Facts - Paras 5 to 6

[**N.B**.: Clayton Matchee, the Canadian soldier suspected of being the leader of the military group which beat to death a Somalian adolescent, Shidane Arone, in 1993, appeared in court for the first time on 23 July 2002 (Source: Le Devoir, Montréal, 24 July 2002)]

N.B. As per the disclaimer [1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: Canada, Court Martial Appeal Reports, Volume 5 Part 3, 1995-1997; footnotes partially reproduced. Paragraph numbers have been added to facilitate discussion.]

HER MAJESTY THE QUEEN

Appellant,

v.

D.J. Brocklebank

(Private, Canadian Forces), Respondent

INDEXED AS: R.v. BROCKLEBANK

File No.: CMAC 383

Heard: Toronto, Ontario, 29 January, 1996

Judgment: Ottawa, Ontario, 2 April, 1996

Present: Strayer C.J., Décary and Weiler JJ.A.

[Décary J.A:]

[...]

THE FACTS

[...]

5. I would add the following to the description of facts set out by my colleague:
    - Prior to the departure of the Canadian contingent to Somalia, the Canadian Forces did not instruct the soldiers as to their role and duties as participants in a peacekeeping mission. Nor is there evidence that during their general training soldiers were ever instructed with respect to peacekeeping missions as opposed to war operations.
    - On March 16, 1993, Private Brocklebank, [...] who was coming down with dysentery, went to bed early, without knowing that he was to be assigned later on in the evening. From the time he went to bed until he was awakened by Master Corporal Matchee ("Matchee") at approximately 2300 hours, he did not get up, did not leave his tent and did not have any knowledge of the fact that there had been an arrest and that both Matchee and Private Brown ("Brown") had been torturing the prisoner.
    - At approximately 2045 hours on the night of March 16, 1993, Sergeant Hillier's patrol captured a Somali youth, Sidane Arone ("Arone"). Flexicuffs were placed on the prisoner's wrists, a baton was placed under his arms at the back, and he was walked through the camp in this way by Captain Sox ("Sox") and by Brown. On the way to the bunker, they stopped briefly at the Command Post so

that Sox could tell Major Seward ("Seward") that they had captured someone.

- Brown testified that he had been ordered by Sox to go to the front gate and to get whoever was on gate guard duty, which happened to be Matchee. According to Brown, once Matchee had come to the bunker, Sox had told Matchee, "You are in charge of the prisoner". Sox was the only witness who testified that it was standard operating procedure for the person who was the gate guard to pull back, stay at the bunker location and assume responsibility for the prisoner. Brown, Corporal Glass, Sergeant Hooyer and Sergeant Hillier all testified to the fact that no such standard operating procedure existed.
- Once they reached the bunker, the prisoner was secured by Matchee and by Brown. Sox gave instructions to Matchee that flexicuffs were to be put on the ankles of the prisoner to secure him.
- At approximately 2100 or 2130 hours, Matchee ordered Brown to go and get Matchee's flashlight. When Brown returned with the flashlight, Sox, Warrant Officer Murphy, Seward and other persons were squatted down looking into the bunker. Brown then left the bunker area and some time later, Matchee came to Brown's tent and told Brown that he was going to interrogate or hassle the prisoner. Matchee also told Brown about some kind of an abuse order from Captain Sox, and that Captain Sox wanted the prisoner beaten.
- Brown was scheduled for gate guard duty at 2200 hours, although he first learned that he was going to be on duty that night sometime after 1930 hours. At approximately 2200 hours, Brown was on his way to his sentry post at the gate when Matchee ordered him over to the bunker. At that time, according to Brown, Matchee was in charge of the prisoner while Brown was on guard duty.[3] Brown de-kitted, went into the bunker and began beating the prisoner with Matchee.
- Prior to the arrival of the respondent at the bunker at approximately 2308 hours, Matchee had been beating the prisoner and was showing the prisoner to various people, none of whom had done anything to try to stop Matchee.
- Brown testified that a flashlight was required to see anything in the bunker.
- According to the respondent, when Matchee woke him at approximately 2300 hours, the respondent had no idea why he was being woken. He understood that

he was ordered to be on duty at the front gate.

