Administration of justice and the practice of law in times of crisis

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The rule of law must be upheld even in times of crisis. Depending on the crisis, however, certain compromises will need to be made and attention given to perspectives other than just the efficiency of the administration of justice. This was demonstrated perfectly during the coronavirus pandemic, when courts had to cancel oral hearings in order to prevent the spread of the virus. Russia's attack[2] on Ukraine and the war crimes[3] uncovered with the retreat of Russian troops make one wonder how exactly the administration of justice in Finland can be safeguarded in highly exceptional circumstances, during times of war and even enemy occupation.

Legislators try to accommodate unexpected events. Section 23 of the Constitution of Finland allows the enactment of such provisional exceptions to basic rights and liberties that are compatible with Finland's international human rights obligations and that are deemed necessary in the case of an armed attack against Finland or in the event of other situations of emergency, as provided by an act, which pose a serious threat to the nation. In other words, the Constitution does not make any individual basic right or liberty inviolable in times of emergency. The provision does, however, include a reference to Finland's international human rights obligations. This means, in practice, that the right to enact provisional exceptions is subject to, for example, the stipulations of the European Convention on Human Rights (ECHR) whereby certain human rights cannot be derogated from even in times of emergency.

Article 15 of the ECHR gives the signatories, in time of war or other public emergency threatening the life of the nation, the right to derogate from their obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law. Article 15 nevertheless prohibits derogations from Article 2 on the right to life, except in respect of deaths resulting from lawful acts of war, as well as from Articles 3, 4 (paragraph 1) and 7, which provide for the

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[2] 'Crime of aggression' within the meaning of chapter 11, section 4a of the Criminal Code of Finland carries a maximum penalty of life imprisonment.

[3] Chapter 11, sections 5 and 6 of the Criminal Code of Finland impose a maximum penalty of life imprisonment for war crimes and aggravated war crimes respectively.

prohibition of torture and other inhuman or degrading treatment or punishment, the prohibition of slavery, and the prohibition of punishment without law (*nullum crimen, nulla poena sine lege*).

Protocol No 6 to the ECHR provides for, among other things, the abolition of the death penalty. Protocol No 13, which Finland ratified in 2004, extends the prohibition of the death penalty to acts committed in time of war, which were not excluded under Protocol No 6.

Emergency Powers Act

Finnish acts concerning the administration of justice hardly make any allowances for times of crisis, which is why the applicable law comes from acts dealing specifically with emergencies. Provisions on times of emergency are included in the Emergency Powers Act (1552/2011) and the State of Defence Act (1083/1991).

The special powers permitted under the Emergency Powers Act were employed in the spring of 2020 during the early stages of the coronavirus outbreak. The Government, together with the President of the Republic, declared a state of emergency within the meaning of the Act. The Emergency Powers Act does not contain provisions on special arrangements in courts, even though section 1 of the Act specifically states that its purpose is to maintain legal order. Under the Finnish Code of Judicial Procedure, for example, a case must be heard on at least two weekdays per week, unless the main hearing is postponed. A new trial must be held if a case has been suspended for more than a total of 30 days. This rule can be derogated from, however, if 'the continuity of the trial can be achieved regardless of its postponement and interruption'. The law makes no allowances for special circumstances. Decisions are made on a case-by-case basis by the presiding judge.

One justification for this kind of decentralisation of decision-making powers even in times of emergency could be the ability to factor in the circumstances, significance and urgency of each individual case. The determination of the circumstances, significance and urgency of individual cases would require consulting the parties, however. There is no benefit to decentralised decision-making if the parties do not get to express their views or if their views do not matter. There are also arguments for case-by-case assessment not being the best approach.

