CHATHAM HOUSE

Chatham House, 10 St James's Square, London SW1Y 4LE
T: +44 (0)20 7957 5700 E: contact@chathamhouse.org
F: +44 (0)20 7957 5710 www.chathamhouse.org
Charity Registration Number: 208223

International Law Programme Meeting Summary

Accountability for Violations of the Laws of Armed Conflict: A Duty to Investigate and Prosecute?

Sean Watts

Associate Professor of Law, School of Law, Creighton University

Charles Garraway

Associate Fellow, International Security, Chatham House

Chair: Louise Arimatsu

Associate Fellow, International Law Programme, Chatham House

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INTRODUCTION

Professors Sean Watts and Charles Garraway participated in an interactive discussion comparing the legal practices and policies in the United Kingdom and the United States in the investigation and prosecution of violations of the laws of armed conflict, or war crimes. Focussing on the violations by members of the national armed forces and civilian contractors, the participants highlighted the similarities and differences in the approaches of each State, and examined the rationale behind each approach. In particular, they focussed upon the degree that each system's procedures, practices and policies are influenced by regional and international legal regimes, in addition to critiquing a number of suggested ways to improve the respective systems.

Prior to his academic career, Professor Watts served as in the Judge Advocate General's Corp in the US Army (1999 - 2007), gaining extensive experience having served as Defence Counsel within the US Military Justice System.

Professor Garraway served as a legal officer with the UK Army Legal Services for 30 years. In that capacity, he represented the UK Ministry of Defence at numerous international conferences and was also the senior army lawyer deployed to the Gulf during the 1990-1991 conflict. In 2004/5, he held the Charles H Stockton Chair at the United States Naval War College and, in 2006, he was elected to the International Humanitarian Fact-Finding Commission of which he is now a Vice President."

Participants included practising lawyers, including those from the armed forces, academics, representatives of NGOs and civil society.

The meeting was not held under the Chatham House Rule.

DISCUSSION

The speakers were invited to address the relationship between civilian and military justice systems in the handling of war crimes

Professor Garraway

In the last decade, the legal system within which the UK military operates has undergone significant change. Broadly stated, the system for the investigation and prosecution of alleged violations of the laws of war can be split into three stages: 1) the decision to investigate; 2) the investigation; and 3) the consequences of that investigation. In contrast to the US, the UK's domestic legal framework must also take into account the legal implications of a regional regime, namely, the European Convention of Human Rights (ECHR).

Two distinct issues arise when considering the decision to investigate. Firstly, in accordance with the jurisprudence of the European Court of Human Rights (ECHR), there is a positive obligation on the State to investigate all deaths that occur at the hands of a State agent. This obligation exists even in the context of the armed forces operating in conflict situations; the leading case on this is *Al Skeini and Others v UK*). This is a purely human rights obligation, and exists independently from any criminal investigation. Secondly, in circumstances where a potential criminal offence has been committed, under the Armed Forces Act 2006,[1] all offences listed under Schedule 2, the so-called 'Schedule 2 offences', are subject to a mandatory obligation on the part of the Commanding Officer (CO) to report the potential offence to the Service Police. This is in contrast to the situation prior to the enactment of the 2006 Act, where the CO enjoyed a much wider discretion. If the findings of the investigation suggest that an offence has been committed, then the Service Police refers the case to the Service Prosecuting Authority, a completely independent authority supervised by the Attorney General and which falls outside of the military chain of command. This is where the first cross-over between the civilian justice system and the military justice system takes place.

By virtue of the International Criminal Court Act 2001,[2] both the civilian justice system and the military justice system have jurisdiction over cases involving alleged war crimes. The Attorney General is empowered to order a civilian investigation into a case concerning military offences, and indeed there have been a number of instances where the Metropolitan Police have been responsible for investigating a case. Thus, while in most cases the Service Police will be responsible for conducting an investigation, this need not necessarily be the case.

