CASE COMMENT:

EFU GENERAL INSURANCE LTD., VS. M/S. EMIRATES AIRLINE / EMIRATES SKY CARGO AND OTHERS

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INTRODUCTION

On June 8, 2014, 10 militants disguised as security forces attacked the cargo terminal at Jinnah International Airport, Karachi. The gunmen fired automatic guns and used hand grenades in the six-hour long attack before the army regained control of the terminal. A total of 36 people were killed and the Tehrik-i-Taliban Pakistan (TTP) claimed responsibility for the attack. In 2016, a number of cases were filed by insurance companies claiming compensation against airline carriers for destroyed cargo during the attack. The airline carriers argued that they were exempt from liability because the attack constituted an armed conflict. This article will discuss the judgment of the Sindh High Court of May 6, 2020, *EFU General Insurance Ltd., vs. M/s. Emirates Airline / Emirates Sky Cargo and Others*, in which these cases were decided. The court held that Pakistan was involved in a non-international armed conflict against the TTP at the time of the attack and that, therefore, airline carriers were precluded from liability.

1. Main Issues

Under Rule 18(2)(c) of the Carriage by Air Act 2012, airline carriers are not liable for destroyed cargo if it has resulted from an act of war or armed conflict. The carriers argued that the attack constituted an armed conflict under this provision. However, the insurance companies contended that it was not an armed conflict but a terrorist attack. The key issue, then, before the court was to determine whether the attack was an act of terrorism to which international humanitarian law (IHL) did not apply or whether it constituted or was part of a non-international armed conflict to which Pakistan and TTP were party.

2. Act of Terrorism or an Armed Conflict?

In order to determine which regime of law applies to the situation, it is necessary to state the requirements for application for each framework.

IHL - Threshold of Application

IHL affords protection on the basis of a person's status and the type of armed conflict in question. It distinguishes between international armed conflicts (IACs) and non-international armed conflicts (NIACs).

An **international armed conflict** occurs when there is a:

a. resort to force between states;[457]

[457] See Common Article 2 of the Geneva Conventions (1949)

b. partial or total occupation of one state's territory by another state even if the occupation meets with no armed resistance;[458] and
c. conflict between people fighting against colonial domination and alien occupation against racist regimes in exercise of their right to self-determination.[459]

Non-international armed conflicts occur on the territory of a state between its armed forces and dissident armed forces or other organized groups. However, it does not include internal disturbances and tensions such as riots, isolated and sporadic acts of violence. The existence of a non-international armed conflict is determined by there being protracted armed violence by an armed group which is sufficiently organized to conduct hostilities.[460]

The Legal Framework Applicable to Terrorism

The UN's counterterrorism regime consists of treaties in the form of 13 Terrorism Suppression Conventions and Security Council Resolutions. Common elements of terrorist crimes in these Conventions include the prohibited means or method (such as bombing or hostage taking); a prohibited target (such as internationally protected persons or civil aircraft); or some combination thereof and also in some cases a terrorist purpose. The Suppression Conventions also regulate matters not covered by IHL such as terrorist financing. The framework is rather fragmented and shares a confused relationship with IHL. There is no comprehensive terrorism

[458] *Ibid.*
[459] See Article 1(4) of Additional Protocol I (1977) to the Geneva Conventions (1949)
[460] Prosecutor vs. Dusko Tadic (Appeal Judgement), IT-94-1-A, (ICTY), 15 July 1999

convention largely because the definition of terrorism and its scope of application has been contentious, particularly on the subject of whether the treaty would apply to freedom struggles.

However, Trapp offers a useful definition of terrorism as; 'any act falling within the scope of a Terrorism Suppression Convention', in addition to:

> any act intended to cause death or serious bodily injury, or extensive damage to property, when the purpose of such act, by its nature or context, is to intimidate a population, to provoke a state of terror in the general public, a group of persons or particular persons for political purposes, or to compel a government or an international organisation to do or abstain from doing any act'.[461]

Although, a terrorist attack may give rise to, or occur in the context of situations of armed conflict, the concepts of terrorism and armed conflict are different. A significant blurring of the lines between armed conflict and acts of terrorism have led to confusion in determining which legal framework applies to such incidents.

3. Terrorism in an Armed Conflict

IHL prohibits acts that would be designated 'terrorist' if committed in peacetime. Under the principle of distinction, the parties to the conflict must at all times distinguish between civilians and civilian objects and combatants

[461] Trapp, K. (2011-06-01). Introduction. In State Responsibility for International Terrorism. : Oxford University Press. page 24

and military objectives.[462] Attacks may only be directed against combatants and military objectives and must not be directed against civilians or civilian objects. Any direct and deliberate targeting of civilians or civilian objects are criminalized as war crimes under the law of armed conflict.

