



# The Scales

**I**n recent months, the media spotlight swung eastward on its creaky hinges to focus on the shocking events in Iraq. Events, if what is alleged is true, that are in direct contravention of the Geneva Conventions.

Meanwhile, in Eritrea, Irish soldiers on a tour of duty felt the glare of the spotlight as allegations of fraternising with locals gave the media a substantial morsel to chew on. The masses tend to watch the news, make their judgement while chewing the fat over a pint and get on with their life. But to the people involved in enforcing and overseeing Military Law, this is their life. The day-to-day issues in the office of the Deputy Judge Advocate General (DJAG) may not be as grave as events in Iraq, but each case is just as essential for the smooth and successful functioning of the Defence Forces.

Col William Nott, whose triplicate of titles includes Deputy Judge Advocate General, Director of Legal Service and also the new forthcoming title of Director of Military Prosecutions, explains the role of the DJAG: "I think 'Director of Legal Services' describes my job accurately. All Defence Forces legal matters at DFHQ level come through my office. In the old days the majority of those matters would be disciplinary – matters relating to courts-martial, summary trials and so on. However, the Defence Forces has changed a lot in that personnel in general are of a much higher educational standard than before. I would say that not more than 25% of the work in this office would now be in the disciplinary area.

"The other 75% would relate to the wider legal issues of the Defence Forces

# Of Justice

today, where matters like freedom of information, equality law, redresses of wrongs, promotion boards, compulsory random drug testing and so on have complex legal undertones which have to be addressed. If you take it that the Defence Forces are 10,000-strong, then that's 10,000 legal problems".

"However, disciplinary matters are still of utmost importance, as they come under the 1954 Defence Act, and probably my most important role is to advise the Deputy Chief of Staff Support, (DCOS(Sp)), on the application of the Defence Act and military law in general to the Defence Forces. As Director of Military Prosecutions, I now also advise independently on military prosecutions. If you like, I perform the same role that the Director of Public Prosecutions (DPP) performs in relation to criminal matters within the State, in that I direct whether to prosecute or not," he says.

## The Long Arm of the Law

The issue of jurisdiction is a complex one for the Defence Forces. The Defence Act sets down military offences that are not applicable against civilians, they are purely military offences. The men and women who join the Defence Forces remain subject to the laws of the land as soldiers and officers but in addition they are subject to extra laws under the Defence Act. Some times these laws can restrict their civil liberties in the interests of the common good. The act also allows the military to prosecute members of the Defence Forces for non-military criminal offences under, for instance, the Road Traffic Act or any other

criminal law within State. Punishments can range from a warning or reprimand to two years imprisonment in the case of a limited court-martial or imprisonment for life in the case of a general court-martial.

Furthermore, service overseas with international United Nations mandated forces required strict legislation regarding exclusive Irish jurisdiction over our Forces. "The important thing with regard to the

**with regard to the overseas deployment of Irish troops, there are certain offences that only court martials can prosecute**

overseas deployment of Irish troops is that they are not subject to the laws of the host state but to Irish law under the Defence Act" explains Col Nott. "For example, over the years we would have prosecuted under Irish law some serious cases that occurred in Lebanon. Irish courts would not normally have jurisdiction to hear cases that took place overseas but courts-martial have that jurisdiction. Very serious offences - like murder, manslaughter and rape - can only be prosecuted by a court-martial when committed on active service abroad. Those offences cannot be prosecuted before a

court-martial when committed in Ireland; that must be done in the civil courts. The most common types of offences range from thefts and frauds, absence without leave and various types of assault.

"Section 168 of the act creates the important military offence of "committing conduct to the prejudice of good order and discipline." What constitutes that offence is for a court-martial to decide. That affords us wide leeway to prosecute infringements of regulations and instructions and inappropriate behaviour with regard to personal relationships and so on.