If it has been determined that a prosecution should take place, the question becomes whether the case is prosecuted in a civilian court before a jury, or whether it is made subject to military court martial procedures. A third, hybrid option is also available, which in effect takes the form of a court martial, but is staffed by civilians, outside the military justice system. For example, in one case, a High Court Judge was appointed as the Judge Advocate, rather than one of the staff of the Judge Advocate General – themselves civilians, and the majority of prosecuting counsel, as well as all defence counsel, were civilians. The advantage of this is that the UK system has a considerable degree of flexibility.

Professor Watts

As in the UK, both the US civilian and military systems of justice are vested with jurisdiction to investigate and prosecute war crimes. However, in practice, the military justice system enjoys primacy by virtue of an Executive memoranda of understanding. In other words, the Department of Justice (DOJ) has stepped aside and ceded authority to the military for most war crimes prosecutions and, by default, investigations. The civilian justice system tends to only become involved in cases involving allegations of war crimes when the military has failed to or cannot assert jurisdiction over a situation or individual. In two such cases, US service members who were

[1] Available at http://www.legislation.gov.uk/ukpga/2006/52/contents
[2] Available at http://www.legislation.gov.uk/ukpga/2001/17/contents

suspected of committing war crimes, managed to clear the out-processing procedures of the military and regain their civilian status before military justice authorities were able to catch up with them. Once they became civilians, the military lost prosecutorial jurisdiction over the individuals precluding court martial proceedings. For that reason, those cases were processed through the federal court system.

In addition to the broader civilian criminal justice system, in the mid 1990s, a specialist War Crimes Division of the DOJ was established by the War Crimes Act.[3] This Division operates entirely outside the military justice system, and was, in large part, created as a consequence of lessons learned from the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY). More specifically, there was a realisation that a gap existed in domestic US law in respect of situations involving international crimes committed by civilians in the context of situations of violence falling short of international war. In such situations, there were no domestic laws enabling the civilian justice system to take jurisdiction. Accordingly, the War Crimes Division was established and staffed by civilian lawyers. However, the Division has not been put to particularly effective use in trying cases. Moreover, the recent amendments to the Uniform Code of Military Justice (UCMJ) to bring private military contractors within the jurisdiction of the courts martial system (see section 8) means that the prospect of a prosecution through this Division is unlikely.

The US adopts a particularly narrow understanding of human rights law and does not avail itself to the jurisdiction of any international or regional human rights system. As a result, and in contrast to the UK, the military justice system is not framed by the kind of human rights-oriented obligation to investigate killings that occur within the context of armed conflict along the lines of those referred to by Professor Garraway. In the US, the authority to investigate is considered to exist as part of the authority to prosecute. Accordingly, the rules and regulations setting out the procedural duties and powers relating to the investigation of alleged crimes can be found alongside those rules and regulations elaborating upon prosecutorial authority and jurisdiction. There is little by way of express law specifically governing investigative practices.

Are there any formal mechanisms that trigger an investigation into allegations of violations of the laws of war?

Professor Garraway

An investigation can be triggered in any number of ways. It may be initiated internally by a member of the armed forces, or it may be that one is triggered following the exposure of an incident by the media. It could even be triggered by a person working at a photography laboratory who sees photographs depicting something untoward and raises an alert. As a matter of law, where it appears that a Schedule 2 offence may have been committed, the CO of the Unit is obliged to refer the situation to the Service Police. However, how that situation comes to the attention of the CO can be a result of a number of different means and factors.

A key point of departure between the US and UK is the concerted effort in the UK to move away from a command-driven system. In light of problems encountered where discretion within the chain of command was abused or misused, the 2006 Act restricted the powers of the chain of command, placing them instead in the hands of independent authorities.

Professor Watts

The system is the US is quite similar – the US military justice system receives its information from many different sources; it can be members of the armed forces, but it can equally be from civilians and human rights bodies. The information provided by the International Committee of the Red Cross (ICRC) through their confidential reports on US detention centres have been the source of information that has triggered a number of war crimes investigations. The appropriate legal

[3] War Crimes Act of 1996, 18 U.S.C. § 2411.

standard required to initiate an investigation is 'credible information of a suspected law of war violation'. Since 'credible information' leaves considerable room for interpretation, the process of initiating an investigation is very much Command-driven, as it is the CO who has the power to determine what constitutes 'credible evidence' in a given situation.

