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Military Self-Interest in Accountability for Core International Crimes

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Military Justice and Self-Interest in Accountability

Arne Willy Dahl*

In 2001 the International Society for Military Law and the Law of War made a comparative study of military justice systems around the world and their development. The study was followed up in 2011.[1] One of the conclusions that can be drawn is that there has been a steady trend of 'civilianisation' of military justice systems over the last two or three decades. These conclusions are supported by information about reforms in various countries in recent years.

In many cases, the handling of military penal cases has been placed in the hands of fully civilian courts and prosecutors. In other cases, the reforms have been less dramatic, such as establishing standing military courts replacing courts martial convened by commanders for the individual case. Some reforms have also resulted in hybrid solutions consisting of civilian courts with a military element.

The driving force behind many of the reforms have been decisions by the European Court of Human Rights, demanding that courts which are independent of the military chain of command decide matters of penal punishment. Such decisions have had an impact not only on member States of the Council of Europe but also on States with historical or cultural affiliation to member States. Structures for investigation and prosecution have also been put under a similar pressure, requiring independence of those who might have an interest in the outcome.

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1 The study is documented in the Recueil of Seminar on Military Jurisdiction, 10–14 October 2001, which gives the national responses to a questionnaire, a report summing up the findings and other proceedings of the seminar. The Recueil can be obtained from the International Society for Military Law and the Law of War, Avenue de la Renaissance 30, 1000 Brussels, Belgium. E-mail: brussels@ismllw.org.

In many of the decisions, the focus has been on securing the accused's right to a fair trial. In other cases, the attention has been on the victim's right to an effective and unbiased investigation. Such considerations will be of particular importance when the issue is responsibility for core international crimes or other serious human rights violations, such as torture.

In addition to decisions by the European Court of Human Rights and other human rights bodies, one can also from time to time see eruptions of a more general distrust against military justice systems, from society at large. Such distrust can lead to fundamental changes, in some cases amounting to full dismantling of a military justice system and its replacement with fully civilian organs and procedures.

The aim of this chapter is to explore whether such developments should be resisted by the military, or whether they should be welcomed, fully or partially. The issue is whether accountability by independent organs is in the long-term self-interest of the armed forces and which factors are likely to promote the overall effectiveness of a system of accountability for real or alleged crimes.

2.1. The Natural Inclination to Resist Reforms

Military commanders and military lawyers will have a natural inclination to resist changes of military justice in the direction of civilianisation. After all, military justice has its roots in the military commander's need to control his soldiers. It is about punishing such acts as disobedience, abuse of alcohol and absence without leave, but also about securing proper behaviour towards civilians.[2] By enforcing discipline, the commander maintains his authority. If somebody else enforces discipline within his troops,

[2] William Shakespeare has provided an illustration in *King Henry V*, Act 3 Scene 7. The King has a conversation with Captain Fluellen about a successful encounter about a bridge. The King asks: "What men have you lost, Fluellen?". Fluellen answers: "[...] I think the duke hath lost never a man but one that is like to be executed for robbing a church; one Bardolph, if your majesty know the man [...]". The King:

> We would have all such offenders so cut off: and we give express charge that in our marches through the country there be nothing compelled from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language; for when lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner.

it could undermine the commander's authority.[3] For these reasons, military commanders are likely to resist reforms that are aimed at removing military justice from their hands.

It might, however, be useful to consider more closely which elements of possible reforms are harmful and which are beneficial. The perspective should be the enlightened long-term self-interest of both commanders as those responsible for the overall performance of their units, and soldiers in general as potential suspects, under investigation or on trial. It is my position that such enlightened long-term self-interest would concur with the interest of the general civilian society, which wants effective and disciplined armed forces with members than enjoy fundamental civil rights under the rule of law.

In other words, the military should consider its true long-term interest in order to contribute to solutions that secure the principles of fair trial and the rights of victims, also taking into account the needs of military effectiveness and the necessity of ensuring that the courts have a proper understanding of military affairs.

