WHY MILITARY LAW? SOME UNITED KINGDOM PERSPECTIVES

GERRY R RUBIN*

I INTRODUCTION

The academic study of military law within the United Kingdom, with its emphasis on military justice, has few adherents and disciples. This contrasts sharply with the flourishing status of the law of armed conflict (or international humanitarian law) within university law schools. No doubt a major reason for the limited university appeal of military law, as understood in the narrow sense of military justice and military 'employment' law, is due to its small constituency. The size of the all-volunteer armed forces in the United Kingdom and the numbers of those civilians abroad accompanying the military on postings, and who are subject to the reach of military law, have been falling steadily over the past decades. Moreover where 'victims' of breaches of military law are themselves civilians, the penal law applicable in those cases is likely to be the ordinary civilian criminal law rather than specialist military offences even if proceedings were to take place before military courts.

Thus any description and analysis of military law for inclusion in a public law compendium ought perhaps to expound initially upon some core issues concerning military law for an audience assumedly not intimately acquainted with the map of the subject. Therefore it is proposed in this paper to address some basic questions. These are: What is Military Law? Where is Military Law? Finally we will seek to answer the more analytical question Why Military Law?

II WHAT IS MILITARY LAW?

Military law is the term applied to the code of military discipline passed by parliament (most recently in the *Armed Forces Act 2006* (UK)) and to which members of the British Army are subject (in addition to their obligation to obey the ordinary civilian law). Military law is also applicable to reservists and to members of the Territorial Army (TA) when on duty, and to TA officers at all times.[1] Technically naval law is applicable to members and reservists of the Royal Navy (and to the Royal Marines and reservists when on naval duties), while air force law is applicable to members and to reservists of the Royal Air Force. However the term military law is frequently applied to members of the armed forces generally. Indeed as a result of the enactment of the 2006 Act (above) there is now a uniform and tripartite code of military law applicable across all services and which replaces the *Army Act 1955* (UK), the *Air Force Act 1955* (UK) and the *Naval Discipline Act 1957* (UK).

Military law is particularly associated with prescribing military offences such as mutiny,[2] desertion, going absent without leave, insubordination and conduct to the

* Professor of Law, University of Kent, United Kingdom.

1 The relevant legislation is the *Reserve Forces Act 1996* (UK).

2 For a recent study of the offence of mutiny and its demise see G R Rubin, 'Debasing the Currency? Defining and Prosecuting Mutiny in the Post-War Era' (2006) 27(1) *Journal of Legal History* 1-28.

prejudice of good order and service discipline.[3] However, service personnel are also made subject under military law to the ordinary rules of English criminal law wherever they serve.[4] This may mean that if they commit an offence such as theft or assault abroad during, say, a training exercise or a tour of duty, they may be tried before a service court (assuming a 'status of forces agreement' (SOFA) between the United Kingdom and a host nation is in place) for such offences rather than being made subject to the jurisdiction of the host nation. In some cases, crimes committed abroad by servicemen may not be covered by a SOFA, or the SOFA might accord primacy for trying the offender to the host nation.[5] For example in Cyprus some years ago, three British servicemen were tried and convicted by a Cypriot court for the murder of a Danish tour guide on the island. (They were recently released after serving a lengthy prison sentence).[6]

Under the *International Criminal Courts Act 2001* (UK) British servicemen may also be tried for war crimes before courts martial. The first such conviction occurred in early 2007 when a defendant soldier pleaded guilty at a court martial at Bulford Barracks, near Salisbury, to abusing an Iraqi detainee following the Iraq war of 2003.[7] A very serious civilian offence committed by a serviceman in the United Kingdom, such as rape, murder or manslaughter, can only be tried before a civilian criminal court. For a lesser civilian offence committed by a serviceman in the United Kingdom, the civilian courts have primacy, though this is sometimes waived, allowing service discipline law to be enforced. Two cases local to the present writer illustrate civilian primacy. In the first a soldier who assaulted a civilian in the street was tried and convicted before the local magistrates. Perhaps more surprisingly, a fellow-soldier who attacked his wife on barracks was also dealt with by the civilian authorities rather than by the military disciplinary system. Perhaps the view was taken that wife battering is considered such a serious social evil that it was not appropriate to keep the matter within the confines of the Army.[8]

Under certain circumstances civilians abroad are made subject to military law (or, technically, to 'service discipline if not subject to service law' by virtue of section 370 of, and Schedule 15 to, the 2006 Act). They include families of service personnel or civilian staff such as teachers or welfare workers on overseas barracks. Thus offences committed by such civilians, for example, breaches of a commanding officer's standing orders restricting speed limits on barracks, or civilian offences

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3 Military offences are set out in Part 1 of the *Armed Forces Act 2006* (UK).

4 *Armed Forces Act 2006* (UK) s 42.

5 For an example of status of forces agreements see G R Rubin, 'United Kingdom SOFAs and Rules of Engagement in Former Yugoslavia: Some Further Reflections' in William Dunlap, John Carey and R John Pritchard (eds), *International Humanitarian Law* (2004) vol 2, ch 8, 176-82.

6 The members of the Royal Green Jackets were convicted by a Cypriot court of the murder of a Danish tour guide on the island in 1994. They were eventually released from prison on the island in August 2006. See *Soldier free after Cyprus killing* (2006) BBC News Online <http://news.bbc.co.uk/1/hi/england/4792915.stm> at 3 December 2007.