This command focussed orientation, is a key characteristic of the US system of military justice. Like the UK, the US has experienced problems surrounding the abuse and excess of command powers. However, the investigatory proceedings are generally well insulated from the risk of manipulation. The most serious cases of suspected war crimes are investigated by professional investigatory agencies within the military system. These agencies, the Military Criminal Investigatory Organisations (MCIOs), do not answer to operational CO's but rather are answerable directly to their own headquarters. To the extent that commanders have no authority to terminate an investigation by the MCIO, these investigations are insulated from command abuse. However, this insulation only goes so far. As independent as MCIO investigations may be, the findings of those investigations are relayed back to the respective CO, who retains the authority to determine whether to pursue prosecutions on the basis of those findings or not, once again highlighting the command-driven nature of the US process.

The speakers were invited to discuss the processes and practices regarding the investigation of alleged war crimes

Professor Garraway

Over the last decade the UK investigatory authorities have become increasingly independent from the military chain of command. The Military Police and its Special Investigatory Branch (SIB) have been taken completely out of the command chain and greater efforts have been made to ensure both the appearance of independence and actual independence once a case has been referred to them. However, one of the enduring problems faced by the investigatory authorities is the availability of resources to independently and effectively fulfil their duties. As further cutbacks in military funding are announced along with the planned reduction in the size of the army, these problems become increasingly acute, despite strong and concerted efforts by the Provost Marshal to insulate the Military Police, and in particular the SIB, from those cuts.

Regarding the practicalities of investigating alleged instances of war crimes, it must be remembered that the contexts in which they occur make investigations extremely difficult. Not only can they be very complex on the facts, but the challenges faced by investigators operating in an active conflict situation can be extremely difficult to surmount. It can be difficult, if not impossible, to secure potential crime scenes, to preserve evidence and conduct tests, such as ballistics tests. In cases involving killings or other maltreatment of individuals, it may be impossible to conduct an autopsy or an examination of the victim if the other side to the conflict has removed the body or investigators are denied access to the victim. Investigators can only hope to do their best in these circumstances.

Professor Watts

One of the main challenges facing US investigators is one of definition. Although a definition of 'war crimes' is available, it only provides very limited assistance to investigators, prosecutors and reporters when seeking to identify what constitutes a war crime. In essence, the definition is overly broad; it states that a war crime is 'any violation of the laws of armed conflict'. As a point of illustration, it is useful to look at the obligations set forth in the 1949 Third Geneva Convention relating to the treatment of prisoners of war (GCIII).[4] Here, it is stipulated that any Commander in charge of a prisoner-of-war (PoW) camp is required to post copies of the Geneva Conventions throughout the camp and in the language of the detained persons.[5] Putting aside the US's recent

[4] Available at http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument.
[5] Article 41, Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

reluctance to admit that any person captured by US forces are PoWs, according to the definition cited, a failure to post the Geneva Conventions in the language of the detainees would constitute a war crime. Clearly, this conclusion is dubious and does not reflect what constitutes a war crime as properly understood. Rather, this should be treated as an administrative shortcoming that must be rectified. In practice, when inspecting US detention centres, the ICRC acknowledges that a failure to comply with this obligation does not constitute a war crime. The ICRC is usually able to provide copies of the Conventions in the appropriate language should a detaining Power so request.

Is there an obligation in international law to investigate and prosecute?

Professor Watts

It is one thing to examine *what* the conduct of a State is on a given matter, but quite another to examine *why* it acts in the manner in does. Here, the question is whether when investigating and prosecuting war crimes, a State perceives itself to be implementing its international legal obligations, or whether the system is a product of domestic policy and legal requirements. In the US, the system is as it is by reason of domestic considerations. The extent to which the US is in compliance with perceived international legal obligations to investigate, report, and prosecute war crimes is purely coincidental; the system is not designed with a deliberate eye to implementing international law.

