].

27. *See* Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INT'L L. STUD.: U.S. NAVAL WAR COLL. 1, 346 n.14 (1977) ("At the 1949 Diplomatic Conference the Netherlands delegate (Mouton) took the position, one that is particularly applicable to a code dealing with the law of war, that 'an international convention had no strength without the possibility to enforce it, had no strength without sanctions.'"); *see also* Corn & VanLandingham, *supra* note 21, at 320–21 (outlining vital need for accountability for war crimes violations as a means of ensuring general compliance).

28. OLIVER WENDELL HOLMES, THE COMMON LAW 49 (1881) ("The purpose of the criminal law is only to induce external conformity to rule. All law is directed to conditions of things manifest to the senses . . . its purpose is to put a stop to the actual physical taking and keeping of other men's goods, or the actual poisoning, shooting, stabbing, and otherwise putting to death of other men . . . ."); *see also* U.N. Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,

that is not enforced is law that is ineffective, particularly during war when the most intense of emotions and dynamics are at play;[29] this recognition is continued in the Conventions' protocols.[30]

The Conventions' accountability framework places responsibility on states to prevent war crimes bearing the grave breach label, suppress them where and when discovered, and finally, to punish their perpetrators through criminal prosecution.[31] This state responsibility explicitly devolves to military commanders: the Conventions link combatant immunity, which is the legal shield against prosecution for lawful acts of war, to the concept of "responsible command."[32] This combatant privilege against prosecution is conferred only upon belligerents fighting under commanders who are responsible for the compliance triad of prevention, suppression and punishment of grave breaches, and for adherence to the Conventions generally.[33]

¶ 14–16, U.N. Doc. S/2004/616 (Aug. 23, 2004) (discussing the need for accountability to sustain the rule of law). *See generally International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 411, 447 (1947) ("Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.").

29. *See* 1 MARCO SASSÒLI ET AL., HOW DOES LAW PROTECT IN WAR? 44 (3d ed. 2011) ("The regular prosecution of war crimes would have an important preventive effect, deterring violations and making it clear even to those who think in categories of national law that [international humanitarian law] is law."); *see also* Donald J. Guter et al., *The American Way of War Includes Fidelity to Law: Preemptive Pardons Break that Code*, JUST SEC. (May 24, 2019), https://www.justsecurity.org/64260/the-american-way-of-war-includes-fidelityto-law-preemptive-pardons-break-that-code ("Just and fair consequences for violations safeguard overall fidelity to the law, contributing to the good order and discipline of military units . . . ."). *See generally* Corn & VanLandingham, *supra* note 21, at 329 (analyzing the nexus between accountability for war crimes and legitimacy).

30. *See, e.g.*, INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1675 (Yves Sandoz et al. eds., 1987) [hereinafter AP I COMMENTARY] (referencing article 43's requirement for an internal disciplinary system as a *sine qua non* of armed forces: "it is clearly impossible to comply with the requirements of the Protocol without discipline").

31. *See* GC I, *supra* note 26, art. 49; GC II, *supra* note 26, art 50; GC III, *supra* note 26, art. 129; GC IV, *supra* note 26, art. 146; *see also Basic Rules of the Geneva Conventions and Their Additional Protocols*, INT'L COMM. RED CROSS 3 (1988), https://www.icrc.org/en/doc/assets/files/other/icrc_002_0365.pdf ("Military commanders must be watchful to prevent breaches of the Conventions and the Protocol, will suppress them and, if necessary, report them to the competent authorities.").

32. *See* Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 87, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter AP I] (requiring military commanders to prevent, suppress, and report violations of the Conventions and Protocols and obligating, inter alia, that state parties "require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof"); *see also* AP I COMMENTARY, *supra* note 30, at 43 (noting that at the troop level, "everything depends on commanders").

33. *See* GC III, *supra* note 26, art. 4 (outlining requirements for prisoner of war status). International humanitarian law has explicitly linked combatant immunity to responsible command since 1899. *See* Hague Convention with Respect to the Laws and Customs of War on Land art. 43, July 29, 1899, 32 Stat. 1803 (entered into force Jan. 26, 1910) [hereinafter Hague Convention II]; Hague Convention (IV)

Importantly for this Article, the mechanism that the Geneva Conventions and their Protocols presume will enable commanders to effectively exercise their trio of command responsibilities (particularly that of punishing those who violate the Convention) is a set of internal disciplinary rules and procedures.[34] In the terms of Additional Protocol I (AP I), this set of rules constitutes an "internal disciplinary system."[35] While neither the Conventions nor their protocols define such system, commanders are expressly required to "to initiate disciplinary or penal action against violators" of the Conventions;[36] the official Commentary to AP I explicitly provides that "the expression 'internal disciplinary system,' . . . covers the field of military disciplinary law *as well as that of military penal law*."[37]

Hence both state and command responsibility for war crimes implicate military justice systems: as noted in the Commentary to AP I, "the modern trend is to regard violations of rules of the Protocol and of other rules of international law as matters primarily of military penal law."[38] As further discussed in Part III, the phrase "military penal law" usually refers to states' unique military criminal justice systems originally established to maintain good order and discipline within the ranks.[39] This paradigmatical and actual relegation of war crimes accountability to domestic military justice systems loudly raises, or should raise, a question regarding these systems' ability to provide accountability in a manner that meets modern fundamental fair trial guarantees.

B. Duty to Prosecute Grave Breaches

As mentioned above, the Conventions' repression regime categorizes specific violations of its provisions as "grave breaches;" related to such

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Respecting the Laws and Customs of War on Land art. 43, Oct. 18. 1907 (entered into force Jan. 26, 1910) [hereinafter Hague Convention IV]; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, July 27, 1929, 118 L.N.T.S. 343 (entered into force Oct. 21, 1950). *See generally* Geoffrey S. Corn, *Contemplating the True Nature of the Notion of "Responsibility" in Responsible Command*, 96 INT'L REV. RED CROSS 901, 904 (2014) (analyzing the legal concept of responsible command and highlighting that "[p]reparing a military unit to execute its combat function within the bounds of IHL is therefore an inherent expectation of responsible command").

34. *See* AP I, *supra* note 32, art. 87; *see also* GC I, *supra* note 26, art. 49; GC II, *supra* note 26, art. 50; GC III, *supra* note 26, art. 129; GC IV, *supra* note 26, art. 146 (repeating the three command responsibilities as a set of rules to ensure discipline).

35. *See* AP I, *supra* note 32, art. 43(1) ("[A]rmed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.").

36. *Id.* art. 87; *see also* AP I COMMENTARY, *supra* note 30, at 1022, ¶ 3562 (noting that this provision does not require commanders to encroach upon judicial authorities but rather to exercise the authorities given them to report, investigate, and if they wield such authority, to prosecute).

37. AP I COMMENTARY, *supra* note 30, at 513, ¶ 1675 (emphasis added).

38. *Id.*

39. *See infra* Part III (explaining why military courts should be limited to military members only and civilians should be tried by state courts).

crimes, it imposes an *aut dedere aut judicare,* "surrender or judge," obligation on all states party to the Conventions (all states) to search for and criminally prosecute[40] those alleged to have committed grave breaches, or transfer them to a party that will.[41] Outside of grave breaches, the Conventions establish a separate obligation to suppress all other violations of the Conventions[42] as well as repress—including prosecution—serious violations outside of those listed as grave breaches.[43] Each of the four Conventions include a list of grave breaches pertaining to those persons protected by that particular Convention.[44] These breaches include violent acts as well as the courtroom crime of denying fair trial guarantees during prosecution of protected persons.[45] While treaty law does not include grave breaches in non-international armed conflicts nor does it provide a similar repression regime,[46] various accountability pathways—including some with

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40. The Conventions' duty to prosecute requires sufficient evidence to prosecute; this mandate considers that domestic criminal procedural rules, such as the requirement for probable cause prior to prosecution, will operate. However, if such evidence does exist, this obligation eliminates prosecutorial discretion and leaves two choices: to prosecute or extradite to a State Party that will. INT'L COMM. RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR art. 129, ¶ 5127 (2020) [hereinafter ICRC 2020 COMMENTARY ON GC III], https://ihl-databases.icrc.org/ihl/full/GCIII-commentary.

