

## From the guest editor

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Recently, military justice systems throughout the world have experienced rapid changes, with much debate throughout the international community on a variety of military legal issues. The South African military legal system has not attracted equivalent attention or debate. Yet, since the advent of the Constitution, the South African National Defence Force (SANDF) has been welcomed back into the international community. It has joined international and regional organisations in promoting peace and stability on the continent, deploying in peace support and humanitarian missions throughout Africa. Underlying the constitutional mandate of the SANDF is the imperative that the SANDF must be structured and managed as a disciplined military force. Partly, this is given effect by the Defence Legal Services Division (DLSD) whose mandate is to fulfil and apply military justice. In spite of a well-established legal framework based on constitutional imperatives, South African military law remains largely unknown, except to the small group of military lawyers involved in this unique discipline of the law.

The DLSD held its first ever International Military Law conference over the period of 31 October to 3 November 2016. This saw practitioners of military law gathering alongside academics to explore the theme of contemporary military law as it relates to international law, human rights law, operational law and the administration of military justice. The aim of the conference was to raise awareness amongst the legal fraternity of the important

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role of military law in a democracy, but more importantly, to stimulate academic research in this specialised field, thereby strengthening and developing a long neglected area of the law. This issue of

*Scientia Militaria* is a selection of articles spanning the various themes covered during the conference.

The first article identifies the limited development in South African military law from its inception as a challenge in the new constitutional dispensation of the changed role and mandate of the SANDF. Michelle Nel argues that the little development experienced was not due to an internal need to change, but rather forced on the SANDF through constitutional challenges and outside factors. She argues that military law is generally understood as the criminal law of the soldier, thereby limiting it to the realm of military justice whereas the expanding international role of armed forces, and the execution of its secondary roles of its employment necessitates a broadening of the definition and scope of military law as an academic discipline. Since there are a number of other disciplines that can be of great assistance in a broadening of our understanding of military law, she identifies the critical need for the development of a legal-academic discourse within the discipline.

Nina Mollema examines the role of the military in combating the complex and diverse crime of trafficking in human beings. Human trafficking is regarded as one of the most lucrative criminal enterprises globally, and the fastest-growing source of revenue for organised criminal operations internationally. The South African government, having ratified several international and regional human-rights instruments also implemented comprehensive anti-trafficking legislation in 2015 to combat and punish human trafficking. The article examines the desired role of the military in combating human trafficking. She argues that the SANDF should take the initiative in formulating a similar policy to that adopted by the North Atlantic Treaty Organisation (NATO) in order to facilitate co-operation between African states in combating human trafficking. She examines current legislation, instruments and strategies, providing recommendations for counter-trafficking policy standards and best practices for the SANDF.

The unique legal and physical maritime environment requires specialised capabilities, training and legislation. André Smit, the Chief State Law Advisor at the Department of International Relations and Cooperation, assesses the powers of the SANDF in enforcing South African law at sea. Where the SANDF is increasingly deployed in maritime law enforcement operations, its constitutional imperatives in a democracy with entrenched human rights requires the SANDF to perform its duties in a manner commensurate with international and domestic law. He investigates the legal framework for law enforcement at sea by the military, elaborates on the nature of the law enforcement tasks and surveys the applicable international and domestic legal prescripts. Possible human rights concerns are identified and cooperation with other government departments is discussed. He identifies challenges to law enforcement faced by military commanders and cautions for the need for training and doctrine development at an institutional level to ensure compliance and the safeguarding of interests within the limits of the law.

Pieter Brits examines the disparate legal regimes that regulate the conduct of soldiers during different types of armed conflicts. He investigates the international law prescripts applicable to international and non-international armed conflicts and identify a third category of internationalised conflicts which, due to third party involvement and magnitude, transcends the traditional categorisation of non-international armed conflicts. The events of 11 September 2001 and the resultant “war on terror” also brought into focus transnational armed conflicts, being cross border conflicts falling somewhere between international and non-international conflicts. After examining the history behind the classification of different types of conflicts and recent developments in international law, he argues the merits for the development of uniform rules for all conflicts in order to enhance victim protection and the conduct of military operations under International Humanitarian Law.

Aifheli Tshivhase considers the uncertainty of the status of South African Military courts within the South African judicial system. The South

African Constitution provides for a hierarchy of courts. Here Tshivhase investigates the status of the military courts in comparison to the South African magistrates' courts in order to determine the appropriate yardstick against which the institutional independence of the military courts can be measured. He uses the level of remuneration perceived as sufficient financial security as an indicator of the institutional independence of the South African military courts.

Joel Block examines Israel's automated Iron Dome Missile Defence System as a backdrop to the uncertain legality of automated systems for aerial defence against missile and rocket attacks. Concerns regarding the deployment of advanced sensor-based technology have been raised by the International Committee of the Red Cross (ICRC), roboticists, international law lawyers and scientists. Although the law has not yet developed a definitive answer on the legality of deploying automated aerial defence systems against rocket attacks, Joel Block investigates how States using such systems may increase military efficiency and legality by considering different design choices.

In his commentary, Eric Mnisi reflects on the 1999 Constitutional Court decision regarding union membership and participation by members of the SANDF. He investigates the influence of this decision on national security and argues that membership of the union has polarised the military and undermined national security. He examines the constitutional and legislative provisions and argues that the Constitutional Court has erred in its judgement. He calls for a reassessment of the military's position on union membership and legislative amendment to address what he regards as the adverse effect of unionised soldiers on military discipline in the SANDF. As a counter-argument to the commentary by Dr Mnisi, Lindy Heineken investigates the history of military unionisation. She argues that the limitation of labour rights minimise the disruption of unions on civil military relations. The limitation on the right to strike as well as the union's inability to interfere in operational grievances generally allows for a cooperative relationship with military unions. Power struggles between the military leadership and military unions have however led

to a deterioration of the relationship between the parties, resulting in numerous grievances not being resolved. She argues that the threat to national security lies in the SANDF's poor labour relations rather than the unions. She highlights concerns regarding the perceived influence of military unions on military discipline, its effect on the military chain of command and a resultant lack of esprit de corps that lead to an unhealthy us-them situation. She argues that military unions defend the defenders of our democracy, allowing them an outlet to voice their complaints.

This publication addresses merely the tip of the iceberg that is military law. We however consider this is as a necessary first step in bringing military law into the wider spectrum of research.

*Michelle Nel*