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Military Self-Interest in Accountability for Core International Crimes

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Troop Discipline, the Rule of Law and Mission Operational Effectiveness in Conflict-Affected States

Róisín Burke*

> After the organization of troops, military discipline is the first matter that presents itself. It is the soul of armies. If it is not established with wisdom and maintained with unshakeable resolution you will have no soldiers. Regiments and armies will only be contemptible, armed mobs, more dangerous to their own country than to the enemy.[1]
>
> *Maurice de Saxe*

The international community has an interest in re-establishing the rule of law in conflict-affected, failing or failed States, given the potential impact of regional instability on international peace and security. Tasks relating to re-establishment of the rule of law, the protection of civilians and the promotion of human rights are increasingly inserted in peace operation mandates and the mandates of other multinational forces. Peacekeeping and other multinational military operations are gradually more multidimensional in nature and require frequent civilian-military engagements. Soldiers are often required to conduct a broad array of tasks which may include disarmament, demobilisation and reintegration of former combatants; economic and social development activities; promotion of human rights; security sector reform; reconstruction and capacity building activities with security sector and governance actors; counter-insurgency opera-

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1 Marshal Maurice de Saxe (1696–1750), *My Reveries Upon the Art of War*, first published in 1757, quoted in John Fisher, "Worst Case Scenario", Brief to the Special Advisory Committee on Military Justice and Policing, Office of the Judge Advocate General, Department of National Defence, Ottawa, 1997, p. 4.

tions; addressing sexual and gender-based violence; and even transitional administration. A component of this often includes working with host State armed forces in relation to security sector reform. This may involve activities aimed at increasing professionalism, knowledge of and adherence to human rights standards and international humanitarian law, and ensuring accountability of host State armed forces. Where the international community or foreign States deploy armed forces to conflict-affected States, these forces must themselves be governed by the rule of law if they are to be effective.

This chapter will reflect on why effective investigation and, where appropriate, prosecution of military personnel alleged to have committed international and other serious crimes in host States are in the interest of armed forces deployed on peace operations or other missions, and their sending States. Such reasons may include ethical and moral values, self-regulation and internal discipline of armed forces, the image of the armed forces and their States, their relationship with host State populations and indeed their home public,[2] erosion of military justice systems,[3] operational effectiveness and legitimacy, and the promotion of the rule of law.[4] This applies both to peacekeeping and other military operations.[5]

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2 For instance, Philip Alston highlighted the failure of the US to conduct on-site trials of soldiers committing serious crimes in Afghanistan and to convey any outcomes to local Afghanis. UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Philip Alston: Addendum: Mission to the United States of America*, 11th session, Agenda Item 3, UN Doc. A/HRC/11/2/Add.5, 28 May 2009, p. 24, paras. 49–50.

3 See, for example, Commission on Human Rights, Issue of the Administration of Justice through Military Tribunals, 55th, Provisional Agenda Item 3, E/CN.4/Sub.2/2003/4, 27 June 2003, p. 16–17.

4 See Franklin D. Rosenblatt, "Non-Deployable: The Court-Martial System in Combat from 2001 to 2009", in *The Army Lawyer*, 2010, vol. 448, pp. 27–28. As stated by Michael Gibson: "In other words, it is necessary to be both principled and pragmatic. In military parlance, states and their armed forces will need to be persuaded that adherence to such principles will be a 'force-multiplier' rather than an 'ivory tower' obstacle to operational effectiveness". Michael Gibson, "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity", in *Journal of International Law and International Relations*, 2008, vol. 4, no. 1, p. 13.

5 General Assembly, *Report of the Special Committee on Peacekeeping Operations 2011 Substantive Session*, New York, 22 February – 18 March and 9 May 2011, 65th session, UN Doc. A/65/19, para. 48.

15.1. Instances of Crimes and Troop Discipline

Crimes have been committed in the context of military operations worldwide, be they war crimes, crimes against humanity, murder, detainee mistreatment, kidnapping, assault, sexual offences both within and outside the military, sexual exploitation, trafficking and smuggling, among others. Such crimes are often perpetrated by State armed forces at home and in the context of many forms of military deployments, including in peace operations, counter-insurgency operations and situations of armed conflict.

For instance, in recent years, cases involving crimes by US and British troops in Afghanistan and Iraq have been highly publicised and detrimental to State operational objectives. The torture, sexual humiliation and general mistreatment of Abu Ghraib detainees is one of the most prominent cases of serious human rights violations by soldiers in recent times. The incidents have had deleterious effects on the US's public image at home, in Iraq and abroad. This, in turn, has had a negative impact on the US war effort in Iraq, not least by alienating the public, but also with images of the degradation and abuse of detainees being manipulated and used as propaganda against the US by insurgents and others. As stated, the support of local populations is of strategic importance in all types of military deployments, including counter-insurgency and peace operations. In a report conducted on abuses in Abu Ghraib it was noted that for young soldiers in particular, "it is important that standards of behaviour be *clear and explicit* throughout all phases of an operation and that *leaders at all levels represent and reinforce those standards*".[6]

In March 2006, in the *Mahmoudiyah* case, five US soldiers deployed to Iraq were involved in the abhorrent rape and killing of a 14-year-old Iraqi girl. The soldiers spotted the girl at a checkpoint. While drinking, the soldiers planned to enter the girl's home − where they knew only one male family member was present − in order to rape her. They murdered the girl's parents, her six-year old sister and the girl herself, subsequent to gang raping her. The girl's body was then burned in an effort to destroy evidence. The soldiers were sentenced to between five and

[6] Paul Bartone, "Lessons of Abu Ghraib: Understanding and Preventing Prisoner Abuse in Military Operations", in *Defence Horizons*, 2008, no. 64, p. 1 (emphasis added), available at http://permanent.access.gpo.gov/LPS105635/LPS105635/www.ndu.edu/CTNSP/docUploaded/DefenseHorizon64.pdf, last accessed on 31 January 2014.

100 years' imprisonment.[7] The incident led to calls for revenge by insurgents and others. Allegedly in retaliation for the rape and killings, insurgents beheaded two US soldiers in the same vicinity and threatened to kill others.[8]

The potential implications crimes have on the armed forces, their image and how they operate, are similarly illustrated in the Somali incident involving the murder of Shidane Abukar Arone, a Somali teenager, by Canadian soldiers on 16 March 1993. The teenager was raped with a baton and then brutally beaten to death while in the Canadian soldiers' custody. The Somalia Inquiry was commissioned by the Canadian government subsequent to this and other abuses of civilians, including children, by members of the Canadian Airborne Regiment while deployed on the UN peace operation in Somalia during the 1990s. The commissioners noted that poor leadership, lack of accountability, problems with the chain of command, poor discipline, inadequate selection process of soldiers deployed, inadequate training and theatre readiness, insufficient planning, lack of transparency and flaws within the military justice system all contributed to the conduct of the soldiers in question. This led to an overhaul of the military justice system and placed the military and its culture under public and government scrutiny − a process lasting for years.[9]

The hyper-masculine culture prevalent in military environments is well recognised and may well contribute to some soldiers engaging in

7 "'I didn't think of Iraqis as humans,' says U.S. Soldier who Raped 14-year-old Girl before Killing her and her Family", in *Daily Mail*, 21 December 2010, available at http://www.dailymail.co.uk/news/article-1340207/I-didnt-think-Iraqis-humans-says-U-S-soldier-raped-14-year-old-girl-killing-her-family.html, last accessed on 5 December 2014; Associated Press, "Former US Soldier Found Guilty of Raping and Shooting Iraqi Girl: Steven Dale Green Faces Possible Death Sentence for Fatal Attack on 14-year-old after Killing her Parents and Sister", in *The Guardian*, 8 May 2009.

8 John M. Hackel, "Planning for the 'Strategic Case': A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine", in *Naval Law Review*, 2009, vol. 57, pp. 239, 257–58; Julian E. Barnes, "US Sees Possible Links Between Incidents in Iraq", in *Los Angeles Times*, 5 July 2006.

9 Capstick notes, "institutional reform has been focused on the military justice system, 'mechanisms of voice' such as the CF Ombudsman, the Military Police, education and training, and CF command and control procedures". Colonel M.D. Capstick, "Defining the Culture: The Canadian Army in the 21st Century", in *Canadian Military Journal*, 2003, vol. 3, no. 1.

sexual harassment, violence or other misconduct.[10] There is a high rate of sexual crimes both within many national militaries and in the context of overseas deployments. Indeed, sexual exploitation and abuse of civilians by UN peacekeepers have proved a problematic issue for the UN for many years. Peacekeepers have been accused of rape, sex trafficking, rape disguised as prostitution, sexual abuse of minors, among other acts of sexual exploitation, violence and abuse.[11] This conduct has physical and psychological consequences for victims, not least the spread of HIV/AIDS.[12] Despite UN efforts aimed at promoting eradication of sexual exploitation and abuse by its peacekeepers they continue to be a problem. Part of the problem is the perception of impunity among peacekeepers and the lack of criminal accountability.[13]

Sexual misconduct by military personnel against other military personnel and civilians at home is also a problematic issue for some militaries. These types of incidents have spurred negative public and media reactions in recent years in, for example, the US and Australia. In the Australian case, *Re Colonel Aird*, Justice McHugh stated that "the prohibition against rape goes to the heart of maintaining discipline and morale in the Defence Force. Rape and other kinds of sexual assault are acts of violence. It is central to a disciplined defence force that its members are not persons who engage in uncontrolled violence".[14] Moreover, he observed that other defence force personnel are likely to be reluctant to serve alongside soldiers perpetrating such acts of abuse.[15]

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10 Major General C.W. Orme, *Beyond Compliance: Professionalism, Trust and Capability in the Australian Profession of Arms*, Report of the Australian Defence Force Personal Conduct Review, Australian Government, Department of Defence, 2011, para. 31 (https://www.legal-tools.org/doc/a4486a/); Martin Friedland, *Controlling Misconduct in the Military*, Study Prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Minister of Public Works and Government Services Canada, Ottawa, 1997, p. 6 (https://www.legal-tools.org/doc/ed9d6a/).

11 See generally Róisín Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law*, Brill, Leiden, 2014.

12 Harley Feldbaum, Kelly Lee and Preeti Patel, "The national security implications of HIV/AIDS", *PLoS Medicine*, 2006, vol. 3, no. 6; Burke, 2014, pp. 6–7, see *supra* note 11.

13 See Burke, 2014, see *supra* note 11.

14 *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311, para. 322.

15 *Ibid*.