## The Process

The recent developments in Eritrea provide a sound illustration of the role of the DJAG in military legal proceedings regarding overseas offences. Col Nott outlines the process: "When a report is received from a mission area like Eritrea containing allegations against persons subject to military law, I would advise the DCOS (Sp) on the nature of the investigation required. In most cases a Military Police investigation team would immediately be dispatched to the mission area, as in the case of Eritrea. That report would eventually end up on my desk, after submission to the DCOS (Sp). If the report disclosed evidence that offences had been committed I would advise that charges should be preferred. The process would then be dealt with by the GOC of the Brigade concerned with advice from his Legal Officer. Charges of 'inappropriate behaviour' under Section 168 were brought in this case. While what took place would not amount to a crime in civilian life, it is a crime in the military's eyes because any



Col. Billy Nott

form of fraternisation, of this nature, with local people while on active service is an offence in military law."

The prompt and thorough manner by which this case was handled has earned the Irish Defence Forces a favourable reputation internationally, says Col Nott. "I think that we are looked upon quite highly by other countries in that where allegations of this nature are made, they are not brushed aside. A full investigation was undertaken followed by proceedings under the Defence Act and the individuals that were found guilty were punished. It is well known by our officers, NCOs and men, that where breaches of discipline occur, action will be taken," he says.

### Courts Martial

Col Nott was appointed Judge Advocate in 1983, after working his way up through the officer ranks since he was commissioned in 1964 into the Artillery Corps. Over the last 20 years, the number of courts-martial has dropped from between 150 and 200 per year to 20 or 30 per year. However, this is still a crucial element of the role of the DJAG and there are subtle differences between a court martial and a regular court. "A court-martial is a court of law, provided for in Bunreacht na hÉireann and in the 1954 Defence Act. The exact same rules of evidence and more or less the same rules of procedure are applied as in any ordinary court," says Col Nott. "The difference is that indictable offences in this country, with the exception of the Special Criminal Court, are

tried before a judge and jury. In a court-martial it is a Judge Advocate and a court of officers - from a minimum of three to a maximum of five officers. These officers perform the functions of a jury in some respects but they have more power than a jury. The Judge Advocate advises them on the law and sums up on the evidence but they are responsible for making decisions of law and of fact, whereas a jury only makes decisions on the facts and are directed on the law by the judge. The court-martial is advised by the Judge Advocate as to what sentence it can award and then it has full discretion to decide on sentence."

### Human Rights Violations

The current situation in Iraq, with allegations of human rights violations and offences against international humanitarian law or the law of armed conflict, is a subject that is very close to Col Nott's

**"I think that we are looked upon quite highly by other countries in that where these allegations are made, they are not pushed aside"**

heart. He has been a member of the international teaching staff in San Remo since 1990 either lecturing or directing courses on international humanitarian law, which deals with the area of the Geneva Conventions, human rights and how troops should behave in a combat situation. The International Institute of Humanitarian Law is located in the north of Italy at San Remo and legal and other officers have been undertaking the international military course there since the 1970's. Lt Col Hogan, currently legal adviser to the EUMM (European Union Monitoring Mission) in Sarajevo, is also a member of the teaching staff at San Remo. Col Nott is a member of the Military Commission of the Institute, which establishes the curriculum for these courses.

The two burning questions about the Iraq situation that spring to mind are: 'How could it get so out of hand?' and 'How should it be dealt with?'

Col Nott attempts to tackle these questions: "How does it happen? It is very complex; there is no simple answer to this. Professional soldiers shouldn't behave in the way we are given to understand that some did. It would appear that violations were committed by a small minority of personnel, and I don't think it is fair to paint all the coalition forces in Iraq with the same brush.

"It would appear the coalition forces were very well-prepared to fight a war. After the victory in Baghdad, law and order got out of control and these forces were taking casualties. Pressure was obviously being put on commanders to restore the situation.

"Illegal interrogation methods were being used which, if reports are correct, were being encouraged by certain non-military elements. These methods are contrary to the Geneva Conventions. The coalition forces are forces of occupation in Iraq and the 4th Geneva Convention covers the extensive international law of occupation. Any abuse of prisoners of war or detainees amounts to a violation of the 3rd and 4th Geneva Conventions as well as a violation of human rights.

