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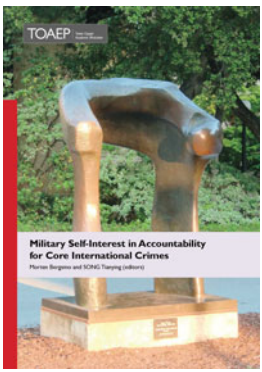
doi:10.1017/S1816383116000278

INTERNATIONAL REVIEW of the Red Cross

BOOK REVIEW



Military Self-Interest in Accountability for Core International Crimes

Morten Bergsmo and Tianying Song (eds)*

Book review by William J. Fenrick, a Canadian military lawyer and former Senior Legal Adviser for the International Criminal Tribunal for the former Yugoslavia.

The book under review, edited by Morten Bergsmo and Tianying Song, contains papers linked to a conference of the same name given at Stanford University in 2012. It opens a debate on a topic that is extremely important but has not been adequately addressed in the past. Reasons for this lack of prior discussion include the perception by most lawyers and legal scholars directly involved with international humanitarian law (IHL) that their task is one primarily of prevention rather than enforcement and, unfortunately, the relative dearth of court cases when compared with the large number of offences allegedly committed.

The core international crimes are genocide, crimes against humanity, war crimes and aggression. All members of the armed forces are, obviously, obligated to comply with applicable national and international criminal law, including an obligation not to commit any of the core international crimes. The most effective way to ensure such compliance is to adopt a preventive law approach. All members of the armed forces must receive sufficient training in the law to enable them to comply with its constraints in relatively straightforward situations. At lower levels in military organizations, this training will normally aim at teaching

* Published by Torkel Opsahl Academic EPublisher, Brussels, 2015. The reviewer contributed a foreword to the book under review but was not involved in the 2012 conference and did not see the book or any of the papers until after publication.

individual soldiers to comply with the basic principles of the law as embodied in codes of conduct or rules of engagement. At higher levels, officers may require a degree of formal training in the relevant law and also access to legal specialists who have both a degree of expertise in the law and an awareness of the realities of military operations. At all levels, both trainers and legal advisers must and do advise that compliance with the law should also comply with the principles of war, which mandate such things as focusing on the aim of the military operation and economizing on the resources used in particular operations to ensure adequate resources are available for other tasks. If the law is not to be merely hortatory, it must be enforced when breaches occur. Although the military should have a substantial self-interest in accountability for core international crimes, those who commit such offences may not always be subject to trial before military courts either because of limitations in the jurisdiction of such courts or because, for some core crimes such as genocide and crimes against humanity, the degree of involvement of higher-level persons may render military prosecution unrealistic.

The main text of the book consists of sixteen papers by sixteen authors (one of the editors both contributed a paper and co-wrote a second with the other editor). Of the authors, three appear to be former or presently serving US military lawyers, four appear to have had close involvement with their national military legal systems (Norway, the UK, Israel and Switzerland) and one is a thoughtful Indonesian general with a great deal of military experience. The other authors do not appear to have had direct involvement with their national military forces or their national military legal systems. By and large, the papers of those authors who have not had such direct involvement tend to adopt a more abstract and theoretical approach, while those who have had such involvement tend to be more concrete. This is not a rigid rule, however, as some of the papers by authors who have no apparent military background – notably the case study on comfort women by Kiki Anastasia Japutra and that by Róisín Burke on the impact of the rule of law on troop discipline and mission operational effectiveness in conflict-afflicted States – are admirably down-to-earth. Further, both theoretical papers and detailed case studies have their places in the developing dialogue on this subject.

The opening paper by Morten Bergsmo and Tianying Song, entitled "Ensuring Accountability for Core International Crimes in Armed Forces: Obligations and Self-Interest", is a thoughtful overview of the general issue and of the other papers in the book. It includes an extremely helpful but not exhaustive list of self-interests in ensuring accountability derived from the other papers and from the reflections of the two authors: ensuring accountability upholds the core values, both legal and moral, of the armed forces and of their State; it also enhances the domestic legitimacy of the armed forces, whereas a failure to ensure accountability may result in a loss of domestic support for a conflict; it fosters the accomplishment of counter-insurgency, peace-building and other missions by gaining support from the local population; it enhances military professionalism; it enhances discipline and control over the armed forces and fosters operational efficiency; at the national level, it pre-empts international judicial scrutiny; it

fosters the development of national or military judicial capacity; it contributes to the preservation of the morale and self-respect of individual soldiers; and it minimizes the risk of military commanders being held liable on the basis of the doctrine of superior responsibility. All of these self-interests are important.

