‘Application of International Humanitarian Law by Domestic and International Courts’

*Temple Garden Seminar Series in International Adjudication*

**Event Report**

**Date:** 16 June 2015, 17:30-19:00

**Venue:** British Institute of International and Comparative Law  
Charles Clore House, 17 Russell Square, London WC1B 5JP

**Keynote Speaker:**
- Andrew Cayley CMG QC,  
Temple Garden Chambers, and former International Co-Prosecutor of the Khmer Rouge Tribunal in Cambodia

**Discussants:**
- Dr Veronika Fikfak, University of Cambridge  
- Associate Professor Marko Milanović, University of Nottingham  
- Solon Solomon, King’s College London Dickson Poon School of Law

**Chair:**
- Cathy Adams, Foreign and Commonwealth Office
On 16 June 2015 the British Institute of International and Comparative Law hosted a panel discussion entitled, ‘Application of International Humanitarian Law by Domestic and International Courts.’ The panel chair was Cathy Adams (Foreign and Commonwealth Office), the keynote speaker was Andrew Cayley CMG QC (Temple Garden Chambers) and the three panellists were Dr Veronika Fikfak (University of Cambridge) Associate Professor Marko Milanović (University of Nottingham) and Solon Solomon (King’s College London Dickson Poon School).

Andrew Cayley CMG QC
Mr Cayley began with a disclaimer, explaining that he was speaking in a personal capacity and not as a representative of the government. He observed that there has been a huge rise in the use of IHL in domestic and international courts. He posited four explanations for this rise: 1) the establishment and development of a number of tribunals, primarily the International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) 2) the increase in domestic legislation implementing incorporating concepts, norms and definitions from IHL and providing appropriate remedies 3) the work of international civil society in promoting IHL and 4) the increased quantity of military operations in recent years.

1) International tribunals
Mr Cayley recalled that, at the time it was established in 1993, most perceived the ICTY as an experiment that would not succeed. In reality, the ICTY and similar tribunals have had remarkable success in prosecuting crimes. However, these tribunals cannot fully answer the enforcement question. They are constrained by their geographical limits and only prosecute the most serious criminals. Remaining criminals must be tried by domestic courts: this is an aspect of the principle of positive complementarity. Consequently, national courts have a big responsibility when it comes to implementing IHL.

2) The incorporation of IHL norms into domestic law
The inability of international tribunals to prosecute all criminals has meant that the responsibility to prosecute the remaining individuals has fallen on domestic courts. However, domestic courts cannot enforce IHL unless it is incorporated into national law, which has led states to update their legislation. Furthermore, the Rome Statute contains an obligation on all states parties to incorporate its provisions into domestic law. Mr Cayley also made the point that the Geneva Conventions demonstrate that judicial enforcement of IHL by domestic courts was always the ultimate goal. However, Belgium’s failed attempt to introduce universal jurisdiction reveals the dangers of attempting to take this approach too far.

3) International civil society
Initially NGOs did not have a huge amount of influence on the ICTY. However, upon the establishment of the ICC, civil society mobilised and exerted a much stronger influence over the development and structuring of the court. In particular, Human Rights Watch and the Open Justice Initiative played a vital role. Mr Cayley stated that NGOs are valuable because they often have better local knowledge which is useful in international courts.

NGOs have also supported domestic IHL prosecutions. The Martina Johnson case is a particularly good example, in which Liberian nationals cooperated with Civitas Maxima, a Geneva-based NGO, in order to bring Johnson to trial. They also help by representing victims, assisting in the delivery of justice, formulating IHL charging strategies and acting
as a quasi-regulator. As quasi-regulators, NGOs scrutinise both national and international courts, monitor trials, and lobby governments for the better delivery of justice. Mr Cayley submits that this is important, as, in his experience, there is little external scrutiny over prosecutorial and court decisions.

4) Rise in military operations
Finally, Mr Cayley stated that there has been a rise in the number of military operations between 2003 and 2014, leading to more cases.

