United States, The Prize Cases

[**Source**: Supreme Court of the United States, 67 US 635 (1862), available on http://laws.findlaw.com/us/67/635.html]

THE BRIG AMY WARWICK; THE SCHOONER CRENSHAW;THE BARQUE HIAWATHA; THE SCHOONER BRILLIANTE
[The Prize Cases]
December 1862

PRIOR HISTORY:

[...]

The whole matter comes, then, to a few propositions. To justify this condemnation, there must have been war at the time of this so-called capture; not war as the old essayists describe it, beginning with the war between Cain and Abel; not a fight between two, or between thousands; not a conflict carried on with these or those weapons, or by these or those numbers of men; but war as known to international law – war carrying with it the mutual recognition of the opponents as belligerents; giving rise to the right of blockade of the enemy's ports, and affecting all other nations with the character of neutrals, until they shall have mixed themselves in the contest. War, in this, the only sense important to this question, is matter of law, and not merely matter of fact. [...]

It is worthy of remark that the sovereign can exercise these belligerent powers at first, if ever. The lapse of time gives him no new rights of war. The recognition of the rebel state as belligerent by foreign powers, confers no right on the sovereign. It only recognizes an existing right. The recognition of rebel States as sovereign by foreign powers, confers on the sovereign no new war power. The moment he ceases to claim jurisdiction over the rebel territory, the war ceases to be a civil war, and becomes an international war. [...]

According to this theory, if the civil war is one in which each party claims to be the state, neither can exercise belligerent powers. If neither makes that claim, both may exercise them. If one claims to be the state, and the other does not, (as in this case,) the latter only can exercise them. [...]

OPINION BY: GRIER

[...]

War has been well defined to be, “That state in which a nation prosecutes its right by force.”

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents – the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

“A civil war,” says Vattel, “breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

“This being the case, it is very evident that the common laws of war – those maxims of humanity, moderation, and honor – ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, the war will become cruel, horrible, and every day more destructive to the nation.”

As a civil war is never publicly proclaimed, eo nomine against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writing of the sages of the common law, may be thus summarily

stated: “When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land.” [...]

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an “insurrection” by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. [...]

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, “recognizing hostilities as existing between the Government of the United States of America and certain States styling themselves the Confederate States of America.” This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. [...]

Discussion

1. Is not the definition of war used by the Court (“That state in which a nation prosecutes its right by force”) a very Clausewitzian approach? Is such recourse to war permitted today? (UN Charter, Art. 2(4)) Does this explain why the UN International Law Commission (ILC) chose not to delve into issues concerning ius in bello? Was this an appropriate decision by the ILC?
2. Are non-international armed conflicts treated the same as international armed conflicts under IHL? Does the Court suggest that they should be?
3. 1. Must war be declared for IHL to apply? (GC I-IV, Art. 2; P I, Art. 1(3); P II, Art. 1) Is that necessary only in cases of internal rebellion? Or is it also necessary in conflicts between States?
   2. Today, does application of IHL in armed conflict really require mutual recognition of opponents as belligerents? Also in non-international armed conflict? (GC I-IV, Art. 3(4))
4. 1. Under international law today, what factors cause an internal conflict, such as a civil war, to become an international conflict? [**See**, e.g., ICTY, The Prosecutor v. Tadic [particularly Part A., paras 72-73] and ICTY, The Prosecutor v. Rajic [particularly Part A., paras 13-31]]
   2. Does recognition by another State, e.g. of insurgents, automatically make a conflict international?
   3. When do internal tensions or disturbances reach such a level of intensity that common Art. 3 and/or Protocol II apply? Is the test mentioned in the writings of the sages of the common law cited by the Court really the true test?
   4. Is the existence of an armed conflict in contemporary IHL a matter of fact or a matter of law?