



OPERATIONAL SELECTION POLICY OSP46  
RECORDS RELATING TO MILITARY LAW AND  
COURTS-MARTIAL

10 January 2008.

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### Appendix

Appendix 1 - Records relating to Military Law and Courts Martial selected by the National Archives to April 2007

# 1 Authority

- 1.1 The National Archives' Acquisition and Disposition policy statements (February 2000) announced the intention of developing, in consultation with departments, operational selection policies across government. These policies would apply the collection themes described in the policy to the records of individual departments and agencies.
- 1.2 Operational selection policies are intended to be working tools for those involved in the selection of public records. This policy may, therefore, be reviewed and revised in the light of comments received from the users of the records or from archive professionals, the department's experience of using the policy, or as a result of newly discovered information. There is no formal cycle of review but we would welcome comments at any time. The extent of any review and revision exercise will be determined according to the nature of the comments received.
- 1.3 If you have any comments upon this policy, please email

[recordsmanagement@nationalarchives.gov.uk](mailto:recordsmanagement@nationalarchives.gov.uk)

Or write to:

Acquisition and Disposition Policy Manager  
Records Management Department  
The National Archives  
Kew  
Richmond  
Surrey  
TW9 4DU

## 2. Scope.

2.1. Military law is the body of law governing the rights and duties of armed services personnel. The courts martial justice system is separate from the civil courts service, applying the principles of military law to ensure that justice and discipline within the armed services is maintained.

2.2. This operational selection policy covers the public records of the Ministry of Defence that generates most of the policy and legislation relating to military law. These include those public records relating to high-level policy relating to discipline and justice in the main military services: Army, Royal Air Force and Royal Navy.

2.3. The Office of the Judge Advocate General and the Judge Advocate of the Fleet created records relating to the administration of the military justice system. These bodies are supposed to have been independent from the Ministry of Defence in order to reach impartial decisions on courts martial cases<sup>1</sup>. As well as case records some operational policy and legal advice records are likely to be generated.

2.4. Records relating to civil indictable criminal proceedings are covered by a separate operational selection policy (OSP40) – see, <http://www.nationalarchives.gov.uk/documents/osp40final.pdf>.

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<sup>1</sup> The operational business of the Judge Advocate of the Fleet was transferred to the Office of the Judge Advocate General in 2004.

### **3. Origins of the Offices of the Judge Advocate General and the Judge Advocate of the Fleet**

– Through a statute of Edward I in 1279 it was enacted that, by virtue of the royal prerogative, the sovereign of England had the right to command all the military forces of the English nation. The royal prerogative also accorded the Crown the power to regulate and discipline the army. Crown jurisdiction over military offences was exclusive but its jurisdiction over military offences committed by soldiers was coordinated with the civil courts in early medieval times. The appointment of a special officer to conduct courts martial during war campaigns can be traced back at least to the reign of Elizabeth I when a Judge Martial (or Marshal) accompanied the Earl of Leicester's army to the Low Countries in 1587-1588. It had previously been thought that the Chivalry Court of the Lord High Constable and the Earl Marshal, who were Commander and second-in-command of the king's armies respectively, had regulated the conduct of English soldiers. However, recent research suggests that the Judge Martial was independently responsible for military discipline.<sup>2</sup> A list of Rules and Ordnances of War was issued by the king usually on the advice of the Judge Martial at the start of every campaign of war that eventually became the basis of a code of military law.

3.1. An Advocate of the Army served with the Army of Charles I in 1639 and Advocates of the Army (or Judge Advocates) served on both sides during the English Civil War (1642-1649). After the standing army had been brought into being during the English Civil War and the Interregnum period (1649-1659) the office of Judge Advocate General was created to supervise 'courts martial' for the new army. The Judge Advocate General is not a General of the army; the word "general" signifies broad oversight, as in the terms 'Secretary-General' and 'Attorney General'.

3.2. It was the Mutiny Act of 1689 that first formally recognised the legality of the military courts and gave parliamentary approval to the exercise of their jurisdiction. Successive Mutiny Acts passed between 1689 and 1878 strengthened the authority of these courts in dispensing military justice. The Army Act of 1881 replaced the principle provisions of the Mutiny Acts and has been renewed every five years since this date.

3.3. Early origins of the Judge Advocate of the Fleet are found in the role of the Lord High Admiral who became a permanent officer of state in the fifteenth century. This officer performed at sea the functions, which on foreign land and in military installations the Judge Martial discharged - referred to above. One of the Lord High Admiral's roles was to pronounce and apply the laws of war at sea. Therefore, the origins of the 'articles of war' and courts-martial at sea derive from his role. From 1660, the Judge Advocate of the Fleet took over this role.

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<sup>2</sup> See 'Records of the War Office and Related Departments' by Michael Roper, Chapter 10 (PRO Publications, 1998).

## **4. Significant Statutes in Military Law since 1955**

4.1. Military law is the body of law governing the rights and duties of soldiers. All serving personnel are subject to it. There have been three significant Acts that have shaped and provided the foundations for military law for the three main armed services of the United Kingdom over the past 50 years.<sup>3</sup> These are:

- Army Act 1955
- Air Force Act 1955
- Naval Discipline Act 1957

4.2. The above acts are collectively known as the 'Service Discipline Acts'. They have provided a comprehensive system of law for the services since their introduction. They incorporate offences that reflect the civilian criminal offences and establish offences that are unique to the Armed Forces, such as 'desertion'. A range of rules and regulations has followed the passing of these statutes that practically articulate the principles they set out. These Acts are reviewed approximately every five years and amendments are made to reflect changes in civil law and the requirements of the Armed Services.