Mr Cayley moved on to talk about the application of IHL in domestic courts more specifically. Recent research has demonstrated that domestic courts do not display a uniform approach to applying IHL. He made a reference to Dr Sharon Weill’s book1 in which she argues that national courts demonstrate different functional roles depending on the state in question, and the different approaches can be conceptualised as being on a spectrum. At one end of the spectrum, there is the ‘apologist’ role in which the courts merely legitimise the state’s actions. Further along the spectrum, there is the ‘avoiding’ role where, for policy reasons, courts avoid exercising jurisdiction over such cases. The next role is the ‘deferral’ role, where courts defer the responsibility to find a remedy back to the government. Further along still, we have the ‘normative’ role where courts properly apply IHL; this best reflects the situation in the UK. Finally, on the other extreme, there is the ‘utopia’ where courts actually make moral judgments in favour of the complainant: hints of this have been seen in Italy.

Finally, Mr Cayley discussed the case of Ante Gotovina, Ivan Čermak and Mladen Markač, submitting that it demonstrates the challenges that courts are still facing in applying the more technical aspects of IHL. He briefly explained the facts, highlighting that a key question in the case was the legality of certain complex targeting decisions made during the recapture of the city of Knin. He explained that although all three defendants were eventually acquitted, the initial trial and conviction of Gotovina and Markač is the focus of his discussion.

In assessing the liability of the defendants, the Court adopted a two-stage test, looking first at whether the test of distinction had been satisfied and secondly at whether the attack was proportionate. The court was satisfied that the defendants had considered the distinction and proportionality rules in making targeting decisions.

However, the court then created another test to determine whether damage was excessive. It created a 200m radius around the military targets, and stated that all damage within the radius was lawful, and all damage outside was unlawful. On the facts, around 5% of the 900 projectiles landed outside the 200m radius. The court stated that this rule was a ‘reasonable interpretation of the law’ but Mr Cayley argued that the court had created the rule itself, as it had no legal or factual basis and, worryingly, the violation of this rule was a key factor (if not the basis) in the outcome of the case. Another troubling aspect of the court’s ruling is that it did not consider the commanders’ intentions at all but applied a no-

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fault standard despite Articles 51(5)(b) and 52(2) of Additional Protocol I\(^2\) making it clear that the commander’s intentions should be considered. This was incorrect and led to an appeal to the Appeals Chamber, after which the decision was overturned.

The case shows that ICTY judges could not make a reasonable determination of the case because it was steeped in the complex area of targeting decisions. Notably, no specialist evidence was received from, for example, military experts in targeting, despite the judges’ power to call witnesses. Without this evidence, the judges were unable to formulate reasonable and workable rules in order to decide the case. He stated that the successful resolution of such cases ultimately relies on a healthy dialogue between the military and legal academic communities. It has also been commented that the judges did not need to create definitive rules in order to decide the case, but rather, they could have looked at the case as a whole in order to decide if the attack was proportionate.

Mr Cayley concluded by warning against distorting IHL to achieve legally unsound, but politically desirable, outcomes.

**Solon Solomon**

Mr Solomon argued that the two traditional pillars of IHL (states and judicial bodies) no longer serve their purpose in applying IHL and are being replaced by their ‘negative mirror images’ – non-state actors and quasi-judicial bodies. Whilst non-state actors are usually considered as the subjects of IHL, they are also able to trigger its application and, increasingly, are doing so. Also, quasi-judicial bodies are setting up a dialogue with states over IHL, especially through the writing of reports.

Mr Solomon stated that there is a mistrust in the implementation of IHL by states, but that this mistrust is understandable for two reasons. First, the nature of warfare has changed drastically in recent years but states are still required to apply the traditional rules of IHL. When states try and reinterpret the rules to accommodate changing conditions, they are accused by the international community of not applying and not respecting the laws of war altogether. States reply, complaining that the international community does not understand their needs. Thus, more inter-state cooperation is needed to reinterpret the rules of IHL for a modern age.

