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The reform of military justice

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At the conclusion of World War I a committee established by the United Kingdom Army Council was tasked with examining the 'law and rules of procedure regulating Military Courts-Martial, both in peace and war, and to make recommendations'.[1] In its 1919 report to Parliament, the committee began by noting the 'enormous expansion of the Army during the European war' and the 'corresponding increase in the number of Courts-Martial'.[2] Sadly, it also stated that the difficulties in dealing with the volume of legal work were exacerbated by the fact that 'so many of the regular officers who were familiar with military law' were lost in the first few months of the war.[3] The need for reinforcements 'rendered it impossible to devote much attention to the legal side of the training of new officers'.[4] The committee was of the opinion that given the difficult circumstances, as a whole, the work of courts martial during the war was 'well done',[5] although it made a number of recommendations for future improvements. Such recommendations included redrafting the Army's disciplinary code to remove repetition and overlapping provisions and the appointment of trained legal advisers with experience in military discipline to assist in a number of matters, such as the work of courts martial and legal education.[6] The committee commented on a range of matters, including the distinction between courts martial held on active service and in times of peace, the difficulties in ensuring justice

[1] *Report of the Committee Constituted by the Army Council to Enquire into the Law and Rules of Procedure Regulating Military Courts-Martial* (London, HMSO, 1919) at 2 ('Report of Committee').
[2] Ibid., at 3. There were 252,773 courts martial for the entire war. [3] Ibid. [4] Ibid.
[5] Ibid. In a separate report, H. Bottomley (MP), Major Lowther (MP) and Stephen Walsh (MP) were more critical of aspects of the court-martial system, commenting that legal aid (in the form of a friend, solicitor or counsel) should be provided and that a 'competent judicial tribunal' should hear appeals in cases where a death sentence had been pronounced: ibid., at 14.
[6] Ibid., at 3–4.

while on operations, particularly where troops were in proximity to the enemy, and the rights of soldiers when charged with offences.

In the (nearly) one hundred years since this report was written, the military justice system in the United Kingdom has been subject to a number of different reform efforts, not least due to the entry into force of the European Convention on Human Rights (ECHR) in 1953 and the adoption of the Human Rights Act 1998 (UK). Such reforms are not limited to the armed forces of the United Kingdom. As the chapters in this book demonstrate, military justice systems throughout the world, whether they are separate from the civilian justice system, as in the United Kingdom, or a part of that system, are in a state of transition. This book examines both the domestic and international influences on these transitions in military justice and discusses two important questions: first, in what way(s) has military justice been changing throughout the world; and second, why is military justice in a state of transition?

Before considering some of the common themes explored in this book, it is important to reflect on the use of the term 'military justice' in this context. 'Military justice' in this book is used broadly to refer to the systems which states have put in place to regulate both disciplinary and criminal offences by members of their armed forces. In some states, separate regimes (including distinct courts or courts martial) have been established to deal with violations committed by members of the armed forces and civilians who are associated with the military. Such violations may include offences against the ordinary civilian criminal law as well as specific offences only known to the military (e.g. disobeying a superior order). In other situations, states deal with these offences within their ordinary civilian criminal justice systems. The chapters in this book examine not only the mechanisms that investigate and hear the more serious offences but also those procedures designed to deal with infractions arising at the lower end of the spectrum (often managed as summary matters within defence forces).[7] Some practitioners and commentators prefer to use the term 'military discipline' rather than 'military justice' to describe such systems. This is in order to highlight the fact that legal instruments and institutions dealing with members of the armed forces are primarily designed to maintain discipline. This point is emphasised in Chapter 13 by Cronan, an air commodore in the Australian Defence Force, when he notes that military discipline is designed to promote certain behaviours, such as obedience to lawful

[7] For an analysis of summary procedures see Chapter 17 by Aifheli Enos Tshivhase.

orders, which are required to ensure that the military's objectives are met. The underlying point of his analysis is that the rules contained within a military justice or discipline system operate to guide and inform the military personnel to which they apply.

