40th Round Table on Current Issues of International Humanitarian Law

"The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives"

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Building Respect for IHL – a Role for the Judiciary

Firstly, allow me to thank the Institute, its most able staff, and its indefatigable leader and friend of many years, Fausto Pocar, for a new invitation to appear in front this august gathering of academics with practical skills, and practitioners with strong academic credentials.

Secondly, I would like to seize the opportunity offered yesterday by Professor Sivakumaran who, in his exchange with members of the audience, referred to a role that domestic courts may play in promoting respect for International Humanitarian Law (IHL).

Courts in various jurisdictions are not alien to notions of international humanitarian law. Depending on facts and circumstances of cases brought before them, they refer to, comment on, or expound legal obligations under IHL in general, or its specific provisions and sources – in particular. Courts have looked into situations arising from armed conflicts, both international and non-international, as well as from peace operations.

To cite but a few notable examples, in the *Public Committee against Torture in Israel v. The Government of Israel*, also known as *Targeted Killings case*, the Supreme Court of Israel discussed at length the applicability of IHL to what it described as "the armed conflict between Israel and the terrorist organizations". The Court further stated that "confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character" [1]. However, while making several references to Article 3 common to Geneva Conventions, the Court reckoned that a classification of the conflict as international or non-international was immaterial for the case at hand. Moreover, the Court apparently shared the Respondent's view that the conflict could belong "to a new category of armed conflict which has been developing over the last decade in international law – a category of armed conflicts between states and terrorist organizations".[2]

In *Hamdan v. Rumsfeld* the US Supreme Court decided by majority that what transpired between the United States and al Quaeda amounted to an armed conflict. And, since that was not a conflict between two nations, hence not international, the Common Article 3

[1] HCJ 769/02, December 11 2005, para. 21.

[2] Id., para. 11.

applied. To quote the majority, that "kind of conflict does not involve a clash between nations"[3].

In *Regina v. Brocklebank* the Court Martial Appeal Court of Canada ruled that the Geneva Conventions, the Fourth Convention in particular, did not apply to a situation in which Canadian Forces deployed to Somalia as part of UNITAF (which was a non-UN international mission). The reason was that "the mission of the Canadian Forces in Somalia was a peacekeeping mission. There is no evidence that there was a declared war or an armed conflict in Somalia, let alone that Canadian Forces were engaged in any conflict"[4].

By contrast in *Regina v. Ministry of Defence Ex Parte Walker* the British Law Lords accepted the argument of the Government that the UN peacekeeping operation in Bosnia was conducted in a "warlike situation"[5]. The case at bar did not require the Law Lords to analyze the applicability of IHL, but their reasoning may lead to a conclusion that it should have applied.

Allow me to digress here as I have a certain bond to that case. Sergeant Trevor Walker of 21st Engineer Regiment had arrived in Bosnia on or around May 1, 1995 to be assigned to the British Cavalry Battalion of the United Nations Protection Force. At the material time, I was a Civil Affairs Officer with UNPROFOR concurrently acting as a civilian political advisor to the British Cavalry Battalion, or, if you will, a red commissar with the British Horseguards. Walker did not serve as part of the Battalion for even a couple of days when the base was shelled and he received severe injuries to his leg. It was literally mended together at the Battalion Medical Unit, but several months and thirteen surgeries later he lost his limb. He applied for compensation, sued the Ministry of Defense when his application was denied, and ultimately lost his case before the Law Lords. Had Walker received his injuries while serving in Northern Ireland where the British Army deployed in support of the Royal Ulster Constabulary, he would have had a better chance of receiving the compensation. Alas, he was in a "warlike situation". Ironically, several years later a Royal Air Force typist received a five-digit compensation for straining her thumb and suffering from depression resulting from that work-related injury.

Let me get back to discussion of cases. Another one that I wanted to mention is the *Expanded ISAF Mandate* case that was decided in 2007 by the German Federal Constitutional Court. The case dealt with the distribution of constitutional authority between the executive and legislative branches in decisions on foreign deployments of Bundeswehr. Here the Federal Constitutional Court seemed to have accepted the IHL applicability to international coalition operations in Afghanistan[6]. A more recent case

[3] Hamdan v. Rumsfeld, decided June 29, 2006, para. 4 (d – ii).
[4] Regina v. Brocklebank, rendered April 2, 1996,
[5] Regina v. MoD (Respondent) Ex Parte Walker (Appellant), 6 April 2000.
[6] BVerfG, Judgment of the Second Senate of 03 July 2007 - 2 BvE 2/07.

regards foreign deployment into an armed conflict environment to evacuate German nationals, entirely focused on that distribution of authority, and did not discuss IHL[7].
There were, of course, other cases. Professor Sivakumaran mentioned Swedish jurisprudence. There were cases in Belgium and France and other jurisdictions.