The involvement of UN peacekeepers in sex trafficking and patronising brothels where trafficked victims were held in the Balkans in the 1990s has been well publicised. The services of prostitutes fund and thereby incentivise trafficking of women and children.[16] This brought the UN mission as a whole into disrepute, undermining trust in the mission and its credibility with the local populace. Such conduct has been prevalent in many UN operations. Moreover, peacekeepers' patronage of brothels containing trafficking victims empowers or feeds into organised crime in already fragile and conflict-affected regions. These activities often occur alongside UN efforts to re-establish the rule of law.

In 2011, for example, an alleged gang rape of an 18-year-old Haitian boy by Uruguayan marines deployed on the UN operation in Haiti was videoed on a mobile phone and disseminated widely across the Internet and elsewhere. Four of the five marines involved were convicted of acts of "private violence" which carried a light penalty of between three months and three years' imprisonment.[17] The case, along with other instances of sexual abuse and exploitation by UN peacekeepers, in addition to the outbreak of cholera attributed to the UN in Haiti, has given rise to widespread discontent among the local population.[18] There have been numerous protests across Haiti demanding that peacekeepers and the UN be held to account, and that ultimately the UN operation should leave Haiti. Sexual offences have led to the repatriation of whole contingents, which has obvious operational implications. In the Haitian case, for example, 114 members of a Sri Lankan UN military contingent were repatriated from Haiti in 2007 in response to allegations of sexual exploitation and abuse of minors. It is not apparent that any individuals were subsequently held to account.[19]

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16 Geneva Centre for the Democratic Control of Armed Forces, "Peacekeepers and Sexual Violence in Armed Conflict Report", 1 August 2007, p. 175.

17 Kim Ives, "Haiti: Uruguay Will Withdraw from MINUSTAH, President Says Beginning of End of UN Occupation of Haiti", in *Global Research*, 30 October 2013, available at http://www.globalresearch.ca/haiti-uruguay-will-withdraw-from-minustah-president-says-beginning-of-end-of-un-occupation-of-haiti/5356424, last accessed on 10 December 2014.

18 Associated Press, "Uruguay will Question Haitian about Alleged Abuse", in *Idaho Press-Tribune*, 11 January 2012, available at http://www.idahopress.com/news/world/uruguay-will-question-haitian-about-alleged-abuse/article_3b81f392-3d88-11e1-9343-001cc4c00fca.html, last accessed on 10 December 2014.

19 Department of Peacekeeping Operations, United Nations, "Human Trafficking and United Nations Peacekeeping", Policy Paper, March 2004, para. 6, available at http://www.un.org/

15.2. Military Culture and Operational Environment

Military society is a highly complex, idiosyncratic set of multilevel social interactions.[20] It relies to some extent on group cohesion, institutionalism, parochialism, institutional hierarchies, regulation, structure, disciplinary control, bonding and camaraderie.[21] Major General C.W. Orme led a review of the Australian Defence Forces regarding deviations by armed forces personnel from acceptable norms of behaviour − in this case unacceptable sexual behaviour by Australian Defence Force soldiers. It was observed that soldiers often relate to 'insider' and 'outsider' identities. Within the military it posits that there is "a 'tight' culture in which shared identity, clear norms and role requirements, strong sanctions for deviations, and social stratification are exercised in a predominantly male culture".[22] This leads to the creation of 'insiders' and 'outsiders' in cultural and social interactions, wherein insiders dominate and outsiders are marginalised. 'Outsiders' may be women, ethic minorities, the local population where deployed abroad, homosexuals or others.[23] The review notes that in this dynamic "[t]he intersection of flaws in a masculine military culture, together with instances of alcohol-fuelled inhibition, has sometimes led to instances of unacceptable behavior".[24] This is why socialisation of positive norms or standards of conduct is of essence lest individuals succumb to negative group behaviour. As pointed out by a study by the International Committee of the Red Cross ('ICRC'), while individuals may not be killers, in a militarised group environment they may become part of the machinery that is. Greater value may be placed by individual soldiers on their group than others. The ICRC study finds that "when an-

womenwatch/news/documents/DPKOHumanTraffickingPolicy03-2004.pdf, last accessed on 10 December 2014; and Committee Against Torture, *Sri Lanka: Concluding Observations of the Committee Against Torture*, UN Doc. CAT/C/LKA/CO/3-4, 25 November 2011, para. 23.

20 Eugene R. Fidell, Elizabeth L. Hillman and Dwight H. Sullivan (eds.), *Military Justice Cases and Materials: 2010–2011 Supplement*, LexisNexis, p. 6 (https://www.legal-tools.org/doc/dae5fe/).

21 See also Joseph L. Soeters, Dona J. Winslow and Alise Weibull, "Military Culture", in Giuseppe Caforio (ed.), *Handbook of the Sociology of the Military*, Springer, New York, 2006, p. 237.

22 Orme, 2011, para. 8, see *supra* note 10.

23 *Ibid*.

24 *Ibid*. See also Soeters *et al*., 2006, p. 253, see *supra* note 21.

other group is declared to be an enemy, these tendencies become all the more acute. Thus, it is quite easy for the group to slide into criminal behaviour and perhaps even to end up promoting and encouraging it".[25]

Some have noted that another contributory factor to misconduct in military contexts is that soldiers deployed are predominantly male youths, between the ages of 18 to 25, who may have a greater propensity to engage in risk-taking behaviours.[26] These young soldiers are often deployed in dangerous environments and are given increasingly complex tasks having operational importance on multiple levels, including in rebuilding the rule of law in conflict-affected States. Young soldiers are often required to spend prolonged periods in volatile environments in small groups, while having little contact with family support structures. Members of these groups are sometimes killed while on duty.[27] Some may perceive a need, even at a subconscious level, to engage in ritualised behaviour to feel part of a group seen as the dominant group. Others may have difficulty coping. When such behaviour is negative it may have broader impacts on the group, as was seen in the cases of the Canadian Airborne Regiment in Somalia, Abu Ghraib, sexual abuse and exploitation in the context of UN operations, the mass killing of 24 Iraqi civilians in Haditha in 2006 by US forces,[28] among numerous examples.

Discipline is foremost ensured through social interactions and group dynamics within military environments, and the relationship between soldiers and their superiors. Training, strict orders and regulation of combatants, and effective criminal and disciplinary sanctions for breaches of standards, as pointed to by the ICRC study, are the most effective means of guarding against international humanitarian law violations by soldiers.[29] This is often also the case with respect to other forms of criminal behaviour and rights violations.

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25 Daniel Muñoz-Rojas and Jean-Jacques Frésard, "The Roots of Behaviour in War: Understanding and preventing IHL violations", in *International Review of the Red Cross*, 2004, vol. 853, p. 194.

26 Orme, 2011, see *supra* note 10.

27 *Ibid*., para. 63.

28 Michael Duffy, Tim McGirk and Bobby Ghosh, "The Ghosts of Haditha", in *Time*, 4 June 2006.

29 Muñoz-Rojas and Frésard, 2004, p. 203, see *supra* note 25.

Lack of morale has been cited by a number of commentators as a contributory factor to lack of discipline. Feeding into this may be inadequate living conditions. This was pointed to by Prince Zeid, the United Nations High Commissioner for Human Rights, in the context of UN peace operations, when he found that lack of recreational facilities contributed to sexual exploitation and abuse by peacekeepers. Living and operational conditions were also likely a factor in Somalia when Canadian troops committed violations against Somali civilians. In an interview conducted by the author with a senior official of an international organisation working in Somalia, the interviewee noted that the lack of facilities, poor living standards and absence of recreational opportunities for African Union troops in Somalia, in addition to a dangerous operational environment, were likely to have contributed to the level of sexual exploitation and abuse by African Union troops of Somali civilians.[30]

15.3. Military Operations, Hearts and Minds

As Don Carrick has noted, "[t]he soldier of the future is likely to be not only on occasion soldier, policeman, 'hearts and minds' ambassador or general diplomat, but sometimes all of them alternately on a single occasion".[31] The protection of civilians is often a major purpose of multinational military operations. When soldiers deployed on peace or other operations commit serious criminal offences, human rights violations or violations of international humanitarian law in mission host States, it undermines efforts to promote rule of law, the protection of civilians and the ability to carry out mission mandates. Failures to hold soldiers to account may have broader implications for the mission's relationship with the local population, in creating perceptions of impunity and embedding distrust.[32] This is also the case where individuals are repatriated home, often never to face trial or to face what might be perceived as sham trials conducted for the

[30] Personal interview, August 2014, on file with the author.

[31] Don Carrick, "The Future of Ethics Education in the Military: A Comparative Analysis", in Paul Robinson, Nigel de Lee and Don Carrick (eds.), *Ethics Education in the Military*, Ashgate, Burlington, VT, 2008, p. 191.

[32] For example, civilians in Haiti staged protests requesting the UN to leave in response to allegations of sexual crimes by peacekeepers against minors and lack of transparent and effective investigation and prosecution of such. Associated Press, 2012, see *supra* note 18.

purpose of shielding the soldier.[33] Failures to hold soldiers to account put other military personnel at risk of retaliation. Additionally, there is a risk of repeat offences. This was emphasised by Judge Jeff Blackett in the recent *Blackman* case before British courts involving the murder of an unarmed injured Taliban member by a British Royal Marine.[34] Judge Blackett stated:

> Your actions have put at risk the lives of other British service personnel. You have provided ammunition to the terrorists whose propaganda portrays the British presence in Afghanistan as part of a war on Islam in which civilians are arbitrarily killed. That ammunition will no doubt be used in their programme of radicalisation. That could seriously undermine the reputation of British forces and ultimately the mission in Afghanistan […] committing this sort of act could well provoke the enemy to act more brutally towards British troops in retribution or reprisal.[35]

Moreover, he stated that:

> Hearts and minds will not be won if British service personnel act with brutality and savagery. If they do not comply with the law they will quickly lose the support and confidence of those they seek to protect, as well as the international community. [...] You treated that Afghan man with contempt and murdered him in cold blood. [...] In one moment you undermined much of the good work done day in and day out by British forces.[36]

Negative media coverage with respect to a State's armed forces may have implications for internal morale of troops and affect their relationship with the public at home. As noted by John M. Hackel, the fact is the media, and indeed others, are more likely to publicise cases of human rights abuses by armed forces that have not been adequately dealt with by

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[33] Timothy McCormack, "Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their 'Own Nationals' for International Crimes", in Mark Lattimer and Philippe Sands (eds.), *Justice for Crimes Against Humanity*, Hart Publishing, Oxford, 2003, p. 107.

[34] *R v. Sgt Alexander Wayne Blackman*, Court Martial, Case Ref: 2012CM00442, 6 December 2013, Sentencing Remarks by HHJ Jeff Blackett, Judge Advocate General ('Blackman case').

[35] *Ibid*.

[36] *Ibid*.

