



Military Self-Interest in Accountability for Core International Crimes

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Ensuring Accountability for Core International Crimes in Armed Forces: Obligations and Self-Interest

Morten Bergsmo* and SONG Tianying**

1.1. Topic and Discourse Parameters

This anthology seeks to further an emerging discourse on ‘military self-interest in accountability’ for genocide, crimes against humanity, war crimes and aggression.¹ The topic was first conceptualised and introduced for a conference at Stanford University on 27 November 2012, co-organised by the University, the Centre for International Law Research and Policy (‘CILRAP’, through its department, the Forum for International Criminal and Humanitarian Law), and the UC Berkeley War Crimes Studies Center.² The location may have stimulated a confident sense of an innovative approach among conference participants. But it goes without saying that such a sentiment is not sufficient to trigger a broader, ongoing discourse on a new topic in the neighbourhood of well-established fields, such as professionalisation of armed forces, dissemination of international humanitarian law, and criminal justice for core international crimes. More is required to innovate in this borderland of sustained human endeavour over many decades. It was not difficult to find experts interested in the topic of ‘military self-interest in accountability’;

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¹ These categories of crimes are referred to as ‘core international crimes’ for the purposes of this anthology and the research project of the Centre for International Law Research and Policy of which this book is an integral part.

² For information about the conference, see the persistent URL <http://www.ficHL.org/activities/the-self-interest-of-armed-forces-in-accountability-for-their-members-for-core-international-crimes/>.

the response to the call for conference papers was very positive. But in the absence of published sources directly on the topic, the authors and editors have worked to make this anthology a catalysing discourse opener, involving perspectives from different military and legal traditions, regions, professions and generations.

With sufficiently representative and qualified participation, anthologies that come out of communitarian research projects³ have the potential not only to serve as a coherent knowledge product, but also to generate a wider sense of ownership in the discourse and, hence, a more genuinely global process of thought-fertilisation and -development. Both are important for a topic such as ‘military self-interest in accountability’. This is particularly the case in this period of time when the consensus around the international legal protection of civilians and those most vulnerable in conflict and transitions can and should be deepened.

In his foreword, William K. Lietzau – a distinguished lawyer of the United States military who also played an important role in the negotiations to set up the International Criminal Court (‘ICC’) – observes that of “all the international community’s well-intended endeavours to foster accountability and end impunity, none is more important than that addressed in this book”.⁴ He goes on to say that the “coin of persuasion is self-interest. And, as is explored in this volume, military self-interest in accountability has never been higher. Let us pray that it remains so”.⁵ We share Lietzau’s well-informed and noble aspiration, and have dedicated this volume to “those in armed forces who articulate military rationales for accountability for core international crimes”. Where a culture of military self-interest in accountability has not yet taken hold, persuasion efforts require such articulation.

³ CILRAP uses the terms ‘communitarian scholarship’ and ‘communitarian research’ about its research projects where, after an internal process of conceptualisation and definition of the research topic, it opens up the inquiry through a competitive, public call for papers; holds an expert conference in which anyone can register to participate without a fee; edits the conference papers and sometimes additional papers not presented at the conference; and publishes them in print and open access in a manner that treats all potential readers equally in terms of factors such as the timing of the release, format and page numbering, and other citation qualities.

⁴ See William K. Lietzau, “Foreword”, p. ix.

⁵ *Ibid.*, p. xiii.

The goal of this book is to increase our understanding of this articulation process and the contexts in which it is played out. It also provides information, reasoning and arguments that may aid the construction of military rationales for compliance and accountability, and, more widely, raises self-awareness and understanding within armed forces and governments of the existence and nature of military self-interests in accountability. These self-interests should be discussed, elaborated and made as familiar as bread-and-butter or rice in the diets of armed forces, to such an extent that they become an integral part of their decision-making, education and communication cultures. It may even be useful to generate pedagogical and work-process language around the self-interests, such as by numbering, mapping or classifying them, or by giving them popular labels or nicknames.

Section 1.3. below makes a tentative contribution by listing 26 formulations of self-interests under some initial headings. We invite further elaboration and adaptation of this taxonomy. Military professionals and training mechanisms around the world deserve and need to have access to a more comprehensive statement of these self-interests. This project can only represent a cognitive and knowledge-resource beginning of a broader effort, which should be conducted in languages additional to English, and not be limited to the Anglosphere and its usual extensions.