4.3. A Strategic Defence Review of 1998 argued that advantages would be gained from combining the three Service Discipline Acts into a single Act. Subject to Parliamentary approval, it is planned to carry out this complex rewriting of legislation by the end of 2008.

## **5. Ministry of Defence military law functions.**

5.1. In 1963, the three independent service ministries (Admiralty, War Office and Air Ministry) were merged to form the present Ministry of Defence (MoD). The UK MoD is the government department that is responsible for all defence related aspects of national policy.

5.2. This large organisation is controlled by the Secretary of State for Defence and his deputies. The Minister is supported by a Permanent Under Secretary of State (PUS) who is responsible for policy, finance and administration in the Ministry of Defence. Under the PUS, the Chief of Defence Staff acts as the professional head of the Armed Forces and he is the principal military adviser to the Secretary of State and to the government. He represents the Chiefs of Staff for all three armed services with the help of the Vice Chief of the Defence Staff<sup>4</sup>.

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<sup>3</sup> The Armed Forces Acts 1996 and 2000 radically amended these Acts to accommodate the requirements of the European Convention on Human Rights.

<sup>4</sup> Chiefs of Staff are: Chief of Naval Staff and first Sea Lord; Chief of the Air Staff; Chief of the General Staff; Chief of Defence Procurement and the Chief Scientific Adviser.

5.3. The Ministry of Defence is responsible for creating military law (as comprised in the above Service Discipline Acts and their successive soon to be enforced Armed Forces Act 2006) amending existing legislation, creating codes of conduct and for providing the legal basis for military operations. For the Army, policy on discipline is developed by the Adjutant General's Department, Directorate of Personal Services (Army), PS2(A) branch. Their role is as follows.

- Discipline. To develop policy for standards of conduct and the maintenance of discipline in the Army. Anticipate the demands of future legislation in developing discipline policy. Expedite proper resolution of disciplinary casework. Conduct a vigorous and effective campaign to deter substance misuse in the Army, in order to sustain and strengthen the disciplinary fabric of the Army to underpin its operational effectiveness.

5.4. The fruits of these objectives are captured in the various publications available at <http://www.army.mod.uk/servingsoldier/termsoserv/discmillaw/ref/index.html> that comprise the Ministry of Defence Discipline and Military Law Reference Library.

5.5. The Defence Council is the senior Ministry of Defence committee that provides the legal basis for the conduct and administration of defence. The Secretary of State for Defence chairs this council. In the course of its duties, this Council will occasionally validate the policies of the Adjutant General's Directorate and other service directorates responsible for discipline.

**5.6. The Military Court Service (MCS).** The Defence Council made provisions for the Military Court Service as an independent organisation and appoints its Director who is a civil servant. It is a tri-service and consists of a headquarters at Upavon (Wiltshire) and seven staffed Military Court Centres at: Bulford (Wiltshire); Catterick (Yorkshire); Colchester (Essex); Portsmouth (Hampshire); Aldergrove (Northern Ireland); Osnabruck and Hohne (Germany). While the three service justice systems have remained distinct, up to the introduction of the Armed Forces Act 2006, the Military Court Service has enabled some sensible integration since its inception in the 1990s. This includes the administrative requirements for court martial hearings; providing administrative support and provision of the appropriate environment for the trial to be heard. Before the introduction of the Military Court Service in 1997 the provision of facilities for courts martial were far more likely to be ad-hoc, with some trials taking place in local barracks and defence facilities.

5.7. The main elements of the military criminal justice system are:

5.7.1. Court-martial. Serious matters, including both offences against the civilian criminal law and specifically military offences, may be tried by Court-martial. A Judge Advocate controls the court, his directions being final in all

matters of law, practice and procedure. The Lay Members of the court are known as a board and consists of officers, warrant officers, who are appointed to perform their duties independently and impartially in accordance with the evidence and the law. Each board consists of 3 members (District Court Martial) or 5 members (General Court Martial) one of whom is nominated as a President, whose role is not dissimilar to that of a foreman of a jury. Having listened to the Judge Advocate's directions on the law and summary of the evidence; the board are responsible for finding defendants guilty or not guilty. Following a finding or plea of guilty, the board and the Judge Advocate decide on sentence. A Court-martial has the same sentencing powers in relation to imprisonment as a Crown Court, including life imprisonment.

5.7.2. Summary Dealing by a Commanding Officer. Minor disciplinary and criminal matters are deal with summarily by the Commanding Officer of the serviceman or servicewoman accused. This is similar to a magistrates' court hearing before lay magistrates. The great majority of matters are disposed of in this way, which forms one of the foundations of the disciplinary system of the armed forces. A Commanding Officer has powers of punishment up to 60 days detention (Army or RAF) or 90 days detention (RN). An accused person may opt for trial by Court-martial rather than to appear before their Commanding Officer, or may appeal to a Summary Appeal Court in all cases.

