



The Self-Interest of Armed Forces in Accountability for their Members for Core International Crimes

An international expert seminar organized by the
Forum for International Criminal and Humanitarian Law,
UC Berkeley War Crimes Studies Center, and Stanford University,

27 November 2012, at Hoover Institution, Stanford University.

Accountability for war crimes, crimes against humanity and genocide has received increasing international attention since the establishment of the International Criminal Tribunal for the Former Yugoslavia in 1993. Internationalized criminal tribunals have subsequently been established for Rwanda, Sierra Leone, Cambodia, Iraq and Lebanon, and we have seen high profile war crimes cases against Slobodan Milošević, Saddam Hussein and Charles Taylor. At the same time, a number of states have prosecuted their own citizens or refugees from war-affected countries before national military or civilian courts. Although there have been some controversies,¹ the overall trend since the mid-1990s has been one of increased support for accountability for flagrant violations of international criminal law.

The political and diplomatic rhetoric put forward in favour of criminal justice for atrocities frequently refers to the struggle against impunity and that there can be no lasting peace without justice. A common theme is the obligation to investigate and prosecute core international crimes under international law. Sometimes a government may also pursue national prosecutions in response to purely political interests or expectations. Both the language of international legal obligation and that of politics can act on military or civilian decisions to investigate or prosecute, as a raised stick. This seminar is not concerned with the stick, but the carrot.

Most often, such accountability tends to be rationalized and imposed as a 'stick', even when undertaken by the military. However, one should also look at accountability from a 'carrot' perspective, namely, whether such accountability is in the self-interest of the armed forces. Why do soldiers, officers and military leaders themselves often prefer such accountability? Is it because accountability mechanisms distinguish them as military professionals who are uncompromised by such crimes? Or is it because of the way individual incentive structures, such as promotion, function? Are they concerned that the commission of war crimes may undermine the public's trust in the military, increasing the security risks faced and the size and cost of deployment in the area concerned? Or are they motivated by moral, ethical or religious reasons? Does accountability ensure higher discipline and morale and therefore secure more effective

¹ They have mostly concerned the relationship between peace processes and war crimes trials, the exercise of universal jurisdiction, the delays in internationalized criminal justice, as well as the reach of the jurisdiction of the International Criminal Court.

chains of command? Or is it because accountability gives them a political advantage *vis-à-vis* potential opponents? Or does it promote a better public image? Could such accountability be particularly crucial when the armed forces are involved in efforts to establish a new regime in a post-conflict situation or a process of democratization?

This seminar seeks to create a better understanding of the self-interested reasons that armed forces may have in ensuring accountability for core international crimes by clearly mapping and articulating the above issues and others. It aims to provide military lawyers and military professionals around the world with a more comprehensive statement of these reasons. The needs of institutional military training mechanisms are also relevant. To these ends, the papers presented at the seminar will be published in an anthology to be published by the Torkel Opsahl Academic Epublisher² by 1 July 2013. Additionally, a concise policy brief summarizing the outcome of the seminar will be published online and in print in English, French, Spanish and Portuguese shortly after the seminar.³ It will list and describe each self-interest of armed forces in ensuring accountability, as identified during the seminar. The programme of the seminar seeks to establish common ground between accountability traditions.

² See <http://www.fichl.org/torkel-opsahl-academic-epublisher/> and, for the specific Publication Series where the anthology will appear, <http://www.fichl.org/publication-series/>.

³ In this Policy Brief Series <http://www.fichl.org/policy-brief-series/>. New publications in the two Series are announced to more than 9,000 institutions and individuals in the field.

Programme:⁴**Session 1:**

Chaired by **Richard Sousa**⁵ (Research Fellow, Hoover Institution, Stanford University)

09:00 **Richard Saller**⁶ (**Dean, School of Humanities and Sciences, Stanford University**):

Remarks on the Importance of the Seminar Topic

Morten Bergsmo⁷ (Visiting Professor, Peking University Law School):
The Concept, Programme and Purpose of the Seminar

09:30 **Richard J. Goldstone**⁸ (in 2013 Visiting Professor of Law, University of Virginia Law School and Stanford Law School):

⁴ This programme is a draft. The final and updated versions will be available at <http://www.fichl.org/activities/>. There will be time for discussion throughout the programme.

