

Military v. Civilian Justice for Core International Crimes

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In past decades, a considerable number of states have seen investigations and prosecutions of war crimes, crimes against humanity and genocide (core international crimes). Many international lawyers believe that there has been a decisive historic shift away from military to civilian criminal justice for core international crimes when prosecuted at the national level.

On 23 August 2010, a seminar organized by the Forum for International Criminal and Humanitarian Law in co-operation with the Norwegian Centre for Human Rights (University of Oslo) and the Peace Research Institute Oslo (PRIO) was held to consider evidence of such a shift and its implications for international criminal justice. The seminar speakers included Nils A. Butenschøn, Joseph Rikhof, Arne Willy Dahl, Terje Einarsen, Nobuo Hayashi and Annika Jones.

The first presenter opened the seminar by predicting that international institutions dealing with core international crimes (CICs) will most likely cease to exist by 2015, with the exception of the ICC. If the international community is serious about combating impunity for these crimes, he claimed national jurisdictions would need to step up their efforts. This would not mean “starting from nothing”, as a large number of countries have already made efforts in this area in the last ten years. Since the establishment of the ICC a very large number of countries (the vast majority of the 113 which have ratified the ICC Statute) have enacted legislation to comply with the ICC enunciation of CICs, including often adding crimes against humanity to their legislative arsenal for the first time. In addition, there has also been a substantial number of countries which have started to investigate and prosecute CICs.

Some statistics:

- Since 2000, 43 countries have taken steps to enforcing criminal remedies, for the most part criminal investigations and prosecutions, but also extradition; of these 43 countries, 26 based their efforts on territorial jurisdictions, while the remaining 17 on extra-territorial jurisdiction, in most cases universal jurisdiction; efforts have been made on all continents.
- Over 10,000 cases were decided on the territoriality principle while in the last ten years there have been 50 indictments with 31 convictions and five acquittals in countries relying on universal jurisdiction.
- Of the 43 countries, 33 used their regular civil courts with the other ten using some type of special court or tribunal for CICs.
- Cases tried in military courts have always been based on war crimes (although more recently the DRC has also added other crimes to its jurisdiction).
- Only once has a court using universal jurisdiction issued a conviction which included crimes against humanity, namely Canada.
- Specialized investigative units for CIC only exist in universal jurisdiction countries, namely Norway, Sweden, Denmark, the Netherlands, the UK and Canada apart from Ethiopia.

There have been some encouraging trends; twelve former heads of state have been indicted by national courts (as well four by international institutions) while corporations and corporate players have also been the subject of criminal prosecutions.

Several other legal issues are worthy of note. Universal jurisdiction has been contracting to a limited form, as has been seen in Belgium and Spain. The notion of genocide has been expanded both by national legislation and national jurisprudence primarily by adding more groups to the traditional four included in the definition of the crime. There has only been one prosecution for crimes against humanity on the basis of universal jurisdiction so far, but more can be expected, including, and especially, for such crimes committed before 2002 in spite of concerns regarding the legality of retroactive enactment (as has been the case in Norway, Uganda, the UK and soon the Netherlands). International criminal law relating to war crimes committed in non-international armed conflict as developed by the international institutions has been very closely followed except in the Netherlands and Chile.

In general, more consistency is needed between national jurisprudence regarding CICs. There is some co-operation in this field, but it is tentative and sporadic. Thought needs to be given to the cause of the wide disparity between results in countries using territorial jurisdiction and those employing universal jurisdiction. Also, one needs to develop a more effective division of labour. Finally, thought must be given to specialization of investigators and judiciary; there are advantages and disadvantages to either model which can be partially related to the type of jurisdiction (given the higher frequency of prosecutions in the territorial jurisdiction model). In this regard, perhaps the equation is not between military and civil justice systems, but rather between specialized and non-specialized, of which the military tribunal is only one option.

One panelist observed that, while the three CICs stem from the Nuremberg trials after the Second World War, it is, however, clear that genocide and crimes against humanity have no necessary connection to war. It is only war crimes that typically have a direct connection to combat operations. Therefore, a widely used argument in support of military components in criminal justice for core international crimes, namely that only military personell has the capacity of a proper understanding of the setting in which the alleged crime took place, will for this reason mainly be relevant for war crimes.

