



Military Justice in Difficult Circumstances

Brigadier S Lythgoe UK Army
Deputy Director Service Prosecutions
(DDSP)



Topics

- Introduction
- Recent UK and European Court Judgements
- International Criminal Court
- Practical challenges
- Conclusions



Introduction

- SPA independence and the Director of Service Prosecutions (DSP)
- Authority of DDSP
- Military Justice
- UK, European and International Civilian Justice Systems
- Difficult Circumstances



Recent UK and European Court Judgements

- Background – Iraq 2003 to 2009
- *Ali Zaki Mousa v Secretary of State for Defence* (AZM 1)
- *Al Skeini and others v UK*
- *Ali Zaki Mousa v Secretary of State for Defence* – No 2 (AZM 2 - 1st Judgement)
- *Ali Zaki Mousa v Secretary of State for Defence* – No 2 (AZM 2 - 2nd Judgement)



AZM 1 (2011)

“It sometimes seems that part of the choreography of public accountability in this country is the clamour for a public inquiry into suspected wrongdoing by agents of the state. Usually, the ministerial decision to order or to refuse such an inquiry is a matter of discretion. However, where the suspected wrongdoing involves breaches of Articles 2 and/or 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the investigatory obligation of those provisions is engaged. It may be satisfied in various ways, depending on the circumstances of the case. The central issue on this appeal is whether it was permissible for the Secretary of State to adopt a specific procedure which fell short of a public inquiry.”



AZM 1 (2011)

Independent investigations

- “...necessary for the persons responsible for and carrying out the investigations to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also practical independence.”
- “Public perception of the possibility of unconscious bias is the key”
- Iraq Historic Allegations Team (IHAT) not independent
- Iraq Historic Allegations Panel (IHAP) not independent



Al Skeini (2012)

“The Obligation to comply with the United Kingdom’s Article 2 obligation continues “even in difficult security conditions including in the context of armed conflict” as in the present cases. Therefore even in those circumstances, “all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into the alleged breaches of the right to life.”

(Underlining not by the court.)



AZM 2 – 1st Judgement (2013)

- Events since AZM 1
- Independence of separate Service police forces
- Directorate of Judicial Engagement (DJEP) not independent
- Coroners' inquests
- IHAT not capable of discharging the UK's Art 2 ECHR duties
- No requirement for a public inquiry
- Guidance on quasi-coronial inquiries that do meet the UK's Art 2 and Art 3 ECHR duties



International Criminal Court

- 13 May 2014 – Re-opening of Preliminary Examination
- Aim – decide whether or not to open an Investigation
- Visits to SPA and IHAT by members of the Office of the Prosecutor
- Complementary jurisdiction
- SPA's internal lessons learned procedures



Practical challenges

- Force protection
- Culture
- Hostility of civilian population
- Adequate numbers of sufficiently experienced investigators
- ‘Open Justice’ and the need to preserve secrecy
- Combined operations
- Disclosure to defence



Conclusions

- *Al Skeini* and the scope of extra-territorial jurisdiction
- Risks to the lives of investigators
- Independence of investigations
- Independence of prosecutions
- Early engagement between investigators and prosecutors
- Quasi-colonial inquiries
- Review of potential systemic issues
- Coalition operations



Questions and Comments