

Office of the Judge Advocate General

Cabinet du Juge-avocat général

Canada



**MILITARY JUSTICE  
IN OPERATIONAL SETTINGS,  
IN PEACEKEEPING  
AND IN SITUATIONS OF TRANSITIONAL  
JUSTICE**

# Purposes of a Military Discipline System

*The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.*

*Supreme Court of Canada  
R. v. Généreux,  
[1992] 1 S.C.R. 259 at 293*

# Discipline



After the organization of troops, military discipline is the first matter that presents itself. It is the soul of armies. If it is not established with wisdom and maintained with unshakable resolution you will have no soldiers. Regiments and armies will only be contemptible, armed mobs, more dangerous to their own country than to the enemy....

**Maurice de Saxe: Mes Reveries, 1732**

**From time of ancient Rome down to the present day, the best armies have ever been the most disciplined...Whenever and wherever war takes place, it cannot occur unless those who participate in it are given to understand just whom they are and not allowed to kill, for what ends, under what circumstances and by what means. A body of [soldiers] that is not clear in its own mind about these things is not an army but a mob.**

**Martin Van Creveld "The Transformation of War" 1991**

# Discipline and Justice

“Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable.”

Powell Report 1960

# Purposes of sentencing in the Military Justice System

Bill C-15 Clause 62 ( NDA s. 302.1)

The fundamental purposes of sentencing are:

- (a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and
- (b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society

## Required Attributes of a Military Court

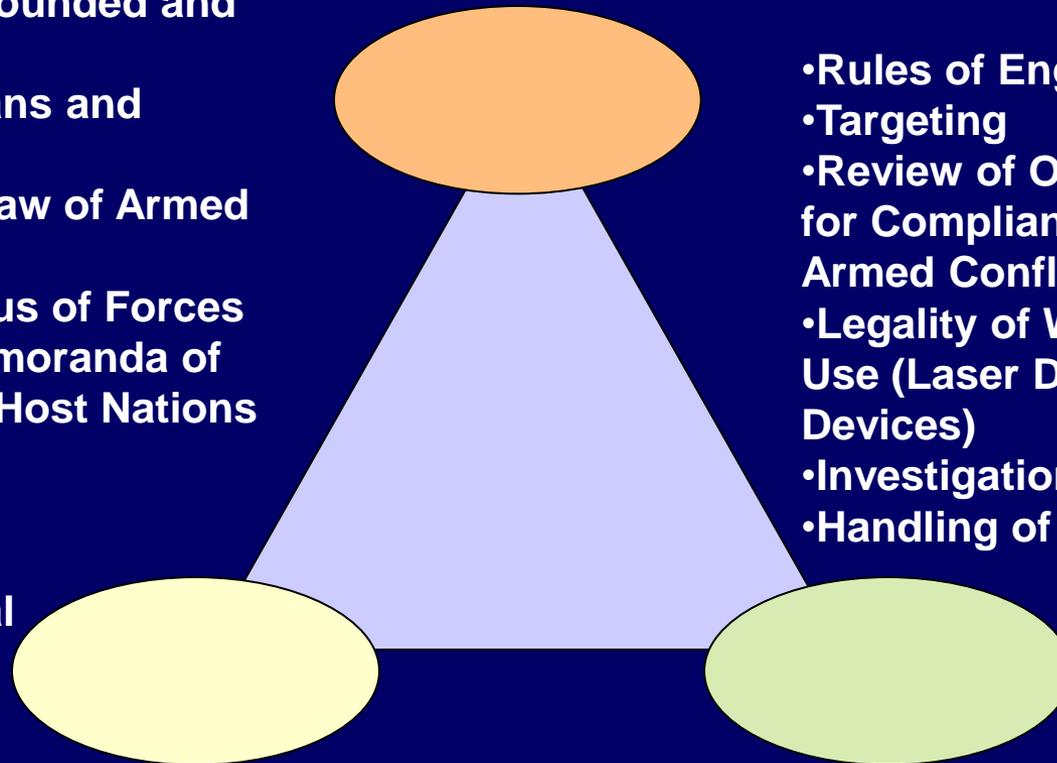
- Requisite jurisdiction to deal with matters pertaining to the maintenance of discipline and operational effectiveness
- Must possess an understanding of the necessity for, role of and requirements of discipline
- Must operate in a fair manner, and be perceived to be fair
- Must be compliant with constitutional law
- Must be compliant with applicable international law
- Promptness
- Portability
- Flexibility

