



The Commonwealth

COMMONWEALTH MILITARY JUSTICE PRINCIPLES

THE STELLENBOSCH DRAFT

7th of November 2023, at Stellenbosch, South Africa

At their meeting in November 2022, Commonwealth Law Ministers mandated the Commonwealth Secretariat to produce Commonwealth Military Justice Principles. A committee of experts,* assisted and coordinated by the Commonwealth Secretariat, drafted, and on 7 November 2023, at Stellenbosch, South Africa, agreed to the draft Principles set out below. The Commonwealth Secretariat will consult on the draft with Commonwealth member countries and the Secretariat will provide a final version of the Principles to Law Ministers for approval.

Preamble

- I. *Emphasising* our commitment to the values and principles set out in the Commonwealth Charter and other Commonwealth statements, including the Singapore Declaration of Commonwealth Principles, the Harare Commonwealth Declaration, the Millbrook Action Programme, the Latimer House Principles, and the Trinidad and Tobago Affirmation of Commonwealth Values and Principles;
- II. *Reaffirming* our core Commonwealth principles of the rule of law, separation of powers, and human rights;
- III. *Reiterating* that an independent, effective, and competent legal system is integral to upholding the rule of law;
- IV. *Underscoring* our support for an independent, impartial, and honest judiciary;
- V. *Recognising* the unique roles of military justice systems to reflect the nature of armed forces defending their nations and international security, to support discipline, operational effectiveness and morale of the armed forces, to extend the laws of the country to personnel outside the relevant country's general jurisdiction, and to ensure accountability and compliance with international and domestic law; and
- VI. *Emphasising* the need to ensure that military justice systems form an integral part of the general justice and judicial systems and reflect international norms and standards, including international humanitarian law and international human rights law, to guarantee the proper administration of justice, due process of law, and equal access to justice; and
- VII. *Recognising* that military justice systems in member countries are at different stages and desiring to assist with further development.



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1. Military Justice

- a. Ensure that military courts, when they exist, are part of a state's general judicial system under the authority of the constitution or statute, respecting the principle of separation of powers and reflecting the rule of law and the obligations of international law.
- b. Ensure that the law and procedure relating to military justice are reviewed at regular intervals to ensure their compliance with best practices and developments in international and domestic jurisdictions.

2. Judges in Military Courts

Ensure that proceedings in military courts are presided over by independent, impartial and legally qualified judges who have security of tenure and are free from:

- a. command interference;
- b. executive or political influence or interference;
- c. improper career consequences;
- d. perceived or actual bias; and
- e. personal interest in the proceedings.

3. Non-judicial Members in Military Courts

Where the determination of any issue in proceedings in military courts involves non-judicial members of the court, select those members by a process which is independent of the chain of command or prosecution. Take appropriate and effective measures to ensure that they are independent, impartial, and free from:

- a. command interference;
- b. executive or political influence or interference;
- c. improper career consequences;
- d. perceived or actual bias; and
- e. personal interest in the proceedings.

4. Jurisdiction

A. Military Personnel (Regular and Reserve Forces)

Restrict proceedings in military courts against military personnel to cases which have a direct and substantial military connection beyond the military status of the accused.

B. Civilians

Conduct proceedings against civilians in military courts only in exceptional circumstances which are prescribed in national law and limited to cases:

- a. where there is no appropriate civilian court with jurisdiction (for example, where civilians are deployed abroad with military personnel);
- b. where the proceedings relate to events that occurred when the civilian was subject to military law and the necessary military connection existed; or
- c. when required or permitted by international law.

5. Prosecution

Ensure that the prosecution of proceedings in military courts is conducted by independent and legally qualified prosecutors who are free from:

- a. command interference;
- b. executive or political influence or interference;
- c. improper career consequences;
- d. perceived or actual bias; and
- e. personal interest in the proceedings.

6. Protection of Victims

Ensure that victims in proceedings in military courts are:

- a. provided with general information about the military justice system, including their role, and the services, protections and remedies available to them;
- b. provided with reasonable and necessary measures to protect them from intimidation, repercussions, and improper command or peer influence;
- c. able to inform the court of the impact of the offence upon them; and
- d. entitled to have the court consider remedies, including compensation, for any loss or injury they have incurred.

7. Rights of Accused

Ensure that proceedings in military courts provide the internationally recognised rights of due process and a fair trial to a person charged with an offence, including, but not limited to, the following rights:

- a. to be equal before the court, regardless of rank, race, age, gender or any other characteristic;
- b. to be presumed innocent until proved guilty according to law;
- c. to be informed promptly of the details of the offence with which they are charged, in a language which they understand;

- d. to have the free assistance of an interpreter if they cannot understand or speak the language used in court;
- e. not to be charged with or prosecuted for an offence on account of any act or omission that did not constitute an offence at the time when it was committed;
- f. to have timely access to all materials that the prosecution plans to offer in court against the accused or that are exculpatory;
- g. to be tried without undue delay and in their presence;
- h. to be guaranteed all the rights and facilities necessary for the preparation and conduct of their defence;
- i. to defend themselves in person or through legal assistance of their own choosing or, if they do not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- j. not to be compelled to testify against themselves or to confess guilt;
- k. to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
- l. if convicted, to be subject to a sentence which is prescribed by law, proportionate to the gravity of the offence and the degree of responsibility of the offender, and not more severe than the penalty in force at the time the offence was committed;
- m. if the person is a minor, to be guaranteed the specific international rights and safeguards that govern the prosecution and punishment of minors under 18 years of age; and
- n. not to be liable to be tried or punished again for an offence for which they have already been finally convicted, acquitted, or pardoned in accordance with their national law. However, this shall not prevent the reopening of the case in accordance with the national law if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

8. Open and Accessible Proceedings

- a. Ensure that proceedings in military courts are open and accessible to the public, including the press.
- b. Require the presiding judge to decide whether circumstances exist which make it necessary to hold part or all of the proceedings in closed court in the interest of justice or to protect the state from a genuine threat to national security, and to provide an explanation for their decision in open court.
- c. Ensure that a decision to hold proceedings in a closed court may be subject to appeal to a higher civilian appellate court and that proceedings are re-opened as soon as possible.

9. Executive Review and Appeals

- a. Ensure proceedings in military courts are not subject to command, executive or administrative review or alteration.
- b. Grant the right to appeal from military courts and ensure that final judicial review and/or appeal from proceedings in military courts is conducted only by civilian appellate or constitutional courts.

10. Summary Proceedings

- a. Where summary proceedings are initiated by commanders against military personnel, ensure that sufficient protections exist, including the right to elect trial in a military court which provides access to the internationally recognised rights set out in **Principle 7** above, or an unfettered appellate procedure to such a court.
- b. Ensure that summary proceedings are only used to adjudicate minor offences and to impose minor sanctions which are proportionate to the gravity of the offence and the degree of responsibility of the offender, and which do not involve sentences of imprisonment or any other significant deprivation of liberty, violation of human rights, or dismissal from service.

*The Stellenbosch Draft is the result of a series of detailed online discussions culminating in a workshop held at the Stellenbosch Institute for Advanced Study (STIAS) in Stellenbosch, South Africa, on 6 and 7 November 2023, with the support of the Commonwealth Secretariat and Stellenbosch University.

The committee of experts attended in their personal capacities and proceedings were conducted on the understanding that comments would not be attributed to any individual or institution. A committee member's endorsement of the Stellenbosch Draft should not be understood to represent the position of any institution, government, international or non-governmental organisation.

The members of the committee of experts are listed below in alphabetical order. Affiliations are shown solely for the purpose of identification.

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