Secondly, however, states cannot always be trusted to apply IHL. The notion for example of universal jurisdiction, provided by the Geneva Conventions, has not been adequately used by states. First, states tried to broaden the list of grave breaches also on positivist grounds, not necessarily comprising the most heinous crimes and second resort to the notion of universal jurisdiction has taken place also driven by political grounds, such as in the case of Belgium.

Mr Solomon emphasized that the second traditional pillar of IHL is the courts which, also cannot be entrusted with the task of promoting the application of IHL. In the past, he stated, there were too few judicial institutions. Now the opposite problem has arisen: there are too many bodies and they quarrel between themselves over who has jurisdiction. Taking the Saif-al-Islam Gaddafi case as an example, Mr Solomon pointed that both the ICC and the domestic Libyan courts wanted to try Gaddafi, leading to a ‘judicial competition.’ This harms both the national and international credibility of such institutions.

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\(^2\) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.
Another example is the recently established Special Tribunal for War Crimes in the Central African Republic. The division of competence between the new court and the ICC and the ability of this new court to add value is unclear as they both have jurisdiction. The lack of discussion over these issues is a cause for concern.

African states are incredibly suspicious of the ICC. The solution is not to ignore the court but to open up a dialogue between states and the Court. Furthermore, the ICC needs to step up and define its own jurisdiction – ‘compétence de la compétence.’ For example, the ICC could establish the principle that it cannot go against the will of states if they want to establish a regional body with jurisdiction over certain conflicts or areas. The ICC should also be obliged to define its relationship with other regional bodies. Finally, the ICC should be able to review the formal aspects of decisions of regional tribunals, similar to a Court of Cassation.

If the two traditional pillars of IHL have been transformed and acquired more flexibility between state/non-state actors and courts/quasi-judicial bodies, then the judicial mechanisms of IHL also need a more flexible form. In practice, application of IHL should be more dynamic, especially when the case concerns ‘humanity as a whole’ rather than individual states. It is peculiar that the ICC cannot try cases that involve non-state actors without state consent just because the origin of the violation is not state-oriented.

In the area of the right of self-defence, it is now recognised that in the post 9/11 era non-state actors can trigger the right to self-defence. This demonstrates how international law has kept pace with the modern world, and IHL should follow. This dynamic application of IHL can also be seen in the law, particularly English jurisprudence, in cases relating to military occupation. It has been argued that, in order to establish military occupation, forces must either be present or have the potential to occupy. In its judgement of the Armed Activities in the Territory of Congo case, the ICJ ruled that in essence the army has to be present in a territory in order for occupation to be established.

However, a more dynamic application of IHL would recognise that large areas may be subdivided into smaller areas which may be controlled by different authorities and/or to different degrees. This need to subdivide larger areas into smaller areas was argued by the British in the Al-Skeini case but was rejected. However the recent Al-Saddoon case shows that this argument is finding more receptive ears. In that case, at [74] the judge found that, ‘The inference that I draw is that the test of control over individuals, like the test of control over an area, is a factual one which depends on the actual exercise of control and not on its legal basis or legitimacy.’ This judgment also has a soothing effecting on the fears of the British public and military who are concerned about the extraterritorial effect of the ECHR.

Associate Professor Marko Milanović
Professor Milanović focused on the application of IHL by the European Court of Human Rights (ECHR). He started by stating that the Al-Skeini case reflected a trend in ECHR jurisprudence to apply the Convention more expansively in two particular situations, namely, (1) extraterritorially and (2) in armed conflicts.

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Increasingly, the Court is looking at armed conflict cases and upcoming cases include: Georgia v Russia (concerning the 2008 Russo-Georgian War); Ukraine v Russia (concerning the 2014-5 Russian intervention into Ukraine); and cases brought by individuals over the shooting of the MH17 aircraft. The interesting feature about all these cases is that they demonstrate that states are now bringing cases concerning conflict zones, rather than just individuals, which could signify a tacit acceptance of conflict zone jurisdiction.