The Government published a list of employees in sectors critical to the functioning of society[4] at the beginning of the coronavirus pandemic on 18 March 2020. The idea was to continue providing contact teaching for the children of these 'key workers' despite schools and nurseries being ordered to close. The only employees identified as 'key workers' in the administrative branch of the Ministry of Justice were prison services and institutional staff of the Criminal Sanctions Agency as well as essential functions of the autonomous region of Åland. Not a single judge – not even a judge on call to sign warrants – was considered critical to the functioning of society, prosecutors and attorneys even less so. Meanwhile, the administrative branch of the Ministry of Social Affairs and Health would have seen the Social Security Appeal Board and other insurance appeal boards included on the list of critical functions. Is this a case of overemphasising the impartiality of the court system to the point where the Government felt that it should not issue orders pertaining to judges? If the reason why such little appreciation was

[4] https://valtioneuvosto.fi/-/10616/yhteiskunnan-toiminnan-kannalta-kriittisten-alojen-henkilosto?languageId=en_US.

given to the judicial administration is that the Government had to rush the list of sectors critical to the functioning of society, it seems astonishing that the Government did not have such a list already prepared and tucked away in a safe, ready to be pulled out if the Emergency Powers Act ever had to be invoked.

The special measures taken in response to the coronavirus pandemic also make one question whether different kinds of emergencies really have been given enough attention in the drafting and passing of procedural laws. Is it sensible to still trust decisions on court cases to individual judges in times of crisis? Would it not be better to give the politically independent, judge-led National Courts Administration the power to issue nationwide orders that judges would have to abide by in such circumstances?

Chair of the Constitutional Law Committee *Johanna Ojala-Niemelä* concluded at the end of the Committee's evaluation of the lockdown of the Uusimaa region due to the pandemic that the Emergency Powers Act would need to be re-examined after such an extraordinary measure.[5] The same goes for adding provisions on court proceedings to the Act. Should it be possible, for example, for the National Courts Administration to decide centrally that a widespread epidemic or the threat of an epidemic constitutes a legally valid excuse without each judge having to make a ruling on the matter individually? Should the Emergency Powers Act be supplemented with a list of procedural deadlines and urgency criteria that the National Courts Administration could decide to waive in times of crisis?

The first three courts that issued media releases about the introduction of special measures in response to the coronavirus pandemic in March 2020 all used the same wording in their releases. The communication needs of all three courts were the same, and all three releases were also motivated by the same reasons. These courts therefore chose not to exercise their independence and communicate about the effects of the special measures on their operation individually.

The Ministry of Justice should take action to ensure that a chapter dedicated to courts, court proceedings and the judicial administration is incorporated into the Emergency Powers Act. The National Courts Administration – which did not yet exist when the Emergency Powers Act was enacted – is ideally placed to assume additional powers during times of crisis and otherwise as well. It is much easier for such a central agency to coordinate the expert consultations that are needed to make the right decisions and to implement them quickly. An unsystematic approach whereby each judge decides the fate of his or her own cases and communicates decisions individually is hardly efficient, nor does it inspire confidence or treat everyone equally.

State of Defence Act

Section 1 of the State of Defence Act (1083/1991), which is the Emergency Powers Act's bigger, meaner cousin, mentions the maintenance of legal order as one of the Act's objectives: in order to safeguard the country's independence and maintain legal order, national defence can be stepped up and security heightened by declaring a *state of defence* during an armed attack against Finland or an equivalent internal violent conflict where the aim is to overthrow

[5] The Government did in fact set up a parliamentary monitoring group to support the reform of the Emergency Powers Act on 24 March 2022. A working group tasked with the actual drafting of the reform is due to be appointed in the near future.

or change the constitutional form of government and where there are serious implications for public order.

The State of Defence Act provides nothing for the operation of courts. The only provision loosely related to court proceedings is section 44, according to which a member of the Defence Forces who is ordered to appear in court or asked to give a statement to a court is excused from attending the proceedings without losing their opportunity to be heard, unless the court dealing with the case decides otherwise.