International law is a legal regime founded on State consent. To identify the international legal norms that bind States, it is necessary to adduce evidence of State consent to that norm or obligation. Such evidence can be derived from texts (treaties and conventions to which the State is a party, for example) or from actual State practice. On the question of the investigation of war crimes, there is very little codified law. Many law of war provisions provide for a basic duty, obligation or requirement, but leave States a very wide margin of appreciation as to how to implement those obligations or requirements. For example, GCIII requires that in the event that the status of an individual is in question (i.e. whether they are a PoW), it is necessary to convene a competent tribunal.[6] The Convention itself provides no further guidance such as on the composition of the tribunal or its procedures and evidentiary standards. This indicates that States were unwilling to relinquish their authority on such matters. Similarly, there is very little evidence in the Geneva Conventions that States have consented to a high degree of international input in respect of investigating and prosecuting war crimes. Of course, the Geneva Conventions do establish at least one clear duty to investigate and prosecute, and that is in the case of the grave breaches regime; but again the particulars surrounding the implementation of that duty have been left to States to determine. The same can be said for the provisions of the Additional Protocols to the Geneva Conventions.

Professor Garraway

As a matter of policy, in the UK, every allegation made is taken seriously. For example, if any book is published in which allegations of war crimes are made, then those allegations are quietly investigated, even if, for instance, that book was a relatively inconspicuous memoir written by a WWII veteran.

With regard to the existence of an international legal obligation to investigate and prosecute, there is an obligation common to all the Geneva Conventions that requires States to respect and to *ensure respect for* the laws of war. This means that where there have been breaches, there is an obligation to follow up on those breaches.

[6] Article 5, Geneva Convention (III) Relative to the Treatment of Prisoners of War. 12 August 1949.

To what extent did the incorporation of the Rome Statute into UK legislation alter the offences for which soldiers are charged? Did it make any difference?

Professor Garraway

In principle, the enactment of the 2001 International Criminal Court Act has made it easier to prosecute war crimes as such in the UK. Prior to the 2001 Act, a very limited number of war crimes were chargeable as such, with only the grave breaches regime of the Geneva Conventions and Additional Protocol I having been implemented into domestic law as war crimes. However, Schedule 8 of the 2001 Act, which implements the Rome Statute of the ICC in accordance with the obligations incumbent upon the UK as a State Party to the ICC Statute, also directly transposes the definition of war crimes as found in Article 8 of the Rome Statute into English law, thus considerably broadening the range of offences chargeable as war crimes under domestic law.

Nevertheless, in the vast majority of cases, defendants are charged with ordinary criminal offences. As a military prosecutor there are good reasons for this. Why add extra legal burdens on what you have to prove when you don't need to do so to secure a conviction? What is important is to present the full facts before the court; but that's the pragmatic prosecutor speaking. Only one UK Service member has, to my knowledge, ever been prosecuted for war crimes. In the case concerning the death of the Iraqi civilian detainee Baha Mousa at the hands of UK soldiers, charges of inhumane treatment as a war crime were successfully brought.[7]

Professor Watts

The US never prosecutes any of its Service members for war crimes. Despite the number of prosecutions commonly recognised and understood in terms of 'war crimes', such as the cases concerning the Abu Ghraib prisoner abuse, or that of Specialist Green found responsible for rape at a checkpoint in Iraq, or that of the CIA agent who, while detailed to the armed forces, killed a detainee during an interrogation in Afghanistan, none was charged with war crimes as such, but rather the underlying substantive ordinary crime – such as murder or rape. There are two pragmatic reasons for this. Prosecutors are not risk takers and therefore they want to avoid decisions being overturned on appeal. Second, there is a well-developed body of case law that underpins the prosecution of those traditional substantive and underlying offences that provide a perfect guide for ensuring convictions.

Despite this practice, the US has criminalised war crimes. Twenty-four crimes are enumerated in legislation, alongside others that are incorporated into the Military Commissions Act 2009.[8] Mechanisms exist that would enable the incorporation of the 2009 Act into the UCMJ in order to make war crimes chargeable offences before the courts martial procedures, although this has not occurred. Indeed, the US does in fact prosecute war crimes in their own right, but only in cases involving non-US Service members or citizens. Responding to a question from the audience asking why the pragmatic reasons for not prosecuting US personnel with war crimes do not apply in the context of non-US citizens, Professor Watts suspected that the prosecutorial decisions made in the context of non-US citizens were made not by lawyers or those familiar with the justice system, but rather were the result of a political process involving political decision makers.