The two Additional Protocols prohibit 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'.[463] This prohibition enjoys customary status in IACs and NIACs.[464] The International Criminal Tribunal for the Former Yugoslavia also convicted Stanislav Galić for unlawfully inflicting terror on the civilian population by conducting a shelling and sniping campaign in the city which was indiscriminate and disproportionate.[465]

Furthermore, Article 33 of the 1949 Geneva Convention IV also prohibits 'collective penalties and likewise all measures of intimidation or terrorism' against protected persons. Article 4(2)(d) of Additional Protocol II applicable to NIACs also prohibits 'acts of terrorism' which 'covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect'. This protects members of the armed forces or armed groups who are no longer participating in hostilities.

Acts of terrorism that transpire within an armed conflict are subject to IHL even if the act happens in a territory where the conflict is not taking place.[466]

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462 Article 48, Additional Protocol I
463 Art. 51(2), Additional Protocol I and Art. 13(2), Additional Protocol II
464 ICRC Customary IHL, Rule 2
465 Prosecutor v Galic, Appeals Chamber Judgment, Case. No. IT-98-29-A, 30 November 2006
466 *Prosecutor v Dusko Tadic (Opinion and Judgment)* ICTY IT-94-1-T (7 May 1997) para 70.

It is sufficient for the incident to be linked to the existing armed conflict[467]and such acts also do not change the legal status of the conflict.[468] An act of organized violence may, in certain circumstances, serve as a trigger for an armed conflict or such an act may also take place as an isolated incident inside an armed conflict.

4. LEX SPECIALIS APPROACH

It has in fact been argued that a *lex specialis* approach be adopted with regards to terrorism and armed conflict wherein terrorism laws apply during peacetime and IHL applies during an armed conflict. This is supported by the exclusion clause in Article 19(2) of the 1997 Convention for the Suppression of Terrorist Bombing which states that "The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention…" The use of the term armed forces here is understood to refer to both state and non-state forces. The combination of Art. 2(1)(a) and art. 21 of the Terrorist Financing Convention has the same effect.

However, there is not yet clarity in international law on whether these two regimes operate mutually exclusively. This uncertainty was addressed by the UK Supreme Court in *R. v. Gul* in which it stated that "while international law "has developed so that the crime of terrorism is recognized in situations where there is no armed conflict", it "has not developed so that it could be

[467] *Prosecutor v Dusko Tadic (Opinion and Judgment)* ICTY IT-94-1-T (7 May 1997) para 572.
[468] http://www.cidh.org/Terrorism/Eng/part.b.htm#_ftn164. Para 73.

said there is sufficient certainty that such a crime could be defined as applicable during a state of armed conflict".[469]

If we adopt the *lex specialis* approach then if the incident was an act of terrorism occurring in peacetime then IHL would not apply and an armed conflict would not exist under Rule 18(2)(c) of the Carriage by Air Act. If it was an attack which started or occurred during an armed conflict then airline liability would be precluded and IHL would apply.

5. Defining a Non-International Armed Conflict

Common Article 3 of the 1949 Geneva Conventions (Common Article 3) refers to non-international armed conflicts as those *"occurring in the territory of one of the High Contracting Parties"*.[470] It recognises a low threshold of violence, as it does not impose any criteria about what may constitute as a non-international armed conflict. The only condition it stipulates is that the conflict must take place within the territory of a state, and the conflict must not be of an international character. It implies that the provision applies to disputes between non-governmental armed forces and state forces; or between two or more such groups.[471]

The 1977 Additional Protocol II to the Geneva Conventions of 1949 (Additional Protocol II) classifies non-international armed conflicts as hostilities between State forces and armed dissident groups or other organised

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[469] *R v Gul* [2013] UKSC 64 [35]

[470] *The Geneva Conventions of 12 August 1949* (International Committee of the Red Cross (ICRC) 1995) 35, 61, 81, 151, Common Art. 3.

[471] Claude Pilloud and others, *Commentary on the Additional Protocols of 8th June 1977 to the Geneva Convention of 12th August 1949* (Jean Pictet ed, Kluwer Academic Publishers 1987) para 4339.

armed units, who exercise control over a large part of the territory that allows them to carry out *'sustained and concerted'* military attacks.[472]

The restrictive nature of this definition is evidenced by three requirements and all prerequisites need to be satisfied cumulatively: (1) non-state actors must exercise control over a sufficiently large territory that allows them to carry out coordinated military operations; (2) only applicable to conflict between rebel forces and government troops; and (3) the conflict must take place in the territory of the State that has ratified Additional Protocol II.[473]

However, the leading criteria for what may constitute a non-international armed conflict is found in the jurisprudential authority of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Dusko Tadić*. A non-international armed conflict exists where there is "*protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.*"[474] This statement allows the division of qualification of non-international armed conflict into two key criteria:

(a) The hostility must reach a minimum level of intensity – a succession of attacks conducted over a large disputed geographic area that is 'regionally disparate and temporarily sporadic' cannot amount to an armed conflict.[475]

(b) There must be involvement of an organised armed group - those party to the conflict i.e. non-state actors must possess a structured armed force that can sustain and mount a coordinated military operation.