7 Cpl Donald Payne of the (then) Queen's Lancashire Regiment pleaded guilty to a war crime involving the inhumane treatment of a number of Iraqis in his custody. He was sentenced at the end of April 2007. See *British soldier admits war crime* (2006) Guardian <http://www.guardian.co.uk/Iraq/Story/0,,1876151,00.html> at 3 December 2007.

8 *Kentish Gazette* (Canterbury), 30 October 2003.

such as theft or assault may render such civilians subject to military discipline.[9] The forum for the civilian defendant may be summary dealing before the commanding officer (CO), a Service (formerly Standing) Civilian Court before a judge advocate sitting as a magistrate in Germany, Belgium and Holland, or in Cyprus and the Sovereign Base Areas of Dhekelia and Akrotiri in Cyprus, or even a court martial.[10]

However, the court martial in Germany of a young British civilian dependant of an Army corporal, convicted of murder, was recently held by the European Court of Human Rights (ECtHR) to be a violation of Article 6 of the *European Convention on Human Rights* (ECHR) in respect of the right to fair trial. This was on the ground that the composition, structure and procedure of his court martial were sufficient to raise in him a legitimate fear as to its lack of independence and impartiality.[11]

It should be noted that the term military law is also applied to what may be described as service 'administrative law', covering such issues as enlistment, discharge, redress of grievance, equal opportunities and treatment, pay and pensions, health and safety, billeting and so on.[12] Some of these provisions are statutory but others are purely prerogative powers such as the regulations respecting the commissioning of officers (the various sources of military law will be discussed below).

III COURTS MARTIAL

The most formal disciplinary forum in military law is the court martial. In the United Kingdom there are in effect two kinds, district and general, though the 2006 Act no longer distinguishes between different types of court martial in such terms. However, for the sake of convenience and familiarity the terms are retained here. Thus district courts martial deal with lesser civilian or military offences and contain at least three court members, effectively the jury who nowadays are usually a mix of officers and warrant officers. Their maximum sentence is two years imprisonment (which they might award for a serious physical assault or for a major breach of trust involving financial irregularity). An award of detention at the Military Corrective Training Centre at Colchester in Essex, accompanied with or without dismissal from the service, is an alternative custodial sentence, though the phrase 'corrective training' is significant. Lesser punishments such as compensation orders, fines, reduction in rank etc can also be awarded.

A general court martial contains at least five members and will try more serious military or civilian offences (but not the most serious civilian offences, as noted above, if committed in the United Kingdom). The maximum punishment is that prescribed by law, either under civilian law or under the 2006 Act. As in civilian society the death penalty is no longer available. It was finally abolished for remaining military offences such as mutiny in the face of the enemy by the *Human*

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9 Military law jurisdiction over civilians is contained in the *Armed Forces Act 2006* (UK) s 370. See also Peter Rowe, 'The Trial of Civilians Under Military Law: An Empirical Study' (1995) 46 *Northern Ireland Legal Quarterly* 405-22.

10 See Part 11 of the *Armed Forces Act 2006* (UK).

11 *Martin v United Kingdom*, ECtHR, Application no 40426/98, 24 October 2006, available at <http://cmiskp.echr.coe.int> at 3 December 2007.

12 See *Manual of Military Law* (1992 ed) pt 1, ch 1, [6].

Rights Act 1998 (UK), section 21(5), following the United Kingdom acceptance of a relevant Protocol to the ECHR.[13]

There remains provision for the holding of field general courts martial (FGCMs). These were the notorious forums in which the vast majority of the Great War British soldiers executed by firing squad had been condemned[14] (the soldiers were subsequently pardoned in 2006).[15] However in the light of sophisticated communications systems, tele-conferencing and video links, it is unlikely that FGCMs will ever sit again in the future. It may be noted that when the relevant provisions of the 2006 Act do eventually come into force, there will no longer be separate courts martial for the Army, Navy and Air Force. Instead there will simply be standing courts martial[16] where, in theory, a soldier can be tried before a court whose members also contain officers or warrant officers from the other services. Moreover such courts will no longer be ad hoc and convened whenever the need arises. Instead they will be permanent courts (which might be said to enhance the independence of court members from command influence). Indeed it may be said that this development builds on the practice in recent years of the adoption by courts martial in the United Kingdom and Germany of the Assizes system whereby they sit according to a fixed timetable of set periods.

It is important to recognise that while courts martial might be perceived as an example of drumhead injustice, the reality is that their procedures nowadays are not dissimilar to Crown Court hearings. Naturally shining brasses, spruce uniforms, precision marching and bellowed orders can be seen and heard. But the formality of courts martial is comparable to the formality of the Crown Court for civilian trials.

In the past legal advice was offered to the court martial by a judge advocate (since 1948 always a civilian). However until the *Armed Forces Act 1996* (UK) he could not, unlike a judge in a civilian court, direct the court martial as to the law (though his legal advice, for example, on the distinction between murder and manslaughter, was invariably accepted by the lay members of the court). Following an important ruling of the ECtHR in *Findlay v United Kingdom*[17] the absence of full judicial powers on the part of the judge advocate, among other flaws in the proceeding, meant that courts martial until that time were incompatible with Article 6 of the ECHR on the right to fair trial. The 1996 Act corrected that position. It also abolished the anomalous situation that the convenor of a court martial was the complainant CO's own superior (his brigade or divisional commander). The need to remove the taint of command influence meant that the convening of courts martial and appointment of members would thenceforth be undertaken by an administrative body (mainly retired officers) separate from the chain of command. That body is now called the Military Courts Service. Similarly the appointment of military prosecutors is now no longer in the hands of a convening officer but is made by the independent service Prosecuting Authority which is also outside the chain of command and which is answerable ultimately to the (civilian) Attorney-General for prosecution matters (see later). Authority for the appointment of a Director of

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13 Consequential textual changes to earlier armed forces legislation were made by paras 14-22 of Schedule 6 to the *Armed Forces Act 2001* (UK) to remove references to the death penalty. Capital punishment for the remaining civilian offences of treason and piracy was abolished by the *Crime and Disorder Act 1998* (UK) s 36.

