

## **THE MILITARY JUSTICE SYSTEM IN THE UNITED STATES OF AMERICA**

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*The procedure of initiation of a court martial is named “convocation”. A commander authorized to convene a court martial is a “convening authority”. The Uniform Code of Military Justice appoints the commanders which convene a court martial.*

*The authority to convene a court martial is independent of the ranks and is maintained as long as the convening authority remains as a commander in an assigned position.*

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### **Role of the convening authority**

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The authority to convene a court martial is independent of the ranks and is maintained as long as the convening authority remains as a commander in an assigned position.<sup>2</sup>

### **Rules for the courts martial<sup>3</sup>. Rules for the Courts Martial 504 (b)**

A commander may order disciplinary measures by:

- a. Considering the accusations as groundless;
- b. Forwarding them to a superior commanding officer;
- c. Proposing administrative measures;

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<sup>1</sup> *Uniform Code of Military Justice (UCMJ)*

<sup>2</sup> *Ibidem.*

<sup>3</sup> *Art. 504 b and the following ones from the Uniform Code of Military Justice (UCMJ)*

- d. Imposing non-punitive measures;
- e. Imposing extrajudicial punishments;
- f. Convening a court martial.

The commander's influence as regards the inquiry and the enforcement of the disciplinary measures consists of the following:

- Once the accusations have been notified by the commander to a court martial established under the law, said commander may not use his command authority to influence the decision of the Court Martial.

- A superior commanding officer may choose not to give the authority of disposition in the case of a particular offence, in types of cases, or in general. A subordinated commander may take measures for which the authority has not been withdrawn<sup>4</sup>.

Here are some examples of how inquiries take place:

- Inquiries begin with a report on the offence. Such a report may come from the staff in charge with law enforcement currently trying to uncover the wrongs from the victim of an offence or from witnesses.

- The report of the offence is forwarded to the direct commander of the suspect for subsequent measures. Usually, the commander shall order a more thorough inquiry.

- In the case of a serious or complex criminal activity, the commander may request the assistance of specialized military investigators. In the Marine, these are specially trained civilians acting as agents of the Naval Criminal Investigative Service. In the Land Forces, the specially trained personnel are assigned to cooperate with the Criminal Investigation Division.

- In the case of minor or simple offences, the commander normally appoints a younger officer under his command to lead the inquiry. In other cases, the inquiry may be led by personnel of the military police.

- Criminal investigations should be led in accordance with the Constitution of the United States, the Uniform Code of Military Justice and the Military Rules of Evidence<sup>5</sup>.

The following activities are often a part of the criminal investigation:

- Questioning the witnesses. The persons that witnessed an offense or have information about an offense should be contacted and asked for a statement or the identification of the suspect. Witnesses may not refuse to

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<sup>4</sup> It is somewhat similar to the exception from the official procedures in the Romanian Criminal Procedural Law when, for certain offences involving militaries and their activity, an indictment may only be issued at the order of the commander.

<sup>5</sup> *US Constitution*, with the Uniform Code of Military Justice and the Military Rules of Evidence.

give a statement, unless it incriminates them. False statement is a military offence.<sup>6</sup>

- **Interrogations.** Suspects are often asked to give a statement during the investigation. If the officer in charge of the investigation knows that the questioned military is a suspect, he should inform the suspect about the right of not giving statements and the right to an attorney.<sup>7</sup> The suspect may not be forced to give statements and may request to stop the interrogation at any time.

- **Searches.** Physical or documentary evidence is often the key of an efficient prosecution. However, the fourth amendment of the US Constitution prohibits the searches of private areas, such as residences or briefcases without the permission of a neutral judicial official. In the army, commanders are authorized to give permission for a search. In emergency situations, the police may conduct a search without prior permission.

- **Scientific proofs.** A variety of scientific investigation techniques are used to prove offences. In the army, the use of chemical urine tests to determine prior drug consumption is the most common one. Other techniques such as taking fingerprints, writing, blood and DNA analyses are also widely used as part of the investigation of the militaries accused of offences. The results of the scientific tests may be used in court if the scientific methods are generally accepted in the scientific community.

- *Inquiries* may be considerable and prolonged and may not be enough for a conviction. Accordingly, prosecutors may use several special inquiry techniques to obtain vital testimonies of the witnesses.

- *Informative.* When criminal investigators suspect that a criminal activity is being carried on by certain individuals, they may try to gather evidence by sending an informer to the suspect to see whether the suspect will engage in criminal activities in the presence of the informer. Later on, at the trial, the informer may testify against the suspect.<sup>8</sup>

- *Compromise.*<sup>9</sup> Called in the army a pre-trial agreement, it is an agreement made between the accused and the government. The accused offers

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<sup>6</sup> *Art. 260 Criminal Code.*

<sup>7</sup> In Romanian law, we encounter these principles, namely the right to remain silent and the right to defense. In the disciplinary procedure for the militaries in Romania, it is stipulated the right to defense, but not the right to remain silent.

<sup>8</sup> It is somewhat similar to the procedure of article 224<sup>1</sup> *Romanian criminal procedure code* regarding undercover investigators.

