YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011

CORRESPONDENTS' REPORTS

THE NETHERLANDS

Contents

Cases — Interpretation of 'Racist Regime' under Article 1(4) of Additional Protocol I

☛ *Prosecutor v X*, District Court of The Hague, 21 October 2011, LJN BU2066 (English translation LJN BU9716)

In a case concerning the conduct of members of the Liberation Tigers of Tamil Eelam ('LTTE') residing in the Netherlands, the District Court of The Hague addressed the applicability of international humanitarian law ('IHL') to the fighting between the LTTE and the government forces of Sri Lanka. It elaborated on how to establish the existence of a 'racist regime' in the sense of Article 1(4) of *Additional Protocol I* ('AP I').

The Court considered that not every instance of racial discrimination by a State can lead to the conclusion that there is a racist regime within the meaning of Article 1(4), but that the High Contracting Parties had a higher threshold in mind when including this provision. The Court found support for this conclusion in United Nations General Assembly Resolution 3103 (XXVIII), entitled 'Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes', which places the term 'racist regime' within the context of apartheid and racial oppression.

The Court concluded that:

> although the case file does contain evidence that Tamils were discriminated against in Sri Lanka, the defence did not substantiate sufficiently that the state of Sri Lanka could be considered a racist regime, nor has this been made plausible in any other way.

The fact that there was in fact racial discrimination against Tamils was not seen as sufficient to conclude that there was a 'racist regime' in the sense of Article 1(4) of AP I.

In the same case, the Court found that in the absence of an international armed conflict, Common Article 3 of the *Geneva Conventions* applied as well as *Additional Protocol II* ('AP II'). Although Sri Lanka was not a party to AP II, the Court held that Sri Lanka was bound by AP II because the provisions contained in that protocol constituted customary law.

Both the Public Prosecution Service and the accused have appealed the judgment.

Cases — Direct Participation in Hostilities and the Requirement of a 'Nexus'

☛ *Prosecutor v Joseph M.*, Court of Appeal of The Hague, 7 July 2011, LJN BR0686

The Hague Court of Appeal was called upon to decide if the alleged victims of a war crime in this case qualified as civilians who had lost their protection from attack by directly participating in hostilities. The Court considered the issue of directly participating in

hostilities as it applied to the circumstances of the alleged victims in this case, i.e. persons fleeing the genocide, and several other persons assisting them. The Court concluded:

> While there are indications that Tutsi refugees who took refuge inside the Adventists complex used traditional weapons to defend themselves against the continuous attacks by the suspect and his co-perpetrators, the Court believes that it has not become plausible that the use of rudimentary defensive weapons causes a change in the status of the victims. Even if those using traditional weapons, in the Court's view, with the sole purpose of defending themselves and other refugees, could be fighters in accordance with the abovementioned treaties [the *Geneva Conventions*] then their presence would not deprive those not participating in hostilities of their protected status.

Therefore, the alleged victims were considered persons protected by Common Article 3 and by AP II.

In the same case, the Court of Appeal took the opportunity to reflect on the topic of the nexus to the armed conflict needed to establish a war crime. Reversing the finding of the District Court, which employed a stricter reading of this nexus, it decided that there was sufficient evidence to conclude that there was a close connection (nexus) between the crimes committed by the suspect and the armed conflict.

The Court of Appeal pointed out several possible criteria derived from the jurisprudence of international tribunals to indicate this nexus: the furtherance of the military aim; the position of the accused; dependence on the environment of armed conflict for the shaping of the crime; and the position of the victim. In applying these criteria to the facts of the case, the Court used examples such as: the awareness of the suspect of the ongoing genocide; taking part in meetings of groups preparing the genocide; the handing out of weapons by the suspect; and his control of a roadblock of the sort usually aiming to single out Tutsi victims.

Consequently, the Court concluded that it was irrelevant that in the prefecture where the suspect lived during the period of the charges, no factual hostilities took place between the warring parties, that the suspect did not have a military function, that he did not have any influence on the course of hostilities or did not have any other special connection with the FAR (Forces armées rwandaises). The Court considered that the nexus with the armed conflict

> does not require that the wrongful acts as charged are committed while the hostilities between warring parties continue to take place or that they are committed at the scene of the hostilities. Humanitarian law is applicable to the whole area under the control of one of the parties, regardless of whether at the time and place of the charged facts actual hostilities were (also) taking place. It is the opinion of the Court that it has been established that the alleged crimes were closely related to the hostilities in other parts of Rwanda that were under the control of one of the parties to the conflict.