States than instances promptly investigated and prosecuted.[37] Moreover, the media and others often place greater focus on what has been done badly than positive activities of armed forces in the context of overseas deployments. This has strategic and operational consequences. Soldiers have tended to be prosecuted with greater frequency where the media put significant pressure on States and the armed forces.[38]

In the current information age, access to the media and other information is readily available and easily disseminated both in home States, across the globe, and in areas of military deployment, via the Internet, television, radio and other sources. Moreover, the spread of information and propaganda is now rapid and easily subject to manipulation.[39] This has been apparent, for instance, in relation to US counter-insurgency operations in the context of its war on terror, where serious crimes by US soldiers have been used by insurgents to villainise the US.[40] Insurgents tend to rely on popular support. They often seek to delegitimise and demonise counter-insurgents. In essence, this requires 'winning hearts and minds'. Counter-insurgents, generally represented by States, tend to be held to a higher moral standard than that which applies to insurgents. It is to the strategic advantage of those involved in counter-insurgency efforts, or other types of military operations, to build good relationships with local and international media and encourage them to report positively on their activities.[41]

Commentators have highlighted the frequent complete failure to convey to local populations the progress and results of any investigations into alleged crimes by soldiers, including serious criminal offences, some of which may amount to war crimes. Local populations often have no opportunity to attend courts martial or any other form of hearing, and they often never hear of case outcomes.[42] This creates perceptions of impunity, ambivalence and double standards. This was highlighted, for example, by

37 Hackel, 2009, pp. 255, see *supra* note 8.

38 *Ibid*., pp. 254–55.

39 *Ibid*., p. 257.

40 See, generally, Dale Walton, "Victory through Villainization: Atrocity, Global Opinion, and Insurgent Strategic Advantage", in *Civil Wars*, 2012, vol. 14, no. 1, pp. 123–40.

41 See, generally, US Department of the Army, *Field Manual, Counterinsurgency*, US Department of Army, Washington, DC, 2006.

42 Rosenblatt, 2010, p. 26, see *supra* note 4.

the Special Rapporteur on extrajudicial, summary and arbitrary executions, Philip Alston, in relation to cases against US soldiers for unlawful killings in Afghanistan and Iraq. Alston notes that in some instances there was a lack of adequate investigations, use of administrative procedures where a criminal prosecution should have ensued, and inadequate or lenient punishments.[43]

Today's reality is that many military operations take place in close proximity to civilian populations. Therefore it is necessary to promote a good rapport with host State civilians and national authorities. Where crimes by military personnel, in particular against civilians, are overlooked, it is not conducive to building these relationships. Equally, as highlighted by Olivier Bangerter, it is not good for the morale of troops.[44] Militaries, States and international or regional organisations concerned with portraying their military interventions as legitimate and well intentioned should be conscious of these consequences. That stated, where this is less of a concern, reputation may not have a similar impact on compliance.[45]

Moreover, there are broader national considerations. As noted by Christopher Borgen, "[i]nternational law is both the language and the grammar of international relations".[46] Failures by soldiers to adhere to certain international legal standards have implications for States in the realm of international relations. States have an interest in maintaining the moral high ground and fostering good international relations. Additionally, there is a clear link between the reputation of a State and State responsibility for the maintenance of disciplined armed forces. A State's fear of

43 UN Human Rights Council, 2009, pp. 24–26, see *supra* note 2.

44 Olivier Bangerter, "Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not", in *International Review of the Red Cross,* 2011, vol. 93, pp. 353, 362; and Hugo Slim and Deborah Mancini-Griffoli, *Interpreting Violence: Anti-Civilian Thinking and Practice and How to Argue Against it More Effectively*, Centre for Humanitarian Dialogue, Geneva, 2007, p. 25.

45 Heike Krieger, "A Turn to Non-State Actors: Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood", in *SFB-Governance Working Group Paper*, 2013, no. 62, p. 20 (https://www.legal-tools.org/doc/a76ff9/).

46 Christopher Borgen, "Hearts and Minds and Law: Legal Compliance and Diplomatic Persuasion", in *South Texas Law Review,* 2009, vol. 50, pp. 769, 771.

loss of reputation for its armed forces' violations of international law is significant both at international and domestic levels.[47]

15.4. Discipline, Operational Effectiveness and Control

Criminal offences by soldiers have serious operational consequences, some touched on already, including undermining legitimacy of the operations and the trust of local counterparts, and efforts to establish or re-establish security and the rule of law in fragile States. Bangerter aptly points to two primary reasons armed groups see it to their advantage to respect international humanitarian law. The first is their reputation and image. The second is military advantage.[48] States also have obligations to prevent and hold to account soldiers committing human rights or international humanitarian law violations. Discipline can be even more difficult to ensure, but even more essential to control, in multinational deployments. Part of the difficulty could be the diverse and sometimes unclear command and control structures, ambiguous regulations, diversity of tasks and difficult operational environments. States have an interest in the effectiveness of UN peace operations as an instrument of international peace and security.[49] Where there is a failure to act as a disciplined whole, it may result in disrespect from the civilian population, as was the case in Somalia, the Democratic Republic of Congo, Haiti and numerous other operations.

In the late 19th century, Captain J.F. Daniell posited that

> [t]he great aim and object of all discipline is not only to maintain order and to ensure obedience and submission to authority, but also to produce and establish that cohesion between the individuals composing an army, which is essential if complete success is to be obtained in the operations in which it may happen to be engaged.[50]

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47 On reputation and compliance with international law see, for example, Andrew T. Guzman, "Reputation and International Law", in *Georgia Journal of International and Comparative Law*, 2006, vol. 38, p. 379.

48 Bangerter, 2011, pp. 353–84, see *supra* note 44.

49 Ganesh Sitaraman, "Credibility and War Powers", in *Harvard Law Review*, 2013/2014, vol. 127, pp. 123, 131.

50 Captain J.F. Daniell, "'Discipline': Its Importance to an Armed Force, and the Best Means of Promoting and Maintaining It", in *Royal United Service Institution Journal*, 1889/1890, vol. 33, no. 148, p. 335.

He highlighted that disciplinary failures lead to barbarity not only against the enemy but also against inhabitants of host States, leading to discontent and local resistance.[51] Captain M.D. Capstick, paraphrasing one commentator, notes that discipline and obedience within military are premised on three basic elements: 1) understanding by soldiers of the value of discipline; 2) reward for discipline; and 3) sanctions for disciplinary failures.[52] In order to ensure military cohesion and effectiveness, the military maintains a hierarchical structure which requires stringent obedience to superiors.[53] Military commanders play an integral role in maintaining a system of mutual respect, moral behaviour, group cohesion and discipline among subordinates.[54] Failures to hold individuals to account for crimes undermine this.[55] A weak commander can therefore have deleterious consequences for the good behaviour of armed forces. This has been recognised in international criminal law.[56] Article 87(1) of Additional Protocol I to the Geneva Conventions requires military commanders "with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol".[57] It also requires commanders to take disciplinary or penal action against those soldiers in breach of international humanitarian law.[58] Effec-

[51] *Ibid*., p. 336.

[52] Capstick, 2003, p. 14, see *supra* note 9.

[53] Edwin R. Micewski, "Military Morals and Societal Values: Military Virtue versus Bureaucratic Reality", in Edwin R. Micewski (ed.), *Civil-Military Aspects of Military Ethics*, Austrian National Defence Academy Vienna, 2003, pp. 22–23.

[54] Capstick, 2003, p. 15, see *supra* note 9; Hans Born and Ian Leigh, *Handbook on Human Rights and Fundamental Rights of Armed Personnel*, OSCE Office for Democratic Institutions and Human Rights (ODIHR), Warsaw, 2008 (https://www.legal-tools.org/doc/d61b95/); Friedland, 1997, p. 6, see *supra* note 10; François Lesieur, "A New Appeal to Canadian Military Justice: Constitutionality of Summary Trials under Charter 11(d)", MA dissertation, University of Ottawa, 2011, p. 15; see, for example, US Department of Defense, *Report to Honorable Wilber M. Brucker, Secretary of the Army by Committee on the Uniform Code of Military Justice, Good Order, and Discipline in the Army* (OCLC 31702839), Washington, DC, pp. 11–14.

[55] Steven Smart, "Setting the Record Straight: The Military Justice System and Sexual Assault", 12 July 2012 (https://www.legal-tools.org/doc/b5b458/).

[56] See also Burke, 2014, pp. 54–55, *supra* note 11.

[57] Article 87, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force on 7 December 1978).

[58] *Ibid*.

tive investigation and prosecution indicate to other would-be perpetrators that certain conduct is not tolerable.[59]

Command responsibility was also highlighted as a key element in the prevention of sexual exploitation and in ensuring troop discipline and accountability for such.[60] The model memorandum of understanding between the UN and troop-contributing States, a bilateral legal agreement, requires commanders to ensure proper conduct of troops and to take action where appropriate. Commanders of UN contingents may now be held responsible at least at some level for failures to do so.[61] In the context of sexual offences and impunity of military personnel, UN Women has aptly emphasised that "lower-level commanders" must "receive unambiguous directives that there are no 'rape cultures', only cultures of impunity, and that there can be no security without women's security".[62]

Discipline is often used as a means of military socialisation, enabling soldiers to obey orders and carry out their duties effectively. Internal discipline and self-regulation are perceived by most militaries as essential to operational effectiveness of armed forces and the profession of arms. It is, therefore, in the self-interest of the military to ensure good discipline, adherence to international law and accountability for non-compliance.[63] According to Michael Gibson, "[o]perational effectiveness means the capacity of the armed forces of a country to effectively achieve the purpose for which it is created and maintained: to conduct military operations on the direction of the government of, and in service to the interests of, the

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59 Smart, 2012, see *supra* note 55.

60 *Report of the Special Committee on Peacekeeping Operations*, 64th session, UN Doc. A/64/19, 22 February–19 March 2010, paras. 48, 52.

61 See Working Group on Contingent-owned Equipment, Manual on Policies and Procedures Concerning the Reimbursements and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions, 63rd session, Agenda Item 132, UN Doc. A/C.5/63/18, 29 January 2009, ch. 9, Article 7*ter*.

62 UNIFEM, United Nations Department of Peacekeeping Operations and UN Action against Sexual Violence in Conflict, *Addressing Conflict-Related Sexual Violence: An Analytical Inventory of Peacekeeping Practice*, UN Development Fund for Women, New York, 2010, p. 35.

