NATIONAL INSTITUTE OF MILITARY JUSTICE

LONDON CONFERENCE ON CONTINUITY AND CHANGE IN MILITARY JUSTICE

On 12 December 1998, over 30 practitioners and scholars of military justice from the United States, United Kingdom, Republic of Ireland, and Canada came together at the Royal Air Force Club in London for a day of discussion and debate. Several major themes resonated throughout the conference's six panels and informal conversation about current trends and issues in military justice. The process and ramifications of the civilianization of military law, the proper scope of civilian review of military tribunal's decisions, the effects of reform on military effectiveness, the possibility of an increasing disconnect between military and civilian societies, the treatment of sex and gender-related misconduct under military law, and the potential avenues for civilian involvement in military-legal affairs occupied lawyers from both sides of the Atlantic.

None of the participants represented any governmental agency or institution. The views expressed were solely their own.

Opening Remarks

Eugene R. Fidell (President, National Institute for Military Justice, Washington, D.C.) convened the conference early on Saturday morning, welcoming participants to London and reviewing the day's agenda. Opening with a narrative of Darwin's voyage on HMS *Beagle*, Mr. Fidell compared the development of separate systems of military justice to the independent evolution of life on the islands of the Galapagos archipelago. Hoping to engender a spirit of inquiry and exploration across national borders, Mr. Fidell highlighted the conference's goal of promoting international interaction and understanding among lawyers involved in military justice. In light of recent reforms and the increasing frequency of multi-national missions around the globe, this appears an auspicious moment for the start of greater international cooperation in the common arena of military justice.

Session 1: Country Reports on Current Issues

Professor Donald N. Zillman (University of Maine Law School, U.S.) opened the first session by noting the diverse areas of law and legal thought that come under the broad rubric of military justice. He identified four factors that bear on the study of law in the armed forces:

1) the prominence of sex in military crime and punishment;

2) the progressive civilianization of military legal standards;

3) the imperfect nature of civilian criminal justice, and the significance of the military as an alternate model of justice;

4) the increasing isolation of military v. civilian societies, among lawmakers, social and cultural elites, and scholars, as well as in the demographic base of servicemembers.

Brigadier Tom Glynn (U.K.) followed Professor Zillman's introduction with a focus on the current difficulties of British military law. He pointed toward the "tremendous civilian influence on military-legal matters" and the lack of military experience among civilian judges who review court-martial as major hurdles to maintaining a working system of military law. Apart from functional viability, Brigadier Glynn expressed concern about basic issues of legal authority, such as whether a civilian appeal court should be able to quash any sentence of dismissal from Her Majesty's forces and thereby return a servicemember to duty. The European Court of Human Rights' decision in *Findlay v. United Kingdom* has placed military lawyers in the difficult position of being forced to reorganize under the gaze of outsiders, including those with political causes.

Professor Gary D. Solis (U.S. Military Academy, West Point, N.Y.) addressed current issues in American military law, leaving the issue of criminal adultery to other panelists. He identified six issues of "significant current interest" in U.S. military law, including:

1) unlawful command influence in court-martial panel selection;

2) the admissibility of polygraph results;

3) the ongoing litigation surrounding Sergeant Major of the Army McKinney's court-martial for sexual harassment;

4) "the fine line between inspection and search;"

5) the upcoming trial of the Marine Corps flyers whose EA-6B severed the cable that sent 20 civilians to their death near Aviano, Italy; and

6) the possibility of the first execution under the military death penalty since 1961.

David J. Bright, Q.C. (Boyne Clarke, Halifax, Canada), highlighted current issues while providing an overview of military justice in Canada. As one of only two civilian barristers who routinely represent defendants at courts-martial, Mr. Bright described a flexible, responsive system of military justice under the combined authority of the National Defense Act and the criminal law. The regular force of approximately 65,000 servicemembers and a small reserve force are subject to military law, resulting in about 100 courts-martial each year. In addition to JAG-supervised general courts-martial?decided by five-officer panels?and disciplinary courts-martial, two additional types of courts-martial are permitted: bench trials of servicemembers, termed "standing courts-martial," and "special general courts-martial," which may try civilians who accompany active-duty forces. Each type of court-martial is automatically subject to civilian review. Following U.S. military law, crimes need not be service-connected to be subject to court-martial, although unlike the U.S., there is no death penalty available at court-martial.