41. *See supra* note 26 and accompanying text ("Military commanders must be watchful to prevent breaches of the Conventions and the Protocol, will suppress them and, if necessary, report them to the competent authorities.").

42. *See, e.g.*, GC III, *supra* note 26, art. 129 ("Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following [a]rticle . . . ."); *see also* GC I, *supra* note 26, art. 49 (repeating the identical duty to suppress all acts other than grave breaches); GC II, *supra* note 26, art. 50 (same); GC IV, *supra* note 26, art. 146 (same).

43. *See* INT'L COMM. RED CROSS, COMMENTARY ON GENEVA CONVENTION III art. 129, at 624 (1960) [hereinafter ICRC 1960 COMMENTARY] (providing that "[h]owever, there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed, and only in the second place administrative measures to ensure respect for the provisions of the Convention"); *see also id.* art. 130 3(b), at 629 (noting that enabling legislation must include a "general clause providing that other breaches of the Convention will be punished by an average sentence, for example imprisonment for from five to ten years . . . . This general clause should also provide that minor offences can be dealt with through disciplinary measures").

44. *See* GC I, *supra* note 26, art. 50; GC II, *supra* note 26, art. 51; GC III, *supra* note 26, art. 130; GC IV, *supra* note 26, art. 147; AP I, *supra* note 32, art 11(4); *see also* U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 1094, § 18.9.5.2 (2016) [hereinafter DOD LAW OF WAR MANUAL], https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf (noting that while grave breaches are war crimes, the universe of war crimes—or serious violations of international humanitarian law—is larger than grave breaches).

45. For example, GC III, *supra* note 26, art. 130 lists the following as grave breaches: "willful killing, torture, or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." GC III, *supra* note 26, art. 130.

46. *See* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 129, ¶ 5171 (noting the history behind and the current state of not extending the grave breaches regime to non-international armed conflicts).

universal jurisdiction—have been created or extended by customary international law, international tribunal decisions, and domestic law for serious violations of international humanitarian law committed during non-international armed conflicts.[47]

Regarding international armed conflicts, states have, for the most part,[48] established domestic criminal laws to prosecute those alleged to have committed grave breaches,[49] in fulfillment of their treaty obligation to pass enabling legislation.[50] This includes legislation providing crimes, proceedings, and jurisdiction—judicial as well as investigative mechanisms are needed to fulfill states' prosecutorial duty—furthermore, the Conventions require universal jurisdiction for the prosecution of war crimes, regardless of nationality.[51] Prosecution "regardless of nationality" was drafted specifically[52] "to give all [s]tates . . . the means to prevent impunity and to deny safe haven to alleged perpetrators of grave breaches."[53]

The Conventions' accountability regime does not specify what type of penal system states and their required domestic legislation must utilize for

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47. GARY D. SOLIS, THE LAW OF ARMED CONFLICT 100 (3d ed. 2021) (concluding that "there are war crimes and grave breaches in non-international armed conflicts"); *see also* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art.130, ¶ 5173 ("Grave breaches are part of the wider category of serious violations of international humanitarian law that States are called upon to suppress in *both* international and non-international armed conflicts . . . .") (emphasis added).

48. ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 129, ¶ 5131 ("Subsequent practice has shown that [s]tates Parties undoubtedly understand [a]rticle 129 as providing for universal jurisdiction. More than 115 national laws have extended this form of jurisdiction to the list of grave breaches . . . ."). *But see id.* at 5132 (noting that many states have universal jurisdiction in principle while conditioning prosecution on accused's presence in their territory).

49. The United States did not enact its GC III article 129 domestic penal legislation until 1986, and even then did not enact universal jurisdiction, given that the 1986 War Crimes Act (18 U.S.C. § 2441) required either nationality or passive personality jurisdictional nexus; it was not until this year, 2023, that Congress, responding to domestic and international demands for accountability for Russian war crimes, amended 18 U.S.C. § 2441 in its "Justice for Victims of War Crimes Act" to apply U.S. federal criminal jurisdiction to named war crimes without any jurisdictional nexus, except for requiring that the offender be in the territory of the United States. S. 4240, 117th Cong. § 2 (2022), https://www.congress.gov/117/bills/s4240/BILLS-117s4240enr.pdf; *see also* Todd Buchwald, *Unpacking New Legislation on US Support for the International Criminal Court*, JUST SEC. (Mar. 9, 2023), https://www.justsecurity.org/85408/unpacking-new-legislation-on-us-support-for-the-international-criminal-court/ (chronicling evolution in U.S. war crimes legislation).

50. *See* GC I, *supra* note 26, art. 49; GC II, *supra* note 26, art. 50; GC III, *supra* note 26, art. 129; GC IV, *supra* note 26, art. 146.

51. ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 129, ¶¶ 5129–30 ("[U]niversal jurisdiction must also be provided for in national legislation, to ensure that any State Party, and not only States party to an armed conflict, is able to exercise its jurisdiction over alleged offenders regardless of their nationality . . . .").

52. *See* Roger O'Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 811, 811–31 (2009) (defining universal jurisdiction and noting the lack of "territoriality, nationality, passive personality and the protective principle").

53. ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 129, ¶ 5130; *see also* ICRC 1960 COMMENTARY, *supra* note 43, art. 129, at 619 (noting that the experts who drafted the first text of the article believed that the "universality of jurisdiction in cases of grave breaches would justify the hope that such offences would not remain unpunished").

grave breaches.[54] The relevant provisions leave it up to states to decide how to incorporate grave breaches into their criminal law, and notably, leaves to states whether to utilize military tribunals instead of civilian courts.[55] Parties such as the United States waited until 1986 to enact new domestic legislation in fulfillment of its 1949 treaty obligation, believing, like others, that its military criminal code (governing courts-martial and military commissions) already fulfilled this treaty-based legislative requirement.[56]

It is clear that the Conventions' drafters considered but decided against establishing a war crimes penal code.[57] They intentionally left to states, based on states' existing laws and traditions, to implement however states saw fit the requirement of domestic legislation outlining effective penal sanctions.[58] Despite continuing concern that many state statutory regimes fail to provide for the "effective penal sanction" of grave breaches (and, importantly, for those who order them)[59] as the Conventions mandate—concern reflected in establishment of international tribunals such as the ICC—the grave breaches regime continues to favor national prosecution.[60]

Indeed, "[t]he Rome Statute . . . reaffirmed the primacy of national prosecution" of grave breaches.[61] Yet despite states' original tendency to implement their 1949 Conventions' obligations by giving their existing military justice systems jurisdiction over grave breaches, as in the United States, there has been a growing movement away from military courts in general, as described *infra*, which has implications for grave breaches

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54. *See generally* Knut Dormann & Robin Geiss, *The Implementation of Grave Breaches into Domestic Legal Orders*, 7 J. INT'L CRIM. JUST. 703, 709 (2009) (indicating the broad interpretation of the required legislation).

55. ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 129, ¶ 5107 ("The implementing legislation ought to provide for penal sanctions that are appropriate and can be strictly applied. Penal sanctions, as opposed to disciplinary ones, will be issued by judicial institutions, be they military or civilian, and will usually lead to the imprisonment of the perpetrators, or to the imposition of fines. Because of their seriousness, imprisonment is widely recognized as a central element in punishing grave breaches and other serious violations of humanitarian law.").

56. *See* Corn & VanLandingham, *supra* note 21, at 335–36 n.101 (detailing the history of the U.S. War Crimes Act).

57. ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 82, ¶ 3557 ("The inclusion of the 'principle of assimilation' in [a]rticle 82 reveals that the drafters of the Third Convention did not intend to establish 'a code of penal laws or criminal proceedings' applicable to prisoners of war . . . .").

58. *Id.* at 5113–18 (detailing the variety of options for implementing legislation); *see also* Dormann & Geiss, *supra* note 54, at 703–21 (noting criticism of such legislation).

59. ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 129, ¶ 5104 ("[T]he adopted version of [a]rticle 129 extends the penal responsibility of the person committing a grave breach to whoever ordered the breach to be committed, a welcome improvement on the Stockholm draft."); *see also id.* at 5120 (noting that state practice has also recognized that those not only ordering but also "assisting in, facilitating or aiding and abetting the commission of such crimes" possess liability for grave breaches, as well as are "criminally responsible for planning or instigating their commission").

60. Dormann & Geiss, *supra* note 54, at 706.

61. *Id.* at 718 (noting that the ICC Statute "has thus added an important incentive for states to ensure that they are at least capable and ready to prosecute offenders nationally on an equal footing as the ICC"); Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter ICC Statute].

prosecutions.[62]

C. Fair Trial Guarantees & Courtroom War Crime

The grave breaches regime, while leaving to states whether to utilize military or civilian courts, requires that all such prosecutions meet minimum fair trial guarantees.[63] The willful failure to provide these fair trial and due process guarantees within domestic prosecutions of grave breaches of protected persons is itself a grave breach, if they lead to a denial of a fair trial—the only procedural grave breach war crime.[64] These guarantees are numerous and intended to militate against the natural tendencies of achieving, through procedural shortcuts, illegitimate "victor's justice."[65]

The specific procedural guarantees required during grave breaches' prosecutions include all those mandated by the Conventions and AP I for judicial criminal proceedings against protected persons, such as prisoners of war (governing criminal trials for crimes committed during detention, distinct from pre-capture war crimes).[66] Specifically, the trial guarantees at issue are sprinkled throughout numerous Convention articles; for example, article 105, GC III lists numerous fair trial rights for the accused, and complements procedural safeguards included within articles 82–108, GC III.[67] GC IV provides similar guarantees for civilian internees; importantly, the Conventions require that civilians in occupied territory be tried by regular military courts of the occupying power, with jurisdiction limited to offenses during occupation plus war crimes committed prior to it.[68]

Article 130, GC III and article 147, GC IV (each Convention's grave breaches provision) specify that the failure to provide the rights "prescribed in this Convention" may constitute itself a grave breach by omission; the protections required in grave breaches prosecutions extend beyond only those listed in those Conventions themselves to also include those listed in article

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62. *See generally* Annika Jones & Alf Butenschøn Skre, *Military v. Civilian Justice for Core International Crimes*, F. INT'L CRIM. & HUM. L. POL'Y BRIEF SERIES, no. 1, Nov. 9, 2010, https://www.toaep.org/pbs-pdf/1-jones-skre (describing this trend); *infra* Section II.D.

63. *See* GC I, *supra* note 26, art. 49; GC II, *supra* note 26, art. 50; GC III, *supra* note 26, art. 129; GC IV, *supra* note 26, art. 146. Its kindred articles in all three other conventions also provide that, regarding grave breaches prosecutions, "the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by article 105 and those following of the present Convention." GC I, *supra* note 26, art. 49.

64. *See* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 104, ¶ 4076.

65. *See generally* James G. Stewart, *The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview*, 5 J. INT'L CRIM. JUST. 26, 29 (2007) (noting the host of international humanitarian law procedural safeguard mandates were established "precisely in order to counter the understandable temptation to offer enemy prisoners lesser justice in exceptional circumstances").

66. *Id.*

67. ICRC 1960 COMMENTARY, *supra* note 43, art. 105, at 484–92; *see also* GC III, *supra* note 26, arts. 82–108.

68. GC IV, *supra* note 26, arts. 70–75, 126 (detailing fair trial rights).

75, AP I.[69] This "mini convention" repeats many of the Conventions' fair trial rights while requiring that sentences and convictions can only emanate from an "impartial and regularly constituted court" respecting the generally recognized principles of regular judicial procedure.[70] It also adds to the Conventions' protections by requiring the presumption of innocence.[71] Article 85(4)(e) of AP I complements the Conventions' procedural grave breach provisions by providing that willful deprivations of article 75 protections that result in an unfair trial would constitute a grave breach; it also explicitly states that this grave breach can occur in the prosecution of all those covered by article 85.[72] Because of this addition, willful deprivations of a fair trial are not only grave breaches when committed against prisoners of war and civilian internees, but also when they occur in prosecutions of a wider swath of individuals being tried in state courts.[73]

As mentioned, in order to give these guarantees teeth, the willful denial of the rights of a fair trial—to either a prisoner of war or civilian internee—is a grave breach of the Conventions, triggering their punishment obligations.[74] Such a grave breach could occur in any trial of a person in one of GC III and IV's protected categories regardless of whether the criminal proceeding is for a war crime or other criminal misconduct.[75] Given the numerous fair trial guarantees required for a fair and regular trial, this grave

69. Knut Dörmann, *War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on The Elements of Crimes*, 7 MAX PLANK 341, 374–75 (2003), https://www.mpil.de/files/pdf3/mpunyb_doermann_7.pdf (explaining that failure to provide judicial guarantees not listed in the Conventions, such as the presumption of innocence, also can result in this grave breach); s*ee also* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 129, ¶ 5168 (noting that "[s]ince 1949, the list of judicial guarantees has evolved through the development of both humanitarian and human rights law").

70. AP I, *supra* note 32, art. 75. Article 75 echoes GC III's mandate that "[i]n 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." GC III, *supra* note 26, art. 84; *see also* GC IV, *supra* note 26, art. 71 (requiring "regular trial[s]"). The other mini-convention, article 3 common to all four Conventions, reiterates this baseline requirement. GC I, *supra* note 26, art. 3; GC II, *supra* note 26, art. 3; GC III, *supra* note 26, art. 3; GC IV, *supra* note 26, art. 3 ("(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples . . . .").

71. AP I, *supra* note 32, art. 75.

72. *Id.* art. 85(4).

73. *Id.* arts. 85(2), 85(4)(e); *see also* AP I COMMENTARY, *supra* note 30 (noting that art. 85(4)(e) brings AP I article 75's protections into the grave breach regime). Referring to those protected by, inter alia, art. 45, AP I, which provides in pertinent part "[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favorable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of article 75 of this Protocol," while also referring to refugees and stateless persons in the hands of the detaining Party.

74. *See* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 104, ¶ 4076.