5.7.3. Summary Appeal Court. A Summary Appeal court which is conducted by a a Judge Advocate and two service members , who can be two officers or one officer and one warrant officer. An accused has a right of appeal to the Summary Appeal Court, which is conducted by a Judge Advocate. Appeals take the form of a re-hearing and may be against finding and/or punishment. Thus, where the appeal is against finding and punishment, the Summary Appeal Court will hear the evidence afresh before deciding whether to confirm or quash the finding. If it confirms the finding, the Summary Appeal Court will decide what the punishment should be on the basis of the evidence it has heard. If the appeal is against punishment only, the respondent (prosecuting officer) will inform the Summary Appeal Court of the facts of the case. The Court will consider any mitigating factors and determine or amend punishment accordingly. 5.7.4. Review. To 2006, after every court-martial where there has been a guilty plea or a finding of guilt, the verdict and sentence are automatically reviewed by a higher military authority, following the legal advice provided by the Judge Advocate General (and prior to 2004 by the Judge Advocate of the Fleet). There may also be a petition from the convicted defendant. The review may set aside the conviction, or may reduce (but not increase) the sentence. The Armed Forces Act 2006 is due to abolish the review process when it comes in to force in 2009.

5.7.5. Court-Martial Appeal Court. The avenue of appeal for a convicted defendant, subject to obtaining permission to appeal, is to the Court-Martial Appeal Court (as the Court of Criminal Appeal is named when dealing with military cases), and ultimately to the House of Lords.

5.7.6. Standing Civilian Court. Civilians who are officials attached to the Services overseas, or dependants of Service personnel resident overseas (for



example in Germany or Cyprus) may be tried for minor offences by the Standing Civilian Court (which consists of a Judge Advocate sitting alone), or for more serious matters by a Court-martial.

5.8. Please also refer to *British Army: Courts Martial, 17<sup>th</sup>-20<sup>th</sup> Centuries – Military Records Information 22* available on the National Archives web site at <http://www.nationalarchives.gov.uk/catalogue/RdLeaflet.asp?sLeafletID=28> .

## 6. Army and Royal Air Force courts martial

6.1. As stated above, the Office of the **Judge Advocate General** has early modern historical origins but in its modern form is contemporaneous with the origins of the standing army in the 17<sup>th</sup> century. From 1666, during the Restoration period, the separate offices were placed on the permanent establishment of the Army. Since 1682, these officers were appointed by letters patent and have continued to be to the present day.

6.2. Originally, the office holder was a lawyer whose functions were

- To advise on the charges and evidence in cases of difficulty before the court martial was convened.
- The making of arrangements for courts martial.
- The prosecution of military offenders before them. His duties as a prosecutor ended in 1860 but his responsibility for advising on charges and evidence continued.
- To act as legal adviser to the courts martial.
- The recording of their proceedings.
- Advising the sovereign and Commander in Chief on the exercise of the prerogative of mercy with regard to the sentences of courts martial.
- To the early nineteenth century, he also acted as secretary and legal adviser to the Board of General Officers, one of whose functions was to hear complaints against officers and soldiers (usually in times of war).

6.3. His channels of communication with the sovereign were successively the Secretary at War (from 1706), the Commander in Chief (from 1806) and the Secretary of State for War (from 1905). From 1793 to 1904 he was legal adviser to the Commander in Chief and, thereafter to the Secretary of State for War.

6.4. By 1892 the Judge Advocate was a Privy Councillor, a junior minister in the government, usually a Member of Parliament and a spokesman for the Commander in Chief in Parliament and he had direct access to the Sovereign on matters pertaining to his office. The appointment was regarded as a political office. In 1893 he ceased to be a minister, and from that date his office was wholly judicial and advisory in character. By 1905, it was decided that the office should in future be filled by a person with suitable legal attainments, subject to the orders of the Secretary of State for War. Initially the President of the Probate, Divorce and Admiralty Division of the High Court held the post but he was unpaid and acted mainly through deputies whom he was empowered to appoint.

6.5. From 1918 Judge Advocate General became legal adviser also to the Secretary of State for Air and had responsibility for courts martial of Royal Air Force personnel. In 1923 a Military and Air Force Department of the War Office was formed to undertake prosecutions, thus separating the office's prosecuting and judicial functions.

6.6. In 1938 the Army and Air Force Courts Martial Committee under Rowland Oliver KC had recommended "that the Judge Advocate General should be appointed on the recommendation of, and be responsible to, some Minister other than the Secretary of State for War or Air". The Committee made this recommendation to ensure that any impression that the Judge Advocate General, whose duties include the review of all convictions of courts martial and advice to the Secretary of State for War and Air on questions of law arising from such review, was in any sense a subordinate official of the War Office or Air Ministry. The issue of ensuring and promoting the legal independence of the Judge Advocate General was considered to be critical. The Cabinet approved the proposal in 1939 but the War intervened and nothing was done about this until 1946, when a Committee under Mr Justice Lewis was appointed to review the structure of the Courts Martial procedure and kindred matters with particular reference to the recommendations of the Oliver Committee. They endorsed the recommendations of their predecessor committee regarding the appointment of the Judge Advocate General. The Cabinet approved a complete separation of prosecuting and judicial functions and this was put into effect on 1 October 1948<sup>5</sup>.

## Advisory roles of the Judge Advocate General's Department (Lord Chancellor's Office) and Legal Services Department (War Office) from 1948.

6.7. In 1946 the Judge Advocate General's Office comprised three departments: a Judicial Department; a Military Department; and an Air Force Department. The last two departments were responsible for the giving of pre-trial legal advice and the conduct of prosecutions within the Army and the Air Force respectively. The Judicial Department's function was to provide independent judge advocates to sit at courts martial and review proceedings of trials.

