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In the latest in a series of judgments on the constitutionality of the Canadian military justice system, the Canadian Supreme Court on July 26, 2019 in *R. v. Stillman* (also frequently referred to in the media as the *Beaudry* case) upheld the trial of military accused before a court martial panel, as opposed to a civilian jury, for serious civilian criminal offences incorporated into military law. The Court reaffirmed a previous [decision](#) that a provision of the *National Defence Act* incorporating all Canadian civilian criminal offences into service offences was not overly broad under section 7 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), and that the “military nexus” required to ground a rational connection to discipline, efficiency, and morale in the military was simply an accused’s military status (*Stillman*, para 109).

Further, the Court ruled that “military law” as contemplated by the human rights *Charter* is not limited to “purely” military offences (e.g. spying for the enemy, mutiny with violence, insubordination). Accordingly, the Court held that a service accused has no right to a jury trial, since “where such an offence is tried before a military tribunal — as was the case for each of the accused persons in this instance — the military exception in s. 11(f) of the *Charter* is engaged” (*Stillman*, para. 113). Section 11(f) of the *Charter* provides that:

11. Any person charged with an offence has the right...

(f) *except in the case of an offence under military law tried before a military tribunal*, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

Instead of a right to trial by a jury of twelve as provided for under civilian criminal law, a General Court Martial consists of five service members sitting on a panel.

The Court also noted that sentencing in the civilian justice system “might not truly account for the seriousness of such offences, seen in light of the purposes of discipline, efficiency, and morale” (*Stillman*, para. 100). Included in the charges under consideration was sexual assault. This is notable because of the ongoing debate about the ability of military forces to adequately deal with such offences. This issue has raised significant controversy not only within [Canada](#) and the [United States](#), but also internationally regarding [United Nations peacekeeping operations](#).

In anticipation of this judgement, a March 24, 2019 *Just Security* article by Preston Lim, [Canadian Supreme Court's Chance to Reform its Military Justice System](#), had suggested:

...when it comes to civil offences, there is no reason why Canadians who choose to put on a uniform should be entitled to fewer constitutional protections than their civilian counterparts. France and Germany have abolished courts martial in times of peace despite boasting much larger militaries than Canada. Moreover, post-*Beaudry* reforms would not necessarily have to be revolutionary. As some military lawyers have argued, a simple way of adhering to the Appeal Court's holding would be to introduce civilian-style juries into courts martial of civil offences.

The Supreme Court of Canada found instead that “the inclusion of a military exception shows that s. 11(f) [of the *Charter*] contemplates a parallel system of military justice designed to foster discipline, efficiency, and morale in the military” and traced its evolution over time to establish its change “from a command-centric model of discipline to a full partner in administering justice alongside the civilian justice system.” (*Stillman*, para. 20).

The *Stillman* decision can rightly be viewed as a watershed judgement in Canadian law, although it has also attracted commentary within Canada that the ruling confirmed the [“obvious — the military is a pretty unique thing in a free society.”](#) and that there were [no surprises in the decision](#). This is, of course, easy to state after the fact. Questions about compliance of the military justice system with human rights law have been the subject of litigation since the 1982 adoption of the *Canadian Charter of Rights and Freedoms*. As the Court noted, the ability of the system to withstand this human rights scrutiny was directly a result of regular independent reviews by eminent jurists, periodic legislative changes by the Canadian Parliament, and a commitment to modernize the service tribunal system. In the words of the Court “[t]he military justice system has come a long way” (*Stillman*, para. 53).

Stillman also has significant implications in the international sphere. Military justice system compliance with human rights norms has increasingly been the subject of international debate and scrutiny. Amongst the issues flowing from the *Stillman* case is the need to acknowledge the diversity of military justice systems globally, the different ways in which human rights norms are incorporated into law around the world, the role such accountability systems perform, and the requirement for a holistic approach when considering “complementarity” and the ability of States to deal with [“the most egregious crimes: war crimes, crimes against humanity, and genocide.”](#)

Diversity of Military Justice Systems

Turning first to the diversity of military justice systems, the *Stillman* case is framed in terms of Canadian law. However, as is reflected in the above noted reference to France and Germany, there has been a steady undercurrent of comparison throughout the lead up to this decision between the common law based Canadian military justice system and the approach adopted by nations with a civil law tradition. In respect of earlier litigation, one commentator listed States with civil law based justice systems — France, Belgium, Germany, The Netherlands, Lithuania, Morocco, Taiwan, Mexico, Chile, Austria, the Czech Republic — as examples of countries that had [either abolished military tribunals in peacetime or deprived them of their jurisdiction over ordinary criminal law offences and over civilians](#). As is reflected in the Canadian court's exhaustive review

of the history of military law in Canada, its system is firmly common law based. In that respect, States such as Canada, the United States, United Kingdom, Australia, and Israel rely on military justice systems that diverge significantly from those that are civil law based like those of most European countries.