75. *See id.* art. 130, ¶ 5192.

breach can be committed in numerous ways.[76] Critically, the willful denial of an explicit trial right *per se* is not a grave breach; it is the denial of a fair and regular trial because of the *a priori* procedural denial, if that is indeed its effect, that constitutes a grave breach.[77] Violations of any one or more of these many procedural rights may or may not, singly or cumulatively, constitute the denial of a fair trial.[78] "Judges will have to assess the seriousness of the denial of judicial guarantees in each case . . . ."[79]

Outside the specific grave breaches regime, which on its face only applies to international armed conflicts, the International Committee of the Red Cross (ICRC) considers the serious war crime of denial of a fair trial to apply not only to international armed conflicts (during which it is considered a grave breach), but also to non-international armed conflicts as a matter of customary law.[80] In highlighting the customary nature of this rule, the ICRC notes that common article 3 of the Geneva Conventions, considered a mini-convention applicable to non-international armed conflicts, prohibits: "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[81]

The characterization of the denial of a fair trial as a war crime (indeed, a grave breach if an international armed conflict) is found not only in the Conventions and customary international law; major international criminal courts established since Nuremberg have considered it a war crime as well.[82] Specifically, the statutes of the ICTY, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and of the ICC clearly specify this deprivation as a war crime.[83] As one scholar notes, this customary and statutory offense is broad: it is not simply denial of fair trial rights that can

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76. ICRC 1960 COMMENTARY, *supra* note 43, art. 130, at 628 ("[T]he breach mentioned here can be split into a number of different offences, for example: making a [prisoner of war] appear before an exceptional court, without notifying the Protecting Power, without defending counsel, etc.").

77. ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 130, ¶ 5280 ("The material element of this grave breach is that the perpetrator deprived one or more prisoners of war of a fair and regular trial by denying their judicial guarantees as set down in the Convention.").

78. *Id.* art. 130, ¶ 5284.

79. *Id.* ("The denial of one of the listed judicial guarantees may not necessarily amount to a denial of fair or regular trial.").

80. *See* ICRC STUDY, *supra* note 1, at 352 (noting that the rule, "[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees" is considered customary law that applies in both international and non-international armed conflicts).

81. *See id.* at 590 (quoting GC III, *supra* note 26, art. 3(1)(d)).

82. *See* Updated Statute of the International Criminal Tribunal for the former Yugoslavia, art. 2(f) (Sept. 2009) [hereinafter ICTY Statute], https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; Statute of the International Criminal Tribunal for Rwanda, art. 4(g) (1994) [hereinafter ICTR Statute], https://legal.un.org/avl/pdf/ha/ictr_EF.pdf.

83. *See* ICC Statute, *supra* note 61, art. 8(2)(a)(vi), 8(2)(c)(iv); ICTY Statute, *supra* note 82, art. 2(f); ICTR Statute, *supra* note 82, art. 4(g); Statute of the Special Court for Sierra Leone art. 3(g) (2002), https://www.rscsl.org/Documents/scsl-statute.pdf.

lead to deprivation of a fair trial: the crime is construed more broadly as denial of judicial guarantees, which include those associated with trial as well as "all those guarantees related to the criminal proceedings as a whole and their various stages."[84] While prosecutions of this war crime have been rare, the symbolic effect of criminalizing the willful deprivation of fair trial guarantees should not be underestimated, particularly in this era of cognitive warfare and related contests for legitimacy.[85]

D. The Outdated Geneva Presumption of Military Courts

The principle of assimilation in the juridical arena works alongside the law of war's fair trial guarantees, at least with regard to prisoners of war.[86] Assimilation mandates that prisoners are to be prosecuted and disciplined according to the same rules applicable to the detaining power's own service personnel.[87] As explained below, this means that prisoners are to be tried according to the same procedure and in the same courts as the detaining power's military members, according to the concept of equality of combatants and the principle of non-discrimination.[88] Of course, international humanitarian law's fair trial guarantees[89] require that the domestic military courts meet certain standards, regardless if deficiencies are present in proceedings against the prosecuting a state's own service members.[90] So it is not that the same proceedings are required in a vacuum—they must be the same but better, if the detaining power's own procedures are indeed deficient regarding fair trial guarantees.

Attempts to reconcile (1) the assimilation requirement to use the same courts and procedures for detainee prosecution (for both grave breaches and other offenses) that are used for prosecuting a detaining power's own military personnel, with (2) international humanitarian law's establishment of a baseline of fair trial procedures that must be provided in such prosecutions,

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84. *See* Diletta Marchesi, *The War Crimes of Denying Judicial Guarantees and the Uncertainties Surrounding Their Material Elements*, 54 ISR. L. REV. 174, 183 (2021).

85. *See generally id.* at 180 (describing the two Extraordinary Chambers in the Courts of Cambodia cases involving the war crime of denial of fair trial in international armed conflict context and the International Criminal Court 2019–2023 prosecution of Malian terrorist, Al Hassan, for the "war crime of sentencing or execution without due process" during a non-international armed conflict).

86. *See* GC III, *supra* note 26, art. 82.

87. ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 82, ¶ 3565 ("The principle of assimilation seeks to avoid prisoners of war being placed in a less favourable position than members of the armed forces of the Detaining Power. At a minimum, the Detaining Power is obliged to apply the same legal safeguards to prisoners of war as are afforded to members of its own forces.").

88. GC III, *supra* note 26, arts. 84, 102.

89. *See* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, ¶¶ 33, 36 (emphasizing that the principle "does not operate in a vacuum but in conjunction with the minimum standards and safeguards spelled out in the rest of the Convention").

90. *See* ICRC 1960 COMMENTARY, *supra* note 43, art. 129, at 618 (noting the World War II practice of trying enemy soldiers according to special laws established after the fact, and that most such domestic war crimes prosecutions had not been seen as fair).

reveal various dynamics. For example, such reconciliation could result in the systemic improvement of the detaining power's domestic criminal justice system used to try its own service personnel. Indeed, such improvement has occurred in numerous states, demonstrated both by the growing use of civilian courts for prosecuting service members and by the related shrinking jurisdiction of military courts.[91]

In other words, international humanitarian law's requirement that prosecution of grave breaches, and of offenses committed by those in detention, be conducted exclusively in tribunals that are, *inter alia*, independent and impartial corresponds with and has perhaps helped fuel the trend away from military courts *writ large*.[92] This movement ultimately stems from the recognition that military courts in modern democracies are neither independent nor impartial, at least not in comparison to civilian courts. This modest modern mini-trend away from military courts for war and other crimes is clearly at odds with the Conventions' presumption of military courts.[93]

Given that at the time of the 1949 Conventions' drafting, most of the drafting states' armed forces utilized a separate military justice system—military courts—for prosecuting their own service personnel during armed conflict, such juridical assimilation led to military courts becoming the default for prosecuting prisoners of war, for both offenses committed during detention as well as for grave breaches committed prior to detention.[94] This military court default resulted in the Conventions' jurisdictional presumption in favor of military over civilian courts, as seen in the ICRC explanation of GC III, article 84.[95] It describes this article as:

> [L]ay[ing] down the general rule that prisoners of war accused of an offence must be tried by military courts. By virtue of [a]rticle 102, prisoners of war must moreover be tried by the *same* military courts that have competence to try members of the armed forces of the Detaining Power accused of the same offence.[96]

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91. *See id.*

92. *See generally* van Dijk, *supra* note 25, at 556 (describing the impact of "human rights thinking" on international humanitarian law, demonstrating that the latter was very much the product of the same emphasis on human dignity as human rights law); Cotelea et al., *supra* note 18, at 13 (highlighting the "civilianization of military jurisdictions"); *see also* MILITARY JURISDICTION, *supra* note 18 (highlighting the abolishment of military jurisdiction by numerous armed forces, at least during peacetime).

93. *See infra* Section III.B (describing this trend).

94. *See generally* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 84, ¶ 3600 (showing how military courts became the default for prosecuting prisoners of war).

