

# Military Criminal Justice and Jurisdiction over Civilians: The First Lessons from Strasbourg\*

STEFANO MANACORDA AND TRIESTINO MARINIELLO

## I. INTRODUCTION

SINCE THE END of the cold war, states and non-state actors have consistently increased their use of private military and security companies (PMSCs) in conflict and post-conflict situations.<sup>1</sup> Relying on the high level of expertise of PMSCs, their personnel have been employed to perform a huge number of tasks,<sup>2</sup> including operational assistance to members of armed forces on the battlefield.<sup>3</sup> In the aftermath of the privatisation of security and military services, states have lost their traditional role as the only guarantors of citizens' security.<sup>4</sup> From a criminal law perspective, the presence of PSMC employees in war scenarios poses several problems in ascertaining the individual criminal responsibility for crimes they may commit abroad, and in particular the question of competent jurisdiction and the consequent procedural and substantive rules to be applied. The difficulties in prosecuting PSMC personnel are demonstrated, for instance, by the so-called Nissor Square incident that occurred in Iraq in 2007, when 17 people were killed and 24 others were injured: a US Federal Court dismissed all charges over private company employees accused of voluntary manslaughter and

<sup>1</sup> See, inter alia, C Holmqvist, *Private Security Companies: the Case for Regulation* (Stockholm, SIPRI, 2005). See also A Alexandra, DP Baker and M Caparini (eds), *Private Military and Security Companies: Ethics, Policies and Civil-Military Relations* (New York, Routledge, 2008).

<sup>2</sup> JR Heaton, 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' (2005) 57 *Air Force Law Review* 155, 190.

<sup>3</sup> UB Steinhoff, 'What are Mercenaries?' in Alexandra et al, above n 1, 19.

<sup>4</sup> See Holmqvist, above n 1, 1.

weapons violations.<sup>5</sup> Similarly, no civilian contractor involved in the Abu Ghraib scandal of 2004 has been held responsible for abuses of prisoners, whereas some members of the armed forces have been sentenced.<sup>6</sup>

The involvement of civilian contractors in military operations makes it necessary to address the issue of the form of criminal jurisdiction to which they are subject in the case of crimes committed outside national borders. Ever more frequently, home states rely on specific bilateral agreements to provide PMSC employees with immunity from the jurisdiction of the host state in which they are deployed.<sup>7</sup> This policy prevents states on whose territory PMSC personnel have committed crimes from exercising criminal jurisdiction. Great powers, such as the US and the UK, have decided to face this challenge by opting for an expansion of the competence of military courts to civilian contractors.<sup>8</sup>

Although the matter of PMSC employees has not been debated in depth by international human rights bodies, it is encompassed within the wider issue of civilians brought before military courts. In this regard, human rights concerns have been raised over the application of military jurisdiction to 'civilians', as demonstrated by several decisions issued by the United Nations Human Rights Committee (UNHRC), the Inter-American Court for Human Rights and the European Court of Human Rights (the ECtHR). Indeed, the UNHRC has pointed out that allowing martial courts to prosecute civilians raises concerns in relation to the equitable, impartial and independent administration of justice,<sup>9</sup> hence the scope of military jurisdiction should be confined to crimes committed by members of armed forces in the course of their duties.<sup>10</sup>

Among human rights supervisory bodies, the Inter-American Commission and Court of Human Rights has expressed one of the most critical approaches to the exercise of military jurisdiction over civilians.<sup>11</sup> The reason for this lies in the fact that during the era of military

<sup>5</sup> See *United States v Paul A Slough et al*, Criminal Action No 08-0360 (RMU).

<sup>6</sup> See DL Snyder, 'Civilian Military Contractors on Trial: the Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice' (2008) 44 *Texas International Law Journal* 65, 11.

<sup>7</sup> See M Frulli, 'Immunity versus Accountability for Private Military and Security Companies and Their Employees: Legal Hurdles or Political Snags?' in F Francioni and R Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford, Oxford University Press, 2010) 1.

<sup>8</sup> For the US, see chapter 16 above; for the UK, see chapter 15 above.

<sup>9</sup> See the Human Rights Committee, Administration of Justice, General Comment No 13 (UN Doc HRI/GEN/1/REV.1 (1984)).

<sup>10</sup> See CCPR/C/79/Add 23, para 9. See also UNHRC, General Comment No 32 (2007), para 22.

<sup>11</sup> See, *inter alia*, KM Chenut, 'Les tribunaux militaires et juridictions d'exception dans le système interaméricain des droits de l'homme' in E Lambert Abdelgawad (ed), *Jurisdictions militaires et tribunaux d'exception en mutation: perspectives comparées et internationales* (Paris, AUF, 2007), 553; see also C Lascano, 'Inter-American Court of Human Rights and Penal Military Justice' in S Manacorda and A Nieto (eds) *Criminal Law between War and Peace* (Ediciones de la Universidad Castilla—La Mancha, 2009) 273.

dictatorships in several American countries the military justice system was widely abused.<sup>12</sup> In the aftermath of these misdeeds, the Inter-American Court stated that civilians must not fall within the scope of military jurisdiction.<sup>13</sup> The exercise of military jurisdiction over civilians would indeed constitute a violation of the individual's right to be prosecuted by a competent, independent and impartial tribunal previously established by law.<sup>14</sup>

This paper aims to explore in greater detail the approach of the ECtHR to military criminal justice. In particular, it examines the compatibility of military jurisdictions with the Convention system of protection. In light of the Strasbourg case law, concerns arise in relation to the procedural guarantees enshrined in Articles 5 and 6 of the European Convention on Human Rights (ECHR) regarding liberty and security of persons, as well as the right to a fair trial. Indeed, the critical evaluation of military courts provided by Strasbourg judges is mainly based on the lack of independence and impartiality of both military courts and special courts when they are composed of civilian and military judges. With regard to the specific topic of civilians, the ECtHR has clearly expressed that 'the power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation'.<sup>15</sup>

These issues will be investigated, starting with a brief comparative overview of the different patterns followed by Member States of the Council of Europe (CoE), ranging over and combining in different ways an expansionist to an abolitionist approach to military jurisdiction. Thus, without intending to be exhaustive, the present paper will provide a general assessment of the question of the competence that many of the countries of the CoE enjoy over civilians employed abroad.

## II. GENERAL TRENDS IN MILITARY CRIMINAL JUSTICE, BETWEEN ABOLITION AND EXPANSION: A RELEVANT ISSUE FOR CONTRACTORS?

Member States of the CoE do not show a uniform development of military justice. In particular,<sup>16</sup> three different trends emerge from a brief comparative analysis of domestic military jurisdictions. However, it should be observed that the results of this comparative assessment do

<sup>12</sup> See P Steiner, R Alston and HJ Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford, Oxford University Press, 2008), 432.

<sup>13</sup> With regard to the Inter-American Court, see, inter alia, *Durand and Ugarte v Peru* [2000] IACHR (16 August 2000), para 117.

<sup>14</sup> *Castillo Petruzzi and others v Peru* [1999] IACHR (30 May 1999), para 128.