2.2. The Soldiers' Perspective

It goes without saying that it is in the interest of soldiers to have their cases heard in a fair trial. Important elements are independent courts, legal representation and the right to appeal. These aspects have been elaborated on by courts and academics, and should today be trivial. The author will therefore focus on some aspects of a different nature.

It is in the interest of soldiers to have their possible offences investigated, prosecuted and adjudicated by persons who are not only independent and impartial but also familiar with military affairs. Proper understanding of the case and the situation of the accused is also an important element in a fair trial. It will also be in the interest of soldiers to know and be able to show that someone has a certain degree of oversight of their actions, and the power to take action if something appears to go

[3] Disciplinary authority or authority to issue summary punishments is usually derived from command authority. As a personal observation, it can be noted that in discussions about which commander possesses this authority in a particular situation where the command structure is complex, it can be felt as an undercurrent that the commander who has the disciplinary authority is considered to have a more tangible command and therefore some form of supremacy vis-à-vis the commander who has not.

wrong. The author will illustrate with an example from personal experience.

In 2006 the Norwegian Provincial Reconstruction Team ('PRT') in Meymanah in Afghanistan encountered a dangerous incident when it was beleaguered by a hostile mob claiming revenge for the publication of insulting cartoons of the Prophet Muhammad. Within the mob were particularly active persons aiming shots and throwing hand grenades over the wall of the PRT headquarters, succeeding in setting a vehicle of the PRT on fire at the main entrance gate. Some months after the incident an officer approached the author and said that at a certain critical moment, when the PRT was close to being overrun, he had considered machine-gunning the mob indiscriminately. The thought had, however, struck him: What will the Judge Advocate General ('JAG') say? He laid the machine gun down and stuck to aimed shots at those individuals who represented an imminent threat. He thereby saved his own conscience and reputation, and probably also the reputation and success of the whole Norwegian operation in Afghanistan.

On the other hand, it is sometimes the case that weapons are used with disastrous results for non-combatants in a way that could be problematic, requiring an investigation of the incident. When, for instance, a soldier at a checkpoint uses his gun against a vehicle that does not heed his warning signals and the vehicle in the event contained nothing but innocent civilians, one may ask whether he acted recklessly or whether he merely followed lawful orders. If such cases are investigated thoroughly and considered by an independent person who knows both the law and military life, and this person concludes that no wrongdoing has taken place, the soldier can continue his life with his head held high – in contrast to a situation when the case is either swept under the carpet or considered by someone with insufficient understanding of military law and military operations and procedures, and gives a superficial or wrong assessment.

War entails strain on soldiers and can put them in situations where they experience conflict of norms, making them feel guilty for their choices afterwards. I have twice been approached by persons who felt guilty about events that had never been investigated, in both cases through an intermediary. The first one goes back to the Second World War and was about a soldier who had been ordered to execute the local vicar for treason. The order had been given by his commanding officer, without

any proper trial. The unit was about to be dissolved after having been gradually pushed by the invading enemy up through a valley until they were standing with their backs to the mountains. The soldier had taken the vicar and a firing squad with him in a truck, but had released the vicar instead of executing him. Now he felt guilty because of his disobedience to the commanding officer. My answer, via the intermediary – a local chief of police – was that an execution under the circumstances described would have been unlawful, and that the soldier had done the right thing.

The second soldier had been involved in a serious incident in Afghanistan and had shot a person who represented an immediate and mortal threat to the soldiers' unit. Through his gunsight he had seen the skull of the person split. Afterwards the sight had haunted him and he felt guilty about his act. I told the intermediary, who was his platoon leader, that under the circumstances described the shooting was both lawful and necessary and that the soldier had done the right thing. I hope my message gave him some relief.

Therefore, in addition to the official activity of a military prosecution service, its mere presence can contribute to giving soldiers both guidance and confidence, including peace of mind and the feeling of being a respectable person in spite of having made difficult choices on the site, and participated in warlike acts with lethal consequences for human beings.

2.3. The Commander's Perspective

As Shakespeare demonstrated, it is in the best interest of the military that units preserve goodwill and co-operation with local civilians. This is particularly important in unstable situations, where the allegiance of the local population can shift. In counter-insurgency operations it is paramount to maintaining legitimacy in competition with the insurgents.