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[472] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, Art. 1.
[473] Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press 2008) 9.
[474] *Prosecutor v Dusko Tadic (Opinion and Judgment)* ICTY IT-94-1-T (7 May 1997) para 561-62.
[475] *Prosecutor v Fatmir Limaj et al (Judgement)* ICTY IT-03-66-T (30 November 2005) para 168.

a. Intensity of Violence

The ICTY has provided several indicators upon which could reliance could be placed to enable a determination regarding the intensity of the fighting such as:[476]

- The number, duration, and intensity of armed confrontations (including whether there has been an increase in clashes)
- Whether the fighting is widespread (including whether towns are besieged or supply routes blocked and roads closed)
- The types of weapons and equipment used
- The number and caliber of munitions fired
- The number of fighters and type of forces participating in the fighting
- The number of military and civilian casualties
- The extent of material destruction
- The number of civilians fleeing combat zones

While the threshold in a NIAC must be distinguished from isolated acts of terrorism, in the *Boškoski* case, the ICTY Trial Chamber held that protracted terrorist acts are relevant in assessing whether the level of intensity has been reached.[477] It noted that 'terrorist acts may be constitutive of protracted violence' and 'while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where

[476] See Dustin A. Lewis, Gabriella Blum & Naz K. Modirzadeh, Indefinite War: Unsettled International Law on the End of Armed Conflict (Harvard Law Sch. Program on Int'l Law & Armed Conflict, Feb. 2017) and Nathalie Weizmann, The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF, 47 Colum. Hum. Rts. L. Rev. 204 (2016)
[477] Prosecutor vs. Boškoski, Case No. IT-04-82-T, Judgment, (ICTY July 10, 2008)

they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict."[478]

b. Level of Organization

The ICTY has also elaborated indicators to assess the level of organization of non-state groups:[479]

- The existence of a hierarchical command structure (this includes the existence of staff, spokespersons, or high command, internal regulations, issuing of political statements or communiqués, and identifiable ranks and positions)
- The ability of the group to plan and launch coordinated military operations (including to define a unified military strategy, use military tactics, carry out large-scale or coordinated operations, control territory and territorial division into zones of responsibility)
- The capacity to recruit, train and equip combatants
- The existence of an internal disciplinary system on which trainings are held
- The group's ability to act on behalf of its members (including its ability to conclude cease-fire agreements and speak with one voice)

However, whether a situation amounts to a non-international armed conflict is a matter of fact, and is decided purely on a case by case basis. Therefore,

[478] Ibid
[479] See Tadic

an objective assessment of what may constitute as a non-international armed conflict is required.[480]

6. Analysis of the Sindh High Court's Judgment

The High Court of Sindh in its judgment ruled that the attack at the Karachi Airport was not an isolated act of terrorism, but rather a concerted incident within the context of a non-international armed conflict, or a hybrid of a terrorist attack and armed conflict i.e. where recurring acts of violence further the defined objectives of a proscribed organization translates into a non-international armed conflict.[481] As a result, the airline carriers were not liable to pay compensation.

The court acknowledged that acts of terrorism are distinguished from the definition of an armed conflict and stated that most actions against terrorist groups are not part of an armed conflict. The counsels before the court had rather alarmingly at one point referred to dictionary definitions for the terms 'terrorism', 'armed', and 'conflict'. However, the court later did rely on secondary source material for the definitions of an armed conflict. The judgment does not, disappointingly, refer to the *Tadić* case but rather to an ICRC report which provides the criteria mentioned above for the existence of a NIAC. It held that the attack was committed by an organised group which had engaged in a series of hostilities spread over many years, therefore, the criteria stand fulfilled. The court also ended the judgment with the rather

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[480] Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press 2015) 65.
[481] *EFU General Insurance Ltd., vs. M/s. Emirates Airline / Emirates Sky Cargo and Others*, (Sindh High Court 2020).

abstract conclusion that the country was in a state of war with terrorist militias.