Non-US citizens captured during conflict and accused of violations of the laws of war are made subject to the system of Military Commissions. Despite a popular misconception, military commissions have a well established history within the US military justice system that extends long before 2001. Military commissions were first introduced in the mid-19th century during the Mexican-American war, and were extensively used in the aftermath of WWII, both at Nuremberg and in the Asia-Pacific region. Traditionally, the military commission system was linked to offences cognizable under international law, in particular the laws of war. As a matter of procedural law, however, the question remains as to whether the procedural safeguards found under international law also

[7] *R v Payne, Mendonca and Others* [2006]
[8] Available at http://www.defense.gov/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf .

attach to military commissions or whether they are subject to national procedural laws and practices. Even if it is the latter, this does not mean that procedural rules can be drawn up *ad hoc.* There is consistent practice to indicate that the procedures and rules applicable to courts-martial have been applied to military commissions.

One of the major drawbacks of the military commission system is that prosecutorial discretion over charging is more restricted since the principal body of law is the law of war rather than ordinary criminal law. This has meant that the legal process has been prolonged as questions as to the existence of an armed conflict, its classification, and the status of the accused (ie. whether they are protected person under IHL) have had to been addressed first. The consequence of this is that in the 12 years since 9/11, only two cases have been completed, neither of which was contested.

The relationship between human rights and the investigation of alleged war crimes

Professor Watts

The main difference between the US system and the UK system, and some may say also the biggest advantage, is the fact that the US armed forces are not subject to the jurisdiction of any regional or international human rights regime. The US's engagement with the Inter-American system of human rights is very limited. It has not ratified the American Convention on Human Rights,[9] the main human rights instrument of the Inter-American system which also established the Inter-American Court on Human Rights. The US is however a member of the Inter-American Commission on Human Rights, and in 2006 the Commission called on the US to conduct an investigation into the treatment of detainees at Guantanamo Bay. In response, the US Government challenged the jurisdiction of the Commission and reiterated its position on human rights; namely that the US perceives a reduced role for human rights in general, and it adopts a particularly narrow view on the application of human rights in armed conflict. Although a Party to the International Convention on Civil and Political Rights (ICCPR), the US rejects the view that it is of extra-territorial application. The US position is that human rights law regulates only how States treat those persons within their own territories, as opposed to constituting what some may call a 'transportable system of rights'. The second reason for its rejection of the applicability of the human rights paradigm to Guantanamo Bay is the legal doctrine of *lex specialis* which provides that where a body of law, or a specific legal provision addresses a specific situation, then competing provisions that also address that situation give way. In the context of armed conflict, the US considers the laws of armed conflict as the predominant body of law and displaces the operation of human rights law.

Non-criminal approaches to accountability

One participant made the observation that an independent investigation itself is a mode of accountability, even if it does not lead to criminal proceedings. The fact that the 2001 ICC Act includes a broad range of *acts* that may constitute war crimes, means that a greater proportion of cases get referred to the Service Police and Service Prosecution for investigation and review, even if the results of that review indicate that the alleged offence was not of a sufficient gravity to meet the threshold required for a war crime charge. This is also the case where the acts and allegations presented are difficult to fit in to substantive crimes. For instance, sleep deprivation and hooding, although not legal, are difficult to fit within the existing categories of substantive crimes. Nevertheless, the very fact that these cases are investigated by an independent body is an important aspect of promoting accountability.

[9] Available at http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm .

Civilian contractors – Accountability for private military contractors

One participant observed that in the UK, one of the key areas of difficulty when ensuring accountability for violations of the laws of armed conflict concerns private military contractors. Whereas UK Service personnel are subject to the Armed Forces Act 2006, and US Service personnel are subject to the US UCMJ, contractors can, and frequently do, fall outside the scope of these regimes depending on the nature of their contract.

Professor Watts

Recently, the UCMJ was amended by the Congress to include civilians outside declared war. Accordingly, civilians, which include private military and security contractors, can be made subject to courts-martial. However, US military prosecutors have been reluctant to use this power; there is some unease surrounding the constitutionality of subjecting civilians to courts martial outside the context of war. Rather, civilians tend to be processed by the civilian justice system. The power to prosecute civilians under the UCMJ has only been used twice; once in the case of a stabbing in Iraq, and the other in the case of the theft of a considerable amount of Iraqi government property.