63 This is an argument frequently utilised by the International Committee of the Red Cross, See Steven R. Ratner, "Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War", in *European Journal of International Law*, 2011, vol. 22, no. 2, pp. 459, 478.

state".[64] Part of the overall purposes of military justice is to contribute to morale, discipline, control, respect for the law, respect for others, efficiency, peace and justice within the military, and consequently the overall achievement of the mission purpose.[65] As stipulated by Peter Rowe, discipline is pertinent when conducting extraterritorial operations given that "[t]he degree to which soldiers act as a disciplined body whilst forming part of a multinational force will largely determine the success of the operation in relation to the respect due to the civilian population".[66]

Many militaries across the world see the maintenance of military justice as integral to the functioning of their armed forces. The US *Manual for Courts-Martial* stipulates that "the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and to strengthen the national security of the United States".[67] Canada's Bill C-15, Clause 62 (NDA s. 3012.1) provides that sentencing violations of the law by Canadian forces have two fundamental purposes, namely, "a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and b) to contribute to respect for the law and the maintenance of a just peaceful and safe society".[68] For many militaries it seems that military discipline is perceived as having strategic and operational purposes. Discipline is an integral component of maintaining high standards of military professionalism.[69] Discipline is integral to cohesion, the sharing of values, loyalty to the military institution and the implementation of military directives and orders. Holding soldiers accused of serious crimes effectively to account within this system, and publicising such,

64 Gibson, 2008, p. 10, see *supra* note 4.

65 *Ibid*.

66 Peter Rowe, *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, 2006, p. 225.

67 United States, Department of Defense, *Manual for Courts-Martial*, US Government Printing Office, Washington, DC, 2008, pp. 1, 3.

68 An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts, Bill C-15, Clause 62 (NDA s. 3012.1), 2012.

69 See, for example, "The Statement of Canadian Military Ethos", in *Duty With Honour: The Profession of Arms in Canada*, Chief of Defence Staff, Ottawa, 2003, p. 27 (https://www.legal-tools.org/doc/c7b14f/); and Smart, 2012, see *supra* note 55.

may guard against the erosion of military justice systems, which is occurring in many countries. We will return to this below.

Failure to maintain this discipline has broader implications than the act itself; it undermines the army's ability to quickly consolidate and pursue gains and the aims of given mandates. According to the Queen's Regulations for the British Army, "[d]iscipline, comradeship, leadership, and self respect form the basis of morale and of military efficiency".[70]

The behaviour of individuals or small groups of individuals can have serious consequences for militaries and their ability to carry out their missions while deployed abroad.[71] As already noted, crimes by soldiers undermine trust and confidence in the armed forces both at home and abroad.[72] This in itself is an incentive for effective regulation of armed forces and for holding those who commit crimes adequately to account. The British government recognised, for instance, the need for effective action to be taken against soldiers complicit in the killing of Baha Mousa, an Iraqi civilian, at the hands of British soldiers in Basra, Iraq. This was partially due to possible negative implications it could have on British operations in Iraq.[73]

Discipline is also key to control over armed forces. Disciplinary failures are often demonstrative of inadequate control over military personnel by the army and State. As Rowe explains, militaries are trained in and given access to weapons and technologies that ordinary civilians are not, making the exercise of stringent control over forces essential.[74] Serious crimes such as international humanitarian law violations, and even lesser disciplinary infractions, undermine control over armed forces. Mili-

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70 Command of Defence Council, Ministry of Defence, *Queen's Regulations for the Army, 1975*, Her Majesty's Stationery Office, London, 1976, para. 5.201.

71 Orme, 2011, see *supra* note 10.

72 See further, Bangerter, 2011, p. 364, see *supra* note 44. In the Dumford case before the US courts, a soldier was charged with violating an order to engage in "safe sex" and aggravated assault. The individual was HIV-positive. The order had required the soldier to inform partners prior to sex of the HIV infection. The court stated that this order had a military objective, namely, not to spread the infection among the civilian population, and ensuring the health and readiness of other service members, and that violating this order undermined this and discredits the military. *United States v. Dumford*, 30 M.J. 137 (CMA 1990), 137–38.

73 See Rosenblatt, 2010, pp. 27–28, *supra* note 4.

74 Rowe, 2006, p. 60, see *supra* note 66.

taries across the world see the maintenance of military justice systems as integral to the functioning of their armed forces, reinforcing the military chain of command, hierarchy, obedience, authority and group values. As noted by the Somalia Inquiry into abuses by Canadian forces in Somalia, with respect to discipline, "the more important usage in the military entails the application of control in order to harness energy and motivation to a collective end".[75] And as McDonald has suggested, "[a]n undisciplined military force is a greater danger to Canada than to any foreign enemy".[76]

Some argue that crimes are committed more frequently by individual soldiers where there is a break down in military discipline and control, enabling unscrupulous individuals to pursue self-interested ends, be they murder, sexual abuse and exploitation, trafficking and so forth.[77]

A number of normative end goals might be served by prosecuting peacekeepers or indeed other military actors, particularly where this is done in the host States. Prosecution can serve a number of values in a general context, including retribution, reconciliation, rehabilitation, deterrence, restoration, incapacitation, and expressivism or deontological purposes. In the context of crimes committed during military operations, peacekeeping or otherwise, perhaps the most significant of these goals are deterrence and the expressive or deontological purposes served by prosecutions. For deterrence to be effective perpetrators of crimes must be genuinely in fear of being held to account.[78] Deterrence operates on two levels, that of the individual and that of the broader community.[79] Deterrence requires a realistic threat of sanction. This is equally the case in a military context.[80]

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75 Canadian Department of National Defence, *Report of the Somalia Commission of Inquiry*, Minister of Public Works and Government Services Canada, Ottawa, 1997, vol. 2, "Discipline" ('Report of the Somalia Inquiry').

76 R.A. McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", in *Canadian Forces JAG Journal*, 1985, vol. 1, pp. 1, 28.

77 See Mark Osiel, "Obeying Orders: Atrocity, Military Discipline and the Law of War", in *California Law Review*, 1998, vol. 86, no. 5, p. 1030.

78 Burke, 2014, pp. 227–30, see *supra* note 11.

79 Robert D. Sloane, "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law", in *Stanford Journal of International Law*, 2007, vol. 43, pp. 39, 43.

80 Daniell, 1889/1990, pp. 287, 309, see *supra* note 50.

In the context of military operations, punishment may deter other soldiers from committing offences where impunity is not permitted, and it may also deter members of the community in the host State, whether State security forces or members of the civilian population, from committing similar offences. Deterrence, according to one commentator, in the US Air Force context, "is best applied directly from commanders to individual Airmen". He notes that sending cases to a central prosecutor takes time and causes difficulties in forward deployment of air force personnel when discipline is required most urgently.[81] In recognition of the importance of maintaining discipline, during the second half of the 19th century, sanctions used against British soldiers involved in misconduct were particularly swift and harsh, with numerous soldiers even put to death for their crimes.[82]

Perceptions of impunity for crimes committed by deployed troops are also increasingly leading to calls to limit jurisdictional immunities granted under the terms of status of forces agreements ('SOFA').[83] SOFAs are essentially bilateral agreements between host States and States deploying forces, governing their status. In the context of deployments by international bodies such as the UN, SOFAs are agreed between the host State and the body. Failures, or perceived failures, to effectively hold US soldiers to account for crimes allegedly committed in Iraq, for instance, saw the Iraqi government and the US renegotiating the jurisdictional provisions of the SOFA with the US, so that Iraq might prosecute these soldiers for crimes committed while on its territory.[84] Specifically, the new bilateral agreement provides for primary and secondary jurisdiction depending on the crime committed and where it was committed. In essence, Iraq now has primary jurisdiction over off-duty criminal offences by US service members in Iraq where these constitute grave premeditated felonies. While the Iraqi government may waive this primary right to exercise its jurisdiction, should it not do so safeguards must be put in place to pro-

81 Smart, 2012, see *supra* note 55.

82 Friedland, 1997, p. 67, see *supra* note 10.

83 Associated Press, 2012, see *supra* note 18.

84 Rosenblatt, 2010, pp. 26, see *supra* note 4.

tect the rights of the accused and accord him with due process standards in line with the US Constitution.[85]

The Statute of the Special Court for Sierra Leone contains quite a unique provision regarding the jurisdictional immunities afforded to UN peacekeepers. While Article 1 grants the troop-contributing State primary jurisdiction over members of its armed forces deployed to the host State, it provides that should that State fail to exercise its jurisdiction, the Special Court for Sierra Leone possibly could. This rationale is in line with the principle of complementarity, where a State proves "unwilling or unable" to instigate genuine judicial processes for crimes committed overseas by State actors. The right to secondary jurisdiction is limited to circumstances wherein a State specially proposes that the Special Court for Sierra Leone exercise its jurisdiction and where the UN Security Council authorises the exercise of such jurisdiction. A parallel limitation is increasing being advocated by academics, legal practitioners, policymakers and others with respect to UN peacekeepers given failures to hold peacekeepers involved in sexual violence, abuse and exploitation against members of the civilian populations of host States to account. The complete lack of transparency in relation to these cases is also problematic. States deploying troops are likely to be very nervous about the erosion of the jurisdictional immunities granted to their soldiers. Therefore it is in the interests of States to ensure, and be seen to ensure, effective investigations and prosecutions of soldiers committing serious criminal offences while deployed overseas.

15.5. Rule of Law and Security Sector Reform

Militaries are increasingly involved in a broad array of activities, including the protection of civilians, facilitating the delivery of aid, capacity building through mentorship and training of local armed forces, humanitarian intervention, tackling terrorism, assisting with the re-establishment of the rule of law, security sector reform, and generally in State-building and reconstruction processes in conflict-affected or fragile States. State-building and reconstruction activities have been central to UN interven-

[85] Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of their Activities During their Temporary Presence in Iraq, US-Iraq, Article 12, 17 November 2008.

tions since the 1990s.[86] Such interventions may be conducted in the context of regional or international deployments, whether through the UN, NATO, Organisation for Security and Co-operation in Europe, the European Union, the African Union or others. Part of the purpose of these interventions has been to ward off regional instability and protect against widespread human rights abuses. The protection of civilians and rule of law and security-related activities are contained in Security Council resolutions establishing the mandates of most current UN peace operations.[87] Good governance, rule of law and stability operations are also key to counter-insurgency efforts. This is based on the premise that an effective means to prevent widespread human rights abuses, insurgency or terrorism is to (re)establish stable States, security, rule of law and good governance.[88]

Failed or failing States are often perceived as potential breathing grounds for terrorism.[89] External interventions, from the Cold War period on, and capacity building efforts to strengthen governance in weak or failed States have been perceived as necessary to ward off security threats and they are now a key component of many States' foreign policy.[90] Moreover, this is also related to State and international community concerns about promoting human rights, the rule of law, stable environments for investment, good governance, and forms part of broader efforts to

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86 See, for example, William B. Wood, "Post-Conflict Intervention Revisited: Relief, Reconstruction, Rehabilitation, and Reform", in *Fletcher Forum of World Affairs*, 2005, vol. 29, no. 1, pp. 119–20.

