

## **Statement by Arne Willy Dahl\***

*Peace Palace, The Hague, 29 May 2015*

Excellencies, General, Ladies and Gentlemen.

Some 30 years ago, a senior military prosecutor said in my presence that war crimes trials were something you did in order to get at enemy war criminals. Our own war criminals, if any, would benefit from their patriotic motives and not be prosecuted with any vigor, if at all.

His words sank into me. My reaction was one of puzzlement, more than approval or protest. Maybe he was right, as a matter of historic fact. The Nuremberg and Tokyo trials were about trying the war criminals of the former enemy. National post-war trials in my home country, Norway, were about trying enemy persons who had committed war crimes against Norwegians. Norwegian nationals were tried for treason, and in some cases also for war crimes in the service of the enemy, if committed against Norwegians. Norwegian soldiers who had abused or even killed enemy prisoners after the liberation in 1945, were treated leniently.

The My Lai case in 1970-71 might have been proof to the contrary, but in the event a life sentence for having murdered 22 civilian Vietnamese, ended up with the accused having to serve only about three years of incarceration before he was released.

Much has happened since then.

But the factual circumstances that my former colleague based his statement on may have contributed to a process where the armed forces in a number of countries have lost their moral 'high ground' as disciplined guarantors of the security of the State, protecting its fundamental values, including the rule of law.

A wave of reforms of military justice systems have been sweeping over the world in the recent decades. In many cases, possibly most, the reforms can be interpreted as distrust of military commanders and their role in military justice. The reforms we are seeing are about the rights of the accused, the protection of victims, fear of abuse of power by military courts towards civilians and suspicion of embarrassing cases being 'swept under the carpet' or outright shielding of grave crimes committed by officers and soldiers.

A number of countries have gone through reforms introducing independent bodies for investigation, prosecution and adjudication of cases related to the military, while in other countries reforms have amounted to full 'civilianization' abolishing military justice systems altogether. For the armed forces affected, such developments have may have been felt as being placed under guardianship.

How should military commanders react when proposals for reforms are put on the table? Military commanders and military lawyers will have a natural inclination to resist changes of military justice in the direction of civilianization. After all, military justice has its roots

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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, for good military reasons.

By enforcing discipline, the commander maintains his authority. If discipline within his troops is enforced by somebody else, it could undermine the commander's authority. 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 the interests of 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 who enjoy fundamental civil rights under the rule of law.

In other words, the military should consider its true long-term interest, in order not to resist but 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 securing that the courts have a proper understanding of military affairs.

One important element in the total picture is the self-respect of soldiers.

It is in the interest of soldiers to have their possible offences investigated, prosecuted and adjudicated by persons that 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 wrong. I shall illustrate with an example from personal experience.

In 2006, the Norwegian Provincial Reconstruction Team ('PRT') in Meymanah in Afghanistan, had a dangerous incident when it was beleaguered by a hostile mob claiming revenge for the publication of insulting cartoons of Muhammed. Within the mob were particularly active persons aiming shots and throwing hand grenades over the wall of the PRT headquarters, succeeding in putting a vehicle of the PRT on fire in the main entrance gate.

Some months after the incident an officer approached me and told me that at a certain critical moment, when the PRT was close to being over-run, he had considered to machine-gun 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, probably also the reputation and success of the whole Norwegian operation in Afghanistan.

On the other hand, it happens 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 a raised head – in contrast to a situation when the case is either whisked under the carpet or considered by someone with insufficient understanding of

military law and military operations and procedures, and gives a superficial or directly wrong assessment.

In sum, it is both in the interest of the soldiers and the military as a whole, that their actions are assessed and, if necessary, investigated, prosecuted and adjudicated by bodies that have a sufficient understanding of military affairs but are independent of the chain of command.

In conclusion, I shall sum up by submitting a few recommendations:

**First:** 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.

**Second:** 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.

**Third:** To retain the self-esteem of the personnel, it has to be kept under good discipline, thereby keeping up its good reputation.

**Fourth:** 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.

Total civilianization may not be the best solution, but one that is likely to be the result if the military stubbornly resists sensible reforms.

Thank you for your attention.