<sup>15</sup> See *Ergin v Turkey* [2006] ECtHR no 47533/99 (4 March 2006), para 47.

<sup>16</sup> It is important to underscore that this research will mainly rely on papers and State Reports drafted by other scholars.

not appear to be particularly relevant for the issue of civilian contractors. While the majority of states have moved towards the abolition of military jurisdiction in peacetime, other countries have proceeded to a restriction of the competence of military courts. A third category includes those states which have opted for an expansion of military jurisdiction.

With regard to the first group, it is important to point out that several countries have reformed military justice by suppressing military jurisdiction in peacetime, as testified by the cases of Germany, Austria, Norway and Sweden after the end of the Second World War.<sup>17</sup> In Germany, despite the fact that the Basic Law for the Federal Republic of Germany (Grundgesetz, GG) allows for the institution of military courts,<sup>18</sup> these tribunals have never been established, given the misdeeds for which they were responsible during the Nazi era.<sup>19</sup> Likewise, in the last 30 years, Denmark, Slovenia, Estonia, the Netherlands, the Czech Republic and Belgium have also opted for the abolition of military jurisdiction in peacetime.<sup>20</sup> In particular, in Belgium the legislature has reformed Article 157(1) of the Constitution limiting the exercise of military jurisdiction to wartime.<sup>21</sup>

France is currently assessing the opportunity of completely abolishing military jurisdiction in peacetime. It is important to note that in this country, in order to simplify the military justice system, the competence of military courts over crimes committed on French territory has been transferred to a special chamber of ordinary jurisdiction.<sup>22</sup> In view of the process of simplification of military justice, in 1999 France decided to transfer the power to exercise jurisdiction over all crimes committed by members of the armed forces abroad in peacetime to a single military court (the *Tribunaux aux armées de Paris*). Nevertheless, the legislative reform—which is underway at the time of writing—envisions, *inter alia*, the overall suppression of the *Tribunax aux armées*, whose compe-

<sup>17</sup> International Commission of Jurists, F Audreu-Guzmán, 'Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations Vol 1' (Geneva, 2004) 158.

<sup>18</sup> Indeed, according to Art 92(2) of the Constitution: 'The Federation may establish federal military criminal courts for the Armed Forces. These courts may exercise criminal jurisdiction only during a state of defence or over members of the Armed Forces serving abroad or on board warships. Details shall be regulated by a federal law. These courts shall be under the aegis of the Federal Minister of Justice. Their full-time judges shall be persons qualified to hold judicial office.'

<sup>19</sup> G Werle, 'Crisis Management Operations and the German Justice System' in S Manacorda (ed), *European Common Defense and Judicial Area* (Consiglio della Magistratura Militare, 2005) 34.

<sup>20</sup> International Commission of Jurists, above n 17, 159.

<sup>21</sup> HD Bosly and T Moreau, 'Les Tribunaux militaires en Belgique' in Lambert Abdelgawad, above n 11, 34.

<sup>22</sup> The Law was issued on 21 July 1982. See also C Saas, 'Led tribunaux militaires en France' in Lambert Abdelgawad, above n 11, 317.

tences will be shifted to a special chamber forming part of the ordinary jurisdiction.

The second group concerns those countries that have decided to restrict the scope of military jurisdiction only to members of armed forces, a reform which is necessary to achieve democracy. This process has already been underway for a long time in some countries. For instance, Greece has removed civilians from military jurisdiction.<sup>23</sup> In Spain, the democratisation process has led to a restriction of the competences of military jurisdiction, the highest organ of which is constituted by the Supreme Court, which is part of ordinary criminal jurisdiction.<sup>24</sup> During the Franco dictatorship, pursuant to the Code of Military Justice issued on 17 June 1945, military tribunals enjoyed a broad competence over all crimes committed by members of armed forces or in military places, and over acts of terrorism and crimes against public order committed by civilians. The Constitution, issued in 1978 on the basis of the principle of jurisdictional unity, recognises in Article 117 the role of military courts as a part of ordinary judiciary power. Therefore, in peacetime the competence of military jurisdiction is confined 'to the strictly military sphere in relation to offences which are classified as military in the Military Criminal Code'.<sup>25</sup>

In Italy, military tribunals could exercise their jurisdiction over members of armed forces and all persons subject to military criminal law.<sup>26</sup> However, a judgment of the Constitutional Court declared that the part of this provision which encompassed individuals who were not actually members of the armed forces was inconsistent with the Constitution (Article 103).<sup>27</sup> In the wake of this judgment, the jurisdiction *rationae personae* of military courts has been restricted to the military.

In other countries, such an aim has been pursued only more recently. In Turkey, the laws no 4963 of 30 July 2003 and no 5530 of 29 June 2006 state that civilians can be tried by military tribunals only in wartime. It is to be stressed that in this country the restrictive path also involved the suppression in 2004 of a special tribunal, the National Security Court—composed of civilian and military judges—because of its inconsistency with the standards of independence and impartiality enshrined in Article 6 of the ECHR.<sup>28</sup>

<sup>23</sup> See Art 96.4 of the Greek Constitution.

<sup>24</sup> L Jimena Quesada, 'Les Tribunaux militaires et Juridictions d'exception en Espagne' in Lambert Abdelgawad, above n 11, 234.

<sup>25</sup> See also Art 12 of Basic Law 4/1987. It is to be observed that the requirement of 'strictly military sphere' has been restrictively interpreted by the Constitutional Court. See, *inter alia*, Ruling No 75/1982, 13 December 1982.

<sup>26</sup> See Art 263 of the Military Criminal Code in Peace Time.

<sup>27</sup> Judgment No 429 of 10 November 1992.

<sup>28</sup> In particular, see *Öcalan v Turkey* [2005] ECtHR no 46221/99 (12 May 2005). For the deepening of the influence of the ECtHR on the Turkish justice system, see S Tellenbach,

A third group of countries are moving in the opposite direction, towards an extension of military justice, as Ireland and the UK demonstrate. Indeed, Ireland recognises the establishment of military and special courts with a very extended competence, even over crimes committed by civilians (see below).<sup>29</sup> In this regard, the Irish Constitution states that military courts may be established ‘for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion’.<sup>30</sup> It is important to note that the justice system in question still allows for Special Criminal Courts. These Courts, founded by the Offences Against the State Act, represent extraordinary tribunals which can be established any time that the government deems it necessary. Although they cannot be technically defined as military courts, they might be composed only of military judges.<sup>31</sup>

In the British military justice system, military courts are mainly ad hoc in nature, given that they are convened each time their judgment is required.<sup>32</sup> These courts have broad-ranging jurisdiction not only over members of the armed forces but, since 1955, over civilians accompanying the armed forces overseas. In 1976, the Armed Forces Act established the Standing Civilian Court as part of the military jurisdiction, with competence over civilians working abroad for armed forces or employed by the Ministry of Defence, to deal with minor offences. In 2006, a new Armed Forces Act extended the list of persons working overseas for armed forces who can be subject to military jurisdiction.<sup>33</sup>

### III. AN EMERGING MATTER IN DOMESTIC LEGAL SYSTEMS: THE EXTENSION OF MILITARY JURISDICTION OVER ‘CIVILIANS’

The fact that civilian contractors are employed in military missions abroad raises sensitive questions about the competence of military courts. Without attempting to be exhaustive, the present research confines itself to revealing how military justice systems in some CoE Member States—though following different trends in reforming their military justice systems—still recognise cases in which civilians may be prosecuted by military tribunals.