Whether the terminology of 'military justice' or 'military discipline' is adopted, the changes explored in this book have been the result of a combination of domestic and international influences. Some changes can be attributed to the 'war on terror' but many have a much longer history, as is demonstrated by the recommendations contained in the report to the UK Parliament in 1919. Some striking examples of change, specifically in the laws of war, can be drawn from US history, where the first comprehensive attempt to document the laws of war was made during the American Civil War. This was achieved by the *Lieber Code*, the instructions to the Union forces of the United States in the American Civil War, which took a 'seminal step' in providing a 'detailed codification and exposition of the laws of war'.[8] This early attempt of the United States to codify the laws of war both assumed and explained a concept of military justice to which military commanders and their soldiers were subject. The promulgation of this code during the Civil War demonstrates that in the United States, as in the United Kingdom, momentous wars sharpened the legal and political focus on the laws of war and, in turn, on military justice. Military justice in the United States underwent enormous reforms after World War II, driven by widespread dissatisfaction by former members of the military who complained of the arbitrary and arcane nature of military justice. These complaints led to a wholesale revision of military justice in the United States and the adoption of the Uniform Code of Military Justice (the UCMJ), which was arguably based on similar principles to the American Civil Rights movement in that it sought to provide greater rights to a part of society that had previously been denied them. Ironically, in recent times the UCMJ has been the subject of much the same complaints that led to its own creation, although wholesale reform seems unlikely.[9]

One of the common themes that emerges in the reforms that have been adopted (and in some cases rejected) in various states is the question

[8] Stephen C. Neff, *War and the Law of Nations: A General History* (New York, Cambridge University Press, 2005), p. 186.

[9] The most significant review of the UCMJ was the 'Cox Commission': Honorable Walter T. Cox III, *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* (2001). A summary of its report is located on the website of the National Institute of Military Justice: www.nimj.org.

whether military justice should be a part of, or separate from, the civilian justice system. As demonstrated in this collection, views on this fundamental issue differ dramatically between legal systems and commentators. Changes in military justice that result in the adoption of civilian elements or attributes are often referred to as 'civilianisation', or potentially 'lawfare' when the involvement of civilian institutions and norms is seen as interference.[10] The term is not exclusively directed to military justice, but the increasing influence of civilian justice norms and civilian courts on the military has been viewed as the sharp edge of civilianisation because such structures impose a strong form of civilian oversight upon the military. Many argue that this oversight conceals a subtle but far-reaching challenge to the autonomy of the military and the internal command structure that lies at the heart of an effective military force. In Chapter 6 Hansen examines reforms to military justice in light of the commander's unique responsibility to ensure compliance with the laws of war. He argues that '[r]eforms to military justice should not undermine the commander's authority and responsibility to ensure law of war compliance'.[11] The perceived threat civilianisation may pose is that it enables soldiers to question the decisions and authority of their commanders by recourse to external legal norms. Chapter 4 by Collins (which examines whether the judiciary has showed deference – or otherwise – to military institutions in their decisions), Chapter 7 by McLaughlin (which discusses the question whether the command power is susceptible to judicial review) and Chapter 2 by Rowe (which argues that properly constituted military courts have an important role in times of peace and armed conflict) demonstrate that such recourse also includes challenges to the structures of domestic military justice systems.[12]

'Lawfare' is the more recent and weaponised successor to civilianisation.[13] Lawfare does not refer to the modernisation of military law or

[10] An alternative term to civilianisation is 'juridification', which refers more particularly to the effect of external judicial oversight upon the military. See, e.g., G.R. Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' (2002) 65 *Modern Law Review*, p. 36; Anthony Forster, 'British Judicial Engagement and the Juridification of the Armed Forces' (2012) 88 *International Affairs*, p. 283.

[11] See Chapter 3. [12] See Chapters 2, 4, 14.

[13] The notion of lawfare was popularised by Charles Dunlap Jr but has been traced to Australia some twenty-five years earlier. See Christopher Waters, 'Beyond Lawfare: Juridical Oversight of Western Militaries' (2009) 46 *Alberta Law Review*, pp. 885, 890 (fn 27), citing John Carlson and Neville Yeomans, 'Whither Goeth the Law – Humanity or Barbarity' in Margaret Smith and David Crossley (eds.), *The Way Out: Radical Alternatives in Australia* (Melbourne, Lansdowne Press, 1975).

