International trends in Military Justice

Presentation by Arne Willy Dahl[1] at the Global Military Appellate Seminar at Yale Law School, April 1-2, 2011

Friends and colleagues,

Military justice is under scrutiny in several countries and by several international organizations.

My own organization, the International Society for Military Law and the Law of War, conducted a comparative study in 2001, presenting the results at a conference in Rhodes the same year. The study was a follow-up of a similar study for the 1979 congress of the society in Ankara, at it is about to be followed up this year with a conference in late September, the "Rhodes II".

In the meantime, the Hungarian national group of the society has been continuously active in organizing bi-annual conferences on various aspects of military jurisdiction and criminology. This year in early September there will be a conference in Budapest focusing on certain human rights issues in military justice.

In 2007, the International Society of Social Defence organised a conference in Toledo in September on justice and cooperation in criminal matters in international military interventions, and in November The United Nations Office of the High Commissioner for Human Rights in cooperation with The International Commission of Jurists and Brazilian authorities organized an expert meeting on human rights and the administration of justice by military courts.

In June 2009, the Geneva Center for the Democratic Control of Armed Forces (DCAF) organized a workshop for discussion of possible military jurisdiction reforms in selected countries, mainly Arabic.

There have also been other meetings and initiatives, among these a conference in South Korea in 2010 that I did not have the opportunity to attend. Put together, this activity shows a strong interest worldwide directed at military justice, much of it of a critical nature.

Assessing international trends in military justice, my point of departure is the 2001 study, where respondents among other questions also answered the following:

> *Please indicate whether there has been any recent discussion, evaluation or reform of your military legal system with reference to human rights such as those laid down in the European Human Rights Convention or other comparable instruments applicable to your country. Details should be reflected in the answers to the questions below.*

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Since 2001, I have gathered further information from individual contacts, visits etc. and from presentations delivered at the bi-annual conferences organized in Hungary. A systematic update will, however, not be available before the "Rhodes II" conference in September 2011.

In this assessment of international trends in military justice I shall focus on two factors.

1) influence from Human rights quarters with regard to impartiality of courts, rights of the accused etc, and
2) a more diffuse tendency of distrust from the civilian society in general, which may lead to demands for reforms to counter any possibility of unwarranted acquittals or cases being swept under the carpet by a more or less self-contained military justice system.

There have been numerous changes in a large number of national military justice systems in recent years. To identify trends, one has to simplify matters, not drowning in details.

My first simplification, is to divide military justice systems into two groups. The 2001 survey made by the International Society for Military Law and the Law of War showed that the systems in 35 respondent states could be divided into "Anglo-American" systems based on courts-martial convened for the individual case, and "European continental" systems based on standing courts.

"Anglo-American" systems were first and foremost found in Great Britain and in her former colonies, while some states with "European continental" systems might have had systems resembling the "Anglo-American" in a more distant past. It should also be noted that several states have dispensed with military courts altogether, having military penal cases heard before civilian courts. In some states this might be a civilian court with some specialization or military element, in other states the court could be a fully civilian non-specialized court. The systems could also be different in peacetime and in wartime.

This leads me to distribute the various military justice systems along an axis – with the traditional fully military courts-martial system at the one end, and the fully "civilianised" system at the other.

Courts-martial convened for the individual case	Standing military courts	Specialized civilian courts	General civilian courts in peacetime	General civilian courts in peace and war

All changes in military justice systems that are known to me, have been from the left to the right in this table.

The military justice system of **Australia** has been heavily criticized in Parliament from 2006 onwards. A number of proposals have been put forward concerning independence, public inquiries and other matters focusing on the effectiveness of the system. One of the proposals was to introduce a standing court instead of the courts-martial system. This proposal was implemented in 2007, but declared unconstitutional by the Australian high Court in 2009.

In **Belgium** military courts are abolished since 1 January 2004 in times of peace. The old law of 1899 was found to be incompatible with the European Convention on Human Rights. The new law thus provided that that in times of peace the members of the Belgian army, even for

crimes outside Belgium, are judged by the ordinary courts of Belgium. In times of war a new military court and a new procedure is created.

In **Canada**, *the Canadian Charter of Rights and Freedoms*, an integral part of the Canadian Constitution, has been a remarkable catalyst for change in the military justice system. The *Charter* has precipitated a rapid convergence of the military and civilian justice systems. However, in 1992, the Supreme Court of Canada re-affirmed the necessity for a separate military justice system with distinctive features, and the constitutionality of courts martial.

In September 1999, significant reforms to the Military Justice System were implemented to modernize the system and ensure it reflects Canadian societal norms and values. This included the elimination of the death penalty, which had remained as a punishment in the Military Justice System although it has not been used since 1945.