95. *See also* GC III, *supra* note 26, arts. 82(1), 102 (providing guidance and a framework for how to handle provisions of its guidelines). *But see* Vargas, *supra* note 21, at 411 (claiming that "no indication or requirement is made as to the type of jurisdictional forum" in the grave breaches regime). *See generally* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 84, ¶ 3600 (explaining the requirement of the prosecution to pursue claims).

96. ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 84, ¶ 3600.

This presumption of military courts is only that, a presumption, despite the ICRC Commentary's "must" language. According to the Convention's nuanced assimilation principle, a detaining power can utilize civilian courts to prosecute prisoners of war *if* a member of its armed forces could, and would, be prosecuted for the same crime in that particular civilian court system.[97] Prisoners of war are to "be tried by the same courts as members of the detaining State's own forces;" hence if a detaining party prosecutes its soldiers' war crimes in civilian courts, it is supposed to do the same for its prisoners of war.[98] Not only must there be a legislative basis for trying the state's own forces in civilian courts; it must be the practice of that state to use such a forum.[99] That is, it is not simply that members of a detaining power's service personnel *could* be tried in civilian courts, it is that that *would* be tried. Otherwise, the protective principles behind assimilation, of both non-discrimination and equality of combatants, would be rendered illusory. Since military courts were both *de jure* and *de facto* the norm for the Conventions' framers' armed forces at time of drafting, it makes sense that the fulfillment of assimilation became synonymous with an implied requirement for miliary courts regarding domestic prosecutions of enemy prisoners.

It is clear that GC III's general presumption, based on World War II era assimilation assumptions, to use military courts to prosecute prisoners of war (for offenses during detention as well as grave breaches committed prior to capture) is based largely on the historical use of military courts to discipline fighting forces' own personnel throughout both world wars. On closer inspection, there is more to the story: the requirement to use the same proceedings for one's enemies was also based on functional and non-discrimination reasons.[100] Specifically, GC III provides that prisoners of war are, while in detention, subject to the same regulatory regime (military discipline and military laws) as members of the detaining power's armed forces.[101] This pragmatic arrangement—crafted because the Convention drafters could not agree to a standard disciplinary and penal code for prisoners, plus recognized that applying prisoners' own sending state laws would be impractical—is premised on the assumption that most prisoners of war are military personnel.[102]

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97. *Id.* ¶ 3602 (explaining the option to try prisoners of war in civilian courts).

98. *Id.* (further clarifying that "[i]n other words, where a member of the armed forces would be prosecuted within the civilian justice system for a particular offence, a prisoner of war accused of the same offence must likewise be tried by a civilian court").

99. *Id.*

100. *See also* Vargas, *supra* note 21, at 411 (emphasizing the non-discrimination rationale). *See generally* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 84 3600 (determining the competent courts).

101. GC III, *supra* note 26, art. 82(1).

102. *See generally* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 81, ¶ 3546 (noting that the drafters did not opt for a standard penal code). However, given the fact that not all prisoners of war

Prisoners of war are subject to the same orders and regulations as the military personnel detaining them, based on the concept of equality of combatants; the Convention requires that detaining powers employ their standard military disciplinary and judicial mechanisms to manage prisoner non-compliance with such regulatory schema: this make sense given that a detaining power's military courts have the expertise to enforce these rules.[103] The assumption being that if the same rules applicable to detaining power's soldiers apply, the same disciplinary and military criminal proceedings designed for and capable of dealing with violations of these rules should also apply.[104]

While this functional argument for military courts carries weight regarding offenses committed by prisoners of war during their detention, it is less persuasive when it comes to the prosecution of grave breaches and other war crimes committed by enemy prisoners prior to capture. Instead, values involving non-discrimination as well as pragmatic ease support the Conventions' requirement of the same judicial forum for both prisoners of war and members of the detaining powers' armed forces when it comes to the prosecution of grave breaches.[105]

Finally, it should be noted that the Geneva presumption of military courts extends to the trial of civilians as well, indeed in a stronger manner than presumptive use.[106] While local civilian criminal laws and courts are to be maintained, GC IV requires an occupying power to prosecute violations of security measures (rules the Convention allows the occupying power to promulgate in the occupied area) in its own military courts established in the occupied area.[107] Instead of a functional argument, necessity and the historical abuse of civilian courts in World War II undergird this requirement of military courts.[108] These military courts must sit in the occupied territory itself, so that civilian internees are not prosecuted in a state other than where the misconduct occurred, per "the principle of the territoriality of penal jurisdiction."[109]

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are military personnel, per GC III, art. 4, the assimilation principle loses rational footing. *See generally id.* ¶ 3567 (highlighting the difficulty of squaring this circle and noting the original protective nature of such application of assimilation principle to civilian prisoners of war).

103. *Id.*

104. *Id.* (supporting that this is not a comprehensive assimilative model, given that some military rules and offenses are designed to maintain loyalty that a prisoner is not expected to show).

105. *See generally* Vargas, *supra* note 21, at 411–12 (noting that the non-discrimination principle also motivates the imposition of same penalties found in art. 87, GC III).

106. *See generally* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 84, ¶ 3600 (noting the use of military courts for trials involving civilians).

107. GC IV, *supra* note 26, art. 66 (allowing the occupying force to use their "non-political" military courts to prosecute violators of the penal laws the occupying force is allowed to promulgate per article 64 of the Fourth Convention).

108. *See generally* ICRC 2020 COMMENTARY ON GC III, *supra* note 40, art. 84, ¶ 3600 (providing background for the modern use of military courts for civilians).

109. JEAN S. PICTET, COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, art. 66, at 340–43 (2020) (noting that, "It prevents protected persons

While not the focus of this Article, this GC IV requirement of military courts in occupied territory warrants greater attention. These tribunals must satisfy the numerous fair trial and due process guarantees provided in GC IV, AP I, and relevant human rights treaties; given the growing recognition that military courts are inferior to civilian courts regarding impartiality and independence, whether military courts should remain the required forum in GC IV situations is certainly debatable (given technological progress as well).[110] Furthermore, if a particular armed force no longer operates military courts during peacetime, the viability and wisdom of special military courts that stand up only during armed conflict, and solely for the prosecution of civilians during occupation, seems particularly problematic.

III. MILITARY JUSTICE & PROSECUTION OF WAR CRIMES

A. What & Why Military Justice

Military justice—broadly referring to the criminal law, disciplinary rules, and criminal and disciplinary proceedings operated by a nation's armed forces—has an ancient lineage.[111] The evolution of military justice is fundamentally linked to the necessities of war; for centuries war has constituted an incredibly violent environment during which other mechanisms for maintaining order, such as civilian courts, were not available.[112] While its genesis was necessity, first internally regarding those under hierarchy of command[113] and then externally over subjugated

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who are accused of an offence from being brought before a court in a country other than that in which the offence was committed and thus provides them with a safeguard of the utmost value").

110. *See* Sharon Weill, *The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories*, 89 INT'L REV. RED CROSS 395, 406 (2007) (labeling the use of Israeli military courts to prosecute Palestinians in West Bank as unfair "judicial domination"). *See generally The Military Courts*, ISR. INFO. CTR. FOR HUM. RTS. OCCUPIED TERRITORIES (Nov. 11, 2017) [hereinafter B'Tselem], https://www.btselem.org/military_courts (criticizing the Israeli military occupation courts used in the occupied West Bank as neither independent nor impartial).