87 See United Nations Peacekeeping, "Protection of Civilians", available at www.un.org/en/peacekeeping/issues/civilian.shtml, last accessed on 12 December 2014.

88 US Department of Army, 2006, see *supra* note 41.

89 Chester A. Crocker, "Engaging Failing States", in *Foreign Affairs*, 2003, vol. 82, no. 5, p. 32; Frances Fukuyama (ed.), *Nation-Building: Beyond Afghanistan and Iraq*, Johns Hopkins University Press, Baltimore, 2006, p. 2; Charles E. Tucker, "Cabbages and Kings: Bridging the Gap for More Effective Capacity-building", in *University of Pennsylvania Journal of International Law*, 2011, vol. 32, pp. 1329, 1335; President of the United States, *National Security Strategy*, May 2010, pp. 26–27, available at https://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf, last accessed on 2 November 2014. See also Nora Bensahel, Olger Oliker and Heather Peterson, *Improving Capacity for Stabilization and Reconstruction Operations*, RAND Corporation, Santa Monica, CA, 2009, pp. ix–x, 3–4.

90 Frances Fukuyama, "National-Building and the Failure of Institutional Memory", in Fukuyama, 2006, pp. 1–2, see *supra* note 89. See also Michèle A. Flournoy, "Nation Building: Lessons Learned and Unlearned", in Fukuyama 2006, pp. 86–87, see *supra* note 89.

combat transnational crimes.[91] Crime in failing or failed States may have connections with corrupted political actors or State security forces, those in power, warlords and others.[92] Reform and capacity building of State security forces, including the military, are therefore often linked to State and international community concerns over threats to peace and security that weak governance entails.

Stabilisation activities are often prioritised in interventions in conflict-affected States, and may include disarmament demobilisation and reintegration, rule of law reform activities and security sector reforms ('SSR'). Thereafter, focus may shift to reconstruction activities such as promoting democracy, development of State institutions, capacity building of State institutions, reform of the education system, promoting economic activity, governance, promoting human rights and so forth.[93] In the long run, the two are interdependent.

There is no universally accepted definition of SSR. Sean McFate defines SSR as entailing efforts "to institutionalize a professional security sector that is effective, legitimate, apolitical, and accountable to the citizens it is sworn to protect".[94] While SSR is a distinct area to rule of law reform post-conflict, it nevertheless has significant links to and interdependence with the broader rule of law reform agenda. Akin to SSR, rule of law reform has no universally recognised definition and means different things to different actors, often depending on their objectives. Nevertheless, an often referred to definition was provided by UN Secretary-General, that rule of law

> refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[95]

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91 Crocker, 2003, p. 34, see *supra* note 86.

92 *Ibid*.

93 Bensahel *et al.*, 2009, pp. ix–x, 3–4, see *supra* note 89.

94 Sean McFate, "Securing the Future: A Primer on Security Sector Reform in Conflict Countries", Special Report no. 209, United States Institute of Peace, Washington, DC, 2008, p. 2 (https://www.legal-tools.org/doc/7fd458/).

95 United Nations, Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies, UN Doc. S/2004/616, 23 August 2004.

Militaries often play an integral role in SSR and the re-establishment of the rule of law, and are frequently required to work with various national authorities and counterparts in SSR efforts in the context of humanitarian interventions, reconstruction and stability operations. This is particularly the case in volatile operational environments.[96] These efforts require leading by example. In many conflict-affected States this may require assisting national authorities with rebuilding the security sector from scratch or reforming existing structures and actors. There may be widespread civilian distrust of military and indeed other security sector personnel given that they may have been implicated in human rights abuses during or prior to the conflict. Part of the goal of SSR efforts is to build effective and accountable security sector institutions, which are disciplined and abide by rule of law and respect human rights,[97] so that they can provide security to the State and its civilian population. This often includes vetting, recruiting and training State armed forces and building their capacity to act as a professional army, including through reform and instilling norms of military professionalism, ethos and respect for human rights. Training may also extend to the police and to human rights education.[98] A key element for forces deployed abroad is to lead by example, particularly in the context of mentoring national counterparts. As noted by John Nagl and Paul Yingling, in the context of counter-insurgency, "[i]nsurgencies are defeated not by foreign powers but by indigenous forces".[99]

As noted, SSR and rule of law reform in conflict-affected States is often in the interests of States intervening or the broader international community where the end goal is to stabilise regions. Failures may have impacts on international or transnational crimes, terrorism, conflict and violence relapse, and implications for effective exit strategies for military interventions.[100] Vast amounts of money have gone into SSR programmes both in peacekeeping and other intervention contexts. For instance, in the

96 Bensahel *et al.*, 2009, pp. 6–7, see *supra* note 89.

97 UN Security Council, Report of the Secretary-General: Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform, UN Doc. S/2008/39, 23 January 2008.

98 See, for example, McFate, 2008, p. 15, see *supra* note 94.

99 John Nagl and Paul Yingling, "New Rules for New Enemies", in *Armed Forces*, 2006, vol. 144, no. 3, pp. 25–26.

100 McFate, 2008, pp. 3–4, see *supra* note 94.

context of its 1206 programme the US committed to spending USD 200–300 million a year on developing the capacity of foreign militaries to deal with terrorism and stability operations.[101]

By way of example, peacekeepers are increasingly required to undergo some form of gender training prior to deployment.[102] Moreover, they are frequently providing such training to national counterparts when engaging in SSR and rule of law reform activities in transitional and reconstruction phases. This was largely spurred by Security Council Resolutions on women, peace and security. Part of the aim of such training and capacity building is to transform attitudes that lead to discriminatory practices, in particular against women. This includes tackling gender-based violence and the inclusion of women on an equal basis in reconstruction and State-building endeavours. Activities have included mentoring and other supports by military personnel to national counterparts. These activities provide opportunities to imbue certain values, such as zero-tolerance for sexual violence and respect for international human rights standards. In 2010 guidelines on "Integrating a Gender Perspective into the Work of the United Nations Military in Peacekeeping Operations" were developed.[103] Training has also been provided to military peacekeepers, at least those deployed on UN operations, on the implementation of mandate requirements relating to women, peace and security. During conflict women and girls are often disproportionately affected by sexual violence, wherein rape is used as a tool of war, including by security sector personnel. An "Analytical Inventory of Peacekeeping Practice" to address conflict-related sexual violence was drawn up in 2010 in order to determine the contribution military components of UN operations can make to ending violence against women in the context of UN deployments.[104] Links are made between such efforts and building the trust and confidence of

[101] Named after Section 1206 of the National Defense Authorization Act of 2006. *Ibid*, p. 6.

[102] See also Comfort Lamptey, "Gender Training in United Nations Peace Operations", Gender and Peacekeeping in Africa, Occasional Paper no. 5, p. 11.

[103] United Nations Department of Peacekeeping Operations and Department of Field Support, Guidelines: "Integrating a Gender Perspective into the Work of the United Nations Military in Peacekeeping Operations", Department of Peacekeeping Operations, New York, 2010 (https://www.legal-tools.org/doc/66e0ae/).

[104] UN Women, "Addressing Conflict-Related Sexual Violence: An Analytical Inventory of Peacekeeping Practice", United Nations Entity for Gender Equality and the Empowerment of Women, 2012, p. 32 (https://www.legal-tools.org/doc/64b143/).

the local population, thereby contributing to mission operational effectiveness.

Where peacekeepers engage in sexual offences against the civilian population, or indeed other members of their armed forces, this undermines the influence that gender training and capacity building can have in conflict-affected States. These principles can have little impact on transforming gender relations, in particular with respect to security sector actors, if those seeking to expose them cannot or will not adhere to them. For instance, in recent months African Union Mission in Somalia ('AMISOM') peacekeepers have been providing Somali National Army forces with training on human rights, gender-based violence including sexual violence, civilian protection, international humanitarian law and military discipline.[105] These training activities coincided with the 2014 release of a report by Human Rights Watch of widespread sexual abuse and exploitation by AMISOM troops deployed to Somalia.[106] This has obvious implications.

In the Democratic Republic of Congo sexual offences are widespread. The international community, often with the support of military personnel, has made significant efforts to curb such abuses. Where soldiers are instead involved in the commission of sexual offences, as has been the case with UN peacekeepers in the Democratic Republic of Congo, this undermines these efforts. Impunity is seen as the norm.[107] As highlighted by Muñoz-Rojas and Frésard,

> [a]uthorities should take action, even for offences which are less serious than a war crime, so as to ensure the discipline of their troops and avoid entering a spiral of violence in which violations may become not only more and

[105] "Ethiopian peacekeepers conduct human rights training for Somalia forces in Baidoa", in *AMISOM News*, available at http://amisom-au.org/2014/03/ethiopian-peacekeepers-conduct-human-rights-training-for-somalia-forces-in-baidoa/, last accessed on 2 November 2014.

[106] Human Rights Watch, "'The Power These Men Have Over Us': Sexual Exploitation and Abuse by African Union Forces in Somalia", Human Rights Watch Report, September 2014, available at http://www.hrw.org/sites/default/files/reports/somalia0914_ForUpload.pdf, last accessed on 2 December 2014.

[107] United Nations Department of Peacekeeping Operations, "The Comprehensive Report on Lessons Learned from United Nations Operation In Somalia (UNOSOM)", Lessons Learned Unit, New York, 1995, para. 57 ('Comprehensive Report').

> more serious but also more and more acceptable in the eyes of those who commit them.[108]

Failure to hold individuals to account for sexual offences or other criminal offences may have deleterious consequences for military discipline[109] and undermine efforts to address gender-based violence and discrimination. It creates a perception of impunity not only among peacekeepers but also national counterparts and other locals. Justice needs to be seen to be done and individuals need to be held to account in the host State if perceptions of impunity are to be altered. In terms of training soldiers to respect certain ethics or values, including in the context of capacity building, command or mentorship relationships, as noted by Robinson, "[t]here is little point in teaching individuals a particular form of behavior, if they can see that the in-situation to which they belong in practice rewards and values other behavior".[110]

As noted, the success of counter-insurgency operations and indeed peace operations tends to rely heavily on good civil-military relations, civilian protection and activities targeted at improving the lives of the civilian population. Trust of the local population is beneficial on numerous levels, not least in terms of intelligence gathering and the perceived legitimacy of the operation. Moreover, as Nagl and Yingling note, trust "fosters participation in political processes and ethnic/sectarian reconciliation and encourages risk-taking and investment necessary for economic reconstruction".[111] Failures to foster good civil-military relations may lead to the civilian population supporting insurgents, militia groups or other opponents undermining stabilisation activities such as promotion of the rule of law.[112]

Accountability of soldiers deployed to peace-building and other operations for their criminal conduct or human rights violations may well have a rule of law demonstration effect in host States. Namely, it may

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[108] Muñoz-Rojas and Frésard, 2004, p. 204, see *supra* note 25.

