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Military Self-Interest in Accountability for Core International Crimes

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1. Introduction

Accountability for war crimes, crimes against humanity and genocide has received increased international attention since the establishment of the International Criminal Tribunal for the Former Yugoslavia in 1993 ('ICTY'). Internationalized criminal tribunals were subsequently established 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. At the same time, 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 and setbacks,[1] the overall trend since the mid-1990s has been one of increased support for accountability for flagrant violations of international criminal law.

The political and diplomatic rhetoric put forward in favour of criminal justice for atrocities frequently refers to the struggle against impunity and that there can be no lasting peace without justice. A common theme is the obligation to investigate and prosecute core international crimes[2] under international law – traditionally referred to as serious violations of the law of armed conflict. Sometimes a government may also pursue national prosecutions in response to purely political interests or expectations. Both the language of international legal obligation and that of politics can act on military or civilian decisions to investigate or prosecute, as a raised stick. This policy paper is not concerned with the stick, but the carrot: the self-interest of armed forces to take active part in bringing perpetrators to justice and with which forms of justice speak most effectively to such military self-interest.

From the beginning, prosecution and adjudication of war crimes was a matter for the military itself. Since World War II, the trend has moved towards the establishment of civilian jurisdiction and bodies for dealing with such cases. This has been clearly visible at the international level with international *ad hoc* tribunals like the ICTY and the permanent International Criminal Court ('ICC') established pursuant to the Rome Statute of 1998. Less visible, but equally important, is the tendency to transfer the national prosecution and adjudication of war crimes and other core international crimes from military to civilian jurisdiction when states update their legislation. This trend has also affected traditional military justice systems with regard to less serious offences, narrowing the jurisdiction of military courts or abolishing such courts altogether.[3]

Against this background we might ask whether it is in the interest of the military to become a passive object of scrutiny by the civilian society or whether it is time for the military to share in the 'ownership' of war crimes cases. Within the framework of this broad question, we may also pose a more pointed question: Is it in the enlightened long-term self-interest of armed forces that perpetrators of war

1 The controversies have mostly concerned the relationship between peace processes and war crimes trials, the exercise of universal jurisdiction, the delays in internationalized criminal justice, as well as the reach of the jurisdiction of the International Criminal Court (ICC). The setbacks include the weakness of a high number of the cases brought by the ICC Prosecutor, the first ICC Prosecutor's handling of the preliminary examination of the Article 12(3) declaration of the Palestinian Administration, and the allegations of lack of independence made against Judge Theodor Meron of the *ad hoc* Tribunals in the first half of 2013.

2 By 'core international crimes' in this policy brief is meant war crimes, crimes against humanity, genocide and aggression.

3 Military Jurisdiction Seminar Report 10-14 October 2001 at Rhodes, Recueil of the International Society for Military Law and the Law of War; Military Jurisdiction Conference Report 28 September – 2 October 2011 at Rhodes, Recueil of the International Society for Military Law and the Law of War (on file with the authors). See also the FICHL seminar on the topic 'Military v. Civilian Criminal Justice for Core International Crimes' held in Oslo on 23 August 2010, at http://www.fichl.org/activities/military-v-civilian-criminal-justice-for-core-international-crimes/, with a link to the seminar presentation made by Arne Willy Dahl.

crimes and other core international crimes are brought to justice?

Seen from the perspective of non-military actors, it may also be asked whether it is time to welcome a more active military participation in core international crimes cases, searching for a proper balance between independent judicial procedure embraced by civil society on the one hand, and efficient military justice on the other. One of the main weaknesses of internationalized criminal justice is its consumption of material resources and time. This shortcoming is challenging the future of such criminal justice for core international crimes, and could become an argument for justice with national military involvement where appropriate.

This policy brief distils keys points made during a seminar on *The Self-Interest of Armed Forces in Accountability for their Members for Core International Crimes* at the Hoover Institution, Stanford University, on 27 November 2013.[4] The views expressed in the brief are those of the authors and should be ascribed to other speakers or participants at the seminar. Seminar papers will be published by the Torkel Opsahl Academic EPublisher.

2. Elements of Military Self-Interest

2.1. Some General Considerations

In human affairs, raw force may decide matters in the short term, but not in the long. Longer term security depends on factors such as your standing among other people, their willingness to co-operate with you, to help you in trouble, and to abstain from taking advantage of your weaknesses. The same principles would seem to apply in relations between states and within a state, in particular when considering obedience to superiors and the stability of a particular regime.