6.8. From 1948, the judges serving under the Office of the Judge Advocate General retained their judicial functions but were now appointed by the Lord Chancellor instead of the Secretaries of State for War and Air. The Judge Advocate General himself continued to be appointed by royal decree (under the advice of the Lord Chancellor) under letters patent. The old Judge Advocate General Office Military Department responsibilities for the prosecution function passed to new directorates of Legal Services in the War

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<sup>5</sup> The transfer of functions from the War Office to the Lord Chancellor's Department was operationally enacted by Army Council Instruction 880, 1 October 1948 and Air Ministry Order A 798/48 of the same date.

Office (Adjutant General) and Air Ministry respectively and were separately constituted for both Army and Royal Air Force as uniformed legal services.

**6.9 Directions for trial and prosecution.** To 2006, three distinct prosecution authorities have existed in the UK armed services. These were the Army Prosecution Authority, Royal Navy Prosecuting Authority and the Royal Air Force Prosecuting Authority. These authorities may have had different titles in the past: e.g. the Army Prosecution Authority in recent years was known as Army Legal Services. Since 1997, each authority was to be independent of the chain of command, and their role has been to determine whether cases referred to them by the chain of command should be directed for trial. Where the cases were directed for trial, the prosecution authorities would have prosecuted the cases before military courts. They essentially carry out the role that in civilian life is carried out by the Crown Prosecution Service. Further, the prosecution authorities have provided advice to police forces on matters concerning the prosecution of offences and have represented the Crown as respondent to appeals before Summary Appeal Courts and the Courts-Martial Appeal Court. The separate prosecution authorities that have existed since 1997 are to be reformed into a single tri-service by the Armed Forces Act 2006.

6.10. To provide for appeals against convictions from courts martial a Courts Martial Appeal Court was established under the Courts Martial (Appeals) Act 1951. This Act also made provisions for appointments to the Judge Advocate General's Office.

6.11. Standing Civilian Courts were established for the trial of overseas civilians working for the Ministry of Defence under the Standing Civilian Courts and Standing Civilian Courts (Areas) Orders 1977. These courts also fell under the jurisdiction of the Judge Advocate General.

## **7. Royal Navy courts martial.**

### **Structure of the Naval Disciplinary Administration to 2000.**

7.1. From 1661 the office of **Judge Advocate of the Fleet** has existed to supervise the Royal Navy courts martial system, separately from the Judge Advocate General. During the 20th century the Judge Advocate of the Fleet has been a civilian barrister appointed by the monarch on the advice of the Lord Chancellor to whom all questions of law arising out of the Naval Discipline Act must be referred. For much of the twentieth century, the post has been part-time appointment. His functions were:

- To advise when required on any important questions respecting the administration of justice under the Naval Discipline Act 1957
- To examine all proceedings of courts martial and disciplinary courts except when the accused pleads guilty and no evidence is taken (other than evidence as to character) and to advise generally and in detail on

the proceedings of the Court; to call attention to any irregularities or illegalities that may have occurred in the course of the proceedings and to propose such action as the legal requirements of the case may necessitate.

- To advise on all questions which may arise out of, and subsequent to, a court martial or disciplinary court

7.2. To the mid-1990's, the Chief Judge Advocate (known as the Deputy Judge Advocate in 1960) was traditionally a serving Captain or Commodore in the Royal Navy. In recent times the Director of Naval Legal Services carried out this role. The office was traditionally based at Greenwich. His main functions were:

- Superintending the legal training and studies of selected Supply and Secretariat Officers
- Providing guidance to those Officers already trained
- Officiating at important courts martial

7.3. The Royal Navy had no legal branch unlike the Army and the Royal Air Force. The Royal Navy had approximately 25 legally trained **Supply and Secretariat Officers** (who were usually barristers) and rarely worked full time on legal matters. They were distributed throughout the fleet in general service appointments where they were available to advise on disciplinary problems and to officiate as judge advocates at courts martial. They also acted as prosecution and defence lawyers in naval courts martial. Since 2004, their role as naval judge advocates has been abolished but their other legal duties have continued.<sup>6</sup> In recent times the title of these naval legal officers has changed to 'Logistics Officers'.

7.4. The War Office Naval Law Division was created in the 19<sup>th</sup> century and was continued under the Ministry of Defence from 1963 under the title Naval Legal Services Division. It originally comprised two branches.

- The Discipline Branch comprised a small team dealing with all disciplinary matters concerning the Fleet and responsible for the Naval Discipline Act 1957, including the review of courts martial, complaints and scrutiny of punishment warrants. This Branch was in regular communication with the Judge Advocate of the Fleet and the Chief Naval Judge Advocate

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<sup>6</sup> See *Grievs v United Kingdom* [2004] 39 EHRR 171. The independence of serving uniformed Acting Judge Advocates was challenged at the European Court of Human Rights. Also, *Findlay v United Kingdom* [1997] 24 EHRR 221, established that the absence of independent authority acting in the pivotal role of Acting Judge Advocate in any court martial deprived the defendants of their rights under Article 6 of the Human Rights Act 1998. The European Court of Human Rights decision was that members of the court martial were to be sufficiently independent of the convening officer of the trial to ensure a fair trial. Consequently, the Armed Forces Act 1996 was amended and the functions of the convening officer and Boards, prosecution and defence counsels were separated. The Armed Services Act 2006 is to introduce a tri-service prosecution authority and the Office of the Judge Advocate General (staffed by civilians) will coordinate all tri-service courts martial.

- The General Branch dealt with other legal matters concerning the Navy Department. Their role was to seek legal advice from the Treasury Solicitor. They normally had no dealings with the Judge Advocate of the Fleet and the Chief Naval Judge Advocate.

