Canadian Criminal Law Review
April, 2013

Article

***83** International Developments in Military Law

Eugene R. **Fidell** [FNa1]

Since the Supreme Court of Canada's landmark decision in Généreux, Canada has been a leader in military law. This article explains why, despite the paucity of court-martial cases, the subject of military justice remains an important one in Canada and elsewhere. Public confidence in the administration of justice is at least as important in military law as it is in other fields of jurisprudence. How a country dispenses military justice speaks volumes about its commitment to democratic values. To what extent is the military on a separate ice floe from the rest of society? This article proceeds to identify key international trends in military justice, such as who should be tried in military courts, and for what kinds of offenses. Judicial independence is a continuing issue with which Canada has grappled, with greater success than the United States. Finally, the article suggests a variety of emerging issues, including the impact of likely increased austerity in overall government resources, rising public expectations of transparency, the continuing fallout of the struggle against terrorism, and whether the historical role of commander in the administration of military justice should be re-examined.

***84** Since the Supreme Court of Canada's landmark decision in *Généreux*, [FN1] Canada has been a leader in military law. This article will address three questions concerning this field. First, why should anyone care, given the paucity of cases? Second, is there a trend as to the key international issues in military justice? And third, to what emerging issues should we be alert in the future?

1. DOES SIZE MATTER?

Canada does not conduct many courts-martial. We in the United States conduct thousands every year, although the numbers are declining. A number of countries--notably in Western Europe-- have dispensed with classic courts-martial altogether, at least in peacetime. The Netherlands tries military offenses in a special chamber of the local court and court of appeal in Arnhem. Germany, and now France, [FN2] handle military cases in the civilian courts or administratively.

Does size matter? In another context (the military commissions unwisely revived by the second President Bush), I have argued that a legal system has to have a certain size and other

attributes to be viable. [FN3] There has to be a sufficient flow of cases for the machinery to run properly, not to mention for the taxpayers to feel that their money is not being wasted. There has to be a more or less settled body of jurisprudence, a respected bench, an established bar, and a commitment to transparency. Strength in one respect may overcome weakness in another, but all of these are essential in order for a system to enjoy public confidence in the administration of justice. This is not a particularly high bar, but it's one that a system needs to overcome. In important respects Canada has done so.

Even so, in a country like Canada, with a thankfully small military justice caseload, why spend the time even to learn about the system?

The answer is that how a country deals with military discipline tells much about its democratic values. That is not to say that a country that has a wide-open grant of subject matter jurisdiction for its military courts is by definition undemocratic, but surely it says something about a society when military personnel are treated as a distinct and separate community, replete with its own judicial machinery. A useful image is that of ice floes: are the larger society and the military on separate ice floes? Should they be? Does it matter in a country that has no history of military threats to the democratic process?

***85** I have never been entirely comfortable with the notion that the military is a separate society, notwithstanding the United States Supreme Court's repeated assertions to that effect. [FN4] My point is not to persuade readers one way or the other on this issue, which is a matter of personal core values as much as anything else, but simply to suggest that where one stands on this fundamental question will--or should--have an effect on what one's view is of the proper limits and structure of military justice in a democratic society.

2. INTERNATIONAL TRENDS IN MILITARY JUSTICE

What are the key contemporary issues in international military justice? I'll point to some overall themes and, in the process, mention a few cases that may be of interest.

First, who is to be tried at all by military courts? Prevailing international standards suggest that military courts should be reserved for military personnel--but should *not* try human rights violations by those personnel.

This is more complicated than it might seem. For one thing, what if the common law court system has broken down, and military courts are the only functioning courts? (Hint: think “Congo.”) What qualifies as a human rights violation? Is a retiree fair game for trial by court-martial? A number of Latin American countries think so, and have been repeatedly faulted by the Inter-American Court of Human Rights.

What about military dependents? The United Kingdom permits them to be tried by court-martial, and this was approved by the House of Lords in *R. v. Martin*, [FN5] but ran into criticism at the European Court of Human Rights, [FN6] even though the UK tried to do its best by including MOD personnel on the court-martial panel. A case can be made that such a trial was preferable to trial in a German court. [FN7] But are the druthers of the accused a reason

to alter our constitutional values?

How about former soldiers? It's not uncommon for common law countries to seek to continue military jurisdiction even after a soldier has been discharged. We had such a law until it was struck down by the Supreme Court in *Toth v. Quarles*. [FN8] Of course the danger is that criminal conduct may not become known until after the date of an otherwise valid discharge. The famous case of the crown jewels of Hesse, whose theft in Occupied Germany did not become known until one of the thieves had been discharged, shows why a country might want to exercise such "tail" jurisdiction. I cannot say there is a trend with respect to this particular kind of ***86** extension of military jurisdiction, but it does run counter to prevailing international standards that limit court-martial jurisdiction to current, rather than past, personnel.