⁵ **Richard Sousa** is Senior Associate Director and Research Fellow at the Hoover Institution, Stanford University. He has been at Hoover since 1990. Sousa, an economist, specializes in human capital, discrimination, labor market issues, and K–12 education. He coauthored *School Figures: The Data Behind the Debate* (Hoover Institution Press, 2003) and is co-editor of *Reacting to the Spending Spree: Policy Changes We Can Afford* (Hoover Institution Press, 2009). He was an economist at the RAND Corporation and has taught economics and statistics at UCLA. He holds degrees in economics from Boston College and UCLA.

⁶ **Richard Saller** is Dean of the School of Humanities and Sciences and Professor of European Studies, Stanford University. He came to Stanford in 2007 with years of experience as a teacher and a leader. Earning bachelor of arts degrees in Greek and history from the University of Illinois and a doctorate from Cambridge University, he taught at Swarthmore College. From there he went to the University of Chicago, where he served as a professor, the dean of the Social Sciences Division, and provost over the course of 22 years.

⁷ **Morten Bergsmo** is Visiting Professor, Peking University Law School; Visiting Fellow, Stanford University; Senior Researcher, University of Oslo; and ICC Consultant. He was formerly Visiting Professor of Law, Georgetown University Law Center (2010-12); Fernand Braudel Senior Fellow, EUI (2011 Spring); Visiting Scholar, UC Berkeley (2010 Spring); Senior Researcher, PRIO (2006-09); Special Adviser to the Office of the Director of Public Prosecution of Norway (2007-08); Senior Legal Adviser and Chief of the Legal Advisory Section, ICC Office of the Prosecutor (2002-05); Co-ordinator of the establishment of the ICC Office of the Prosecutor (2002-03); Legal Adviser, ICTY (1994-2002); and Legal Adviser, UN Commission of Experts for the Former Yugoslavia established pursuant to Security Council resolution 780(1992) (1993-94). He represented the ICTY to the UN negotiation process to establish the ICC (1996-2002). He has pioneered the democratization of access to international law sources, and to this end he directs the ICC's Legal Tools Project and founded the capacity development organization CMN (www.casematrixnetwork.org). He also founded and directs the Forum for International Criminal and Humanitarian Law (www.fichl.org), and is Editor-in-Chief of the Torkel Opsahl Academic EPublisher (www.fichl.org/toaep/).

⁸ **Richard Goldstone** is Visiting Professor of Law in 2013 at the University of Virginia Law School in the spring and Stanford Law School in the fall. He is a former justice of the Constitutional Court of South Africa and was the first Chief Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. Justice Goldstone was appointed by the Secretary-General of the United Nations to the Independent International Committee, which investigated the Iraq Oil for Food program. In 2009 he led the UN Fact Finding Mission on Gaza. Among his other professional endeavours, Goldstone served as chairperson of the Commission of Inquiry regarding Public Violence and Intimidation that came to be known as the Goldstone Commission; and of the International Independent Inquiry on Kosovo. He also was co-chairperson of the International Task Force on Terrorism, which was established by the International Bar Association; director of the American Arbitration Association; a member of the International Group of Advisers of the International Committee of the Red Cross; and national president of the National Institute of Crime Prevention and the Rehabilitation of Offenders (NICRO). He is also a foreign member of the American Academy of Arts and Sciences and an honorary member of the Association of the Bar of the City of New York.

The International Criminal Law Context of Accountability for Members of Armed Forces for Core International Crimes and its Limitations

- 10:10 **William K. Lietzau**⁹ (Deputy Assistant Secretary of Defense, U.S. Department of Defense):
A U.S. Military Lawyer's Reflections on the Self-Interest of Armed Forces in Accountability for their Members for Core International Crimes
- 10:50 **Ruth Wedgwood**¹⁰ (Professor, Johns Hopkins University):
Self-Interest in Accountability as Prevention: Taking Factors Such as Righteousness and Motivation in Armed Forces into Account
- 11:20 Tea

