

## 2019 YALE DRAFT PRINCIPLES FOR MILITARY SUMMARY PROCEEDINGS

### Note

*The following Draft Principles were developed at an international expert workshop conducted at Yale Law School on November 15-16, 2019, through the generosity of the Oscar M. Ruebhausen Fund.*

*The workshop participants are listed in the Appendix. They represent nine countries and were selected based on their experience with military operations, military justice, international humanitarian law, and international human rights law. The group includes the authors of three leading academic treatises on military summary proceedings. Views expressed in the workshop and reflected in this draft should not be imputed to any individual, government, nongovernmental organization, or institution of higher learning.*

*The Draft Principles seek to indicate the minimum standards under international law that should be observed by any system of military summary proceedings. They are not intended as the last word by any means. Rather, they should be treated as a starting point for discussion and future consultations and a source of possible reform ideas for national authorities. Because law and state practice with respect to victims' rights in and public access to military summary proceedings are evolving, we have not attempted to articulate principles on these matters.*

### Draft Principles

#### **Preamble**

It is fundamental to the operational effectiveness of armed forces that military commanders maintain the discipline of personnel under their command.<sup>1</sup> Summary proceedings are non-judicial proceedings conducted for that purpose by commanders (or other officials who exercise disciplinary authority over military personnel).<sup>2</sup> The case for summary disciplinary action is strongest when that power is exercised promptly and for minor misconduct.<sup>3</sup> It should not involve lengthy legal processes, complicated points of law or extensive evidence. If significant punishment is warranted, fine points of law are likely to be presented, or the evidence is complex, the matter should be dealt with in a forum that complies with Article 14 of the *International Covenant on Civil and Political Rights*.

Principle 15 of the 2018 Yale Draft of the 2006 Draft Principles Governing the Administration of Justice Through Military Tribunals<sup>4</sup> [hereafter, the 2018 Yale Draft] states:

Summary proceedings may be conducted by or on behalf of commanders in order to ensure the commander's ability to carry out his or her obligation to discipline the forces. Such proceedings should respect the human rights of the accused, and should not be used as a means to achieve impunity if criminal prosecution is warranted.

The principles that follow are intended to provide guidance on the proper scope of, and limitations on, the use of summary proceedings to maintain discipline in armed forces. They identify fundamental characteristics of fair proceedings. States may confer additional or more generous protections in accordance with national law, customs, and traditions.

### **Principle 1**

Military summary proceedings may be used only to the extent authorized by national law and governing international human rights instruments.<sup>5</sup>

### **Principle 2**

Principle 6 of the 2018 Yale Draft reads:

Military courts have no jurisdiction to try civilians except where there are very exceptional circumstances and compelling reasons based on a clear and foreseeable legal basis, made as a matter of record, justifying such a military trial. Those circumstances only exist, where: (a) Such a trial is explicitly permitted or required by international humanitarian law; (b) The civilian is serving with or accompanying a force deployed outside the territory of the sending State and there is no appropriate civilian court available; or (c) The civilian who is no longer subject to military law is to be tried in respect of an offence allegedly committed while he or she was serving as a uniformed member of the armed forces or he or she was a civilian subject to military law under paragraph (b).

Principle 6 of the 2018 Yale Draft applies *mutatis mutandis* to summary proceedings. In the case of persons other than military personnel on active duty, summary proceedings should be employed only if essential to the maintenance of unit discipline.

### **Principle 3**

A commander may not deal summarily with a charge if he or she has an interest other than official in the matter.

### **Principle 4**

The State shall define by law which offences are subject to summary proceedings, the applicable penalties, and periods of limitation.<sup>6</sup>

### **Principle 5**

A commander may not impose any punishment that is cruel, unusual, inhuman, degrading, or disproportionate. Periods of detention should be of relatively limited duration, reflecting the fact that summary proceedings are designed for the adjudication of minor offences.<sup>7</sup>

### **Principle 6**

A person who would not be held criminally responsible or competent to stand trial on the grounds of mental impairment shall not be dealt with summarily.