111. *See* Rachel E. VanLandingham et al., *Military Justice*, GENEVA CTR. SEC. SECTOR GOVERNANCE, 40–41 (2023), https://www.dcaf.ch/sites/default/files/publications/documents/MilitaryJusticeFundamentals.pdf (defining military justice as "the specialized processes and procedures which provide criminal justice for those serving in the armed forces"); *see also* Anne Herzberg, *Lex Generals Derogat Legi Speciali: IHL in Human Rights Regulation of Military Courts Operating in Situations of Armed Conflict*, 54 ISR. L. REV. 84, 86 (2021) (describing military justice systems as greatly varied, such the model of standing courts versus ad hoc tribunals, and noting commonality being that military justice systems typically see uniformed judges, prosecutors, defense counsel, and triers as fact with tailored procedural and criminal codes); Panagiotis Kremmydiotis, *The Influence of Human Rights Law on the Reform of Military Justice*, *in* MILITARY JUSTICE IN THE MODERN AGE 311, 313 (Alison Duxbury & Matthew Groves eds., Cambridge Univ. Press 2016) (noting the role of military courts varies amongst states based on their legal systems and needs of their armed forces).

112. *See* VanLandingham et al., *supra* note 111, at 7–8.

113. EUGENE R. FIDELL, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 1 (Oxford Univ. Press 2016) (noting that specialized rules of conduct seemingly organically developed within military forces to facilitate the organized use of violence); *see also* Claire Simmons, *The Scope of Military Jurisdiction for*

populations, military justice has often expanded far beyond such claimed needs, and has too often been perverted as a tool of persecution.[114]

Military law and the military courts that apply this law have been abused in a variety of ways in both democracies and dictatorships alike, though more frequently the latter.[115] Military tribunals have served as a powerful tool to crush lawful dissent and exert authoritarian control, freed from the checks and balances provided by procedural safeguards and due process guarantees.[116] As noted by the United Nations High Commissioner for Human Rights in 2015, "[g]overnments had used military justice to persecute opposition figures and to shield military personnel who committed serious human rights violations."[117]

While originally designed to harshly control the men forced to fight for their emperors and monarchs—the difference between a violent mob and an army is discipline, with discipline being obedience to orders with such obedience obtained largely but by no means exclusively by threat of punishment[118]—the reach of military justice has at times extended to cover all offenses (both of military and civilian nature) committed by those in uniform, and has also extended to offenses committed by civilians in varying degrees.[119] Military justice is, in the words of the International Commission of Jurists, "an institution [that] presents a rich and heterogeneous panorama . . . [i]n terms of personal, territorial, temporal and subject-matter jurisdiction, national legislation regulates military justice in a wide variety of ways."[120]

Violations of International Humanitarian Law, 54 ISR. L. REV. 3, 6–7 (2021) (noting the hoary tenet that internal maintenance of discipline within an armed force has been the *raison d'etre* of military justice).

114. Manacorda & Mariniello, *supra* note 18, at 561 (describing abuse of military courts by military juntas in Latin America).

115. *See id.*

116. *See, e.g.*, Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 2–3 (2017) (describing the Union Army's deeply flawed military commission of Clement Laird Vallandigham for his public criticism of the government during the Civil War); *see also* B'Tselem, *supra* note 110 (aptly noting that the Israeli military occupations courts "are not an impartial, neutral arbitrator[—]nor can they be. They . . . serve as one of the central systems maintaining Israel's control over the Palestinian people"); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1867) (finding that U.S. civilians cannot be tried in a domestic military commission, that is, martial law is unavailable, unless the civilian courts are not functioning). *See generally* MILITARY JURISDICTION, *supra* note 18, at 10 ("In many countries, military jurisdiction and the *esprit de corps* that has characterized it have turned military courts into true instruments of military power that have been wielded against civilian power.").

117. Report of the United Nations High Commissioner of Human Rights, Summary of the Discussions Held During the Expert Consultation on the Administration of Justice Through Military Tribunals and the Role of the Integral Judicial System in Combating Human Rights Violations, U.N. Doc. A/HRC/28/32, at 3, (Jan. 29, 2015) [hereinafter HCHR 2015 Report].

118. *See* Robert Patterson, *Military Justice*, 19 TENN. L. REV. 12 (1945) ("An Army without discipline is a mob, worthless in battle.").

119. *See* VanLandingham et al., *supra* note 111, at 29.

120. MILITARY JURISDICTION, *supra* note 18, at 13.

As mentioned, despite such wide variety of military justice systems, military courts and their supporting and surrounding rules have long been grounded on necessity, grounds that have sporadically shifted since World War II.[121] This necessity has assumed varied forms. There is (1) the necessity to control men (modern armed forces remain predominantly male) in order to most effectively wield organized violence—this claimed necessity is manifested today in the unsupported assumption that uniquely military crimes require uniquely military proceedings;[122] (2) the necessity to provide deterrent consequences for misconduct by soldiers and sailors in areas in which civilian courts were unavailable;[123] and (3) the necessity of providing deterrent and retributive consequences for enemy belligerents who fail to comply with battlefield rules reigning at the time, as well as for civilians in time of occupation.[124]

While military justice is quite long in the tooth, its reformation in the last fifty years thanks to international human rights law coming of age has been striking and comparatively quick, resulting in military justice systems that are quite unlike their ancestors—and some that can no longer be called "military" systems at all.[125] This revolution has even resulted in the wholescale elimination of a separate system of national military criminal justice in some states.[126] The general development of military criminal law and jurisdiction over the decades since the end of World War II is multifaceted, and points to the need to remove the presumption of military courts from international humanitarian law.[127]

B. Trends in Military Justice

The structural backlash against military courts began with a movement toward limiting military courts' personal jurisdiction exclusively to military

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121. *See generally* van Dijk, *supra* note 25, at 558 (discussing the importance of balancing human demands with military necessity for optimal support).

122. *See, e.g.*, United States ex rel. Toth v. Quarles, 350 U.S. 11, 22 (1955) ("Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order . . . .").

123. *See generally* FIDELL, *supra* note 113, at 28 (discussing specialized rules of conduct for soldiers and sailors); Vargas, *supra* note 21, at 403 (describing the use of military tribunals in the Roman Legions).

124. *See., e.g.*, Henry Wager Halleck, *Military Tribunals and Their Jurisdiction*, 5 AM. J. INT'L L. 958, 959 (1911) (describing Roman military tribunals reach as "where the ordinary civil tribunals could not, or did not take cognizance of wrongs or offenses, the military would do so, both within and without the limits of the empire"); *see also* Weill, *supra* note 110, at 399 (explaining the allowance found in article 64, GC IV, of military courts by occupying powers).

125. *See generally* Kremmydiotis, *supra* note 111, at 311 (noting the impact of international human rights law on military justice systems). *See also* Simmons, *supra* note 113, at 18–19 (remarking that "recognition of individual soldiers as beneficiaries of human rights" has led to military justice reform).

126. *See The Yale Draft*, YALE L. SCH.: DECAUX PRINCIPLES WORKSHOP, 10, Principle No. 3 (2018) [hereinafter *Yale Draft*], https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf.