The Russian experience bears both similarities to and differences from those cases.
The Russian Constitutional Court, and to a lesser extent other branches of the Russian Government, used the language borrowed from IHL with respect to a non-international armed conflict not in foreign lands, but on domestic soil. But it was the high judicial authority that considered applicability of IHL with special reference to Additional Protocol II, to that conflict.
In 1995 the Constitutional Court of the Russian Federation was petitioned by legislators of both Chambers of the Federal Assembly who challenged the constitutionality of several acts passed by the President and the Government aimed at quelling the insurgency in Chechnya. In its review of Presidential decrees that authorized the use of military force in Chechnya the Constitutional Court, while never directly referring to hostilities there as a 'non-international armed conflict', none-the-less cited Additional Protocol II to Geneva Conventions as a source of law that should have been applied by parties to the conflict. The Court did not analyze the Protocol, nor did it consider it as applicable law in the judicial review of decrees simply because in was neither required, nor authorized to do so under the Constitution. However, the Court explicitly stated that lack of appropriate consideration of the Protocol in the domestic legislation had been one of the grounds for "non-compliance with rules of the aforesaid Additional Protocol". The Constitutional Court further instructed the legislator to take into consideration provisions of the Protocol while amending legislation applicable to "extraordinary situations and conflicts".
Sufficient time has elapsed to now reveal that judges were advised to engage in, and may indeed have considered a more detailed analysis of Additional Protocol II and IHL in general. However, I am not in a position to discuss or to even be aware of the course of their *in camera* debates, though heated they were judging by a number of separate opinions. The outcome was a rather abridged *obiter dictum* that appeared in the judgment.
And yet, the Court stated that although it was not authorized to review the acts and consequences of the use of force in light of Additional Protocol II, such review should be the duty of other branches, whether courts of general jurisdiction or supervisory bodies. Furthermore, it indicated that under the International Covenant on Civil and Political Rights persons who sustained damages due to such use of force were entitled to remedies. As a reminder: at the material time Russia was not yet party to the European Convention on the Protection of Human Rights and Fundamental Freedoms.
Other branches of the Russian Government acknowledged that prolonged and intensive armed violence in the Russian North Caucasus could be characterized as a "non-

[7] BVerfG, Judgment of the Second Senate of 23 September 2015 - 2 BvE 6/11.

international armed conflict". They also acknowledged that armed conflict was part of what was referred to as "counter-terrorist operation". While stopping short of making specific references to Common Article 3 or Additional Protocol II, the legislature and the then Prime Minister, Vladimir Putin, specifically named IHL as applicable law.

As to the legislative instruction, unlike the US Congress that in the aftermath of *Hamdan v. Rumsfeld* enacted the Military Commission Act, the Russian Parliament failed to specifically and precisely execute the Judgment of the Constitutional Court in so far as it concerned the need to amend the legislation. Of course, current laws and regulations relevant to the use of armed force by uniformed services both domestically and beyond national territory make general references to international treaties and principles of international law, but not to IHL specifically.

However, the Armed Forces under Charters promulgated by the Presidential Decree, and two manuals on Legal Administration and on Application of IHL, are bound to study, respect and apply International Humanitarian Law. Whether related to, and influenced by the Judgment of the Constitutional Court and the burden they carried from the armed conflict in the North Caucasus, they seem to be the only Government organization that literally responded to the Court's instruction.

To conclude, let me reiterate that, as this brief and cursory review of jurisprudence may demonstrate, courts in various jurisdictions are not alien to international humanitarian law and its particular sources and norms. Sometimes what the courts say may be inconclusive or even misleading. And yet the least they prove is that *inter arma non silent leges* – please correct my Latin if I erred. But they go beyond that and set certain standards and guidelines to be followed by governments while resorting to armed violence, as well as indicate remedies for those affected.