7.5. In 2004 Courts Martial in the Royal Navy began to be heard in a similar way to Army and Royal Air Force cases under a single independent authority and by the same civilian judges, rather than uniformed naval officers. The functions of the Judge Advocate of the Fleet were transferred to the Judge Advocate General by delegation in 2007 and will be finally transferred by statute in 2008.

7.6. On board ship, policing and disciplinary matters were traditionally the responsibility of the Executive Department and specifically by the Master at Arms and his Ship's Service Police Team (usually comprising of three men who are experts in seamanship). The Master at Arms reports directly to the Executive Officer – a First Lieutenant and second in command – who is assisted by the Executive Warrant Officer – the most senior non-commissioned officer aboard ship. These officers will report any crimes and misdemeanours to the Ship's Captain, who decides whether the offence can be dealt with summarily or whether it should proceed to a courts martial<sup>7</sup>.

## **8. Ministry of Justice and predecessor bodies' military law functions.**

8.1. As stated above, since 1948 the Office of the Judge Advocate General has been a component unit of the Lord Chancellor's Department and its successor bodies (e.g. the Ministry of Justice (MoJ)) to preserve an independent and impartial Head of the Military Justice system. The entire Office is comprised of civilian civil servants that provide administrative support to the Judge Advocate General, Vice Judge Advocate General and the cadre of Assistant Judge Advocates General. The office has also provided advice to Ministers within the Ministry of Justice concerning its interests in military justice matters.

8.2. MoD is the lead department for all policy on military matters including the legal framework for military justice: it proposes to parliament statutes and statutory instruments – e.g. rules. However, the MoD purview on military law is tempered by the need for it to comply with international and specifically European law and by the rulings and judgements of the British superior courts: i.e. the Supreme Court of Judicature.<sup>8</sup>

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<sup>7</sup> The defendant can request a trial by courts martial if s/he so wishes. Where a Ship Captain thinks the matter is too complex or serious for him to deal with summarily he will recommend a courts martial.

<sup>8</sup> A new United Kingdom Supreme Court is due to open in October 2009 as provided for in the Constitutional Reform Act 2005 that will replace the role of the House of Lords as the highest court of appeal and the Supreme Court of Judicature appeal courts. It will provide

## 9. Jurisdiction of Courts-Martial

9.1. Courts martial historically have no jurisdiction over criminal offences committed by civilians on mainland UK, which are referred to the magistrates' and crown courts. For offences allegedly committed by service personnel where the victims are civilians or service personnel the trial will usually take place at a courts martial. However, serious offences (murder, manslaughter, rape) may be tried at Crown Court. The current sentencing policy advocated by the Judge Advocate General is available on their web site<sup>10</sup>.

9.2. Where the offence was committed abroad by armed service personnel the issue of jurisdiction becomes more complicated. The Status of Forces Agreement (SOFA) has defined the legal position of a visiting military force deployed in the territory of a friendly state. Agreements delineating the status of visiting military forces may be bilateral or multilateral. Provisions pertaining to the status of visiting forces may be set forth in a separate agreement, or they may form a part of a more comprehensive agreement. These provisions describe how the authorities of a visiting force may control members of that force and the amenability of the force or its members to the local law or to the authority of local officials. To the extent that agreements delineate matters affecting the relations between a military force and civilian authorities and population, they may be considered as civil affairs agreements.

9.3. **Sovereign Base Areas (SBAs).** Two Sovereign Base Areas currently exist for British forces colonies at Episkopi and Dhekelia in the Republic of Cyprus that was agreed with the national government in 1960. These SBAs have administration, independent judiciary, courts and police force completely separate from the United Kingdom. The Court administers the laws of the Sovereign Base Areas. These comprise the laws of the Colony of Cyprus as at August 1960, as amended by Ordinances enacted subsequently. The Laws of the Sovereign Base Areas are kept as far as possible the same laws of the republic of Cyprus. The Court of the Sovereign Base Area is concerned with non-military offences

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greater clarity to constitutional arrangements by further separating the judiciary from the legislature and the executive. It will:

- act as the final court of appeal in England, Wales and Northern Ireland;
- hear appeals on arguable points of law of general public importance;
- hear appeals from civil cases in England, Wales, Northern Ireland and Scotland; and
- hear appeals from criminal cases in England, Wales and Northern Ireland.

The current Law Lords will be the first justices of the 12-member Supreme Court and will remain members of the House of Lords once the court is created. New judges appointed to the Supreme Court after its creation will not be members of the House of Lords; they will become Justices of the Supreme Court.

<sup>10</sup> <http://www.hmcourts-service.gov.uk/infoabout/rcj/ojag.htm> *Sentencing in Courts Martial: a Short Guide* (2006) for up-to-date information on sentencing.

committed by any person within the Sovereign Base Areas. That includes offences committed by British servicemen, by the families of servicemen, by Cypriots, and others such as tourists, of whom some 2 million per year transit the Sovereign Base Areas. A Resident Judge, who hears cases at the two SBA courts and is reinforced, as necessary, by senior judges brought out from the UK. The Court administers the laws of the Sovereign Base Areas. These comprise the laws of the Colony of Cyprus as at August 1960, as amended by Ordinances enacted subsequently. The Laws of the Sovereign Base Areas are kept as far as possible the same laws of the Republic of Cyprus. Military law offences committed by UK service personnel on active service continue to be subject to British courts martial procedure.<sup>11</sup>

9.4. Where the offence is committed abroad and the local judiciary are content to allow the crime to be tried by the UK military, the case would be subject to courts martial jurisdiction within that country.