For these reasons, qualities such as credibility and good reputation are considered essential in a modern world. This is all the more important for those tasked with upholding governmental authority internally, like the police, or externally, like the armed forces. Both entail enforcing law and order – nationally or internationally. In order to function effectively, such actors must be trustworthy. In order to maintain trust, malfunctions need to be remedied. In the case of core international crimes, this can only be done effectively by bringing perpetrators to justice in a credible and visible manner.

2.2. Operational Self-Interest

In order to function persuasively, a military unit has to maintain order and discipline among the troops. It is discipline that distinguishes an army from a mob. Each soldier must understand that he or she serves and is deployed in order to fulfil a mission, acting on the authority of commanders who derive their powers from the supreme executive, and within a framework of national and international law. These are important requirements.

When undisciplined behaviour by the military affects local civilians adversely, this is likely to create friction between the civilian and the armed force in question. The willingness to co-operate may diminish and persons that have been passive or indifferent to the military presence may commence subversive or active opposition activities. An adversary, with whom one hopes to come to terms, may become less willing to compromise and more determined to continue fighting. Depending on the nature of the mission, such developments can be particularly damaging and costly.

Many military operations are about counter-insurgency or have an element of it. In order to succeed, one has to maintain legitimacy – oftentimes in competition with the insurgents. Playing by the rules is a vital prerequisite for legitimacy. Any deviation from the rules should be in favour of the local civilians, not to their detriment.

When there has been a breach of rules, this has to be repaired by paying reparations to the aggrieved and showing that any personally guilty perpetrator is punished. This is important for small infractions, but even more important in case of war crimes and the like, which may have fatal consequences for the success of an operation if not addressed speedily and credibly.

2.3. Morale and Self-Respect

News about infractions is likely to spread among troops. When it comes to war crimes and other serious offences, modern mass media will seize any opportunity to distribute such information all over the world. Social media and crowd sourcing make further distribution even easier and virtually instantaneous. The enemy will gain a propaganda advantage and our own people will lower their gaze, having an unpleasant feeling of being associated with the crime.

Unfortunate incidents in recent years have in some cases led to a feeling of general distrust towards the military, in one case even the disbandment of the unit concerned. The loyal and law-abiding majority of officers and soldiers have a need to distance themselves from such acts and a rightful expectation of seeing the case brought to justice. This is the most enduring way to give them a sense of cleansing the stain of the crime from the military and, ultimately, from themselves. Effective accountability helps

4 For more information on this international expert seminar organized by the Forum for International Criminal and Humanitarian Law, Stanford University, and UC Berkeley War Crimes Studies Center, please go to http://www.fichl.org/activities/the-self-interest-of-armed-forces-in-accountability-for-their-members-for-core-international-crimes/.

define the armed forces as professionals with high standards.

2.4. Temptations That Should Be Avoided

A short-sighted commander may see the reputation of his or her unit best served by avoiding that unfavourable incidents become publicly known. If this is not possible, the commander may seek to downplay the gravity of the case by manipulating facts. It may also be tempting to focus on the individual 'rotten apple in the basket' rather than on possible systemic failures or responsibilities of commanders.

For such reasons, military investigation and prosecution should be anchored at a sufficiently high level. The likely alternative is loss of confidence on the part of the civilian society, leading in turn to diminishing powers of military justice.[5] Such developments may be the underlying cause of the broad trend towards 'civilianization' of military justice worldwide in recent decades. Seen against this background, it is in the longer term self-interest of armed forces to develop, maintain and run military justice systems that secure effective accountability, particularly in the most serious cases.

3. Special Military vs. Human Rights Considerations

The operational military need to show that those responsible for war crimes and other serious crimes affecting the civilian population are held accountable, in turn generates a need to try cases close to the site of the alleged crime. Justice must not only be done, it should also be seen to be done.

This can be supported by legal considerations on access to evidence, which is usually better the closer you are to the location where things went wrong. This is, however, not always feasible.

Military operations may be peace-keeping or war-fighting, often far from the homeland of the troops. In deployments far from the homeland, considerations of security and logistics can speak against trial on site. Such considerations weigh more when many persons have to be brought to the site in order to conduct a trial.