Neither the organisers of the Stanford conference nor the editors of this volume have imposed strict definitions on the authors and other participants in this research project. A nascent discourse should not be stifled and locked into established or hastily defined sub-categorisations. That does not mean that discourse actors were left without guidance and direction. The original concept paper of the Stanford conference⁶ started by placing the topic of military self-interest in accountability in the context of the evolution of criminal justice for core international crimes since the early 1990s. Accountability for war crimes, crimes against humanity and genocide has received increasing international attention since the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993. Internationalised criminal tribunals were subsequently estab-

⁶ CILRAP's Forum for International Criminal and Humanitarian Law, "The Self Interest of Armed Forces in Accountability for the Members for Core International Crimes", Hoover Institution, Stanford University, 27 November 2012 (http://www.fichl.org/fileadmin/fichl/activities/121127_Seminar_on_Self-Interest_of_Armed_Forces__draft_concept_and_programme__121125_.pdf).

lished for Rwanda, Sierra Leone, Cambodia, Iraq and Lebanon, and we have seen high-profile war crimes cases against former leaders such as Slobodan Milošević, Saddam Hussein and Charles Taylor. During the same period, a number of States have prosecuted their own citizens or refugees from war-affected countries before national military or civilian courts. Although there have been some controversies,⁷ the overall trend since the mid-1990s has been one of increased support for criminal justice accountability for flagrant violations of international criminal law.

The political and diplomatic rhetoric put forward in favour of criminal justice accountability for atrocities in the period from 1993 to 2015 frequently referred to the struggle against impunity and the argument that there can be no lasting peace without justice. But underlying this rhetoric has been an emphasis on the *obligation* to investigate and prosecute core international crimes under international law. International lawyers in government, academia and civil society have come out in considerable numbers to explain that governments must give effect to this obligation. And governments have indeed listened to the lawyers, facilitating a very high number of core international crimes trials in the period from 1993 to 2015, at a substantial cost. Needless to say, governments sometimes pursue national prosecutions in response to purely political interests or expectations. But both the language of international legal obligation and that of political expediency can act on military or civilian decisions to investigate or prosecute, as a raised ‘stick’: you must facilitate prosecutions because you are obliged to do so under international law; whether or not you consider criminal justice accountability to be in your interest, you have to facilitate it.

The environment often assumes that such perceptions of military self-interest or incentives are absent or weak. The lawyers in foreign ministries and military lawyers who carry the stick of legal obligation to prosecute are often the same experts who for years have trained or shaped the system of training for armed forces in international humanitarian law. The obligations to comply with and to prosecute violations of international humanitarian law easily blend together in one message from the

⁷ Such controversies have mostly concerned the relationship between peace processes and war crimes trials, the exercise of universal jurisdiction by national criminal justice systems, the delays in and cost of internationalised criminal justice, the reach of the jurisdiction of the ICC, the quality of the case-work of the ICC Office of the Prosecutor up until the time of writing, and the controversial first ICC Prosecutor, Luis Moreno Ocampo.

same messenger: you must ensure criminal justice accountability for members of the armed forces as a matter of international legal obligation binding on your country. Even when undertaken by the military itself, such accountability most often tends to be rationalised and imposed as a pure obligation.

This anthology and the research project of which it is part are not concerned with the stick of legal obligation, but the ‘carrot’ of military self-interest in accountability. Is such accountability in the self-interest of the armed forces concerned? Why do soldiers, officers and military leaders themselves often prefer such accountability, contrary to what may be assumed? Is it because accountability mechanisms distinguish them as military professionals who are uncompromised by such crimes? Or is it because of the way individual incentive structures (such as promotion) function? Are they concerned that the commission of war crimes may undermine the public’s trust in the military, increasing the security risks faced, and the size and cost of deployment in the area concerned? Or are they motivated by moral, ethical or religious reasons? Does accountability ensure higher discipline and morale and therefore secure more effective chains of command? Or is it because accountability gives them a political advantage vis-à-vis potential opponents? Does it promote a better public image? Could such accountability be particularly crucial when the armed forces are involved in efforts to establish a new regime in a post-conflict or -oppressive situation?

Such military self-interests in *accountability* for core international crimes will frequently apply equally to *compliance* with international humanitarian and criminal law as well. Compliance with criminal law is preferable to accountability for its violation. Suffice it to say that the former gives effect to the *Rechtsgut* protected by the criminal norm in question, while the latter seeks to remedy harm caused to that legally protected interest. This anthology does not exclude military self-interest in compliance from the analysis – that would not be practically sensitive at this stage of the discourse – but the emphasis is on the narrower phenomenon of self-interest in accountability for core international crimes. That does not mean that the point of the book is to emphasise punishment for such conduct, but rather to generate awareness of accountability also as a means of prevention or to mainstream accountability as a measure to prevent to the extent warranted by available knowledge or consensus.