‘Les Tribunaux militaires et Juridiction d’exception en Turquie’ in Lambert Abdelgawad, above n 11, 438.

<sup>29</sup> J Gilbert and C Olivier, ‘Les Tribunaux militaires et Juridictions d’exception en République d’Irlande’ in Lambert Abdelgawad, above n 11, 382.

<sup>30</sup> See Art 38(4) of the Irish Constitution.

<sup>31</sup> Gilbert and Olivier, above n 29, 387.

<sup>32</sup> International Commission of Jurists, above n 17, 346.

<sup>33</sup> See chapter 15 above.

This application of military jurisdiction to private individuals may be found in countries which still retain an extensive competence of their martial courts, as well as in legal systems which are moving towards a restriction or the abolition of the scope of application of military jurisdiction, even though such a situation appears rarer. For instance, among the states which have suppressed military jurisdiction in peacetime, Belgium has confined the application of military jurisdiction over civilians only to wartime and only when ordinary jurisdictions are exhausted or after an *état de siège* has been proclaimed.<sup>34</sup>

As will become apparent later in this chapter, military jurisdiction applies to civilians both in peacetime and in wartime, in two specific situations: when crimes are committed jointly by civilians and members of armed forces, and when they are committed abroad by civilians only.

With regard to the extension of military jurisdiction over civilians in peacetime, the cases of Ireland, Spain, France and the UK are of particular interest. The Irish Constitution states that, in peacetime, military courts may cover crimes against military law 'committed by persons while subject to military law'.<sup>35</sup> It should be noted that this latter requirement includes a category of individuals which is broader than that of members of armed forces, and therefore allows martial courts to try civilians under certain conditions.

The applicability of military jurisdiction over civilians in peacetime does not exist solely in those countries which still conserve a huge competence of martial courts. Spain, for example, defines the competence of military courts on the basis of the crime committed. Since military courts may exercise their jurisdiction over every crime or breach of discipline defined in the Military Criminal Code, civilians end up being subject to military jurisdiction if they are responsible for crimes defined by the military criminal code.<sup>36</sup> This could be the case when a private individual is responsible for the commission of offences against the administration of military justice.<sup>37</sup>

Apart from the specificities of every domestic system, as stated above, there are two situations in which civilians can be brought before military criminal courts. First, in peacetime some military justice systems extend service jurisdiction to civilians who take part in the joint commission of a crime as co-perpetrators or accomplices. This is the case in France, where the Special Chamber is competent for crimes committed on French territory.<sup>38</sup> Similarly, in Turkey, despite the ban on civilians facing trials before martial courts, when civilians are accomplices of servicemen in

<sup>34</sup> See Art 66 Law 10 April 2003.

<sup>35</sup> See Art 38(4) of the Irish Constitution.

<sup>36</sup> See Art 12(1) of the Basic Law 4/1987.

<sup>37</sup> See Arts 180 and 182–88 of the Code of Military Criminal Law.

<sup>38</sup> See Art 697-1, para 2 of the Code of Criminal Procedure.

the commission of a crime set forth in the Military Criminal Code, both can fall within the jurisdiction of military tribunals. Russia, too, allows military courts to try civilians in cases regarding the joint commission of crimes with servicemen. However, if private individuals submit an objection, the case, if possible, will be separated, allowing the civilians to be tried by ordinary justice.<sup>39</sup>

The second case to be considered is the extension of military jurisdiction over civilians accompanying soldiers for crimes committed abroad. Among the different criteria that allow national justice systems to establish an extraterritorial application of domestic jurisdiction for crimes committed overseas, the active personality principle in particular is used to allow domestic courts to try members of armed forces allegedly responsible for offences committed abroad.<sup>40</sup> In some military justice systems, this expansion involves civilians accompanying soldiers during military operations.

For example, in the UK, the jurisdiction *rationae personae* of military courts covers civilians working overseas for armed forces. The Standing Civilian Court, which forms part of the military justice system, may try civilians working overseas for the armed forces in relation to minor crimes. As already outlined, the new Defence Act of 2006 has increased the categories of private individuals accompanying armed forces abroad who can consequently be subject to military jurisdiction.<sup>41</sup>

In Spain, on the basis of the Organic Law no 4 issued on 14 July 1987, military judges are competent over civilians who accompany armed forces during military operations. This competence includes strictly military offences, as well as ordinary crimes which do not constitute serious violations of human rights or international crimes. Similarly, in relation to military missions, Turkish martial courts exercise competence over military forces and civilians employed by the Ministry of Defence and Armed Forces.<sup>42</sup>

In France, the circumstances in which military courts may prosecute civilians for crimes committed abroad coincide with those stated for wartime. Therefore, in both situations, according to the Military Justice Code, 'members of armed forces and persons who follow them on the basis of authorization' may be subject to military jurisdiction.<sup>43</sup> In other words, private individuals fall within the competence of military jurisdiction when they are employed by the armed forces, including members

<sup>39</sup> See Art 31 al7 Code Criminal Procedure.

<sup>40</sup> See S Manacorda, 'Modelli di integrazione penale europea nelle missioni all'estero: analisi e prospettive' in S Manacorda (ed), *Difesa comune europea e spazio giudiziario penale* (Consiglio della Magistratura Militare, 2005) 261.

<sup>41</sup> See chapter 15 above.

<sup>42</sup> See Art 3 Code of Military Criminal Law.

<sup>43</sup> See Art 121-1 of the Code of Military Justice (CMJ).

of their family who accompany them abroad,<sup>44</sup> persons who commit a crime against French armed forces<sup>45</sup> and those who take part in the joint commission of a crime with a person falling under the competence of military jurisdiction.<sup>46</sup>

#### IV. THE SCRUTINY OF THE ECTHR OVER MILITARY JUSTICE: DISCIPLINARY LAW AS A PENAL MATTER

The ECHR system of protection covers both civilians and members of armed forces,<sup>47</sup> since Article 1 states that the Convention applies to every individual within the jurisdiction of the Member States.<sup>48</sup> This is true even though nothing in the Convention expressly extends its fundamental clauses to soldiers. Nevertheless, a reading of a number of provisions of the Convention demonstrates its general applicability to members of armed forces too, in particular where it imposes explicit limitations to fundamental rights for servicemen.<sup>49</sup> For instance, in relation to the freedom of assembly and association, Article 11(2) provides that 'this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces'.

In assessing military justice systems, the ECtHR has mainly been called upon to find out whether military courts have breached the procedural guarantees enshrined in Articles 5 and 6 of the Convention. However, before focusing on the compatibility of military jurisdiction with the provisions in question, it is opportune to address the role that the ECtHR has played in relation to military law by extending the scope of Articles 5 and 6 over disciplinary law, an issue widely debated among scholars.<sup>50</sup>

Member States of the CoE normally distinguish between disciplinary

<sup>44</sup> See Art 121-2 CMJ.