- After leaving his tent at approximately 2307 hours, the respondent was heading to the front gate when Matchee called him to come over to the bunker. The respondent testified that he believed that this was an order and he walked toward the bunker. As he got close to the bunker, Matchee pointed a flashlight at a Somalian in the bunker and said, “Look what we got here”. The respondent testified that he had no idea who the prisoner was, nor did he have any idea as to why the person was in the state in which he saw him.
- After Matchee turned off the flashlight, he asked the respondent for his pistol. The respondent asked what Matchee wanted it for and Matchee’s response was something to the effect of, “Give me the f’n pistol, just give me your pistol Brocklebank”. Brown testified that the respondent still seemed puzzled and told Matchee, “But it’s loaded” and Matchee said, “Just give me your pistol Brock, that’s an order”. The respondent followed the order and gave Matchee his pistol, although he had no awareness at that point what Matchee’s intended use of the pistol was. It was not until Matchee told Brown, “I’d like to take a picture of me”, that the respondent understood why Matchee wanted the pistol. Matchee then held the pistol to the prisoner’s head and told Brown to take pictures of him, which Brown did. After this, Matchee returned the pistol to Brocklebank.
- Brown left the bunker after the picture taking. Brown testified that in the entire time that he was in the area of the bunker, he never saw the respondent de-kit, never saw him enter the bunker and never saw him touch the prisoner. Further, Brown was clear that at no time did he ever see the respondent abuse the prisoner or encourage Matchee in what he was doing. There were no photographs of the respondent with the prisoner.
- The respondent testified that after Brown had left, he remained outside the pit while Matchee was down in the pit with the prisoner. The respondent asked Matchee if anyone else “had seen this” and Matchee told him that Warant Officer Murphy had kicked or hit the prisoner and that Captain Sox had instructed Matchee to “give him a good beating, just don’t kill him”.
- The respondent testified that he remained outside at the entrance of the bunker, watching the gate from the bunker. He never went down into the pit while

Matchee was present. Even though he knew the beating was going on, he assumed it was as a result of an order given to Matchee and he sat there, in shock, not realizing the severity of the beating.

- The respondent testified that at no point had he been ordered to guard the prisoner and that he believed that the prisoner was in the custody of Matchee.

6. I shall now move on to the three grounds of appeal. [...]

- Footnote 3 : Private Brown was eventually charged and convicted with one count of torture. He was not charged with negligent performance of a military duty. ?

Ground of appeal - Paras 6 to 99

THE FIRST GROUND OF APPEAL: THE CHARGE OF TORTURE

7. I agree with my colleague that the first ground of appeal should be dismissed.
8. The accused was charged under section 269.1 of the Criminal Code of Canada ("*the Criminal Code*") and under section 72 of the National Defence Act ("*the Act*"), of the offence of aiding and abetting in the commission of torture. The relevant *Criminal Code* provision reads as follows:

269.1 (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. [...]

72. (1) Every person is a party to and guilty of an offence who

a. actually commits it;
b. does or omits to do anything for the purpose of aiding any person to commit it;
c. abets any person in committing it; or
d. counsels or procures any person to commit it.

9. In order to be found guilty of the offence of aiding and abetting in the commission of torture, the panel [the members of the court of first instance] had to be convinced beyond reasonable doubt that Brocklebank a) did or omitted to do something; b) for the purpose of aiding Matchee in the commission of the offence of torture.

10. Assuming for the sake of discussion that the accused did or omitted to do something, there was, in my view, not even an iota of evidence that could establish that the respondent had formed the intention required to commit the offence he was charged with. [...]