9.5. The Armed Forces Act 1976 introduced the Standing Civilian Court for the trial of civilians working for or accompanying the Army outside the UK. Offences committed by civilians would also be subject to the Status of Forces Agreement.

## **10. Procedures in courts martial from 1990 to the present.**

10.1. Procedures for Army, Royal Navy and Royal Air Force courts martial in recent times have been continually subject to regular amendment according to the requirements of the law; procedures may have applied in 1995 may have been removed or replaced by 2005. Researchers interested in courts martial procedure for respective armed services prior to 2006 are advised to search for statutory instruments relating to Army, Royal Navy and Royal Air Force at the website for the Office of Public Sector Information<sup>12</sup>.

10.2. For modern tri-service courts martial procedure dating from 2006, researchers are directed to the website of the Office of the Judge Advocate General.<sup>13</sup>

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<sup>11</sup> See [http://www.sba.mod.uk/web\\_pages/index.htm](http://www.sba.mod.uk/web_pages/index.htm) .

<sup>12</sup> <http://www.opsi.gov.uk/index.htm> .

<sup>13</sup> <http://www.hmcourts-service.gov.uk/infoabout/rcj/ojag.htm> . See *Procedure in Courts Martial: a Short Guide* (2006).

## 11. The National Archives' current / past selection policy and practice.

11.1. The records that have been selected in the past by the National Archives are detailed in Appendix 1. Those selected records that are still potentially accruing are detailed below.

11.2. **War crimes records** - The Hague Conventions were international treaties negotiated at the First and Second Peace Conferences at The Hague, Netherlands in 1899 and 1907, respectively, and were (along with the Geneva Conventions of 1925 and 1928) among the first formal statements of the laws of war and war crimes in the nascent body of secular international law. War crimes under international law were firmly established by the Nuremberg Principles, a document that was created as a result of the Nuremberg Trials of leading Nazis from 20 November 1945 to 1 October 1946 at the International Military Tribunal. These principles are based at the level of international law. The National Archives has selected all war crimes policy and case materials created by the British contingent of the Tribunal or by the Judge Advocate General's Office on behalf of the Tribunal for the Second World War (1939-1945).

11.3. The Nuremberg Trials were the first of their type whereby the allied powers convened an International Military Tribunal specifically to try and sentence leading Nazis. Great Britain, the United States, the Soviet Union, and France were all given places on the Tribunal. The records created by the British contingent to the Tribunal are contained in record series: WO 235; WO 238; WO 309; WO 310; WO 311; WO 325; WO 331; WO 353; WO 354; WO 355; WO 356 and WO 357. Some 200 German constituting the main war crimes defendants were eventually tried at Nuremberg and 1600 others were tried under the traditional channels of military justice: courts-martial in other German towns.

11.4. **Modern War Crimes.** The Rome Statute of the International Criminal Court (or 'Rome Statute') 1998 is the treaty, which established the International Criminal Court (ICC). It sets out the Court's jurisdiction, structure and functions. It entered into force on 1 July 2000. Any perpetrator of a crime within the jurisdiction of the Court committed after this date is liable to prosecution.

11.4.1. The Statute provides for the ICC to have jurisdiction over three main classes of offence: genocide, crimes against humanity and war crimes. The treaty establishing the court gives a special definition of genocide in Article 6. a list of crimes against humanity in Article 7 and a lengthy and detailed list of war crimes in Article 8.

11.4.2. The International Criminal Court Act 2001 was adopted in the UK on 11 May 2001<sup>14</sup>. The Act implements into the law of England, Wales and Northern Ireland the Rome Statute of the International Criminal Court.

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<sup>14</sup> <http://www.opsi.gov.uk/acts/acts2001/20010017.htm>.



11.4.3. The principle aims of the Act are:

- To incorporate into domestic law the offences contained in the Rome Statute relating to genocide, crimes against humanity and war crimes
- To fulfil the UK's obligations under the Statute, particularly in relation to the arrest and surrender of persons wanted by the International Criminal Court (ICC) and the provisions of assistance with respect to ICC investigations; and
- To create a legal framework so that persons convicted by the ICC can serve prison sentences in the UK.

11.5. **Army case records** – The main series of courts-martial case records are contained in WO 71. In the past, the National Archives has selected a few records for each year that mainly comprises the more serious offences – murders, sexual offences with a few routine offences included as representative selections. These selections have seldom exceeded 10 files per annum selected from the Judge Advocate General's Office. Most of the remaining Army courts-martial WO series records listed in Appendix 1 have been superseded and are discontinued.

11.6. **Royal Air Force records** – The main series of courts-martial records are contained in AIR 18 (case files), AIR 21 (Registers). Selection of case files seems to have proceeded on a file-by-file review basis with no set criteria for selection other than what appealed to the reviewer. The records mainly comprise the more serious offences – usually murders, sexual offences with a few routine offences included as representative selections. The records contained in AIR 43, AIR 44 and AIR 71 described in Appendix 1 are no longer created.

11.7. **Royal Navy records**– The main series of recent historical courts-martial records are contained in ADM 156 (case records). The files only cover 1890 to 1965: files up to 1976 are still awaiting historical review by the Ministry of Defence. These files comprise cases extracted from ADM 1, ADM 116, and ADM 167 that were transferred into this record series. They contain cases relating to the Royal Navy, Royal Marines and the Naval Reserve and Auxiliary Forces.