<sup>45</sup> See Art 121-7 CMJ.

<sup>46</sup> See Art 121-8 CMJ.

<sup>47</sup> See *Engel et al v The Netherlands* [1976] ECtHR no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (8 June 1976), §54.

<sup>48</sup> See also Art 14, according to which 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

<sup>49</sup> Similarly, Art 4(3)(b) states that 'For the purpose of this article the term forced or compulsory labour shall not include: any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service'.

<sup>50</sup> See, inter alia, P Van Dijk, F Van Hoof, A Van Rijn and L Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, Intersentia, 2006) 539; FG Jacob and RCA White, *The European Convention on Human Rights* (Oxford, Oxford University Press, 2006) 159; M Delmas-Marty, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (Cambridge, Cambridge University Press, 2002); JC Soyer and M de Salvia, 'Article 6' in LE Pettiti, E Decaux and PH Imbert (eds), *La convention européenne des droits de l'homme: commentaire article par article* (Paris, Economica, 1999) 254.

and criminal law, sometimes indirectly showing their reluctance to allow human rights monitoring bodies to exercise their control over domestic military disciplinary systems. This is testified by the fact that CoE state parties, such as France and Spain, requested that Articles 5 and 6 of the Convention not be applied to disciplinary measures issued towards members of armed forces.<sup>51</sup> Comparative research has also shown that in several cases military disciplinary law represents a 'grey zone', in which fundamental rights, such as the right not to be punished without trial, are not respected.<sup>52</sup>

Nonetheless, the ECtHR jurisprudence has been able to supervise this legal field traditionally closed to external interferences by extending the applicability of the Convention—and in particular of Article 6—to disciplinary law.<sup>53</sup> It should be remembered that the application of the right to a fair trial as well as the right to liberty (Article 5) and the *nullum crimen sine lege* (Article 7) require the existence of a criminal charge. However, since the famous *Engel* case, the ECtHR has held that the formal classification of an offence—provided by domestic law—does not suffice to establish the scope of the fundamental clauses in question.<sup>54</sup> Hence, the European judges have developed an autonomous concept of 'penal matter', which, beyond the domestic classification of the offence, relies on further criteria such as the nature of the offence and the degree of severity of the penalty to which the person concerned could be subject.<sup>55</sup> The rationale behind this approach consists in avoiding that the designation of an offence as disciplinary may constitute for countries a means of eluding fundamental rights established by the Convention. Indeed, as the ECtHR has clearly pointed out, Member States, even while enjoying a full discretion to label 'an offence as disciplinary instead of criminal', cannot limit the scope of applicability of Article 6, which otherwise would be subordinated to their 'sovereign will'.<sup>56</sup>

Through the material concept of penal matter, the Strasbourg Court examines whether disciplinary acts or omissions can be classified as criminal. In relation to disciplinary law, the ECtHR devotes particular attention to the criteria of the seriousness of the penalty. For instance, in the *Engel* case, in the light of this legal reasoning, the ECtHR held that disciplinary charges, whose aim was to impose a serious punishment

<sup>51</sup> See A Nieto, 'Los derechos humanos en el derecho penal military y en la guerra' in Manacorda and Nieto, above n 11, 3.

<sup>52</sup> G Nolte and H Krieger, *Comparation of European Military Law System* (Berlin, De Gruyter Recht, 2003) 141.

<sup>53</sup> M Chiavario, 'Diritto ad un equo processo' in S Bartole, B Conforti and G Raimondi (eds), *Commentario alla Convenzione Europea per la Tutela dei Diritti dell'Uomo e delle Libertà Fondamentali* (Padova, Cedam, 2001) 159.

<sup>54</sup> See *Engel et al v The Netherlands*, above n 47, para 81.

<sup>55</sup> *ibid*, para 82.

<sup>56</sup> *ibid*, para 81.

involving the deprivation of personal liberty, fall within the notion of criminal sphere.<sup>57</sup>

The scope of Article 6, however, does not encompass all military disciplinary law, which is still partially removed from the application of the Convention system of protection.<sup>58</sup> Therefore it is worth noting that, in several circumstances, the ECtHR has excluded the inclusion of disciplinary penalties in the penal matter.<sup>59</sup>

#### V. THE JUDICIAL CONTROL OVER PRE-TRIAL DETENTION BEFORE MILITARY COURTS IN THE CASE LAW OF THE ECtHR

In relation to military criminal justice, the approach of the ECtHR has been mainly oriented towards guaranteeing the independence and impartiality of military jurisdictions. European judges have critically assessed one of the most peculiar elements of military jurisdiction: the link between hierarchy and judicial role, on the basis of which hierarchical superiors or their substitutes perform jurisdictional functions.<sup>60</sup> It follows that the approach of the Strasbourg jurisprudence has relied on covering the gap between hierarchical dependence and independence as an essential element of the judicial function. Unlike the Inter-American Court of Human Rights,<sup>61</sup> the ECtHR has not addressed the standards of independence and impartiality in relation to military tribunals facing serious violations of human rights committed by members of armed forces, but the applicability of the right to a fair trial has often concerned military criminal proceedings faced by civilians or servicemen who have committed military offences.

With regard to military proceedings, the ECtHR has mainly addressed the problem of assessing whether military officers may convict a serviceman (Article 5(1)(a)) or may authorise pre-trial detention (Article 5(3)). Article 5 seeks to guarantee individual liberty and security by

<sup>57</sup> *ibid*, para 85.

<sup>58</sup> J Daniel, 'Les Tribunaux militaires et Jurisdictions d'exception à l'épreuve de la jurisprudence de la Cour européenne des droits de l'homme' in Lambert Abdelgawad, above n 11, 576.

<sup>59</sup> See, *inter alia*, *Bas v Turkey* [2002] ECtHR, no 34493/97 (29 January 2002); *Yuksel v Turkey* [2002] ECtHR no 35078/97 (29 January 2002); *Yaka v Turkey*, [2002] ECtHR no 36201/97 (29 January 2002).

<sup>60</sup> See Nieto, above n 51, 325.