Government contractors and others who find their way into areas of deployed military operations are a subject of current controversy. Nowadays, uniformed personnel form only a fraction of a deployed workforce. At times, for example, the United States had more contractors in Iraq than soldiers. *Should* they be subject to court-martial jurisdiction? *Can* they, constitutionally? This issue was recently resolved in favor of the government by the United States Court of Appeals for the Armed Forces in a case in which the accused happened to be a Canadian-Iraqi dual national. [FN9] Presumably, the case will now go to the Supreme Court.

I imagine contractor crime has arisen in other countries' deployments as well. Congress a few years ago limited court-martial jurisdiction over (non-military) persons serving with or accompanying an armed force in the field to times of declared war (which we have not had since World War II) or contingency operations (which we currently do have). [FN10] This jurisdiction runs afoul of contemporary international standards. The counter-argument is that the alternatives--trial in local courts or impunity--are equally intolerable. Happily, at least some overseas contractor misconduct is also subject to trial in our federal district courts.

Judicial independence is one of the overarching themes of current international military justice. Canada of course led the way in this field with *Généreux*. [FN11] That case was followed by the European Court of Human Rights in *Findlay* [FN12] and its progeny. But these landmark cases have not been universally influential. For example, smaller, less well-developed countries have argued that these cases are inapplicable to their situations, [FN13] although only recently the Supreme Court of Nepal required that country's military justice scheme to be overhauled on *Findlay* and *Généreux* grounds as a result of public interest litigation in which I participated as an *amicus curiae*. [FN14]

When the question of judicial independence came before the Supreme Court of the United States in *Weiss v. U.S.*, [FN15] the Court held that the Fifth Amendment's guarantee of due process of law did not afford military personnel a right to a judge with a fixed term of office. This was so, as Justice Scalia separately pointed out, even though the Court would never tolerate at-will judges in a state court. [FN16]

Since I mentioned the case from Nepal, it would be wrong not to mention major developments from Australia and India. In Australia, the government thought it was doing the right thing when it tried to make the court-martial system look more like the civilian criminal

justice system. The problem proved to be that Parliament***87** went so far in that direction that the High Court held that the resulting "Australian Military Court" was so much of a court that it had to--but did not--comply with the requirements of Chapter III of the Constitution of Australia. [FN17] The result was a legal train wreck, causing Parliament to restore the status quo ante. [FN18] As of this writing, corrective legislation to create a new "Military Court of Australia" has been introduced, [FN19] but has not yet been enacted.

In India, after decades of delay during which the slow-moving civilian courts were flooded with challenges to courts-martial and other military personnel decisions, Parliament finally got around to creating an Armed Forces Tribunal ("AFT"), composed of both senior judges and retired general officers. The AFT has rendered a number of important rulings, but it is now under fire from two directions: first, can litigants still resort to the regular Indian courts to seek judicial review, [FN20] and second, is the AFT itself sufficiently independent? [FN21] These important issues cast a cloud over the AFT's functioning and ability to earn public confidence.

Choice of forum is a major issue in military justice, and a complicated one in at least some countries with a federal system. No trend is discernible here because these systems may vary dramatically. In the United States, crimes by military personnel may, in theory, be prosecuted in a court-martial, in a federal court, or in a state court. Indeed, since the federal government and each state is considered a separate sovereign, a soldier could, under our "dual sovereigns" doctrine, be tried in both a court-martial and a state court, or in both a civilian federal court and a state court.

There is a rather vague memorandum of understanding between the Defense and Justice Departments with respect to which cases will be tried in courts-martial and which in federal civilian courts, [FN22] but I know of no such formal agreements between the military and state or local governments. In practice, those choices of forum (and remember, both systems can prosecute) are left to local negotiations and *modi operandi*. Oftentimes the local district attorney is more than happy to have the military expend its resources prosecuting a case that could be tried locally, but at times there may be strong local sentiment for trial in the civilian court. Lofty questions of political theory are likely to be lost in the resulting local "horse-trading" between district attorneys and military legal advisors, which is typically conducted out of public view.

***88** A parallel issue of choice of forum has arisen in the context of terrorism trials. Some countries have established special courts for such cases. For example, there was great controversy in the United States over whether Khalid Sheikh Muhammad and the other so-called High Value Detainees who are accused of having planned the 9/11 attacks should have been tried in federal district court in Manhattan rather than the military commissions they currently face. Here again there is a protocol between the Defense and Justice Departments, [FN23] but it too is rather vague and does not give the kinds of clear criteria for which one would have hoped.