14 See, for example, Julian Putkowski and Julian Sykes, *Shot at Dawn: Executions in World War One by Authority of the British Army Act* (1992).

15 *Armed Forces Act 2006* (UK) s 359.

16 *Armed Forces Act 2006* (UK) s 154.

17 (1997) 24 EHRR 221.

Service Prosecutions (likely to be a civilian rather than a senior military lawyer) as the head of a tripartite service prosecuting authority was made by the 2006 Act, section 364.

IV PRE-TRIAL STEPS

When an alleged serious offence is reported to the CO he is required to call in the service police.[18] For lesser offences the battalion's regimental police investigation may suffice and may lead to summary disposal (or dealing; see later). Interviews with suspects, identification parades, fingerprinting, taking intimate samples etc are all governed by service equivalents of the Codes under the (civilian) *Police and Criminal Evidence Act 1984* (UK). The service police may then identify possible charges and submit a report for the CO (or it will be referred to him by the prosecuting authority). He will 'investigate the charges' and, if the matter falls within his jurisdiction, may dismiss the charge(s), stay the proceedings (in which case the matter may possibly be passed to the civilian authorities for processing), or deal with the matter himself by summary dealing (assuming, as noted above, he possesses the necessary jurisdiction to proceed summarily).

If the matter is a serious one and is referred by the service police to the prosecuting authority, the ultimate decision on whether to court martial the accused, that is, whether to 'direct the charge', is taken by that authority. In effect the 2006 Act has removed the power of the CO to deal with serious cases. This came about following the collapse of a controversial (civilian) Old Bailey prosecution of a tank commander, Trooper Williams and led to a change in pre-trial procedure whereby COs will no longer have power under the 2006 Act to deal with, and thus potentially to dismiss, serious charges without a court martial. Serious cases must now be reported to the service police and referred to the service Prosecuting Authority.

The Williams case had arisen when the trooper's CO decided to dismiss homicide charges against him arising out of the fatal shooting of a fellow tank crewman involved in an altercation with an Iraqi civilian.[19] When Williams opened fire with a view to protecting his colleague, the latter was unfortunately hit by a round from the trooper's weapon. However the CO, investigating the incident, presumably concluded, after receiving divisional legal advice, that the death was either accidental when Williams was attempting to prevent the Iraqi then being questioned from resorting to violence to the deceased or else that Williams had not infringed the rules of engagement then applicable.

It was a legal judgment not shared by a more senior legal adviser at the Army Prosecuting Authority. However since the CO had already dismissed the charge against Williams, the only legal avenue against the latter was a civilian trial for manslaughter at the behest of the Attorney-General. It was that trial which collapsed at the Old Bailey. However civilian concern that a CO possessed the power to dismiss a serious charge against a member of his unit and thereby could prevent trial by court martial prompted first an administrative instruction depriving the CO of such power and, subsequently, a provision to that effect in the 2006 Act. Whether the reform represents a further flexing of civilian muscle over the military or whether it reflects a shift of power within the military away from commanders on the ground and towards 'professional' staff authority (whereby the military lawyer

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[18] See Part 5 of the 2006 Act for this and subsequent information.

[19] For the Tpr Williams Old Bailey case, see *Guardian* (UK), 7, 8, and 28 September 2004, 7 October 2004, 7 and 8 April 2005.

can 'trump' the battalion CO) is not wholly clear. Perhaps there is an element of both present.

The prosecuting authority is composed of service lawyers who are independent of the chain of command and who are organisationally separate from the brigade or divisional military lawyers who advise commanders at that level on prosecutions or on operational matters relating to, for example, law of armed conflict questions such as specific targeting questions. Thus if the prosecuting authority direct that no court martial should take place (perhaps because it is not in the 'service interest' or because the authority considers that there is a less than fifty per cent chance of a conviction) then the CO does not have this option. A joint prosecuting authority, replacing the three separate service prosecuting authorities for the Army, Navy and Air Force will be created in due course.

V SUMMARY DEALING

The majority of formal disciplinary proceedings take the form of summary dealing whereby an accused appears before his CO or the latter's second-in-command to answer charges relating to more minor civilian or military offences than would ordinarily be heard at court martial.[20] Colloquially known as 'CO's Orders', the procedure is conducted on a more informal basis than is a court martial. The prosecution will be conducted by the unit's adjutant or executive officer and lawyers are not permitted to be present to represent the accused or the CO. Moreover the rules of evidence are not followed. However a record of summary dealing is now meticulously maintained.

The accused is required to represent himself, to examine and cross-examine witnesses himself (even to the extent of being obliged, if the need arose, to argue legal points such as, for example, the definition of theft) and to present his own submissions. He may, however, be assisted by an assisting officer who may prompt him. The officer will also present any mitigation in the event of a finding of guilty.