127. *Id.*

members, thus excluding civilians.[128] The presumption that military courts are inappropriate for the trial of civilians during peacetime has seemingly solidified into a recognized human rights principle flowing from article 14 of the International Covenant of Civil and Political Rights (ICCPR).[129] The Decaux Principles, an oft-cited work of international experts that provides authoritative military justice norms in the international arena,[130] concluded in 2006 that, "[m]ilitary courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts."[131] Updated by military justice experts in 2018, including this author, the Yale Draft of the Decaux Principles reiterates this principle against civilians being tried in military courts.[132]

Related, the United Nations Human Rights Committee, according to its formal interpretation of article 14, ICCPR and in its case law, does not strictly prohibit jurisdiction over civilians.[133] To exercise such jurisdiction, the Committee does require that a state demonstrate that its military courts meet article 14's fair trial standards, and that the state must provide discrete justification that a military court is necessary.[134] Specifically, "[t]rials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons." [135]

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128. *Id.*; *see also* Cotelea et al., *supra* note 18, at 13; *see, e.g.*, United States ex rel. Toth v. Quarles, 350 U.S. 11, 22 (1955) (prohibiting military courts from trying a former soldier, a civilian, in military court during peacetime: "Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades"); *see also* Reid v. Covert, 354 U.S. 1 (1957) (finding invalid court-martial jurisdiction of a capital offense over a service member's civilian spouse in peacetime); Kinsella v. United States, 361 U.S. 234 (1960) (invalidating courts-martial jurisdiction over civilians in peacetime for non-capital offenses); Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (invalidating courts-martial jurisdiction for civilian employees of the military, both capital and non-capital, respectively).

129. *See* G.A. Res. 2200A (XXI), International Covenant Civil and Political Rights, art. 14 (Dec. 16, 1966).

130. Sharon Weill & Mitch Robinson, *The Decaux Principles on the Administration of Justice by Military Tribunals and the Guantanamo Bay Trials*, *in* RECIPROCITE ET UNIVERSALITE: SOURCE ET REGIMES DU DROIT INTERNATIONAL DES DROITS DE L'HOME 533, 534 (2017).

131. *Decaux Principles*, *supra* note 20, at Principle 4.

132. *Yale Draft*, *supra* note 126, at 13, Principle No. 6.

133. *See, e.g.*, Abbassi Madani v. Algeria, U.N. Doc. CCPR/C/89/D/1172/2003 (Mar. 28, 2007).

134. Hum. Rts. Comm., General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (2007) [hereinafter HRC Comment No. 32]. *See generally* Evelyne Schmid, *A Few Comments on a Comment: The UN Human Rights Committee's General Comment No. 32 on Article 14 of the ICCPR and the Question of Civilians Tried by Military Courts*, 14 INT'L J. HUM. RTS. 1058, 1063 (2010) (explaining the Human Rights Committee's two-part test regarding trial of civilians in military courts as "the military tribunal . . . must comply with the standards set out in [a]rticle 14. Second, it is incumbent upon the [s]tate to demonstrate why a civilian court is unsuitable").

135. *See* HRC Comment No. 32, *supra* note 134, ¶ 22 ("[T]he trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial, and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take

Amongst international tribunals, the Inter-American Court of Human Rights has led the way in recognizing the principle that military courts should never prosecute civilians; their jurisprudence concludes that military courts lack requisite independence and impartiality, and thus: "civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offences that by its own nature attempt against legally protected interests of military order."[136] The European Court of Human Rights has also interpreted article 6 of the European Convention on Human Rights as generally precluding civilian prosecution by military tribunal.[137]

Closely related to the recognition that military courts are unsuitable for trial of civilians due to their lack of independence and impartiality is the narrowing of military courts' jurisdiction *ratione materia*, or subject matter jurisdiction, as seen in the above quote from the Inter-American Court.[138] It is widely recognized today that if military courts are to operate, their subject matter jurisdiction should be limited by military functionality; that is, only service-related offenses[139] that deal with crimes against military discipline, obedience, military capability, and operational effectiveness are to be disposed of by military courts.[140]

This limitation of military courts' jurisdiction *ratione materia* is also reflected in the Decaux Principles,[141] and similarly found in the Report of the Special Rapporteur on the independence of judges and lawyers to the U.N. Human Rights Council in 2012:

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place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.").

136. Durand v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 68, 117–18 (2000); *see also* Mindia Vashakmadze, *Military Justice in Ukraine: A Guidance Note*, DCAF, at 1 (2018), https://www.dcaf.ch/sites/default/files/publications/documents/Military_Justice_Guidance_Note_eng.pdf.

137. *See* Ergin v. Turkey, App. No. 47533/99, Eur. Ct. H.R. (2006) ("[T]he power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation . . . ."); *see also* Martin v. United Kingdom, App. No. 40426/98, Eur. Ct. H.R. (2006); *see also* Findlay v. United Kingdom, App. No. 110/1995/616/706, Eur. Ct. H.R. (1997).

138. *See Durand*, (ser. C) No. 68 at 117–18.

139. *But see* Solorio v. United States, 483 U.S. 435 (1987) (bucking this trend by reversing an almost twenty-year-old decision that had required such service-connection for military jurisdiction).

140. *See* Vargas, *supra* note 21, at 404 (referring to this restrictive jurisdiction as only including functions crimes, or "offences strictly related to the military function"); *see also id.* at 403–05 n.6–8 (outlining the relevant jurisprudence of the Inter-American Court of Human Rights as limiting military jurisdiction to service-connected offenses only); *see also* Cotelea et al., *supra* note 18, at 6.

141. *Decaux Principles*, *supra* note 20, at Principle 8 (describing the functionality principle as limiting the "jurisdiction of military courts . . . to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status").

> "[t]he Special Rapporteur wishes to reiterate, as stated in a number of instruments and reports on this issue, that resorting to military jurisdiction, including military prosecutors, should be exceptional and generally limited to offences committed within a military context, specifically military offences committed by military personnel."[142]

In general, this functional restriction of military subject matter jurisdiction is directly related to the heavily-emphasized historic justification for the exceptional, special, and inferior (regarding impartiality and independence in particular) nature of military courts—the justification being the necessity to maintain good order and discipline.[143] Criminal offenses referred to as "strictly military crimes" or "military-unique crimes" are those directly related to obedience and military functions; they have no counterpart in civilian criminal law, and include offenses such as insubordination, dereliction of duty, desertion, and malingering.[144] However, if civilian courts were given jurisdiction over such crimes—such as in the Netherlands, one of the first European nations to abolish military courts—even this functionality argument would be insufficient justification for military courts, given that prosecution for such crimes in a military court would not be necessary.[145]

A corollary to this growing theoretical and practical restriction of subject matter jurisdiction to military offenses is the corresponding exclusion of serious human rights violations from military jurisdiction.[146] Such violations are obviously not of a "strictly military nature" and do not implicate military function (unlike desertion or disobedience, which are "matters directly and immediately connected to the military performance, with the arms function, the military discipline").[147] Therefore, the limitation

142. U.N. Hum. Rts. Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, U.N. Doc. A/HRC/20/19, at 12, (June 2012) (emphasis added) ("This implies that when the offence committed amounts to a human rights violation or when the matter involves a civilian, the case must be referred to the civilian jurisdiction."); *see also* U.N. Hum. Rts. Comm., Kholodova v. Russian Federation, U.N. Doc. CCPR/C/106/D/1548/2007 (Dec. 11, 2012) (finding that military jurisdiction should be exceptional).

143. *See* Gutter et al., *supra* note 29.

144. *See* Vargas, *supra* note 21, at 404.

145. *See* Netherlands Ministerie Van Justice Box, *Court System in the Netherlands*, U.S. DEP'T OF JUST. (1990), https://www.ojp.gov/ncjrs/virtual-library/abstracts/court-system-netherlands.

146. *See Decaux Principles*, *supra* note 20, at Principle No. 8; *see also* Vargas, *supra* note 21, at 402; *Yale Draft*, *supra* note 126, at 6, ¶ 15 (listing the major trends in modern military justice evolution). *See generally* Cotelea et al., *supra* note 18, at 12 (highlighting that human rights mechanisms have called for excluding human rights violations from military jurisdiction).