He further submitted that the case of Jaloud v Netherlands\(^5\) demonstrates that it is clear that arguing that the Convention doesn’t apply (extraterritorially and/or in armed conflict zones) is counter-productive. In that case the litigants expended a lot of effort arguing that the Court did not have jurisdiction, but the Court was unanimous in deciding that there was jurisdiction despite being deeply divided on the merits (upon which the litigants spent far less time and effort). Thus, litigants should focus on the actual merits of the case and not waste time on jurisdiction.

Moving on to the merits, Professor Milanović observed that the Court has rarely applied IHL. This is justified as being outside the Court’s mandate, which is to establish violations of the ECHR. Thus, IHL can only be relevant in interpreting the Convention. Having said that, there are obvious situations where the Court chose not to use IHL in interpreting the Convention, such as in the numerous cases brought against Russia concerning targeting decisions in Chechnya concerning. However, occasionally the court uses concepts from IHL, such as ‘indiscriminate weapons’.

This leads to a question why has the Court declined from applying IHL, unlike other human rights courts such as the Inter-American Court of Human Rights? The most important reason is lack of institutional competence. The majority of the judges on the ECtHR have very little public international law, let alone IHL, experience. There is also, arguably, a fear of applying a different body of rules in the ECtHR because this may somehow ‘dirty’ the Convention.

Secondly, there are numerous factual and evidential uncertainties. To take one example, if the Court had reached the merits of the Banković\(^6\) case, the Court would have had to answer the question of whether the radio television station in Belgrade was a lawful military target and then whether there had been a breach of Article 2. Establishing the merits of this issue would have been incredibly difficult, requiring the Court to hear evidence that may not be subject to disclosure. Thus, it’s unsurprising that the Court declined to hear the case by finding that there was no Article 1 jurisdiction.

Increasingly, however, more cases are arising where it is proving harder to dismiss cases on Article 1. Also, the Court has to deal with a range of cases which are not necessarily armed conflict cases. For example, in the Finogenov v Russia\(^7\) case the level of deference shown by the Court was extraordinary – the Court stated that gas was not as indiscriminate weapon, even though gas by definition is an indiscrimination weapon.

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5 Jaloud v Netherlands App no 47708/08 (ECHR, 20 November 2014).
6 Banković and ors v Belgium and ors (2007) 44 EHRR SE5.
7 Finogenov and ors v Russia App no 18299/03 (ECHR, 20 December 2011).
Recently, the Court is more willing to look at IHL. In Hassan v UK\(^8\) the Court stated that if there is a conflict between provisions of IHL and the ECHR, in situations of international armed conflict, the Court will read Article 5 down so as to allow internment on the basis of IHL. It used Article 31(3)(c) VCLT\(^9\) in a very strong way to achieve this result. Notably, however, the Court did not rely on lex specialis. It is thus clear that the ECHR will apply more to armed conflict.

There are a number of cases now pending in the UK courts which are likely to be appealed to Strasbourg where the Court will finally be confronted with the IHL and human rights issues raised by the UK’s invasion into Afghanistan. Future cases also include cases brought by soldiers in war zones, complaining about breaches of their rights (the ‘Smith’\(^10\) type case).

Professor Milanović finished by referring to the recent case of Sargsyan v Azerbaijan\(^11\) in which the Court implicitly ruled that Gaza was not occupied by Israel. The interesting element of this judgment was that, in coming to this conclusion, the Court relied on IHL and The Hague Regulations.

Veronika Fikfak
Dr Fikfak focused on the issue of *jus cogens* and their perception and use by national courts. She started by observing that in the Furundžija case\(^12\), the ICTY Trial Chamber stated that *jus cogens* norms could only be useful if they operate both between states and also at home. This begs the question, therefore, as to how the operation of *jus cogens* can be achieved at home. Looking across to other jurisdictions, Switzerland has passed a constitutional amendment giving effect to *jus cogens*, and Italian courts have stated that *jus cogens* is part of Italian law.

Returning to English jurisprudence, the current domestic position is that *jus cogens* norms are treated like all other customary international law, despite arguments to the contrary. Customary international law (CIL) is automatically incorporated into domestic law, unless CIL conflicts with the constitution. The next question, therefore, is what limits are there in the UK constitution that could limit the application of CIL?