[109] William C. Westmoreland and George S. Prugh, "Judges in Command: The Judicialized Uniform Code of Military Justice in Combat", in *Harvard Journal of Law and Public Policy*, 1980, vol. 3, p. 60.

[110] Paul Robinson, "Ethics Training and Development in the Military", in *Parameters: US Army War College Quarterly*, 2007, vol. 37, no. 1, pp. 23, 34.

[111] Nagl and Yingling, 2006, pp. 25–26, see *supra* note 99.

[112] *Ibid*.

have a normative effect in demonstrating that nobody is above the law and in expressing condemnation for serious crimes by military personnel to the local populace, security sector and civilians alike. This may be useful, for instance, in efforts to tackle sexual violence in many countries affected by conflict. Action taken against soldiers committing serious crimes should be communicated both to local populations and other peacekeeping personnel. Where actions are not taken, or where such crimes or misconduct arise in the first place, it undermines efforts to work with host State authorities and national counterparts. Additionally, it taints the relationship between actors such as the UN, NATO, the European Union and the African Union and the local population.

Compliance with international standards by militaries is often based on expectations of reciprocity, namely restraint mirrors restraint, despite international humanitarian law stipulating otherwise.[113] Soldiers' failures to comply with international standards, whether international humanitarian law, international human rights law or other norms or values, show that there is a failure to practise what they themselves preach.[114] Those seeking to defeat insurgents, or to re-establish rule of law and security, must themselves abide by host State laws, international human rights standards and the laws of war. Moreover, failure to abide by the law risks reprisals from other belligerent forces, and risks loosing the hearts and minds of the local population.[115] As some commentators have observed, brutality and targeting weak foes and civilians bestows further brutality and fosters distrust among civilian populations.[116]

In a peacekeeping context or other interventions, winning the hearts and minds of the local population may be a central goal. Moreover, failures in this regard may actually result in defeat of purpose, in particular where establishing security and rule of law and security sector reforms are the aims.[117] Maintaining high standards and respecting international law, and holding those violating it to account, generates perceptions of legiti-

[113] Security Council, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2013/689, 22 November 2013, para. 41.

[114] Krieger, 2013, p. 16, see *supra* note 45.

[115] Blackman case, see *supra* note 34.

[116] See John Robb, *Brave New War: The Next Stage of Terrorism and the End of Globalization*, John Wiley, New York, 2007, p. 27.

[117] Rowe, 2006, p. 65, see *supra* note 66.

macy in the local populace and by national actors. The latter is of particular importance in a capacity building context.

15.6. Military Ethics and Moral Values

Since well before the Napoleonic Wars, State militaries have perceived themselves as being bound by a normative code or code of conduct, which goes hand in hand with the profession of arms. Such values include integrity, honour, loyalty to superiors, the military and country,[118] initiative, courage, respect for the rule of law and justice, self-discipline, respect for the professional image of the military and peace operations, and respect for human rights and international humanitarian law.[119] These are often contained in military codes of conduct, which may vary from State to State. International humanitarian law and the laws of war already legally regulate soldiers' behaviour during armed conflict. These are to a large extent a codification of norms governing professional and ethical conduct of soldiers.[120] However, these laws may not fully reflect codes of conduct or ethics by which a solider is or may feel bound by.[121] An ethical soldier is often perceived as a more effective soldier.[122] Virtues are often the corollary of expectations of pain or pleasure. Norms of behaviour are

[118] US Department of Army, *Field Manual No. 22-100, Army Leadership B-7*, US Department of the Army, Washington, DC, 1999, pp. 1–17.

[119] Stephen E. Wright, *Airforce Officer's Guide*, 36th ed., Stackpole Books, Mechanicsburg, PA, 2014, p. 4; Orme, 2011, see *supra* note 10; Daniel Lagacé-Roy, "The Profession of Arms and Competing Values: Making Sense", in *Elucidating the Future: Soldiers and their Civil-Military Environment*, Austrian Armed Forces, p. 126, (https://www.legal-tools.org/doc/49e828/); and William Lad Sessions, *Honor for Us: A Philosophical Analysis, Interpretation and Defense*, Continuum, London, 2008, p. 69.

[120] Micewski, 2003, pp. 22, 24, see *supra* note 53.

[121] See, for example, Convention for the Amelioration of the Conditions of the Wounded in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 12 October 1950); Convention Relevant to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 12 October 1950); Convention Relevant to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('Geneva Conventions'); and Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War*, Transaction Publishers, New Brunswick, NJ, 2002, p. 25.

[122] Jessica Wolfendale, "What is the Point of Teaching Ethics in the Military?", in Robinson, de Lee and Carrick, 2008, pp. 161, 166, see *supra* note 31.

adopted from our role models, and become habitual. This applies equally to the military context.

Loyalty (which is key to functional militaries), team cohesion and camaraderie entails also discipline for the soldier.[123] Integrity involves values such as self-discipline, honesty, candour and conducting oneself in accordance with military regulations, and applicable laws and codes of conduct. Honour is professed as a fundamental value of most States' armed forces.[124] According to Michael Ignatieff, "[a] warrior's honour is a slender hope, but it may be all there is to separate war from savagery. And a corollary hope is that men can be trained to fight with honour. Armies train people to kill, but they also teach restraint and discipline".[125] Rain Liivoja posits that honour arises at two levels, that of the personal level and public level in terms of a collective sense of what is right and what is wrong.[126] Atrocities, or indeed crimes, committed by armed forces bring into disrepute the honour of the defence forces of a country as a whole. This was apparent, for instance, in public reactions in Uruguay, Canada and the US, wherein serious human rights violations or war crimes by armed forces from each of these countries, as mentioned previously, led to public outrage. In terms of the US deployment to Iraq, the intervention was termed illegitimate and abusive by many, even within the US.

The military, like other professions, such as the law and medicine, is governed by a self-regulated code of ethics. In one sense, in the military context, it distinguishes soldiers or warriors who are trained to use arms, inflict violence and kill for a given purpose, from being perceived as murderers or criminals by society and themselves.[127] Ethics are central to the

[123] Forrest C. Pogue, "George C. Marshall: Global Commander", in Harry Borowski (ed.), *The Harmon Memorial Lectures in Military History, 1959–1987*, Office of the Air Force History, Colorado, 1988, pp. 177, 190, 191–93.

[124] Richard A. Gabriel, *To Serve with Honor: A Treatise on Military Ethics and the Way of the Soldier*, Greenwood Press, Westport, CT, 1982; Paul Robinson, *Military Honour and the Conduct of War: From Ancient Greece to Iraq*, Routledge, London, 2006.

[125] Michael Ignatieff, *The Warrior's Honour: Ethnic War and the Modern Conscience*, Vintage, London, 1998, p. 157; on the honour of warriors, see Sessions, 2008, p. 62, see *supra* note 119.

[126] Rain Liivoja, "Law and Honor: Normative Pluralism in the Regulation of Military Conduct", in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance*, Cambridge University Press, Cambridge, 2013, pp. 143, 146–47.

[127] *Ibid*., pp. 143, 146; See also, Slim and Mancini-Griffoli, 2007, p. 25, see *supra* note 44.

effective operation of the military and maintaining good relationships with civil society both at home and on deployment abroad, including in the context of peace operations, counter-insurgency operations and others.[128] Ethics generally relate to organisational codes of behaviour, whereas the term morals tends to be used to refer to the individual level.[129]

Historically, the military law of some States proscribed "conduct unbecoming of an officer and a gentleman",[130] generally prohibiting conduct that is considered "disgraceful" or "dishonourable". According to the US Uniform Code of Military Justice ('UCMJ'), this might include "acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty".[131] A gentleman today is taken to refer to both men and women in this context.[132] Similarly, the UCMJ, like the military codes of many States, prohibits conduct to the "prejudice of good order and discipline" or which brings "discredit upon the armed forces".[133] This could encompass an array of conduct which may or may not be criminalised under sending State law but almost certainly should capture most violations of human rights of civilian populations of the host State, where not already criminalised. On the other hand, these provisions may be used to shield soldiers from more serious criminal charges carrying greater penalties, including specific crimes such as rape, drug trafficking, murder and so on.[134] Similar provisions may be found in the military laws of other States. The Australian Defence Force Discipline Act of 1982, for instance, prohibits conduct "likely to prejudice the discipline of, or bring discredit on, the Defence Force".[135] These provisions highlight in effect two opera-

[128] See, Ratner, 2011, p. 478, see *supra* note 63.

[129] George B. Rowell, "Marine Corps Values-Based Ethics Training: A Recipe to Reduce Misconduct", Strategy Research Project, US Army War College, 2003, p. 2.

[130] This has its roots in medieval codes of military chivalry. See Liivoja, 2013, pp. 152–54, *supra* note 126; and Keithe Nelson, "Conduct Expected of an Officer and a Gentleman: Ambiguity", in *US Air Force JAG Law Review*, 1970, vol. 12, pp. 124–41.

[131] See, for example, Article 133, United States Uniform Code of Military Justice, 10 UCMJ 832.

[132] *Ibid*.

[133] *Ibid*.

[134] Ives, 2013, see *supra* note 17; see also Burke, 2014, pp. 36–37, *supra* note 11.

[135] Australian Defence Force Discipline Act 1982, Section 61. See, similarly, Article 19, British Armed Forces Act 2006; and Canadian National Defence Act 1955, Section 129(1).

tional consequences, the first being the reputation of the States concerned and their armed forces, the latter being the maintenance of order and discipline within the military.[136] In counter-insurgency operations in particular, but also in the case of peace operations, maintaining the moral high ground may assist in securing both local and external co-operation.

In the *Semrau* case, involving the wrongful killing of an unarmed injured insurgent by a Canadian commander who was mentoring Afghan counterparts, the court stipulated that breaches of military discipline run contrary to core values and training, and constitute disgraceful conduct.[137] The court further stated that central to the profession of arms is the "management of violence" and putting into effect the will of the soldier's State in line with the State's citizens' values. In the context of sexual misconduct by Australian armed forces, including the dissemination of sexual pictures and videos portraying women in an abusive and degrading manner, Lieutenant General David Morrison, Chief of Army, condemned the behaviour, stating that it had "not only brought the Australian Army into disrepute, but has let down everyone of you and all of you whose past service has won the respect of our nation".[138] He further stated that degrading and exploiting others in no way enhances military capability or the traditions of the Australian Army. A similar reflection was made in the Canadian context when it was stated that a State's armed forces are integral to and must reflect the values of the society that they serve, be they with respect to women's rights, sexual orientation or other normative values.[139]

15.7. Erosion of Military Justice Systems

Across the world many militaries have been subject to separate systems of military norms, laws and institutions regulating their behaviour. Military

[136] For and explanation of these provisions, see US Rule for Courts-Martial, RCM. 60.c.(1)-(3); *Mocicka v Chief of Army* (2003) ADFDAT 1 [13]-[14]; see also Liivoja, 2013, pp. 151–52, see *supra* note 126.