However, being founded on a legal tradition different than that of civil law-based justice systems does not make the justice system any less compliant with international law norms. One area of divergence regarding legal approaches arises in the context of military jurisdiction over the “ordinary criminal law.” In a 2013 [report](#) to the United Nations General Assembly, the Special Rapporteur on the independence of judges and lawyers, while acknowledging the diverse ways in which States apply military jurisdiction (para. 33), recommended that

a specialized jurisdiction aimed at serving the particular disciplinary needs of the military, the *ratione materiae* jurisdiction of military tribunals should be limited to criminal offences of a strictly military nature, in other words to offences that by their own nature relate exclusively to legally protected interests of military order, such as desertion, insubordination or abandonment of post or command (para. 98).

This recommendation was in line with the 2006 *Decaux Principles*, a report submitted to the Commission on Human Rights by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights. However, the *Decaux Principles* have also attracted significant criticism (see the 2015 [Report of the High Commissioner of Human Rights, Summary of Expert Discussions](#), paras. 64-71), and were not the approach adopted by the Canadian Supreme Court in *Stillman*. Even the two dissenting judges specifically rejected the argument that jurisdiction must be limited to narrowly defined “purely” military offences (para. 123). Further, the Canadian Supreme Court had previously recognized that discipline requires a “instilled pattern of obedience,” which the *Stillman* decision indicated “make clear that military discipline suffers when service members engage in criminal conduct, even in a civilian setting” (para. 107).

Although not litigated in the *Stillman* case, another area of divergence with the civil law system is the “dual hat” role of both advisor to the Government and the administration of the justice system performed by many civilian Attorneys General in common law systems. A recent review of the Attorney General system in Canada resulted in a [report](#) that noted “[t]he model of having the same person hold the minister of justice and attorney general roles was deliberately chosen at Confederation, and for good reason. Our system benefits from giving one person responsibility for key elements of the justice system.” This role is replicated in a number of common law-based military justice systems, such as by the Judge Advocate Generals in Canada and the United States, and the Military Advocate General in Israel.

The performance of this role by a senior military lawyer has been criticized in the Israeli context by [local human rights groups](#) and in the [Human Rights Council](#). However, it is not inherently problematic in the common law tradition, as was reflected in the second [Turkel Commission Report](#) (full disclosure: I was a Foreign Observer on that Commission). States can take steps consistent with their own constitutional structure and laws to ensure adequate independence and impartiality. One example is the Canadian adoption of the Director of Military Prosecutions role patterned on the civilian Director of Public Prosecutions (DPP) model. The Director of Military

Prosecutions is statutorily responsible for the conduct of prosecutions, although the Judge Advocate General (like an Attorney General under the DPP model) has the power to intervene in a specific case on an exceptional basis ([National Defence Act, s. 165.17](#)).

Differences in legal approaches may not be limited to the underlying system of law, but also result from national experience regarding the circumstances under which military forces are disciplined and employed. For example, the United States, the United Kingdom, Canada, Australia, and other States have a long history of extra-territorial military operations in times of peace and war. This expeditionary history may lend itself to a greater acceptance by courts of the broad exercise of jurisdiction by service tribunals.

Further, the idea that discipline can be maintained differently in times of peace appears exceptionally problematic given the paucity of formal declarations of war since 1945, an extensive military involvement in “peace support” operations, and the existence since 9/11 of what has been called the “forever war.” With multinational forces operating during peacekeeping operations in what are often failing foreign States, the ability to conduct court martial proceedings is arguably more important than ever given the challenge the United Nations has experienced in dealing with sexual misconduct. In this respect, a 2016 Secretary-General’s [report](#) requested Member States “agree to establish on-site court martial proceedings, supported by the judicial infrastructure necessary, when allegations amount to sex crimes under national legislation” (para. 68).

In *Stillman*, the Supreme Court specifically acknowledged that military law as referred to under the *Canadian Charter* was understood as “the law which governs the members of the army and regulates the conduct of officers and soldiers as such, in peace and war, at home and abroad” (*Stillman*, para. 74). The result is that critiques based on the more narrowly focused civil law-based military justice systems of Europe and elsewhere do not appear to be in line with a common law approach towards the maintenance of discipline that typically relies on a more universal and continuous application of military legal jurisdiction.

Implications of *Stillman* for Compliance of Military Justice Systems with Human Rights Norms

Stillman also implicates the manner by which international human rights law norms are incorporated into national jurisdictions and the mechanisms by which compliance with those norms is judged. In this respect, [“international” criticism of military justice systems](#) frequently relies disproportionately on decisions of two regional human rights tribunals: the European Court of Human Rights and the Inter-American Court of Human Rights. Canada, the United States, or for that matter the majority of States, including some with the largest armies in the world (e.g. China, India, Pakistan, Iran), are simply not subject to the jurisdiction of such regional human rights tribunals. Nor do they necessarily appear to want to be, as is reflected in the American and Canadian decisions not to be subjected to the jurisdiction of the Inter-American tribunal. Evidently, these North American States believe international human rights norms are properly reflected within their domestic constitutional frameworks.