Current problems involve Quebec and its French civil code (as only two bilingual judges sit on

the Canadian military bench), the ongoing integration of women and a "zero tolerance" policy toward sexual harassment that has diminished morale, and rising media interest in military-legal proceedings such as the much-publicized murder in Somalia. The question of judicial independence became a paramount concern with the *Lauzon* case, which deemed standing courts-martial unconstitutional but granted the military a year to reform the system of judging. Mr. Bright explained that the Canadian *Charter of Rights and Freedoms* will continue to affect Canadian military law, which has been forced to civilianize some legal standards. Sexual orientation is no longer a source of official discrimination, and few problems have resulted from the change in the policy concerning homosexuality, though Mr. Bright noted that some senior servicemembers are very intolerant of openly gay servicemembers. General courts-martial use a computer-generated method to ensure random selection of panel members, although Mr. Bright suggested that servicewomen appear more frequently on panels for sex-related cases than other types of crimes, reflecting the larger concern with the Canadian authorities' tendency to promote "political correctness" at the expense of procedural fairness. A final issue related to the role of civilian attorneys in courts-martial is a recent indication that the government may no longer cover expenses incurred in hiring experts for trial if the accused elects a civilian as counsel.

Captain Gerard Humphreys, B.L. (Dublin, Ireland), delivered the final country report, describing the Irish system of military law as a hybrid of the British and American systems, with problems similar to those mentioned by the other presenters. Approximately 12,000 Irish serve in the military, both within the country and abroad, the latter through nearly continuous involvement in peacekeeping missions. Unlike members of Ireland's police forces, servicemembers must sue in order to receive benefits if injured. An "explosion of litigation" over the duty of care owed soldiers by their military superiors has erupted, explained Capt. Humphreys. Questions about how to compensate soldiers injured while serving under United Nations commanders, how the legal concepts of duty of care and assumption of risk apply to service outside state boundaries, and how to handle changes in soldiers' operational chains of command have yet to be fully litigated.

After the initial presentations, a lively discussion over the current state of military law, particularly in the United Kingdom, ensued. John Mackenzie, Esq. (U.K.), observed that a "mad scramble" to meet the requirements of the European Convention on Human Rights was underway, and that potentially huge financial losses loomed for the British military. British military officials' control over the structural composition of courts-martial has been weakened by the decisions of international courts, a blow to the authority and independence of serving officers. Apart from changes in the military's criminal law, challenges to past dismissals for homosexuality, to violations of employment rights, and to racial and sexual discrimination are now actionable. How (and whether) the current system of British military law can survive the changes wrought by a smaller force and the intervention of international tribunals remains to be seen. Other topics addressed during the discussion included the scope of the Irish military's civil liability, the U.S. Congress' tasking of the Joint Service Committee on Military Justice to study the question of court-martial member selection, the U.S. Supreme Court's sweeping deference to the American military, and whether resistance to legal reforms from within military institutions stems from concerns about military effectiveness or adherence to dated models of coercive discipline.

Session 2: Changing Composition of the Armed Force: Consequences for Military Justice

Professor Michael F. Noone, Jr. (Catholic University Law School, Washington, D.C.) described shifts in the composition of the U.S. armed forces, assessing their impact on the military justice system. Noting remarkable continuity between modern American military law and the eighteenth-century articles of war, Professor Noone outlined how the contemporary force structure differs from the U.S. armed forces pre-1950, when the Uniform Code of Military Justice was implemented. Professor Noone reviewed four areas of importance:

> 1) The effects of "the shift from conscription to an all-volunteer force," including the consequences for the rates of court-martial, the need for uniformed lawyers, the extent of procedural protections required for a non-conscript force, the limitations on rehabilitating servicemembers, and the doubtful efficacy of summary punishment;
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> 2) Increased numbers of servicewomen and issues of sex crimes and equality, including date rape, fraternization, the relationship between consent and hierarchies of rank, and the prosecution of sexual harassment;
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> 3) The impact of the larger percentage of married servicemembers (twice as many soldiers are married as are single) on both desirable punishment options for offenders with family obligations and the "long term consequences of mixed gender deployment;"
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> 4) Rising deployment rates along with "increased reliance on civilian and reserve components" and the problems of exerting jurisdiction over civilians accompanying military forces, especially overseas, and over inactive reservists for offenses that may have been committed during active-duty stints.

