EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No:[003/07-09-2009]

Party Filing:[TRIAL (Track Impunity Always)]

Filed to:[CO-INVESTIGATING JUDGES]

Original language: [ENGLISH]

Date of document: [19-05-2016]

CLASSIFICATION

Classification of the document suggested by the filing party: [PUBLIC]

Classification by OCIJ or Chamber: [PUBLIC/CONFIDENTIAL/STRICTLY CONFIDENTIAL]

Classification Status: [INTERIM/CONFIRMED]

Review of Interim Classification: [PUBLIC/CONFIDENTIAL/STRICTLY CONFIDENTIAL]

Records Officer Name:

Signature:

[*Amicus Curiae* Brief]

-

Filed by:

[AMICUS CURIAE]

[TRIAL (Track Impunity Always)]

Distribution to:

Co-Prosecutors

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[INSERT LAWYERS NAME]

Civil Parties

[INSERT LAWYERS NAME]

[ZYLAB ERN NUMBER] [CASE NUMBER]

INTRODUCTION AND PETITION

The object of this brief is to establish whether, according to customary international law applicable between 1975 and 1979, an attack by a state or organisation against members of its own armed forces may amount to an attack "against any civilian population" for the purposes of crimes against humanity (CAH)[1].

In order to do so, the present brief will determine what are the correct legal standards to interpret the concept of "any civilian population" for the purposes of CAH[2] *in the situation at hand, taking into account relevant International Human Rights Law and International Humanitarian Law.*

[1] The present brief starts from the assumption that the said attack undertaken against the members of its own armed forces cannot be regarded as being only one attack in the framework of a larger one targeting the broader population of the country. In this case, settled international jurisprudence affirms that the presence of military personnel as a target within a broader population does not change the civilian character of the population for the purpose of defining CAH, see ICTY, Prosecutor v Tadić, case no IT-94-1-T, Trial Judgement 7 May 1997, para. 638; Akayesu Judgement, para. 582; ICTR, Kayishema-Ruzindana Judgement, para. 128; SCSL, Prosecutor v Sesay et al, 2 March 2009 para 82; ICC, Prosecutor v Bemba Gombo, Trial Chamber, 21 March 2016, para. 156; ECCC, Case n. 001, Judgment, 26 July 2010, para. 305.

[2] The need for such an interpretation is dictated by the fact that the "*definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy",* ICTY, Prosecutor v Tadić, case no IT-94-1-T, Trial Judgement 7 May 1997, para. 648.

1.International Human Rights Law (IHRL)

1.1 Applicable law (1975-1979)

1. In order to establish the international human rights norms applicable at the relevant time, it is necessary to refer to the Universal Declaration of Human Rights (UDHR)[3]. It is submitted that by 1975 Cambodia was bound by the obligations contained in the UDHR, in particular those related to the right to life (Art.3) and the right not be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art. 5).

2. First, Cambodia was admitted to membership of the United Nations in 1955[4]. The Democratic Kampuchea, being bound by the same international obligations as the Kingdom of Cambodia[5], was fully constrained by the principles set up by the UN Charter[6]. As a consequence, the Democratic Kampuchea accepted the principles of the UDHR by virtue of its UN membership.

3. Secondly, although regarded in 1948 as primarily bearing moral significance,[7] by 1975 most of the articles contained in the UDHR had reached the status of customary international law[8] and their content was therefore legally binding on all states regardless of their ac-

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[3] See UN General Assembly , Universal Declaration of Human Rights, 183rd plenary meeting, Paris - 10 December 1948, Res. 217 A (III).

[4] See Charter of the United Nations, San Francisco, 26 June 1945, Declarations of Acceptance of the Obligations contained in the Charter of the United Nations - Admission of States to Membership in the United Nations in accordance with Article 4 of the Charter, San Francisco, 24 October 1945, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-2&chapter=1&lang=en

[5] In 1975 the Khmer Rouge took control of the state which was officially renamed Democratic Kampuchea with the promulgation of the new Constitution on January 5, 1976.