However, no adequate analysis of the existence of a non-international armed conflict under the *Tadić* criteria was undertaken. Instead the court appears to place much importance on the fact that the TTP is a proscribed terrorist organisation. This ignores the fact that a group's designation as 'terrorist' under the framework applicable to terrorism does not factor into the IHL qualification for a NIAC. While TTP's ability to sustain and mount coordinated operations in Pakistan meets the ICTY's criteria of the degree of organisation required from a non-state armed group,[482] the requirement that hostility must attain a minimum level of intensity remains unfulfilled. The judgment relies on the Supreme Court's decision in the *District Bar Association vs. Federation of Pakistan*, 2015 and instances such as the attack on the Army Public School in Peshawar in December 2014 to fulfill the requirement of intensity of violence. However, these are all acts that took place after the attack on Karachi Airport. Therefore, they cannot be used to satisfy the intensity requirement retroactively.

The Pakistani Armed Forces launched a full military operation against Tehrik-i-Taliban Pakistan in North Waziristan and Khyber Tribal Agency on June 15, 2014, in response to the attack.[483] It may then be argued that the attack on Karachi Airport sparked the non-international armed conflict in the Federally Administered Tribal Area. However, the attack on Karachi airport should be

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[482] Hassan Abbas, 'A Profile of Tehrik-I-Taliban Pakistan' (2008) 1 CTC Sentinel 1, 2. http://belfercenter.ksg.harvard.edu/files/CTC%20Sentinel%20-%20Profile%20of%20Tehrik-i-Taliban%20Pakistan.pdf..

[483] Annyssa Bellal, *The War Report: Armed Conflict in 2014* (Oxford University Press 2016) 222 – 227.

considered individually or holistically with acts of violence prior to June 8, 2014 to establish the existence of non-international armed conflict. Its subsequent incitement of an armed conflict in a geographically distant location would arguably not satisfy the criteria under *Tadić*.

As far as the argument that the airport attack was part of a pre-existing non-international armed conflict goes, Pakistan has seen numerous displays of violence since as early as 2002 between the State's Security Forces and non-state actors. However, it may be argued that such acts of violence were isolated and sporadic in nature, and thus do not fall within the purview of non-international armed conflict and instead are mere instances of terrorist violence. The judgment itself reproduces an ICRC report which states that terrorist attacks after 9/11 were not treated as an armed conflict but as crimes.

Another argument that may be made is that the frequency of fighting over time and spread out over territory, given the number, duration and intensity of individual confrontations, have resulted in a non-international armed conflict. In 2007 and 2009, Pakistan's Armed Forces started military operations in the Federally Administered Tribal Area and Khyber Pakhtunkhwa to break the power of Tehrik-i-Taliban Pakistan and other affiliated organizations in the region. The engagement of State Forces and Non-State Actors may signify the attainment of the level of intensity of the hostility. Furthermore, due to the nature of the conflict in the Federally Administered Tribal Areas, and the gravity of military action that took place points to the presence of a non-international armed conflict in Pakistan. It satisfies the criteria set under Common Article 3 of the Geneva Conventions 1949; the Additional Protocol II of 1977 and ICTY's judgment in *Tadić*. However, these active hostilities ended in 2010, therefore, it is unlikely that

they could be linked to an attack four years later given the requirement under Tadić that they be 'protracted'.

Moreover, the judgement relies on the *Abella Case* to establish the existence of a non-international armed conflict. In that case, 42 armed persons had attacked a military barracks at La Tablada, Buenos Aires on January 23, 1989 which was followed by intense combat between the attackers, and the Argentine military in which 29 people died. According to the appreciation of the facts by the Inter-American Commission on Human Rights, the attack could not be characterized as a situation of internal disturbance. The conflict was a direct confrontation between non-state actors and government armed forces. The armed attack on the base was diligently planned, coordinated and executed. The Commission held it was significant that the conflict was '…a military operation, against a quintessential military objective - a military base.' The Commission held that even though the violent attack lasted for only 30 hours, it was of such intensity that it triggered the application of Common Article 3.[484]

However, there are major differences between the attack on La Tablada military base and Karachi Airport. While the conflict was between the armed forces of Pakistan, and an organised armed group, the attack was against a civilian airport rather than a military base. Moreover, the duration of the two attacks significantly differ. The clash at La Tablada military base lasted for 30 hours, whereas the violent act at Karachi airport lasted a mere six hours.

[484] 'Inter-American Commission on Human Rights, Tablada' (*Casebook.icrc.org*). https://casebook.icrc.org/case-study/inter-american-commission-human-rights-tablada.

7. Conclusion

In sum, determining the threshold of application for a non-international armed conflict requires an objective assessment of the criteria as established by IHL and jurisprudence from international courts and tribunals. This assessment is often a difficult task given the many factors which should be considered in making such a determination. The lack of a clear demarcation between terrorist incidents and sufficiently protracted violence by an organized armed group contributes to this difficulty. While the Sindh High Court attempted to grapple with these issues the judgment rendered falls short in adequately clarifying the law and its application in this particular case. The lack of reliance on primary source material as well as interaction with the criteria outlined above has resulted in a largely confusing and wanting order which may raise more questions than it answers.