

Myanmar Military's Self-Interest in Self-Accountability for War Crimes

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Myanmar military's criminal justice system is facing legitimacy challenges amid multiple external accountability initiatives for core international crimes.¹ The challenges present, at the same time, a unique opportunity to strengthen Myanmar's military justice system, in connection to the wider re-examination of the military's own culture, values and sustainability.

1. The Language of 'Self-Interest' and that of Coercive Obligation

Accountability is better desired than imposed. The language of legal obligation is familiar to many: whether you want it or not, you have to do it. The assumption is that accountability is *against* military self-interests. I would argue the contrary: self-accountability is essential to the survival and prosperity of the military.

'Self-interest' is understood as *overall* and *long-term* interest. It does not imply something morally inferior or less than ideal. A self-interest can be a moral good or a practical benefit. The language of self-interest creates an alternative or complementary discourse space for rational actors. It incorporates natural human responses and shared military experiences to which the receiving party can relate. To make self-accountability happen, the language of self-interest is as important as that of coercive obligation.

It is necessary (i) to provide information, reasoning and arguments that help the construction of military rationales in compliance with laws of war and accountability for violations. Military professionals and training mechanisms deserve a comprehensive statement of these self-interests; and (ii) to increase awareness of such self-interests within the military and civilian government. These self-interests should become an integral part of their decision-making, education and communication.

In 2018, the second edition of the anthology *Military Self-Interest in Accountability for Core International Crimes* was published.² In the introductory chapter, Morten Bergsmo and I formulate 26 points of self-interest in accountability under nine headings. This policy brief builds on some of the analyses and conclusions of the

book in explaining why the Myanmar military should expressly embrace self-accountability, further to the courts-martial they are conducting.

2. Self-Interests in Self-Accountability for War Crimes

Myanmar is home to some of the world's longest-running armed conflicts, with some ethnic conflicts dating back more than 70 years.³ Militarisation and insecurity have perpetuated minority areas. At the time of writing in 2020, Myanmar has some twenty powerful non-state armed groups around most of its periphery.⁴ These armed groups are formed around ethnic identities (for example, the Karen National Union or the United Wa State Army) with stated objectives of greater autonomy for their community.⁵ These armed groups fight for or against the State military (the 'Tatmadaw'), and ally with or fight against each other.⁶ Since Myanmar's independence in 1948, the Tatmadaw has been fighting counter-insurgency wars across a significant part of the territory. Since early 2019, the armed conflict between the Tatmadaw and Arakan Army in Rakhine State has witnessed vicious fighting.⁷

Most of the self-interests stated below also apply to ethnic armed groups in Myanmar, although non-state actors may need different accountability mechanisms. I explain self-interests from the two perspectives of military self-regulation and external relations.

2.1. Interests of Self-Regulation and Development

2.1.1. Internal Order and Discipline

"It is discipline that distinguishes an army from a mob."⁸ The military justice system requires involvement of command authorities because its basic goal is to ensure good order and discipline, regardless of the retributive effect.⁹ Effective investigation and prosecution of war crimes have a pedagogical value that induces habitual

³ International Crisis Group ('ICG'), "Identity Crisis: Ethnicity and Conflict in Myanmar", 28 August 2020, p. 6 (available on its web site).

⁴ *Ibid.*, p. i.

⁵ *Ibid.*, p. 2.

⁶ *Ibid.*, p. 13.

⁷ More on the Arakan Army, see NAKANISHI Yoshihiro and Antonio Angotti, "The Arakan Army: Violence in Rakhine State in Myanmar", Policy Brief Series No. 107 (2020), TOAEP, Brussels, 2020 (<https://www.toaep.org/pbs-pdf/107-nakanishi-angotti/>).

⁸ Morten Bergsmo, Arne Willy Dahl and Richard Sousa, "Military Self-Interest in Accountability for Core International Crimes", FICHL Policy Brief Series No. 14 (2013), TOAEP, Brussels, 2013 (<http://www.toaep.org/pbs-pdf/14-bergsmo-dahl-sousa>).

⁹ William K. Lietzau, "Foreword", in Bergsmo and SONG (eds.), 2018, see *supra* note 2.

¹ Ye Mon, "Myanmar's military 'justice' system", 25 January 2020, *Frontier Myanmar*; Maggi Quadrini, "The Problem with the Myanmar Army's Admissions of Guilt", *The Diplomat*, 17 September 2020.