THE THIRD GROUND OF APPEAL: THE DEFENCE OF OBEDIENCE TO SUPERIOR MILITARY ORDERS

11. The defence of obedience to superior military orders was put to the panel by the Judge Advocate in his charge on the offence of torture. Even defence counsel agrees that the defence he was raising was not that of obedience to superior military orders; what he wanted to do, as my colleague puts it, was to raise the defence of honest belief as negating the mens rea of the offence of torture. [...]

[...]

THE SECOND GROUND OF APPEAL: NEGLIGENT PERFORMANCE OF A MILITARY DUTY

12. The prosecution alleges that the Judge Advocate made two fatal errors in his instructions to the panel on the charge of negligent performance of a military duty.

a) The standard of care [...]

18. In summary, the standard of care applicable to the charge of negligent performance of a military duty is that of the conduct expected of the reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred. In the context of a military operation, the standard of care will vary considerably in relation to the degree of responsibility exercised by the accused, the

nature and purpose of the operation, and the exigencies of a particular situation. [...] Furthermore, in the military context, where discipline is the linchpin of the hierarchical command structure and insubordination attracts the harshest censure, a soldier cannot be held to the same exacting standard of care as a senior officer when faced with a situation where the discharge of his duty might bring him into direct conflict with the authority of a senior officer. [...]

b) A de facto duty of care

24. Second, the prosecution alleges that the Judge Advocate failed to instruct the panel that the respondent had a *de facto* duty of care as a Canadian Forces soldier to protect civilians with whom he came in contact from foreseeable danger, whether or not he was aware of the duty. Conversely, defence counsel claims that the Judge Advocate erred in instructing the panel that on the charge of negligent performance of a military duty imposed upon the respondent, the panel could consider the "non-statutory duty of care to observe the provisions of chapter 5 of the Unit Guide to the Geneva Conventions with respect to civilians with whom the Canadian Forces come into contact". [...]

25. The Judge Advocate was of the view that section 5 of chapter 5 of the Unit Guide to the Geneva Conventions issued by the Chief of Defence Staff (I shall return to the Unit Guide in more details further in these reasons) imposes on a member of the Canadian Forces, at all times including in peacetime, a duty to safeguard civilians in Canadian Forces custody whether or not these civilians are in that member's custody. The Judge Advocate further instructed that the mere knowledge or notice of the relevant provision in the Unit Guide is sufficient to activate the duty and render culpable under section 124 of the Act an omission to safeguard a civilian prisoner. While it is not questioned that the Geneva Conventions for the Protection of War Victims assert the right of civilians to be protected from acts of violence where possible I cannot so quickly subscribe to the Judge Advocate's view that as a matter of military law, the Unit Guide and the Geneva Conventions apply to peacekeeping missions and if they do, that they create a "military duty" in the sense of section 124 of the *National Defence Act*. I will elaborate my reasoning with an outline of the nature and purpose of the charge of negligently performing a military duty, to be

followed with an examination of the nature and effect of the Unit Guide and the Geneva Conventions.

i) The charge of negligent performance of a military duty

aa) The context [...]

35. The offence of negligently performing a military duty, [...] concerns the discharge of any military duty. The charge relates explicitly to the manner of discharging a military duty imposed upon a member of the Canadian Forces. [...] The impugned act or omission of the accused must constitute a marked departure from the expected standard of conduct in the performance of a military duty, as distinguished from a general duty of care. [...]

bb) "A military duty" [...]

48. The conclusion, in my view, is inescapable: a military duty, for the purposes of section 124, will not arise absent an obligation which is created either by statute, regulation, order from a superior, or rule emanating from the government or Chief of Defence Staff. Although this casts a fairly wide net, I believe that it is nonetheless necessary to ground the offence in a concrete obligation which arises in relation to the discharge of a particular duty, in order to distinguish the charge from general negligence in the performance of military duty per se, which upon a plain interpretation of section 124, it was clearly not Parliament's intention to sanction by that section.

ii) Military duty to safeguard prisoners; the Unit Guide and the Geneva Conventions

aa) Where prisoner in custody of the accused

49. It is a principle of law, recognized by counsel for both parties, that a person who has physical custody of, and authority over a prisoner is under a duty to safeguard that prisoner. That duty exists and is enforceable independently of the Unit Guide and of the Geneva Conventions.