In **Czechia**, the military courts system was abolished in 1993 as a result of political and socio-economical changes in that country. The tasks of the military courts were assumed by civilian judicial organs.

In **Denmark**, a reform in 2005 split the penal cases from summary punishments cases. De Danish military prosecution is under the Ministry of Defence but independent of the military chain of command. After the reform, the military prosecution authority has no role in summary punishment cases.

In **Finland**, the military prosecution system was reformed in 2001. Prosecution tasks were shifted from the military legal advisers to the public prosecutors in order to prevent any criticism with regard to possible influence of military authorities in court proceedings. Further reforms are underway pursuant to a report of June 2009. The right to appeal a summary punishment is possibly the most interesting proposal.

In **Ireland** a comprehensive review of the Irish military law system has been undertaken, with a view to adapt to the European Convention on Human Rights into domestic law and relevant decisions of the European Court of Human Rights. Military cases are now heard by standing courts with permanent judges.

For many centuries, the armed forces of the **Netherlands** decided on his or her own whether a soldier had to be prosecuted for any alleged offence. The legal system for the military was in the hands of the military justice. If prosecution was decided, the soldier had to stand trial for a court martial. This meant that prosecution; sentence, punishment and execution were in the hands of the military with no civil exertion.

In 1990 the modernisation the system of military criminal law and military disciplinary law was completed after review of legislation; several new Codes appeared. The jurisdiction over soldiers has been transferred to civil courts and is concentrated at the Arnhem District Court and the Arnhem Court of Appeal. Separate military chambers provide the necessary military element. Nowadays the public prosecutor - a civil servant instead of a military officer - decides to the prosecution of a soldier.

In **Tunisia**, the Military Justice Code was modified by an act of 13 June 2000. The military tribunals lost their competence to adjudicate breaches of the general penal code when one of the parties is not a military person (with a few exceptions). As a result of the recent change of

regime, much of the current legislation is under reconsideration. This could also affect the military justice system.

The system of military discipline in the **British Army** has undergone extensive change since 1996 to ensure that it more closely reflects the provisions of the European Convention on Human Rights (ECHR). Following the EctHR decision in Findlay v UK the UK Armed Forces Act 1996 revised the procedures to guarantee the objectivity and impartiality of courts-martial, largely by removing the conveners, court members, and prosecutors at courts-martial from the normal military chain of command.

It subsequently became clear that the British military summary dealing procedure was also very vulnerable to challenge under ECHR Art 6, and that procedure was consequently amended in the Armed Forces Discipline Act 2000, which for the first time allows soldiers to elect trial by court martial in all summary dealing cases if they choose, and even where they do not so elect they now have the right to appeal to a Summary Appeal Court (SAC). Jurisprudence has since upheld this system.

The latest piece of domestic legislation to affect the British system substantially is the Armed Forces Act 2006, which received Royal Assent at the end of 2006, and was implemented in 2009. The main purpose of this Act is simply to create a unified military discipline regime for all three services.

Recent changes in the military justice system of **New Zealand** is described in an article in The Military Law and the Law of War Review Volumes 3-4 2006. For the purpose of this presentation, the most important element seems to be a new court martial structure, ad hoc courts being replaced by permanent courts-martial. The right for the accused to elect trial by court-martial instead of being tried summarily has been increased, as is also the right to legal representation.

In **South Africa**, a previous act from 1957 on military justice was superseded by ”Military discipline supplementary act” of 1999. Cases may be handled summarily if the accused elects so and pleads guilty. Lieutenants and higher officers cannot be punished summarily but must be indicted before a military court. This restriction will probably be lifted.

Spain has a complicated procedure for appeals that has been criticized for not being in accordance with the European Convention of Human Rights, Protocol 7 (not ratified) and art. 14 (5) in the 1966 Civpol (ratified). It seems that ”The remedy of appeal” will have to be reformed, including with regard to decisions by military courts.

In the **USA**, recommendations for changes have been put forward in the *Cox report* from May 2001. One of the recommendations is to increase the independence, availability and responsibilities of military judges.

According to the report, complaints against the military justice system have long been fueled by allegations that military judges are neither sufficiently independent nor empowered enough to act as effective, impartial arbiters at trial. It is recommended to create standing judicial circuits, composed of tenured judges and empowered to manage courts-martial within geographic regions. It is also recommended to establish fixed terms of office for military judges, to enhance the overall independence of the military judiciary. It is believed that increased judicial independence is critical, given the central role of judges in upholding

the standards of due process, preserving public confidence in the fairness of courts-martial, and bringing United States military justice closer to the standards being set by other military criminal justice systems around the world.
However, the tragic events of September 11, 2001, and the war on terror that has followed, has drawn the attention towards other matters, such as trial of suspected terrorists by military commissions, which is not on the agenda of this conference.