<sup>61</sup> See, in particular, *Durand and Ugarte v Peru*, above n 13, in which the Inter-American Court stated that 'In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not', para §118.

establishing judicial scrutiny over measures entailing arrest or detention. For instance, among cases which allow detention consistent with the Convention system of protection, Article 5 refers to the 'lawful detention of a person after conviction by a competent court'.<sup>62</sup>

According to the ECtHR, pursuant to the provision in question, the 'competent' court is one with jurisdiction to try the case, which enjoys independence from the executive and the parties,<sup>63</sup> and provides individuals with adequate judicial guarantees.<sup>64</sup>

In light of these standards, European judges have held that the Dutch Supreme Military Court can fall within the meaning of competent court pursuant to Article 5(1)(a), even though the King could remove its four military members from their role.<sup>65</sup>

In the *De Jong, Baljet and Van Den Brink* case, the ECtHR did not seemingly consider the fact that the arrest was issued by a commanding officer over a member of the armed forces suspected of an offence set out in the Military Penal Code to be worrying. In this regard, Strasbourg judges have not argued whether a commanding officer may come within the meaning of 'competent tribunal'.<sup>66</sup>

Nonetheless, in the *AD v Turkey* case, the ECtHR explicitly excluded that the *supérieur militaire* could be considered a competent tribunal. The applicant—a sergeant in the Turkish armed forces—had been accused of military disobedience and punished by a lieutenant-colonel with imprisonment for 21 days on the basis of Article 171 of the Military Criminal Code. Due to the deprivation of liberty involved in the penalty in question, the ECtHR found that it should have been issued by an independent competent court. The ECtHR, accepting the applicant's submission, held that the military superior did not meet the standard of independence since he exercised his authority within the military hierarchy.<sup>67</sup>

Concerns about the role of military officers as judicial organs have arisen in particular in relation to the application of Article 5(3), according to which

everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer

<sup>62</sup> See Art 5(1)(a): 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a the lawful detention of a person after conviction by a competent court'.

<sup>63</sup> See, inter alia, *Neumeister v Austria* [1968] ECtHR no 1936/63 (27 June 1968), para 24.

<sup>64</sup> With regard to Art 5(1)(a) Strasbourg judges point out that this provision has an autonomous scope from Art 6, stating that its requirements 'are not always co-extensive with those of Article 6 (Art 6)'.

<sup>65</sup> See *Engel v The Netherlands*, above n 47, para 68.

<sup>66</sup> *De Jong, Baljet and Van Den Brink v The Netherlands* [1984] ECtHR no 8805/79; 8806/79; 9242/81 (22 May 1984), paras 43–44.

<sup>67</sup> See *AD v Turkey* [2005] ECtHR no 29986/96 (22 December 2005), para 22.

authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.

The first part of Article 5(3) provides every individual subject to pre-trial detention with the right to be brought 'promptly before a judge or other officer authorised by law to exercise judicial power'. In this regard, the Strasbourg jurisprudence has mainly focused on clarifying the concept of 'officer authorised by law', developing an autonomous notion which is based more on substance than on terminology.<sup>68</sup> Indeed, the ECtHR states that the officer authorised by law, in order to protect the individual detained from arbitrary deprivation of liberty, must meet procedural and substantive requirements.<sup>69</sup> First, he must be independent of the executive and of the parties. This does not automatically exclude the officer being, in turn, subordinated to other independent judges or officers. The second condition has a procedural nature, since it establishes that, pursuant to Article 5(3), the officer must personally hear the person subject to deprivation of liberty. Thirdly, in accordance with the substantive requirement, he must 'review the circumstances militating for or against detention, in deciding, by reference to legal criteria, whether there are reasons to justify detention or for ordering release if there are no such reasons'.

With regard to military proceedings, particular concerns arise from the fact that the competent officer authorised by law to decide on the appellant's pre-trial detention may take part in the subsequent phases of the proceedings on behalf of the prosecuting authority. Strasbourg judges, however, consider it unimportant whether the officer effectively intervenes at a later stage, since the mere possibility that he can play the role of prosecutor in the subsequent proceedings raises doubts about his impartiality.

## VI. ECTHR AND THE IMPARTIALITY OF THE JUDGE IN MILITARY PROCEEDINGS

The ECtHR has pointed out that

in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision.<sup>70</sup>

<sup>68</sup> See S Trechsel, *Human Rights in Criminal Proceedings* (Oxford, Oxford Press University, 2006) 507.

<sup>69</sup> *Schiesser v Switzerland* [1979] ECtHR no 7710/76 (4 December 1979), para 31; see also *Letellier v France* [1991] ECtHR no 12369/86 (26 June 1991), para 35.

<sup>70</sup> See, inter alia, *Delcourt v Belgium* [1979] ECtHR no 2689/65 (17 January 1979), para 25.

This provision establishes one of the most important guarantees of the whole Convention: the right to be judged by an independent and impartial tribunal established by the law.<sup>71</sup> The ECtHR considers these requirements strictly connected and in several cases takes both concepts into account together.<sup>72</sup>

By independent tribunal pursuant to Article 6(1), Strasbourg jurisprudence means that it is independent both of the executive and of the parties.<sup>73</sup> In order to assess the independence of a court, the ECtHR relies in particular on four elements: the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

With regard to impartiality, the ECtHR requires that the tribunal lacks prejudice or bias, which must be examined on the basis of both a subjective and objective test.<sup>74</sup> It follows that it is to be assessed whether, in the specific case, judges have prejudice or bias which may influence their decision in the case in question. In relation to the objective approach, the ECtHR states that 'the tribunal established by the law' must provide 'sufficient guarantees to exclude any legitimate doubt' about its independence and impartiality.

In several cases, the ECtHR has assessed the compatibility of military tribunals with the standards provided by Article 6(1) without, however, providing a definition of military courts. In doing this, the Strasbourg case law shows that particular concerns arise not only with regard to courts which are formally classified as military by domestic justice systems, but even in relation to ordinary courts composed, even if only in part, of military judges.<sup>75</sup>

It is important to state, however, that the ECtHR holds that military courts are not per se contrary to the Convention system of protection.<sup>76</sup> For instance, the European judges maintained that the Dutch Supreme Military Court, composed of two civilian judges and four military officers, was consistent with the standards set out in Article 6(1), although all the members were appointed by the Crown, following a joint recommendation from the Ministers of Justice and of Defence, who also had the power to dismiss them.<sup>77</sup> Similarly, in relation to the

<sup>71</sup> See S Trechsel, above n 68, 46.

<sup>72</sup> See *Findlay v United Kingdom* [1997] ECtHR no 22107/93 (25 February 1997), para 73.

<sup>73</sup> See *Ringeisen v Austria* [1971] ECtHR no 2614/65 (16 July 1971), para §95.

<sup>74</sup> See, inter alia, *Sahiner v Turkey* [2001] ECtHR no 29279/95 (25 December 2001), para 35.

<sup>75</sup> *ibid*, para 36.

<sup>76</sup> See *Morris v United Kingdom* [2002] ECtHR no 38784/97 (26 May 2002), para 59.

<sup>77</sup> See *Engel et al v The Netherlands*, above n 47, §§ 30 and 89. In this judgment, the ECtHR stated that the Supreme Military Court in the Netherlands provided sufficient guarantees, relying on the fact that 'the appointment of the military members was usually the last of their careers and that they were not, in their functions as judges, under the

Special Criminal Court in Ireland, which deals with terrorist offences, the European Commission stated that such a court was consistent with Article 6(1).<sup>78</sup> The Commission held that members of this court met the requirements provided by the provision in question, although they were appointed and dismissed by the government. Indeed, according to the reasoning provided by the Commission, beyond the legal provision concerning the composition of the court, it must be taken into account how 'these provisions are interpreted and how they actually operate in practice'.<sup>79</sup> Therefore, the members of the Special Criminal Court satisfied the standards of Article 6(1), as there had not been any attempt by the executive to interfere with the work of the Court and the Court's independence could be subject to review by ordinary courts.