The anthology encompasses both *individual* military self-interests in accountability for core international crimes, and *collective* self-interests of institutions, organisations or States. Interests will often apply to both, but many will differ between individual and collective actors. In this book the term ‘military self-interests’ includes both categories, including the State, its government or political-military leadership. Furthermore, the word ‘military’ does not exclude armed groups that are non-State actors or persons taking part in hostilities outside regular armed forces. As the discourse on the topic of the book is only starting at the time of writing, there has not been a need to restrict the treatment of this anthology to one of the two categories. Over time, the discourse should become more specialised, with knowledge-contributions by actors who can meaningfully take a more compartmentalised approach.

A further distinction could be made between *positive* and *negative* self-interests in accountability. In Chapter 10, the Indonesian scholar Kiki A. Japutra introduces this polarity, suggesting that the “expression ‘positive interests’ refers to the advantages that a State may acquire, and the unfavourable situations that can be avoided, by initiating prosecution. ‘Negative interests’, on the other hand, refer to the unavoidable responsibilities and obligations to prosecute perpetrators as stipulated in international law”.⁸ Used in this way, ‘negative interests’ could be synonymous with the term ‘obligation’ as used earlier in this section. We may therefore see that an emerging notion of ‘negative self-interests in accountability’ will take on additional meanings.

The term ‘self-interest’ is not intended to be juxtaposed to the values or *Rechtsgüter* on which international humanitarian and criminal law are based. It does not imply something morally inferior or less than ideal. Needless to say, the function and nature of ‘self-interests’ in accountability as used in this book may be entirely selfless. But the notion does also include what Christopher Mahony refers to in Chapter 11 as “realist self-interest”: “If armed forces refrain from sitting at the prosecuting table they remain potential prey on the ICC menu”,⁹ he writes, soberly arguing

⁸ See Kiki Anastasia Japutra, “The Interest of States in Accountability for Sexual Violence in Armed Conflicts: A Case Study of Comfort Women of the Second World War”, Chapter 10, p. 213.

⁹ See Christopher Mahony, “If You’re Not at the Table, You’re on the Menu: Complementarity and Self-Interest in Domestic Processes for Core International Crimes”, Chapter 11, p. 230.

that “the primary interest of armed forces in prosecuting core international crimes cases is realist self-interest in controlling who is prosecuted and who is not”, primarily “via early engagement in domestic prosecution of core international crimes cases”.¹⁰ More often than not, however, the authors in this first edition include “ethical and moral values, self-regulation and internal discipline of armed forces”¹¹ in their discussion of likely military self-interests in accountability. Chapter 8 by Marlene Mazel and Chapter 9 by Adel Maged show the promise this topic holds for meaningful contributions that also draw on religious sources as well as ethics and philosophy, in addition to more systematic work by the behavioural and social sciences that can increase our understanding of patterns of conduct in and by armed forces as regards compliance and accountability. This multidisciplinary potential should be tapped, as ownership in the discourse gradually broadens and it takes on a life of its own in different knowledge communities.

Moreover, with the expression ‘accountability for core international crimes’ the anthology does not distinguish between accountability in *military* or *civilian* criminal jurisdictions. Both forms of criminal justice are included, and authors discuss the topic with regards to both in the following chapters. In fact, the chapters by Elizabeth L. Hillman, Bruce Houlder, Christopher Jenks and Franklin D. Rosenblatt all primarily discuss military criminal justice, whereas the chapters by Arne Willy Dahl and Elizabeth Santalla Vargas explicitly analyse the merits of military and civilian criminal jurisdictions under the thematic shelter of military self-interest in accountability for core international crimes.

Neither is the term ‘core international crimes’ restricted to classifications under international criminal law proper (such as crimes against humanity or genocide). It also includes classifications under regular domestic criminal codes, whether military or civilian (such as murder or rape), as long as the underlying conduct speaks to core international crimes as well, and not only domestic or so-called ordinary crimes. Jenks’s chapter considers in detail how members of US armed forces are charged with offences under the US Uniform Code of Military Justice and not the core international crimes provisions in international legal instru-

¹⁰ *Ibid.*, p. 258.