As shown above, incidents that affect locals negatively can easily happen. These could range from mere accidents to real or alleged war crimes or other core international crimes. A commander might feel tempted to preserve the reputation of the unit by seeking to avoid unfavourable incidents becoming known publicly. If this is not possible, he may seek to downplay the gravity of the case by manipulating facts. Considerations of loyalty among colleagues may lead to a conspiracy of silence.

Such cover-ups are likely to be exposed sooner or later, and thus backfire. For the commander, even mere passivity with regard to initiating or facilitating investigation and prosecution of war crimes or other core international crimes can lead to responsibility under the rules of command responsibility. For him, and for the reputation of the military, it is much better that the case is investigated immediately and disciplinary action taken in minor cases, or that the case is submitted for prosecution if it is of sufficient gravity.

An incident involving the Norwegian Army can serve as an illustration. In 1999 rumours reached the JAG office indicating that Norwegian soldiers had subjected a young Kosovar to harsh treatment. A judge advocate was sent to the area to support the ongoing investigation conducted by the military police, although local commanders tended to downplay the seriousness of the affair and seemed not to see the need for any investigation. In the event, the case was found to be serious enough, but nothing like a war crime. A few weeks later I received a journalist from a major newspaper in my office who was able show me what the next day's front page would look like, with a rather embarrassing picture showing how the young Kosovar was being treated. Did I have any comment on the picture? Fortunately, I could tell him that we had submitted the case a few days earlier to the relevant military authorities with a recommendation for disciplinary action. Thus the damage to the reputation of the army was kept at a minimum and unnecessary friction with the local population in Kosovo was avoided.

2.4. An Effective Justice System Best Serves Military Self-Interest

2.4.1. The Issue of Independence

Although it was of no consequence in the above-mentioned case, it has served the reputation of our armed forces well that the office of the Norwegian JAG is independent, outside the chain of command and actually receives its funds from the Ministry of Justice. This is particularly important when a high-profile case is investigated and the conclusion is that no crime has taken place, or that the case is less grave than it was assumed to be. It is much more convincing when an acquittal is given by an independent body than when the army has investigated and acquitted itself.

The conclusion, then, seems to be that it serves the long-term interest of the armed forces to have independent bodies to investigate, prose-

cute and adjudicate cases, in particular when they are of certain gravity. There are, however, also downsides. If independence means distance – in organisation, geography and mentality – one may find oneself in a situation where the independent bodies lack understanding of military affairs. If such lack of understanding leads to unwarranted sentences or acquittals, it is time to pull the brakes.

2.4.2. The Need for Expertise

In criminal cases, a court needs to know both the law and the factual aspects. Expert witnesses are often called upon to explain forensic details that may shed slight upon what the accused may or may not have done or intended to do. In financial cases, accountants may be called in to explain what the accounts show with regard to possible tax fraud or whatever the case is about. In some sectors, many countries have concluded that specialised courts are needed to deal effectively with particular cases.

One may ask whether this could also be relevant for military cases. In Norway, where the system is fully civilianised in peacetime, the specialised prosecutors occasionally have to explain important aspects of the case to the court – aspects that would have been known to the court if its members had some basic military experience. If the defence counsel, too, has to rely on the explanations of the prosecutor, one may ask whether the trial is really fair and balanced.

If one may doubt that the court needs expertise, one can hardly doubt that the investigators need it. During a preliminary investigation in the former Yugoslavia, a military lawyer had a discussion with a civilian investigator about the possible sources of some artillery shells that had struck a marketplace. The discussion revealed that the civilian investigator was unaware of the fact that artillery can hit targets on the other side of a mountain.[4] Had it not been for the presence of a colleague with military experience, the investigation would have risked being derailed.

This was a trivial example. In a high-tech environment such as in air and missile warfare, the demands for expertise are substantially higher. An investigator who does not understand, for example, weapons options, fusing, guidance systems, angle of attack, optimal release altitudes, command and control relationships, communications capabilities, tactical op-

[4] Personal conversation with the late Judge Advocate Terje Lund.

tions, available intelligence options, enemy practices, pattern of life analysis, collateral damage estimate methodology, human factors in a combat environment, and so forth, will struggle to *effectively scrutinise* an air strike.[5]

One may, of course, ask whether any investigator, prosecutor or judge has a full understanding of all such factors. My answer is that he or she must have sufficient knowledge to know what to ask, who to ask and to understand the answers. This kind of and degree of knowledge is most likely found among persons who are familiar with the military environment, preferably also with the affected service.