11.8. Peculiarly, ADM 178 also contains some case records that overlap with the dates of ADM 156: beyond this there is no indication of how these file series differ.

11.9. **Standing Civilian Courts records** – These records comprise the case files of civilians working for the Ministry of Defence who committed felonies within British Armed Service facilities outside of the UK under the Standing Civilian Courts and Standing Civilian Courts (Areas) Orders 1977. They are contained in record series ER 1 and currently date from 1977 to 1986. Very few files are created annually and to date only a few files have been selected to 1986.

**11.10. Courts-Martial Appeal Court** - The main series of case records are contained in J 135. They cover all British armed services appeals on courts-martial court decisions. The Supreme Court of Judicature has ultimate jurisdiction over all courts-martial appeals. The selection of these records has followed the decision made in the *Report of the Committee on Legal Records* (Cmnd. 3084, August 1966) where it was decided that all records relating to courts martial appeals were to be preserved permanently.

**11.11. Judge Advocate General's Office case tracking records** – These comprise datasets of summary information concerning the totality of cases that have been processed by the Judge Advocate General for courts-martial. They are contained in LCO 60 (or National Digital Archive of Datasets reference CRDA/23). From 2003 they include summary case details relating to the Royal Navy.

**11.12. Ministry of Defence records relating to policy** – The main series for policy records are held in WO 32.

**11.13. Judge Advocate General's Office records relating to policy** – The main series for policy records are held in LCO 53.

**11.14. Judge Advocate of the Fleet's Office records relating to policy** – There is no discrete record series for the policy files of the Judge Advocate of the Fleet for records selected by the National Archives. The policy records are mixed with a number of other Admiralty policy records located in record series ADM 1. Few have been selected over the years. All Royal Naval courts martial policy files dating from 2004 and selected for preservation are to be preserved in LCO 53 as, from this date, the Judge Advocate General's Office took over the responsibility for naval courts-martial proceedings.

**11.15. Ministry of Defence (MoD) records disposal relating to courts-martial** – At the time of writing, no record disposal schedules were available at the Ministry of Defence web site.

## **12. Proposals for the future preservation at the National Archives of public records relating to military law and courts martial.**

**12.1. Policy records** – Much of the policy records for military law and courts martial will have been generated by the Ministry of Defence but will also include some operational policy advice from the Judge Advocate General and the Judge Advocate of the Fleet. The following subjects are likely to be worthy of preservation by the National Archives.

12.1.1. All Defence Council (Ministry of Defence) records relating to the Military Justice System. These will be, by definition, high level policy discussions.

12.1.2. Ministry of Defence Strategic Defence Review work on military law and courts martial practices: e.g. working group papers.

12.1.3. Chief of Defence Staff and Chief of Staffs reviews of policy relating to military law and courts martial.

12.1.4. Policy papers of the Executive Committees of the respective Armed Services that discuss military law and courts martial practices.

12.1.5. All policy discussions of amendments to the Service Discipline Acts with notes on clauses. These may include Ministry of Defence working party and sub-committee records.

12.1.6. Policy discussions to combine the three Service Discipline Acts into a single Armed Services Discipline Act. Legal advice on drafting, notes on clauses and departmental consultation responses are to be preserved.

12.1.7. Policy discussions relating to the legal independence and impartiality of the Judge Advocate General and Judge Advocate of the Fleet and their respective staffs prior to 1996.

12.1.8. Policy on the separation of sentencing and disciplinary functions from the military chain of command to legally authorised independent bodies as a consequence of the Human Rights Act 1996 and any other legislation.

12.1.9. Policy discussions on suspensions of Army and Royal Air Force courts martial enacted by European Court of Human Rights rulings<sup>15</sup>.

12.1.10. Policy on reorganisation of the Military Justice System engendered by UK and European Union legislation or other legislation and events. In particular, policy on organisational changes to the Military Justice System introduced by the Armed Forces Act 1996 that were brought into force on the 1 April 1997 with the creation of an independent prosecuting authorities.

12.1.11. Policy discussions on the European Court of Human Rights decision to suspend and subsequently terminate all Royal Navy courts martial from December 2003 and to pass them over to the Judge Advocate General's Office from this date. Discussions relate to the ability of the

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<sup>15</sup> For example, the courts martial system was challenged in the European Court of Human Rights by ex-Lance Sergeant (Corporal) Alec Findlay. He complained that the system whereby the convening officer appointed the members of the court, appointed the prosecutor, directed the charges and, post-trial, became the confirming officer was not an independent one. The ECHR upheld his complaint and found that the system had the appearance of being unfair. However, the court did not go so far as to state that the system was, in fact, unfair. Nevertheless, the case did form the catalyst for some fairly radical changes.

Judge Advocate of the Fleet to ensure independent and impartial trials whilst operating a uniformed Judge Advocates staff for the Royal Navy.

12.1.12. Policy discussions on the validity of Royal Navy courts martial decisions dating from 1996 in consideration of Human Rights legislation.

12.1.13. Policy discussions on the interaction of the Service Discipline Acts and the Human Rights Act 1996 and discussions of amendments to service administrative instructions required to comply with this legislation.

12.1.14. Policy on Sovereign Base Areas.

12.1.15. Policy discussions on Prosecutors and Defendants rights of appeal.

13.1.16. Any policy discussions or high-level consultations between the Ministry of Defence, the Judge Advocate General, the Judge Advocate of the Fleet, the Attorney General and the Crown Prosecution Service and the Ministry of Justice concerning military law and courts martial.