¹¹ See Róisín Burke, “Troop Discipline, the Rule of Law and Mission Operational Effectiveness in Conflict-Affected States”, Chapter 15, p. 360.

ments. As long as the conduct in question may amount to core international crimes, it still falls within the scope of this anthology and research project.

The topic of military self-interest in accountability is intimately linked with the comprehensive practice and discourse of *professionalisation of armed forces*. In Chapter 5, Hillman shows that, in the case of the USA, “long before war crimes, crimes against humanity, genocide and aggression were acknowledged as core international crimes, the professionalisation of the army was paving the way for war crimes accountability”.¹² Importantly, she claims that the “professionalisation of the US Army increased its interest in accountability. It elevated principles, encouraged discipline and led to more ways to prevent, identify and prosecute violations of law”.¹³ Her proposition makes comparative and in-depth knowledge of the professionalisation of armed forces not only relevant but central to the study of military self-interest.

When we refer to accountability in the form of investigative and prosecutorial action, as opposed to training and capacity development action, the point should not primarily be to stress self-interests in accountability to ensure more prosecutions, but to help increase the awareness of self-interests in accountability during capacity development. In this respect as well, this book can only start a process. It seeks to do so under the broader, existing umbrella of the professionalisation of armed forces.

Lietzau’s foreword reminds us of the topicality of military self-interest in accountability as we begin to witness more clearly the stark limitations of international criminal justice as such. The former Director of the British Service Prosecuting Authority, Bruce Houlder, writes poignantly in Chapter 6 that the “United Kingdom has now entered a time of public inquiry and self-examination over the way it deals with crimes of abuse alleged against its military. It is going through a soul-searching time”.¹⁴ And the US Judge Advocate Franklin D. Rosenblatt warns in Chapter 13 that in “an Afghan society with ingrained beliefs about injustice at the hands of Western powers, perceived ‘double standards’ for ser-

¹² See Elizabeth L. Hillman, “Accountability in the 19th-Century US Army”, Chapter 5, p. 62.

¹³ *Ibid.*, p. 81.

¹⁴ See Bruce Houlder, “The Self-Interest of Armed Forces in Accountability for Their Members for Core International Crimes: Carrot Is Better than Stick”, Chapter 6, p. 87.

vice member crime likely fuel ambivalence or resentment about the American military mission”.¹⁵ Houlder reinforces the point that “the strategic consequences of resentment towards the perceived ‘double standards’ of powerful foreign forces are highly relevant to current operations. Indeed, if there is not to be visible evidence of a country taking action against those of their own military who commit crimes against citizens of another country, that of itself would fuel the counter-insurgency”.¹⁶ The issue of accountability for core international crimes has reached the highest levels of the UK and US defence agendas following very costly wars in Afghanistan and Iraq at the outset of the 21st century.

But the need to strengthen the effect of military self-interest in accountability is shared by peace support operations generally. As Roberta Arnold points out in Chapter 17, the “misconduct of a few servicemen may have a boomerang effect not only on the deployed troops, who may lose the hearts and minds of the host nation’s population, but also on the sending State’s government, which may lose the necessary political support for the continuation or deployment of similar operations”.¹⁷ Concerns for public opinion at home and in receiving States, as well as the dizzying financial commitment – and sometimes tragic loss of human life – of troop-sending States make the issue of compliance and accountability with international humanitarian and criminal law a precondition for success of peace support operations. “A flabby force, an ill-disciplined force or a military that makes its own rules, worse still mixes its own messages, and does not respect international norms, will in the end defeat itself in operations, and in the public mind”, warns Houlder.¹⁸ Against the background of statements such as these, it is hard to question the practical relevance of the ensuing discourse on military self-interest in accountability for core international crimes. It deserves proper attention and investment of thought and creativity.

As readers will see from the summary of the individual chapters in section 1.2., the anthology brings together a variety of backgrounds, including country, thematic and historical perspectives. It is hoped that this

¹⁵ See Franklin D. Rosenblatt, “Awakening Self-Interest: American Military Justice in Afghanistan and Iraq”, Chapter 13, p. 325.

¹⁶ Houlder, Chapter 6, p. 89, see *supra* note 14.

¹⁷ See Roberta Arnold, “Prosecuting Members of the Armed Forces for Core International Crimes: A Judicial Act in the Self-Interest of the Armed Forces?”, Chapter 14, p. 343.