² Morten Bergsmo and SONG Tianying (eds.), *Military Self-Interest in Accountability for Core International Crimes*, second edition, Torkel Opsahl Academic EPublisher ('TOAEP'), Brussels, 2018 (<https://www.toaep.org/ps-pdf/25-bergsmo-song-second>). The topic was first conceptualised and introduced for a conference at Stanford University on 27 November 2012, co-organised by the University, the Centre for International Law Research and Policy ('CILRAP'), and the UC Berkeley War Crimes Studies Center.

compliance and norm internalisation.¹⁰ Permitting serious criminal conduct can lead to demoralisation of troops.

Order and discipline are important for operational efficiency. Soldiers need to carry out their profession in an environment where they can rely on the proper conduct of their comrades and superiors.¹¹ An ill-disciplined force, which “makes its own rules, worse still mixes its own messages”, is self-defeating in operations and in the public mind.¹²

2.1.2. Operational Advantage

Operational advantage is deeply rooted in the very idea of laws of war.¹³ In earlier days, military leaders were taught that the law of war was written “by warriors, for warriors”.¹⁴ The utilitarian argument is that ensuring compliance with the law of war through self-accountability helps the war-fighting effort:

1. *Economy of violence* means military resources are better used against military targets than to cause needless death and destruction. Brutality and excesses are wasteful. They also distract soldiers from proper military tasks.
2. Humane and fair treatment of captured enemy soldiers encourages surrender. Mistreatment or summary execution of captives motivates the opponent to fight harder and longer.
3. When war crimes are punished and known to be punished, it may dissuade the adversary from resorting to reprisals, thus avoiding *escalation*. On the contrary, violations such as using weapons which cause excessive pain and suffering may force the enemy to respond with the same or more brutality in the battlefield. Ill-treatment of captured enemy soldiers may subject one’s own soldiers in enemy hands to equal or worse treatment.
4. Adherence to laws of war fosters *reciprocal compliance* by the adversary.
5. With self-accountability, the military can control the release of information so that it is sufficiently transparent but not harmful to military operations. The military avoids the situation where it is forced to release confidential or sensitive information, which may happen in externalised accountability processes.

2.1.3. Professionalisation and Self-Development

Standards and rules create a sense of vocation, a loyalty to the military profession which holds the professional community together. If soldiers are not to be seen as members of a criminal gang, they must use violence within professional constraints.

In the process of military professionalisation, self-accountability for war crimes should be cultivated together with other capacities such as combat skills, strategic planning, and ruses of war. No military, however professional, can expect zero crimes among its members. A mature military recognises and learns from its own mistakes. Self-correction and self-improvement are essential to the military’s professional integrity and sustainable existence.

¹⁰ Róisín Burke, “Troop Discipline, the Rule of Law and Mission Operational Effectiveness in Conflict-Affected States”, in Bergsmo and SONG (eds.), 2018, see *supra* note 2.

¹¹ Roberta Arnold, “Prosecuting Members of the Armed Forces for Core International Crimes: A Judicial Act in the Self-Interest of the Armed Forces?”, in Bergsmo and SONG (eds.), 2018, see *supra* note 2.

¹² Bruce Houlder, “The Self-Interest of Armed Forces in Accountability for Their Members for Core International Crimes: Carrot Is Better than Stick”, in Bergsmo and SONG (eds.), 2018, see *supra* note 2.

¹³ Pablo Kalmanovitz, *The Laws of War in International Thought*, Oxford University Press, 2020.

¹⁴ Lietzau, 2018, see *supra* note 9.

2.1.4. Capacity-Development in the Military Justice System

There can be no strong military without a strong military justice system. A professional, sufficiently transparent military justice system can deliver self-accountability and clear false accusations. The military needs to protect the integrity and reputation of its justice system. Only a trustworthy military justice system is likely to be seen to deliver trustworthy justice.

2.1.5. Minimising Risks of Superior Responsibility

The law of war crimes presumes an effective chain of command. The nature of command responsibility is such that commanders either prevent and punish war crimes committed by their subordinates, or take personal responsibility for these crimes. The stain or even suspicion of serious crimes is harmful to the professional advancement of the commander. It further poisons a post-military political career. If Tatmadaw commanders want to pursue a political career after retiring from the military, they need to take the responsibility to prevent and punish war crimes very seriously.