Provisions on both military and civilian intelligence as well as coercive measures apply during a state of defence just as they do in peacetime. Does this mean that we could secretly listen in on enemy soldiers' telephone calls to their mothers? Under the Finnish Military Intelligence Act (590/2019), telephone tapping requires permission from a court, and the petition must specify the individual, telecommunications address or device subject to tapping. How can this information be provided if the targets are enemy soldiers using mobile telephones appropriated from Finnish civilians?

The State of Defence Act contains certain provisions that give courts special powers and duties: sections 8 and 9 of the Act provide for travel bans and preventive detention. The provisions apply to persons who, due to their previous criminal conduct or for some other legitimate reason, are likely to commit treason or high treason or some other offence that could undermine or jeopardise national defence or security. Appeals against travel bans and petitions for preventive detention under the State of Defence Act are heard by district courts. Appeals against administrative decisions made under the State of Defence Act concerning, for example, the imposition of work obligations on critical workers, are heard by administrative courts.

Military Court Procedure Act

The Finnish Military Court Procedure Act (326/1983) was enacted almost 40 years ago, and its provisions on states of emergency and special courts martial in particular, which are contained in chapter 6 of the Act, are outdated. One good example is section 22(1), which provides that presidents of courts martial are subject to the same provisions as judges in county courts (which no longer exist). A court martial consists of the president and two other members. One member must be an officer and the other a warrant officer, non-commissioned officer or military professional, or a rank-and-file soldier.[6] Under section 20 of the Act, a court martial can be set up to take over the handling of criminal cases from the general court of first instance in an area where a state of war has been declared, if this is deemed necessary to ensure the expedient administration of justice. The establishment and dissolution of a court martial as well as its jurisdiction are provided for by a decree. The decree must also stipulate the administrative court to which rulings of the court martial can be appealed. The term 'state of war' is outdated. The concept

[6] Courts martial hear cases of military law as well as criminal charges for offences that fall under military jurisdiction that have been brought against military personnel or other individuals within the meaning of chapter 45 of the Criminal Code of Finland. If the offender is no longer subject to the provisions of chapter 45 of the Criminal Code, the court martial is only competent to hear charges of military offences. If the offence was committed in an area where the operation of general courts is suspended, the court martial can also hear charges brought against other individuals.

refers to what is now called a 'state of defence', which is provided for in the State of Defence Act discussed above.[7]

The Ministry of Justice is due to draft a reform of the Military Court Procedure Act during the current parliamentary term.[8] The proposed changes are designed to strengthen the independence and impartiality of courts and to lessen the bureaucracy involved in military court proceedings.

A report[9] drawn up in 2004, almost 20 years ago, by a working group set up by Defence Command and Helsinki Court of Appeal to lay the groundwork for the reform of the military court procedure concluded that the administration of justice during a state of defence should be based on a system of permanent courts. This view discourages the setting up of courts martial, even though the Military Court Procedure Act dedicates a whole chapter to the institution. The very concept of courts martial has become dubious since the enactment of section 98(4) of the Constitution of Finland, which prohibits the establishment of provisional courts. The modern premise is that courts are established by law and that they are permanent institutions.

The plan is to make district courts responsible for hearing criminal cases involving both Finnish soldiers and, for example, enemy soldiers or prisoners of war while a state of defence is in force. The misdeeds of 'little green men' can therefore land them before a district court just like any regular offender. Charges of treason brought against any Finnish residents helping such enemy forces in Finland would also be heard by the local district court.

The law gives courts an additional, unusual task: Article 5 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Treaty Series 8/1955) makes the determination as to whether or not a person should be classed as a prisoner of war the responsibility of a competent tribunal. This is hugely significant in situations such as the invasion of Crimea, which began with Russia's sending unmarked soldiers, referred to as 'little green men', to Crimea without declaring war. Eyebrows have also been raised in Finland when Russian oligarchs have, for example, bought a dilapidated tower block in Hanko[10] or built heliports and sturdy piers on the shores of the Archipelago Sea[11]. It is difficult to see any other reason for these actions than the preparation of bases for military units. With the prospect of tourists on Finnish territory turning into enemy soldiers, telling soldiers apart from civilians is more difficult than ever before. Our national laws say nothing of the tribunal that would be competent to determine whether a detained individual should be classed as a prisoner of war in Finland. This issue may need to be addressed preliminarily in connection with, for example, a detention hearing where a person arrested for a terrorist offence claims to be a prisoner of war with the rights and benefits guaranteed under the Geneva Convention.