The second paper, by Arne Willi Dahl, the long-serving and recently retired Judge Advocate General of the Norwegian Armed Forces, addresses the relationship between the trend toward the civilianization of military justice in many countries, which may be perceived to produce fairer trials, and the continuing need to ensure that adequate heed is paid to relevant military factors. This relationship is complicated, as the rights of the accused, the rights of victims and the brutal realities of combat must all be given due regard.

Marlene Mazel of the Israeli Ministry of Justice contributes a paper addressing the Israeli perspective on compliance with the law. She reviews the preventive measures taken by the Israeli Defence Forces to ensure compliance, and then goes on to review Israeli jurisprudence related to the enforcement of the law, a body of case law with which IHL experts outside of Israel are insufficiently familiar.

Three papers in the book address the experience of the US Armed Forces. The first of these, by Elizabeth L. Hilman, discusses accountability in the nineteenth-century US Army and focuses on US military experience during the Mexican War and the Civil War.

Christopher Jenks contributes an extremely helpful paper addressing how the United States charges its service members for violating the laws of war. He notes that the US approach is to charge its service members with analogous violations of the Uniform Code of Military Justice instead of with war crimes. There may be a variety of reasons for this approach, including a desire to minimize the optics of the case. Jenks is of the view that a war crime is a war crime and should be charged as such, whether the accused is a service member or a detainee. There is much to be said for Jenks' perspective, but one must also observe that if offences are charged as war crimes or as crimes against humanity, it may be necessary for the prosecution to prove several additional elements, such as the classification of the conflict or the context for commission of the offence, which have nothing to do with the alleged moral culpability of the accused but which may take up an inordinate amount of court time.

Franklin Rosenblatt provides an extremely concrete and practical analysis of how US military justice has been applied in Afghanistan and Iraq. He addresses all military justice issues and does not confine his paper to the prosecution of core international crimes. He does point out, however, that military commanders tend to be reluctant to have courts martial conducted in an operational theatre and they tend either to send the accused back to the United States for prosecution or to reclassify the alleged offence as one of lesser severity which can be handled summarily without recourse to the military judicial system. The general rationale for these tendencies is that the armed forces in theatre are too busy fighting a war, and this approach is not completely unreasonable. On the other hand, where crimes have allegedly been committed against civilians in

theatre or against enemy personnel, removal of the accused for trial at home gives local people the impression that US soldiers may commit offences against them with impunity, even when that perception is inaccurate.

As a former military lawyer, a former legal adviser at the International Criminal Tribunal for the former Yugoslavia, an amateur historian and a person very interested in concrete examples, the reviewer does have a few observations about additional avenues which might be explored to elaborate upon this extremely important subject. First, Germany is the country which, because of its history during the Second World War, has done most to have its soldiers internalize the need to comply with IHL. Reflections by German historians, military and academic lawyers and military officers on military self-interest in accountability might substantially enrich the discussion. Second, case studies related to particular incidents (such as the My Lai massacre), their treatment in the justice system, and their impact on the military and on the general population might also be helpful.

This volume should be of interest to all persons professionally involved with IHL, with international human rights law or with international criminal law because of the importance of the topic and the high quality of the papers. The armed forces do have a substantial self-interest in accountability for core international crimes, primarily because such accountability will contribute to individual and general deterrence. A second reason supporting accountability is that reported trials will help to flesh out the law in a manner which should contribute both to recognizing military realities and to furthering the fundamental purpose of IHL – that is, limiting human suffering in armed conflict. To use a domestic example, the general concept of negligence in motor vehicle cases is well established and elaborated upon in national legal cases. There is no such elaboration of the concept of proportionality in IHL cases, with the result that the application of the concept is far too subjective.