The accused has the right to elect trial by court martial rather than by summary dealing. This option is considered to enhance the procedure's compliance with the right to fair trial under Article 6 of ECHR. However, the vast majority of service personnel facing summary dealing prefer to have the matter dealt with quickly, and done and dusted. The creation of the Summary Appeal Court in 2000 also sought to ensure that the procedure was in conformity with ECHR, for the court is presided over by a judge advocate with two officer wingmen. Recent decisions of the ECtHR have indeed endorsed the view that the whole package of summary dealing is ECHR-compatible notwithstanding the absence of judicial involvement or legal representation at the first instance hearing.[21] The court can, of course, quash the finding and/or sentence awarded by a CO at summary dealing and an early study of the record of the court suggests no reluctance on the part of the court to do so,

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[20] *Armed Forces Act 2006* (UK) pt 6.

[21] *Thompson v United Kingdom* (2005) 40 EHRR 11; *Baines v Army Prosecuting Authority* [2005] EWHC 1399 (Admin); cf, *Bell v United Kingdom*, ECtHR, Application no 41534/98, 15 November 2005 (complaint admissible under Arts. 6(1) and 6(3) of ECHR).

notwithstanding how such decisions might be received by the CO whose award is overturned or by the unit generally.[22]

It may be noted that from January 2005 the British Army introduced a new system of low-level and swift disciplinary procedures as a result of which minor punishments, such as extra duties or loss of privileges, can be imposed, following a relatively informal hearing, by even the most junior of commanders such as a lance-corporal. Such procedures are prescribed in internal Army administrative rules (see later for sources of military law). They are, indeed, perhaps akin to a factory disciplinary code, the enforcement of which probably derives from the terms of engagement rather than from 'external' legal authority.[23]

VI WHERE IS MILITARY LAW?

The legal governance of the British armed forces is wondrously complex.[24] There are, of course, statutes such as the *Armed Forces Act 2006* (UK). There is subordinate legislation in the form of statutory instruments issued by the Secretary of State under statutory authority such as the *Army Custody Rules 2000* (UK) (S.I. 2000, No. 2368). There is subordinate legislation in the form of regulations issued by the Defence Council under statutory authority, for example, the *Custody and Summary Dealing (Army) Regulations 2000* (UK). There are prerogative Orders in Council issued under statutory authority, for example, any Order in Council issued under s. 131(3) of the *Reserve Forces Act 1996* (UK) directing the extension of the Act to the Channel Islands and the Isle of Man. There are 'pure' prerogative Orders in Council, for example, the Requisitioning of Ships Order relating to the Falklands conflict. It may also be observed that 'pure' prerogative powers, whether the deployment of the armed forces or the termination of an appointment held under the prerogative, may be recognised by statute. For example the *Courts-Martial (Appeals) Act 1968* (UK) states in section 54(2), 'Nothing in this Act is to be taken as affecting Her Majesty's Royal prerogative of mercy'.

Importantly attention should be drawn to the prerogative powers embodied in Queen's Regulations (QR), a code for each of the arms. QRs are regulations approved by the Sovereign and issued under the aegis of the Defence Council. They may provide detailed provisions relating to such matters as enlistment, discharge, redress of grievance, equal opportunities and treatment, pay and pensions, health and safety, billeting, or servicemen's relations with the media or with respect to political activity (though some of these issues may also be covered in other sources of military law).

For example, QRs contain detailed provisions in respect of the procedures for the administrative discharge of service personnel, whether medical discharge, unsuitability, conscientious objection or 'services no longer required'. Indeed QRs cover an extensive range of issues from the monumentally important such as publicising the applicability of the law of armed conflict to service personnel, on the one hand, to the monumentally esoteric, such as which flags should be flown from

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22 Peter Rowe, 'A New Court to Protect Human Rights in the Armed Forces of the United Kingdom: The Summary Appeal Court' (2003) 8(1) *Journal of Conflict and Security Law* 210-15.

23 *Army General and Administrative Instructions* (January 2005) ch. 67; 'Low-level law: swift justice' (January 2005) *Soldier* 10.

24 This section is adapted from the present author's notes to the Sweet & Maxwell Current Law Statutes edition of the *Reserve Forces Act 1996* (UK) s. 4.

barracks on the birthdays of various members of the Royal Family. However it is important to note that breaches of QRs do not, per se, lead to disciplinary proceedings but any breach may provide evidence for charges under the service discipline legislation, notably the offence of conduct to the prejudice of good order and service discipline.

Other significant prerogative sources include the Royal Warrants for regulating pay and promotion, for example, the Pay Warrant or the Commissioning Regulations. It is paradoxical that while service personnel are entitled to equal pay by virtue of legislation, they are not entitled to sue for pay, per se, since their service engagement is grounded in the prerogative and at the pleasure of the Sovereign.

Further military law sources of importance include documents called Defence Council Instructions or single-arm Orders such as Army Orders. The former may deal with allowances, postings or even prohibitions on downloading pornography from Ministry of Defence (MOD) computers. The latter may regulate such matters as entitlement to wear decorations or the attachment of personnel to units. Letters of Policy Guidance on particular subjects may be issued, for example, relating to sexual harassment (or, formerly, to homosexuality). These will emanate from Heads of Staff, such as the Adjutant-General.