[6] See, in particular, Art. 1(3) UN Charter.

[7] United Nations, The International Bill of Human Rights 1, New York: UN Dept. Of Public Information, 1988.

[8] See Yearbook of the United Nations: 1948-1949, Chapter V: Social, Humanitarian and Cultural Questions, Human Rights, available at http://www.ohchr.org/EN/UDHR/Pages/Resources.aspx; see also International Court of Justice, United States v. Iran, 1980 3, 42 (Judgment of 24 May): "*Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights*" (we underline); see also Barcelona Traction, Light & Power Co.,

cession to particular international treaties. Cambodia never objected to the content of the articles of the UDHR; on the contrary, during the first International Conference on Human Rights in Teheran in 1968, it participated in the unanimous adoption of the Proclamation affirming that "*the Universal Declaration of Human Rights (...) constitutes an obligation for the members of the international community*[9]".

1.2 IHRL applicability to the specific case: no need for distinction

4. Concerning the applicability of human rights rules to the armed conflict in Cambodia, it is submitted that the interplay between IHL and IHRL must be examined in light of the status of the law in 1975 and the specific conduct under review.

5. The applicability of IHRL to situations of armed conflict was already universally accepted by 1975[10].

6. As for IHL, this branch of law is meant to regulate the conduct of parties to an armed conflict[11], therefore it applies only to those conducts that are closely related to the hostilities[12]. Consequently, the law of International Armed Conflict, with only a few exceptions, is not applicable to the relationship between a state and its citizens, even if they are members of its military.

Ltd., 1970 ICJ 3, 32-34 (Second Phase) (Judgment of 5 February 1970); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ 16, 57 (Advisory Opinion of 21 June); See for example Humprehy Waldock, Human Rights in Contemporary International Law and the Significance of the European Convention, in The European Convention of Human Rights 1, 15 (Brit. Inst. Int'l & Comp. L., Ser. No. 5, 1965); Louis B. Sohn, The Human Rights Law of the Charter, 12 Tex. Int'l L. J., 129, 133 (1977); Richard Bilder, The Status of International Human Rights Law: An Overview, in International Human Rights Law & Practice 1, 8 (James Tuttle ed., 1978).

[9] Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41.

[10] See, *inter alia*, United Nations General Assembly Resolution 2675, Basic principles for the protection of civilian populations in armed conflicts, 25th Session, 9 December 1970; United Nations General Assembly Resolution 3318, Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 29th Session, 14 December 1974. This will be confirmed later on by the International Court of Justice in ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, 8 July 1996, ICJ Reports 1996, para. 25; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 2004.

[11] C. Droege, the Interplay between International Humanitarian Law and International Human Rights Law in situations of armed conflict, ISR. L. REV. Vol. 40, No.2, 2007, p.310

[12] Prosecutor v.Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

7. Even if both IHL and IHRL were applicable at the time, it is submitted that IHRL must prevail in the case under consideration. According to the International Law Commission, "*the principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts*[13]".The *lex specialis* principle[14] can be considered as a conflict-of-norms solution technique whereby, out of two legal provisions that are both valid and applicable and in no hierarchical relationship, the one that is more effective, has greater clarity and definiteness and is better able to take account of particular circumstances must prevail[15].

8. It is thus necessary to analyse the two legal systems on a rule-by-rule basis and evaluate which one is more pertinent. In the situation under consideration, the two rules would be, on the one hand, Common Art. 3 GCs intended as reflecting "*elementary considerations of humanity*",[16] and, on the other hand, Art. 3 and 5 UDHR. Common Art. 3 sets basic protections for "persons taking no active part in the hostilities", therefore it is centered on the idea of hostilities between warring parties and the logic of protecting a portion of the population that does not (or not any more) represent a threat to the enemy. Conversely, Art. 3 and Art. 5 UDHR assign specific rights that human beings have *vis-à-vis* their State regardless of the situation they are in. The conduct under consideration, whereby a regime commits widespread or systematic crimes against its own armed soldiers without any link with hostilities, is best captured factually by the human rights provisions.