7 State of Defence Act, section 45(3).

8 Reform of military court procedure legislation, Publications of the Ministry of Justice, Memorandums and statements 2021:5.

9 Defence Command Legal Division document R863/3.18/D/II.

10 Helsingin Sanomat of 10 March 2022: Residents of buildings owned by Russian oligarchs fear for their electricity and heating supply in Hanko, https://www.hs.fi/talous/art-2000008672608.html.

11 Helsingin Sanomat of 22 September 2018: Military source to HS: The Defence Forces and the Finnish Security Intelligence Service have had Pearl of Airisto Ltd under surveillance for years – 'They are buying up strategic locations and we have been stupid enough to sell', https://www.hs.fi/kotimaa/art-2000005838123.html.

Criminal trials during and after military conflicts

Finland has almost exclusively negative experiences of the administration of justice during and after military conflicts.

Political offence courts handled 75,575 cases after the Finnish Civil War and handed down 67,788 convictions. Of those found guilty, 555 were given capital punishment but only 115 were executed. There were also executions that were not authorised by courts, however, and a total of 11,905 of the 74,803 known prisoners died in inhumane conditions in prison camps.[12] Professor of Legal History *Jukka Kekkonen* has described the camps as 'the shipwreck of legality'.[13] Regent *P E Svinhufvud* gave Whites immunity from prosecution for the deaths of Reds by a decree issued in December of 1918 (Decree 165/1918).[14]

A scholar of the political trials of the early stages of Finland's independence *Lars Björne* describes in his thesis, for example, how difficult life was made for the defence counsel of the accused: many were denied access to police investigation records and were not allowed to meet with their client – at least not without the presence of a detective from the Central Detective Police.[15]

The administration of criminal law during the Second World War was entrusted to general courts on the one hand and to military courts on the other, with the latter being responsible for the great majority of court rulings delivered in wartime between 1939 and 1945. The wartime system of military courts consisted of drumhead courts martial, summary courts martial and the Military Supreme Court. There were a total of 163 drumhead courts martial in Finland during the war. A summary court martial could be set up to deal with serious crimes for which capital punishment could be imposed.[16] The operation of courts martial on the Finnish front during World War II is described in the diaries of military judge Paavo Alkio, edited by President of Vaasa Court of Appeal *Erkki Rintala*.[17]

Death sentences given in Finland during World War II are discussed in a thesis written by *Jukka Lindstedt*, which also includes a detailed description of wartime trials from the perspective of defence counsel. Only seven per cent of those sentenced to death had counsel in the court of first instance. The right to choose counsel was restricted by law (Act No 611/1943). The dates of hearings were not communicated to the accused in advance, the promised counsel

[12] See *Sture Lindholm*, Vankileirihelvetti Dragsvik, Tammisaaren joukkokuolema 1918 [Dragsvik Prison Camp Hell, 1918 Ekenäs Mass Death]. Atena Publishing Ltd, 2017.

[13] *Jukka Kekkonen*, Laillisuuden haaksirikko: Rikosoikeudenkäyttö Suomessa vuonna 1918 [The Shipwreck of Legality: Legal Repression in Finland 1918]. Finnish Lawyers' Publishing Company C1, 1991.

[14] Decision of the holder of supreme authority on the amnesty for certain individuals found guilty of treason. https://histdoc.net/historia/1917-18/165_1.html.