[137] *R. v. Semrau*, 2010 CM 4010 [9]–[10].

[138] "Chief of Army David Morrison tells troops to respect women or 'get out'", in ABC News, 14 June 2013, available at http://www.abc.net.au/news/2013-06-14/chief-of-army-fires-broadside-at-army-over-email-allegations/4753208, last accessed on 18 November 2014.

[139] Government of Canada, Department of National Defence, *Military Justice at the Summary Trial Level,* 2001.

justice systems vary significantly in terms of their jurisdictional scope *ratione material*, *ratione loci*, *ratione tempore* and *ratione personae*. Generally they entail judicial or quasi-judicial mechanisms for dealing with disputes or misconduct of a State's armed forces, who are subject to that State's military laws. The degree of civilian oversight varies from State to State. Civilian courts may also exercise jurisdiction over crimes committed by soldiers at home or while deployed overseas in some States, and indeed certain criminal offences may be reserved for civilian courts.[140] Whether or how a soldier will be tried in military courts for crimes committed at home or abroad depends on the particular State and its laws. Military courts are often composed of military officers. Peter Rowe observes that irrespective of whether the offence is a military or criminal one it is often still considered a matter of military discipline.[141] Military justice systems may permit lesser offences to be tried by military officers in command in the form of summary proceedings, and they may provide for greater or lesser procedural and evidentiary safeguards and requirements.[142] Summary trials are often used in the field in order to deal rapidly with offences, to socialise normative values among troops, and to ensure troop morale and unit cohesion.[143] The types of offences provided for and disciplinary sanctions often differ from law applicable to civilians. This may be due to the disciplinary nature of military laws (that is, the purpose may be to ensure control and discipline rather than to punish crime *per se*).

Soldiers are trained in aggression and the use of weapons. Military justice and discipline are often considered key to restraining aggression, maintaining control over soldiers and to allow for easier movement of troops in frequently volatile operational environments.[144] Many States are

[140] Peter Rowe, "United Nations Peacekeepers and Human Rights Violations: The Role of Military Discipline", in *Harvard International Law Journal*, 2010, vol. 51, pp. 69, 79; and Zsuzsanna Deen-Racsmany, "The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?", in *Journal of Conflict and Security Law*, 2011, vol. 16, no. 2, pp. 321–55. See also, UN Secretary-General Report, *Summary Study of the Experience Derived from the Establishment and Operation of the Forc*e, UN GAOR, 13th session, Agenda item 65, UN Doc. A/3526, 8 February 1957, para. 137.

[141] Rowe, 2006, pp. 79–80, see *supra* note 66.

[142] Gibson, 2008, pp. 6–7, see *supra* note 4.

[143] See, for example, Friedland, 1997, p. 72, *supra* note 10.

[144] *Ibid*., p. 67.

therefore strong advocates of their military justice systems and are likely to be resistant to their elimination and to excessive civilian oversight, particularly if this potentially impacts on the effective operation of the armed forces and command and control. Mark Osiel posits that in a world where a strong international criminal court is not likely in the foreseeable future, greater attention should be shifted to "how military law can shape the professional soldier's sense of vocation and his understanding and cultivation of its intrinsic virtues, its 'inner morality'". [145] Retention of control through the military justice system is important given that the acts of soldiers, in particular where such acts violate international humanitarian law, may directly or indirectly incur State responsibility. Under the Geneva Conventions States are required to "search for persons alleged to have committed, or to have ordered to be committed, such *grave breaches* [of the law of war], and shall bring such persons, regardless of their nationality, before its own courts". This includes wilful killing, inhumane treatment and torture.

Military justice systems play an important role in many States with regard to the promotion of the rule of law. However, over recent years concerns about military justice systems have arisen particularly regarding rights violations. This, and in some cases lack of accountability and independence, have led to the dismantling or substantial reform of military justice systems in States across the world. Procedures of military courts are arguably subject to a hierarchal structure, sometimes even requiring decisions be confirmed by a senior officer convening the court martial.[146] Moreover, critics often argue that procedures lack transparency, as they are closed to the public, and they may lack independence and impartiality. Where soldiers are not held adequately to account for crimes by a system and procedures perceived as fair and legitimate this leads to erosion of trust, legitimacy of and confidence in military justice systems. This has resulted in loss of autonomy of military justice systems in many States, requiring greater civilian oversight and regulation.[147] States are increasingly limiting the jurisdictional competences of their military justice sys-

[145] Osiel, 1998, p. 959, see *supra* note 77.

[146] Rowe, 2006, p. 82, see *supra* note 66.

[147] See Chris Griggs, "A New Military Justice System for New Zealand", in *New Zealand Armed Forces Law Review*, 2006, vol. 26; and Matthew Groves, "Civilianisation of Australian Military Law", in *University of New South Wales Law Journal*, 2005, vol. 28, no. 2, pp. 364–95.

tems often in direct response to their inadequate handling of soldiers' human rights abuses.[148]

Concerns about military justice systems, for instance, came to the fore in the aftermath of the Abu Ghraib abuses, and in relation to British and US forces in Iraq and Afghanistan, Canadian forces in Somalia, among many other cases.[149] Criticisms have also been levelled against abuses within Latin American military justice systems and the military commissions utilised by the US to try Guantanamo Bay detainees. The latter are a specific type of body not typical of a military court, and are beyond the scope of this chapter.[150]

The increased 'civilianisation' of military justice systems is perceived by many State armed forces as a risk to the maintenance of effective control and as undermining disciplinary structures applicable to their militaries,[151] and the ability to carry out their missions effectively. Mark Friedland alludes to possible linkages between the decline in the use of military justice with respect to Canadian armed forces in the year preceding their deployment to Somalia in the 1990s and human rights abuses perpetrated by Canadian forces while deployed.[152] Moreover, many commentators highlight the weaknesses of civilian justice mechanisms for dealing with offences committed within a military environment, particularly when deployed overseas. As Michael Gibson aptly argues, delays associated with civilian justice systems make them unsuitable for dealing with crimes committed in the context of extraterritorial deployments or peace operations, where delays in disciplinary measures may result in fur-

[148] Rowe, 2010, pp. 69, 68, see *supra* note 140; Eugene R. Fidell, "A Worldwide Perspective on Change in Military Justice", in Eugene Fidell and Dwight H. Sullivan (eds.), *Evolving Military Justice*, Naval Institute Press, Annapolis, 2002, p. 209–17.

[149] Victor M. Hansen, "Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from This Revolution?", in *Tulane Journal of International and Comparative Law*, 2008, vol. 16, pp. 419–20. In the context of abuses perpetrated against civilians by Canadian forces deployed to the UN operation in Somalia during the 1990s, the Somalia Inquiry scrutinised the Canadian military justice system. Forty-five recommendations for reform were made in light of identified weaknesses and for increasing independence and accountability within the system. Report of the Somalia Inquiry, see *supra* note 77.

[150] See Gibson, 2008, pp. 46–47, *supra* note 4.

[151] See, for example, Hansen, 2008, p. 423, *supra* note 149.

[152] Friedland, 1997, see *supra* note 10.

ther erosion of discipline among troops.[153] Civilian justice systems are not easily deployable, particularly given jurisdictional and practical difficulties such as security, resource and infrastructural concerns.[154] Problems may also arise in obtaining host State co-operation and in accessing witnesses and evidence. States may be reluctant to bring witnesses or victims to the accused soldier's State given the resources required and fears of refugee status claims.[155] Military justice systems are better adapted to deal with some of these issues and are therefore often considered preferable to civilian courts. They are more easily deployable to mission areas and portable in diverse and often volatile operational environments where infrastructure may be scant, and where civilian justice sector personnel may be unable or unwilling to go.[156] Victor M. Hansen points out that having a military justice system that accompanies soldiers to the field is more likely to encourage soldiers to respect the rule of law.[157] In the context of armed conflict, the need for States to have in place a functioning internal legal system to hold armed forces to account for international humanitarian law violations is highlighted in Article 43(1) of Additional Protocol I to the Geneva Conventions.[158]

In *R. v. G n reu* , the Canadian Supreme Court highlighted a number of important advantages of maintaining a separate system of military justice. First, it pointed out that it allows "the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military".[159] It stated that this is important as it enables the military to maintain its armed forces in "a state of readiness" as it can deal more efficiently and effectively with internal disciplinary issues as they arise.[160] This may be of even greater importance in the field where disciplinary matters may need to be dealt with urgently. A further advantage of military justice is that it better enables States to hold individual soldiers to

[153] Gibson, 2008, p. 16, see *supra* note 4.

[154] See, for example, Hansen, 2008, p. 425, *supra* note 149.

[155] Burke, 2014, p. 20, see *supra* note 11.

[156] Gibson, 2008, pp. 16–17, see *supra* note 4.

[157] Hansen, 2008, p. 425, see *supra* note 149.

[158] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978).

[159] *R. v. G n reu* , Supreme Court of Canada [1992] 1 S.C.R. 259 at 293.

[160] *Ibid*.

account for both acts and omissions.[161] Omissions may be particularly relevant in the context of command responsibility to train, prevent and take action where allegations of crimes, or violations of international humanitarian law or human rights law, at the hands of armed forces arise. Holding soldiers accused of serious crimes effectively to account within this system, and publicising such, may guard against the erosion of military justice systems.

As noted, despite certain positive attributes of military justice systems, in recent years they have been subject to criticism given fears of lack of independence, impartiality and transparency.[162] On the other hand, the weakening of military justice systems has also been due to concerns that such systems inadequately protect soldiers' right to due process.[163] The hierarchical structures under which cases tend to be processed, some have argued, can lead to interference with case outcomes.[164] It has also been argued that in situations of emergency, in particular, military justice systems have a tendency to reinforce impunity for grave human rights violations, crimes against humanity and war crimes.[165] A working group on arbitrary detention has gone so far as to recommend that military courts should be "incompetent to try military personnel if the victims in-

[161] Rowe, 2006, p. 133, see *supra* note 66.