European case law has devoted particular attention to examining the confidence that criminal tribunals must inspire in a democratic society.<sup>80</sup> In this regard, in applying the objective test, the ECtHR takes into account the opinion of the individual, ascertaining whether his doubts about independence and impartiality are 'objectively justified'.<sup>81</sup> Following this consideration, in several cases, European judges have found that applicants' misgivings over whether military courts met the standards of Article 6(1) were objectively justified. This is testified, for instance, by the *Castillo Algar* case, in which the ECtHR held that the applicant's fear about the impartiality of the military court was objectively justified since two members of the Central Military Court sat in the chamber that upheld the order (*auto de procesamiento*) by which the applicant had been charged.<sup>82</sup>

In particular, the Strasbourg jurisprudence shows that an individual may legitimately suspect the independence and impartiality of military criminal courts which rely on a strong hierarchical structure. In the *Findlay* case, the ECtHR addressed the martial court system in the UK, in which judges were appointed by their superior in rank: the 'convening officer'.<sup>83</sup> The ECtHR determined a violation of Article 6(1), criticising the hierarchical dependence between judges and the 'convening officer'. This officer had the power, *inter alia*, to decide which charges had to be brought, convene the court martial, appoint its members and dissolve it either before or during the trial. In addition, he acted as 'confirming officer', having the power to ratify or to change the decision of the

command of any higher authority or under a duty to account for their acts to the service establishment'.

<sup>78</sup> See *Eccles, McPhillips & McShane v Ireland* [1988] ECtHR no 12839/87 (23 December 1988).

<sup>79</sup> *ibid.*, 10.

<sup>80</sup> See *Hauschildt v Denmark* [1989] ECtHR no 10486/83 (24 May 1989).

<sup>81</sup> See, *inter alia*, *Findlay v United Kingdom*, above n 72, para 80.

<sup>82</sup> See *Castillo Algar v Spain* [1998] ECtHR no 28194/95 (28 October 1998), para 50.

<sup>83</sup> See *Findlay v United Kingdom*, above n 72.

military court.<sup>84</sup> In light of these functions, the fear of the applicant that the court did not meet the requirements of independence and impartiality, according to the ECtHR, was objectively justified, since judges were subordinated in rank to the convening officer.<sup>85</sup> Furthermore, the ECtHR criticised the fact that the decision issued by the Court was not valid until it was ratified by the convening officer.<sup>86</sup>

After this judgment, the 1996 Armed Forces Act changed the role of the 'Convening Officer' to become consistent with this judgment, distributing his prosecutorial, adjudicatory and advisory functions among three different bodies: the Higher Authorities, the Prosecuting Authorities and the Court Administration Officers.<sup>87</sup> The ECtHR did not miss the opportunity to positively address this reform, appreciating that after *Findlay* the 1996 Act had proceeded to limit the role of the convening officer, solving doubts on the independence and impartiality of martial courts.<sup>88</sup> This is true in relation to the *Cooper* case, regarding the system in the air force, in which the Grand Chamber rejected the applicant's submissions claiming a violation of Article 6(1), maintaining that the 'Higher Authority, the Prosecuting Authority and the Court Administration Officer ("CAO") did not cast any doubt on the genuineness of the separation of the prosecuting, convening and adjudicating roles in the court-martial'.<sup>89</sup> The ECtHR did not hold a violation of Article 6(1), despite the military judges not being legally trained, since it found that they were provided with guidance and instructions by the Judge Advocate, and with briefing notes by the Court Martial Administration Unit. In addition, the ECtHR considered as decisive the fact that 'judges could not be reported on in relation to their judicial decision making'.<sup>90</sup>

Nonetheless, despite the reform, with regard to martial courts in the navy system, in the *Grievés* case, the ECtHR maintained that doubts on the independence and impartiality of the tribunal were still justified.<sup>91</sup> In this regard, the European judges held a violation of Article 6(1) in relation to the role of the Judge Advocate. Although the role of Judge Advocate was played by a civilian in the *Morris* case, Strasbourg judges

<sup>84</sup> *ibid*, para74.

<sup>85</sup> *ibid*, paras 75–80. The ECtHR held a violation of Art 6(1) relying on the role of the convening officer in several cases. See, *inter alia*, *Coyne v United Kingdom* [2004] ECtHR no 25942/94 (24 September 2004), para 58; *Cable et al v United Kingdom* [1999] ECtHR nos 24436/94, 24582/94, 24583/94, 24584/94, 24895/94, 25937/94, 25939/94, 25940/94, 25941/94, 26271/95, 26525/95, 27341/95, 27342/95, 27346/95, 27357/95, 27389/95, 27409/95, 27760/95, 27762/95, 27772/95, 28009/95, 28790/95, 30236/96, 30239/96, 30276/96, 30277/96, 30460/96, 30461/96, 30462/96, 31399/96, 31400/96, 31434/96, 31899/96, 32024/96 and 32944/96 (18 February 1999), para 21.

<sup>86</sup> See *Findlay v United Kingdom*, above n 72, para 77.

<sup>87</sup> See International Commission of Jurists, above n 17, 345.

<sup>88</sup> See, *inter alia*, *Morris v United Kingdom*, above n 76, paras 61–63.

<sup>89</sup> See *Cooper v United Kingdom* [2003] ECtHR no 48843/99 (16 December 2003), para 115.

<sup>90</sup> *ibid*. §§123–125.

<sup>91</sup> See *Grievés v United Kingdom* [2003] ECtHR no 57067/00 (16 December 2003), para 91.

were critical of the fact that the two members of the martial courts were junior serving officers and were appointed on an ad hoc basis.<sup>92</sup> This could expose them to the 'risk of outside pressure', since the criminal justice system did not provide sufficient safeguards. Indeed, this risk posed doubts on the independence and impartiality of the tribunal, as the judges were not provided with a legal training and they were still subject to army discipline and reports. Moreover, the Court criticised the fact that there was 'no statutory or other bar to their being made subject to external army influence when sitting on the case'.<sup>93</sup> Further concerns were due to the fact that the reviewing authority, which constituted a non-judicial body, was provided with the power to review the applicant's conviction, and even impose a more serious sentence than that issued by the military court.<sup>94</sup>

It is in relation to 'guarantees against outside pressure' that in the *Greek* case the Commission stated that the system of extraordinary martial courts during the military dictatorship in Greece could not be regarded as independent. In particular, the Commission regarded as decisive the fact that these courts exercised their jurisdiction 'in accordance with decisions of the Minister of National Defence'.<sup>95</sup>

#### VII. PROSECUTING 'CIVILIANS' BEFORE MILITARY COURTS: A RESTRICTIVE APPROACH BY THE ECtHR

The Convention system of protection does not prevent military criminal courts which provide guarantees enshrined in Article 6(1) from trying members of armed forces who have committed military offences.<sup>96</sup> However, the European judges distinguish from this circumstance the case in which domestic justice systems extend military jurisdiction over civilians. Despite Strasbourg case law recognising that the Convention does not prohibit military criminal courts prosecuting a civilian, the expansion of such jurisdiction over civilians—pursuant to Article 6(1)—'should be subjected to particularly careful scrutiny' and can only be accepted in 'very exceptional circumstances'.<sup>97</sup> In this regard, the ECtHR is clear in stating that civilians may be tried by military courts only when two conditions occur: there must be both 'compelling reasons' justifying such a jurisdiction, and a clear and foreseeable legal basis. The existence of such conditions must be assessed case by case, as 'it is not sufficient

<sup>92</sup> See *Morris v United Kingdom*, above n 76, para 70.