## Principle 7

Principle 8 of the 2018 Yale Draft reads:

Strict respect for the guarantees provided in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the International Covenant on Civil and Political Rights should govern the prosecution and punishment of minors, who fall within the category of vulnerable persons.<sup>8</sup>

Principle 8 of the 2018 Yale Draft applies *mutatis mutandis* to summary proceedings.

## Principle 8

Before a commander may impose a true penal consequence,<sup>9</sup> such as deprivation of liberty or substantial financial penalty, the accused in a summary proceeding must be afforded an opportunity to make a knowing, voluntary, and intelligent waiver of the right to trial in a court that complies with Article 14 of the *International Covenant on Civil and Political Rights* and any applicable regional human rights instrument. For the purposes of this principle, a deprivation of liberty includes military detention.

## Principle 9

The accused shall be presumed innocent in summary proceedings.<sup>10</sup>

## Principle 10

The presumption of innocence may be rebutted by a preponderance of the evidence or such higher standard of proof as national law prescribes. Depending upon the potential consequences of summary proceedings, States should consider adoption of proof beyond a reasonable doubt as the governing standard.

## Principle 11

The accused shall have the following minimum procedural rights:<sup>11</sup>

- (a) to be informed of the charge promptly, in detail and in writing in a language that the accused understands;<sup>12</sup>
- (b) to have adequate time and facilities for the preparation of his or her defence;<sup>13</sup>
- (c) to have the charge heard and determined without undue delay;<sup>14</sup>
- (d) to be present during the proceedings, to defend himself or herself in person, and if he or she wishes, to be accompanied by a spokesperson provided for or arranged by the accused;<sup>15</sup>
- (e) to examine, or to have examined, the witnesses for and against the accused and to receive access to or disclosure of the evidence against the accused;<sup>16</sup>

- (f) to be provided the assistance of an interpreter if the accused cannot understand or speak the language used in the proceedings;<sup>17</sup>
- (g) not to be compelled to testify against himself or herself or to admit responsibility;<sup>18</sup> and
- (h) to be given promptly the commander's written decision, associated documents, and information concerning rights of appeal or review.<sup>19</sup>

### **Principle 12**

A State may apply simplified rules of evidence to summary proceedings.<sup>20</sup>

### **Principle 13**

To the extent practicable, the accused shall have the right to consult a lawyer in respect of a charge that is to be dealt with summarily, whether or not national law permits legal representation in the hearing.<sup>21</sup>

### **Principle 14**

Summary proceedings resulting in the imposition of a punishment shall be subject to appeal or review by a tribunal or higher military authority in a fair process prescribed by national law.<sup>22</sup> Nothing in this principle affects the right of a member of the armed forces to seek judicial review of a decision by a military authority to the extent permitted by national law.

### **Principle 15**

Unless a summary proceeding has been overturned on appeal or review, the same offence may not be the subject of a further summary proceeding.<sup>23</sup> Ordinarily, an offence disposed of summarily should not be the subject of subsequent criminal proceedings.

### **Principle 16**

Summary proceedings shall not be deemed criminal proceedings for the purpose of recidivism statutes, sexual offender reporting requirements, or the loss of civil rights or social benefits.

### **Principle 17**

Because summary proceedings are likely to be conducted by commanders without legal qualifications, States should ensure that those commanders are trained in the applicable laws and regulations.

### **Principle 18**

States should exercise ongoing oversight of their summary proceedings to maintain discipline and to foster public and service confidence therein.

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<sup>1</sup> See article D4137-1, France, Code de la défense.

<sup>2</sup> See, for example, article R4137-10 of France, Code de la défense; sections 27 and 28, Germany, Wehrdiziplinarordnung (WDO); article 108.10 of Canada, Queen's Regulations and Orders for the Canadian Forces (Canadian QR&O); article 6 of volume 1, chapter 9, United Kingdom, Manual of Service Law (British MSL); subsection 163(4), Canada, National Defence Act; chapter 7 section 1, New Zealand, DM 69 (2 ed) Volume 1 Commander's Handbook on Military Law (New Zealand manual); article 15 of the Uniform Code of Military Justice, 10 U.S.C. § 815.