2.4.3. The Need for Portability

If independence is obtained by severance of all connections with the military, one may also find oneself in practical difficulties when cases arise at units deployed overseas.

When soldiers are accused of having committed crimes against local civilians whom they are supposed to protect, it does not create a good impression to put the accused on an airplane for prosecution at home. The local affected civilians need to see that justice is done, which is best demonstrated by having deployable courts. This does not go well together with a civilian justice system. Any court that is going to sit in a combat area must do so as guests, if not members, of the armed forces. Preparations have to be made with regard to transport, billeting, security and, in many cases, vaccination. Attire suitable to the climate and general conditions may have to be issued – what the armed forces could offer might be uniforms. Such preparations should be done in advance, involving judges who are mentally prepared and willing to be deployed. In other words – close co-operation between the armed forces and the court is required.

In this connection, it can also be mentioned that status of forces agreements typically allow for exercise of jurisdiction by *military* courts of the sending State, while civilian courts exercising jurisdiction on foreign territory is an anomaly, which would require special arrangements with the host country.

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[5] Michael N. Schmitt, "Investigating Violations of International Law in Armed Conflict", in *Harvard National Security Journal*, 2011, vol. 2, no. 1, p. 31.

2.5. Jurisdiction Over Civilians

Human rights bodies have been sceptical with regard to military jurisdiction over civilians. This seems to have been out of a concern that military courts may not be impartial in cases that could be seen to have national security implications. In a report of the special rapporteur on the independence of judges and lawyers prepared for the United Nations General Assembly in 2013, it is said that military jurisdiction should be restricted to offences of a military nature committed by military personnel.[6]

Such concerns may be relevant with regard to countries where the military form a social and legal structure that is separated from the civilian sector. In other countries, where the military prosecution and/or the military courts are under the ultimate control of the civilian society, such concerns seem to have less weight. This would, for instance, be the case if the judgments of military courts can be appealed to the Supreme Court of the country and, in particular, if the military prosecution takes directions from the director of public prosecutions.

The issue of jurisdiction over civilians may look different when seen from the perspective of a unit deployed abroad, in contrast to a unit in a garrison in the home country. At home, it may not be of critical importance to the military whether a civilian person with some connection to the military has his case tried at the local district court or by a military court, particularly if the crime is not of a military nature which requires understanding of military affairs to adjudicate.

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[6] UN General Assembly, "Independence of judges and lawyers – Note by the Secretary-General", UN Doc. A/68/285 ('Knaul report'), para. 15:

> In the present report, the Special Rapporteur addresses these concerns and proposes a number of solutions that are premised on the view that States that establish military tribunals should ensure that such tribunals are an integral part of the general judicial system and function with competence, independence and impartiality, guaranteeing the exercise and enjoyment of human rights, in particular the right to a fair trial and the right to an effective remedy. *Also, their jurisdiction should be restricted to offences of a military nature committed by military personnel* (emphasis added).

The report gives particular attention to military and special tribunals in terrorism-related cases. In its resolution adopted on 27 March 2014 on the integrity of the judicial system (A/HRC/25/L.5) the UN Human Rights Council does not, however, reiterate this passage but focuses on the fact that military tribunals, when they exist, must be an integral part of the general justice system and operate in accordance with human rights standards, including respecting the right to a fair trial and due process of law guarantees (operative para. 2).

An important factor is, however, the increasing use of civilian contractors in conjunction with military forces. This is visible both at home and with units deployed abroad. In some cases, such contractors perform security functions that may lead to serious situations if not performed correctly.[7] Cases may have to be investigated and those responsible brought to justice. If military commanders have no summary punishment jurisdiction over such persons, and military courts that could be deployed have no penal jurisdiction over them, the end result could in practice be impunity. The potential for scandals, or at least complicated and inefficient prosecutions, is evident.