Complicating factors can be related to the rights of the accused. Depending on the national rules of criminal procedure, such rights could include the right to civilian defence counsel, right to introduce expert witnesses, right to lead character witnesses, and right to elect full rather than summary proceedings. In some cases the applicable national justice system may not be 'portable' at all.

When a case is brought for trial in the homeland of the armed force in question, the atmosphere may be different. The demands of military discipline are not felt as keenly far away from the battlefield. The interests and perspectives of victims and other affected locals are not as evident and not necessarily considered as seriously. The accused may, as the underdog or the scapegoat in the proceedings, receive undue sympathy from judges and others who are far removed from the consequences of his acts.

Human rights considerations have in many countries also led to limitation of military jurisdiction to military personnel and military offences proper. In modern military operations, however, the units are often served or supplemented by civilian contractors and local (often less disciplined) militia, who may be capable of committing war crimes or other crimes against locals. If military investigators, prosecutors and courts are barred from handling such cases, the end result may be impunity, which is contrary to both military and civilian interests and counterproductive to human rights values.

It can be argued that core international crimes are not of a strictly military nature and should, therefore, be dealt with only by civilian prosecutors and civilian courts. Many national codes define such crimes as civilian. Depending on the circumstances, this may well reduce the possibility of trying the case close to the site of the crime. It may also lead to confusion if the evidence is insufficient to convict for a war crime, but ample to convict for a military offence.[6] Since it may not be clear before the case has been investigated whether there is sufficient evidence for a core international crime or merely for a military offence, the powers to investigate should not be divided. In any event, civilian investigators may need the support of military experts.

4. Towards Some Conclusions

The need for civilian oversight and control speak against self-contained military justice systems. If, however, the need for civilian control and rights of the accused make it impossible to try cases on site, a valuable possibility is lost since the credibility and standing of the military mission can suffer. The solution may be that when cases that concern local victims are tried far from the site of the crime, information should be communicated systematically in order to avoid that an impression of impunity spreads.

Civilian investigators, prosecutors and courts may lack sufficient expertise on military matters and could need

5 This is arguably the case with the United States military, where the perceived lack of attention to, vigilance of, and concern for sexual abuse and discrimination within the military has led to increased acceptance of civilian oversight and adjudication.

6 Only some 10 % of the provisions in the Geneva Conventions and Additional Protocols are covered by the 'grave breaches' lists and considered war crimes in the 1998 Rome Statute for the ICC.

substantial support from military experts, depending on the nature of the case. If cases of core international crimes are handled by civilian bodies under the relevant national legal system, the military should offer any assistance needed and feasible to ensure that the case is handled properly and military issues are correctly understood.

5. Conclusions, Observations, and Recommendations

The following propositions apply not only to materially resourceful states that send troops abroad on peace-keeping or war-fighting missions, but are also relevant in other situations such as when a state is facing an insurgency or when insurgents aspire to statehood.

1. Undisciplined behaviour – be it within the military or towards outsiders such as prisoners of war and local civilians – is likely to undermine the morale of the troops and adversely affect their military performance.
2. In modern conflicts, success and mission accomplishment will more often than not depend on the legitimacy, credibility and general standing of the troops in the eyes of local civilians, armed partners, and other actors in the area.
3. Depending on the gravity of the case, offences must be met with disciplinary action or criminal prosecution in order to maintain military performance and standing, thus ensuring mission accomplishment.
4. Any attempted cover-up or downplaying of offences is likely to backfire, damaging the reputation of the forces far more severely than immediate open disciplinary or penal action.
5. In order to show that justice is being done, it is preferable to hold trials in cases that affect local civilians near the site of the alleged crime when feasible. States should consider whether their systems for justice in military cases ought to be adjusted in order to accommodate trials in foreign countries when their troops are deployed.
6. If offenders are brought back home for trial, information should be made available to affected persons in the conflict area where the crime took place.
7. The jurisdiction over core international crimes and military offences should not be divided more than necessary, particularly in the investigation phase when it may be unclear whether the conduct in question can be classified as military offences, international crimes or neither.
8. Any court adjudicating cases concerning military operations should possess or have immediate access to sufficient expertise on military affairs.
9. If military justice systems that are seen to serve the legitimate interests of the armed forces well are to be preserved in the long run, they should be sufficiently transparent and have adequate connections to the general civilian justice system to retain the confidence of the general public.

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