The *Stillman* case made no reference to regional human rights tribunal decisions, although it acknowledged that a lower appellate court had cited an emerging international trend towards

restricting the jurisdiction of military tribunals (*Stillman*, para. 14). The Supreme Court of Canada did refer to United States military justice related decisions (e.g. *Solario v. The United States*). This is not surprising, not only because of geographical proximity, but also because the United States' common law-based system of justice is more closely related to Canada's. Moreover, universal human rights norms are directly reflected in Canada's *Charter*. As noted, the *Charter* does make a specific exception for military tribunals. However, "rights" exceptions are not unique to Canada, as is evident in article 2 of the European *Convention on Human Rights*, which provides for [specific exceptions to the right to life](#).

Differences in how universal human rights law norms are incorporated into domestic or regional jurisdictions make it all the more important to be comprehensive when assessing human rights requirements internationally. The result is that critiques of military justice systems based on regional human rights tribunal decisions without reference to case law governing other States can appear to be parochial and even "foreign," rather than truly international in nature. This remoteness is compounded if those critiques are also based on the approach of predominately civil law jurisdictions rather than looking at common law ones as well. In this respect, a particular strength of the Turkel Commission Report was that it looked at both common law (United States, Canadian, Australia, United Kingdom) and civil law based (German and Netherlands) civilian and military justice systems when assessing how violations of the law of armed conflict are examined and investigated in Israel.

Accountability and Complementarity

A third area where the Canadian decision has implications internationally is in respect of accountability regarding allegations of military misconduct. As I noted in a previous article on *Just Security* ([Accountability Fatigue: A Human Rights Law Problem for Armed Forces?](#)) "problems arise when advocates or courts seek to impose a unitary human rights-based solution in conflict situations, or fail to acknowledge that military investigatory bodies can meet international legal requirements of independence and impartiality." The same can be said where there is an unwarranted bias regarding the ability of military justice systems to deal with wrongdoing. Certainly, some military justice systems are very problematic and have failed to deal with abuses. Yet, so have some civilian systems of justice. There is nothing inherently flawed about a military justice system, and not all are the same.

Further, as I suggested in my previous article, it must be acknowledged "that the armed forces themselves have an important, indeed, essential oversight role to perform." This raises a fundamental question about whether discipline, which impacts directly on the lawful conduct of operations, is best carried out by civilian courts and tribunals exercising oversight that is external to the military, or by establishing effective and independent military courts that help inculcate the habit of obedience from within that organization. Ultimately, there is a requirement for a balance of approaches that countries will need to seek out based on their own legal traditions and constitutional and human rights frameworks.

This in turn raises the issue of "complementarity," which has been [described](#) as "one of the most important concepts — if not THE most important concept — in the Rome Statute and the global fight to end impunity for serious crimes." As is set out in Rule 51 of the International Criminal

Court, [Rules of Procedure and Evidence](#) in respect of whether a State is genuinely willing or able to carry out a prosecution, that State “may choose to bring to the attention of the Court [information] showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct.” Critics of military justice systems that view their jurisdiction as being limited to “purely” military offences would argue that such systems are not capable of doing so. However, the Canadian jurisprudence establishes that its military justice system is capable of meeting international recognized norms and standards, and many others do as well.

The breadth of the *Stillman* decision would include the use of military courts to try offences that involve allegations of serious human rights abuses such as torture, another area of limitation suggested in the *Decaux Principles* and the 2013 report by the Special Rapporteur on the independence of judges and lawyers. Indeed, a military [prosecution](#) for torture committed by a Canadian soldier had already occurred arising from Canada’s 1993 deployment to Somalia. A proper assessment of complementarity in a military justice context will require a broad assessment of national systems, both common and civil law based.

Justice Requires a Commitment to Change

This does not mean that challenges do not remain. While courts martial structurally mirror their civilian counterpart, they must be conducted in a way that provides a more “portable, and efficient solution that can be implemented whenever and wherever needed” (*Stillman*, para. 71). Further, the Supreme Court of Canada indicated it “would not foreclose the possibility of challenging certain aspects of the military panel system, particularly in relation to their composition and their independence from the chain of command, under other provisions of the Charter” (e.g. requirements of an independent and impartial tribunal) (*Stillman*, para. 86).

Ultimately if justice is to be done (“Fiat Justitia”) in a military context there is a requirement for an ongoing commitment to change. A key aspect of the willingness of the Supreme Court to uphold the constitutionality of the court martial system in *Stillman* was the significant effort over the past thirty years to effect change and modernize. There must be a cultural commitment within the military to effect such change. Positively, as the *Stillman* court noted “[j]ust as the civilian criminal justice system grows and evolves in response to developments in law and society, so too does the military justice system. We see no reason to believe that this growth and evolution will not continue into the future” (*Stillman*, para. 53).

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