[15] *Lars Björne*, "… syihin ja lakiin eikä mielivaltaan …": tutkimus Turun hovioikeuden poliittisista oikeudenkäynneistä vuosina 1918–1939 ['… reason and the law, not the rule of man …': study of the political trials of 1918–1939 in Turku Court of Appeal]. Finnish Lawyers' Association A 117, 1977, pp. 354–355.

[16] *Kalevi Klefström*, Sotilasoikeudenhoidosta jatkosodan aikana [Administration of Military Justice during the Continuation War]. In Jari Leskinen, Antti Juutilainen (eds), Jatkosodan pikkujättiläinen [Encyclopaedia on the Continuation War]. WSOY, 2005, p. 294.

[17] *Erkki Rintala* (ed), Paavo Alkio – Sotatuomarin päiväkirjat [Paavo Alkio – Diaries of a Military Judge]. Ajatus Kirjat, 2003.

failed to materialise, witnesses were not allowed to testify. Attorneys' telephones were tapped and they were tailed.[18]

The Finnish Military Criminal Act was amended on 4 July 1944 by making capital punishment a possible penalty for desertion as well.[19] These charges were heard by drumhead courts martial and summary courts martial. A person found guilty could be executed immediately after the judgment was announced.[20] Drumhead courts martial and summary courts martial handed down a total of 415 capital punishments for various offences between 1939 and 1946. With other courts delivering a further 266 death sentences, the total number of capital punishments during the war years was 681. Of all those sentenced to death by the courts, 77 per cent, i.e. 528 people, were executed.[21]

It has subsequently transpired that the State Police was feeding judges of the Military Supreme Court additional information on their cases – unbeknownst to the parties.[22] Jukka Lindstedt's thesis describes how left-wing sympathisers such as *Hella Wuolijoki* struggled to retain counsel for wartime treason trials. Those accused in connection with the Mäntsälä rebellion and the Weapons Cache Case, on the other hand, were represented by the country's best attorneys.[23]

After the war, a particular problem was what became known as the 'Red Valpo' – the Finnish State Police – which was following the Stalinist ideology and abusing its powers in, for example, the treatment of detained suspects. Among the cases investigated by the Red Valpo was the aforementioned Weapons Cache Case.

The Allied Control Commission (ACC) that had been established in Finland drew up a list of war criminals on very tenuous grounds. The identified war criminals, including many completely innocent people, were quickly detained. Only 15 of the 45 people detained were ultimately convicted after long detentions.[24] Minister of the Interior *Yrjö Leino* was forced to resign in 1948 when it was revealed that he had handed over to the Soviet Union around 20 emigrants and refugees named by the ACC in 1945 without any investigation or administrative decision.[25]

Finland's war-responsibility trials and the associated retroactive laws are totally untenable under critical scrutiny. It was even suggested in 1946 that the Finnish Bar Association was fascist and should be abolished – on the grounds of the political influencers at the helm of the association at the time.[26]

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[18] *Jukka Lindstedt*: Kuolemaan tuomitut: kuolemanrangaistukset Suomessa toisen maailmansodan aikana [Under sentence of death: capital punishment in Finland during World War II]. Finnish Lawyers' Association A 221, 1999, pp. 360–371.

[19] Government proposal 49/1944, which led to the enactment of Act No 426/1944 just one week after the bill was presented in Parliament.

[20] *Lindstedt*, p. 385.

[21] *Lindstedt*, pp. 197–198.

[22] Helsingin Sanomat Monthly Supplement 6/2015, Miksi Martta Koskinen teloitettiin? [Why was Martta Koskinen executed?] https://www.hs.fi/kuukausiliite/art-2000002829643.html.

[23] *Lindstedt*, pp. 372 and 375, and *Björne*, pp. 358–359.

[24] *Klefström*, p. 299.

[25] *Olle Leino*, Kuka oli Yrjö Leino [Who was Yrjö Leino]. Tammi, 1973.

