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Focus

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"British rules of engagement, established after decades of experience in Northern Ireland - and latterly in peacekeeping missions in Bosnia and Kosovo - are much stricter than the Americans"

European Commission on Human Rights
Kelly v. United Kingdom
13/1/1993

"[...] the only course of action open to the soldiers was either to open fire or to allow the car to escape. Neither before the domestic courts, nor before the Commission, was it contended that it would have been possible to immobilise the car by shooting at the tyres or the engine block. [...] the High Court judge commented that there was a high probability that shots fired at the driver would kill him or inflict serious injury. The situation facing the soldiers, however, had developed with little or no warning and involved conduct by the driver putting them and others at considerable risk of injury. Their conduct must also be assessed against the background of the events in Northern Ireland, which is facing a situation in which terrorist killings have become a feature of life. In this context the Commission recalls the judge's comments that, although the risk of harm to the occupants of the car was high, the kind of harm to be averted (as the soldiers reasonably thought) by preventing their escape was even greater, namely the freedom of terrorists to resume their dealing in death and destruction."

A checkpoint near Najaf: is human rights law applicable?

In an earlier bofax, reference was made to the killing of several civilians on 31 March 2003 at a checkpoint held by American soldiers. This event was analysed in the light of the rules of international humanitarian law.

Yet, the question remains whether human rights law is relevant. From the outset, one must be aware that human rights law is always applicable, even in times of armed conflicts, a position that has been stressed on several occasions by the European and the Inter-American Courts of Human Rights. The only exception relates to derogable rights that can be suspended in times of conflict. However the right to life, important in the instant case, is a non-derogable right and hence relevant in the discussion. Yet, the International Court of Justice expressly declared in the *Nuclear* advisory opinion that humanitarian law is the *lex specialis* to be applied in times of armed conflict, thereby overshadowing the rules laid down in human rights law treaties or customary international law relating to human rights.

Yet, it is interesting to see how human rights law regulates the use of force in such situations. There is no shimmer of a doubt that the right to life must be ensured in all circumstances and that this right is of customary nature. The scope of application of this right depends nevertheless on the wording adopted in a particular convention and on the court involved in interpreting this provision.

For the sake of comparison, let us assume that the European Convention on Human Rights would be applicable to the American checkpoints in Iraq. It is all the more interesting to examine the 1993 *Kelly* case because the facts are rather similar. In this case, a young joyrider was shot dead by British soldiers in Northern Ireland after he had failed to stop at a checkpoint. The European Commission on Human Rights held that the soldiers had not violated the right to life of the seventeen-year-old driver. It explained that, having regard to the circumstances prevailing at the time, i.e. the soldiers expected a terrorist to evade the army checkpost, their reaction "shoot to kill" fulfilled the "proportionality test" as encapsulated in the expression "absolutely necessary" of article 1 of the European Convention on Human Rights. It was clear in this context that the choice lay between opening fire and allowing the car to escape as there were no other means to immobilise the car. Further, the driver was putting the soldiers at considerable risk of injury. For this reason, the Commission held that the case was manifestly ill-founded.

Applied to the case of the checkpoint near Najaf and looking at the context, i.e. the American soldiers were wary of any civilians who, in fact, may take up arms or may be suicide-bombers, it is possible to contend that the soldiers legitimately shot with intent to kill or cause serious injury. However it is not clear whether they had the possibility to immobilise the car in a manner that would have prevented the death of the occupants. Should the examination reveal that there would have been other means available to the soldiers, then one may legitimately question the legality of such an action under human rights law.

Responsibility

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