Investigators in war crimes cases must have sufficient military expertise. This should include technical expertise on weapons *et cetera*, tactical expertise

on how the military operates, knowledge about the organization of the units involved and understanding of how a military chain of command is structured and how it functions. For the prosecution there is a similar need for understanding of the factual subject matter, not only of the law. Both the prosecutor and the defence counsel need to understand when the other has a good point that has to be taken into account, and when the argument is poor. The bench will have to apply provisions containing legal standards, such as “imperative military necessity”, “feasible”, “when circumstances permit”, “excessive”, *et cetera*. Interpretation and application of such standards presupposes a conception of how things work and how humans act on a battlefield. This cannot be conveyed by investigators or prosecutors, but must be in the head of the judges. Furthermore, a soldier has good reason to demand to be judged by his or her equals. This leads to an argument for having military representation on the bench.

A main counterargument, however, is that CICs may implicate commanders or their friends, and colleagues of the commander. Commanders should in such cases not be in control of the investigation, prosecution or even adjudication procedures. A system with military components under civilian direction could be organized in a way that ensures a sufficient degree of expertise, but does not give any opportunity to “push a case under the carpet” or suppress or distort it in some way in order to keep unpleasant facts out of sight to the public.

Military components can be useful in providing understanding of military matters and give the accused a sense of being judged by his equals. It is, however, a question of confidence on the part of the society at large. This might prove to be a challenge with regard to reaching fair and balanced solutions.

Another panelist maintained that, from a human rights perspective, it is not the name of the institution or its formal character that counts, be it military or civil, but that a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, in accordance with the International Covenant on Civil and Political Rights, Article 14. The more serious the alleged crimes are, the more important these safeguards will be. The second panelist rightly highlighted the competence aspect, especially with regard to potential war crimes committed during combat. He made a case for military components in the investigation, prosecution and adjudication, also

arguing that a soldier has good reason to be judged by his or her equals, leading to an argument for having military representation on the bench. On the latter point there was some disagreement. The equal of a soldier would not be another soldier-colleague, but an ordinary member of society, a layman.

Moreover, he noted, even ordinary criminal cases often raise complicated issues of factual determination and value judgments, where expert witnesses are absolutely necessary in order to illuminate the case. The same is true with regard to many civil cases, for example tort cases. Medical or highly sophisticated technical expertise of different kinds might be required. The judge is required to be able to make an informed and sound judgment, although he or she has no experience as, for example, a surgeon or as a captain of a high-speed passenger catamaran ship.

Military lawyers have the advantage of a better understanding of military operations and they are usually closer to the facts on the ground than their civilian counterparts. But the third panelist thought the solution to the problem should be a bit different than that suggested by the previous panelist. For example, it is no doubt valuable to a court that some of its judges in large criminal cases are former prosecutors or defence lawyers. Specialised investigative units, and even specialised courts for core crimes cases, may also serve a state. Former military investigators, prosecutors and adjudicators may well form part of the respective civilian teams.

In principle, military justice should be confined to adjudicating minor offences concerning a state's own military personnel, and should not adjudicate core crimes cases, at least not in times of peace in the prosecuting country. Such alleged grave crimes require fair, transparent procedures and independent and impartial decision-making. Military courts are more often than civil courts not sufficiently independent, as the former are usually part of the executive branch. Impartibility is another problem with military courts, something that in my opinion is quite obvious with regard to the prosecution of enemy soldiers and non-combatants, but also with regard to the prosecution of the military's own soldiers and high commanders. On the other hand, as always, apparently sound legal principles need to be challenged by actual experience and research. Depending on the circumstances, some kind of shared or joint responsibility with regard to investigation and even prosecution of war crimes could be envisaged, in order to secure more effective

law enforcement.