[26] Prosecuting Counsel *A Rautakorpi* voiced this view in his closing argument for the so-called Great Espionage Case, which was quoted in Helsingin Sanomat on 29 November 1946. According to the article, Rautakorpi made the following statement: 'The degree of derision towards the authorities that is evident in the content and form of the writs submitted by counsel Lagus yesterday, as well as the fact that they practically urge the accused towards continuous criminality, are such that I am asking counsel Lagus to be severely reprimanded for his

Modern capacity for the administration of justice during times of crisis

It has become increasingly clear in past decades that what matters the most during times of crisis is the ability to defend the rule of law and legal order. The emergency powers that the law provides and conscription, for example, are specifically designed to ensure that Finland never finds herself in a situation where judges take their orders from undemocratically elected authorities and become corrupt, passive extensions of government – which is what, in addition to everything else, the loss of the country's independence would mean.

The aforementioned report of the working group set up to lay the groundwork for the reform of the military court procedure opens with the following lofty words: 'The rule of law is an integral element of Finnish social order. Protecting this principle requires safeguarding legal order, the constitutional rights of citizens and human rights both in normal conditions and in the event of societal disruption and times of emergency. The court system and the proceedings held in courts play key roles in achieving this objective.'

The working group's 2004 report is a basic study that analyses a variety of threat scenarios. They predict an increase in military offences during regional crises and international tensions. The report concludes that the plan for the reform of the military court procedure is based on a rule of five per cent, according to which five per cent of serving military personnel find themselves in military court each year. A force of 100,000 therefore generates approximately 5,000 court cases annually. The reason for the increase in military offences during regional crises is simply that a higher number of conscripts attend training exercises in a short space of time. Absence from duty offences and service offences are the most likely to increase.

For some reason, the report says nothing about the incidence of war crimes. There is not one single mention of even the term 'war crime' (or its predecessor 'warfare crime'). Regarding armed attacks, the threats discussed in the report are clearly underestimated, which has been plainly shown by news about the war in Ukraine. War crimes targeting civilians and soldiers would be a completely new phenomenon and pose the biggest challenges in terms of the administration of justice.

According to the working group set up to lay the groundwork for the reform of the military court procedure, the basic premise of both the Emergency Powers Act and the State of Defence Act is that, in times of emergency, the authorities must be able to attend to their duties within their normal powers and in their normal compositions for as long as possible. As has been stated above, the goal should be for courts to operate according to the peacetime organisation even during a state of defence. This is why the working group explored the option of not establishing separate military courts at all.

statements. Counsel Lagus is a member of the Finnish Bar Association, an organisation whose former leaders include Kivimäki, Ryti, Salmiala and Hellström (an honorary member of the association, a well-known German sympathiser from Vyborg) and which has always been known for its fascist leanings. Just like his fascist organisation, counsel Lagus feels that he can treat the authorities in any way he wishes. I am nevertheless certain that the operation of the Finnish Bar Association, the only surviving fascist organisation that I know of, will get the attention it deserves in due course, and that a stop will at that time be put to counsel Lagus's seditious ways.'

Three former attorneys were convicted in the war-responsibility trials, and the association's secretary was well known for being one of the founders of the right-wing Patriotic People's Movement. The prosecuting counsel was a special prosecutor for charges of serious crimes that were heard by Courts of Appeal in the first instance.

The report explains that an analysis of the system that existed during the Second World War and the feasibility of similar solutions in modern society must take into account the fact that the wartime system was a product of its time. It does not satisfy the requirements of human rights and constitutional rights in the 21st century. The possibility of sentencing an offender to death in peacetime was removed from the Finnish penal system in 1949. The entire concept of capital punishment was abolished in 1972. The procedure followed by summary courts martial during the Winter War and the Continuation War, for example, would not stand up to scrutiny in the light of modern human rights and due process requirements. The government proposal that led to the enactment of the current Military Court Procedure Act (HE 86/1981 vp) expressly states that summary courts martial or similar improvised courts must not be established in any circumstances. The report explains that a system like the court martial system that was devised with large-scale and long-term front-line warfare in mind would also not be compatible with the most likely threat scenarios of today's military justice.