Session 2:
Chaired by **Richard Sousa**

- 11:35 *Historical and Professional Perspectives on the Seminar Topic:*

⁹ **William K. Lietzau** was appointed as the Deputy Assistant Secretary of Defense for Detainee Policy on 16 February 2010. In this capacity, he is responsible for developing policy recommendations and co-ordinating global policy guidance relating to individuals captured or detained by the Department of Defense, as well as for developing and co-ordinating global policy guidance regarding Rule of Law initiatives. Mr. Lietzau is a retired Marine Corps officer who served primarily as a judge advocate. His most recent assignment was at the White House as Deputy Legal Adviser to the National Security Council where he addressed a variety of legal issues dealing with subjects such as international criminal law, counter-narcotics, interdictions, piracy, counter-terrorism, weapons of mass destruction, non-proliferation, missile defence, foreign assistance, and treaty implementation. Mr. Lietzau was initially trained as an infantry officer in the Marine Corps. His first assignment was with Company G, 2nd Battalion, 3rd Marine Regiment in Kaneohe, Hawaii where he served as a Rifle Platoon Commander, Executive Officer, and Company Commander. As a judge advocate in the Marine Corps, he was stationed in Japan, Germany, and numerous locations within the United States. His criminal law experience includes service as a Prosecutor, Defence Counsel, Military Judge, and Deputy Chief Judge of the Navy-Marine Corps Trial Judiciary. He also served as a Special Assistant U.S. Attorney and headed the Navy and Marine Corps' Appellate Government practice. As a legal adviser, he served as Staff Judge Advocate to United States European Command, Chief of the Law of War Branch for the Department of the Navy's International Law Division, Deputy Legal Adviser to the Chairman of the Joint Chiefs of Staff, and Special Adviser to the General Counsel in the Office of the Secretary of Defence. Mr. Lietzau also has served on several United States delegations in multilateral treaty negotiations. He earned his B.S. in Political Science from the United States Naval Academy and his J.D. from Yale University. He also holds an LL.M. from the Judge Advocate General's School, U.S. Army and an M.S. in National Security Law from the National War College.

¹⁰ **Ruth Wedgwood** is Edward B. Burling Professor of International Law and Diplomacy and Director of the International Law and Organizations Program, Paul H. Nitze School of Advanced International Studies (SAIS), Johns Hopkins University. She is U.S. member of the U.N. Human Rights Committee; member of the U.S. Department of State's Advisory Committee on International Law, the Defense Policy Board and the CIA Historical Review Panel; U.S. public delegate to the Organization for Security and Co-operation in Europe and Wehrkunde Munich Security Conference; founding member of Davos World Economic Forum Council on International Law; independent expert for International Criminal Tribunal for the former Yugoslavia; director of studies at the Hague Academy for International Law in the Netherlands; former professor at Yale Law School, visiting professor at University of Paris I (Sorbonne), Berlin Prize Fellow of the American Academy, and Charles H. Stockton Professor at the U.S. Naval War College; former member of the Hart-Rudman Commission on National Security in the 21st Century, senior fellow at the Council on Foreign Relations and chief of staff to the head of the criminal division in the U.S. Department of Justice, chairing the attorney general's working group on informant and undercover investigative guidelines; served as federal prosecutor in the Southern District of New York; vice president of American Society of International Law; vice president of the American branch of the International Law Association; and on the board of editors for American Journal of International Law, World Policy Journal, American Interest and PRISM; vice chairman of Freedom House; served as law clerk to Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit and Justice Harry Blackmun of the U.S. Supreme Court, and as executive editor of the Yale Law Journal; commentator for BBC, NPR and PBS; J.D., Yale University.

- **Bruce Houlder**¹¹ QC DL (Director, Service Prosecution Authority, United Kingdom):
A Perspective from the UK Service Prosecution Authority
- **Agus Widjojo**¹² (General, Indonesian Armed Forces):
A Perspective from the Indonesian Armed Forces
- **Michael Gibson**¹³ (Deputy Judge Advocate General Military Justice and Colonel in the Canadian Forces):
A Perspective from the Canadian Forces

13:15 Lunch

Session 3:

Chaired by **Arne Willy Dahl**¹⁴ (Norwegian Judge Advocate General, Honorary President of the International Society for Military Law and the Law of War)

14:00 *Thematic Perspectives on the Seminar Topic:*

- **René Provost**¹⁵ (Professor, McGill University):

¹¹ **Bruce Houlder** QC DL has been Director of Service Prosecution Authority of the United Kingdom (DSP) since January 2009. He has formerly been in practice at the private Bar for 39 years, and has been a former Chairman of the Criminal Bar Association of England and Wales.

¹² **Agus Widjojo** is the former Vice Chairman of the People's Consultative Assembly (MPR) of the Republic of Indonesia and Tentara Nasional Indonesia's (TNI) Chief of Territorial Affairs, and is regarded as one of the TNI's leading intellectuals. During his appointment as Commandant of the Armed Force's staff college, the TNI think tank, he was responsible for restructuring the political and security doctrine of the TNI. He served as a member of the Indonesia-Timor Leste Joint Truth and Friendship Commission. He is a Senior Fellow of the Centre for Strategic and International Studies, Indonesia, and was a Visiting Senior Fellow of the Institute of Defence and Strategic Studies in Singapore. He has written numerous articles on security issues in the Asia-Pacific Region.