9. Since IHRL does not provide for any status-based distinction,[17] fundamental rights are applicable to all citizens under the state jurisdiction regardless of whether they assume a combat function.

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[13] Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law, para. 56, 13 April 2006.

[14] The principle was already valid at the relevant time, see Statement of the Expert Consultant (Waldock), United Nations Conference on the Law of Treaties, Second Session, Vienna 9 April-22 May 1969, Official Records (The United Nations, New York, 1970) p. 270.

[15] *Supra* note 15, para. 60

[16] ICJ, Military and Paramilitary Activities (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, paras. 113-114.

[17] René Provost, International Human Rights Law and Humanitarian Law, Cambridge University Press, 2002, p. 41.

10. This implies that members of the armed forces are citizens in uniform who must enjoy the same protection of their fundamental rights as any other citizens[18] and must be considered as civilians for the purpose of CAH in the situation under consideration.

2. International Humanitarian Law (IHL)

2.1 Applicable Law

11. As affirmed by the ECCC, the situation in Cambodia from 1975 to 1979 is to be considered as an International Armed Conflict[19]. The four 1949 Geneva Conventions are applicable to the conflict[20] and reflective of customary international law (CIL)[21]. Moreover, the relevant Hague Regulations[22] were also part of CIL at the time[23].

2.2 Defining the status of military members

12. Art. 4 GCIII defines prisoner of war as "*persons (...) who have fallen into the power of the enemy*[24]" but it does not define combatants *per se*. On the other hand, Regulation 3 of the Hague Regulations[25] states that "*the armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war*[26]". Two elements must be noted. Firstly, the possibility for members of the armed forces not to be considered as combatants. Secondly, the logic of

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[18] See recent jurisprudence, such as UK Supreme Court, Smiths and others vs. Ministry of defence, para. 54-55, 19 June 2013.

[19] ECCC, Case n. 001, Judgment, 26 July 2010, para. 423.

[20] The Conventions were ratified by Cambodia in 1958 and by Vietnam in 1957. The 1977 Protocols were ratified only later, therefore not applicable.

[21] *Supra* note 21, para. 405. The Hague Regulations were also part of CIL at the time.

[22] See in particular Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907

[23] See I Trial of the Major War Criminals before the International Military Tribunal, 253 (1945).

[24] GCIII, Art. 4

[25] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[26] See Regulation 3, available at https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4D47F92DF3966A7EC12563CD002D6788

the article which relies on the relationship between soldiers of one belligerent party *vis-à-vis* the other parties.

13. It is submitted that, in the situation under consideration, members of the armed forces are to be considered - *vis-à-vis* their own state - as civilians or as soldiers *hors de combat*, therefore being protected against CAH[27].

a) Members of the armed forces as non combatants

14. For the purpose of targeting, civilians enjoy protection as long as they take no active part in the hostilities[28] (not DPH). For the purpose of internment, civilians might be regarded as protected persons according to the meaning of Art. 4 GCIV, if they fulfil certain conditions.

15. Applying these standards to members of the armed forces *vis-à-vis* their own state, it should be borne in mind that the definition of direct participation in hostilities includes the belligerent nexus, meaning that "*the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.*[29]". Therefore, unless it can be proven that members of the armed forces were putting in place a conduct adversely affecting their own state, they cannot be considered as DPH for the purpose of targeting.

16. For the purpose of internment, Art.4 GCIV requires civilians not to be nationals of the party they find themselves in the hands of[30]. International jurisprudence has affirmed that the nationality requirement has been widely overcome by "allegiance" and "effective pro-

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[27] *One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes",* ICTY, *Prosecutor v Kupreškić*, IT-95-16-T, Trial Chamber, 14 January 2000, para. 547.