Two further sources of military law must be mentioned. First there is a compendious five-volume collection of Army General Administrative Instructions and its equivalents in the other services, such as the Royal Navy's FLAGO (Fleet General and Administrative Orders). The scope of coverage dwarfs anything which could be conjured up by QRs. Thus at one level AGAI includes detailed instructions to COs as to how to deal with disciplinary matters involving officers and other ranks, or with redress of grievance complaints, or sexual harassments issues, or applications to leave the services on grounds of conscientious objection, or drugs investigations. But they also cover matters such as catering, barracks, military and language training, transfers, postal services, even instructions as to defecating in Arctic climes so as to leave no trace of one's presence for the benefit of one's enemy!

Such internal guidance are, of course, house rules and do not themselves possess legal authority. Moreover, most of them have until recently been classified, leading, it is believed, to a bizarre situation in one case when a gunner was court-martialled for desertion during the first Gulf War of 1990-91 but claimed conscientious objection. Defence counsel, it seems, could only obtain a copy of the AGAI instruction to COs on how to deal with conscientious objectors with the kind permission of the MOD.[25] Since that time much, but by no means all, of their classified status has been lifted and occasional references to AGAI now appear in case law such as tort litigation involving the military.

The last source of military law which it is proposed to mention here is standing orders, usually issued by a commanding officer. Those of a continuous nature are recognised by the *Armed Forces Act 2006* (UK), section 13, and it is an offence for those subject to them to disobey such orders if they were aware, or ought to have been aware, of them. They may deal with such matters as curfews, out of bounds areas, speed limits on barracks or the maintenance of private vehicles in proper condition. They are also applicable to civilians working abroad within a military command or formation or who otherwise fall within the scope of command of a CO

[25] Gordon Risius, 'Conscientious Objection and the Gulf War' (1995) 2 *Military Law Journal* 25-40.

and civilians abroad (as well as service personnel) can therefore be prosecuted under military law for breach of such standing orders.

VII WHY ENFORCE MILITARY LAW?

In one respect there is an obvious answer to this question. That is, that military law has been widely recognised (not least by the Duke of Wellington) as essential to military effectiveness in ensuring that a disciplined military force does not degenerate into a lawless armed rabble. This is particularly essential on operations abroad where British courts do not function. In other words a feature of a military law system is its portable quality. It is carried with service personnel wherever in the world they serve, and whether a state of war or a state of peace is in existence. Moreover, enforcing military law is also nowadays recognised as fulfilling a country's international obligations to prevent and punish war crimes. Third, it is acknowledged that civilian sanctions may be inadequate to prevent the kind of misconduct within the ranks which may have far-reaching and disastrous consequences.

The obvious example is the case of those departing their employment. In civilian society, an employer could, technically, sue for breach of contract. For the armed forces, however, desertion or going absent without leave, especially during active service, may, of course, have fatal consequence for those left behind. Such a fate would scarcely befall those factory workers perhaps left in the lurch by their colleague walking out on the job. Consequently, a more compelling sanction, in the form of penal, and not merely civil, sanctions may be justified to ensure retention within armed forces deployed on operations or a unit which must be at the ready at a moment's notice.[26]

Similar arguments may be raised in respect to such behaviour as insubordination to a superior. This is scarcely a criminal offence within the civilian world and the consequences may be minimal. Within the military, however, the principles on which the latter operates include a rigorous application of authority going up, and strict obedience to orders coming down, the chain of command. In particular the essence of teamwork, so central to military activities, is dependant on trust in one's superiors (which is not to ignore the requirement for mutual trust). Insubordination will not only undermine such trust within a unit. It may hazard operations if subordinates were to treat superiors' orders with contempt, derision or resistance. Again the point can be advanced that civilian non-penal sanctions would lack sufficient punch to bring home the seriousness of insubordination in a military setting where lives may be at stake.

Moreover, the need for a separate system of military law alongside civilian criminal law is justified on the footing that there *are* distinctive military offences which have no counterpart in a civilian criminal law system. We have already cited mutiny, desertion, absence without leave and insubordination. We could add to this list such military offences as malingering, offences against morale, scandalous conduct by officers, 'ill treatment' of officers or men of lower rank, disgraceful conduct and the protean offence of conduct to the prejudice of good order and service. The last-named may, of course, cover a multitude of sins, including insulting the ambassador's wife at an embassy reception, passing a dud cheque, or even unacceptable fraternisation between officers and other ranks. Indeed the existence of

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[26] See, for example, the 'Report of the Army and Air Force Courts-Martial Committee, 1946 (Cmd. 7608)' (1949) 12(2) *Modern Law Review* 223, [11].

the military offence of conduct to the prejudice etc and of the specific case of fraternisation will also tell us something significant, as we shall see below, about the ideological and functional rationales for military law as a whole.

VIII MILITARY LAW AND THE RULE OF LAW

Attention has recently been focussed in the United Kingdom on a series of courts martial conducted against British servicemen for various forms of ill treatment (including deaths in custody) against Iraqi civilians following the conflict in 2003.[27] One might ask why the British Army proceeded to investigate and, in some cases, to conduct such prosecutions. For by revealing such alleged (and in some instances proved) abuse, such proceedings, it might have been thought, could encourage a hostile reaction among Iraqis opposed to the British military presence in their country. Moreover such trials might be seen in some British quarters as harmful to service morale.