The first limit is parliamentary sovereignty. In *R v Jones\(^13\)*, the House of Lords considered whether a crime of aggression in CIL could be part of English law. Lord Bingham stated that in order for custom to be translated in common law it must conform to the constitution. However, it was a rule of the constitution that only Parliament could create new crimes so the court could not bypass Parliament and create a new crime by applying this rule of CIL. Similarly in the *Pinochet\(^14\)* case the court rejected the submission that the court had jurisdiction because the Torture Convention created universal jurisdiction.

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\(^8\) Hassan v United Kingdom App no 29750/09 (ECHR, 16 September 2014).
\(^12\) Prosecutor v Anto Furundžija (Trial Judgement) IT-95-17/1-T (10 December 1998).
\(^14\) Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3) [1999] UKHL 17, 1 AC 147, [1999] 2 WLR 827.
Rather, the court had jurisdiction because of the Criminal Justice Act 1998. Finally, in *Jones v Saudi Arabia*, the court applied the State Immunity Act 1978, giving no special weight to the *jus cogens* prohibition on torture.

The second limit is the large scope of executive discretion in foreign affairs. In *R (Abbasi) v Secretary of State for Foreign Affairs* the House of Lords ruled that the executive discretion was justiciable, but certain issues remain non-justiciable. For example, cases that raise the issue of the *jus cogens* prohibition on the use of force, or the legality of war, are non-justiciable and go to executive discretion. Furthermore the scope of review of government actions when those actions go to *jus cogens* remains unchanged. In the *Al-Rawi* case, the court considered whether the executive was under a duty to make diplomatic representations to another state where torture had occurred. The court found that the executive only had a duty to consider making representations.

The implication is, therefore, that *jus cogens* do not enjoy any special status in English law. Dr Fikfak, however, submitted that the position was more complex. Many *jus cogens* prohibitions already exist in domestic law. The case of *A (No. 2)* considered the admissibility of evidence obtained by torture. At the start of his judgment, Lord Bingham stated that the prohibition of torture was found in the common law as well as in international law. Thus, *jus cogens* come from sources other than international law, i.e. national law. Lord Bingham also talked about the prohibition of torture as a ‘constitutional principle’. This concept embraces both the idea that the norm derives from the common law and that it has higher standing than other norms. Finally, in the recent *HS2* judgment the Supreme Court held that the UK constitution is no longer flat, but rather contains a hierarchy of norms/principles, including normal domestic statutes and ‘constitutional statutes’ which have a higher status. If we look at the *A (No. 2)* judgement in light of *HS2* it is possible to argue that the prohibition of torture is a constitutional principle, and therefore lies above other domestic norms such as jurisdiction or limits on review of executive discretion.

This idea has been hinted at by Lord Hodge in *Moohan v Lord Advocate* where he stated that, ‘I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and 15 *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia & Ors* [2006] UKHL 26, [2007] 1 All ER 113, [2007] 1 AC 270.
19 ibid [10]-[12], [51].
international norms, would be able to declare such legislation unlawful." Lord Neuberger rejected this argument but it does suggest that the powers of the courts may be expanding.

Ultimately, therefore, whilst *jus cogens* may not attain higher status because of their higher status in international law, they may attain special importance if they are recognised as constitutional principles.

**Discussion**

The first question inquired whether the ECtHR’s judgment on the occupation of Gaza would make any difference to the debate on its occupation. Professor Milanović replied that it might do, and it may have unintended consequences. A second comment was made to Mr Solomon that, according to his interpretation of IHL, states would be able to choose how to interpret the law in whatever way they desire which could be dangerous and allow states to act however they want. Mr Solomon clarified that he does not support this approach to IHL, but rather suggests that the rules should be updated so that they reflect the ground reality more accurately. For example, with respect to Gaza, IHL only recognises it as occupied or non-occupied. This is too black and white and IHL should recognise different shades of grey.

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This Report was prepared by **Rajkiran Barhey**