50. Counsel for the prosecution relies on a stream of English and Canadian jurisprudence for what he refers to as a common law duty of care. While I agree that the principle exists, I would hesitate to apply *mutatis mutandis* to the military milieu a jurisprudence developed in a non-military context. Although all military duties are subsumed into the broader category of legal duties, general private law duties such as a tort law duty of care owed by prison guards to prisoners are not, in my opinion, contemplated by the term "military duty". As I earlier stated, it is clear that Parliament did not intend to codify a civil law duty of care in the Code of Service Discipline. [...]

52. [...] The Judge Advocate correctly instructed the panel that before they could find Private Brocklebank guilty of the charge, they had to establish beyond a reasonable doubt that the prisoner was in his custody, or that he had custodial responsibilities in respect of the prisoner sufficient to invoke the military duty to safeguard the prisoner.

bb) Where prisoner in custody of the Canadian Forces but not in custody of the accused

53. The appellant contends, in what appears to have been an afterthought, that even if the prisoner was in the direct custody of the accused, the latter was nonetheless bound by a de facto duty to come to the assistance of an aggrieved prisoner in Canadian Forces custody with whom he came in contact. The Judge Advocate agreed with the prosecution. [...]

56. [...] Defence counsel having mentioned:

> ... I believe it is a matter agreed as between us, that there is no suggestion that the Geneva Convention applies to the situation that is before you, but it is admitted that insofar as a guard guarding a prisoner in the army has a responsibility at common law, as we understand the ordinary common law. The responsibility of a guard to the prisoner is so akin to what the Geneva Convention sets out that I have no objection to you having it, but that it will not be an issue as to whether or not, in fact, the rules of the Geneva Convention apply specifically to what occurred in the Somalian operation. [...]

58. A military duty, as I earlier found, can arise from statute, regulation, or specific instruction, such as an order from a superior officer or an imperative from the Chief of Defence Staff. Counsel for both prosecution and the defence concede that there is no statutory or regulatory duty extant which imposes an obligation on members of the Canadian Forces to take positive steps to safeguard prisoners who are not in their direct custody. The appellant, however, relies on Canadian Forces Publication (CFP) 318(4), Unit Guide to the Geneva Conventions, issued by the Chief of Defence Staff on June 15, 1973, as the basis of a general military duty of all service members to protect civilian prisoners not in their custody.

59. The aims of the manual, as appears from its introduction, is “to acquaint all ranks with the principles of the Geneva Conventions for the Protection of War Victims signed on August 12, 1949” and to comply with the provision contained in each of the four Conventions “requiring participating nations to distribute the text of the Convention as widely as possible and, in particular, to include a study of these texts in programmes of military instruction”. The manual “is a guide only”. Paragraph 5 of chapter 1 states that the provisions of the Conventions apply “to all nations who have accepted the conventions in declared war and in any other armed conflict which may arise” and paragraph 7 states that “(i)t therefore follows that members of the Canadian Forces should observe all the provisions of the Conventions when engaged in any conflict”.

60. Chapter 5 of the manual is entitled “Treatment of Civilians” and it deals specifically with Convention IV of the Geneva Conventions, i.e. the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, known as the Civilian Convention. It is noted in the first paragraph that “[t]he Civilian Convention is designed to give protection to categories of civilians particularly exposed to mistreatment in time of war “ and that “[i]ts provisions are [...] restricted to the *inhabitants of occupied territory*” [my emphasis]. Paragraph 2 specifies that “the provisions outlined in this chapter should be regarded as the minimum standard of treatment of any civilians with whom our armed forces come in contact”. Paragraph 5 provides as follows:

> 5. Civilians are entitled in all circumstances to respect for their persons, their honour, their family rights, their religious convictions and practices, and their

manners and customs. They must be humanely treated at all times and protected against all acts of violence possible and, where appropriate, against insults and public curiosity. [31]

61. I do not believe that the relevant provisions of the Unit Guide constitute specific instructions or imperatives giving rise to an ascertainable military duty. The provisions are, by the very words of the manual, “a guide only”.