*Billard v. The Queen (2008)*  
(Court Martial Appeal Court)

**“A member of the Canadian Forces, whatever his or her rank, trade or occupation, is at all times a fighting soldier. The Appellant’s offence did not relate to the performance of his routine duties as an intelligence operator; the evidence is that he performs those duties very well.... Rather, his offence bore directly on his failure to perform as a member of a fighting unit which was then under attack. It put at risk the lives and safety of himself and his comrades.”**

# Applicable Law - International Ops: Operational Law, Military Justice, Military Administrative Law

- Treatment of the Wounded and Sick
- Treatment of Civilians and Refugees
- Instruction in the Law of Armed Conflict
- Negotiation of Status of Forces Agreements and Memoranda of Understanding with Host Nations
- Host Nation Law
- Law of the Sea
- Rule of Law
- Bilateral/Multilateral Arrangements (NATO/NORAD)



- Rules of Engagement
- Targeting
- Review of Operational Plans for Compliance with the Law of Armed Conflict
- Legality of Weapons and Their Use (Laser Dazzlers, Sonic Devices)
- Investigation of War Crimes
- Handling of POWs/detainees

- The Code of Service Discipline
- Access to information/Freedom of the Press (CFLA)
- Claims by or against the Crown (CFLA)
- Human Rights (CFLA)
- Materiel Acquisition (CFLA)
- Pensions and Estates

# Rule of Law

The rule of law “expresses a preference for law and order within a community rather than anarchy, warfare and constant strife”.



# *Brocklebank v. The Queen* (1996)- (Court Martial Appeal Court)

“I agree with the prosecution--and I did not hear defence counsel say otherwise--that Canadian soldiers should conduct themselves when engaged in operations abroad in an accountable manner consistent with Canada's international obligations, the rule of law and simple humanity...”

# Military Justice In Operational Settings



# Range of Offences in Operational Settings

- Criminal-type offences against the person
  - murder, torture, assault, sexual assault
- Criminal-type offences against property
  - Fraud, theft of materiel
- Disciplinary-type offences
  - Quarrelling, Drunkenness, Maintaining equipment, Negligent discharges
- “Dumb” offences
  - arising from boredom or stupidity
- Operational offences

# ***R. v. Corporal M.A. Wilcox***

***2<sup>nd</sup> Nova Scotia Highlanders, Sydney, Nova Scotia***

- **Kandahar, Afghanistan, 6 March 2007**
- **Alleged that he shot and killed a fellow Corporal while playing quick draw in tent quarters at KAF**
  - **Accused testified he shot other soldier in self defence**
- **At first trial charged with Manslaughter, Criminal Negligence Causing Death and Negligent performance of duty**
- **Was found guilty by a GCM of Criminal negligence causing death and Negligent performance of duty**
- **Sentenced by the Military Judge to four years Imprisonment, Dismissal from Her Majesty's Service, a Weapons Prohibition Order for 5 years following release and a DNA Order.**
- **On appeal, CMAAC ordered a new trial**
- **At second trial, the same result occurred**

# ***R. v. Captain R.A. Semrau***

***3<sup>rd</sup> Royal Canadian Regiment, Petawawa, Ontario***

- **Helmand Province, Afghanistan, 19 October 2008**
- **Member of the Operational Mentor and Liaison Team (OMLT)**
- **Shot an unarmed and wounded insurgent**
- **Charges preferred by the Director of Military Prosecutions in Sep 2009 : Second Degree Murder, Attempted Murder, Disgraceful Conduct and Negligent performance of a Military Duty.**
- **GCM found him guilty of Disgraceful Conduct**
- **Military Judge sentenced him to Reduction in Rank to 2Lt and Dismissal from Her Majesty's Service**

# Semrau Military Judge Reasons for Sentence

5 Oct 2010

- “Decisions based on personal values cannot prevail over lawful commands ... you committed a serious breach of discipline. You failed in your role as a leader because you chose to put aside your training and orders”
- “You might have been torn between your personal moral values and your duties as a Canadian soldier when you made your choice; but did you consider the dilemma you were inflicting upon your subordinates? How can we expect our soldiers to follow the laws of war if their officers do not?”

