RECENT REVISIONS OF MILITARY JUSTICE SYSTEMS

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For those of us who have taken an interest in military justice, the last ten years or so have been a period of tremendous ferment and professional interest. I suggest that this is so for at least four reasons.

First, the continuing high tempo of military and peacekeeping operations in various parts of the globe has meant that disciplinary issues have continued to emerge, as is quite predictable in any military force. Military justice, quite simply, has never been very far from the front page of the news. I am sorry to say that this is particularly true of my own country, and it is little comfort to be able to add that we are not alone in this experience.

Second, country after country has found it timely to revamp their legislation relating to military justice. There has been a lot going on. Some of this is the normal business of updating various national codes, and some of it is in response to decisions of national constitutional courts.

Third, and related to the factor I just mentioned, is the pervasive effect of decisions of the human rights bodies, especially the regional courts in Europe, Latin America, and Africa. Slowly but surely, brick by brick, these bodies have been constructing a body of doctrine against which national legislation can be – and is being – examined.

Finally, thanks to the Internet as well as the important work of the International Society for Military Law and the Law of War, it has become increasingly feasible for those who are interested to monitor pertinent legislative and judicial developments all around the world. Awareness of the experience and actions of authorities in other countries does not necessarily lead to "copycat" activities elsewhere, but I do think the mere awareness of developments beyond our own countries' borders cannot help but bring about the conditions needed for domestic legislative and judicial action.

Arne Willy Dahl, Robert Husbands, and others have ably summarized what some of the current trends have been, but it may be useful to try to highlight the main ones – and add one that may not have been on your own personal lists of candidates for attention.

The steady contraction of military justice remains a fact of life, as witness the recent French legislation that dramatically pared it back in peacetime. Other coun-

tries in Europe and elsewhere may find themselves taking similarly dramatic measures.

Less dramatic but equally important is the fact that country after country, especially those in the common law tradition, have found themselves reexamining the basic "wiring diagram" of traditional British-style military justice. At the heart of that system is the military or naval commander in whose power it lies to convene, appoint, and review courts-martial. That model is under attack because it is so difficult to reconcile with universally accepted demands for judicial independence. Some countries, including my own, have sought to retain the command-centric model by constructing elaborate mechanisms to hold back the eternal and inevitable danger of unlawful command influence, or "UCI." (We do love acronyms in the United States.) The result has been a steady flow of litigation. One cannot help but wonder whether we have created a Frankenstein's Monster in which a substantial body of doctrine has grown up and requires persistent attention to fight against a risk that is more easily avoided by jettisoning the role of the commander.

The European Court of Human Rights has played a central role – no, *the* central role – in this development. Its influence has been felt far beyond those States that are governed by the European Convention. This is a tribute to the power of ideas as well as the tide of globalization we have all witnessed in the law. Reference should also be made to the leadership role played by the Supreme Court of Canada and the Court Martial Appeal Court of that country. I imagine few if any of us here today are unaware of the great case of *The Queen v. Généreux*.

Not that the path of reform has been an easy one. There have been missteps, most notably perhaps in Australia, about which I am sure we will be hearing. But those missteps have typically been the result of good intentions, and I would like to think that Australian military justice will rest on a surer footing than it perhaps has in the past thanks to the legal wringer through which it has been put as a result of Parliament's effort a few years ago to do the right thing.

The interaction between parliaments and constitutional courts varies dramatically from country to country and from issue to issue. The Mexican Congress's response to the Supreme Court's recent military jurisdiction decision may bear little resemblance to the Nepalese' Parliament's response to that country's decision earlier this year finding the Nepali military justice system constitutionally deficient.

The path of reform has at times met with resistance. Many countries may be tempted to argue that constitutional doctrines – like beer – do not travel well. Or reform initiatives may be viewed as a new and insidious form of colonialism. Countries with small defense establishments may view the body of law being articulated in Strasbourg as nice for rich countries, but unimaginable for poor ones, or small ones. The battle for recognition of universal standards may run headlong into ur-

gent claims for national sovereignty and resistance to outside influence. Indeed, even in my own country, powerful voices in the judiciary are deeply hostile to reference to developments elsewhere as irrelevant and antidemocratic.

Questions of jurisdiction also rank high in the current era of reform. Should civilians ever be tried by a military court? This is a very live issue in post-Arab-Spring Egypt. It's even an issue in the United States, where the military has sought in one or two cases to court-martial civilians for offenses committed in Iraq. The validity of the recent legislation under which those cases have been brought will eventually reach the Supreme Court, since we have a long constitutional tradition of confining military jurisdiction to military personnel.

But what about retired military personnel? Are they military or civilians? The United States from time to time prosecutes military retirees, in sharp contrast to the consistent pronouncements of the Inter-American Court. Trying retirees seems to be a constant temptation in Latin America. Why is that?

This brings us to the question of reform with respect to subject matter jurisdiction. Here mention should again be made of the Inter-American Court in particular. Only recently, a decision of that court led the Supreme Court of Mexico to make it clear that military human rights violations affecting civilians must be tried in the civilian courts. The Mexican Congress and President have been focusing on these issues, but it is unclear whether the reforms under consideration will satisfy demands of the human rights community.

In this connection, mention must also be made of those parts of today's world where the only even marginally functional system of justice may be courts-martial. If that is the reality, as it is in parts of Africa, for example, what should be our response as the global military law community? To write that country off, or to try to work with its leaders to upgrade military justice to the point that it inspires public confidence until civil society gains strength and can resume responsibility for the administration of justice?

What are the consequences of a trimming back of military jurisdiction? I would like to propose one for your consideration: the more court-martial jurisdiction is limited, the greater countries will rely on summary punishment as a means of ensuring discipline and on administration separations as a means of weeding out those who really should not be in uniform. Unfortunately, these kinds of changes – unlike those that concern the formal structure of classical military justice – may not take the form of legislation and will probably less frequently reach the level of the constitutional court. Hence, developments of this kind may be more difficult to track. This makes the work of the International Society all the more critical.

Finally, I would like to mention a concern of my own that has not yet attracted the level of legislative or judicial attention it merits. I have become increasingly interested in the application of professional responsibility norms – both legal ethics and standards of judicial conduct – in the world of military justice. Perhaps it is unreasonable to expect parliaments and high courts to concern themselves with such obscure matters, but I suggest that they should be somewhere on the agenda, for without high ethical standards, there can be no confidence in the administration of justice by military courts. I invite both panelists and members of the audience to comment on pertinent developments in this field, if time permits.

New Haven, Sept. 11, 2011