

YALE LAW SCHOOL

Application to the Oscar M. Ruebhausen Fund Committee

PROPOSAL FOR A SPRING 2011  
GLOBAL MILITARY APPELLATE SEMINAR

February 4, 2010

I. Summary Description of Project

It is proposed to conduct an international seminar of judges of military appellate courts, modeled on the Global Constitutionalism Seminar. The overall concept is to provide a forum for the exchange of views and close analysis of legal, philosophical and policy issues arising from the administration of justice by military courts. Details are set forth below.

II. Applicant

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Mr. Fidell teaches Military Law and co-teaches the Guantanamo seminar at the Law School. He is also president of the National Institute of Military Justice and served on active duty in the U.S. Coast Guard.

III. Full Description of Project

1. *Why conduct such a seminar—and why now?* Military justice is undergoing dramatic change in many countries and is facing serious issues as a result of rising expectations for due process/the rule of law in the administration of justice by military courts. The draft UN *Principles Governing the Administration of Justice Through Military Tribunals* (rev. 2006) reveal the substantial human rights implications of military justice. The persistent willingness of even democratic nations to employ and expand the jurisdiction of military courts merits study, and because nations commonly face comparable issues, insight into common problems may be gained by encouraging discussion across national lines. The timing is propitious because many military justice systems have been challenged by a high operational tempo of their armed forces in either armed conflict or peacekeeping operations or both, and because a number of countries have embarked on major reforms within the past several years, including, notably, India's creation of a separate military appellate court for the first time. There is also a growing international human rights jurisprudence relating to military justice.

2. *Who would be the participants?* Participants should be no more than 10 judges of appellate military courts, preferably from diverse legal traditions. Some of these will be civilians, while others will be uniformed personnel, either serving or retired officers. Some of the officer judges may be nonlawyers. Facilitators for the seminar would include law professors. A small number of experts from the Office of the High Commissioner for Human Rights, the ICRC, the European Court of Human Rights, the International Criminal Court, and pertinent NGOs, such as the International Society for Military Law and the Law of War, could be included. It would presumably also be desirable to include some non-judicial national officials, such as a Judge Advocate General or senior Ministry of Defense legal official.

3. *What would be the venue, duration and format of the seminar?* The seminar would be conducted at the Law School. Two full business days, preceded by an evening opening session, should suffice. The proceedings should be open only to invited participants and guests, operating under Chatham House rules. Attendance by law school faculty and selected students (especially those who have taken or will be taking the Military Justice course), some of whom could assist with administrative matters and preparation of a summary report, would be encouraged. Proceedings would be conducted in English. The seminar would include keynote luncheon speakers each day, and a series of panels moderated by teams consisting of one judge and one professor or other expert. Participants would be encouraged to take their evening meals together to continue their discussions and “bond.” Readings would be selected, edited, and circulated in advance by a team of judges and professors, to help inform the discussions. It will be assumed that participants will have studied the readings before the seminar. Readings would include statutes, rules, judicial decisions, and other materials.

4. *Will there be further similar events?* If the seminar is successful, consideration could be given to repeating it at intervals, preferably with a broadening base of participating countries, but also with continuity so the seminar can develop an ethos of its own, as has happened, very beneficially, with the Global Constitutionalism Seminar.

5. *What topics would be covered?* Illustrative topics for the seminar include:

- a. Judicial independence
- b. The role of military commanders in the administration of justice and their concomitant legal responsibility as operational commanders
- c. Special issues arising from the administration of justice during active operations, foreign deployments generally and peacekeeping operations in particular
- d. Personal jurisdiction of military courts (*e.g.*, jurisdiction over civilians, including military retirees, defense force civilian employees, contractor personnel)
- e. Subject matter jurisdiction of military courts, including civilian and disciplinary offenses and administrative matters (*e.g.*, separations, promotions, retirements)

- f. The use of military courts to try terrorism charges
- g. Human rights of military personnel, including religious freedom, freedom of speech, and freedom of association (*e.g.*, conscientious objection, dissent, sex offenses)
- h. Transparency in the administration of military justice (*e.g.*, public hearings, access to court records and decisions)
- i. Contemporary issues
  - i. Senior officer cases
  - ii. Pornography and sex offenses (*e.g.*, adultery, fraternization, the short-lived order from 2009 concerning U.S. personnel who become pregnant in Iraq)
  - iii. Evidentiary issues (*e.g.*, classified information, battlefield evidence, laboratory reports in drug cases)
- j. Sentencing appeals
- k. Relations with the common law courts (*e.g.*, habeas corpus, access to national supreme courts)
- l. Role of national legislatures
- m. The role of the bar

Plainly, not all of the listed topics would be covered. For those that are selected, readings and discussion would seek to situate the issues within the framework of human rights and international humanitarian law jurisprudence, including international norms for the administration of justice by military tribunals.

#### IV. Ruebhausen Fund Criteria

The proposed program clearly falls within the purposes set forth in Mr. Ruebhausen's Will. It will provide incremental benefit to the Law School on issues of growing contemporary interest. Selected students will be afforded an opportunity to observe and participate in the conversation, as well as to assist in the preparation of both read-ahead materials and an after-action summary.

The seminar will enrich the intellectual life of the Law School and will build bridges to an increasingly important part of the world legal community that has not been properly integrated in the past. It will also afford foreign judges, scholars and military legal leaders an opportunity to be exposed to the richness of intellectual life of the Law School.

#### V. Budget

A pro forma budget is attached. We had hoped to secure funding from the Office of the High Commissioner for Human Rights, but have learned that that office will be unable to assist. We still hope that they will send one or more representatives at UN expense.

Respectfully submitted,

Eugene R. Fidell

Attachment