2.2. External Relations Interests

2.2.1. Pre-empting International Judicial Scrutiny

“If armed forces refrain from sitting at the prosecuting table they remain potential prey on the ICC [International Criminal Court] menu”.¹⁵ There is a “realist self-interest”¹⁶ to take ownership of war crimes cases, and avoid being a passive object of external scrutiny.¹⁷ The ICC’s practice shows that where States demonstrated due diligence and intent to pursue accountability for the crimes, they have successfully disabled ICC investigations through the operation of the legal principle of complementarity.¹⁸ By contrast, more belligerent responses to the ICC have led to further proceedings before the Court.¹⁹

For Myanmar, the opening of investigation by the ICC Prosecutor concerning Tatmadaw operations in northern Rakhine in 2017, combined with genocide allegations before the International Court of Justice over the same situation, presses the need for self-accountability.²⁰ In early September 2020, video clips were circulated where two Tatmadaw deserters stated that they were ordered to kill Rohingya Muslims in the 2017 incidents. These two soldiers were held by the insurgent Arakan Army when the video was made. They were subsequently transferred to The Hague and reportedly in contact with the ICC.²¹ Regardless of the evidentiary value of these statements, this episode further exposes the risk of externalisation of accountability when self-accountability is delayed or denied. The Arakan Army holds a number of Tatmadaw soldiers and may capture more in future combat. Lack of adequate self-accountability for past violations would present an ongoing risk.

The Tatmadaw has taken positive steps in self-accountability since 2019, when later in the year the situation entered investigation stage before the ICC (November 2019). Thirteen officers and soldiers have been convicted in the two courts-martials concerning Inn Din and Gutarpyin villages.²² On 15 September 2020, the

¹⁵ Christopher B. Mahony, “If You’re Not at the Table, You’re on the Menu: Complementarity and Self-Interest in Domestic Processes for Core International Crimes”, in Bergsmo and SONG (eds.), 2018, see *supra* note 2.

¹⁶ *Ibid.*

¹⁷ Bergsmo, Dahl and Sousa, 2013, see *supra* note 8.

¹⁸ Mahony, 2018, see *supra* note 15.

¹⁹ *Ibid.*

²⁰ SONG Tianying, “Positive Complementarity and the Receiving End of Justice: The Case of Myanmar”, Policy Brief Series No. 104 (2020), TOAEP, Brussels, 2020 (<http://www.toaep.org/pbs-pdf/104-song/>).

²¹ David Scott Mathieson, “Commodifying prisoners of war in Myanmar”, *Asia Times*, 25 September 2020.

²² Statement by the Chairman of the Delegation of Republic of the Union of

Tatmadaw announced that a court-martial would take place concerning events at the Chut Pyin and Maung Nu villages in Rakhine State in 2017, following investigation by a court of inquiry. The court-martial will commence before the end of 2020.²³ In addition, the Office of the Judge Advocate-General is “investigating possible wider patterns of violations in the region of northern Rakhine in 2016-2017”.²⁴ These investigations cover allegations regarding Taung Bazar and villages in the Maungdaw area, locations where the two captured soldiers claimed attacks against Rohingyas happened. The inquiry into regional patterns of violations anchors the self-accountability process at a “sufficiently high level”.²⁵ These and possible future cases have the potential to neutralise international judicial interventions provided they deliver quality justice within reasonable time, in a sufficiently transparent manner.

Self-accountability should be routinised in military thinking and practice. It should not be a tool of crisis management. The 2017 incident will not be the last cause for international intervention. Given the numerous armed conflicts between the Tatmadaw and ethnic armed groups, more proceedings may be initiated before foreign and international courts. Effective self-accountability presents a lasting solution to external judicial scrutiny: instead of putting out fires here and there, now and then, self-accountability takes the wood out of fire.

2.2.2. Domestic and International Legitimacy and Reputation

The military’s longer-term security depends on domestic and international support. Self-accountability remedies reputational loss over war crimes and helps restore the military’s credibility. Self-accountability, when conducted professionally, can also give due regard to the military’s internal view and offer convincing alternative narratives. A case in point is the Turkel reports commissioned by the Israeli government concerning the military’s interception of a flotilla heading for Gaza.²⁶

Self-accountability gives closure to victims and helps the State and the military to move forward. Proper communications should be made about the military trials. One way to create transparency and legitimacy is to invite members of affected communities to observe the trial. In 2016 and 2017, the Tatmadaw invited observers, including local villagers, victim’s relatives and civil society groups to attend court-martial trials concerning killings in Mong Yaw village and Mansi Township.²⁷ This can be replicated in other cases, where feasible.