¹³ **Michael Gibson** is Deputy Judge Advocate General Military Justice and Colonel in the Canadian Forces, which he joined in 1980. He has been prosecution, defence and appellate counsel, and has had significant involvement in recent legislation affecting the military justice system. He has also published several articles on international human rights law and the administration of justice by military tribunals. Colonel Gibson has served in a variety of field and headquarters positions, including Director of Military Justice Policy and Research, and Director of International and Operational Law. He has done numerous operational deployments abroad, including being Deputy Legal Advisor at the NATO SFOR Headquarters in Sarajevo, Bosnia and Herzegovina, and Senior Military Law Advisor for the Rule of Law Unit of MONUC, the United Nations Mission in the Democratic Republic of Congo. Colonel Gibson is a graduate of the Royal Military College of Canada (Honours B.A. Political Science and History), the University of Toronto Faculty of Law (LL.B.), and the London School of Economics and Political Science (M.Sc. International Relations, and LL.M. Public International Law). He is called to the Bar in Ontario. Colonel Gibson is a member of the Board of Directors of the International Society for Military Law and the Law of War, as well as being President of the Canadian National Group of the Society.

¹⁴ **Arne Willy Dahl** is Judge Advocate General for the Norwegian Armed Forces, and in that capacity responsible for penal prosecution in military cases and for legal advice in summary punishment cases. He is currently Honorary President of the International Society for Military Law and the Law of War. Since 1982, he has been lecturer at the Army Academy, Judge Advocate for Eastern Norway, District Attorney (Public Prosecutor) in Oslo, Head of the Legal Services of the Norwegian Armed Forces, and Prosecutor at the Office of the Director for Public Prosecutions with special responsibility for war crimes. He has written a handbook on military international law.

¹⁵ **René Provost** is Professor at the Faculty of Law of McGill University. He teaches and conducts research in public international law, international human rights law, and international humanitarian law. He is the author of *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002), the editor of *State Responsibility in International Law* (Ashgate/Dartmouth, 2002), and a co-editor of *International Law Chiefly As Applied and Interpreted in Canada* (Emond Mongtgomery, 2006). Professor Provost served as Law Clerk to Jus-

Jungle Justice or Monkey Courts? Accountability for International Crimes Within Insurgent Groups

- **Catherine P. MacKenzie**¹⁶ (Lecturer, University of Cambridge):
The Role of Moral and Political Authority in Military Accountability Mechanisms: the Nature of Military Accountability in the Context of Environmental Offences
- **Christopher Mahony**¹⁷ (Deputy Director, New Zealand Centre for Human Rights Law, Policy and Practice, University of Auckland):
Disparate Incentives in Disparate Circumstances: Examining Domestic Prosecution and the ICC in Kenya, Uganda, and Colombia

15:20 *Procedural and Jurisdictional Perspectives on the Seminar Topic:*

- **Melvin Christopher Jenks**¹⁸ (International Law Branch Chief, US Army Office of the Judge Advocate General):
Self-Interest or Self-Inflicted: Why the United States should Report the Disposition of its Service Members' Violations of the Laws of War
- **Franklin D. Rosenblatt**¹⁹ (Major, U.S. Army Judge Advocate General's Corps):

tice L'Heureux-Dubé of the Supreme Court of Canada. He was the President of the Société québécoise de droit international from 2002 to 2006. Professor Provost is the founding Director of the Centre for Human Rights and Legal Pluralism, created in the fall of 2005. He holds a D.Phil. from the University of Oxford and an LL.M. from the University of California at Berkeley School of Law.

¹⁶ **Catherine P. MacKenzie** is Chairman of the Board of Scrutiny of the University of Cambridge. She is a Fellow of Selwyn College and University Lecturer in Law at Cambridge. She is also a Visiting Research Fellow at the University of Oxford and an Academic Fellow of Inner Temple (Inn of Court). A member of the Bar of England and Wales and of the High Court of Australia, and a Commonwealth Scholar, she has been employed by the United Nations, the World Bank and the Asian Development Bank, and held fellowships at the Australian National University, the University of Tokyo and Oxford. She has served as a Legal Officer in the Australian Army Reserve and as a civilian rule of law monitor with the United Nations Mission in Liberia. She is a member of the Delegacy for Military Instruction at the University of Oxford and has served as Acting Director of the Oxford Military Law Program.

