

VIRTUAL CONFERENCE PROGRAMME
12-15 SEPTEMBER 2021
“POST-PANDEMIC INNOVATIONS”

Ensuring Fair Court Procedures for Commonwealth Militaries: A Collective Responsibility

Policy decisions of courts martial made during peace time regarding trial procedures must be made with an eye on how courts martial are conducted in times of war. A court martial for military offences during times of peace invariably functions under little duress in the sense that the prosecution has time to prepare its charges against the accused. The soldier charged will have time to prepare his defence, and the court has the time to hear all arguments in full and thereafter to deliberate on the outcome of the case.

The distinguishing factor between a court martial and a civilian trial is that underlying the legalities of the offence in question upon which the soldier is being court martialled, the court martial, in coming to its verdict and sentence, has to keep a balance between morale and discipline.

In theory, morale and discipline are straightforward concepts and should have no separate meanings in times of peace and in times of war or conflict. But as the world has recently seen, when the Americans and their allies were evacuating Afghanistan, events on the ground may be unforeseen and occur spontaneously outside all military planning.

Eventually, we will learn more as further facts and observations emerge from those last days of urgency in Kabul, but for now we need only look back to a similar event in Saigon on 30 April 1975, when the American military was evacuating Americans and their Vietnamese allies. Not only were there not much operating procedure, but whatever there were, did not seem to help because in the crisis of the moment, people forget, or simply have no time to adhere to general orders.

In fact, it transpired that many orders from Graham Martin, the American ambassador, and even, at the last minute, a Presidential order from President Ford, were not obeyed. Those orders came swiftly one after the other. Initially,

Ambassador Martin, for several reasons, mostly noble ones, refused to give the orders to evacuate.

He had himself lost a son in Vietnam. He felt personally attached to the land and to the cause. Thus, there was perhaps, a reluctance on his part to accept that all the efforts of the American and South Vietnamese military had come to naught. Furthermore, he did not want to create a panic before they had even heard the rumble of a North Vietnamese tank in Saigon.

The unfortunate result was a frantic effort by those on the ground, both by the embassy staff and the military and intelligence staff, to make hasty arrangements, contrary to instructions, for evacuation. Finally, on the last day, when President Ford gave the order for the last helicopter flight out, the men on the ground defied the order and continued to try and save more Vietnamese.

The point of the events in Saigon and Kabul is that under war and conflict situations, there may be no time for anyone to ponder about the niceties of a court martial protocol. What is morale and what is discipline become gut issues depending on whether the soldiers in the field had guts or not.

No one was court martialled for what they did in Saigon in the last days in Saigon. But the point is that what goes on in the battlefield should be matters that military justice must contemplate long before the battle begins. Not every battlefield situation exudes a sense of nobility as saving comrades, friends, and allies. Again, in Vietnam, for example, distressed soldiers were known to have hazed their own officers, sometimes even shooting them in the back.

Conversely, the fact that there is no time for a court martial in the heat of battle, soldiers who retreat against orders might find themselves shot by their own officers — as had happened in the Korean war. The problem with what soldiers do in the heat of battle and against orders, is that in some cases, the action cannot be condoned. Cowardice in the face of the enemy is the most obvious. In other cases, such as the actions of soldiers in rescue situations may, in hindsight, be viewed as heroism.

There are situations in which soldiers operate not in the heat of battle, such as when launching a missile strike from hundreds or thousands of miles away

from the target. Two sets of soldiers are involved — the ones who are ordered to fire, and the ones who give the order to fire. In the case of the former, the soldier may have no information himself to determine whether his missile is likely to injure civilians.

The officer ordering the fire may sometimes have information that the target may not be a military one, and he may have been pressured into making the wrong decision. The New York Times reported in its 13 September 2021 edition that there is evidence that the US drone strike on a car might have injured and killed civilians, and it also cast doubt as to whether the car was a correct military target.

An article by Isaac Stanley-Becker, appeared in the Washington Post this morning, 15 September, reporting on a book published this year by Bob Woodward and Albert Costa. It is an extraordinary account about how the highest military officer of the United States, General Mark A Milley, the Chairman of the Joint Chiefs of Staff, had contacted his counterpart in the People's Liberation Army, General Li Zuochang. Twice, during the presidency of Donald Trump, General Milley called to assure the Chinese that the United States was stable and that it would not strike China. General Milley was quoted as saying, 'General Li, I want to assure you that the American government is stable and everything is going to be okay...General Li, you and I have known each other for now five years. If we are going to attack, I'm going to call you ahead of time. It's not going to be a surprise.'

It was reported that General Milley acted out of fear that President Trump might spark war with China. Whether the incidents are true is not the concern of this conference, but even if untrue, it serves as an illustration that even when there is no conflict or war, a soldier may take it upon himself to act in a manner which, if court martialled, emphasises the need for clear jurisprudential thinking. In a situation like this, would General Milley's conduct be regarded as sensible and heroic, or as unpatriotic and even treacherous? Would his conduct be subject to proceedings in a civilian or military court?

When soldiers disobey orders under stressful circumstances, in conflict or war, or even in peacetime when the stakes are raised, how should a military tribunal decide should those soldiers be court-martialled? From the perspective

of the military courts, the criteria for amnesty may have to be examined critically so that the conduct of soldiers who defy orders may be carefully and fairly judged — and properly determined as to whether that conduct deserves or does not deserve prosecution, or whether deserving of prosecution but meriting light punishment. Although amnesty is a political pardon, it has a place in military jurisprudence (apart from supporting a political pardon) by the prosecutors declining to press charges. That brings us to the full circle — how does a military prosecutor determine conduct that may be exempt from prosecution when in normal circumstances they would not be so?

Similarly, from the point of view of a military tribunal, depending on the jurisdiction conferred upon it (and that varies from country to country) it may have no power to grant an acquittal and absolute discharge. In which case, should the tribunal may only impose the lightest possible punishment?

It is therefore, imperative that military justice must be considered from the practical aspects of morale and discipline in the heat of battle, or in the heart of a conflict, so that decisions relating to a court martial for events that take place under those circumstances can be jurisprudentially justified. Discussions on this subject may also need to be expanded to include training in areas such as psychology, and even ideology for justice to be meaningful. And most importantly, so that field officers may make the right decisions in the heat of battle. And that, in turn, enables courts martial to be conducted through procedures that will enable the context of the conduct in question ventilated fairly.

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Judge
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