Failed self-accountability fuels accusations and blame, feeds enemy propaganda, invites deeper and wider scrutiny of all aspects of the military, and distances potential allies and supporters who are afraid of being guilty by association. Not to mention that time-consuming international proceedings inflict significant and lasting

damage to the national reputation, regardless of the eventual outcome. Since the eruption of the internal armed conflict, the Tatmadaw and Arakan Army have exchanged a number of accusations of war crimes.²⁸ Regardless of the truthfulness of these statements, enemy propaganda thrives on existing doubts over compliance and self-accountability.

2.2.3. Accomplishment of Counter-Insurgency Missions

Counter-insurgency missions often mean competition for legitimacy, not merely of brute force, between the State military and insurgent groups. Brute force may bring about short-term victory, but not lasting peace. Unpunished serious crimes against the civilian population undermine the military’s legitimacy. The local people may be unwilling to co-operate, or even become hostile. This results in increased security risks, and requires deployment of more troops. Lack of local acceptance also undermines the army’s political standing. In counter-insurgency missions, winning the war is only the first step. Lack of accountability for war crimes is an obstacle to winning ‘hearts and minds’.

A recent case shows the importance of prompt self-accountability in the age of social media. In May 2020, a video went viral on the Internet showing Tatmadaw soldiers beating and threatening to kill five men of Rakhine ethnicity. These Rakhine men were suspected of having links to the Arakan Army. The Tatmadaw immediately announced that it had taken its soldiers into custody and would open an investigation.²⁹

2.2.4. Peace Process

Lack of accountability for war crimes makes subsequent peace and reconciliation more difficult. Unpunished serious crimes can have a delayed impact. They sustain resentment, social division, and legitimacy challenges long after the conclusion of the war.

| Interests of Self-Regulation and Development | External Relations |
|--|--|
| Internal Order and Discipline | Pre-empting International Judicial Scrutiny |
| Operational Advantages | Domestic and International Legitimacy and Reputation |
| Professionalisation and Self-Development | Accomplishment of Counter-Insurgency Mission |
| Capacity Building of Military Justice System | Peace Process |
| Minimising Risks of Superior Responsibility | |

Figure 1: Military self-interests in self-accountability for war crimes: the case of Myanmar.

3. Competing Interests in Decision-Making

Violations of the laws of war can be motivated by short-term military or political advantages, especially when the enemy presents a serious threat. If compliance with the law breeds compliance, illegal tactics provoke more violations.³⁰ Although one side’s violations do not justify the other side’s violations, the vicious atmosphere does nurture short-sightedness and vengefulness.

The Arakan Army (‘AA’), perhaps “Myanmar’s deadliest anti-government insurgency” at the moment, has inflicted severe

Myanmar at the General Debate of the 75th Session of the United Nations General Assembly, 29 September 2020 (<https://www.legal-tools.org/doc/yd7ftx/>).

²³ “Press Statement of Tatmadaw True News Information Team about allegations regarding villages in Maungdaw area”, *The Global New Light Of Myanmar*, 15 September 2020 (<https://www.legal-tools.org/doc/eh0yzi/>).

²⁴ *Ibid.*

²⁵ Bergsmo, Dahl and Sousa, 2013, see *supra* note 8.

²⁶ Marlene Mazel, “Compliance with the Law of Armed Conflict: An Israeli Perspective”, in Bergsmo and SONG (eds.), 2018, see *supra* note 2. See also Gilad Noam, “Some Reflections on the Role of Military Justice Mechanisms in the International Criminal Justice System”, in Xabier Agirre Aranburu, Morten Bergsmo, Simon De Smet and Carsten Stahn, *Quality Control in Criminal Investigation*, TOAEP, Brussels, 2020 (<http://www.toaep.org/ps-pdf/38-qcci>).

²⁷ Ye Mon, 2020, see *supra* note 1.

²⁸ See for example, Arakan Army’s Statements (available on its web site).

²⁹ “Myanmar Army Acknowledges Unlawful Interrogation Methods After Viral Rakhine Beating Video”, *Radio Free Asia*, 12 May 2020 (<https://www.legal-tools.org/doc/ddfg8j/>).