¹⁸ Houlder, Chapter 6, p. 94, see *supra* note 14.

diversity of experience, insights and advice will increase the ability of the book to trigger an ongoing discourse.

1.2. Chapter Contributions

In Chapter 2, Arne Willy Dahl addresses the trend of “civilianisation” of military justice systems, a recurring theme of this anthology, and evaluates this phenomenon from the perspective of the armed forces’ long-term self-interest in having an effective accountability system. For soldiers, military justice may provide not only the hope of fair trial but also guidance and confidence after their sometimes challenging decisions in combat. For commanders, such jurisdictions may minimise the damage to reputation caused by individual violations and avoid unnecessary friction with the local population in the area where the force operates. Dahl then discusses three elements for an effective justice system: independence, military expertise and portability.

In Chapter 3, Richard J. Goldstone takes on what may in effect be a precondition for military self-interest in accountability, namely a sense of ownership of international humanitarian and criminal law. Goldstone notices the worrisome trend that such sense of ownership has declined in the past two decades. He then traces the origin and evolution of international humanitarian law to the military, before considering the US armed forces as an example of how the sense of ownership has fluctuated historically. The case is made for increased military ownership and, in turn, the awareness of military self-interest in accountability for core international crimes.

Chapter 4 discusses accountability in the context of international humanitarian law implementation. SONG Tianying examines two conditions for international humanitarian law implementation: the material capabilities and willingness of the military. The first condition envisions international humanitarian law implementation through a professional military organisation, where effective accountability plays a crucial role. The second condition concerns the self-interest of the military in complying with international humanitarian law. In this regard, competing interests in military decision-making are also considered. In light of the international efforts to fight impunity, SONG concludes that the military’s internal accountability for serious international humanitarian law violations

is key to reinforcing its professionalism and retaining essential values in the modern age.

In Chapter 5, Elizabeth L. Hillman approaches the topic of military professionalisation and accountability by revisiting the historical evolution of the 19th-century US Army. Through two wars – the Mexican War and the Civil War, which respectively introduced a new type of military court and a new code of law – Hillman highlights the role of accountability in enhancing operational effectiveness and political legitimacy. Over time, the military's desire to avoid excessive interference from civilian authorities has prompted their interest in professionalisation and self-accountability.

In Chapter 6, Bruce Houlder depicts the landscape of military self-interest in accountability, reflecting on his experience as the Director of the Service Prosecuting Authority ('SPA'). He notices a change of ethos following the structural reform of the SPA, which is now led by a civilian lawyer. This change is an attempt to increase transparency and legitimacy of the armed forces facing public scrutiny. Historical and contemporary cases show that accountability helps States – as well as the armed forces – to move forward. Houlder further emphasises that accountability is an inherent requirement of national and international rule of law and a means to maintain internal discipline.

In Chapter 7, Agus Widjojo places the accountability analysis within the socio-cultural context in which the military operates. He sheds light on how contextual elements affected the Indonesian Armed Forces' establishment and evolution. Taking the example of the accountability process for the 1999 East Timor crisis, Widjojo examines a non-judicial alternative, namely the Indonesia-Timor Leste Commission of Truth and Friendship, and its contextual analysis of accountability. He then argues that clearly identified responsibilities that factor in the socio-cultural context may better assist the military in future self-development and the prevention of atrocities.

Chapter 8 offers an Israeli perspective on the self-interest of accountability. Marlene Mazel establishes that Israel's history, core values and institutional features contribute to its commitment to the law of armed conflict. In this connection, she recalls the Eichmann trial and its legacy for universal jurisdiction. Mazel then follows the current jurisprudence of the Supreme Court of Israel regarding the legality of certain military con-

duct and the importance of national investigations of alleged violations of the law of armed conflict, where the Court seeks to prevent violations, educate troops and uphold the rule of law. Finally, the Turkel reports are used to illustrate the point that effective accountability mechanisms may affirm the credibility and international image of the military.

In Chapter 9, Adel Maged investigates the relationship between the law of armed conflict and the Islamic *Sharī'ah* as he contemplates the latter's impact on military self-interest in accountability. He asserts that Islamic *Sharī'ah* has established sound legal and moral foundations for preventing and punishing core international crimes, through ethical principles of military engagement and norms regarding the conduct of hostilities in times of war. Religious beliefs should thus provide incentives for accountability in the Islamic world. Meanwhile, Maged cautions against extremist groups' abuses of interpretations of Islamic teachings to justify their atrocities.