One might, of course, answer that such proceedings were taken simply because breaches of military law were alleged to have occurred and that the rule of law, in its crude simplicity, must be upheld. For example, during an earlier conflict, the Korean War, a British soldier guarding a barracks in Taegu, South Korea, was prosecuted at a court martial in Kure, Japan, for the killing of a local civilian who was alleged to have been acting suspiciously near the barracks. As the judge advocate at the court martial told the court,

> A British soldier, Driver Fargie, stands before a British Court upon a charge of murdering a South Korean in Taegu, a town in South Korea. It is possible … that the life value of a South Korean has been or will be or may be evaluated in the minds of the Court. I say to you, gentlemen, with all the gravity and force at my command that British Law admits of no differentiation in the life value of human beings.[28]

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[27] The cases which went to trial were the 'Camp Breadbasket' prosecutions of Royal Fusiliers for, inter alia, ill-treatment of detainees. See *Guardian* (UK), 23, 24, and 26 February 2005, 25 March 2005. Second was the trial of seven paratroopers for the murder of a young Iraqi. See *Guardian* (UK), 6, 12, and 13 September 2005, 3 and 4 November 2005; *Observer* (UK), 6 November 2005. Third, there was the trial of members of the Irish Guards and Scots Guards for the killing of an Iraqi teenager allegedly chased into a canal in Basra where he drowned. See *Guardian* (UK), 3 May 2006, 6, 7, 8 and 9 June 2006. Fourth was the prosecution of a number of members of the Queen's Lancashire Regiment and other units for various offences including the killing of an Iraqi hotel receptionist. See *Guardian* (UK), 19, 21, 23, and 27 September 2006, 2 and 27 October 2006, 17 November 2006, 14 and 15 February 2007, 13 and 14 March 2007; *Observer* (UK), 18 March 2007. Most of those tried for the Camp Breadbasket offences were convicted. None of the paratroops nor the guardsmen were convicted. Finally, with the exception of one soldier pleading guilty to a war crime of inhumane treatment (see above n 7) all the other accused, including a former CO of the QLR, were acquitted. The significance of the trials and the lessons to be drawn would obviously repay detailed examination.

[28] See G R Rubin, *Murder, Mutiny and the Military: British Court Martial Cases, c. 1940-1966* (2005) 245. Fargie was defended by Major J M Smail of the Australian Army Legal Corps.

However the proceedings arising out of the Iraq conflict may not simply reflect a concern for the rule of law. For it is arguable that they may also fulfil a further 'political' aim of promoting, within a society only recently emerging from the totalitarian rule of a dictator (irrespective of the apparent chaos which is Iraq at the time of writing), the democratic ideal which underpins the rule of law doctrine. In other words, perhaps there is a further, quasi-foreign policy, role for military law, which role might be perceived when the population of an occupied, colonial or 'liberated' territory are enabled to observe that British servicemen, including officers, are being court-martialled, whether in that territory or not, for offences committed against civilians in that territory.

Thus in respect of Iraq, the proceedings might be designed, inter alia, to transmit, particularly to Iraqi society, a democratic message regarding equality before the law and the legal accountability of military occupiers. The contrast with the former undemocratic regime of Saddam Hussein would thereby be underlined. In other words it may be argued that the proceedings reflected not only a judicial hearing but also the 'politics of courts martial'.[29]

Other post-war historical examples which might be said to illustrate this concept include the trials of British officers in 1948 following allegations of their mistreatment of ex-SS officers in a detention centre, Bad Nenndorf, in Germany.[30] Thus among the reasons for mounting such courts martial, it is suggested, was the political object of demonstrating to post-Nazi German society that in a democratic society the British authorities are legally accountable. In other words the military trials of British service personnel for offences against the local population in certain theatres abroad might be perceived as contributing to Britain's assumedly benign foreign policy aims insofar as these proceedings would display the government's credentials in the struggle to win over to democratic values the populations of former dictatorships now under foreign occupation (or, in the case of Iraq, now reinforced by the armed forces of democratic societies).

As a German periodical noted in March 1948 in respect of the Bad Nenndorf proceedings,

> It is a good omen that in the middle of Germany a trial is being conducted against British officers accused of having ill-treated German prisoners at Nenndorf in order to extract confessions. All Germans should take trouble to understand the full significance of this trial. The details which come to light are not so important; what matters is the fact that these proceedings are taking place publicly on the initiative of the occupying Power in the middle of the occupied country. The Germans who are inclined to say 'The victors are no better' are thereby disarmed. For imagine Justice being administered in this way under Hitler. Would it have been possible to

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[29] The politics of courts martial, as employed here, is to be distinguished in the first instance from the 'politics of law' which, in Marxian terms, views law as reflective of and as furthering the economic 'sub-structure' (whereas liberal conceptions of law tend, of course, to view the legal regime and legal doctrine as autonomous phenomena independent of politics). The politics of courts martial must also be distinguished from 'political trials' involving charges such as treason or sedition which may challenge the political legitimacy of an existing regime. Cf, Peter Hain, *Political Trials in Britain* (1985).

[30] *Guardian* (UK), 17 December 2005, 3 April 2006; BBC 2, 'After the War', 16 August 2005 (television documentary).