³⁰ James Morrow explains factors influencing compliance with laws of war, including operational calculations and reciprocity, in *Order within Anarchy: The Laws of War as an International Institution*, Cambridge University Press, 2014.

damage to the Tatmadaw.³¹ Both the Arakan Army and the Tatmadaw have been accused of killing and injuring civilians caught in the conflict, destroying or confiscating property, and other abuses.³² Although the AA publicly pledges respect for all ethnic groups in Rakhine and human rights in general, its abusive practice towards civilians, especially non-Rakhine ethnic groups, has been widely documented.³³ The AA also engages in the disturbing tactic of taking civilian hostages (including members of parliament, political party officials, local officials, firemen and even Indian engineers) and enforced disappearance of civilians.³⁴ There is a strong sense among non-Rakhine groups that the AA is acting with impunity because victims have no recourse.³⁵

Short-term advantages gained by permitting violations of the laws of war are compensated by escalation of violence and long-term damage to the reputation. Self-accountability is an essential remedy, albeit a partial one. An effective military justice system can deliver not only self-accountability, but also accountability for members of armed groups who have committed serious crimes, once they are captured or come into custody after the conflict.

4. Temptations to Cover-Up or Downplay the Offences

Even if the military does not approve crimes committed by its members, it may still hesitate to publicly admit responsibility. There is concern that admission of responsibility damages reputation, makes the institution look weak, undermines morale, and strengthens the enemy. A short-sighted commander may therefore see the interests of the unit best served by covering up unfavourable incidents, denying responsibility, or downplaying the gravity of the case by manipulating facts.³⁶ Alternatively, the military may be tempted to scapegoat lower level soldiers rather than acknowledging possible systemic failure or responsibility of commanders.³⁷ These are counter-productive strategies. If serious crimes already harm the military's image, denial or disingenuous accountability efforts would harm its image a second time. Dismissive or evasive responses would only confirm prior doubts that the military condones, approves, or orders the crimes. They in turn lead to calls for external investigation, suspicion of more crimes, and mistrust of future self-accountability efforts. On the contrary, immediate, genuine, sufficiently transparent self-accountability distances the military from criminal conduct and pre-empts criticism and external intervention.

The Tatmadaw's own experience confirms this analysis. When the military conducted genuine self-accountability and involved the affected community and civil society, the focus was no longer on the crimes but the accountability process. In other cases, its strategy to downplay alleged crimes backfired. Serious crimes left without

acceptable explanation or accountability perpetuate in people's minds.

Military forces with a long history need to modernise not only their equipment and organisation, but also their way of thinking. Self-scrutiny and self-accountability can be "a painful, expensive and lengthy process".³⁸ But there is no alternative. Today's armed conflicts are fought not only on the battlefield, or in the eyes of affected communities, but also in the world public opinion. There is a strong momentum to hold individuals who commit crimes during military operations accountable, no matter where they are, no matter *when* the crimes are committed.

5. The Gap between Willingness and Capacity

Developing capacity for self-accountability is a topic in its own right. The point I want to make here is that willingness towards self-accountability should not be equated with capacity to do so. Like compliance with the laws of war, self-accountability for war crimes needs to be cultivated and sustained.³⁹ Commitment to self-accountability for war crimes should be accompanied by long-term investment in personnel and resources, and preparedness for temporary setbacks. Lessons can be drawn from military justice practices in other countries.

External actors should consider offering to assist the military justice system in Myanmar. Self-accountability is "fundamentally important to any real progress in protecting human rights in armed conflict and diminishing war's devastating effects".⁴⁰ Regardless of the actual deterrent effect of external accountability processes, history tells us that the number of soldiers held accountable by external mechanisms is very small.⁴¹ In the case of Myanmar, even if external processes succeed in holding a few commanders accountable, the many armed conflicts will continue for the foreseeable future. These armed conflicts are likely to continue in the same manner for lack of norm-internalisation. External accountability processes may induce, but not replace self-accountability.

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³¹ Mathieson, 2020, see *supra* note 21.

³² ICG, 2020, p. 19, see *supra* note 3.

³³ *Ibid.*, pp. 25-6; Mathieson, 2020, see *supra* note 21.

³⁴ Mathieson, 2020, see *supra* note 21.

³⁵ ICG, 2020, p. 26, see *supra* note 3.

³⁶ Bergsmo, Dahl and Sousa, 2013, see *supra* note 8.

³⁷ *Ibid.*

³⁸ Andrew Cayley, "Foreword", in Bergsmo and SONG (eds.), 2018, see *supra* note 2.

³⁹ See, for example, XUE Ru, "Humanitarianism in Chinese Traditional Military Ethics and International Humanitarian Law Training in the People's Liberation Army", in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds.), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, 2019.

⁴⁰ Lietzau, 2018, see *supra* note 9.

⁴¹ *Ibid.*