147. Palamara-Iribarne v. Chile, Concurring Opinion of Judge Sergio García Ramírez, Inter-Am. Ct. of H.R., ¶ 12 (Nov. 22, 2005); Castillo Petruzzi et al. v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 128, 256 (May 30, 1999) (reflecting the necessity of military jurisdiction for offenses of a disciplinary nature); Palamara-Iribarne v. Chile, Inter-Am. Ct. of H.R. (ser. C) No. 52 (1999) (J. Sergio Garcia Ramirez, concurring); Castillo Petruzzi et al. v. Peru, Judgment, Inter-Am. Ct. of H.R. (ser C) No. 52 (1999) (reflecting the necessity of military jurisdiction for offenses of a disciplinary nature).

of jurisdiction *ratione materiae* necessarily demands the concomitant exclusion of serious human rights violations from military courts; indeed, such rationale also calls for war crimes to likewise be handled exclusively by civilian courts.[148] While war crimes reflect general disobedience to the law (except in the situation in which war crimes are ordered), the commission of all crimes demonstrates the same general type of disobedience to lawful authority, given that crimes are violations of authoritative rules.[149] In theory, war crimes are in that way no different than civilian crimes, which by definition also reflect an unwillingness to conform one's behavior to societal standards. Such unwillingness does not make an offense uniquely military or uniquely civilian; it simply makes the conduct uniquely criminal.

In addition to numerous procedural modifications to various national military justice systems in attempts to become compliant with international human rights jurisprudence, some states have simply dismantled military courts; they have eliminated their military justice systems (at least on the criminal justice side) all together.[150] This has resulted in a corresponding increased use of civilian courts to dispose of service member criminal conduct; such armed forces have retained non-criminal disciplinary systems for handling minor military misconduct.[151] In many of the states that have eliminated military courts, legal mechanisms exist to re-constitute such courts during war.[152]

These trends continue not only due to the increasing prominence of international human rights law and the jurisprudence issued by human rights tribunals.[153] They are motivated by the growing recognition that military courts, by their very nature, fundamentally lack the independence and impartiality required for trials to be fair, and be seen as fair.[154] Of course this recognition is connected to a greater understanding of what fair trial guarantees actually entail, which has benefitted from the evolution of human rights.[155] It is becoming increasingly apparent that the attempted operation of a system of fair criminal accountability reliant upon independent decision-making based on facts and evidence, within a top-down hierarchical organization whose lifeblood is obedience to orders and unit loyalty,

148. *See* Vargas, *supra* note 21, at 404 (noting that jurisdiction should be limited solely to "offences strictly related to the military function").

149. *See supra* Section II.B (discussing the need to prosecute grave breaches).

150. *See* Vashakmadze, *supra* note 136, at 1.

151. *See, e.g.*, Cotelea et al., *supra* note 18, at 6–7 (noting the Danish system that maintains a strictly disciplinary non-criminal regime for handling misconduct within the military, while using civilian courts for all military and civilian criminal matters).

152. *Id.* at 9.

153. *Id.* at 11.

154. *See* MILITARY JURISDICTION, *supra* note 18, at 10–11 (explaining that military justice has long been of concern; "Early on in their existence, several United Nations mechanisms expressed their concern about 'military justice'").

155. *See generally* G.A. Res. 2200A (XXI), *supra* note 129, art. 14 (discussing what fair trial guarantees entail).

produces tensions that are largely irreconcilable with best practices and the most fair outcomes, both substantively and procedurally.[156]

IV. CONCLUSION

Given that international humanitarian law contains fair trial and due process guarantees for the criminal prosecutions it both allows (of detainee criminality) and for those it mandates (of grave breaches of the Geneva Conventions, and other serious war crimes), its archaic presumption of military courts creates cognitive dissonance with its mandate of procedural safeguards.[157] Although its martial presumption was originally rooted in the principles of non-discrimination and equality—of the requirement to treat enemy prisoners the same as a states' own military members—today numerous states have moved away from prosecuting its own members in military courts.[158] Hence, the Conventions' assimilation principle today points to the opposite forum presumption—that of civilian courts for prosecuting both war crimes and prisoner criminality.[159] Furthermore, even for those nations such as the United States that insist upon maintaining a substandard military justice system that does not provide independence and impartiality equal to that of its federal civilian courts, the lack of fair trial guarantees supports discharge of its international humanitarian law prosecutorial obligations only in civilian courts—otherwise, it would be committing a grave breach by its prosecution of its enemies in its inferior military courts.[160] Fair trial and due process guarantees limit assimilation.[161]

While international human rights bodies do not prohibit military courts per se, the growing recognition that the very attributes that make them military courts—being part of the military apparatus, with military members serving key roles—also makes them structurally unable to meet international standards, particularly the right to be tried by an independent and impartial tribunal.[162] The placement of a criminal justice system within a hierarchical, authoritarian organization jeopardizes the protection of human rights. Even simply the appearance of partiality and dependence, which such arrangement inherently provides, is sufficient to label it as deficient.[163]

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156. *See* VanLandingham et al., *supra* note 111, at 25.

157. *See supra* notes 90–92 and accompanying text (stating the need for a reconciliation).

158. *See supra* Section III.B (describing the modern trends for military courts).

159. *See supra* Section II.D (describing the assimilation principle).

160. *See supra* Part III (discussing military justice prosecution systems) (arguably the United States is guilty of war crimes due to its procedurally inadequate military commissions at Guantanamo Bay, though the non-international nature of the armed conflict related to those commissions affects the relevant rules).

161. *See supra* Section II.C (describing fair trial requirements).

162. *See supra* note 70 and accompanying text (discussing fair trial guarantees as a whole).

163. *See supra* note 156 and accompanying text (stating the downfalls of a hierarchical system).

The sooner military justice systems are restricted to situations of actual necessity, both domestically and in exceptional cases of occupation, and properly structured to best withstand inherent pressures toward partiality, the better (though the only way to do this is to make the systems largely civilian, hence "military" in name only). The intersection of international humanitarian law and military justice is a good place to start.[164] War crimes and prisoner of war detention offenses (as well as all serious human rights offenses) should be exclusively prosecuted in civilian courts given their superior adherence to the fair trial and due process guarantees required by both humanitarian and human rights law.[165]

Such movement away from military tribunals and their supporting systems aligns the longstanding necessity-based rationale for exceptional, separate military courts with the reality that such necessity has disappeared, or is quickly disappearing, even during armed conflict.[166] It also recognizes the inherent inability of military justice systems to satisfy, at least to the same extent as civilian courts, the fundamental right to independent and impartial tribunals.[167]

164. *See supra* notes 37–38 and accompanying text (discussing how humanitarian law implicates military justice).

165. *See supra* note 148 and accompanying text (discussing fair trial and its process).

166. *See supra* note 135 and accompanying text (stating the need for separate courts).

167. Military justice, unless separate and distinct from the military—hence not military justice—is inferior compared to civilian criminal justice systems due to systemic, inherent partiality and dependence. While military justice defenders continue to insist upon its necessity, "the lady doth protest too much, methinks." *See, e.g.*, Morten Bergsmo et al., *Military Self-Interest in Accountability for Core International Crimes*, TOAEP: FICHL POL'Y BRIEF SERIES, No. 14 (2013), https://www.toaep.org/pbs-pdf/14-bergsmo-dahl-sousa (arguing that military courts remain necessary); WILLIAM SHAKESPEARE, HAMLET act 3, sc. 2, l. 215.