Professor Noone noted that criminal law has become an ever smaller part of a military lawyer's duties and wondered if the drop in total force size and court-martial rate requires a closer look at the number of uniformed attorneys. He also pointed out the decreasing salience of rehabilitation as a goal for servicemembers whose careers are virtually ended by even one incident of minor misconduct. Professor Noone closed by commenting on the increasing number of civilian attorneys who serve as counsel in military cases and the absence of effective sanctions or other disciplinary action available against such counsel under the Uniform Code, which assumes all counsel to be military.

Discussion centered on the links between criminal and administrative systems of discipline and the "growth industry" surrounding redress of grievances from both administrative sanction and criminal punishment. The collateral consequences of administrative action rival criminal conviction in some instances, yet the process often resembles an employment tribunal more than a criminal trial. British observers expressed widely divergent views on whether meaningful judicial review of administrative decisions was available. U.S. practitioners discussed the political considerations that have directly affected review of high-profile cases, the most notable the Senate Armed Services Committee's decision to hold up promotions of Navy officers until each promotable individual was confirmed "not present" at the 1991 Tailhook debacle.

Session 3: Legal and Disciplinary Issues in Humanitarian and Peacekeeping Operations

Professor Peter J. Rowe (Department of Law, University of Lancaster, U.K.) examined the disciplinary aspects of peacekeeping and humanitarian operations, both now-common modes of intervention by military forces. Although maintaining order and discipline among troops engaged in peacekeeping operations is made easier by the absence of combat-related stress, other complications abound. Revisions in the mandates that govern peacekeeping operations make the responsibilities of deployed troops fluid. The concerns raised by the *Rockwood* case in the U.S. point to the political difficulties of limiting the scope of servicemembers' duties in host nations. Conflicts between national and international laws, complex rules of engagement, and the doubtful applicability of the Geneva Conventions to situations in which no armed conflict exist make the legal terrain of humanitarian operations difficult to navigate. In Canada, the 1993 Somalia operation raised these issues after a servicemember was charged in the death of a young boy. Whether lethal force is available in the protection of equipment and supplies, whether the rules of engagement constitute an order?and whether that order may be overridden by a superior's verbal order, and how the various laws of states sending troops interact with the law of the host government were each critical legal questions that had to be addressed. Professor Rowe concluded by remarking that the law has been slow to catch up to the changing factual circumstances of these new military missions.

Professor Mark J. Osiel (University of Iowa Law School, U.S.) then turned to the roles of JAG officers and commanders, using the perspectives of legal ethics and military sociology to assess this unique lawyer/client relationship. He explained the difficulties of negotiating a legal relationship in which the client (the military commander) may not know when legal advice is needed, and the lawyer (JAG officer) may not be able to provide the clear, unambiguous counsel desired by the commanding officer. For this system to function effectively, military attorneys must be responsive to the operational needs of the commanders they serve, and commanders must become smarter legal consumers. Professor Osiel suggested that a business counsel model may be appropriate. He also commented on the importance of recruiting lawyers, suggesting that the JAG corps must convince prospective military lawyers of their crucial role in the administration of military justice in order to compete for the best students.

Colonel Anthony S. Paphiti ((British) Army Prosecuting Service (Germany)) followed Professors Rowe and Osiel with a review of his experiences as legal advisor during the United Nations' effort to bring peace and stability to the Balkans. Colonel Paphiti noted that disciplinary problems were fewer because of the absence of alcohol and women near the front lines, but that issues of deciding which law governed were difficult to resolve. Before the operation, NATO military attorneys anticipated and worked out many of the legal issues they would later face, but they could not fully resolve the difficulty of operating in the murky legal waters of "peace support operations," a mission in the midst of the spectrum between peacekeeping and humanitarian efforts. Because the United Nations mandate was very general, it was of little help in addressing specific legal issues, and the presence of only a titular government in Bosnia was a major difficulty. Colonel Paphiti identified the following issues as particularly significant in his experience:

1) Whether military commanders could exercise jurisdiction over civilians

accompanying the NATO forces in respect of criminal offenses alleged against them;

2) How to ensure freedom of movement for troops across borders of different factions (for instance, avoiding the payment of exorbitant taxes on humanitarian supplies);

3) How to gain the advantage of and enforce political agreements in an atmosphere of almost no useful communication;

4) Whether Status of Forces Agreements are necessary in Peace Enforcement;

5) The rules of engagement flexibility required for PSO;

6) Whether those taken into custody for civilian crimes constituted "prisoners of war" (they were generally treated at the minimum standard required under the Geneva Conventions);

7) How to clarify competing legal definitions of self defense under various domestic and military law;

8) How to position troops from different participating nations in the field, given that certain countries' units would come to the defense of only specified other troops, only in limited circumstances, or not at all;

9) Whether riot gas could be used?not allowed under the Geneva Conventions, but available under some domestic laws;

10) How to coordinate advice among the JAGs from different countries (the British and U.S. Marine Corps JAG advised French and German commanders as well as their own chain of command).

During the discussion, Mr. Fidell queried the speakers and other participants about whether peacekeeping operations posed distinctive morale and disciplinary problems as compared to more traditional warfighting missions. While the legal issues involving discipline of troops are more complex and the conflicts of laws issues often novel, most agreed that commanders face the same types of disciplinary challenges as commanding officers during wartime or long deployments. Professor Solis noted that two U.S. generals were prosecuted for smuggling automatic weapons after returning from peacekeeping missions, and Colonel Paphiti confirmed that the rules of engagement and legal protocols developed addressed the issue of war booty.

Session 4: Modalities of Change in Military Justice

Professor Gerry R. Rubin (Kent Law School, Canterbury, U.K.) mapped out a framework for understanding peacetime change in military, focusing on the evolution of military law in the United Kingdom. He stressed the distinctive requirements of military discipline within the context of broader shifts in society, including an emphasis on individual rights, the equality of women, and the rights of

homosexuals. Using a series of diagrams to model exogenous and endogenous peacetime change in military law, Professor Rubin set out short-, middle-, and long-term factors that influence changes in military justice. He argued that internally motivated changes (endogenous) are more readily accepted than externally imposed reforms, but that such exogenous reforms are nonetheless a legitimate path to reform for military law in a democratic society. Professor Rubin also highlighted the tensions between military and democratic values, explaining that civil society seems to require that the military both accept civilian values and reflect the demographics of society, despite the unique goals of the armed forces.

Captain Feargal Kavanagh, B.L. (Dublin, Ireland), followed with an Irish perspective on changes in military law. Capt. Kavanagh explained that the relatively small size of the Irish defense force provides little experience for military lawyers, judges, and court-martial panel members, and also provokes little external pressure for change. Few fresh ideas come from within the system, and the decreasing number of courts-martial creates the potential for the quality of military justice to suffer as a result of such inexperience. Irish military lawyers spend increasing amounts of time on personnel issues and operational matters rather than criminal justice, much like JAGs in other military-legal corps. Capt. Kavanagh noted that the Irish Judge Advocate General is a civilian appointed by the government, but that courts-martial are presided over by deputy JAGs, or in-house military lawyers, who advise on legal matters but do not decide them. Capt. Kavanagh identified three problems ripe for reform in the current system:

> 1) The court-martial members are both judge and jury, deciding all matters of law as well as fact;
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> 2) Command influence is apparent in the selection of members; and
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> 3) The redundancy of keeping a civilian JAG when all courts-martial are automatically appealed to a court-martial appeals court.

Capt. Kavanagh also noted that although Ireland signed the European Convention on Human Rights, it is not part of Irish domestic law. This is part of the reason that there is no Irish corollary to the *Findlay* decision.

