

## COVID-19 and Military Law

Eugene R. Fidell\*

### INTRODUCTION

The coronavirus, the longer-term trajectory of which necessarily remains unknown at this writing,<sup>1</sup> has already affected every part of the globe, every aspect of society, and of course the cornucopia of governmental institutions. Eventually it will doubtless leave its mark on literature, art, and music. If journalism is fairly described as the “rough first draft of history,”<sup>2</sup> writing about the health and social effects of COVID-19 in this moment is most definitely writing a rough first draft of a rough first draft. This is equally true of writing about it from a legal perspective.

With rare exception, contemporary nation states maintain standing and reserve military forces, and these forces are directly tied to national security. COVID-19 has already spawned a host of legal issues. This article will identify a few of these in light of developments in the first half of 2020. It is a certainty that others will arise in coming years.

It is often said that the military is “a specialized society separate from civilian society.”<sup>3</sup> There is a good deal of truth to this aphorism. Jonathan Turley has described the U.S. armed forces, for example, as a semi-autonomous “pocket republic,” pointing out that it “has all of the characteristics of a classic governing unit. It collects garbage, operates hospitals, runs voting booths, stops speeders, manages museums, enforces environmental laws, operates golf courses, licenses businesses, arrests wrongdoers, runs childcare services, promulgates laws, incarcerates convicts, and even has authority to execute citizens.”<sup>4</sup> As a result, the armed forces will experience many if not all of the same challenges the larger society experiences. In addition, however, they face a host of other challenges because of the missions that are their normal *raison d'être*—as well as the

---

\* Eugene R. Fidell is Adjunct Professor at NYU Law School; editor of *Global Military Justice Reform*, [globalmjreform.blogspot.com](http://globalmjreform.blogspot.com); and of counsel, Feldesman Tucker Leifer Fidell LLP.

<sup>1</sup> This article was completed on June 20, 2020.

<sup>2</sup> The phrase is commonly, but incorrectly, attributed to Philip Graham, the late former publisher of the *The Washington Post*. Although Graham used it, he was not the first to do so. See Jack Shafer, *Press Box: Who Said It First? Journalism is the “Rough First Draft of History,”* SLATE (Aug. 30, 2010, 8:04 PM), <https://perma.cc/D99D-D7X5>.

<sup>3</sup> See, e.g., *Parker v. Levy*, 417 U.S. 733, 743 (1974); see generally PAULINE COLLINS, *THE MILITARY AS A SEPARATE SOCIETY: CONSEQUENCES FOR DISCIPLINE IN THE UNITED STATES AND AUSTRALIA* (2019).

<sup>4</sup> Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 5 (2002).

additional missions that may come their way in times of crisis, such as the one that descended on the United States and the rest of the world in 2020.

Rather than attempt to catalog the many legal issues that have already arisen in the military world as a result of the COVID-19 pandemic, this article will highlight a few as illustrations, mindful that there are many others that have arisen,<sup>5</sup> or could arise, but whose nature, scope, and probability cannot currently be predicted, much less chronicled.<sup>6</sup> The perspectives to be considered are: first, the intersection between commanders' responsibility for the health and safety of their personnel and operational requirements; second, systemic effects on and adjustments to the internal administration of justice and correctional programs within the armed forces; and third, the challenges of shifting to a domestic law enforcement mission paradigm while maintaining accountability and—in some countries an even taller order—resisting the temptation to seize the opportunity to overdo things and meddle in politics, with adverse consequences not only for domestic law and legal institutions but also human rights. This is obviously not a complete catalog, even based on what we currently know.<sup>7</sup>

---

<sup>5</sup> Here are a couple of examples: (1) Does the pandemic justify chaplains' providing soldiers with "faith building strategies" in response? The Military Religious Freedom Foundation objected when this issue surfaced at Fort Drum, New York. *See* Craig Fox, *Group Objects to Religious Content on Fort Drum Videos*, NNY 360 (Apr. 25, 2020), <https://perma.cc/AZ27-SMLM>. (2) May the military require service members to participate in COVID-19 drug trials? *Compare* Jennifer Bard, *Why the Military Can Use Emergency Powers to Treat Service Members with Trial COVID-19 Drugs*, THE CONVERSATION (May 15, 2020, 7:49 AM), <https://perma.cc/PR87-PZ8W>, with Marian Faa, *Coronavirus Drug Trial on Volunteer Military Personnel Resumes Following Ethics Concerns*, ABC NEWS (AUSTL. BROAD. CORP.) (May 4, 2020), <https://perma.cc/HN27-YMAU>.

<sup>6</sup> One of these entails the potential for martial law, about which relatively little has been written. *See, e.g.*, Joseph Nunn, *Can the President Declare Martial Law in Response to Coronavirus?*, THE HILL (Apr. 4, 2020, 11:30 AM), <https://perma.cc/LS3C-KF7B>. Depending on the extent to which the pandemic generates or aggravates civil unrest due to scarcity of medical attention, food, clothing, shelter, and employment, a declaration of martial law cannot be ruled out conclusively; however, it remains difficult to imagine disorder of such intensity that the courts would be closed and Congress would be moved to suspend the privilege of the writ of habeas corpus. *See generally* U.S. Const. art. I, § 9, cl. 2; *Ex parte Milligan*, 71 U.S. 2 (1866). Suspension of the writ is not a precondition, but is usually believed to be a consequence, of martial law. Congress has never suspended the writ but has, on rare occasion, authorized the President to do so. Various acts of Congress have, however, been challenged as suspensions of the writ. *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651 (1996).

<sup>7</sup> For example, it seems inevitable that domestic legal issues will arise concerning the protection of military personnel from vexatious or justified litigation while they are engaged in COVID-19 related duty. Attention has already turned to the application of the Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043 (2018). *See* David Vergun, *As COVID-19 Crisis Continues, Servicemembers Civil Relief Act Protects Military*, DOD NEWS (Apr. 15, 2020), <https://perma.cc/BCM5-A6TZ>. Similarly, domestic legal issues will certainly arise under the Posse Comitatus Act, 18 U.S.C. § 1385 (2018), if and when federal military personnel (as opposed to state National Guard personnel in Title 32 status) are called upon to provide direct assistance in law enforcement in connection with the pandemic. *See generally* STEPHEN DYCUS *ET AL.*, NATIONAL SECURITY LAW 1186-96 (7th ed. 2020). The pandemic has also generated controversy with respect to recruitment. Policy has varied over time as to whether individuals who have tested positive for the COVID-19 virus may be permitted to enlist. At the other end of the military service spectrum, how long must a soldier remain on active duty? A Colombian decree extending obligatory service by

Some of these matters can be viewed as essentially domestic concerns; others draw on international instruments and evolving customary international law. The sheer complexity of the legal landscape we are likely to be navigating is therefore daunting. Although the national security stakes are already sky-high without taking into account the potential for international friction, it would be shortsighted to overlook that possibility. Civil unrest can easily turn a struggling State into a failing one. It can also spill over into neighboring States, and, worse yet, threaten or topple existing multistate alliances. That subject is best left to scholars of international relations.