Therefore, the crimes could be committed as a result of emergence of or the existence of the non-international armed conflict that took place at that time.

The Court continued by dealing with the question of whether the victims were protected persons in the sense of Common Article 3 and with the question of individual criminal responsibility for violations of that Article. The Court stated that to be protected by Common Article 3, the victim must not, or no longer actively participate in hostilities — i.e. he must be

either a civilian, or personnel of armed forces who have laid down their arms, or those who have been rendered *hors de combat* by sickness, injury, internment or any other cause.

In this context the Court cited from the *Tadić* case, in which it was held that Common Article 3 'embraces, at least, all of those protected under the grave breaches regime applicable to conflicts of an international character: civilians, prisoners of war, wounded and sick members of the armed forces at sea'.[1] The Court of Appeal concluded that:

> Hence Common Article 3 applies to all those who find themselves on the territory of the State where the conflict takes place, with the exception of fighters who at that moment participate in hostilities until they are interned and civilians who directly participate in hostilities and thereby increase their privileges.

With regard to individual criminal responsibility for violations of Common Article 3, the Court held that:

> While Common Article 3 limits the category of protected persons, anyone — fighter or non-fighter — can in principle be responsible for a grave violation of Common Article 3. This article contains in principle no restraints as to categories of potential perpetrators. More specifically it is not required that the perpetrator is in any way related to the parties to the armed conflicts (although in practice this is often the case).

Cases — *Attack on Civilian Objects — The Medusa*

- *X v Minister for Immigration and Asylum*, District Court of The Hague, 14 November 2011, LJN BU5791

In a decision regarding the determination by the government that an Iraqi refugee had participated in committing a war crime, which barred him from receiving a residence permit in the Netherlands, the District Court of The Hague had to decide whether the government was justified in considering that a certain attack, in which this refugee participated, was directed against a civilian object, and therefore potentially constituted a war crime.

The object at hand was a vessel, the *Medusa*, which, although sailing under the flag of a neutral State, was in the exclusive service of the adversary (Iran). In deciding that the vessel was indeed a military objective, the Court considered the following. The vessel was part of the Iranian oil-export system, which contributed effectively and substantially to the overall Iranian military effort since Iran generated an income with the oil-export to finance the war with Iraq. These tankers were specifically chartered to transport oil from the island of Karkh to safer harbors, where the oil was transferred to other international oil tankers that did not form part of the export system.

The Court analyzed whether the attack on the *Medusa* without previous warning and without precautions to ensure the safety of the (civilian) crew violated IHL norms. The defendant argued that, *inter alia*, the principle of distinction, the requirement to take precautions, and rules 16–20 of the ICRC Study on Customary IHL were violated and also that the attack constituted a grave breach of the *Geneva Convention IV* and AP I.

The Court concluded:

> Having regard to the above considerations, it has to be concluded that by attacking the Medusa a military advantage could be obtained, in the form of

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Prosecutor v Tadić (Judgment) (ICTY, Trial Chamber, Case No. IT-94-1-T, 7 May 1997) p. 615.

> damaging the Iranian oil-export system. In the Court's opinion, the defendants claim that Rules 17 to 20, article 57 and 85 of Additional Protocol I and article 8 of the Rome Statute, as well as the principle of distinction and the principle of taking precautions are violated, is not sufficiently motivated since the claim is based on the premise that the Medusa was not a military objective … it must be concluded that there was a military necessity for the attack, since it would damage the Iranian oil-export system, which could legitimize the attack on the Medusa.
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> … However, the above does not obviate the fact that a ship with a civilian crew was attacked without prior warning to the vessel, or any other precautions, which could result in a violation of Rule 16 and article 57 of Protocol I. However, the Court is of the opinion that this cannot lead to the conclusion that a crime in the sense of Article 1 (F) of the Convention was committed. Although the crew of the Medusa was not directly participating in hostilities, they nevertheless were on board of a vessel in exclusive service of one of the parties to an international armed conflict, which moreover formed part of the Iranian oil-export system. The civilian crew had in the past been confronted with attacks on the ship. Moreover, it cannot be forgotten that Iraq had declared an Exclusion Zone. That the Exclusion Zone and the method of warfare as such was, in all the experts' opinions, in violation of international humanitarian law is acknowledged by the Court, but cannot take away the fact that Iraq had given some form of warning. The Court finds that it can therefore not be concluded that Rule 16 was violated. Defendant has quoted article 57 of Protocol I, but has not motivated why a violation of article 57, paragraphs 3 and 4, of Protocol I would have taken place.

