Global Seminar on Military Justice Reform

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Eugene R. Fidell , Senior Research Scholar in Law and Florence Rogatz Visiting Lecturer in Law at Yale Law School organized this event at Yale Law School, which brought together military law experts from 15 countries around the world.[2] The Seminar was sponsored by the generosity of the Oscar M. Ruebhausen Fund at Yale Law School and in cooperation with the International Society for Military Law and the Law of War and the National Institute of Military Justice. This was a very important opportunity for military lawyers from around the world to exchange information and discuss the systems they operate under.

A Common Theme

One common theme concerned the pressures on military justice to maintain its relevance as a separate military justice system (MJS). Nowhere is this more so than the UK, where austerity driven financial cuts have led to huge reductions in manpower and the closure of overseas bases. The vast majority of British forces will henceforth be home based. So, one might ask, why should there be a separate system of justice? Some practitioners have questioned why our Servicemen and women accused of criminal offences should not be tried in the same courts as other citizens; before a jury of 12. In Canada, this issue is soon to come before the Supreme Court in the case of *Moriarity* [3], where the court will be asked to rule that it is unconstitutional to prosecute a Serviceman before a court martial (CM), where he is charged with a criminal offence. It was also the point considered – and rejected – by the CM Appeal Court in the case of *Blackman*.[4] The military sees this as a matter of discipline and would argue that it is necessary for that purpose, but there should be flexibility in our system to allow transfer of cases between the civilian courts and court martial. There is a Prosecutors Convention which determines issues of jurisdiction.

Different Rates of Progress

It was interesting to hear about the varying stages of development that the national systems of military

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[2] http://www.law.yale.edu/news/gsmjr13.htm is the homepage of the GMJS, which includes a Reading Room of important articles.

[3] *Second Lieutenant Moriarity, et al. v. Her Majesty the Queen, et al.,* No. 35755

[4] [2014] EWCA Crim 1029. The case concerned the murder of a wounded Taliban fighter by Sgt Blackman, RM.

justice were at, with many still in a pre-*Findlay-v-UK* [5]state of command chain influence, having military prosecutors as part of the chain of command. Two nations were still operating under systems based upon our Army Act 1955, and there was interest to learn how our system had moved on since *Findlay*. In the US, following the outrage which ensued from some very high profile courts martial involving sexual allegations which were overturned by a non-legally qualified superior officer (the Confirming Officer), their MJS has been subjected to much recent scrutiny. A special panel of military, civilian and academic lawyers and politicians was set up, under the chairmanship of The Honourable Barbara Jones, to inquire into possible reform. There was a call for prosecutions of sexual assaults to be removed from the hands of the chain of command and passed to a civilian prosecutor and to abolish the role of the convening and confirming officers. While Congress did not adopt the proposals to modify the authority vested in convening authorities to refer sexual assault charges to courts-martial, we were told that the State of California has made it a requirement for such allegations against members of the National Guard (state military) to be prosecuted by the civil authorities. The USA is still debating the creation of an independent prosecutor for sexual offences in the US armed forces.

In Denmark there is a distinction which sees all criminal cases handled by the civilian courts, although disciplinary cases remain in the hands of the commanders. Danish military prosecution is independent of the military chain of command. After the reforms in 2005, the military prosecution authority has no role in summary punishment cases.

It was also pointed out that in Canada, as in the UK, any conviction (even one before the Commanding Officer) can lead to a criminal conviction.

One concern raised in the UK military related to what is known as “lawfare”, which was perceived as inhibiting commanders in decision making, as they were afraid of being sued. There were some differences in perception of the implications of the decision and whether it in fact reduced combat immunity of commanders for decisions in combat, or really addressed the broader equipment and training issues which led to personnel being killed or injured.

Some countries did not have a financial assistance scheme for accused personnel. It was pointed out that in UK the Service non-statutory legal aid scheme follows that of the civilian system and requires defendants to make a contribution to the cost. This can amount to £400-£500 per month, a significant expense. In turn, this means that an increasing number of Servicemen are opting to represent themselves.

Discipline in UN Peacekeeping

There was a discussion about how the UN dealt with disciplinary matters occurring in national contingents of a UN Peacekeeping force. Discipline, under the provisions of the Participation Agreement and the UN Status of Forces Agreement, is the responsibility of the national contingent commander. The UN can request repatriation of individuals or contingents for serious misconduct. The UN has a zero tolerance policy with respect to sexual exploitation and abuse and has a policy on non-fraternisation with locals.

[5] [1997] ECHR 8; (1997) 24 EHRR 221. This case resulted in the 1996 Armed Forces Act which abolished the role of the Convening Officer, abolished confirmation of courts martial proceedings and led to the creation of an independent prosecutor for each Service.

Dissemination of and Access to Judgments

The final session examined Technology and Discipline. We discovered that in the US and Canada, many decisions of courts martial are freely available on-line. Indeed, in the US there is a first amendment right to such material,[6] although military courts have been criticized for refusing to provide reasonable and proper notice of such proceedings.[7] In India, while CM trial court decisions are not available on-line, other judgments are, on payment of a small sum to cover administration. In contrast, nothing of the sort obtains in the UK, where CM trial transcripts are hardly ever published and, insofar as Appeal Court decisions are concerned, most are only available through expensive subscription services. It is difficult enough for those defending Servicemen to access materials to assist with the preparation of cases, but it is more so when it comes to precedent. In a modern, technological, age, where all judgments are transcribed electronically, it is difficult to comprehend of a justifiable reason why they are not publicly available on eg BAILII or the MoJ website or, in the case of trial decisions, the JAG web space. Redaction of proceedings is not a problem in other jurisdictions, where even the court dockets are published. If we are to ensure our Servicemen are defended to the best of their representatives' abilities, access to the sources of military law should be readily at hand. It is therefore very much to be hoped that the current approach will be reviewed and the relatively straightforward process of "going public" will be introduced expeditiously.

It was clear that the MJ Systems of all nations are under closer scrutiny and that there are, in many countries, mounting pressures to justify a separate system. While the debate about trial by CM remains lively, there is little dispute that the ability of commanding officers to discipline their personnel remains of vital importance to the maintenance of discipline. It is arguable that all offences impinge on discipline. The key issue is where one draws the line.

[6] See, for example, *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555 (1980) and other cases that followed. See more at: http://www.rcfp.org/first-amendment-handbook/introduction-criminal-proceedings#sthash.jaRNNn94.dpuf

[7] 'Military Dockets, Examining the public's right of access to the workings of military justice'. Published August 2008. A White Paper by The Reporters Committee for Freedom of the Press. See: http://www.rcfp.org/rcfp/orders/docs/MILDOCWP.pdf