62. Even if they were to be considered a specific instruction, they would not apply to the case at bar for the simple reason that the Civilian Convention itself, which the Unit Guide purports to explain, does not apply. 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 [32]. There is no evidence that the prisoner was “exposed to mistreatment in time of war” or that the prisoner was an “inhabitant of occupied territory”. That the Civilian Convention does not by its very terms apply to peacekeeping missions is confirmed by the wording of the Additional Protocols adopted in Geneva in 1977. In the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, it is observed that the Civilian Convention “only protects civilians against arbitrary enemy action, and not – except in the specific case of the wounded, hospitals and medical personnel and material – against the effects of hostilities” and that “although humanitarian law had been developed and adapted to the needs of the time in 1949, the Geneva Conventions did not cover all aspects of human suffering in armed conflict”. (General Introduction at xxix). The 1977 Protocol I, which relates to the Protection of Victims of International Armed Conflicts and whose article 51 was meant to enlarge the concept of “protection of the civilian population” as found in the Civilian Convention, only affords civilians “general protection against dangers of military operations” means “all the movements and activities carried out by armed forces related to hostilities”. The 1977 Protocol II, which relates to the Protection of Victims of Non-International Armed Conflicts, contains a similar provision (article 13).

64. Since the Civilian Convention cannot be related to peacekeeping missions such as the one in which the Canadian Forces were involved in Somalia. I fail to see how it could be said that the Unit Guide whose aim is to explain that Convention applies to such

missions. I find, furthermore, that there was no evidence before the Judge Advocate that would allow the Court to assume that the peacekeeping mission could be equated to an armed conflict within the purview of the Civilian Convention or the Unit Guide. [...]

65. Even if I were to hold that the Unit Guide is a source of specific instructions whose application should be extended to peacekeeping missions, the provision of the Unit Guide that declares that civilians "must be humanely treated at all times and protected against all acts of violence where possible and, where appropriate, against insults and public curiosity" would not, in my view, establish a de facto military duty as asserted by the prosecution.

66. I see no basis in law for the inference that the Geneva Conventions or the relevant provisions of the Unit Guide impose on service members the obligations [...], to take positive steps to prevent or arrest the mistreatment or abuse of prisoners in Canadian Forces custody by other members of the Forces, particularly other members of superior rank. I do not wish to comment on the duty that a superior officer might have in similar circumstances, but assert that a military duty in the sense of section 124 of the *National Defence Act*, to protect civilian prisoners not under one's custody cannot be inferred from the broad wording of the relevant sections of the Unit Guide or of the Civilian Convention. I agree [...] that Canadian soldiers should conduct themselves when engaged in operations abroad in an accountable manner, consistent with Canada's international obligations, the rule of law and simple humanity. There was evidence in this case to suggest that the respondent could readily have reported the misdeeds of his comrades. However, absent specific wording in the relevant international Conventions and more specifically, the Unit Guide, I simply cannot conclude that a member of the Canadian Forces has a penally enforceable obligation to intervene whenever he witnesses mistreatment of a prisoner who is not in his custody.

67. Through the *Geneva Conventions Act* Parliament has honoured its international obligations and codified as offences under Canadian law the "grave breaches" listed in the 1949 Geneva Conventions, including torture and inhumane treatment. [...] It is not insignificant that neither the 1965 statute nor the 1990 amendment impose a specific duty on armed forces personnel to protect prisoners in their custody. [...]

CONCLUSION [...]