## *Semrau* reasons for sentence

“In the military context, you committed a grave breach of discipline because you decided to set aside your orders, training and fundamental principles. As I stated previously, this conduct is deemed disgraceful because it is so fundamentally contrary to our values and training that it is shockingly unacceptable.

The profession of arms is synonymous with the management of violence. Officers are ultimately entrusted to lead soldiers and to use weapons systems to put into effect the will of our government. Our discipline and respect for the rule of law ensures that we remain an effective and efficient armed force that reflects Canadian values and makes Canadians proud of its military force’s achievements around the world.

You personally failed to abide by one of our most important responsibilities: that of only using force in accordance with lawful orders.”

# Challenges in Operational Settings

- Perceived administrative burden:
  - Reluctance of commanders
  - Flexibility and readiness of military judges and courts
  - cost
- Witnesses
- Court Martial Panels
- Complexity of procedures

## Imperatives

- Maintain discipline and operational effectiveness
- Preclude impunity
- Uphold the Rule of Law
- Protect the rights of soldiers
- Do Justice

# Effects of Not Trying Cases in Theatres of Operation

- Perceptions of Impunity
- Diminished legitimacy
- Negative impact upon mission reputation
- Impact upon discipline and thus operational effectiveness
- Justice for victims – must not only be done, but be seen to be done

# PEACEKEEPING OPS



# Challenges and Responses

- Sexual abuse and exploitation and black-marketing by military and civilian members of UN contingents e.g. DRC
- Creation of Conduct and Discipline Unit within the Dept of Field Support, and within DPKO missions
- *Draft Convention on Criminal Accountability of UN officials and Experts on Mission*

# UN Peacekeeping missions

- Military personnel in a PSO are under the jurisdiction of their sending state
- UN itself is unable to exercise criminal jurisdiction- there is no “UN Court” for DPKO missions: “ a distant dream”
- Similarly for ICC
- Violations of UN codes are only enforceable by repatriation and/or subsequent prosecution through national military law or civil criminal law
- Violations of UN codes of conduct are not subject to disciplinary action without the reinforcement of national criminal law in any event
- Even though it is ultimately the responsibility of sending states to discipline their troops, the application of standard regulations to all personnel is necessary for the effective functioning of a mission

# Trials *In Situ*

“An on-site court martial for serious offences that are criminal in nature would afford immediate access to witnesses and evidence in the mission area. An on-site court martial would demonstrate to the local community that there is no impunity for acts of sexual exploitation and abuse by members of military contingents...

Therefore, all troop-contributing countries should hold on-site courts martial. Those countries which remain committed to participating in peacekeeping operations but whose legislation does not permit on-site courts martial should consider reform of the relevant legislation.”

*A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in UN Peacekeeping Operations*  
(“Zeid Report”) UN Doc A/59/710 ( 24 Mar 2005)

# Transitional Justice and Capacity-Building

MONUSCO mandate UN SCR 1925 OP 12:

- (d) support national and international efforts to bring perpetrators to justice, including by establishing Prosecution Support Cells to assist the FARDC military justice authorities in prosecuting persons arrested by the FARDC
- (m) assist the Government, along with international and bilateral partners, in strengthening its military capacity, including military justice and military police... support military justice institutions and mobilize donors to provide equipment and other required resources

# Security Sector - Abuser

- Correlation – conflict & crime
- Abuse as tactic
- Entrenched corruption / exploitation
- Cycle of impunity

# Security Sector - Protector

- End cycle of impunity
- Peace Process - *Brassage* of Former Warring Factions
- Defend population / territory
- Symbol of pride / unity



# Why does Military Justice in DRC matter?

Strengthening DRC MJ system is imperative because:

1. In its own right, the MJ system is a primary vehicle for promoting the rule of law and human rights. It is the main legal tool and accountability mechanism within the FARDC for ending the culture of impunity amongst its members.

# MJ system

2. Reforming and strengthening the capacity of the MJ system is also an essential prerequisite for SSR. The level of individual and institutional discipline in the FARDC is low, and thus its operational effectiveness and ability to defend the DRC and its people is low.

# MJ system

Improving the effectiveness of the DRC MJ system is an essential prerequisite for improving the discipline and operational effectiveness of the FARDC, and thus its ability to fulfil its constitutional mission of protecting the DRC and its people, in a manner which is consonant with its obligations under international law, including respect for human rights and international humanitarian law.

# Questions and Discussion