The employment of special powers under the Emergency Powers Act and the State of Defence Act increases criminalisation and therefore also the number of criminal cases that courts have to handle. The nature of the cases can also be very different from the norm. Chapter 45 of the Criminal Code of Finland provides a penalty of up to four years of imprisonment for a violation of combat duty. The maximum penalty for desertion is 10 years. The principle of a fair trial requires courts to also always consider an insanity defence in the case of both these offences – if nothing else has been provided for in the law regarding exceptional circumstances.[27] At the same time, military authorities may, for reasons of general deterrence, demand that a case be heard as a matter of urgency[28] and that a severe punishment be given. Is there any sense in a court's sending a deserter to spend a few months under observation in a psychiatric facility to determine whether they were suffering from momentary or more permanent insanity when they ran away from combat?[29] If this is not what is meant to happen, the law needs to state it.

Practice of law during times of crisis

The aforementioned report of the working group set up to lay the groundwork for the reform of the military court procedure from 2004 states that the defendant's right to choose their own counsel must also be guaranteed in times of emergency. However, the working group believes that the counsel should, as a rule, not be a member of the Defence Forces. The organisation of

[27] The Supreme Court of Finland ruled in case KKO 2021:13 as follows: 'The need for a psychiatric assessment depends on the state of mind of the accused at the time of the offence. As the drafting documents associated with the Act explain, performing a psychiatric assessment on the defendant is justified at least when there is reason to suspect, based on the facts of the case, that the defendant was not fully compos mentis at the time of the offence. The Supreme Court finds that performing a psychiatric assessment may also be justified in special circumstances even if this 'reason to suspect' criterion is not met. This can be the case, for example, if the offence with which the defendant is charged is highly unusual considering the defendant's personal history and its motivations cannot be explained, and if the court does not have enough evidence to rule on the defendant's state of mind without a psychiatric assessment.'

[28] Under section 16 of the Military Court Procedure Act, courts must hear cases involving military justice as a matter of urgency.

[29] See *Ville Kivimäki*, Murtuneet mielet: taistelu suomalaissotilaiden hermoista 1939–1945 [Broken minds. The battle for the nerves of the Finnish soldiers 1939–1945]. WSOY, 2013.

the Defence Forces does not include dedicated military law counsel, and providing legal assistance is not part of the core mission of the Defence Forces. According to the report, retaining counsel from among mobilised forces would also be problematic from the perspective of the principles of impartiality and a fair trial. Public confidence in the de facto impartiality of counsel who are part of mobilised forces could be shaken especially by the fact that these counsels would be under military command and part of an organisational hierarchy subject to military discipline and order.[30]

The Finnish Bar Association co-hosted a seminar with Defence Command in 2018, which addressed, among other themes, counsel in military court proceedings during times of crisis. A presentation given by military lawyer *Jouni Pulkkinen* made it clear that allowing the defendant to choose their counsel from among competent attorneys remains the goal in respect of court proceedings as well. Also upholding the attorney-client privilege in times of emergency is another objective. Counsel are not military personnel but outsiders. Pulkkinen mentioned as an example of a practical obstacle the fact that trials and pre-trial investigations may need to be conducted in locations that have been evacuated of civilians and rendered out of bounds or inaccessible. It is also important for suspects to have the same right as they normally do to have their chosen counsel present during, for example, pre-trial questioning. Pulkkinen explained that in times of crisis – when offences are relabelled and a more severe sentencing scale is in effect – criminal investigations are conducted and discipline enforced by reservists. Criminal investigators in the military only receive a few days of training, and even lead investigators are laymen. The role of counsel is all the more important if they are the only person involved in the case with any experience of pre-trial criminal investigation thanks to their civilian profession.