¹⁷ **Christopher Mahony** is Deputy Director of the New Zealand Centre for Human Rights Law, Policy and Practice, Faculty of Law, University of Auckland. He is a candidate for a DPhil in Politics at the University of Oxford. He holds Bachelor of Commerce (BCom) and Bachelor of Laws (LLB) degrees from the University of Otago and a master's degree in African Studies (MSc) from the University of Oxford. He was admitted to the bar of the High Court of New Zealand in 2006 where he appeared for the crown in criminal and refugee matters. He drafted the recommendations on governance for the Sierra Leone Truth and Reconciliation Commission, and co-authored the 'Historical antecedents to the conflict' chapter. In 2008, he directed the Witness Evaluation Legacy Project at the Special Court for Sierra Leone. He has advised the British and US governments and the Institute for Security Studies on justice sector reform and transitional justice issues.

¹⁸ **Melvin Christopher Jenks** is International Law Branch Chief, US Army Office of the Judge Advocate General. He was formerly Deputy Chief and Senior Litigation Attorney, US Army Litigation Division, and has served as a military attorney and prosecutor in the US and several foreign countries. He holds LL.M. degrees from Georgetown University Law Center and the US Army Judge Advocate General's School, a JD from University of Arizona College of Law, and a B.Sc. from the United States Military Academy. He is currently a Ph.D. candidate with Melbourne University Law School.

¹⁹ **Franklin D. Rosenblatt** is a Major in the U.S. Army Judge Advocate General's Corps. His previous overseas assignments include Korea, Bosnia and Herzegovina, and two tours in Iraq. He is currently a student at the Army's Command and General Staff College at Fort Leavenworth, Kansas. He holds a BA in Philosophy and Religion from James Madison University, a JD from the University of Virginia School of Law, and an LL.M. from the Judge Advocate General's Legal Center and School.

Non-Deployable: The Court-Martial System in Combat from 2001 to 2009

- **Roberta Arnold**²⁰ (Military Academy at ETH Zurich (MILAK)): *The Prosecution of Members of the Armed Forces for Core International Crimes – a Judicial Act in the Self-Interest of the Armed Forces?*

16:30 Tea

Session 4:
Chaired by **Morten Bergsmo**

16:45 *From the History of Military Professionalization to a ‘Stanford List of Military Self-Interests in Accountability’*

- **Elizabeth L. Hillman**²¹ (Professor, University of California Hastings College of the Law): *The Importance of Accountability in the U.S. Military’s History of Professionalization*
- **Arne Willy Dahl** (Judge Advocate General, Norway): *Towards a ‘Stanford List of Self-Interests in Accountability for Members of Armed Forces for Core International Crimes’*
- Discussion

17:45 Conclusion

²⁰ **Roberta Arnold**, Ph.D. (Bern), LL.M. (Nottingham), is a Military Investigating Magistrate, Swiss Military Justice; Legal Officer, Office of the Attorney General (Switzerland), Competence Centre for International Criminal Law, and Research; and Assistant, Military Academy at ETH Zurich (Switzerland), Chair for Strategic Studies. She joined the Academy in January 2012, after having worked in the Laws of Armed Conflict Section (2003-05) and Arms Control and Disarmament Policy Section (2008-10) of the Swiss Ministry of Defence. In September 2010, after qualifying as a barrister in the Canton Ticino, she joined the Office of the Attorney General (Switzerland) as a Legal Officer (International Judicial Assistance Division and Competence Centre for International Criminal Law). In 2005 she joined the Swiss Armed Forces with the function of specialist officer (Capt.) of the Military Justice; she currently holds the function of Investigating Magistrate (Military Tribunal 8). She is the Swiss correspondent of the Review of the International Society for Military Law and the Laws of War.

²¹ **Elizabeth L. Hillman** is Professor of Law at the University of California Hastings College of the Law in San Francisco. Her work focuses on United States military law and history since the mid-20th century and the impact of gender and sexual norms on military culture. A veteran of the U.S. Air Force, she taught history at the Air Force Academy and at Yale University before joining the faculty at Rutgers University School of Law, Camden in 2000. She now teaches military law, constitutional law, legal history, and estates and trusts. Professor Hillman is the author of *Defending America: Military Culture and the Cold War Court-Martial* (Princeton University Press: 2005) and co-author of *Military Justice Cases and Materials* (with Eugene R. Fidell and Dwight H. Sullivan, LexisNexis: 2010; 1st ed., 2007). She has testified before Congress on military sexual violence and in federal district court as an expert on sexual orientation discrimination in military law and history. Her recent work includes “Front and Center: Sexual Violence in U.S. Military Law”, *Politics & Society* (2009).