Cases — Responsibility of the Netherlands for Conduct of Dutchbat in Srebrenica

- *Hasan Nuhanovic v The State of the Netherlands*, Court of Appeal of The Hague, 5 July 2011, LJN BR0133 (English translation BR0133)
- *Mustafic v The State of the Netherlands*, Court of Appeal of The Hague, 5 July 2011, LJN BR0132 (English translation BR5386)

In two cases concerning the actions of Dutchbat in Srebrenica, the Court of Appeal ruled on the responsibility of the State for the death of persons allegedly turned out of the Dutchbat compound. The reasoning was largely similar in the Court of Appeal's judgment in the two cases. The applicants argued that the conduct of Dutchbat violated Bosnian law, the *European Convention on Human Rights*, Article 1 of the *Genocide Convention* as well as Common Article 1 of the *Geneva Conventions*. The Court held that the conduct at hand could be attributed to the Netherlands and violated norms of Bosnian law. This being the case, the Court considered it unnecessary to consider the other norms on which the claim was based, including Common Article 1.

The Court considered that the question of who had 'effective control' over Dutchbat was essential, and had to be determined as follows:

> The question whether the State had 'effective control' over the conduct of Dutchbat which Nuhanovic considers to be the basis for his claim, must be answered in view of the circumstances of the case. This does not only imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned. Moreover, the Court adopts as a

> starting point that the possibility that more than one party has 'effective control' is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party. For this reason the Court will only examine if the State exercised 'effective control' over the alleged conduct and will not answer the question whether the UN also had 'effective control'.[2]

In applying this interpretation of 'effective control' to the facts of the case, the Court took into account a number of elements it saw as specific to the alleged conduct of Dutchbat. These included the fact that the context in which the alleged conduct of Dutchbat took place differed in a significant degree from the situation in which troops placed at the disposal of the UN normally operate, Srebrenica having fallen and it being out of the question that Dutchbat or UNPROFOR in any other composition would continue or resume the mission. The Court also attached much significance to a meeting between high-ranking Dutch military officials and the UN commander, in which the Court considered a decision to evacuate Dutchbat and the refugees was taken by mutual agreement. Based *inter alia* on these considerations, the Court concluded that the Dutch government could have prevented the alleged conduct if it had been aware of this conduct at the time. The State therefore possessed 'effective control' over the alleged conduct of Dutchbat. As requested by the applicants, the Court allowed them to furnish evidence concerning their allegation that at the district court stage, a judge had been taken off the case in order to influence the outcome of the case. Pending the furnishing of such evidence, the Court stayed any further decision.

Cases — Civil Liability for Sale of Chemicals Used in Mustard Gas Attacks in Iraq

- *Prosecutor v Van Anraat*, District Court of The Hague, 3 August 2011, LJN BR3967 (Interlocutory Judgment)

This case concerns an action in tort brought against Frans Van Anraat, a businessman who supplied the Saddam Hussein regime in the 1980s with chemicals used to produce mustard gas, by victims of Iraqi mustard gas attacks during the Iran/Iraq war. Van Anraat was convicted under Dutch criminal law, but the criminal courts did not deal with the claim for compensation by victims of the attacks against him. Instead, it was suggested that the victims bring a tort claim before the civil court.

In the District Court, the claimants from Iraq and Iran alleged that a wrongful act had been committed by the defendant of which they were victims and that he should compensate the damages suffered by them. In an interlocutory judgment, the Court considered that the Dutch supplier of chemicals, who had previously been convicted of complicity in a violation of the laws and customs of war, was obliged to pay compensation to the victims. With regard to these claims, the Court confirmed that it 'has determined in its interlocutory judgment of 13 April 2011 that the claims from Iraqis should be judged according to Iraqi law and the claims from Iranians according to Iranian law.'

Cases — Command Responsibility

- *Prosecutor v X*, Supreme Court of the Netherlands, 8 November 2011, LJN BR6598

[2] *Hasan Nuhanovic v The State of the Netherlands*, Court of Appeal of The Hague, 5 July 2011, LJN BR0133 (English translation BR0133) at 5.9.