### I. CAPTAIN CROZIER'S CASE

Quarantines are nothing new to armed forces, as Irish journalist Fintan O'Toole reminds us:

On July 4, 1775, just his second day serving as commander in chief of the American revolutionary forces, George Washington issued strict orders to prevent the spread of infection among his troops: "No person is to be allowed to go to Fresh-water pond a-fishing or any other occasion as there may be a danger of introducing the small pox into the army."

As he wrote later that month to the president of the Continental Congress, John Hancock, he was exercising "the utmost Vigilance against this most dangerous enemy."<sup>8</sup>

Military commanders continue to have a special responsibility in this regard. The services' most basic regulations recognize the commanding officers' duty to attend to the health of their personnel. United States Army Command Policy calls upon commanders "to promote and safeguard . . . the physical well-being . . . of the officers and enlisted persons under their command or charge."<sup>9</sup> Article 0802.4 of the Navy Regulations concerns "Welfare of Personnel," and states:

The commanding officer and his or her subordinates shall exercise leadership through personal example, moral responsibility and judicious attention to the welfare of persons under their control or supervision. Such leadership shall be exercised in order to achieve a

---

conscripts by three months because of the pandemic, was unanimously upheld by the Constitutional Court, where it had been challenged by several NGOs. See Ministerio de Defensa Nacional, Decreto Legislativo Número 541 de 2020 [Ministry of National Defense, Legislative Decree No. 541 of 2020] (Colom.), <https://perma.cc/R2E7-SUDN>; see also Johana Rodríguez, *Servicio Militar Durante la Pandemia Será Extendido: Corte Constitucional*, LA FM (June 19, 2020, 11:30 AM), <https://perma.cc/VW78-Z8A4>.

<sup>8</sup> Fintan O'Toole, *Vector in Chief*, N.Y. REV. OF BOOKS, May 14, 2020, at 20.

<sup>9</sup> U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 1-5(c)(4)(d)(5) (2014), <https://perma.cc/EMA2-T9KJ>.

positive, dominant influence on the performance of persons in the Department of the Navy.<sup>10</sup>

Article 0820 provides in part: “The commanding officer shall . . . maintain a satisfactory state of health and physical fitness of the personnel under his or her command.”<sup>11</sup> Under a Defense Department regulation, military commanders may impose quarantine and isolation under their emergency health powers.<sup>12</sup>

When COVID-19 emerged, the U.S. Navy had already been taking hostile fire on other fronts. Adverse events included the embarrassing fallout of the “Fat Leonard” corruption cases in the Far East,<sup>13</sup> an unlawful command influence (UCI) ruling involving two flag officers,<sup>14</sup> another UCI case arising from one of two recent serious ship collisions,<sup>15</sup> and above all, the messy general court-martial of a chief petty officer in the SEALs.

The case of Edward Gallagher, in which the accused was acquitted of all but one of the charged offenses, and then received clemency for the remaining specification, was especially debilitating. The prosecutor was removed for having sent malware-laden emails in hopes of finding out who had been leaking documents to the media.<sup>16</sup> Surprise testimony by a government witness caused incalculable damage to the prosecution’s case, and there was repeated meddling by the President of the United States. In the end, command decisions about whether the chief should retire in grade and with his SEAL’s trident insignia were overruled, and a respected Secretary of the Navy wound up being fired.<sup>17</sup> Even before Secretary Richard V. Spencer was dismissed, the Navy had realized it had a major problem on its hands, leading to the formation of an outside advisory group to

---

<sup>10</sup> U.S. DEP’T OF NAVY, U.S. NAVY REG., 1990, arts. 0802.4, <https://perma.cc/5UXY-2NKL>.

<sup>11</sup> *Id.* at 0802.4, 0820. See also U.S. COAST GUARD, U.S. COAST GUARD REG., art. 4-1-15A(1)-(2) (1992), <https://perma.cc/VQ39-ERMK> (stating that commanding officers are responsible for the well-being of all personnel in the command, and to “[s]ee that proper provision is made and that comforts are provided for the sick and disabled in the command”).

<sup>12</sup> U.S. DEP’T OF DEF., INSTR. 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT (PHEM) WITHIN THE DoD 19-24 (2019), <https://perma.cc/EDF8-TR2J>.

<sup>13</sup> See generally Craig Whitlock & Kevin Uhrmacher, *Prostitutes, Vacations and Cash: The Navy Officials “Fat Leonard” Took Down*, WASH. POST, (Sept. 20, 2018), <https://perma.cc/DP22-Z3HH>.

<sup>14</sup> See *United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018).

<sup>15</sup> See generally T. Christian Miller & Robert Faturechi, *How the Navy’s Top Commander Botched the Navy’s Highest-Profile Investigation in Years*, PROPUBLICA (Apr. 11, 2019, 12:06 PM), <https://perma.cc/XR4B-8W3H>.

<sup>16</sup> Dave Philipps, *Judge Removes Prosecutor in Navy SEAL’s War Crimes Court-Martial*, N.Y. TIMES (June 3, 2019), <https://perma.cc/W6BY-4V3F>.

<sup>17</sup> David Philipps, *Trump Reverses Navy Decision to Oust Gallagher from SEALs*, N.Y. TIMES (Nov. 21, 2019), <https://perma.cc/LF7S-X8FT>.

evaluate Navy and Marine Corps legal programs.<sup>18</sup> The *Gallagher* case's messy outcome was simply the icing on the cake.