"As a military person, I would say that the lack of leadership displayed by commanding officers in the areas where this was going on was a major cause of the problem. It is essentially a matter of military discipline. If the superiors of these soldiers were doing their job, they would have ensured that violations did not take place or, if they did, that they were immediately stamped out. Superiors may not have participated in this type of treatment of prisoners but, if they knew or



Capt. Richard Brennan outside the offices of the DJAG.

ought to have known what was going on, then they have also committed an offence through failure to act."

### Geneva Conventions

With instances such as this receiving widespread attention from the media, there is a growing concern that the Geneva Conventions may not be as sacred as they ought to be, that they have fallen by the wayside. But Col Nott claims that the media created this perception. "Every country in the world has an obligation to apply the provisions of the Conventions," he says. "Unfortunately in wartime, it doesn't always happen. People think, because they see these instances which are highlighted in the media, that there is total disregard for the Conventions. My experience is that professional armies do apply the Geneva Conventions in situations of armed conflict. By and large those who violate the conventions tend to be poorly trained, poorly led, ill-disciplined troops or irregular forces that consider themselves not to be subject to any law. We have all heard of high profile examples of instances where the Law of Armed Conflict has been disregarded but I could give you many examples where it has been applied".

"In San Remo we give the example of a platoon that is attacking the enemy and it reaches its objective. At that stage a professional army will begin consolidating its position, replenishing ammunition and getting ready to move on. An ill-disciplined army will start looting and pillaging and the whole system breaks down. It is in the interest of a disciplined army that the Geneva Conventions are applied. If they are not applied they are no longer an army: they are a rabble or an ill-disciplined force."

### Career Path

The road to the DJAG's office is a long one and requires many years of study and practical experience. Captain Richard Brennan, Staff Officer in the Director of Legal Services office, joined the office in February 2003, after being commissioned as an army officer in 1991. He explains the route he took: "Following my commissioning as an officer to the Infantry Corps I was given the option of going to college to pursue a Degree level course. In my case I chose the academic route, being awarded a B.A in 1995 and LLB (law degree) in 1998, both from UCG. After my studies and overseas service with UNIFIL, I was posted to Defence Force Headquarters Dublin and worked as claims officer dealing mainly in the area of civil claims under the Director of Administration. Throughout this period I completed my studies at the Kings Inns (Barrister at Law Degree) and was subsequently called to the Bar in 2002. Fortunately, at this time a vacancy arose within the Legal Service, so being qualified, I applied and was successful"

"I consider myself fortunate in so far as I get to pursue and practice a legal career within the Defence Forces, my primary career choice" The most challenging thing about the job is the learning curve. If I were practising in the Four Courts, as what is called a 'Devil', I would be following a barrister, learning the practice and the procedures. Similarly, in this office I find

“ However, this is still a crucial element of the role of the DJAG and there are subtle differences between a court martial and a regular court ”

myself at the bottom of a steep learning curve and your ability to impart knowledge and information is dictated by how much of military law you can grasp and understand. From that point of view the challenge for me is in understanding the Defence Acts and the Defence Force' regulations and instructions and being able to apply them to problems that come in from a practical level to eventually being involved in Prosecuting in a Court-martial.

"Also, I am probably exposed to an awful lot more work here at my level than I would be allowed in the Four Courts, in terms of 'staffing memos', as we call it, or drafting opinions. There is much more-scope for practical experience," he says.

The role and function of the office of the DJAG has never been more pertinent, particularly because of the ever-increasing levels of scrutiny on military operations by the general public. With an ever increasing overseas deployment of Irish troops - particularly on UN peace enforcement missions - it continues to be imperative that all personnel are educated and trained on the international Law of Armed Conflict and particularly on the Geneva Conventions. The impeccable record of Irish participation on UN Missions is testimony to the training and influence of the office of the DJAG.



All military legal matters go through Col. Nott