[162] John McKenzie, "A Fair and Public Trial", in Fidell and Sullivan, 2002, p. 230, see *supra* note 148; Commission on Human Rights, *Report on the Mission of the Special Rapporteur on the independence of judges and lawyers to Columbia*, ESCOR, 54th session, Agenda Item 8, UN Doc. E/CN.4/1998/39/Add.2; International Commission of Jurists, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, vol. 1, Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, 2004; and Mohammed Ahmed Abu Rannat, *Study of Equality in the Administration of Justice*, UN Doc. E/CN.4/Sub.2/296, 10 June 1969, para. 195.

[163] McKenzie, 2002, see *supra* note 162.

[164] See, for example, Sub-commission on the Promotion and Protection of Human Rights, Issue of the Administration of Justice through Military Tribunals – Report submitted by Mr. Louis Joinet pursuant to Sub-Commission Decision 2001/10, 54th session, Agenda Item 8, UN Doc. E/CN.4/Sub.2/2002/4, 9 July 2002, paras.17–23; and Human Rights Watch, "Egypt: Military Impunity for Violence Against Women: Whitewash in Virginity Tests Trial", Human Rights Watch, 7 April 2012, available at http://www.hrw.org/news/2012/04/07/egypt-military-impunity-violence-against-women, last accessed on 18 November 2014.

[165] Commission on Human Rights, Issue of the Administration of Justice through Military Tribunals, 55th session, Provisional Agenda Item 3, UN Doc. E/CN.4/Sub.2/2003/4, 27 June 2003, para. 8.

clude civilians".[166] Principle 9 of the Draft Principles Governing the Administration of Justice through Military Tribunals (2006) provides that military courts should not be permitted to try those military personnel accused of serious human rights violations.[167] The rationale is that the system may encourage potential cover-ups by the military. The best counter-argument is evidence of effective and transparent investigations and prosecutions of soldiers alleged to have committed serious criminal offences whether at home or abroad.[168]

Looking again at sexual offences in the context of UN operations, according to official UN statistics, many troop-contributing States have been reluctant to provide any information on action taken against those accused of sexual exploitation and abuse while deployed on UN operations.[169] Franklin D. Rosenblatt highlights failures of the US court-martial system with respect to offences allegedly committed by US forces in both Afghanistan and Iraq. He notes: "After-action reports from deployed judge advocates show a nearly unanimous recognition that the full-bore application of military justice was impossible in the combat zone".[170] Rosenblatt reports that commanders actively avoided use of the court-marital system by "sending misconduct back to the home station, to granting leniency, to a more frequent use of administrative discharge procedures".[171] He notes that courts martial were not impossible but often considered too burdensome to conduct in volatile operational environments. Civilian justice would be faced, however, with even greater difficulties. Nevertheless, when the military justice system is not effectively put into operation this undermines deterrence, retribution, good order and discipline, and contributes to impunity. Rosenblatt posits that this is problematic given that, "[i]n an era of legally intensive conflicts, this court-martial

[166] Cited in *ibid.*, para. 21.

[167] Draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58, Principle 9, p. 4.

[168] Michael Evans and Frances Gibb, "Accused Troops Will Face More Robust Courts-Martial, Says Prosecution Chief", in *The Times*, 2 January 2009.

[169] For UN statistics on sexual exploitation and abuse allegation and State response rates to requests for information on action taken against alleged perpetrators, see United Nations Conduct and Discipline Unit, "Overview of Statistics" (https://www.legal-tools.org/doc/72e603/).

[170] Rosenblatt, 2010, p. 12, see *supra* note 4.

[171] *Ibid*.

frailty is consequential and bears directly on the success or failure of our national military efforts".[172] Part of the rationale for not holding courts martial where warranted could be their possible negative implications on military units' ability to carry out their duties during trials.[173] In the period from 2001 to 2003, US Army officers in Afghanistan apparently sometimes chose to use administrative discharges instead of holding a court martial in order to reduce caseloads.[174]

Courts martial often do face difficulties such as lack of personnel and resources, travel restrictions and dangerous operational environments.[175] Investigating and prosecuting a case is often costly and time consuming, deviating resources from the military operation itself. Linguistic and cultural barriers may exist with respect to victims and witnesses. Moreover, investigations of crimes may themselves put troops and other personnel in danger where conflict and violence are ongoing in investigation areas. The US Naval Criminal Investigative Service personnel, for instance, came under attack by insurgents while visiting the crime scene at night in the aforementioned *Hamdaniyah* case.[176] That being said, this is not an argument for greater use of civilian justice systems with respect to crimes committed by a State's soldiers, as greater difficulties would likely be faced by civilian justice systems.

In light of this, if States and their militaries perceive the erosion of military justice systems, despite their possible flaws, as a threat to control over their forces and the ability to deal more effectively with disciplinary issues, then these systems need to be strengthened. If discipline is a *raison d'être* of military justice systems, failure to effectively investigate and hold persons to account undermines the purpose of such a system.[177] Lack of discipline in one area may lead to lack of discipline in another. Military forces that have the use of arms and are deployed to volatile environments need to be under an adequate system of control lest atrocities occur. If

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[172] *Ibid*.

[173] *Ibid*., p. 16.

[174] Carlton L. Jackson, "Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice", in *Military Law Review,* 2004, vol. 179, pp. 1, 66–67.

[175] Eric Hanson, "Know Your Ground: The Military Justice Terrain of Afghanistan", in *The Army Lawyer*, 2009, p. 36.

[176] Hackel, 2009, pp. 272–73, 277, see *supra* note 8.

[177] Dan Box, "Military Police Handling Defence Crimes Struggle for Numbers", in *The Australian*, 1 October 2014.

militaries and their States contend that military justice systems are necessary then there is clearly a need to put in place strong, independent, effective, independent and impartial systems, if they are to be considered fair and legitimate.

15.8. Conclusion

There are strategic and operational consequences for failures to hold soldiers to account for serious crimes committed while deployed overseas, both at home and abroad. Failures to hold military personnel to account for serious crimes has numerous deleterious effects, not least in creating a perception of impunity among military personnel, peacekeepers and local counterparts. Lack of accountability undermines the legitimacy of military interventions, State and international organisation reputations, relationships with the host State populations and population at home, and indeed counter-insurgency activities. Negative media coverage ensues, and crimes are often used for propaganda purposes. Moreover, these failures undermine many norms of conduct these types of missions arguably seek to impart to the local population and national counterparts.

Some States are starting to recognise that holding soldiers to account for crimes committed in the host States and conveying these convictions to host State populations have strategic advantages. They assist with developing amicable relationships with host State populations and with securing their broader co-operation. In the Baha Mousa case, for instance, involving the alleged beating to death of an Iraqi civilian by British soldiers while he was in detention in Iraq, Britain made available Arabic translations of its public inquiry.[178]

Respect for the rule of law by military forces deployed overseas garners confidence, trust and perceived legitimacy of operations. This may be of particular strategic importance in the context of peace operations and counter-insurgency operations. Failures to address grave human rights violations or war crimes by soldiers may actually feed insurgent activities, recruitment efforts by insurgents, and indeed support of insurgents by the civilian population in the host State.[179] Moreover, such fail-

[178] Rosenblatt, 2010, p. 28, see *supra* note 4; and Evans and Gibb, 2009, see *supra* note 168.
[179] Hackel, 2009, p. 245, see *supra* note 8.

ures put the lives of other soldiers at risk.[180] Serious crimes by US armed forces in Iraq led to an overhaul of in mission training and revision of standard operating procedures ('SOP'). Yet training and SOP revisions can do little in the eyes of the public where atrocities have already occurred and individuals have not be adequately held to account.[181]

As highlighted earlier in this chapter, there has been much criticism of military justice systems, including that they risk rights violations such as the right to fair trial, as well as a lack of impartiality, accountability, transparency and independence.[182] States and their militaries may well have an incentive to maintain their military justice systems and to resist civilianisation, for reasons highlighted, not least of which is to maintain control over their armed forces, which in turn is key to discipline and ease of movement of forces. Therefore, States' military justice systems must be seen as fair, equitable, transparent and independent by society.[183] Some of these advantages of military justice systems are not evident when they fail to act adequately and promptly in investigating and, where appropriate, in prosecuting soldiers alleged to have committed criminal offences while on overseas deployment.

There is also a pedagogical value in ensuring effective investigation and prosecution of armed forces committing serious crimes. Habitual compliance and no tolerance of violations of standards of conduct assist with the process of norm internalisation, whether with codes of professional ethics or conduct, compliance with international humanitarian law, international human rights norms, with international criminal law or other standards. Like negative behaviour in a group, positive behaviour likely goes through a similar process or dynamic. As noted by Heike Krieger, "[i]f there is no room for professional training in order to create a habit of norm-compliance, the logic of consequences, particularly the fear of sanc-

[180] See Bing West, *No True Glory: A Frontline Account of the Battle for Fallujah*, Bantam, New York, 2005, pp. 61, 74–88, 93.

[181] Hackel, 2009, pp. 260–61, see *supra* note 8.

[182] See, for example, *R. v. Généreux*, [1992] 1 S.C.R. 259, 260 (Can.); and *Findlay v. United Kingdom,* App. No. 2210/93, 24 Eur. H.R. Rep. 221 (1997).

[183] See, for example, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Union Doc. DOC/OS(XXX) 247; Draft Principles Governing the Administration of Justice through Military Tribunals, 62nd session, UN Doc. E/CN.4/2006/58, 13 January 2006.

tions, may induce individual soldiers and fighters to comply".[184] Failure to effectively investigate and prosecute undermines compliance given the lack of fear of actually been held to account.

For disciplinary measures to have adequate effect in terms of deterrence and norm internalisation, particularly in the context of extraterritorial and multinational deployments, prompt judicial measures should be taken against perpetrators in a location proximate to the crime. If this is done, the local population and other soldiers alike can see that certain conduct will not be tolerated.[185] It may assist in highlighting that this is the conduct of a 'few bad apples', as some have coined them, and not the armed forces at large. Well-disciplined armed forces do not generally commit human rights abuses of civilians or others in host States. As discussed in section 15.6., successful militaries consider themselves bound by certain codes or ethics and moral standards, which are in the interest of operational effectiveness and efficiency.

The difficulty with deterrence is that presumptions of rationale action by soldiers may be thrown into flux in volatile and violent conflict environments where rule of law has been eroded. Yet in such environments significant efforts are invested in re-establishing rule of law and security sector reform supported often by external military actors. In terms of mission operational effectiveness, multinational forces involved in such endeavours must be seen to practice what they preach. This applies equally in the case of States and international organisations such as the United Nations.[186]

[184] Krieger, 2013, p. 13, see *supra* note 45.

[185] Payam Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia?", in *Human Rights Quarterly*, 1998, vol. 20, no. 4, pp. 737, 751.

[186] Comprehensive Report, para. 57, see *supra* note 107.

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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 pre-empting 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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