Enter Captain Brett E. Crozier, commanding officer of the nuclear-powered aircraft carrier USS *Theodore Roosevelt* (CVN 71). On March 30, 2020, he sent an email forwarding to his superiors and officers on their staffs a memorandum<sup>19</sup> that was little more than three pages long and was destined to enter the history books. A copy made its way to a newspaper in his hometown in California. In the memo, he requested assistance in response to an outbreak of coronavirus that the ship had experienced following a port call in Vietnam. The bottom line of his memo was a request for "all available resources" to find "quarantine rooms for my entire crew as soon as possible." The resulting firestorm of controversy was shocking. He was relieved of command and was piped ashore to cheers from his crew. Soon after, the acting Secretary of the Navy, Thomas B. Modly, flew to Guam<sup>20</sup> to address that same crew, in the course of which he spoke disparagingly of Captain Crozier and faced catcalls from some in the ship's company. Within days he had been driven to resign, and an investigation was launched. All of this drew close media attention, as many observers felt Captain Crozier was a hero. Others accused him of improperly leaking sensitive information and suggested ominously that he had violated some (unidentified) provision of the Uniform Code of Military Justice (UCMJ).<sup>21</sup> After a first investigation by the Chairman of the Joint Chiefs of Staff was deemed insufficient, a second was conducted, as a result of which the Navy decided not to reinstate Captain Crozier. The Chief of Naval Operations observed that Captain Crozier and his immediate superior "did not do enough, soon enough."<sup>22</sup>

It is unclear what position President Trump, who had faulted the captain for trying to be another "Ernest Hemingway" by writing his "long" memo,<sup>23</sup> will ultimately take on Captain Crozier's fate.

---

<sup>18</sup> See U.S. DEP'T OF THE NAVY, COMPREHENSIVE REVIEW OF THE DEPARTMENT OF THE NAVY'S LEGAL COMMUNITIES (2019), <https://perma.cc/7V52-JM28>. The author was a member of the executive review panel for the comprehensive review.

<sup>19</sup> Letter from Brett E. Crozier, Capt. U.S.S. Roosevelt, Request for Assistance in Response to COVID-19 Pandemic (Mar. 30, 2020), <https://perma.cc/4DG8-YSPD>.

<sup>20</sup> The flight cost the taxpayers nearly a quarter of a million dollars.

<sup>21</sup> Rebecca Kheel, *Navy Head Stands by Controversial Speech on Ousted Captain*, THE HILL (Apr. 6, 2020, 2:32 PM), <https://perma.cc/9Q5F-WSCD>; but see Eugene R. Fidell, *Modlygate*, GLOBAL MIL. JUST. REFORM BLOG (Apr. 7, 2020, 6:13 AM), <https://perma.cc/5L6N-4A38>.

<sup>22</sup> See Eric Schmitt & Thomas Gibbons-Neff, *Navy Inquiry Faults Two Top Officers Aboard Roosevelt for Handling of Virus*, N.Y. TIMES (June 19, 2020), <https://perma.cc/3WUQ-YD6C>.

<sup>23</sup> Helene Cooper & Eric Schmitt, *An Accidental Navy Chief Steers His Service Through a Storm*, N.Y. TIMES (May 1, 2020), <https://perma.cc/D2NK-YTF6>.

Many believe he should be reinstated in command.<sup>24</sup> He may wind up the hero the author of this article believes him to be, or he may fade into obscurity as a retired naval captain, rather than the serving flag officer he would very likely have become had this pandemic not struck his ship. What is clear is that the Crozier Memo, which is unlikely to take its place in the annals of history alongside pivotal documents like “The Long Telegram” and “The Zimmerman Telegram,” highlights the special challenge of “speaking truth to power” in the military context.<sup>25</sup> This is as much, if not more, of an ethical issue as a legal one.

Still, there are legal issues to take account of when this kind of lightning strikes. Senior commanders have issued general orders in response to the pandemic,<sup>26</sup> and have made it clear that they are punitive in nature—that is, that violations may be punished under Article 92(1) of the UCMJ.<sup>27</sup> If properly disseminated,<sup>28</sup> these general orders are binding whether or not the servicemember has actual knowledge of their contents.<sup>29</sup> Potential penalties are serious: they include a dishonorable or bad-conduct discharge, confinement for up to two years, demotion (for enlisted personnel), and forfeiture of all pay and allowances.<sup>30</sup> Thus far, it appears that no member of the U.S. armed forces has been tried by court-martial for violating a COVID-19 general order, although at least one sailor is reported to have been investigated for violating an isolation order on Guam.<sup>31</sup>

---

<sup>24</sup> See, e.g., Guy Snodgrass, *Return Crozier to the Roosevelt, Restore Faith in the Navy*, U.S. NAVAL INST. BLOG (Apr. 17, 2020), <https://perma.cc/RJ2D-9WP8>.

<sup>25</sup> The Crozier Memo itself is perceptively examined in Anthony Cowden, *The Crozier “Memo”: An Analysis*, REAL CLEAR DEF. (Apr. 7, 2020), <https://perma.cc/QM3T-3YRZ>.

<sup>26</sup> See, e.g., U.S. ARMY, HEADQUARTERS, FORT HOOD, COVID-19 PANDEMIC PERSONAL CONDUCT GENERAL ORDER UNDER THE AUTHORITY OF THE SENIOR COMMANDER, FORT HOOD (20200528) (2020) (enumerating prohibited activities and regulating hygiene, face coverings, quarantine and isolation); U.S. ARMY AVIATION CENTER OF EXCELLENCE, FORT RUCKER, GENERAL ORDER NO. 2: PROHIBITED ACTIVITIES FOR FORT RUCKER PERSONNEL (2020), <https://perma.cc/JFN9-65SB>. A punitive general order issued by the Commander of U.S. Forces Japan required personnel to maintain detailed daily “contact tracing” logs of all contacts with, among others, individuals who come within six feet for longer than 10 minutes. DoD civilian employees, dependents, contractors, and local nationals working on base may be barred from base access if they do not maintain a log.

<sup>27</sup> Uniform Code of Military Justice art. 92, 10 U.S.C. § 892(1) (2018) [hereinafter U.C.M.J.]. An order to self-isolate can also be issued directly, rather than by means of a general order. Such orders are enforceable under U.C.M.J. art. 90, 10 U.S.C. § 890 (2018). Cf. *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989) (upholding individualized “safe sex” order to an HIV+ enlisted man).

<sup>28</sup> See *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982).

<sup>29</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.), pt. IV ¶ 18.c(1)(d) (knowledge need not be alleged or proved; “lack of knowledge does not constitute a defense”).

<sup>30</sup> *Id.* ¶ 18.d(1).

<sup>31</sup> Jerick Sablan, *Rear Admiral: Sailor Under Investigation for Not Following Quarantine Protocol*, USA TODAY (Apr. 13, 2020, 1:57 PM), <https://perma.cc/MS7F-AU26>. The outcome of the case may be kept confidential because of Privacy Act concerns.