military justice *per se* but instead to the suggested adverse effect that the use of law to control the military may have on its ability to fulfil its combat function. Lawfare was originally used to describe 'the use of law as a weapon of war'[14] – invariably by one's adversaries – but is now applied to the more subtle circumstances 'where law can create the same or similar *effects* as those ordinarily sought from conventional warmaking approaches'.[15] The evolving conception of 'lawfare' makes clear that no single term can adequately capture the different forces that operate within and outside military justice. However, the very notion of lawfare highlights that the 'justice' component of 'military justice' is contested. In Chapter 3 Waters leaves little doubt that the level of civilian legal oversight of the military remains less than civilian political oversight, but he also makes a strong case for the evolution of civilian oversight in a form that remains conscious of the particular character and role of the military. Waters' conclusions are consistent with the scholar who popularised the notion of lawfare, Charles Dunlap Jr, who has recently adopted a more subtle approach to the concept, conceiving of lawfare as a 'strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective'.[16] This more refined approach conceives of lawfare as a supplementary weapon, available to both sides in a conflict. Dunlap argues that this more neutral approach to lawfare is not a new gloss because

> the term was always intended to be ideologically *neutral*, that is, harking back to the original characterization of lawfare as simply another kind of weapon, one that is produced, metaphorically speaking, by beating law books into swords. Although the analogy is imperfect, the point is that a weapon can be used for good or bad purposes, depending upon the mindset of those who wield it. Much the same can be said about the law.[17]

Dunlap also conceded that lawfare must be available to one's enemies and mounted a defence of that possibility as follows:

[14] Charles J. Dunlap Jr, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts' (Humanitarian Challenges in Military Intervention workshop paper, Carr Centre for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001) at 5: www.hks.harvard.edu/cchrp/pdf/publications_pdf/nshr/Vol_1_Nov2001_DunlapMeilingerOwen.pdf.

[15] Charles J. Dunlap Jr, 'Does Lawfare Need an Apologia?' (2012) 43 *Case Western Reserve Journal of International Law*, pp. 121, 122.

[16] Charles J. Dunlap Jr, 'Lawfare Today: A Perspective' (2008) 3 *Yale Journal of International Affairs*, p. 146, at 146.

[17] Dunlap, above n. 15, at 122 (citations omitted).

> Just because the law is available, for example, to the most evil of criminals who may avail themselves of its protections from time to time does not mean that the law acquires the attributes of the criminal. Nor does it mean, incidentally, that those lawyers who assist such persons in securing their legal rights necessarily share their malevolent intent.

It merely means that law – at least ideally – has established norms that, on balance, best serve society as a whole even when it has the effect of protecting people that many find odious and even dangerous. Overall, however, it is indisputable that the public enjoys enormous benefits from the social order that law creates – notwithstanding that occasionally evildoers determined to disrupt that social order are among those who profit from the rights and liberties the law produces and protects.[18] This reasoning proceeds on the assumption that the chief beneficiaries of lawfare are those who make up the very society that has promulgated the law and those beneficiaries include the military forces of that society. This proposition leads to a further conclusion: while the military and civilian may be distinct, they are not, and indeed cannot be, separate. The same is true of military and civilian life more generally. A military force and its members are drawn from society and may exist and operate distinctly from that society, but they are not and cannot be separate from that wider society.[19]

This book is designed to capture these influences by first examining the civilian–military intersection and the influence of civilianisation as described above. This includes (in Part I) civilian oversight of the military (Chapter 3), the relationship between military justice and the civilian courts (Chapter 4), the impact of civilianisation on military administrative law (Chapter 7) and the prospect of civilians being subject to military justice (Chapter 5). Part I also provides a critical account of the potential impact of civilianisation on military courts (Chapter 2) and analyses the role of the military commander in military justice systems (Chapter 6). What is revealing in the accounts of military justice in this book is that although the influence of civilianisation is pervasive across legal systems, this does not mean that there is a common response to this push for greater civilian involvement. As Dahl, the former attorney general for the Armed Forces in Norway, remarked at an expert consultation on human

[18] Ibid.