This approach would make it possible for any 'little green men' arrested in Finland to demand representation by an attorney licensed in another member state of the European Economic Area.[31] Such suspects' choice of lawyer and confidential communication with them could be motivated by something completely different than success in the upcoming trial. Only an advocate, public legal aid attorney or licensed counsel can serve as counsel to a party in a criminal investigation.[32]

De lege ferenda

The report drawn up in 2004 called for well-reasoned proposals as to how the administration of justice could be safeguarded in times of crisis. None have been made so far. The Emergency Powers Act and the State of Defence Act also need to provide for the practical aspects of ensuring and organising the administration of justice. The negative experiences described above

[30] The report therefore suggests that there might be plans to restrict the right to choose counsel so that attorneys who are part of the military reserve and who are called up to serve could not be appointed as counsel even at the defendant's specific request.

[31] Chapter 15, section 2(5) of the Finnish Code of Judicial Procedure states that what is provided in that Act or elsewhere in the law for the right to serve as attorney or counsel also applies to individuals who are licensed to practise as attorney in a member state of the European Economic Area or in another country with which the European Union and its member states have signed a treaty on the mutual recognition of the professional qualifications of attorneys.

[32] Finnish Criminal Investigation Act, chapter 11, section 3. See, however, Article 2 of the Lawyers' Services Directive (Council Directive 77/249/EEC).

of the administration of justice during previous crises can be largely explained by the fact that the procedures had to be devised in a hurry, in the middle of the crisis.[33] The establishment of the National Courts Administration as an independent and impartial organisation led by sitting judges has now made it possible to give emergency powers to such a central agency. The National Courts Administration should be given the kind of authority that cannot be given to ministries, to issue orders that courts would have to comply with in times of crisis, assuming that the courts were still controlled by the Ministry of Justice. Legislators would need to determine which jurisdictional and procedural rules and deadlines could be waived by an order of the National Courts Administration in the name of the common good, just like other constructs of society – even fundamental constitutional rights like the right to life – may need to be sacrificed in a crisis. If the civilian communication system is damaged or needed for military defence, it probably would be better not to waste precious resources to hold a remand hearing by video link simply to adhere to the usual deadline.[34] With the Constitution of Finland permitting the sacrifice of constitutional rights in exceptional times, decisions restricting the right to a fair trial guaranteed under section 21 of the Constitution need to be made well in advance of any impending crisis. I would personally advocate for a law that gives the National Courts Administration the power to issue orders derogating from certain provisions specified by the legislature, to waive the usual procedural rules during a state of defence.[35]

The right to choose counsel, for example, could be restricted during a state of defence, as long as there still was a choice. The possibility of ordering an attorney to serve as counsel without their consent in a crisis could also be examined in this context.[36] If a Finnish maternity hospital came under artillery or missile fire – as happened in Ukraine on 9 March 2022 – it could be rather difficult to find an attorney willing to represent an apprehended commander of the missile battery in the midst of the crisis and a lynch mentality. In fact, it is likely that one of the biggest challenges that comes with the uncovering of war crimes is dealing with them fairly and securing evidence without the families of the victims taking the law into their own hands.

[33] The provision added to the Finnish Military Criminal Act in the summer of 1944 to legalise capital punishment for desertion was rushed through a review by the Parliament's Legal Affairs Committee in 15 minutes. *Lindstedt*, p. 142, footnote 65.

[34] A request for remand regarding a person under arrest must be taken up for consideration by a district court within four days of the apprehension, even during a state of defence. Finnish Coercive Measures Act, chapter 3, section 5(1).

[35] The geographical boundaries of district courts' jurisdictions, for example, could be relaxed so that cases of an overwhelmed or debilitated court in a war-affected area could be heard in other districts.

[36] See government proposal HE 132/1997 vp, p. 53: 'An attorney or a Master of Laws could be appointed as counsel subject to their consent. Legal aid attorneys have an ex officio obligation to attend to these duties, but their consent still must be sought to give them an opportunity to excuse themselves in case there is a conflict of interest.'