Disobedience to orders is not the only court-martial charge that can come into play in connection with COVID-19. Breaking quarantine is another. Traditionally, this was a relatively minor offense, and it is not surprising that at times violations have been handled through nonjudicial punishment.<sup>32</sup> Breach of quarantine might be charged as an orders offense or as a violation of Article 134's prohibition of conduct to the prejudice of good order and discipline.<sup>33</sup>

Legislation enacted in 2016, and effective at the beginning of 2019, added a new punitive article to the UCMJ.<sup>34</sup> Article 84 (Breach of medical quarantine)<sup>35</sup> now provides:

Any person subject to this chapter—

(1) who is ordered into medical quarantine by a person authorized to issue such order; and

(2) who, with knowledge of the quarantine and the limits of the quarantine, goes beyond those limits before being released from the quarantine by proper authority; shall be punished as a court-martial may direct.

This is a less serious offense than violation of a general order. The maximum punishment prescribed by the President in the *Manual for Courts-Martial* is a bad-conduct discharge, forfeiture of two-thirds pay per month for six months, and confinement for six months.<sup>36</sup> As a leading treatise on military justice notes, if the quarantine was imposed with respect to a communicable disease,

---

<sup>32</sup> U.C.M.J. art. 15, 10 U.S.C. § 815 (2018); *see, e.g.*, *United States v. Duron*, 42 C.M.R. 165 (1970) (noting prior nonjudicial punishment for disobeying order to submit to medical quarantine). For an example of a special court-martial for, among other offenses, breach of quarantine, *see United States v. Hicks*, 48 M.J. 623 (A.F. Ct. Crim. App.), *pet. for review denied*, 51 M.J. 271 (C.A.A.F. 1998).

<sup>33</sup> U.C.M.J. art. 134, 10 U.S.C. § 934 (2018); *see United States v. Cook*, 31 C.M.R. 385, 386 (N.B.R. 1961) (quoting *United States v. Porter*, 28 C.M.R. 448, 450 (A.B.R. 1959)) (breach of restriction for medical observation). The Navy Board disapproved Seaman Cook's bad-conduct discharge as excessive, leaving him with a sentence of two months' confinement at hard labor and forfeiture of \$70 pay for two months. This sentence exceeded what was authorized for nonjudicial punishment but was still well below the six months maximum a special court-martial could adjudge for breach of quarantine at that time. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES 227 Table of Maximum Punishments (1951 ed.). A bad-conduct discharge was not even authorized for that offense but was permissible because Cook had been convicted of an orders violation for which such a sentence was authorized. Interestingly, the case was tried aboard ship. Since Cook's offense was listed in the Table of Maximum Punishments catalog of Article 134 offenses, prosecuting him under Article 90 unfairly exposed him to a higher sentence. *See* Eugene R. Fidell, *Is There a Common Law of Footnote 5?*, 24 JAG J. 157 (1970).

<sup>34</sup> Because breaching quarantine is now covered by a punitive article, it may no longer be charged under U.C.M.J. art. 134, under the longstanding military justice doctrine of preemption. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.), pt. IV ¶ 91.c(5)(a).

<sup>35</sup> U.C.M.J. art. 84, 10 U.S.C. § 884 (2018).

<sup>36</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.), pt. IV ¶ 8.d; *see also* U.C.M.J. art. 56(a), 10 U.S.C. § 856(a) (2018) (authorizing the President to prescribe maximum punishments).

the permissible punishment increases to a dishonorable discharge, total forfeitures, and a year's confinement.<sup>37</sup>

The Offices of the Judge Advocates General had to move quickly to provide the necessary guidance to commanders, their staff judge advocates, and others involved in framing and enforcing the necessary orders.<sup>38</sup> Thus far, their work has not generated controversy, although this may change as violations come to light and move through the military justice pipeline.

## II. COURTS, BRIGS, AND STOCKADES

A distinguished federal district judge has written that “the pandemic has confronted our court [the United States District Court for the Southern District of New York] with major new challenges, many of them shared with other federal and state courts.”<sup>39</sup> He might have mentioned military courts as well, as these systems have also been substantially affected by COVID-19. This effect has taken a variety of forms. At the most fundamental level, one might expect that the military justice system (courts-martial for serious offenses, summary or nonjudicial proceedings for minor offenses) would be less busy because of the debilitating effect of the coronavirus and the need to take steps to reduce or soften its impact. It is too early to say whether there has simply been less punishable misconduct during the pandemic. Court-martial data in the United States are not centralized across the armed forces and are available at differing paces. Such data as there are, however, suggest that court-martial caseloads have declined. For example, U.S. Navy data for April 2020 revealed a grand total of only one general or special court-martial anywhere. This is down from eight in the preceding month and 13 in the month before that.<sup>40</sup> Since there is ordinarily a delay of some months between the offense and the trial, this decline presumably does not reflect a decline in criminality, but rather a combination of decision making by commanders who, under

---

<sup>37</sup> See WALTER B. HUFFMAN & RICHARD D. ROSEN, *MILITARY LAW: CRIMINAL JUSTICE AND ADMINISTRATIVE PROCESS* § 3:49 (Thomson Reuters Feb. 2020 ed.).

<sup>38</sup> For example, the Criminal Law Division (“Code 20”) of the Office of the Judge Advocate General of the Navy disseminated a useful “Sidebar” on COVID-19. JAG, U.S. DEP’T OF NAVY, *CODE 20 SIDEBAR: COVID-19 PANDEMIC RESTRICTION OF MOVEMENT ORDERS (ROM) AND THEIR ENFORCEABILITY* (2020), <https://perma.cc/L8H3-TAT6>.

<sup>39</sup> Jed S. Rakoff, *Covid & the Courts*, N.Y. REV. OF BOOKS, May 28, 2020, at 10. It is not unheard of for military courts to be omitted when judicial systems are surveyed. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 945 (2008) (on petition for rehearing) (capital punishment for rape of a child in which death did not occur); *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (jury unanimity).

<sup>40</sup> U.S. Navy, *Results of Trial: February 2020 through April 2020*, U.S. NAVY JAG CORPS, <https://perma.cc/F9LC-KUPY>.

the U.S. system, must convene courts-martial *ad hoc*, to find other ways to deal with misconduct, and a general *de facto* suspension of trial-level legal proceedings. What we do know is that some cases have been delayed.<sup>41</sup>

National military court systems have predictably responded to the coronavirus at different paces as to both suspending work and reopening. For example, in March 2020, proceedings ground to a halt in the military commissions being conducted at Guantánamo Bay, Cuba. Defense lawyers were subjected to a rule requiring 14 days of isolation once legal visits are restored.<sup>42</sup> Tunisia suspended all military court litigation on March 17, 2020, and resumed operations on June 4, 2020.<sup>43</sup> Luxembourg included its military courts in an overall suspension of legal proceedings.<sup>44</sup> Israeli law was amended to permit military as well as civilian courts to order arrests or extend interrogation even if investigation must be delayed because the suspect tests positive or is in quarantine.<sup>45</sup> The Judge Advocate General of the UK, His Honour Judge Jeff Blackett, having previously suspended proceedings, issued a detailed Plan for the Resumption of Business Within the Service Courts on May 1, 2020.<sup>46</sup> The Plan applied not only to the Court Martial, but also to the Summary Appeal Court and the Service Civilian Court. Canada's acting Chief Military Judge issued detailed guidance covering numerous issues arising from the pandemic, such as public and media access to proceedings.<sup>47</sup> Military judicial authorities obviously have had to make the same kind of hard calls that other government officials have in this challenging environment.