What mechanisms exist to ensure independence, scrutiny and transparency?

Professor Watts

There are a number of factors that operate to ensure the transparency and integrity of the US military justice system. The first and most important factor is public opinion and the degree of public scrutiny that the US armed forces are under. Although the investigatory procedure is not open, in general, courts martial are open and their records available to the public.

Secondly, there are systemic checks, including the doctrine of unlawful command influence. This doctrine operates to prevent and stop senior commanders interfering with investigations or prosecutions conducted by their subordinates. Operating at a low threshold, the doctrine does not require actual manipulation in order to be triggered; the appearance of manipulation will suffice. Accordingly, if a higher commander has created the appearance that he has pressured a witness, or has pressured a subordinate to close (or even open) an investigation, the doctrine of command influence will operate and that commander's authority to participate in the proceedings will be withdrawn. This may even serve to invalidate the whole proceedings.

In the US, there has always been a policy not to produce transcripts in cases where there has been an acquittal. If taken to appeal, a case will be heard before the Court of Appeal of the Armed Forces, which is staffed by civilians. The court of final resort is the US Supreme Court.

Professor Garraway

In the UK, courts martial are open courts. However, it may be more difficult to obtain transcripts, although courts martial proceedings are reported by court reporters, as they are not all transcribed automatically.

If a case is taken to appeal, the Court Martial Appeals Court (CMAC) is the civilian Criminal Division of the Court of Appeal sitting under another name. As a major court of record, the proceedings before the CMAC would be reported and publically available. Further, appeals from the CMAC are heard before the UK Supreme Court, demonstrating once more the overlap between

civilian and military justice systems.

The International Humanitarian Fact Finding Commission[10]

Professor Garraway

The International Humanitarian Fact-Finding Commission (IHFFC) was created in 1977 under Additional Protocol I to the Geneva Conventions. However, it only came into effect in 1991 following acceptance of the competence of the Commission by 20 States Parties. Although it has never, to date, been called upon, Parties to a conflict are entitled to request the Commission to investigate allegations of violations and to produce a confidential report to the Parties on the pertinent *facts*. The Commission is a *fact finding* body; it is responsible for investigating and ascertaining the facts. It does not set down legal standards, nor does it pronounce upon criminal responsibility.

One potential area in which the IHFFC could play an important role is in the context of investigating compliance with IHL by collective security organisations (such as NATO) during their military operations. With organisations like NATO taking on an increasingly active role (Libya, 2011; Kosovo, 1999) the question of compliance with IHL has become more pressing. It may even become necessary for such entities to subject themselves to appropriate review mechanisms. In this regard, NATO has had two 'warnings'. The first was in the case of Kosovo, where it found itself subject to an investigation by the Prosecutor at the ICTY. The second 'warning' came in the context of the UN Human Rights Council-appointed International Commission of Inquiry (ICI) investigation into the 2011 conflict in Libya.[11] As with ICTY's investigation, the decision by the ICI investigators to include within the scope of their investigation the conduct of NATO came as a shock to many within the Organisation.

It was suggested that if NATO is going to continue its engagement in such operations, it will not be sufficient for it to merely investigate itself. As an international organisation there will be an expectation that it will subject itself to independent, international scrutiny. One possible mechanism that may fill this gap is the IHFFC.

Responding to a question by a participating member of the audience asking what the reasons might be for the failure of any State to use the IHFFC, the statement made in response to the same question by a former legal adviser to the Russia-Georgia Inquiry was recalled: 'because you are four things that the international community does not want: you are independent, you are impartial, you are confidential and you are competent'. Whereas many international fact-finding inquiries appear to operate upon pre-determined outcomes or assumptions, the IHFCC does not operate on that basis. A further problem might be its very confidentiality; invariably, when an international inquiry is called upon by members of the 'international community', what it usually desired is public support for their position.

Would it not be more appropriate for military justice proceedings to be conducted in the State where the alleged offence took place?