In the end, it could be an issue of the human rights of victims, as well as of the standing of the deployed military force among the local civilians, whether proper arrangements securing effective jurisdiction over civilians also exist.

2.6. Jurisdiction Over 'Civilian' Offences

If a soldier murders his wife, is this a case that ought to be handled by a military justice system? One may say that a murder is a murder and can be handled equally well, if not better, by civilian investigators, prosecutors and judges than by the military equivalents.

What if a soldier steals from his fellow soldiers? Is this a case of a military nature? It may not have been included as a provision in the military penal law, but it will certainly affect the cohesion and effectiveness of the unit involved. The commanding officer will perceive a need for having the case investigated and solved quickly, maybe with a higher priority than the civilian police (if within reach) would give to a similar offence involving two civilians.

From this it emerges that the dividing line between military and civilian offences may be fluid.[8] In Norway, as long as security regulations existed only within the military, breach of security (short of espionage) was a breach of service duties, in other words a military offence. When, in 1999, general legislation on security was enacted in Norway, breach of security became in principle a civilian offence.

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7 *Ibid*., Knaul report, paras. 89, 102, where it makes allowances for such situations.

8 *Ibid*. The Knaul report says in para. 32: "There is no consistency between different military legal systems with regard to what is meant by the term 'military offence'".

After the adoption of the 1998 ICC Statute of the International Criminal Court, a number of countries have enacted implementing legislation. War crimes, crimes against humanity and genocide, also known as 'core international crimes', have been defined in national law more or less based on the ICC Statute. Are such crimes of a military nature and should military courts deal with them? Some would explicitly exclude serious human rights violations from the jurisdiction of military courts.[9] The main concern, however, has been about cases where members of the armed forces are accused of serious violations such as extrajudicial executions, enforced disappearances and torture.[10] If such crimes take place within a country that is torn by civil unrest, there could be reasons to fear that the military might be tempted to shield the perpetrators and that the cases should, for this reason, be handled by the civilian justice system.

In other countries, the focus of attention would be on possible war crimes committed by members of the armed forces. In these cases the dividing line may also be fluid. For example, if a soldier intentionally shoots a civilian, it is a war crime. If he does so in the erroneous belief that the civilian was directly participating in hostilities, it may be a breach of the 1977 Additional Protocol I to the 1949 Geneva Conventions if he did not take all feasible precautions to verify that he was attacking a lawful target. This is not necessarily a war crime, at least not under the ICC Statute. It may also happen that he did not aim at the civilian at all, but used his weapon in breach of the applicable Rules of Engagement. This will turn the act into a military offence. Now, the issue of which law applies may not be apparent before the case has been investigated. It may be clear that a civilian has been shot and that the soldier most likely bears some responsibility for it, but it can be uncertain up to the point of sentencing under which law.

This said, it may be noted that cases about crimes against humanity or genocide do not necessarily have a significant military component. The perpetrators may be civilians, as they typically were in Rwanda, or the acts themselves were not part of a military operation, such as when inmates of a concentration camp are mistreated. The link to the military can be tenuous or totally absent and the arguments in favour of a military involvement in investigation, prosecution or adjudication weak. Such cases

[9] *Ibid*., para. 106.

[10] *Ibid*., para. 66.

are not the focus of this chapter, but those that have a clear connection to military activity.

My recommendation would therefore be that in cases, in particular those that arise from military operations, the jurisdiction over core international crimes and military offences should not be divided more than strictly necessary. This is particularly relevant in the investigation phase when it may be unclear whether one is facing one or the other.

2.7. Conclusions

The discussion in both national and international fora has revolved around the independence of military courts and, to some extent, also the independence of military prosecution and investigation. The 'frontline' seems to be between those who in the name of human rights want to abolish or severely restrict military prosecution, on the one hand, and those who defend it as necessary for military effectiveness, in particular under battlefield conditions, on the other. In support of the latter position, it could be added that a fully 'civilianised' system may not be able to deal effectively with military offences when it is most needed. This also goes for militarily organised justice systems if their jurisdiction is so heavily restricted that they cannot deal with cases that may be of great importance to the military as well as to potential victims of crimes.