At times, governmental motives for closure may not be entirely pure. Lebanon, for example, has been accused of using the pandemic as a reason for closing its military courts, thereby keeping

---

<sup>41</sup> See Selene San Felice, *Midshipman Sexual Assault Trial Postponed for Coronavirus Concerns*, CAP. GAZETTE (May 7, 2020, 3:46 PM), <https://perma.cc/4JXQ-NKTX>.

<sup>42</sup> See Carol Rosenberg, *Pressure Mounts over Calls for Guantánamo's Most Isolated Prisoners*, N.Y. TIMES (May 29, 2020), [hereinafter Rosenberg, *Guantánamo's Most Isolated Prisoners*] <https://perma.cc/A7AF-WVHD>; see also Carol Rosenberg, *9/11 Prisoners May Get Video Chats to Bridge the Coronavirus Divide*, N.Y. TIMES (May 2, 2020), <https://perma.cc/459T-4TAL>.

<sup>43</sup> *Tunisia: Military Courts Resume Activities*, TUNIS AFRIQUE PRESS (June 5, 2020), <https://perma.cc/F2CF-BMMS>.

<sup>44</sup> Eugene R. Fidell, *COVID-19 and Military Justice (Luxembourg)*, GLOBAL MIL. JUST. REFORM BLOG (May 12, 2020, 4:32 PM), <https://perma.cc/YL7N-6GKR>.

<sup>45</sup> See David Israel, *Knesset Allows Courts to Issue Arrest Warrants in Cases Involving Coronavirus Health Risks*, JEWISH PRESS (Apr. 26, 2020), <https://perma.cc/E6Y6-DHXS>.

<sup>46</sup> Matthew Bolt, *UK Service Justice System Emerges from Lockdown*, GLOBAL MIL. JUST. REFORM BLOG (June 4, 2020, 8:29 AM), <https://perma.cc/K65U-L6YT>.

<sup>47</sup> Letter from Canada's Office of the Chief Military Judge, *Health Emergency Caused in Canada by COVID-19 - Courts Martial and Other Judicial Hearings* (May 12, 2020), <https://perma.cc/4GTT-5JWC>.

protesters behind bars much longer.<sup>48</sup> The country's military court also had to deal with a potential outbreak of COVID-19 within its staff. Thirteen soldiers assigned to the court tested positive, leading to tests for lawyers practicing before the court, as well as the magistrates.<sup>49</sup>

Military courts in democratic countries have traditionally relied on open-court proceedings where counsel and the accused are physically present, although that norm has been eroded for some purposes.<sup>50</sup> A decision of the Federal Court of Australia on collateral review of a military disciplinary proceeding before a Defence Force Magistrate (DFM) notes that “[b]ecause of COVID-19 restrictions, sentencing proceedings in this matter were conducted through video link. During those proceedings the applicant and his defending officer were at RAAF Base Amberley in Queensland, and the DFM and the prosecutor were in the Court Martial Facility at Fyshwick in the Australian Capital Territory.”<sup>51</sup> As Canadian courts-martial resumed, video teleconferencing was used for some proceedings.<sup>52</sup> Will this leave a lasting imprint?

A further wrinkle involves the impact of the pandemic on counsel's ability to consult with their clients. Thus, in a habeas corpus proceeding brought on behalf of a Guantánamo detainee, a federal district judge in Washington cautioned that “the government may have to bring [the detainee] here to the United States while the pandemic is in play,” despite legislation that bars bringing detainees to the mainland.<sup>53</sup>

Military appellate processes have also been adversely affected by the pandemic. Thus, Surinamese President Desi Bouterse's appeal from his conviction by a military court was put on hold, even though the matter is profoundly important to the country's stability.<sup>54</sup> The U.S. intermediate military courts – the Army, Navy-Marine, Air Force, and Coast Guard Courts of Criminal Appeals – conduct very few hearings in normal times, but there were even fewer at the

---

<sup>48</sup> Eugene R. Fidell, *COVID-19 and Military Justice (Lebanon)*, GLOBAL MIL. JUST. REFORM BLOG (May 12, 2020, 9:24 AM), <https://perma.cc/TP6F-56RN>.

<sup>49</sup> *Coronavirus au Liban: 36 Cas Déclarés ces Dernières 24 Heures*, L'ORIENT-LE JOUR (May 10, 2020, 3:33 PM), <https://perma.cc/AYT2-5UKU>.

<sup>50</sup> See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.), pt. II, RULES FOR COURTS-MARTIAL 804(b), 806(c) (permitting closed-circuit video or audio transmission when the accused is at a remote location but defense counsel is physically present or “when courtroom facilities are inadequate to accommodate a reasonable number of spectators”).

<sup>51</sup> *Igoe v. Ryan*, [2020] FCA (5 June 2020) 2 (Austl.).

<sup>52</sup> See Rory Fowler, *Canadian Military Justice Evolving During COVID-19*, GLOBAL MIL. JUST. REFORM BLOG (June 2, 2020, 2:30 PM), <https://perma.cc/DBH8-ACVX>.

<sup>53</sup> See Rosenberg, *Guantánamo's Most Isolated Prisoners*, *supra* note 42 (discussing *Duran v. Trump*, Civil No. 16-2358) (D.D.C. May 27, 2020).

<sup>54</sup> See generally Ranu Abhelakh, *Suriname President's Future Depends on Legislative Election*, YAHOO! NEWS (May 22, 2020), <https://perma.cc/9VX4-4YMK>.

height of the pandemic. The highest court of the American military justice system, the United States Court of Appeals for the Armed Forces, suspended hearings for two and a half months, during which it closely followed the measures taken by other courts in Washington and explored alternatives to having counsel appear in person. By May 5, 2020, although the court had “a plan in place for the conduct of the hearings at the courthouse on a social distancing-compliant basis,” it nonetheless “had determined that the more prudent course is to set conditions to conduct the hearings by teleconference . . . .”<sup>55</sup> In one order, the court held open the possibility of dispensing with arguments if the parties agreed to do so.<sup>56</sup> Not surprisingly, no one seems to have taken it up on this suggestion.