> institute such proceedings against members of the German forces, of the SS, of the Party, or of the police?[31]

Thus in the case of post-war Germany the spectacle of such courts martial (notwithstanding that acquittals were eventually returned in some cases) could be seen as contributing to the re-education element of the de-Nazification programme (cf the de-Baathification programme in Iraq). Whether the rationale was similar to that for the holding of the Nuremberg trials where one of the Allies' objects was to record for posterity, and to impress upon every German, the evil and barbarity of the Nazi system is a moot point. And of course the defendants at Nuremberg were themselves German or Austrian, not British. Despite this distinction regarding the nationality of the defendants between the Bad Nenndorf and the Nuremberg proceedings, the trials of British servicemen by court martial, it is argued, will in some situations be perceived as transmitting to a society emerging from dictatorship the political values of equality before the law and of the legal accountability of the military.

IX UNIQUE TASK?

Thus it is submitted that the enforcement of military law must be understood in terms of the distinctive status occupied by members of the armed forces and the distinctive nature of the service engagement. Indeed the judging of servicemen's behaviour under military law is, it is argued by its supporters, best undertaken by service personnel themselves who would be in a better position than a civilian judge or jury to comprehend the situation of, for example, infantrymen abroad on guard duty charged with the homicide of a civilian apparently acting suspiciously near the barracks, or of a soldier charged with homicide in connection with the maintenance of order in the immediate aftermath of battle.

The uniqueness of military employment can, of course, be identified in terms of a job involving orders requiring one to risk one's own life and indeed that of one's colleagues. It is a post permitting its occupants to carry lethal weapons and to use them to effect under certain conditions. The job may also involve a 24/7 commitment in certain circumstances. Indeed service personnel do not have a contract of employment. Rather they are on a service engagement under the Royal Prerogative (with certain statutory additions).

Members of the armed forces also tend to live within a military community or on isolated deployments; in both cases often cut off from the norms and values of civilian society with its emphasis on possessive individualism and on individual advancement. Such cultural separation has, of course, been exacerbated both by the ending of universal conscription in Britain in the early 1960s and by the significant decline in the size of the armed forces over the past twenty years.

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[31] *Die Zeit* (Germany), 18 March 1948, cited (and translated) in the *Economist* (UK), 10 April 1948. See also Patricia Meehan, *A Strange Enemy People: Germany Under the British, 1945-50* (2001) 80-6. Similar proceedings against British officers during the Mau Mau troubles in Kenya in 1954-55 and during the Cyprus troubles in 1956-57 can also be cited in support of the proposition regarding the politics of courts martial. For Kenya see Rubin, above n 28, ch 12 (trial of Captain Griffiths). For Cyprus see *R v Linzee and O'Driscoll* [1956] 3 All E R 980.

With a narrower cadre of elite professionals serving in the forces, the 'footprint' of the armed forces within British society has increasingly become thinner. The number of members of parliament who have served in the armed forces is now a tiny proportion compared with the post-war era. Societal and parliamentary understanding of the culture of the military is correspondingly reduced, ironically at the same time as some members of the armed forces voice complaints about the impact of human rights obligations and of other non-discriminatory legal norms on the armed forces.[32] One result has been the generating of a debate on whether the armed forces in Britain have a right to be different or a need to be different in order to be excluded from the scope of, for example, the provisions of the ECHR on freedom of speech, assembly, association, right to privacy etc; or from anti-discriminatory laws commonly deriving from the European Union. Such laws govern issues such as health and safety, hours and conditions of work, equal pay and equal treatment on grounds of gender, marital status, gender orientation, race, religion, age, disability and politics. Given the distinctive nature of the military task, the appropriateness of applying such employment norms to the armed forces has been a common theme among some commentators.[33]

X MILITARY COVENANT

The tension in the debate over the above can perhaps be perceived when one appreciates that the service engagement may be better explained in terms of what the British Army describe as the military covenant.[34] Thus what is implied is more of an ethical or even of a quasi-religious commitment between the serviceman and the armed forces. Moreover it is one which is expected to cut both ways in terms of the armed forces looking after the welfare of the serviceman and his family through thick and thin, a reciprocal duty which some argue is not being fully met by the services in respect of the treatment of British military casualties from the Iraq war or in terms of the quality of service living accommodation.

The covenant seeks to imbue service personnel with certain values such as courage, discipline, trust, loyalty, integrity, self-sacrifice, respect for others and for the law, teamwork, cooperation, professionalism, regimental spirit and tradition, that is, a sense of belonging to a unit (perhaps as distinct from the Army or Navy or Air Force); in other words the primacy of the collective over the individual, of duties as against rights, in order to maintain the essential integrity of the unit as a fighting force and its military effectiveness. It also seeks to set standards of behaviour as reflected in civil law, military law and the law of armed conflict.

Soldiers are adjured to avoid any activity which might undermine their professional ability or place others at risk. The misuse of alcohol and drugs is singled out as unacceptable, as are bullying, harassment, discrimination or other forms of deceit. A CO, faced with a complaint against a soldier relating to such

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32 For a general survey of the relationship between armed forces and human rights law see Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (2006).

33 See, for example, Christopher Dandeker, 'On the Need to be Different: Military Uniqueness and Civil-Military Relations in Modern Britain' (2001) 146(3) *RUSI Journal* 4-9.

34 See *Soldiering: The Military Covenant* (February 2000) vol 5 (British Army Doctrine Publication); *Values and Standards of the British Army* (2000) British Army <http://www.army.mod.uk/servingsoldier/usefulinfo/values_and_standards/index.htm> at 3 December 2007.

conduct will pose the question, 'Have your actions or behaviour adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Army?'

