

Statement by Andrew Cayley CMG QC*

Peace Palace, The Hague, 29 May 2015

I am speaking today in a private capacity and not on behalf of Her Majesty's government.

I have spent the greater part of my professional life either prosecuting or defending military commanders before international courts. Coupled with the fact that I find myself today the Director of Service Prosecutions, the United Kingdom's Chief Military Prosecutor, I have a very great interest in the subject under review and this book.

I am, unusually you might think, as Director of Service Prosecutions, a civilian and not a military person who ultimately determines the prosecutions for the most serious offences of the British military community and supervises uniformed advocates from the army, navy and air force in our military courts. But as Bruce Houlder, my predecessor as the Director, points out in his chapter of the book, the civilian nature of the position was a deliberate choice by the British government. They wanted to ensure that whoever occupied the position would be completely independent of the military chain of command, and any other influence, and so free to make determinations in cases based only on the evidence and the public and service interest in prosecuting the case.

The goal of this book is neatly expressed in its title. It seeks to send a message and to begin a dialogue with military forces around the globe on the deep seated self interest in investigating and prosecuting core international crimes committed by their own personnel. It is worth commenting that in respect of the dialogue international jurists on the one hand and military commanders and military legal advisers on the other must listen to one another and be prepared to educate each other on some thorny issues. Professor Bill Fenrick emphasises this point in his Foreword by giving the examples of military necessity, proportionality, military objective, indiscriminate attack and attacks against civilians. The risk in not listening to one other, particularly on these issues, is ending up at the opposite and unreasonable extreme ends of a single spectrum. And there is no need for this dichotomy.

What is extraordinary about this book is the fact that it builds around its title so many different perspectives. The approaches of different nations, of different time periods in history and most important in our current age the differences, and indeed I would argue the similarities in approach, driven by deeply ingrained religious values. I also agree with Professor Morten Bergsmo and SONG Tianying that in order for this project to gain traction it needs to be conducted in many other languages apart from English.

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I would also add that language is not the only hurdle. Many of the states you are appealing to through this publication do not have the capacity or experience to investigate and prosecute these most serious crimes. They can self-refer to the ICC, as a number of states have done. But also states with experience and resources can work together with those states that need support in this area. Perhaps this could even become part of states' duties under complementarity. In any event, it is a project of mutual interest for states. The most challenging job I ever did for four years was being the international prosecutor in Cambodia, but the biggest reward of that job was working together and supporting Cambodian prosecutors and legal staff and watching them grow in skill and confidence.

The rationales for the self interest are multiple and indeed at the end of the first chapter of the anthology you can see 26 such rationales. There are many more. In my 12 minutes I cannot cover all 26 but I would make brief remarks about two of them:

1. Military commanders will tell you that they support service justice because it enhances operational effectiveness. In other words, a well ordered and disciplined soldier, sailor or airman fights better and is better able to successfully conduct military operations. This speaks for itself, of course, but there is much truth and value in it. You will find this rationale in Section V of the list in the first chapter of the book.
2. The second rationale is one which oddly, not having read this new book at the time, I incorporated into the Service Prosecuting Authority's Annual Report a month ago. And that is this: Law-abiding, disciplined service personnel have the right to work in an environment where their comrades follow the law. Remember that unlike most other vocations the profession of arms often requires you to live and work for long periods of time in very close proximity and in difficult, dangerous circumstances with your fellow servicemen and -women. Here I know we are talking more of normal military discipline, as opposed to core international crimes, but in the end ill-disciplined troops are far more likely to engage in criminal conduct than those who instinctively follow order and regimen. That rationale you will find in Section VIII of the list in the first chapter of the book.

Finally, I anticipate that many of us in this room see these issues through the lens of our own experiences in the international courts – those of us who looked on the horrors of Srebrenica, Rwanda, Kosovo, Darfur, Congo, just to name a few. The events in these places have shaped our thoughts and the way we come to interpret the law and facts presented to us. I find that I need to constantly refresh the way in which I see and interpret things. Many states represented in this room have a mature and strong rule of law. Those states send young men and women to very dangerous places around the globe often where there is no civic order or rule of law. Often where there is anarchy. Many return from serving their country with injured minds and bodies. They have confronted enemies who are generally lawless, unpredictable and always deadly, and then we expect from them the highest standards of civic and military discipline in these vicious encounters. And if they digress from these standards, we investigate them, try them in a military or civilian court depending on the country, and if they are found guilty, we punish them. We ask much of these individuals who are in the majority law-abiding citizens who want to serve their country honourably.

Here in this conference we are talking about the prosecutions and investigation of core international crimes, but the issue is wider than these crimes. Military operations, past and present, are being scrutinised today for criminal conduct all over the world on an unprecedented scale.

And that is right. There are horrors going on in the world as I am speaking now, I know this, but I can reassure you the vast majority of military operational offending is not the industrial killing I prosecuted in Srebrenica. So this book, this debate is important, even vital, but it must be tempered by a dose of reality and a good sense of proportionality.