Chapter 10 undertakes a case study of the practice of using 'comfort women' in Japanese-occupied territories in Asia during the Second World War and the related accountability process. After assessing the attitude of the successive Japanese governments and positions taken by international and domestic courts, Kiki A. Japutra concludes that there has been a lack of will to address the crimes relating to comfort women. She goes on to illustrate the 'positive interests' for States to ensure accountability for serious crimes, which are different from mere legal obligation. Such interests include preventing undesirable incursion on sovereignty, building judicial capacity, enhancing the State's image and credibility, promoting reconciliation processes, and relieving the burden of guilt and shame of the younger generation.

In Chapter 11, Christopher Mahony considers the ICC's principle of complementarity and the military self-interest in conducting domestic proceedings on core international crimes. In the ICC's practice regarding Colombia, Libya, Kenya, Uganda and Guinea, Mahony notices that where States demonstrated the requisite due diligence and intent to pursue the crimes, they have successfully disabled ICC investigations. By contrast, more belligerent opposition to the ICC has led to further proceedings before the Court. Therefore it is in the military's self-interest to bring perpetrators of core international crimes to justice via domestic processes that could be politically controlled but still meet the complementarity threshold.

Chapters 12 and 13 offer insights into the balance of considerations in the US military's accountability practice. In Chapter 12, Christopher Jenks highlights the disparity in charges for similar violations of the laws of war committed by US service members and enemy belligerents. He explains the incentives behind such charging practice and poses the important question as to whether narrowing the accountability gap and increasing transparency may better serve the military's interest. In Chapter 13, Franklin D. Rosenblatt embarks on an empirical study of the effectiveness of the US court-martial system in Afghanistan and Iraq. He provides an overview of US court-martial practices in these two countries, drawing on numerous after-action reports, from which he concludes that the full-bore application of military justice is not viable in combat. Consequently, faulty accountability for military crimes has undermined counter-insurgency endeavours and diminished the armed forces' legitimacy. Rosenblatt suggests making military justice more portable and relevant to better serve strategic goals.

In Chapter 14, Roberta Arnold explores the possible self-interest in prosecuting serious international crimes, both for the military as an institution and for individual members of the military. From the institutional perspective, repressing serious international crimes benefits the military's image, corporate spirit and mission accomplishment. On an individual level, high-ranking officers may have an interest in the smooth exercise of command and control and in avoiding criminal charges as superiors, while ordinary soldiers may want to distance themselves from the misconduct of their comrades and work in a safe environment. Arnold also deems that prosecution will better serve the military's interest if carried out by a military judicial system that is independent, transparent and fair.

In Chapter 15, Róisín Burke provides a comprehensive overview of the interest of armed forces deployed on peace operations or other missions to ensure effective investigation and prosecution of serious international crimes committed by their members in host States. She draws lessons from past incidents and identifies a range of reasons for accountability: ethical and moral values, self-regulation and internal discipline (as cited in section 1.1. above), the image of the armed forces and their States, their relationship with host State populations and with their home public, retention of control by military justice systems, operational effectiveness and legitimacy, and the promotion of the rule of law.

The final chapter seeks to address the question of how the selection of jurisdictional forum for core international crimes may serve the military interest. Assisted by regional and international case law and practice, especially the Latin American experience, Elizabeth Santalla Vargas argues that civilian courts should try human rights violations, even if they are committed by military personnel. Similarly, civilian courts are generally more suitable to try war crimes, despite the controversies surrounding them in some contexts. The legitimacy and credibility of the jurisdictional forum may favour the military by minimising risks of superior responsibility and living up to the complementarity test used by the ICC.

1.3. List of Some Military Self-Interests in Accountability for Core International Crimes

The enumeration of self-interest in this section builds on the policy brief “Military Self-Interest in Accountability for Core International Crimes”,¹⁹ the concept paper for the Stanford conference, *The Self-Interest of Armed Forces in Accountability for their Members for Core International Crimes*,²⁰ and the presentation by Morten Bergsmo at that conference.²¹ The list is further enriched by self-interests identified in other chapters of this book. It is not exhaustive and is evidently tentative in nature. In an attempt to maximise the knowledge base from which interested actors may make their own choice of terms, the items listed below are not necessarily mutually exclusive.

As stated in section 1.1. above, the list invites further research, and will hopefully be extended and adapted to various national and institutional contexts. It also seeks to serve as an operational tool, including in training and other professionalisation efforts, as well as in discussions within armed forces as to whether investigation or prosecution should commence.