Human rights influence
Human rights influence has been seen to be particularly strong in states party to the European Convention on Human Rights and states affiliated to such states, typically Australia, Canada and New Zealand. The reason for the particularly strong influence of the ECHR seems to be the access for aggrieved individuals to obtain binding decisions by the European Court of Human Rights. In such decisions, the Convention is not only applied, but also interpreted in a way that entails a measure of progressive development.

Highly relevant is Article 5 paragraph 1 (a) which lays down:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law; …

Equally relevant is Article 6 paragraph 1 which lays down:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

These articles impose restrictions on the extent to which punishments can be awarded by summary procedures without due process. They also demand that military courts have to be independent, which means that you can't have a court composed of officers convened by a commander who may have an interest in the outcome. And although the courts may in fact act in a fully impartial manner, justice must not only be done, it must also be seen to be done.

General distrust
From time to time, there are eruptions of general distrust towards military courts on the part of the general public as represented by mass media and politicians. Criticism may be sparked by more or less unfortunate events, and is not necessarily well deserved.

For example, UK troops were involved in some nasty incidents in Iraq in 2003 and later.

- In cases where it has been decided there will be no prosecution the Army/Military police/Government have been accused of politically motivated cover-up.
- In cases where there has been a prosecution of some, but not all the accused the same parties face allegations that the wrong people have been prosecuted, e.g. "Why are you trying to ruin a decorated senior officer's career by prosecuting him when it was the soldiers who were responsible?", or "Why have you prosecuted the poor soldier when it was the highly paid officer who should take responsibility?", or thirdly "Why are you prosecuting anybody when they are all just trying to do a difficult and dangerous job on an operation that we should never have embarked on in the first place?".

Similar criticism has occurred in other countries, and will from time to time lead to reforms moving tasks from the military over to civilian bodies, but never the other way around.

How come that such developments take place to-day, but nor, for instance, half a century ago? One possible explanation is that states experiencing "civilianisation" do not find themselves under threat of war that might jeopardize their existence. Considerations of military efficiency are therefore not paramount. Another possible explanation, or contributing factor, might be abolishment of conscription, which over some years could alienate the general public from the military.

One may also seek an explanation in the subordination of the armed forces to the civil political system. As a constitutional matter, this is taken for granted in western-style democracies, but is not necessarily the case everywhere. Apart from constitutions, it is also a matter of perception – should politicians meddle with military affairs? Societies are different, and in several countries the civilian society and the military are more or less two parallel systems. In such countries "civilianisation" of the military judicial system cannot be expected in the near future.

Conclusions

There are clear trends in the development of military justice to be seen on the international scene with regard to the rights of the accused with reference to human rights standards. Important elements are:

- More independence to judges,
- Standing courts,
- Increased right to elect trial instead of summary procedures,
- Increased right to legal representation.

There are, furthermore, trends with regard to shifting from military to civilian jurisdiction, particularly in peacetime, by:

- Reducing the competence of military courts,
- Abolishing military courts,
- Abolishing military prosecution.

These trends are particularly visible in countries that are under influence of the European Convention on Human Rights.

Response?

For people engaged in military justice and who have faith in their systems, it is painful to be the object of distrust and to have tasks taken away from them.

The response should, however, not be to argue against human rights protections. The relevant consideration, in my view, is that military cases need priority and expertise. The military is one of very few branches of society where use of lethal force is permitted, and it is the only branch in which it is required that members take exceptional risks, risks that may entail giving up their lives, to accomplish their missions.

Military cases should be prosecuted, defended and judged by persons, who understand the life of soldiers and officers. It is a matter of being judged by one's peers.

In a case related to a shooting incident in Iraq, the Appeals Chamber of the Arnhem court was quite critical of the public prosecutor's office and the way it had pursued this case, including its apparent lack of understanding of military operations.[2] It recommended that the public prosecutor's office and the Ministry of Defence establish dialogue and share knowledge to avoid the repetition of such a case.[3] (The case is described in the proceedings of the XVIIth Congress of the International Society for Military law and the Laws of War, Scheveningen 2006)

In this case, the court was up to its tasks, but the prosecution apparently not. Civilianization had seemingly gone one step too far.

Thank you for your attention.

[2] The public prosecutors are civilians.
[3] Excerpt from Dutch Military Law Review (Militair Rechtelijk Tijdschrift, June 2005, p 213-224).