[19] Although the classic work of Clode suggests that there was a long period in which military and civilian life were in many respects almost wholly separate: Charles M. Clode, *Military Forces of the Crown: Their Administration and Government*, 2nd revised edn (London, John Murray, 1874).

rights considerations in military tribunals convened by the Office of the High Commissioner for Human Rights in 2015, in some countries military justice is conducted by courts martial convened for individual cases and in others it is conducted through the civilian courts. There are also a number of other variations, including standing military courts or civilian courts with specialised military expertise, with practices altering depending on whether it is a time of war or peace.[20] As is stated by Rowe, '[M]ilitary courts or tribunals come in various shapes and sizes'.[21] These differences have meant that countries have dealt with the influence of civilian laws and institutions on their military justice systems in a variety of different ways.

The laws and institutions which have influenced the reform of military justice systems can be broadly grouped into two sources: domestic and international law. The domestic influences upon military justice include constitutional principles, charters or bills of rights and the rise of oversight bodies such as parliamentary committees and specialist Ombudsmen.[22] The domestic legal requirements of military justice systems are increasingly flavoured by international legal instruments and principles. Consequently, military justice has also come under pressure from international law (including both international humanitarian law and international human rights law) particularly when applied on operations. Part II of this collection focuses on a number of domestic military justice systems to determine the way in which domestic and international legal principles have influenced their historical development. Van Hoek's analysis of the Netherlands in Chapter 11 provides a detailed account of a twenty-five-year legislative process which led to a 'civil swing' in the military justice system. Castañeda's discussion (Chapter 10) of selected military justice systems in Latin America demonstrates the way in which the restoration of democracy has sparked a debate on the role and place of military justice systems in national society. The potential domestic (and international) influences are also clear in Lesh's examination of Israel's investigative processes and the report of the Turkel Commission (Chapter 12).

Whereas the influence of international humanitarian law on military action and institutions is well accepted, the involvement of international human rights law and human rights bodies is more controversial. A 2015

[20] United Nations High Commissioner for Human Rights, Summary of the Discussions held during the Expert Consultation on the Administration of Justice through Military Tribunals and the Role of the Integral Judicial System in Combating Human Rights Violations, A/HRC/28/32 (29 January 2015), p. 4.

[21] See Chapter 2. [22] See Chapters 2 and 4.

report by a UK think tank, Policy Exchange, entitled *Clearing the Fog of Law* examines recent litigation concerning British military action in Iraq and Afghanistan and suggests that the European Court of Human Rights (ECtHR) 'is supplanting and undermining the older and far more suitable body of International Humanitarian Law'.[23] The report has been criticised for overstating the extent of the alleged problem of judicial oversight (suggested in the subtitle to the report – 'Saving our armed forces from defeat by judicial diktat') and oversimplifying the relationship between the extraterritorial application of human rights law and international humanitarian law.[24] Whether the influence of international human rights principles and institutions is to be welcomed or not, there is no doubt that it is becoming more pervasive. This is true of the application of international human rights principles on operations and also the influence of human rights law, particularly the right to a fair trial, on military justice systems. For example, Lyon and Farmiloe discuss the impact of the decisions of the ECtHR on the military justice system in the United Kingdom in Chapter 8. International human rights law, and its influence on reform of military justice throughout the world, is also the central theme of a number of chapters in Part III, including Chapters 15 and 16 by Kremmydiotis and Cerna, respectively. Kremmydiotis examines a diverse range of reforms across the world and the way in which international standards have influenced these reforms. Cerna provides a detailed analysis of the decisions in the inter-American system of human rights and their influence on military justice systems in Latin America. Much of the jurisprudence in this area is on the operation of courts martial and military courts (dealing with the more serious offences); however, Tshivhase's analysis in Chapter 17 also examines the future of military summary trials in the light of the jurisprudence of the ECtHR. Such an analysis is timely given that although discussion of reforms to military justices tends to focus on the trial of more serious offences, most matters are dealt with at the lower level.[25] Tshivhase argues that such trials should be maintained, given their

[23] Richard Ekins, Jonathan Morgan, and Tom Tugendhat, 'Clearing the Fog of Law – Saving Our Armed Forces from Defeat by Judicial Diktat' in *Policy Exchange* (London, Policy Exchange, 2015), p. 9.

[24] See Eirik Bjorge, 'The Fogmachine of War: A Comment on "Clearing the Fog of Law"' *EJIL: Talk!* (13 April 2015) www.ejiltalk.org/the-fogmachine-of-war-a-comment-on-the-report-clearing-the-fog-of-law/.