<sup>93</sup> *ibid*, para 72.

<sup>94</sup> *ibid*, paras 73–75.

<sup>95</sup> 12 Yearbook of the European Convention on Human Rights. The *Greek* case, 148 (1969).

<sup>96</sup> See, inter alia, *Ergin v Turkey*, above n 15, para 40.

<sup>97</sup> *ibid*, paras 42–44.

for the national legislation to allocate certain categories of offence to military courts *in abstracto*'.<sup>98</sup>

In so doing, the ECtHR is clear in stating that the role of the army, which is provided with special rules governing its internal organisation and hierarchical structure, must be confined to the field of national security. Since military courts can provide different treatments which derive from their different nature and reason for existence, civilians subject to military jurisdiction could 'find themselves in a significantly different position from that of citizens tried by the ordinary courts, raising a problem of inequality before the courts'.<sup>99</sup> In light of this reasoning, according to European judges, civilians brought before military jurisdiction for crimes against the armed forces may have the legitimate fear that such a jurisdiction does not meet the requirements of independence and impartiality.

This is true in relation to the *Ergin* case, in which the applicant, who was the editor of a newspaper, was convicted by the Turkish Military Court of the General Staff of incitement to evade military service.<sup>100</sup> It is important to note that the ECtHR, in assessing the compatibility of the military court with standards of independence and impartiality, referred to the situation at international level, emphasising the fact that there was a trend towards an exclusion of military jurisdiction over civilians.<sup>101</sup> In particular, the Strasbourg judges noted that in peacetime, in the majority of European domestic justice systems, civilians are not subject to military jurisdiction. They can be prosecuted by such a jurisdiction only in very precise situations, such as in the case of a crime jointly committed by a member of the military and a civilian, or when civilians work for the armed forces.<sup>102</sup>

In so doing, the ECtHR referred to the decisions of the UNHRC and the Inter-American system of human rights protection,<sup>103</sup> including, inter alia, Principle No 5 of the Report on the Issue of the Administration of Justice through Military Tribunals, according to which 'Military courts should, in principle, have no jurisdiction to try civilians'.<sup>104</sup> In all circum-

<sup>98</sup> *ibid*, para 47.

<sup>99</sup> *ibid*, para 48.

<sup>100</sup> Indeed, before the constitutional reform, Art 145 established, inter alia, that: 'Military courts shall also be responsible for dealing with offences committed by civilians where these are designated by special laws as breaches of military law, or have been committed against military personnel, either during their performance of duties designated by law or on military premises so designated'.

<sup>101</sup> See *Ergin v Turkey*, above n 15, para 21.

<sup>102</sup> See *Maszni v Romania* [2006], ECtHR no 59892/00 (21 December 2006), para 27.

<sup>103</sup> The ECtHR refers, inter alia, to the General Comment on Article 14 of the International Covenant on Civil and Political Rights. With regard to the Inter-American system of Human Rights, European judges quote, in particular, *Durand et Ugarte v Pérou*, above n 13 and *Cantoral Benavides v Peru* [2000] IACHR (18 August 2008).

<sup>104</sup> Doc E/CN.4/Sub.2/2005/9 of 16 June 2005.

stances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.'

In the wake of this critical approach adopted by the UNHCR and the Inter-American Court, the ECtHR pointed out that the same military court which has satisfied standards of independence and impartiality in cases against members of armed forces charged with committing military offences could breach Article 6 when it tries a civilian.<sup>105</sup> The reasoning behind this lies in the fact that a civilian, who has no duty of loyalty to the army, can feel legitimate fear of being prosecuted by military judges. Therefore, relying on the appearance of independence that is perceived by the individual, the ECtHR applies a more strict approach in assessing the independence and impartiality of a military court when it covers crimes committed by civilians. Indeed, it may be remembered that in the *Önen* case the European judges stated that the Military Court of the General Staff was independent from the executive and provided sufficient guarantees under Article 6(1) in a criminal proceeding regarding incitement to evade military service committed by a serviceman.<sup>106</sup> In contrast, in the *Ergin* case the ECtHR demonstrated a different approach, holding that there was a violation of Article 6(1), given that

it is understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings.<sup>107</sup>

Similarly, in the *Maszni* case, the applicant—a civilian—had been convicted, inter alia, of inciting a policeman, subject to military law, to produce false documents. Pursuant to Article 35 of the Code of Criminal Procedure in Romania, the nexus between offences committed by a civilian and a member of the military means that the case comes under the scope of military jurisdiction.<sup>108</sup> The government submitted that the extension of such jurisdiction over Mr Mazsni was necessary to assess the same facts together and avoid contradictory sentences.<sup>109</sup> However, the ECtHR rejected these submissions holding that proceedings could be separated and the applicant could be brought before an ordinary court. As in *Ergin*, the European judges held that the applicant's doubts on the independence and impartiality of the military court were objectively

<sup>105</sup> See *Ergin v Turkey*, above n 15, para 53.

<sup>106</sup> See *Önen v Turkey* [2004], ECtHR no 32860/96 (10 February 2004), paras 11–12.

<sup>107</sup> See *Ergin v Turkey*, above n 15, paras 53–54.

<sup>108</sup> Art 35: 'La compétence de la juridiction militaire s'étend aux civils quand les infractions qu'ils ont commises forment avec les infractions commises par un militaire un ensemble indivisible ou constituent des infractions connexes'.

<sup>109</sup> See *Maszni v Romania*, above n 102, para 37.

justified, relying on the fact that the tendency at the international level is towards a critical approach to the expansion of military jurisdiction over civilians.<sup>110</sup>

In the *Martin* case, the applicant, who was a civilian, was prosecuted and convicted in Germany by a British martial court—composed of four servicemen and two civilians—for the murder of a young lady committed in German territory.<sup>111</sup> On the basis of the 1955 Armed Forces Act, he was subject to military jurisdiction because he was a family member residing with a member of the armed forces.<sup>112</sup> Before the ECtHR, the government, relying on the NATO Agreement, claimed that the case fell within the British courts' competence. It justified the application of military jurisdiction mainly by referring to the fact that the court martial constituted the only system with which to try the applicant in Germany and contended that 'most of the witnesses were German and it might have been difficult to secure their attendance to give evidence in England'. The government added that 'the applicant was familiar with the military system, its structure and its terminology, having spent his life in the military community'.<sup>113</sup> On the other side, the applicant claimed a violation of Article 6(1), pointing out that there were no good reasons supporting the expansion of military jurisdiction over a civilian.<sup>114</sup> The ECtHR, noting similarities with the *Findlay* judgment, found a violation of Article 6(1), relying on the fact that the Convening Officer had the power to dissolve the martial court and all its members, including civilian judges who were subordinate in rank to him.<sup>115</sup> Although the ECtHR found a violation of Article 6(1) relying on these circumstances, it is also to be noted that European judges clearly expressed their doubts on the existence of 'compelling reasons' justifying the extension of military jurisdiction over the applicant.<sup>116</sup>

The ECtHR expresses particular concerns in cases in which civilians are prosecuted by courts composed, even if only in part, of members of armed forces.<sup>117</sup> In particular, the ECtHR assesses whether the applicant can legitimately fear that the tribunal is not independent or impartial because the presence of a military judge 'might allow [the court] to be unduly influenced by considerations which had nothing to do with the

<sup>110</sup> *ibid*, para 59.

