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

Prepared by
Lieutenant Colonel Steve Strickey
President, Canadian National Group, ISMLLW

Prepared and Delivered by
Major Patrick Vermette
Office of the Assistant JAG (Europe)

ISMLLW - Ypres Conference - 14 Oct 14

*The views expressed in this presentation are our own and do not reflect the views of the Government of Canada, the Department of National Defence, the Canadian Armed Forces or the Office of the Judge Advocate General
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 subject to military jurisdiction
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

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

  - 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

  - 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?”
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?