Subject matter jurisdiction is relevant to the choice between civilian and military forums. In thinking about the military commissions, I first came to the conclusion that the wisest rule

would be that any case that can be tried in the federal district courts ought to be tried there. Later on, it occurred to me that even though somewhat different interests were at stake, a case could be made for a similar rule with respect to the choice of forum for prosecuting military personnel: any case that can be tried in the civilian courts--federal or state--ought to be tried there. This would largely relegate courts-martial to the trial of disciplinary offenses such as absence without leave, desertion, missing movement, disobedience, disrespect, and the like. Courts-martial could, on this view, retain jurisdiction over common law offenses committed outside the country.

3. EMERGING ISSUES

I don't have a crystal ball. Nonetheless, let me take a stab at identifying some issues that could prove to be quite salient in the next ten years or so. I can think of at least nine.

First, there is reason to fear that industrialized nations and, *a fortiori*, developing ones, will encounter serious demands for austerity. Legislators and alert civilian and military leaders will have to find ways to reduce costs. The potential implications of fiscal climate change are daunting, but the end result of a protracted drought could be military justice systems that--to shamelessly mix metaphors--get better gas mileage. I see three subsets: (1) programmatic contraction/selectivity; (2) the elimination of brick-and-mortar redundancies (schools, courtrooms, courts); and (3) systemic restructuring to increase efficiency and fairness. [FN24] Whether the sequelae of fiscal drought represents casualties or (at least in some respects) opportunities***89** will be in the eye of the beholder, but if the drought proves to be a reality, then, like it or not, it is far better to view it as the latter and make the most of it.

Second, because of rising public expectations, pressure will grow for increased transparency in the administration of military justice. Canada has little to be concerned about on this score, since it has been a leader in making case information available through the internet. Other countries--my own included--need to catch up, not only with Canada, but with our own regular federal courts.

Third, terrorism cases are unfortunately likely to be a permanent concern, and it can be expected that countries will show varying degrees of success in resisting the pressure to reverse the trend towards reducing the scope of military courts. As can be seen from the experience of the United States, the temptation to jettison tried-and-true regular courts can be strong and at times irresistible.

Fourth, there will be continuing issues with respect to the scope of civilian judicial oversight of the administration of military justice. For example, especially in countries that may not have doctrines of standing and in which the courts freely entertain public interest litigation, will there be more intrusive oversight of the exercise of prosecutorial discretion, as has happened in Israel, for example? [FN25]

Fifth, and somewhat relatedly, the largest structural issue facing military justice worldwide is whether prosecutorial discretion and jury selection should be a function of command or Directors of Service/Military Prosecutions and Court Martial Administration Officers. I

have from time to time cheekily observed that Lord Nelson would recognize the broad outlines of the United States military justice system. [FN26] I'm less sure he would recognize systems that are *Findlay-compliant*.

Sixth, I predict (and hope for) increasing attention to issues of professional responsibility among military lawyers. My own research into United States practice in this respect suggests that the same kinds of shortcomings we unfortunately see in civilian law practice can also arise in the world of military justice, whether the attorneys are uniformed or civilian. Transparency is in short supply generally when it comes to bar discipline, but I think we are headed in the right direction.

Seventh, it is impossible to consider the adjudicatory side of military justice without paying some attention to the end-result: correctional and custodial practices. This is perhaps the most understudied aspect of military justice.

Eighth, the world has not yet come up with a satisfactory way of ensuring discipline and meting out justice in joint or United Nations operations, where each contingent state has sole authority to impose discipline. The regular flow of cases of serious indiscipline in these operations is disturbing, and I cannot help but think the problem will receive more--and more effective-- attention in the future.

Finally, one of these days the United Nations will decide whether it wishes to put its stamp of approval on the draft of "UN Principles Governing the Administration***90** of Justice Through Military Tribunals," [FN27] a project spearheaded by the Office of the High Commissioner for Human Rights in Geneva. Opinions will vary as to whether the draft Principles should be embraced in their current form, modified, or set aside. Personally, I favor continuing the effort in order to see if common ground can be reached.

The pace of change in military law is accelerating, although the direction may not always lend itself to confident prediction. As a friendly observer from south of the border, I hope Canada will continue its leadership in this important part of the legal forest.

[FNa1]. Senior Research Scholar in Law and Florence Rogatz Visiting Lecturer in Law, Yale Law School. This article is based on remarks presented in Ottawa on June 14, 2012 at the Education Conference on Canadian Military Law sponsored by the Court Martial Appeal Court of Canada.

[FN1]. *R. v. Généreux*, 1992 CarswellNat 668, 1992 CarswellNat 668F, [1992] 1 S.C.R. 259, 70 C.C.C. (3d) 1.