<sup>111</sup> See *Martin v United Kingdom* [2007], ECtHR no 40426/98 (24 January 2007).

<sup>112</sup> Indeed, the Fifth Schedule of the Act establishes that '[p]ersons forming part of the family of members of any of Her Majesty's Naval, Military, or Air Forces and residing with them or about to reside or departing after residing with them' are subject to military jurisdiction.

<sup>113</sup> See *Martin v United Kingdom*, above n 111, paras 36–38.

<sup>114</sup> *ibid*, para 39.

<sup>115</sup> *ibid*, 54.

<sup>116</sup> *ibid*, para 45.

<sup>117</sup> See *Incal v Turkey* [1998] ECtHR no 22678/93 [9 June 1998].

nature of the case'.<sup>118</sup> In several cases, the ECtHR has accepted complaints claiming a violation of Article 6 in relation to ordinary courts composed both of civilians and members of the armed forces.<sup>119</sup> This is true with respect to the National Security Court in Turkey, which included a member of the Military Legal Service. It should be remembered that this special court was established to deal with the threat to national security represented by the Kurdish separatist movement and has competence over 'offences affecting Turkey's territorial integrity and national unity, its democratic regime and its State security'. In the *Incal* case the claimant had been convicted by the Izmir Security Court for 'disseminating separatist propaganda capable of inciting the people to resist the government and commit criminal offences'.<sup>120</sup> The ECtHR, in accepting the applicant's submissions, stated that he could be legitimately concerned by the presence of a military judge sitting in the National Security Court. The European judges recognised that it was not sufficient, pursuant to Article 6(1), that military members of the National Security Court provided certain guarantees of independence and impartiality, represented by the fact that they enjoyed the same professional training and constitutional safeguards as civilian judges, and were free from instructions provided by public authorities. Indeed, according to the ECtHR, the presence of a serviceman in the composition of the court could justify the applicant's doubts about the independence and impartiality of the court, since the military judge could take into account 'considerations which had nothing to do with the nature of the case'. The legitimate fear was in particular due to the fact that the military judge still belonged to the army, which is dependent on the executive power, and to the fact that he was subject to military discipline and assessment reports. Furthermore, the ECtHR noted that decisions pertaining to the appointment of military judges were to a great extent taken by the administrative authorities and the army.<sup>121</sup>

Similarly, in the *Öcalan* case, Strasbourg judges were invited to assess the compatibility of the National Security Court with Article 6(1).<sup>122</sup> The ECtHR rejected the government's submission, according to which, given that the military judge sitting in the National Security Court had been replaced by a civilian one in the course of the criminal proceedings one

<sup>118</sup> *ibid*, paras 11–20.

<sup>119</sup> See, *inter alia*, *Çiraklar v Turkey* [1998] ECtHR no 70/1997/854/1061 (28 October 1998); *Süreç v Turkey* [1999] ECtHR no 26682/95 (8 July 1999); *Süreç v Turkey* [1999] ECtHR no 24762/94 (8 July 1999); *Gerger v Turkey* [1999] ECtHR no 24919/94 (8 July 1999); *Okcuoglu v Turkey* [1999] ECtHR no 24246/94 (8 July 1999); *Sener v Turkey*, [2000] ECtHR no 26680/95 (18 July 2000); *Canevi et al v Turkey* [2004] ECtHR no 40395/98 (10 November 2004); *Sevgin and Ince v Turkey*, [2005] ECtHR no 46262/99 (20 September 2005); *Başboga v Turkey* [2006] ECtHR no 64277/01 (13 June 2006).

<sup>120</sup> See *Incal v Turkey* above n 117, paras 72.

<sup>121</sup> *ibid*, para 68.

<sup>122</sup> See *Öcalan v Turkey*, above n 28.

week before the verdict was delivered, the tribunal was independent and impartial. In doing this, the European judges held that, pursuant to Article 6(1), every tribunal must satisfy the standards of independence during the investigation, the trial and the verdict. Therefore, if the military judge participates in an interlocutory decision 'that forms an integral part of proceedings against a civilian, the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court'.<sup>123</sup>

#### VIII. CONCLUDING REMARKS

This study has shown how the majority of CoE state parties are moving towards the abolition or a restriction of military jurisdiction competences. Despite this trend, several countries apply military jurisdictions over civilians both in peace and wartime. This occurs, in particular, in two circumstances: either when civilians are considered as being co-perpetrators or accomplices of servicemen in the commission of a crime, or when they are working abroad for the armed forces.

In several cases, the ECtHR has expressed its concerns with regard to the compatibility of military justice systems with the procedural guarantees enshrined in Articles 5 and 6 of the Convention concerning the liberty and security of persons, as well as the right to a fair trial. In doing this, the ECtHR has exercised notable influence, moving towards a limitation of the scope of military or special jurisdiction. This is true in relation to the National Security Court in Turkey, whose independence and impartiality have been criticised by the ECtHR. Even in countries which still rely on an expansive competence of military jurisdiction, such as the UK and Ireland, the European jurisprudence has led to a reform of military justice and has played an important role in extending the Convention guarantees to military trials.

The ECtHR shows a stricter approach to the ascertainment of the standards of Article 6 in cases in which a military court prosecutes civilians. An individual's fear of not being tried by an independent and impartial tribunal has been conceived of as objectively justified in particular in cases regarding civilians tried by military courts or tribunals composed, even if only in part, of military judges. Nonetheless, it is to be noted that the Convention system of protection does not prohibit domestic military courts from trying civilians, but this may occur only in particular circumstances, namely when there are 'compelling reasons'.

In light of this jurisprudence, extending military jurisdiction over civilians could raise human rights concerns, in particular with regard

<sup>123</sup> *ibid.*, para 115.

to those military justice systems which have been deemed, on more than one occasion, to be acting inconsistently with the legal and procedural safeguards of Articles 5 and 6. Such an expansion could be in compliance with the Convention system of protection only if military jurisdictions start to provide the same guarantees as ordinary jurisdictions.

Nonetheless, the question of the meaning of the maintenance of an autonomous jurisdiction would still be open. Indeed, due consideration should be given to the fact that it would be possible to encompass the military judiciary within the ordinary one, following the same path as countries such as Germany and France.