[28] See Common Art. 3 GC.

[29] ICRC Interpretative Guidelines on the notion of Direct Participation in Hostilities under IHL, Nils Melzer, May 2009, p. 46. (We use the Guidelines only for the purpose of interpretation for a notion that was already in force in 1975).

[30] See Art. 4 GCIV.

tection" as more appropriate criteria[31]. In this case, the lack of effective protection by their own party (which may be interpreted by analogy as the lack of nationality) implies that soldiers may be considered as "protected persons" for the purpose of GCIV, therefore enjoying the protection of civilians in this respect.

17. It is thus possible to conclude that members of the armed forces are not to be regarded as combatants but rather civilians *vis-à-vis* their own state.[32]

b) Members of the armed forces as soldiers "***hors de combat***"

18. Finally, it is argued that members of the armed forces of a party to the conflict can be regarded as *hors de combat* towards that same party.

19. The definition of "hors the combat" requires that the persons have "*laid down their arms and are placed ' hors de combat ' by sickness, wounds, detention, or any other cause*[33]". In the situation at hand, soldiers are clearly placed *hors de combat* as soon as detained. Alternatively, it can be argued that, by the virtue of their membership to the armed forces of their own party ("any other cause"), they are subjectively *hors de combat* towards that party unless they put in place a hostile conduct against it.

20. Being *hors de combat*, they have to be regarded as civilians and protected for the purpose of CAH as confirmed by the jurisprudence[34].

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[31] See Judgment, The Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, ICTY Appeals Chamber, 15 July 1999, paras. 163 - 169: "*already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. In the aforementioned case of refugees, the lack of both allegiance to a State and diplomatic protection by this State was regarded as more important than the formal link of nationality*" (para. 165).

[32] As recognised by ICRC CIL Study, Rule 1: The parties to the conflict must at all times distinguish between civilians and combatants, principle that was first set forth in the St. Petersburg Declaration (1868).

[33] Common Art. 3 GCs.

[34] German Supreme Court (Oberster Gerichtshof), British Occupied Zone, *R. Case*, 27 July 1948; German Supreme Court (Oberster Gerichtshof), British Occupied Zone, *P. and Others*, 7 December 1948; French Court of Cassation (Criminal Chamber), Touvier case, 27 November 1992, 338; ICTY, Prosecutor v Tadić, case no IT-94-1-T, Trial Judgement 7 May 1997, para. 648; Prosecutor v Jelsić, IT-95-10-T, Trial Chamber, 14 December 1999, para. 54; Prosecutor v Blaškić, case no IT-95-14-T, Trial Judgement, 3 March 2000, para. 214; Prosecutor v Kordić and Čerkez, IT-95-14/2-A, 17 December 2004, para. 421; Prosecutor v Akayesu, ICTR-96-4-T, 2 September 1998, para. 582; Prosecutor v Sesay et al (SCSL-04-15-T) 2 March 2009 para. 82. In most of these cases

Conclusions

21. It is submitted that, according to customary international law applicable between 1975 and 1979, the correct legal standards to interpret the concept of "*any civilian population*" for the purposes of CAH included an attack by a state or organisation against members of its own armed forces.

22. Not only this is consistent with the original logics behind the codification of CAH[35] and with the object and purpose of the rules of IHL and IHRL, but it also reflects the development of international criminal law as codified in the 1954 Draft Code of Offences against the Peace and Security of Mankind where there is no reference to civilian populations among the contextual elements of CAH[36].

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the definition of people protected for the purpose of CAH is even broader, including also civilians DPH and, in the German Supreme Court cases, soldiers.

[35] Cassese A, Crimes against Humanity: Comments on Some Problematical Aspects in Cassese, A; The Human Dimension of International Law, Selected Papers; Oxford University Press; 2008, p. 466.

[36] International Law Commission, Draft Code of Offences against the Peace and Security of Mankind 1954, Art. 2, para. 10. See the full text at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_3_1954.pdf