When, on June 2, 2020, the Court of Appeals for the Armed Forces resumed oral argument in cases in which it had granted discretionary review, it conducted the hearings by telephone conference call,<sup>57</sup> starting with the high-profile case of *United States v. Bergdahl*.<sup>58</sup> Only two of the court’s five judges were in the Judiciary Square courthouse. They participated by telephone from their respective chambers; the others participated from home or other remote locations. “This format brings advantages from a public health perspective but comes with technical limitations.”<sup>59</sup> “At the present time,” the parties were advised, “the Court is unable to offer a live feed of the arguments due to limitations on licenses, bandwidth and the system-wide blockage of common outlet websites by our service provider.”<sup>60</sup> There was no provision for the media or other spectators to listen in in real time, but an audio recording was made available on the court’s website within an hour or so.<sup>61</sup>

---

<sup>55</sup> In re Conduct of the June Hearings by Teleconference (C.A.A.F. May 5, 2020) (notice).

<sup>56</sup> In re Rescheduling of Hearings in Cases Impacted by COVID-19 (C.A.A.F. Apr. 2, 2020) (notice and order).

<sup>57</sup> In re Conduct of the June Hearings by Teleconference (Update) (C.A.A.F. May 18, 2020) (notice).

<sup>58</sup> *United States v. Bergdahl* 79 M.J. \_\_ (C.A.A.F. 2020). The *Bergdahl* argument followed a further unwanted (non-pandemic) distraction: the courthouse had suffered external vandalism the night before in the round of street protests that followed the May 25, 2020 killing of George Floyd by a Minneapolis police officer. Earlier, the court had cancelled its traditional reception for members of the bar. In re End of Term Reception Cancelled (C.A.A.F. Apr. 27, 2020) (Notice). (Disclosure: the author represented Sergeant Bergdahl.)

<sup>59</sup> In re Conduct of the June Hearings by Teleconference (Second Update) (C.A.A.F. May 28, 2020) (notice).

<sup>60</sup> *Id.* The court’s statutory placement in the Department of Defense “for administrative purposes only,” U.C.M.J. art. 141, 10 U.S.C. § 941 (2018), may have been an impediment to the use of commonly available user-friendly video services such as Zoom.

<sup>61</sup> “The Court can conduct a hearing by telephone or in chambers when a hearing in open court is impracticable.” EUGENE R. FIDELL & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 341 (LexisNexis 18th ed. 2019). In 1999, the court permitted oral argument to be transmitted live over the Internet in *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999). *Id.* at 355.

One of the changes the court made in its usual course of proceedings was to allow counsel an uninterrupted three minutes for opening statements. After that, each judge had three minutes for colloquies with the two counsel, following by closing statements. In allowing counsel a period without interruption, the court followed the practice of the Supreme Court of the United States, which now allows counsel two minutes for this purpose. The result was that counsel were able to lay out an overall picture of where they were heading without being thrown off-course immediately, as had not uncommonly happened in the past.

Less is known about how the “back end” of the military justice system – the stockades, briggs, regional confinement facilities, and the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas – have had to adjust to COVID-19. Naturally, there was a prompt decision to suspend visitation arrangements temporarily.<sup>62</sup> But no information seems to have been made public about the extent to which military prisoners have been infected or, worse yet, succumbed to the coronavirus. Similarly, little is known about how the pandemic has affected detainees and others at Guantánamo. Members of the U.S. Senate have inquired about that,<sup>63</sup> but as of this writing there has been no public reply. *National Public Radio* reported:

Guantánamo has had at least two cases of COVID-19: one in a sailor at the U.S. naval base on the island and a second in the guard force that oversees its prisoners, which include Khalid Sheikh Mohammed, alleged mastermind of the Sept. 11, 2001, terrorism attacks.

The U.S. Department of Defense said that for security reasons it will not say whether there have been additional positive diagnoses at Guantánamo, but because of the pandemic all court hearings have been canceled since mid-March and are not scheduled to restart until late July.

In addition, the facility is subject to health safety measures such as social distancing and the mandatory wearing of masks and gloves when near prisoners. There is also a 14-day quarantine for anyone arriving on the island, which has basically halted court travel because Guantánamo lawyers must also quarantine for 14 days upon returning to the U.S., turning even a short trip into a monthlong commitment.<sup>64</sup>

---

<sup>62</sup> See, e.g., *Pearl Harbor Visitor Information: All Visitation Has Been Temporarily Suspended due to COVID-19*, NAVY PERSONNEL COMMAND, <https://perma.cc/6TU8-SAMC>.

<sup>63</sup> See Carol Rosenberg, *Senators Seek Answers on Coronavirus Protections at Guantánamo Bay*, N.Y. TIMES (May 28, 2020), <https://perma.cc/F22R-ZKKQ>.

<sup>64</sup> Sacha Pfeiffer, *As Pandemic Halts the Military Court at Guantánamo, Critics Call for Its Closure*, NPR (May 22, 2020), <https://perma.cc/8VMQ-5AJB>.

It is in theory possible that the sheer isolation of the U.S. Naval Station at Guantánamo Bay may have reduced the virus's impact, but this may also not be the case since there is still some coming and going between the installation and the mainland.

In sharp contrast to the significant COVID-19-related litigation in the world of civilian incarceration,<sup>65</sup> there seem to have been no efforts to systematically release military prisoners in the United States for humanitarian reasons in connection with the pandemic. One explanation for this disparity may be that overcrowding is more of a problem in American civilian corrections.<sup>66</sup> Another is that there is no NGO involvement in military corrections, and uniformed defense counsel are focused on trials and appellate review rather than conditions of confinement, as such matters are ordinarily outside the jurisdiction of the military appellate courts.<sup>67</sup>

What lessons may be learned? Should trial and appellate military courts move away from the tradition of in-person proceedings where eye contact is possible? What criteria might usefully be applied in this regard? Can we dispense with face-to-face meetings between incarcerated clients and their attorneys? How important is transparency in connection with health and safety conditions in confinement facilities? The Defense Department, in cooperation with the Court of Appeals for the Armed Forces, should identify best practices and record the lessons learned. This might be a worthwhile task for the already-authorized Military Justice Review Panel.<sup>68</sup>

### III. LOCKDOWNS, CURFEWS, HUMAN RIGHTS, AND DEMOCRACY

Professor Charles Dunlap, one of America's most astute observers of the military, recently had this exchange with a European reporter:

Q: Why do you think it's a bad idea to use the military in a pandemic? Don't they have useful manpower and vehicles that can provide help like building field hospitals?