<sup>3</sup> For a discussion of "minor offenses," see part V, para 1.e, Manual for Courts-Martial, United States (MCM); article 108.02, Canadian QR&O.

<sup>4</sup> Yale Law School, Decaux Principles Workshop, Principles Governing the Administration of Justice Through Military Tribunals (2006, 2018 rev.), available at <https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf>.

<sup>5</sup> See 1-2, "The effect of international law on armed service," Canada, Military Justice at the Summary Trial Level.

<sup>6</sup> See, for example, 3-5, Canada, Military Justice at the Summary Trial Level; article 108.07, Canadian QR&O; annex Q to volume 1 chapter 9, British MSL; chapter 4 section 3, New Zealand manual; articles 20-40, Netherlands, Code of Military Discipline (Dutch CMD); articles 4-6, 19, Denmark, Military Disciplinary Act (Danish MDA).

<sup>7</sup> In *Engel v. The Netherlands* (1976) 1 EHRR 647, the Court remarked: "In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point.[...] The very nature of the offence is a factor of greater import.[...] [A]lso take into consideration the degree of severity of the penalty that the person concerned risks incurring." (§82)

<sup>8</sup> See article 7 (para 2(b)) of the International Covenant on Civil and Political Rights (ICCPR).

<sup>9</sup> In *R. v. Wigglesworth* (1987) 2 SCR 541, 559 (Can.), the court explained that a "true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity." The European Court of Human Rights has also elaborated on the concept of true penal consequences. In *Engel v. The Netherlands* (1976) 1 EHRR 647, it applied a two-fold test; the first prong focuses on whether the offence charged belongs to criminal law, disciplinary law, or both. The second takes into consideration the severity of the penalty, including the maximum potential penalty. In *Bell v. United Kingdom* (2007) 45 EHRR 24, the court considered a sentence of detention for 28 days to be a serious enough to render the charge against the accused to be of a criminal nature.

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<sup>10</sup> See, for example, note (c) to article 108.20, Canadian QR&O; para 5.3.7, New Zealand Manual.

<sup>11</sup> See article 14(3), ICCPR.

<sup>12</sup> See, for example, article 120 of volume 1, chapter 9, British MSL; article 108.15, Canadian QR&O; part V, para 4.a, MCM; rule 26, Indian Army Rules, 1954; article 10, Danish MDA.

<sup>13</sup> See, for example, article 32 of volume 1, chapter 9, British MSL; article 63, para 2, Dutch CMD.

<sup>14</sup> See, for example, article 44 of Volume 1, Chapter 9, British MSL; articles 53, paras 1, 3, 5, 6, 54, para 1b, Dutch CMD; article 10, Danish MDA.

<sup>15</sup> See, for example, part V, para 4.c.(1), MCM; article 64, paras 1-3, Dutch CMD; article 10, Danish MDA.

<sup>16</sup> See, for example, articles 62, 61, para 2, 65, para 2, 68 para 2, Dutch CMD.

<sup>17</sup> See, for example, article 63A of volume 1, chapter 9, British MSL; note A to article 108.20, Canadian QR&O.

<sup>18</sup> See, for example, article 67, Dutch CMD; article 10, Danish MDA.

<sup>19</sup> See, for example, article 6.052, United Kingdom, Queen's Regulations and Orders; article 62, Dutch CMD; article 12, Danish MDA.

<sup>20</sup> See, for example, section 117ZK, New Zealand, Armed Forces Discipline Act 1971.

<sup>21</sup> See, for example, article 14(3)(b), ICCPR; articles 57, para 2, 92, para 3, Dutch CMD.

<sup>22</sup> See, for example, article 26 of volume 1, chapter 15, British MSL; section 124, New Zealand, Armed Forces Discipline Act 1971; article R4137-21, France, Code de la défense; article 14(5), ICCPR; 10 United States Code § 815(e); part V, para 7, MCM; articles 80a, 81, Dutch CMD; articles 14-18, Danish MDA.

<sup>23</sup> See, for example, part V, para 1.f.(1), MCM.