¹⁹ Morten Bergsmo, Arne Willy Dahl and Richard Sousa, “Military Self-Interest in Accountability for Core International Crimes”, in *FICHL Policy Brief Series*, 2013, no. 14, (<https://www.legal-tools.org/doc/396da7/>).

²⁰ See *supra* note 6.

²¹ On file with the authors.

I. The Values of Armed Forces or States

- Ensuring accountability is to uphold the value of the rule of law, as mentioned by Houlder (Chapter 6) and Burke (Chapter 15).
- Accountability may also uphold certain religious teachings, such as those of Islam, as elaborated by Maged (Chapter 9).
- Punishing core international crimes upholds historical lessons and maintains consistent practice and political stances, as in the case of Israel illustrated by Mazel (Chapter 8).
- Punishing core international crimes promotes and confirms ethics and morality.
- Military culture and core values are important in pursuing accountability, as discussed by Houlder (Chapter 6).

II. Domestic Legitimacy of Armed Forces

- Accountability may contribute towards the credibility and reputation of armed forces, and consequently to legitimacy in relevant constituencies and the international community.
- The image of the military may affect recruitment and material support from the State, as noted by Arnold (Chapter 14).
- Acknowledging past crimes may give closure to the victims and help the State and the armed forces to move forward, as Houlder points out (Chapter 6). Conversely, denial may invite the public to extend the scrutiny to other aspects of the State and the armed forces, as Japutra warns (Chapter 11).

III. Accomplishment of Counter-Insurgency, Peace-Building and other Missions

- In counter-insurgency operations legitimacy among the local population, or ‘hearts and minds’ acceptance, is important to mission accomplishment.
- Unpunished serious crimes may increase security risks, undermine the army’s political standing and feed into enemy propaganda. Unpunished crimes create the impression of ‘double standards’ and thwarts counter-insurgency efforts, as Rosenblatt warns (Chapter 13).

- If there is no accountability, there may be lower acceptance of deployed forces among the local population, requiring an increase in the number of troops deployed. This can become an argument of economy in favour of accountability.
- Accountability may be particularly crucial when armed forces are involved in efforts to establish a new regime in a post-conflict situation or a process of democratisation.
- When crimes are punished and known to be punished, it may dissuade the adversary from resorting to reprisals, and thus avoiding escalation.

IV. Military Self-Development and Professionalisation

- Analysis of the socio-cultural impact when identifying responsibility for atrocities may inform the military in future self-development and prevention programmes, as Widjojo argues (Chapter 7).
- Self-accountability is part of the professionalisation process of the military to avoid excessive civilian interference, as Hillman reveals (Chapter 5).
- Effective accountability helps define the armed forces as professionals with high standards.

V. Maintaining Internal Order and Discipline

- Effective investigation and prosecution of core international crimes have a pedagogical value which contributes to habitual compliance and the process of norm internalisation, as noted by Burke (Chapter 15).
- Order and discipline improve operational efficiency and avoid adverse effects on civilians.

VI. Pre-empting International Judicial Scrutiny

- Self-accountability may also pre-empt international scrutiny or interference, such as that of the ICC, as Japutra (Chapter 10), Mahony (Chapter 11) and Santalla Vargas (Chapter 16) note.

VII. Domestic Judicial Capacity Building

- Accountability at the national level is an opportunity to build domestic judicial capacity to try core international crimes, as Japutra sees it (Chapter 11).

VIII. Individual Military Personnel's Morale and Right to Justice

- It is in individual soldiers' interest to have a fair trial with fundamental judicial guarantees, by an effective justice system, as Dahl mentions (Chapter 2).
- Individual soldiers gain confidence and peace of mind as they may be assured, where appropriate, of the lawfulness of their combat decisions by an effective accountability system, as Dahl notes (Chapter 2).
- The morale and self-respect of the troops may be preserved. Loyal and law-abiding members of the military have a need to distance themselves from violations of core international crimes and a rightful expectation of seeing the case brought to justice.
- It is in the soldiers' interest to carry out their profession in an environment where they can rely on the proper conduct of their comrades and superiors, as Arnold contends (Chapter 14).

IX. Minimising Risks of Superior Responsibility

- Under the doctrine of superior responsibility, commanders may minimise the risks of their individual criminal responsibility for their subordinate's crimes by ensuring punishment, as noted by Arnold (Chapter 14) and Santalla Vargas (Chapter 16).
- The commission of core international crimes harms individual professional advancement and going clear of an effective criminal justice system provides protection against harmful suspicions.