<sup>9</sup> In the *Romanian criminal procedure code*, art. 320<sup>1</sup> was introduced, stipulating that this procedure of pleading guilty before the commencement of the judicial investigation, when the criminal case is solved based on the evidence administered during the criminal prosecution, and the applied punishment is reduced by one third. However, this confession should be unconditional.

to plead guilty or to testify against a co-accused in return for a promise of the government to limit the potential sentence against the accused. This method saves the time and costs of a complete trial with witnesses and may result in valuable evidence that can be used against another suspect.

• *Immunity*. In the case of a conspiracy, it is often necessary that one of the conspirators testifies against another. The persons that are suspected of an offence may not be coerced to testify in a way that would bring evidence against them. However, if the government promises not to use any of the supplied information in a future trial against the witness, the same may be coerced to testify. This promise is called immunity against subsequent prosecution. It is often used to prosecute a drug sale conspiracy.<sup>10</sup> For instance, drug buyers may receive immunity in order to testify against the seller.

## **Court Martial procedure**

### ***Jurisdiction***

*a. Personal*. The legal authority to bring a person before a legally established court martial.

*b. Subject*. Perpetration by an active service military of a legally recognized military offence.

*c. Concurrent jurisdiction*. The jurisdiction shared with the civil authorities regarding an offence perpetrated by a military<sup>11</sup>.

Double prosecution: ... and no person shall be judged twice for the same offence<sup>12</sup>.

Double prosecution has been construed as meaning that the same authority may not judge the same person twice for the same offence. Hence, preliminary actions at local, state or foreign level do not prevent, constitutionally speaking, subsequent disciplinary measures for the same offence.

### ***Pre-trial confinement***

a. All officers have the authority to place the militaries in a state of confinement before the final sentence regarding an offence.

b. The continued confinement requires the decision of the commander according to which there are enough reasons to believe that the accused committed an offence and that he can either escape or commit subsequent offences.

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<sup>10</sup> For instance, drug buyers may receive immunity in order to testify against the seller.

<sup>11</sup> *The Romanian legal procedure* does not know this institution because militaries, except for the criminal deeds in the other litigations, are tried according to the usual procedure.

<sup>12</sup> *The 5<sup>th</sup> amendment to the US Constitution*.

c. The decision of the commander is reviewed by an independent and neutral officer, who holds a hearing to see whether the pre-trial confinement should continue.

### ***The three types of courts martial***

#### *Summary court martial:*

- Consists of one officer and may only try enlisted officers.
- May impose sentences of up to 30 days.

#### *Special court martial:*

- Consists of a military judge, a trial counsel, and a counsel of defense and includes minimum three members.
- It may pronounce a maximum punishment of 6 months and a dismissal for disciplinary reasons.

#### *General court martial:*

- Consists of a military judge, a trial counsel, a defense counsel and minimum five members.
- It may pronounce the maximum authorized sentence for an offence.

### **Appeal procedure**

The government may not appeal against an acquittal<sup>13</sup>. At least one form of appeal is guaranteed against each conviction of the court martial.

- *The convening authority*. Should review each conviction and approve each punishment. The accused may petition the convening authority for clemency before these measures. The convening authority may offer clemency or another favorable reduction to the accused upon the approval of the conclusion of guilt and the adjudication of the sentence.

- *The officer exercising the general court martial*<sup>14</sup> (OEGCM). The accused may waive the guaranteed statutory appeal and refer the case for review by OEGCM and by the Judge Advocate of the OEGCM. The OEGCM authority also reviews all the courts martial that do not qualify for the automatic review.

- *The military court of review*<sup>15</sup>. (CMR). (Military judges). All the cases, except for the cases wanted by the accused, where a disciplinary

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<sup>13</sup> This is a special situation.

<sup>14</sup> (OEGCM).

<sup>15</sup> (CMR).

dismissal or a confinement punishment of at least one year has been pronounced, shall be reviewed by one of the military courts of review of the categories of armed forces.

*Court of Appeal for armed forces. (Civil Judges)*

The Court of Appeal for armed forces shall review the CMR decisions when:

- it receives the request of the accused; or
- the Judge Advocate General hands over the case to the Court of Appeal for armed forces.

*USA Supreme Court*

The Court of Appeal for armed forces makes decisions that can be reviewed by the Supreme Court of the USA by a certiorari document. The Supreme Court may not review any action or approval of the military justice, unless the Court of Appeal for military forces has previously entered a review request.

### **Conclusions**

The military justice is the attempt to offer constitutional guarantees to militaries, except for the cases modified by the need for order and discipline. Maintaining the optimum balance between the individual rights and the discipline of the unit shall ensure the efficiency and the morale.

By maintaining high procedural standards and equal protection, the army shall preserve the trust of the civilian leaders in the executive, judicial and legislative branches that have entrusted the military justice to military leaders.

The freedom of speech is important and necessary for the morale and for military recruitment. Any limitation of the freedom of speech should be directly linked to an important military assignment. The restrictions applied to the freedom of speech, when applied to militaries, do not apply and should not be applied to civilians.

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