70. In closing, I would remark that although I am not prepared to extract from the relevant provisions of the Unit Guide a culpable military duty to safeguard prisoners where no custodial relationship exists between the accused and the prisoner, I would add that it remains open to the Chief of Defence Staff to define in more explicit terms the standards of conduct expected of soldiers in respect of prisoners who are in Canadian Forces custody. It is open to the Chief of Defence Staff to specify that these standards apply equally in time of war as in time of peace, to impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge and to ensure that Canadian Forces members receive proper instructions not only during their general training but also prior to their departure on specific missions. Given Canada's traditional and ongoing role as a peacekeeping nation, and the possibility, of if not likelihood of similar circumstances arising in the future, this might prove a useful undertaking. [...]

STRAYER C.J.: I agree [...]

WEILER J.A. (dissenting): [...]

83. Torture is an offence of specific intent. The Crown must therefore prove that Brocklebank failed to act in order to assist Matchee in torturing Arone. Both the Crown and the defence agreed that if Brocklebank was guarding Arone then at common law he has a duty to protect him. If, however, Brocklebank was not guarding Arone, the Crown proceeded on the basis that Brocklebank could be guilty as a party under section 21 of the *Criminal Code* because he ought to have known that he had a duty to protect civilians, and his failure to do so aided and abetted the torture of Arone. The defence admitted that prisoners and civilians in Canadian Forces custody must be protected against all acts of violence as a matter of General Service Knowledge ("GSK"). As part of their battle training, soldiers were instructed on the provisions of the Geneva Convention for the treatment of prisoners of war as well as civilians. In materials provided to them (specifically those in Exhibit "J"), it was clear that the Geneva Convention specifically prohibits the torture or abuse of civilians. It

was clear in these materials that the Geneva Convention "should be regarded as the minimum standard of treatment of any civilians with whom our armed forces come in contact with." The defence did not admit that the accused had specific knowledge of this duty. The position of the Crown is that evidence of Brocklebank's specific knowledge of the GSK was immaterial and the Judge Advocate erred in his summation in not clearly saying so.

84. Given the particular approach of the Crown, this ground of appeal must fail. In relation to the charge of torture, Brocklebank's specific knowledge of the GSK was relevant to his purpose in handing over his revolver to Matchee and to his intention in continuing to be present at the bunker. Clearly, if Brocklebank was under a duty to protect Arone and did not do so for the purpose of aiding Matchee to torture Arone, he could be found guilty as a party. At the opposite end of the spectrum, it is trite to say that had Brocklebank been unarmed, his mere presence while Arone was being tortured would not amount to aiding and abetting if Brocklebank had no duty towards Arone. These two extremes, which were put by the Judge Advocate, ignore a third position. Brocklebank was armed. If the purpose of his presence was to ensure against Arone's escape, particularly when he was left alone with Arone while Matchee went for a cigarette, then there was evidence upon which he could have been found guilty as a party. [...]

89. [...] The Judge Advocate instructed the panel that before they could find that Brocklebank was guilty of a breach of a statutory duty of care under section 124 of the *National Defence Act*, they must find beyond a reasonable doubt that Brocklebank had actual knowledge of a duty under section 124 and actual knowledge of the provisions relating to the Geneva Convention. This was an error inasmuch as section 150 of the Act states:

> The fact that a person is ignorant of the provisions of this Act or of any regulations or of any order or instruction duly notified under this Act, is no excuse for any offence committed by the person.

90. This provision imposes liability on an objective standard. [...] Earlier in his ruling rejecting a motion by the defence that the prosecution had failed to make out a prima

facie case, the Judge Advocate expressed the view that members of the Canadian Forces are under a duty to observe the provisions of chapter 5 of the Unit Guide to the Geneva Convention with respect to civilians with whom the Canadian Forces come into contact and that, specifically, the duty includes the protecting of civilians from all acts of violence where possible. In considering whether Brocklebank ought to have known that soldiers on a peacekeeping mission have a duty of care towards civilians, the panel should have been instructed that it was not necessary to prove that Brocklebank had actual knowledge of the duty in section 124 [...]. Evidence that Brocklebank was given notification of a duty to protect civilians, through lectures given to Brocklebank's platoon, was presented at trial. The average soldier would have been aware of this duty. In my opinion, a peacekeeping mission is a military operation carried out by armed forces with the aim of preventing hostilities and therefore within the Geneva Convention as enlarged by the 1977 Protocols. [...]