Professor Garraway

In principle, it would be possible to conduct proceedings in the territorial state under the UK courts martial system, since such courts can sit anywhere. However, as a matter of practice, it would be extremely difficult to conduct a court martial in a theatre of conflict. Aside from the security issues, a number of significant logistical challenges stand in the way of this occurring on a regular basis, despite some obvious advantages. There has been at least one instance when a court martial was

[10] http://www.ihffc.org/

[11] UN HRC, Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, 1 June 2011, UN Doc A/HRC/17/44.

held in the territorial State: in 1991 in the Gulf. However the vast majority of cases arising from ordinary disciplinary offences committed in the Gulf were processed in the UK.

One participant agreed that it would be appropriate to locate court martial proceedings close to where the alleged offences took place to enable victim access and to make such proceedings visible to the local population. But to hold proceedings in neighbouring provinces or regions is unlikely to satisfy the affected communities. For example, in a country such as Afghanistan, where society is very much organised in a tribal manner, to move a courts martial proceeding from the affected region to a different region will have little additional benefits than to hold the proceedings in the UK. Other participants emphasised the security and logistical challenges including ensuring the safety and security of witnesses. Conducting courts martial proceedings in the affected region may be a PR exercise, but it would not be a very practical exercise in justice. Rather, it was suggested that the media could play an important role in ensuring that the cases were well publicised. Many of the participants agreed that conducting proceedings before the locally affected community would be ideal, but in practice, that would be almost impossible to achieve.

Professor Watts

The US periodically engages in a debate questioning the purpose and continuing relevance of the military justice system; why, when developments in transportation mean that a soldier can be repatriated within 24 hours, is it necessary to have this alternative system of justice, when the historical origins of the Courts Martial system in the US hail from a need to create a portable system of justice and the ability to conduct disciplinary proceedings. The same can be said of Military Commissions; when Winfield Scott belligerently occupied a portion of Mexican territory during the Mexican-American war, it was necessary for him to establish a system of justice. With US federal judges unwilling to travel to the occupied territory in order to provide extra-territorial jurisdiction, and the Mexican authorities unwilling to conduct the proceedings, he created a system of Military Commissions.

Against this historical backdrop, it can be questioned why the system continues to operate today when in the majority of cases, proceedings are now conducted upon return in the US. A number of courts-martial cases have been conducted in Iraq and Afghanistan and a US Military Judge makes regular trips to Afghanistan to preside over cases as part of his regular caseload. Nevertheless, the vast majority of cases are tried back in the US, and serious cases are always tried in the US. For instance, the case of Staff Sergeant Bales who went on a midnight killing spree in Afghanistan earlier in 2012 was sent back to the US within 48 hours of the massacre occurring. His Court Martial is likely to be conducted near Seattle, with victims providing testimony remotely and evidence will be transported to the US.

Having questioned whether the continuation of a separate system of justice can be justified today, it must be remembered that the Military Justice system is not the only system that predominantly operates away from place in which the impugned acts occurred. The majority of proceedings within the international criminal justice system are conducted in cities far removed from the communities and countries where the crimes occurred; the ICTY did not conduct its proceedings in the Former Yugoslavia, nor did the Special Court for Sierra Leone try Charles Taylor in Freetown. The International Criminal Court has conducted all of its cases to date at the seat of the Court in The Hague.

Competing jurisdiction: territorial v. active personality

One participant asked the speakers how their respective jurisdictions would respond if a territorial state requested the extradition of a member of their respective military personnel in order to prosecute them for alleged crimes that were not being prosecuted in the US.

Professor Watts

It has always been the policy of the US to never cede personal jurisdiction over US military personnel to other governments. In every single post-conflict situation, the US has aggressively sought the return of all US military personnel that were arrested by host State authorities, and the US aggressively negotiates Status of Forces agreements that are favourable to the US position that provide it with primary jurisdiction, even when as a matter of law, the host nation does in fact hold primary jurisdiction. Legal officers working with US forces stationed abroad are instructed to use all political and legal leverage available in order to get US soldiers back.

Professor Garraway

Professor Garraway observed that the policy in the UK is very similar to that in the US.