1.4. Challenges Ahead

The scholar Mark Osiel has suggested that in a world where a strong International Criminal Court is not likely in the near future, more attention should be directed to "how military law can shape the professional soldier's sense of vocation and his understanding and cultivation of its intrinsic

sic virtues, its ‘inner morality’”.²² This ambitious statement points to real challenges ahead. In the context of this book, the “inner morality” of military law translates into those interests which the law has been made to serve. The “intrinsic virtues” of military law are those values or *Rechtsgüter* which the law protects. Upholding such values may indeed be virtuous. But the reasons why armed actors should comply with, and promote accountability for violations of, international humanitarian and criminal law include a broader range of military self-interests, some of which can wear the robe of morality and virtue. Cultivating the understanding among armed actors of these self-interests is as important as establishing and serving criminal justice accountability mechanisms for their violations.

To that end, the culture in armed forces is important. As Houlder observes: “The real danger is not the errant foot soldier. It lies in culture. Cultural values are set further up. Like corruption, the rot can start at the top, and develop its own self-protective carapace. That then becomes the greatest evil and is the hardest to eradicate. Seen in this way, the justification for a set of moral imperatives without which an individual simply will become unable to advance through ranks is an obvious aim”. The extent of compliance with, and acceptance of accountability for violations of, international humanitarian and criminal law may provide an accurate reflection of the prevailing culture within armed forces and their constitutional-political context.

The military and political leadership of armed forces matters a great deal to their institutional culture and their ability to foster cultivation of the understanding of soldiers and officers. Hillman expresses the view that the “[o]fficers’ role in the history of accountability in the US military is primarily as enforcers rather than as alleged violators of military laws or codes”.²³ Hopeful as this statement is, it may not always be the case, certainly not if we consider countries in general. In his foreword, Andrew T. Cayley reminds us that the genocide-like acts in Srebrenica in Bosnia-Herzegovina in the summer of 1995 were the acts of the regular Bosnian Serb Army, led firmly by its top commanders. Leaders of armed forces have a particular responsibility to increase the awareness of military self-interest in accountability for core international crimes.

²² See Mark Osiel, “Obeying Orders: Atrocity, Military Discipline and the Law of War”, in *California Law Review*, 1998, vol. 86, no. 5, p. 959.

²³ Hillman, Chapter 5, p. 63, see *supra* note 12.

The destructive capacity of the use of armed force is such that no stone should be left unturned to reduce its harmful consequences, in a never-ending common effort to humanise armed conflict, walking on a long bridge of decades of efforts to set standards, fine-tune institutional safeguards, develop training, and professionalise institutional culture. This book contributes to increased self-awareness of military self-interest in accountability. It cannot do more than to help open and activate a discourse space around this theme, tilting or opening the field, sowing seeds of new perspectives, ideas and concepts, through an exercise in communitarian scholarship.

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Military Self-Interest in Accountability for Core International Crimes

Morten Bergsmo and SONG Tianying (editors)

Is it in the enlightened self-interest of armed forces to have perpetrators of core international crimes brought to justice? This anthology adds the ‘carrot’ perspective of self-interest or incentives to the common rhetoric of ‘stick’ – legal obligations and political pressures. Twenty authors from around the world discuss why military actors themselves often prefer accountability: Richard Saller, Andrew T. Cayley, William K. Lietzau, William J. Fenrick, Arne Willy Dahl, Richard J. Goldstone, Elizabeth L. Hillman, Bruce Houlder, Agus Widjojo, Marlene Mazel, Adel Maged, Kiki A. Japutra, Christopher Mahony, Christopher Jenks, Franklin D. Rosenblatt, Roberta Arnold, Róisín Burke, Elizabeth Santalla Vargas, Morten Bergsmo and SONG Tianying.

The self-interests presented in this book are multi-dimensional: from internal professionalisation to external legitimacy; from institutional reputation to individual honour; from operational effectiveness to strategic stakes; from historical lessons to contemporary needs; from religious beliefs to aspirations for rule of law; from minimizing civilian interference to preempting international scrutiny. The case is made for long-term self-interest in accountability and increased military ‘ownership’ in repressing core international crimes. In his foreword, William K. Lietzau observes that of “all the international community’s well-intended endeavours to foster accountability and end impunity, none is more important than that addressed in this book”.

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