THE THIRD GROUND OF APPEAL

96. At trial, Brocklebank testified that he questioned Matchee about his torture of Arone and that Matchee responded that Sox told him to "[g]ive him a good beating, just don't kill him." In cross-examination, Brocklebank testified that he did not do anything about the beating because he thought it had been ordered. The appellant submits that the Judge Advocate erred in law when he directed the members of the panel in respect of the applicability of the defence of superior orders. Even if Brocklebank lacked the courage to point his pistol at Matchee and stop him, he could have sought help. He did not do so.

97. In *R. v. Finta*, [...] the Supreme Court recognized that the defence of obedience to superior orders was available to members of the military. The defence is not available where the orders in question were manifestly unlawful unless the circumstances of the offence were such that the accused had no moral choice as to whether to follow the orders. The respondent concedes that Brocklebank had a moral choice but submits that the orders in question were not manifestly unlawful. To be manifestly unlawful the orders must offend the conscience of every right-thinking person. Because [of] Brocklebank's lower rank, the defence contends that he was not in a position to assess the lawfulness of the order.

98. If Brocklebank had been ordered to assist in abusing Arone, it would, in my opinion, have been a manifestly unlawful order. As a result, there was no evidentiary foundation for the defence of obedience to superior orders [...].
99. The defence raised does not appear at heart to be a defence based on Brocklebank's obedience to an order given by a superior: the only orders which Brocklebank received from Matchee were to go to the pit and to give him his gun. Rather, the defence is one of non-interference based on a belief that an order has been given to a superior officer. The defence raised here is that Brocklebank honestly believed that Matchee was entitled to beat Arone because Matchee told him that Sox had said it was O.K. so long as he did not kill him. In essence, the appellant raises the defence of honest belief as negating the mens rea of the offence. [...]

- **Footnote 31 :** Whether a civilian, once he becomes a prisoner, remains a civilian for the purposes of the Civilian Convention, is a question which I need not answer in view of the conclusion I have reached as to the applicability and meaning of the Convention. I shall assume, for the sake of discussion, that the civilian convention treats civilians on a same footing whether or not they are prisoners. ?
- **Footnote 32 :** The 1949 Geneva Conventions have been approved by the Canadian Parliament in the Geneva Conventions Act (R.S.C. 1985, c. G-3, as amended). Protocols I and II to these Conventions, which were adopted in Geneva in 1977, were approved by the Canadian Parliament on June 12, 1990 (38-39 Eliz. II, c. 14) in an amendment to the Geneva Conventions Act. Section 9 of Geneva Conventions Act provides that "[a] certificate issued by or under the authority of the Secretary of State for External Affaires stating that at a certain time a state of war or of international or non-international armed conflict existed between the States therein or in any State named therein is admissible in evidence in any proceedings for an offence referred to in this Act." No such certificate having been filed in this case, this court is simply not at liberty to assume the existence of a state of war or of an armed conflict in Somalia. Without such evidence, the Convention cannot be said to be applicable and it follows that the Unit Guide to that convention cannot apply either ?