One of the commentators observed that the presenters' contributions raise three questions. First, how are the persons who are investigating, prosecuting, defending and, above all, adjudicating cases involving core international crimes to interpret relevant rules of international humanitarian law (IHL) and international criminal law (ICL)? As the second panelist observed, military considerations become pertinent when dealing with war crimes involving punishable breaches of rules relating to the conduct of hostilities (for example, circumstantially indiscriminate use of weapons; deliberate, indiscriminate or disproportionate attacks on civilians and/or civilian objects; and militarily unnecessary property destruction). The need for awareness of military operations does not stop there, however. The absence of military necessity is an element of several crimes against humanity, such as deportation, forcible transfer and inhumane acts by way of property destruction as well as certain types of persecution. Interpreting modes of liability requires familiarity with the modalities of combat and military organisation as well as the moral compass surrounding reasonable and law-sensitive soldiers. The same would be true of several defence pleas including mistake of fact, duress and superior orders. The trier of fact must also bear in mind the sometimes complex interplay between IHL and ICL presumptions. For instance, whereas a person with doubtful status enjoys a mandatory civilian presumption and therefore presumptive immunity from attacks, *in dubio pro reo* may entitle a soldier accused of having attacked such a person to the presumption that the latter was liable to attacks. Finesse would be essential when finding or declining to find such conduct criminal. Judicially reviewing combat decisions that had been made quickly, in life-threatening conditions and on the basis of imperfect and conflicting information would involve carefully assessing what was known or, more importantly, what was reasonably knowable to the decision-maker at the time.

Second, how well has the emerging case law of international criminal jurisdictions fared in this regard? Several judgments of the UN Yugoslav Tribunal may be noted here. In Galić, the prosecution possessed extensive legal as well as military expertise in targeting and siege warfare. Counsel for the defence in Hadžihasanović and Halilović expertly argued the law of command responsibility and the organisational structure of the Army of Bosnia and Herzegovina.

These cases produced fairly robust and credible findings of law and facts. In contrast, the Blaškić trial judgement problematically held that the defendant acted criminally by ordering a “mop-up operation” of an area and that targeting civilians or civilian property is an offence when not justified by military necessity (both defects were rectified on appeal). What is crucial here is not that the trier of fact need be, or need have been, a soldier him- or herself. It is rather that he or she should have basic competence in international humanitarian law, international criminal law and military matters and remain alive to the legitimate concerns of reasonable and law-sensitive soldiers. If the law purporting to provide persuasive war-time behavioural guidance with threats of criminal sanctions were to be efficacious, it would depend on the confidence of these soldiers that it imposes just restraints on their belligerent conduct without rendering their profession untenable. International criminal justice would be ill-served by institutions that are disdainful of or subservient to things military.

Third, are the military-civilian and unspecialised-specialised axes of analysis, as espoused by the two first panelists, respectively, all there is to the matter at hand? The commentator suggested that a nationality-based axis would also merit attention. Can national jurisdictions be trusted with prosecuting members of their own armed forces diligently or, for that matter, those of their adversaries fairly for alleged core international crimes? Is it really a good idea to have soldiers tried by their sympathetic compatriots or by their vengeful enemies?

The final commentator noted that the presentations raise questions of the form and the substantive quality of the investigation and prosecution of international crimes when it occurs at the national level. This is relevant in respect not only of human rights guarantees, but also to the jurisdiction of the International Criminal Court. States have taken diverse approaches to the implementation of the Rome Statute into their national legal systems, both in terms of the substantive crimes under the ICC’s jurisdiction

and provisions enabling them to co-operate with the Court. Different approaches to the investigation and prosecution of international crimes are often warranted, or driven, by the unique characteristics, demands and needs of different national systems. It is arguable that as long as certain standards are upheld, ensuring that the system is efficient, effective, transparent and respectful of the rights of the accused, the manner in which criminal justice is implemented is of less significance. This is the approach that has been taken under the ICC’s complementarity regime. Under Article 17 of the Rome Statute, the ICC will not have jurisdiction provided states are willing and able to prosecute, and to do so genuinely. The system respects the diversity of the international community in its approach to justice whilst ensuring that certain standards are upheld. Provided that the national system meets the requirements laid out in the Rome Statute, the form of the proceedings is of lesser significance.

Discussion: One of the organisers highlighted that the availability of resources in national criminal justice systems could be relevant to the seminar discussion. If, for example, there is a surplus of resources in a national military justice system and a deficit in the civilian criminal justice system, an argument could be made that the latter should in some circumstances be able to ‘borrow’ resources from the former. He also drew attention to the fact that this discussion might look differently from the perspective of developing states or states affected by armed conflict. Their perspective must be taken fully into consideration. Other issues raised for discussion included the uniqueness of cases involving core international crimes and the motivations underlying the incorporation of a military element in the investigation, prosecution, adjudication and defence of cases involving core international crimes.

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