The second report of the Turkel Commission (2013) concludes that – consistent with the Geneva Conventions and their Commentaries, decisions by tribunals and State practice – a military justice system is not necessarily inconsistent with the principle of independence. But it adds:

> In summary, in order to achieve an 'effective investigation' it must be conducted independently. The principle of independence consists of both institutional independence (for example, the prosecution is separate from the judiciary) and practical independence (for example, the investigators are in no way connected to the incident under consideration).[11]

In other words, it is not just any military justice system that will pass the test. Generally speaking, the same requirements that can be in-

[11] Turkel Commission, The Public Commission to Examine the Maritime Incident of 31 May 2010. Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, February 2013, paras. 73, 74.

ferred by international humanitarian law sources, as well as international human rights sources, concur with those requirements that are best suited to maintaining the standing of the armed forces in the eyes of the general public as well as its own members. One should, however, take care not to 'throw out the baby with the bathwater' by going to extremes that may prove counterproductive.

The important question that many countries struggle with is whether military commanders should give up their control of military justice in order to have a system that is perceived as fair by the general public. Equally important, however, is whether a process as indicated by current trends should run to the other extreme, separating the investigators, prosecutors and courts totally from the military structure, or whether one should seek some compromise solution, like the 'golden mean' indicated by Aristotle.

In this chapter I have tried to show that it is not necessarily in the best interest of the military to retain more or less self-contained military justice systems where military commanders have a prominent role. Important arguments include the following:

1. To retain the confidence of the general public, who are the taxpayers and elect the legislators, the military should avoid or remove any grounds for suspicion of possible cover-ups or abuse of power, in particular with regard to core international crimes.
2. To retain the confidence of its own personnel, fair trial and impartiality of courts and tribunals should be upheld. Justice must not only be done, it must also be seen to be done.
3. To retain the self-esteem of the personnel, it has to be kept under good discipline, thereby keeping up its good reputation.
4. The military should be able to show that all offences, including alleged war crimes and other core international crimes are investigated impartially and effectively and that the findings are credible. For this reason, organs for investigation, prosecution and adjudication should be independent of any person or organ that might have an interest in the outcome.
5. A good relationship with local civilians in overseas deployments is best served by disciplined troops that are kept visibly accountable by an effective and independent justice body.

6. Some countries might prefer to develop a justice system which is organised by the military, in the direction of independence. Other countries might be recommended to include certain military elements into their basically civilian systems, in order to handle military cases effectively. In both instances, military commanders should be able to provide valuable input, to the benefit of both military effectiveness and a fair and credible handling of cases.

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Military Self-Interest in Accountability for Core International Crimes

Morten Bergsmo and SONG Tianying (editors)

Is it in the enlightened self-interest of armed forces to have perpetrators of core international crimes brought to justice? This anthology adds the 'carrot' perspective of self-interest or incentives to the common rhetoric of 'stick' – legal obligations and political pressures. Twenty authors from around the world discuss why military actors themselves often prefer accountability: Richard Saller, Andrew T. Cayley, William K. Lietzau, William J. Fenrick, Arne Willy Dahl, Richard J. Goldstone, Elizabeth L. Hillman, Bruce Houlder, Agus Widjojo, Marlene Mazel, Adel Maged, Kiki A. Japutra, Christopher Mahony, Christopher Jenks, Franklin D. Rosenblatt, Roberta Arnold, Róisín Burke, Elizabeth Santalla Vargas, Morten Bergsmo and SONG Tianying.

The self-interests presented in this book are multi-dimensional: from internal professionalisation to external legitimacy; from institutional reputation to individual honour; from operational effectiveness to strategic stakes; from historical lessons to contemporary needs; from religious beliefs to aspirations for rule of law; from minimizing civilian interference to pre-empting international scrutiny. The case is made for long-term self-interest in accountability and increased military 'ownership' in repressing core international crimes. In his foreword, William K. Lietzau observes that of "all the international community's well-intended endeavours to foster accountability and end impunity, none is more important than that addressed in this book".

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