Discussion

1.
    a. *(Paras 62, 63, 89 and 90)* Does the Court recognize that international humanitarian law (IHL) is applicable to acts committed against Arone? Does Judge Décary develop his reasoning as he says he will in para. 25? What is the opinion of Judge Weiler? What is your opinion? Was there an armed conflict in Somalia? Were there military operations there? Was there an armed conflict in which Canadian forces were involved? Was Canada a party to the armed conflict? If there was no armed conflict, is that sufficient to conclude that GC IV did not apply? (GC IV, Art. 2 [2])
    b. *(Para. 62, note 32)* Could the Court have decided that there was an armed conflict in Somalia in the absence of a certificate from the Secretary of State for External Affairs confirming it?
2. Which rules of IHL did Canada violate with respect to the treatment of Arone? (GC IV, Arts 27 [3], 31 [4], 32 [5])
3. Was Brocklebank a hierarchical superior of those who tortured and killed Arone?
4.
    a. *(Paras 5 and 49)* Was Arone a prisoner of Canada? Was Canada responsible for Arone's treatment, or were the persons detaining Arone entirely responsible for it? (GC IV, Art. 29 [6])
    b. Is Canada responsible for the behaviour of Seward, Sox, Brown, Matchee and Brocklebank? Even if they acted in violation of Canadian regulations? Even if they had acted contrary to their orders? (P I, Art. 91) Was Canada's responsibility limited to ensuring that its agents did not mistreat Arone, or was it also required to ensure that third parties did not mistreat Arone? (GC IV, Art. 27 [7])
    c. *(Paras 5 and 49-52)* Among those implicated (Seward, Sox, Brown, Matchee and Brocklebank), who detained or kept watch over Arone? Did those who detained or kept watch over Arone only have a duty not to mistreat him, or did they also have a duty to protect him? (GC IV, Art. 27 [7])
    d. *(Paras 24, 25, 53-67)* Was Arone in the custody of Brocklebank? In the Court's opinion? In the opinion of Judge Weiler? If this had not been the case, could Brocklebank have been punished if he had mistreated Arone? If he did not have

Arone in his custody, did Brocklebank, as an agent of Canada, have to uphold Canada's obligation to protect prisoners in Canada's power? Is there, in addition, a general obligation for every soldier to protect all civilians, even those not detained? Only if they are in the power of the party to which the soldier belongs? (GC IV, Art. 27 [7]) Is a failure to meet this obligation a grave breach? (GC IV, Art. 147 [8]; P I, Art. 86(1) [9])

e. *(Paras 48-61, 64, 89 and 90)* Did Brocklebank have "the task" of upholding Art. 27 of GC IV? Under international law? Under Canadian law? Was this task sufficiently precise and verifiable to render its non-performance punishable? Is knowledge of the rule a prerequisite for any punishment in the event of a violation?

f. *(Para. 60)* Does Art. 27 of GC IV apply only to the inhabitants of occupied territories? Is a civilian held prisoner still a protected civilian? What is the difference between the text of Art. 27 and that of Chapter 5, para. 5, of the manual quoted in para. 60?

g. *(Paras 5 and 97-99)* Could Brocklebank refuse when his superior, Matchee, ordered him to give him his pistol? Did he have an obligation to refuse? In the opinion of Judge Weiler? If Matchee had killed Arone with Brocklebank's pistol, would Brocklebank have been an accomplice to the murder? Could what Matchee did with Brocklebank's pistol be termed torture? Was Brocklebank an accomplice to torture?

h. *(Paras 11 and 99)* If Brocklebank believed that Captain Sox had ordered the ill-treatment inflicted on Arone, could the order justify a failure to fulfil his obligation to protect Arone? (ICC Statute, Art. 33 [**See** Case No. 23, The International Criminal Court] and paras 98-99 of the dissenting opinion of Judge Weiler.)

i. What should Brocklebank have done when he saw Arone?

j. *(Paras 64-65)* Would Brocklebank have been convicted if the Court had recognized the applicability of the Geneva Conventions?

5. Did Canada sufficiently uphold its obligation to prosecute grave breaches by bringing the direct perpetrators to trial for the breach of IHL and the superiors for negligently performing their military duty? To comply with IHL, should the superiors also have

been convicted as co-perpetrators or instigators of torture? Does IHL merely require that grave breaches are punished, but leave it to national law to decide whether superiors committed the same breach as their subordinates or the separate breach of negligently performing their duty as commanders?

6. What are the objective factors that might have led these individuals to commit the offences?

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