The case concerned a former Afghan general who had been convicted by the Court of Appeal on the basis of command responsibility for torture by his subordinates. He alleged, *inter alia*, that the Court of Appeal had misapplied the doctrine of command responsibility to the facts. The Court of Appeal had held that command responsibility requires a *de facto* or *de iure* hierarchical relationship between superior and subordinate and that the superior must have been in a position of 'effective control' at the relevant time. This means that he must have had the real possibility to prevent the crimes. According to the Court of Appeal, 'effective control' refers to a factual, real, effective or operational relationship of authority. Any relationship that does not meet this standard, such as when one side must convince the other or must ask the other to behave in a certain way, does not meet the standard of 'effective control' for the purposes of command responsibility. The Supreme Court referred to the analysis of command responsibility by the ICTY in the *Orić* case, and rejected the defendant's complaint that the Court of Appeal had misapplied the doctrine.

Legislation — Convention on Cluster Munitions

- Act of 20 January 2011 concerning the approval by Parliament of the Convention on Cluster Munitions

Since the last report, the *Convention on Cluster Munitions* was ratified and came into force for the Netherlands.

A motion to criminalize direct investment in the production, sale or distribution of cluster munitions received a parliamentary majority and was adopted by government, which is in the process of incorporating the proposal into national legislation. The government stated that:

> After signing the Convention, a broad legal debate has taken place, also in parliament, regarding the question whether the introduction of a prohibition to invest is or is not a part of the obligations to which the parties of the Convention have committed themselves. As yet, there is no international consensus on this matter, but similar to the Convention, the basis of this discussion rests on the premise that the unacceptable humanitarian suffering caused by cluster munitions should end. As a result of this the Government has decided to support the parliamentary motion 'Haubrich-Gooskens' and to introduce a prohibition on direct investment in cluster munitions by financial institutions.
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> Execution of the motion
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> The prohibition will address all direct investment in the production, sale, or distribution of cluster munitions. Direct investment is defined as the granting of a loan or credit, the acquisition of control and shares in an enterprise and the acquisition of any investment product. For the definition of cluster munitions reference will be made to the Convention on Cluster Munitions. The prohibition will apply to parties that trade substantially on the financial markets, such as institutional investors and suppliers of investment products. The scope will be limited to new investments.[3]

Legislation — Investigation and Prosecution of International Crimes

- Act of 8 December 2011 concerning the broadening of the possibilities for investigating and prosecuting international crimes (entry into force 1 April 2012)

[3] Letter from Minister of Finance to Chairman of the Senate of the Parliament (The Hague, 21 March 2012) 32 187 (R1902), nr. M.

The possibility of extradition of persons from the Netherlands has been broadened by the *Act concerning the broadening of the possibilities for investigating and prosecuting international crimes*. Before this Act, the possibility to extradite persons based on the *International Crimes Act* did not include the perpetrators of war crimes committed in non-international armed conflict, genocide as based on the *Convention against Genocide* of 1948, torture as based on the *Convention against Torture* of 1984 and the *Convention against Enforced Disappearances of 2008*.

The same Act also conferred a power to transfer cases from an international tribunal to the Netherlands. Previously, transfer of prosecution could only take place between a 'foreign State' and the Netherlands. The Supreme Court of the Netherlands had decided that the international tribunal for Rwanda could not, even under the broadest interpretation, fall within the notion of a 'foreign State'.[4]

To resolve this issue, the Dutch legislation has been adjusted to facilitate transfer of prosecution from an international tribunal to a Dutch national court. In a memorandum of clarification the Minister of Justice reasoned as follows:

> The prosecution and sentencing of persons that play a smaller part in the responsibility for the totality of illegal acts is mostly left to national authorities. The Netherlands, as host country of several international courts, values that international courts achieve their goals and the impunity of perpetrators of international crimes is prevented. This means that the Netherlands needs to be prepared to endorse possible requests of international courts to take over prosecution.[5]

MARTEN ZWANENBURG AND NELLEKE VAN AMSTEL

[4] *Prosecutor v Joseph M.*, Judgment of the Supreme Court of the Netherlands, 21 October 2008, LJN BD 6568.
[5] Memorandum of Clarification Act Investigating and Prosecuting International Crimes, 14 September 2010, 32475, nr. 3, at 11.