Dwight H. Sullivan (Managing Attorney, American Civil Liberties Union, Baltimore, Maryland) spoke to the process of change in U.S. military law, applying some aspects of Professor Rubin's model to the American experience. Mr. Sullivan described a system subject to little internal pressure for change yet insulated from external pressure by the Supreme Court's deference and lack of congressional interest. The last time a Supreme Court decision affected the operation of military law was *United States v. Matthews*, a 1983 opinion freeing seven servicemembers from death row because of inadequacies in the military death penalty procedures. Since then, the Court has continued an "extremely deferential standard" for reviewing constitutional issues in military justice. Because the Uniform Code of Military Justice does not undergo periodic review, Congress has adopted major revisions only twice, in 1968 and 1983, since the Code's enactment nearly fifty years ago. Legislation affecting military justice has only a small civilian constituency, and because the Department of Defense controls the internal process of suggesting changes to military law, public participation in matters of

military justice is rare and generally ineffectual, such as in the staged hearing that accompanied the adoption of the current "don't ask/don't tell" policy on homosexuality in the military. Mr. Sullivan noted that civilian involvement in the reform of military law has stronger advocates now than in the past (most notably in the creation of the National Institute of Military Justice), but that interested non-servicemembers must wait for belated responses to their efforts such as the U.S. Army's current proposal for adopting judicial tenure nearly a decade after the issue was raised through the efforts of civilian litigators.

During the discussion, participants questioned the distinction between endogenous and exogenous change, and raised the issue of the proper amount of civilian oversight of military justice. Mr. Fidell noted that the absence of unions, lack of legislative oversight, limited media interest in non-sex scandal military-legal matters, and lack of sustained academic interest permit U.S. military justice to operate without the kinds of scrutiny found in other areas of governmental activity. Mr. Fidell suggested that the media could serve as an effective agent of change by raising the level of public understanding.

Session 5: Virtual Military Justice

Commander Philip D. Cave (U.S.) distributed floppy disks and instructions to all participants to further the goal of making web-based data on military justice broadly accessible. Commander Cave described the information currently available on web servers in the U.S., cataloging the differing levels of interest in web resources. He identified several barriers to the goal of a more transparent set of web resources related to military justice, including limits on personnel support and funding, and special military security concerns.

Colonel Paphiti picked up the issue of Internet security, addressing concerns about email communication, the availability of encryption software, and the use of digital signatures for authentication. He explained that the British legal services have very little data accessible on the web, and described aspirations for a single, global military justice web site that would serve as a focal point for the international community, with links to national web pages devoted to military law.

Session 6: Y2000 Military Justice Conference

Mr. Fidell closed the proceedings by asking for input on future conference plans. He noted that many participants had already registered their approval of the current conference and expressed hope for a sequel in the near term. Some recommended that the National Institute for Military Justice develop an international counterpart; others wished to add more countries to the list of participants, broadening the base of national experience to include such countries as France, Germany, and Luxembourg. Irish Judge Advocate General Donagh McDonagh suggested that a conference was needed on each of the day's panels, raising the possibility of a narrowing the scope of future efforts to enable more detailed discussion and comparison. The search for common ground among the different military laws that govern national forces, particularly those conducting peacekeeping actions in the Balkans, was identified as a key objective of a future conference.

NIMJ wishes to extend heartfelt thanks to Elizabeth Lutes Hillman, Rapporteur, for preparation

of this report.

The list of attendees and their affiliation (for identification purposes only) follows.

Canada

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Ireland

Barry Bowman, Solicitor, Dublin
Ciaran Craven, Barrister, Dublin
Capt Gerard Humphreys, Barrister, Dublin
Capt Feargal Kavanagh, Barrister, Dublin
Donagh McDonagh, Barrister, The Judge Advocate General of Ireland
Geri Silke, Barrister, Galway

United Kingdom

Gilbert S. Blades, Solicitor, Lincoln
Air Commodore Richard A. Charles, RAF, Deputy Director of RAF Legal Services
Brigadier Tom Glynn, Brigadier Prosecutions, Army Prosecuting Authority
Lieutenant Colonel Roger A. Lewis, OBE, Army Prosecuting Authority (UK)
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David Meltzer, Research Assistant, Department of Law, University of Kent at Canterbury
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Major General A.P.V. Rogers, OBE, (Ret), former Director Army Legal Services
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Ronald W. Meister, Cowan, Liebowitz & Latman, P.C., New York
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