---

<sup>65</sup> See, e.g., *Wilson v. Williams*, No. 20-3447, 2020 WL 3056217 (6th Cir. June 9, 2020).

<sup>66</sup> COVID-19 has struck in crowded military prisons outside the United States. See *COVID-19: UN Teams Step Up Efforts to Protect Rights in Prisons, as Revolts Intensify Worldwide*, UN NEWS (May 5, 2020), <https://perma.cc/2VS4-4RJL> (noting UN Department of Peacekeeping Operations report on outbreak in Camp Kokolo military prison in Kinshasa, Democratic Republic of Congo).

<sup>67</sup> See, e.g., *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020).

<sup>68</sup> U.C.M.J., art. 146, 10 U.S.C. § 946 (2018).

A: I don't think it's necessarily a "bad idea" to use the military, per se; it can and should be part of the overall effort. Rather, my concern is about the temptation to "militarize" the response. . . .<sup>69</sup>

He continued:

The military does have capabilities useful in a pandemic, but often those capabilities are only sized for military purposes, and are not designed to be a substitute for public hospitals and other civilian capabilities for the general populace.

The more a military is used for a pandemic, the less manpower and equipment is available to deal with the pandemic threat within its own ranks, but also to defend against the kind of external threats it primarily exists to counter.

There is also a civil-military relations aspect. Militaries are by their very nature authoritarian and non-democratic. While their use is often welcomed by the public at the start of an emergency, that positive attitude can fray as time goes on – especially in a democracy. A public whose lives are disrupted by the pandemic – and who are increasingly fearful of it – may look for an outlet for their frustrations and find government an easy target for criticism. The military, fairly or unfairly, might become caught up in that almost inevitable "blame game."

In short, at some point – and this pandemic crisis may be a long one – it is possible the public may come to resent the military and, especially, its directive style. This may particularly be so if the military is used for quarantine enforcement. It's never really a good thing for a democracy for tensions to escalate between the military and the public it is supposed to serve and defend.<sup>70</sup>

These observations – which also resonate with the controversy surrounding use of the armed forces to quell disturbances in the District of Columbia and elsewhere after the murder of George Floyd – are well-founded. Among other things, redeploying militarized police such as the *Guardia Civil* or the *Carabinieri*, for example, may denude ordinarily patrolled rural areas for the benefit

---

<sup>69</sup> Charles J. Dunlap Jr., *Shortburst: COVID-19, the Role of the Military, NATO, Opportunistic Threats, Military Budgets, and Much More!*, LAWFIRE (Apr. 3, 2020), <https://perma.cc/DP9J-H7J8>.

<sup>70</sup> *Id.*

of urban areas where the need is greater.<sup>71</sup> While the U.S. armed forces have not been deployed for law enforcement purposes in connection with the coronavirus pandemic, the experience in other countries that have seen such deployments is disturbing.

Lockdown duty or curfew enforcement is not a normal military mission. Where a community is self-isolating or locked down, unscrupulous individual soldiers may view this as an opportunity to engage in criminal conduct without fear of punishment.<sup>72</sup> Some of this misconduct, however, may be discovered and in fact lead to disciplinary action.<sup>73</sup> But even where essentially private criminality by military personnel is not seen, there may still be excessive use of force.<sup>74</sup> The need to coordinate with regular police may give rise to further unacceptable conduct, including friction between the two forces.<sup>75</sup> Where reservists are called up for pandemic-related duty, they may report in sick or may simply not appear as ordered, as happened in Switzerland.<sup>76</sup>

It is unfortunately the case that some States may seize upon the pandemic to scale back human rights. This derogation can take a variety of forms. For example, medical personnel, concerned for their own health and safety, may refuse to come to work. A hospital administrator in Egypt threatened staff absentees with trial by a military court,<sup>77</sup> despite the fact that human rights jurisprudence strongly disfavors the exercise of military jurisdiction over anyone other than military personnel.<sup>78</sup> In El Salvador, the Supreme Court has pushed back with a ruling that “the President, the National Police, the Armed Forces, and any other authorities are constitutionally

---

<sup>71</sup> See Vanda Felbab-Brown, *How COVID-19 is Changing Law Enforcement Practices by Police and by Criminal Groups*, BROOKINGS (Apr. 7, 2020), <https://perma.cc/E7TL-8VHJ> (discussing Italy's redeployment of the Carabinieri to cities during the country's COVID-19 lockdown).

<sup>72</sup> See, e.g., *Rwanda: Lockdown Arrests, Abuses Surge*, HUM. RTS. WATCH (Apr. 24, 2020, 12:01 AM), <https://perma.cc/8WAR-WGZV>.

<sup>73</sup> See, e.g., J.H. Webster Clayeh, *Liberia: AFL Soldier Found Guilty of Assaulting Woman While Enforcing State of Emergency*, FRONT PAGE AFRICA (June 3, 2020), <https://perma.cc/SU57-6AF9>; see also *Judge Says Criminal Acts by Disciplinary Forces "Prevalent,"* PAPUA NEW GUINEA POST-COURIER (May 6, 2020), <https://perma.cc/2H66-8DCX> (suspended sentence for beating woman with an iron rod).

<sup>74</sup> See Victoria Ibezim-Ohaeri, *COVID-19 and the Shrinking Civil Space in Nigeria*, JUST SEC. (May 19, 2020), <https://perma.cc/PU5T-F222> (noting excessive use of force by State agents to enforce lockdown).

<sup>75</sup> This seems to have happened in Papua New Guinea. See Papua N.G., Joint Agency Task Force, National Control Center for COVID-19, *NCD Situation Under Control Says Manning*, INFO. CTR. FOR COVID-19 IN PAPUA N.G. (May 10, 2020), <https://perma.cc/4P9W-A4QY>, noted in Eugene R. Fidell, *COVID-19 and Military Justice (Papua New Guinea)*, GLOBAL MIL. JUST. REFORM BLOG (May 11, 2020, 8:41 AM), <https://perma.cc/4U2H-3T5J>.

<sup>76</sup> See John Miller & Silke Koltrowitz, *Neutral Switzerland Drafts in Army to Fight Coronavirus*, REUTERS (Apr. 7, 2020, 9:12 AM), <https://perma.cc/X87S-43HW>.

<sup>77</sup> See *Daily COVID-19 Roundup: June 3*, MADA MASR (Egypt) (June 3, 2020), <https://perma.cc/E2RN-PJ63>.

