



The Influence of International Human Rights Law on Military Justice as an Accountability Mechanism

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Discussion Topics

- Brief overview of the role of MJS in IHL – Accountability Mechanism
- “Soft law” and the debate in MJ circles
- Focus on the “right” to an impartial investigation
- Recent Int’l decisions of influence



Role of the MJS in IHL – Accountability Mechanism

- MJS firmly rooted in IHL
 - GC's and AP
 - State is responsible for violations committed by the organs of the State, including its armed forces
 - International law requires states the armed forces to possess a disciplinary code – to have POW “benefit”
 - API – treaty requirement that armed forces must be subject to an internal disciplinary system....that shall enforce compliance with the rules of IHL applicable in armed conflict
 - Right to fair trial, due process and humane treatment of persons persons subject to military jurisdiction



Role of the MJS in IHL – Accountability Mechanism

- Maintenance of Discipline in furtherance of operational effectiveness is the “raison d’être” of a MJS
 - CAN – Dickson/Lamer/LeSage reports and Bill C-15
 - UK – MoD Doctrine
 - AUS – Senate Review of MJS (2005)
- This includes the requirement for a system of investigation, prosecution and adjudication
- Independent, yet military character
 - Portability, Expediency, Expertise
- The structure of this system has been undergoing changes since the 1990s



Imposition of Domestic Criminal Law to MJS

- 1990's – changes to UK following multiple ECtHR decisions
- 1990's – Bill C-25 in Canada makes significant changes to the CDN MJS, yet it retains its military character
- 1990's – NZ human rights legislation causes significant modifications to comply with the ICCPR
- 1990's-2000's – AUS seeks to modify its system but eventually reverts to “traditional” system of CM

- From IHL perspective – Does the State have the ability to enforce compliance with IHL and deal with violations of the Law of Armed Conflict?
 - AUS example – portability
- OVERALL – some external pressures to “civilianize” MJS to adopt/resemble a civilian criminal justice model



“Soft law” impacting MJS

- HRC General Comment 32
(ICCPR Art.14 Right to Fair Trial)
 - MJS trying civilians
- UN Special Rapporteur Reports on the Independence of Lawyers and Judges
 - Decaux Report 2006
 - Knaul Report 2013



“Soft law” impacting MJS

- Knaul Report (2013)
 - Draft Principles
 - No jurisdiction to try civilians
 - Limited scope of jurisdiction to military courts
 - No ability for military courts to try persons accused of “serious human rights violations”



“Soft law” impacting MJS

- Knaul Report (2013)
 - No ability to try persons accused of serious human rights violations
 - “serious disagreement” between HR and military practitioners
 - Rationale – military tribunals “cannot be trusted to try such grave offences properly since they may be tempted to shield military perpetrators of serious HR abuses...”



“Soft law” impacting MJS

- Knaul Report (2013)
 - Military practitioner view– serious HR violations are crimes and breaches of discipline
 - Rapporteur disagrees with this view, citing HR abuses in Latin American countries



“Soft law” impacting MJS

- Concerns with Knaul report
(in terms of jurisdiction over HR violations)
 - Reliance on examples of the use of MJS in the domestic realm
 - No mention of MJS in the IHL context
 - *In all circumstances, the jurisdiction of military tribunals should be set aside in favour of the jurisdiction of the ordinary courts **to conduct inquiries** into serious HR violations....and to prosecute and try persons accused of such crimes...*



ICRC Influence

- 2013 – ICRC Use of Force Study
 - “Interplay between the conduct of hostilities and law enforcement paradigms”
 - 21 Int’l experts – including from Canada
 - Examination of the IHL and law enforcement paradigms as they relate to the conduct of hostilities
 - Focus on MJS – “Issues Before and After the UOF”
 - Obligation to Investigate



ICRC Influence

- Recognition that IHL “implicitly” provides for an obligation to investigate war crimes
 - civilian population wilfully made object of attack
 - Indiscriminate attack...excessive loss to civilian life or damage to civilian objects
 - Wilful killing of a person *hors de combat*



ICRC Influence

- Counter view: HR Perspective
 - Body conducting investigation – independent and impartial
 - All possible steps must be taken in order to gather evidence
 - Cites Al-Skeini – (int'l armed conflict) – ECtHR – Article 2 (right to life applies)

- Key questions:
 - Scope of obligation to investigate in an armed conflict – IHL or IHRL as *lex specialis*?
 - If an investigation is to be conducted – how can it be “operationalized?”



ICRC Influence

- Majority of experts – IHL “has to prevail regarding the obligation to investigate in armed conflicts”
- IHL is the *lex specialis*
- But... some experts argued that in non-international armed conflicts – IHL has to be read in light of subsequent HR developments

- Issues:
 - When/where are there sufficient elements to believe that the U of F raises issues under criminal law?
 - What threshold (in terms of facts) does an allegation must contain to be credible and actionable?



Recent Jurisprudence of Note

- ECtHR – *Findlay et. al*
 - 10 cases before ECtHR to “civilianize” military justice system
 - Civilian judges (former military legal officers), civilian/military prosecutors
 - Issue = MJS did not comply with ECHR right to a fair trial
 - Practical issue = portability of MJS (few CM in theatre during the Afghan campaign)

- ECtHR – *Al Skeini*
 - Expands *Bankovic* “test” (“espace juridique”) to “effective control”



Impact of Regional HR Bodies

- *Al-Skeini* – ECtHR alters the former “espace juridique” (*Bankovic*) notion of control for the ECHR to apply (“state actor” model)
 - Art 2 “right to life” – UK conceded that investigation was not compliant as the investigators were not sufficiently removed from the CoC
 - Court did rule that while Art 2 was breached, the investigation procedures in Iraq were not the same as UK



Impact of Regional HR Bodies

- Case of Note: *Jaloud v. Netherlands*
(heard Feb 14)
- Issue:
 - Non-compliant investigation under Art 2 ECHR
 - Expansion of *Al-Skeini*?
 - Netherlands did not exercise “state control” like functions
 - Independent investigation?
 - Counter point – moving to “individual control”?



Summary

- Clear role for MJS in IHL as an accountability mechanism
- “Soft law” and MJ reform is pressuring MJS to shift towards a civilian criminal law paradigm
- MJS serving as an investigative, prosecution and adjudicative mechanism for alleged crimes in an operational theatre is the subject of debate
 - Practical issues? What is the “test”?
- ECtHR, ICRC and HRC all tilt the debate towards an arguably impractical standard to apply
 - “Right” to independent investigation?