And here we can see the rationale for the general prohibition within military law of conduct to the prejudice of good order and service discipline,[35] whether it takes the form of bullying, harassment or even fraternisation. For the last-named may well sow the seeds of jealousy or favouritism within a unit and may undermine trust in one's superior if it were known that he (or conceivably she) was having an illicit or adulterous relationship with a junior member of the unit.[36]

That is, military law is not simply about forbidding anti-social behaviour by members of the armed forces. It is also about fostering certain values and standards. They may not, perhaps, be wholly unique to the military. Nonetheless, the values of (inter alia) trust, loyalty, teamwork and self-sacrifice are the ideological assumptions upon which military operations are conducted. They are what impel soldiers to undertake dangerous operations and where such values are slipping in any particular instance, military law will be a reminder of the 'moral component of fighting power' or, in simpler terms, of military effectiveness.

XI CONCLUSION

We may now sum up the above arguments. First, the enforcement of military law will reveal more than the obvious aim of maintaining law and order on the part of service personnel. It may set out to show examples.[37] It may seek, such as following the execution of Admiral Byng, to 'encourage the others'.[38] It may foster within the armed forces the appropriate military values, standards and ethos (as exemplified in the 'conduct to the prejudice' provision or in the fraternization restrictions). Some may even seek to justify a separate code of military discipline in order to fend off civilian legal encroachment upon military behavioural norms. For it is widely acknowledged, certainly within the armed forces themselves, that military values differ from those of civilian society. Thus the attempt to impose, for example,

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[35] On the legality of this provision see *Ainsworth v United Kingdom*, European Commission on Human Rights, 27 October 1998; Paul Camp, 'Section 69 of the Army Act 1955' (1999) 149 *New Law Journal* 1736-7.

[36] See, for example, Chris Jessup, *Breaking Ranks* (1996) 124-33; *Armed Forces' Code of Social Conduct: Policy Statement* (2003) British Army <http://www.army.mod.uk/linkedfiles/servingsoldier/termsofserv/discmillaw/annex_n_final_2.pdf> at 3 December 2007. See also 'Love among the ranks', *Independent* (UK), 5 November 2002; *Army Relationship Ban 'Outdated'* (2005) BBC News Online <http://news.bbc.co.uk/2/hi/uk_news/4330865.stm> at 3 December 2007; *Times* (UK), 13 March 2005.

[37] Anthony Babington, *For the Sake of Example: Capital Courts Martial 1914-1918: The Truth* (1985). Cf, Field Marshal Haig's annotation in 1916 in confirming a death sentence despite the accused's plea that he had quit his post because he felt giddy after experiencing shelling: 'How can we ever win if this plea is allowed?' Cited in Cathryn Corns and John Hughes-Wilson, *Blindfold and Alone: British Military Executions in the Great War* (2001) 144.

[38] 'Dans ce pays-ci il est bon de tuer de temps en temps un amiral pour encourager les autres': Voltaire, 1762. After a court martial Byng had been shot on the quarter-deck of his own ship in 1757 for a naval loss for which he ought not to have been blamed. See, for example, Dudley Pope, *At Twelve Mr Byng Was Shot* (1987). His descendants unsuccessfully petitioned the Ministry of Defence for a pardon in March 2007.

civilian employment law norms on the armed forces or to render servicemen subject *only* to civilian criminal law is viewed by some as a profound misunderstanding of the cultural environment of the military, with potentially deleterious consequences for military effectiveness.[39] Finally, the enforcement of military law may, in a limited range of circumstances, be viewed as a contribution (whether so intended or not) towards the promotion of the values of the rule of law and of the legal accountability of the executive. Moreover the hope would be that such a contribution would be identified by a local population just emerging from dictatorship, chaos, widespread violence or terrorism, as an exemplar of a benign or 'ethical' British foreign policy whose values the locals should now embrace.[40]

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[39] See, for example, General (ret'd) Sir Michael Rose, 'Sustaining the Will to Fight in the British Army' (1998) 10(1) *Officer* 40-1; Gerald Frost (ed), *Not Fit to Fight? The Cultural Subversion of the Armed Forces in Britain and America* (1998).

[40] Historically courts martial have also been perceived as courts of honour where an impugned officer might seek to demand a court martial to defend his reputation. See, for example, Arthur N Gilbert, 'Law and Honour Among Eighteenth Century British Army Officers' (1976) 19(1) *Historical Journal* 75-87; Piers Mackesy, *The Coward of Minden: The Affair of Lord George Sackville* (1979). There may even be situations where a senior officer seeks to court martial a subordinate, ostensibly for, perhaps, insubordination or for conduct unbecoming an officer, where the actual basis lies in fundamental policy disagreements. One of the most famous instances is probably the court martial of the United States airman, Billy Mitchell, in 1925, an episode subsequently made into the well-known Otto Preminger film of 1955 starring Gary Cooper and Rod Steiger. For the court martial itself see John Harris, *Scapegoat! Famous Courts Martial* (1988) 131-54. A potential twentieth century British naval example of this kind apparently involved the intention of the captain of the aircraft carrier, HMS Glorious, to send for court martial in June 1940 his senior Fleet Air Arm officer. The vessel was, however, sunk in highly controversial circumstances when returning to Scapa Flow after the disastrous Norwegian campaign. The relevant personnel did not survive the sinking. See Tim Slessor, *Lying in State: How Whitehall Lies, Dissembles and Deceives* (2002) 268-70.