<sup>78</sup> See generally Comm. On Hum. Rts., Rep. on Civil And Political Rights, Including The Question of Independence of The Judiciary, Administration of Justice, Impunity, U.N. Doc. E/CN.4/2006/58 (2006), <https://perma.cc/ZQK2-KD53>; see also *The Yale Draft*, DECAUX PRINCIPLES WORKSHOP (2018), <https://perma.cc/6RRC-T2QJ>.

forbidden” to detain people simply for violating lockdown rules.<sup>79</sup> The U.N. Human Rights Committee has properly cautioned States about the severely limited extent to which the pandemic may justify derogations from the International Covenant on Civil and Political Rights.<sup>80</sup> A guidance document from the Office of the High Commissioner for Human Rights notes, *inter alia*, that

States should take measures to prevent human rights violations and abuses associated with the state of emergency perpetrated by state and non-state actors. Allegations of such violations and abuses should be effectively and promptly investigated with a view to putting an end to the violation or abuse, bringing perpetrators to justice and providing victims with protection and effective remedies.<sup>81</sup>

The first major litigation to emerge that raised issues of an institutional nature with respect to the military’s role in COVID-19 operations took place in South Africa. On April 10, 2020, members of the South African National Defence Force and police engaged in Operation Notlela, a lockdown operation in Johannesburg. In the course of their State of National Disaster operations, Collins Khosa, a civilian, was attacked and eventually died. His family brought a claim to the Constitutional Court, seeking an order requiring creation of a system for receiving and investigating brutality complaints. They also sought an investigation to be presided over by a retired judge. The Constitutional Court refused direct access, *i.e.*, without proceedings in a lower court.<sup>82</sup> His mother, life partner, and brother-in-law then instituted proceedings against the Minister of Defence and Military Veterans and other officials.

On May 5, 2020, the North Gauteng (Pretoria) Division of the High Court (Fabricius, J.) ruled for the applicants and granted extensive declaratory and injunctive relief.<sup>83</sup> Among other things, the court ordered the respondents to suspend with pay all SANDF personnel who were present at the scene of the events at issue, and to warn all members of the SANDF, the police, and their

---

<sup>79</sup> See *El Salvador: President Defies Supreme Court*, HUM. RTS. WATCH (Apr. 17, 2020, 11:51 AM), <https://perma.cc/BJ6W-EHP3>.

<sup>80</sup> See U.N., Hum. Rts. Comm., Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, U.N. Doc. CCPR/C/128/2, (Apr. 24, 2020), <https://perma.cc/GYM7-3PRL>.

<sup>81</sup> Emergency Measures and COVID-19: Guidance, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER (Apr. 27, 2020), <https://perma.cc/7MMB-VQFQ>.

<sup>82</sup> Franny Rabkin, *Khosa case: Going straight to the Constitutional Court isn't always the right path*, MAIL & GUARDIAN (S. Afr.) (Apr. 7, 2020), <https://perma.cc/P442-MPM3>.

<sup>83</sup> *Khosa v. Minister of Defence & Military Veterans*, No. 21512/2020 (S. Afr. High Ct., Gauteng Div. May 15, 2020), <https://perma.cc/6LH7-997N>.

chains of command that “any failure to report, repress and prevent acts of torture or cruel, inhuman or degrading treatment or punishment shall expose them each individually to criminal, civil and/or disciplinary sanctions.”<sup>84</sup> The same respondents were ordered to command all members of the SANDF and police “to adhere to the absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment, and to apply only the minimum force that is reasonable to enforce the law.”<sup>85</sup> The court further directed preparation and publication of “a code of conduct and operational procedures regulating the conduct of members of the SANDF” and police “in giving effect to the declaration of the State of Disaster.”<sup>86</sup> Guidelines were also required to be prepared and widely disseminated concerning the use of force, enforcement of the Lockdown Regulations and other Disaster-related regulations, social distancing, restriction of movement, arrest, and alternative means of securing attendance at trial. A complaints mechanism was to be established and widely publicized, and investigative reports concerning Mr. Khosa’s treatment and that of anyone else “whose rights may have been infringed during the State of Disaster at the hands of members of the SANDF” and the police were to be filed with the court and furnished to the applicants’ counsel by a certain date.<sup>87</sup>

The aftermath of the *Khosa* decision remains in flux at the time of this writing, as there is continuing controversy over whether the SANDF conducted a proper investigation and whether any SANDF personnel should be prosecuted or otherwise disciplined. One tangible result, however, was the issuance of operational procedures for SANDF personnel during the COVID-19 state of national disaster.<sup>88</sup> While early reports indicated that no appeal would be taken by the respondents, it seems quite unlikely that either the High Court’s judgment or the SANDF’s subsequent decision exonerating its personnel represents the last word.<sup>89</sup> Even so, the judgment reflects the challenges faced by the courts when confronted with apparent serious misconduct (and tragic consequences) by military personnel in the unfamiliar role of lockdown enforcers. The detailed relief framed by the court, as well as its declaration regarding the non-derogable rights of

---

<sup>84</sup> *Id.* at 74.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 75.

<sup>87</sup> *Id.* at 76.

<sup>88</sup> See *SANDF Issues Code of Conduct Specifically for Operation Notlela*, DEFENCEWEB (S. Afr.) (May 25, 2020), <https://perma.cc/N4UR-7574>.

<sup>89</sup> See Karabo Ngoepe & Mzilikazi Wa Afrika, *SANDF Report on the Death of Collins Khosa “A Sham,”* INDEP. ONLINE (S. Afr.) (June 7, 2020), <https://perma.cc/GU3J-AN5J>.

South Africans, even under extraordinary circumstances, are a starting point for other courts that may face comparable issues in pandemics or other emergencies. The reaffirmation of the rule of law and the insistence on both individual and institutional actor accountability can only be admired.

#### CONCLUSION

The armed forces may be a separate society but, happily, they will inevitably remain very much part of American society as a whole. Professor Turley's "pocket republic" will have to confront not only many of the same issues that the larger society encounters, but also a broad range of challenging and often unpredictable legal issues of its own that can directly and indirectly affect unit cohesion, mission-readiness, and, ultimately, mission-accomplishment. Public trust may also be on the line.

While less likely in the United States, the challenges presented by the COVID-19 pandemic elsewhere may threaten domestic legal arrangements and the observance of human rights. Some legal aspects of the pandemic may resemble those encountered by the larger society, but others will not. How these societal concerns relate to one another, as well as to the particular issues noted in this essay, will merit close study in the coming years.

With Judge Rakoff, we can hope that the value of advance planning against the next crisis will be recognized not only by those responsible for the administration of justice in the armed forces, but also by those charged with the health and safety of military personnel, when disaster-related operations will bring them into potentially adversarial contact with the civilian population.