[25] For example, in 2013 in the Australian Defence Force forty-two trials were held by courts martial (General and Restricted) and Defence Force magistrates, 1403 trials were held before summary authorities and 5383 minor infringements were dealt with by discipline

importance to military discipline, but that the influence of human rights law means that reform is inevitable.

Despite the undoubted influence of human rights principles on many military justice systems, not all countries accept the direct effect of international human rights law in their legal systems. As is demonstrated by Tarrant's analysis of Australia's military justice system in Chapter 14, the extent to which international human rights principles may directly impact on domestic structures depends on the reception and incorporation of international law into a national legal system. But this does not mean that international human rights law has not been discussed in the context of changes to Australia's military justice system. As is highlighted by Cronan (Chapter 13) in his examination of the Australian system, human rights provisions (including the European Convention on Human Rights and the International Covenant on Civil and Political Rights) and cases have been referenced in reviews of Australia's military justice system.[26] Jha's account of military justice in South Asia (Chapter 9) also reveals that a number of countries have not been subject to the same drive to reform on the basis of international human rights law.

One issue in the human rights discussions and jurisprudence that has proved particularly problematic is the trial of civilians by military courts or tribunals. Recommendations of the expert consultation convened by the Office of the High Commissioner for Human Rights contained reference to General Comment 32 of the Human Rights Committee in which the committee stated that 'civilians should not be subject to the jurisdiction of military courts except in exceptional circumstances'.[27] In Latin America the jurisprudence of the inter-American Human Rights system has displayed a complete antipathy for civilians being tried in military courts, as demonstrated by the cases examined by Cerna and Liivoja (Chapters 16 and 5). However, the ECtHR has not adopted a complete ban against such a possibility. The differences in approach can be explained by the very different historical factors which have led to reforms to military justice in Latin America, as recounted in Castañeda García's analysis of reforms to military justice in Latin America in Chapter 10. Liivoja highlights that there are both practical and policy reasons why a particular group of civilians, those who travel with the armed forces as 'associated civilians', should be subject to military

officers: see Judge Advocate General, *Defence Force Discipline Act 1982 – Report for the period 1 January to 31 December 2013* (2014) Annexes A–N.

[26] See Chapter 13. [27] See above n. 20, 16.

jurisdiction in certain situations. Liivoja argues that military justice systems possess the legal structures and expertise to provide effective legal oversight and accountability over these associated civilians, including private contractors. Consequently, as is recognised by the UN Special Rapporteur on the independence of judges and lawyers, there may be situations where civilians who travel with the armed forces on operations can and should be subject to military jurisdiction.[28]

The position of civilians who travel with defence forces when they are deployed overseas also highlights one of the other questions that arises throughout this collection: should the type of trial (and the trial institution) be dependent on whether an offence is committed in times of peace or war/at home or on operations? It is often claimed that the exceptional circumstances in which military justice must sometimes be dispensed render civilian institutions inappropriate to the task of enforcing discipline (or justice), particularly when the military is deployed overseas. Gibson succinctly makes this point in his discussion of military justice in operational settings in Chapter 19, when he states that '[S]eparate military justice systems exist because of the needs of armed forces to effectively fulfil their mission of defending the state and their parent societies.'[29] However, the approach to this issue is by no means universal. Van Hoek's discussion (in Chapter 11) of the 'civil swing' in the Netherlands demonstrates that military justice can be administered via the civilian court system. Civilian courts may also be involved in other stages of a trial process – for example, in some countries the civilian courts hear appeals from military courts or tribunals.[30] The analysis by Castañeda García of military justice in Latin America also highlights the way in which reform of military justice in certain countries has led to the incorporation of civilian elements in response to the military's role in dictatorships and the use of military courts to try civilians in the past (Chapter 10). For example, military justice in Argentina is now administered through the civilian criminal code with an ordinary jury hearing cases involving the military in times of peace and war.[31] These innovations demonstrate that not all legal systems regard civilian courts as inappropriate forums to hear cases against military personnel, even during armed conflicts.

There is no doubt that the 'sharp end' of military justice – the way in which it does and should function when armed forces are in operational environments – is an important issue – not only to ensure the rights of defence force members but also to ensure that justice is seen to be done

[28] See Chapter 5. [29] See Chapter 19. [30] See Chapter 15. [31] See Chapter 10.