12.1.17. Judge Advocate General and Judge Advocate of the Fleet advice on points of law to the armed services legal branches and chains of command.

12.1.18. Policy on Martial Law – military government involving the suspension of ordinary local laws – in the theatre of war. This may include the first and second Iraq Wars (1991 to 1992 and 2003 to present respectively) and the War in the former Yugoslavia (1992 to 2001). Martial law may have been imposed by the United Nations but United Kingdom operational policy may be preserved where it exists.

12.1.19. Policy on sexual orientation in the armed services relating to disciplinary proceedings: especially relating to cases of dismissal that have been challenged under the European Court of Human Rights rulings.

12.1.20. Policy on the eventual revocation of the ban on the recruitment of homosexuals into the armed services in 2000 as a result of the European Court of Human Rights rulings: breach of articles 8 and 13 of the European Convention of Human Rights<sup>16</sup>. This includes any discussions from the late 1960's onwards on the decriminalisation of homosexuality in civilian life under the Sexual Offences Act 1967 and the legal contradictions posed by the continuing ban in the armed services.

12.1.21. Policy on Status of Forces Agreements (SOFA) that defines the legal position and jurisdiction of visiting military forces deployed overseas whether bilateral or multilateral. This will include the agreements themselves.

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<sup>16</sup> To 2000, fifty personnel were sacked from the armed services for being homosexual. The High Court formally upheld the decision to ban homosexuals from the armed services

12.2. Most of the Ministry of Defence records matching the above criteria will be preserved in TNA record series WO 32 (War Office and successors: Registered Files (General Series)). Most of the Judge Advocate General's Office policy records will be captured in LCO 53 (War Office and Lord Chancellor's Office: Judge Advocate General's Office: Administration Files)<sup>17</sup>. To 2004, the policy records of the Judge Advocate of the Fleet will be preserved in ADM 1 (Admiralty, and Ministry of Defence, Navy Department: Correspondence and Papers). Records dating from January 2004 will be preserved in LCO 53.

12.3. **Register case records** – These comprise summary records of cases created by the Judge Advocate General's Office and the Judge Advocate of the Fleet. Future selection of case files will be as follows.

Judge Advocate General's Office case index system.	LCO 60	Preserve permanently. Datasets to be annually transferred to the National Digital Archive of Datasets
General Courts Martial Abroad (Army) registers.	WO 90	Preserve permanently. Now discontinued.
General Courts Martial Home (Army) registers.	WO 92	Preserve permanently. Now discontinued.
District Courts Martial (Army) case records.	WO 86	Preserve permanently. Now discontinued.
Royal Air Force General and District Courts Martial registers	AIR 21	Preserve permanently. Now discontinued.
Standing Civilian Courts registers	ER 2	Preserve permanently. Now discontinued.
Courts-martial Appeal Court: Registers of Appeals	J 152	Preserve permanently.

<sup>17</sup> Although described as 'Administration Files' these records comprise the operational policy of the Judge Advocate General.

12.4. **Case records** – The case records for courts martial created by the Judge Advocate General's Office and the Judge Advocate of the Fleet. Future selection of case files will be as follows.

General Courts Martial (Army) case records	WO 71	<p>Case files covering the following subjects are to be selected.</p> <ul style="list-style-type: none"> <li>• Murder and manslaughter: including those high profile cases committed on active service from Northern Ireland, the war in the former Yugoslavia and the first and second Iraqi wars.</li> <li>• Treason, sedition and riot.</li> <li>• Any trial where a custodial sentence of five years or more is imposed.</li> <li>• Mutiny where a sentence of two years or more is imposed.<sup>18</sup></li> <li>• Terrorist activities by armed forces personnel – usually against its own side – see treason.</li> <li>• Disciplinary action relating to the sexual orientation of a defendant.</li> <li>• Any case files where there were subsequently the hearings of appeals by the Courts Martial Appeal Court.</li> <li>• Cases relating to genocide, war crimes and crimes against humanity under the terms of the International Criminal Court Act 2001.</li> </ul>
District Courts Martial (Army) case records	WO 71	
General Courts Martial (Royal Air Force) case records	AIR 18	
District Courts Martial (Royal Air Force) case records	AIR 18	
Royal Navy Courts martial case records	ADM 156	
Sovereign Base Area case records	No series at present	
Field General Courts Martial case records	No series at present	Representative selection of courts martial cases in the theatre of war to be preserved.
Standing Civilian Court case files	ER 1	Files to be selected must be an example of an offence brought

<sup>18</sup> Mutiny occurs where actions are knowingly employed by armed services personnel to effect the refusal or avoidance of any duty or service against, or in connection with, operations against the enemy, or impeding the performance of any such duty.

		before the court for the first time or be of national historical interest.
Courts-Martial Appeal Court: Case Files	J 135	Preserve permanently and ensure the original JAG case files are preserved

**12.5. Publications** – All publications from the Ministry of Defence ‘Discipline and Military Law Reference Library’ are to be preserved according to OSP36 on Publications and Grey Literature. A list of these publications is available at <http://www.army.mod.uk/servingsoldier/termsofserv/discmillaw/ref/index.html> . As the Ministry of Defence web site is permanently preserved, the above link and contained publications should also be preserved at the National Archives.

### **13. Implementation.**

The Ministry of Defence and HM Court Service (MoJ) - including the Office of the Judge Advocate General - historical review teams will carry out the implementation of this policy.

All records disposal schedules created by the above bodies which refer to military law and courts martial administration will need to be amended according to this policy.