[FN2]. *See* Loi 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles [Law 2011-1862 of December 13, 2011, on the Distribution of Litigation and the Relief of Certain Court Proceedings], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 14, 2011, p. 21105, ch. X, art. 32.

[FN3]. Eugene R. Fidell, *Charm Offensive in Lilliput: Military Commissions 3.1*, 56 St. Louis U. L.J. (2012).

[FN4]. Chief Justice Rehnquist contributed powerfully to this notion in cases such as *Parker v. Levy*, 417 U.S. 733 (1974) at p. 743:

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.

[FN5]. (1997), [1998] A.C. 917 (H.L.).

[FN6]. *Martin v. United Kingdom*, 44 E.H.R.R. 31 (2006).

[FN7]. *See* Michael R. Gibson, *International Human Rights Law and the Administration of Justice Through Military Tribunals: Preserving Utility While Precluding Impunity*, 4 J. Int'l L. & Int'l Rel'ns. 1, 24 (2008).

[FN8]. 350 U.S. 11 (1955).

[FN9]. *U.S. v. Ali*, 71 M.J. 256 (C.A.A.F., 2012).

[FN10]. Art. 2(a)(10), UCMJ, 10 U.S.C. §802(a)(10).

[FN11]. *R. v. Généreux, supra* note 1.

[FN12]. *Findlay v. United Kingdom*, 24 E.H.R.R. 221 (1997).

[FN13]. *See* Eugene R. Fidell, Elizabeth L. Hillman & Dwight H. Sullivan, *Military Justice Cases and Materials* 835 n.1 (2d ed. 2012) (collecting cases from Lesotho and Fiji).

[FN14]. *Niroula v. Constitutional Assembly & Legislature-- Parliament*, Writ No. 65-ws-0010 (Nep. July 30, 2011).

[FN15]. 510 U.S. 163 (1994).

[FN16]. *Ibid.* at p. 198-199 (Scalia, J., concurring in part and in the judgment).

[FN17]. *Lane v. Morrison*, 239 C.L.R. 230 (2009).

[FN18]. *Military Justice (Interim Measures) Act* (No 2) 2009 (Cth).

[FN19]. Military Court of Australia Bill 2012 (introduced June 21, 2012); see Attorney-General for Australia, Legislation to Establish Military Court of Australia, online: <http://www.attorneygeneral.gov.au/Media-re-leases/Pages/2012/Second%20Quarter/21-June-2012--_-Legislation-to-establish-Military-Court-of-Australia.aspx> (last visited July 22, 2012).

[FN20]. *Nargolkar v. Union of India*, W.P(C) 13360/2009 (Delhi High Ct. Apr. 26, 2011).

[FN21]. *Singh v. Union of India* (Punjab & Haryana High Ct.) Nov. 20, 2012.

[FN22]. Memorandum, of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes, Aug. 1984, in Manual for Courts-Martial, United States (2012 ed.), App. 3.

[FN23]. Memorandum from Brad Wiegmann, Col. Mark Martins, Detention Policy Task Force, to the Attorney General and Secretary of Defense of the United States, Tab A (Determination of Guantanamo Cases Referred for Prosecution) (July 20, 2009), <http://www.justice.gov/opa/documents/taba-prel-rpt-dptf-072009.pdf>.

[FN24]. For example, although it was long the case that countries had separate military justice systems for their various armed force branches, the trend since World War II has been to rationalize national systems under uniform, if not unified, disciplinary legislation and structures. Even in the United States, which substituted a "Uniform" *Code of Military Justice* for the separate Articles of War, Articles for the Government of the Navy, and Disciplinary Laws of the Coast Guard in 1950, the various military justice systems remain surprisingly autonomous and non-uniform. *See* Eugene R. Fidell, *Military Law*, in 140 Daedalus No. 3, 165, 169-70 (Summer 2011). Perhaps their strongest common traits are a resistance to change and (I am sorry to report) a lack of interest in foreign military justice developments.

[FN25]. See, for example, *Tzofan v. Judge Advocate General*, PD 43(4) 718 (Isr. 1989); *Abu Rahme v. Mandelblit*, No. 7195/08 (Isr. 2009), noted in Fidell, Hillman & Sullivan, *supra* note 13, at p. 253.

[FN26]. See, for example, Eric Umansky, *JAGged Justice: The Army Needs an Independent Prosecutor*, Slate, June 12, 2006, online: <http:// www.slate.com/articles/news_and_politics/jurisprudence/2006/06/jagged_ justice.html>.

[FN27]. E/CN.4/2006/58, Jan. 13, 2006.
17 Can. Crim. L. Rev. 83

END OF DOCUMENT