South Africa, Sagarius and Others

[**Source**: *South African Law Reports*, vol. 1, 1983, pp. 833-838; original in Afrikaans, unofficial translation.]

N.B. As per the disclaimer, 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.

THE STATEv.SAGARIUS AND OTHERS

(SOUTH WEST AFRICA DIVISION)1982 May 24-28; June 1-2 Before Judge BETHUNE

[...]

A criminal trial. The facts appear from the reasons for judgment.

J.S. Hiemstra for the State.

B. O'Linn SC (assisted by *P. Teek and A.T.E.A. Lubowski*) for the accused. [...]

Judge BETHUNE: On 24 February of this year, the three accused were found guilty of participating in terrorist activities in terms of the provisions of Law 83 of 1967. [T]he evidence pointing to their guilt was overwhelming.

In brief, what the evidence comes down to is that the three accused were part of a group of 22 members of SWAPO which, in April last year, infiltrated South West African territory from Angola while in possession of firearms, ammunition and explosives. The group later split into smaller groups, but, following various contacts with the Defence Force, all of them, with the exception of the three accused, were either wiped out or driven back across the frontier. It is common knowledge that the members of the group were clad in a characteristic

uniform worn by the armed wing of SWAPO, and that their contacts with the Defence Force occurred in what could be described as a war situation. The three accused were taken prisoner at a stage when they were already in the process of retreating towards the northern frontier of South West Africa. [...].

[...]

When the hearing was resumed [...]. The evidence relating to the verdict dealt with historical events before, during and after the period of German colonial administration and, in particular, with political and constitutional complications which have come into effect since the Second World War.

After the first defence witness had given his evidence, Mr *Hiemstra*, for the State, objected to it on the grounds of irrelevance, given that there was no evidence that the events which had been referred to influenced any of the accused in any way when they committed the crimes. I did, however, allow the defence to proceed with this evidence [...] I shall, in the accused favour, accept that the events about which the defence witnesses gave evidence probably did play a part in the state of mind of the accused when they committed the offence. The events which led to the armed conflict of SWAPO extend over many years, and their effect has been widespread. [...]

It appears, moreover, that the World Court and the authoritative organs of UNO brand South Africa's presence in SWA illegal, and that this view is subscribed to by a large part of the international community.

Even if the accused had no previous knowledge of this fact, it is highly probable that they would have been told about it by SWAPO supporters during their training outside South Africa. All three were obviously youth when they left South Africa. Considering all the circumstances, they probably regarded their actions as part of a legitimate conflict which enjoyed strong support both at home and abroad. In the evidence, reference was made to the fact that there is a tendency in international law to accord prisoner of war status to captives who have openly participated, in a characteristic uniform, in an armed conflict against a colonial, racist or foreign regime. However, Professor Dugard, who testified on this point, made it clear that such recognition rests on a contractual basis. Governments such as those of South Africa and Great Britain, which do not accept the relevant Protocol, are not bound by it. In my opinion, Professor Dugard was right in his opinion that this Court cannot simply declare that the accused must be treated as prisoners of war, but that the tendency in international law must be taken into consideration when deciding whether the death sentence must be imposed.

In this connection, I would refer you to the following passage from his testimony:

South Africa did not sign the text of the First Protocol, nor had it ratified or acceded to the 1977 Protocols. Consequently it was quite clear that South Africa is not bound by Protocol 1 and therefore, in terms of the treaty, is not obliged to confer prisoner of war status upon members of SWAPO.

Although South Africa is not bound in terms of this treaty, I suggested that there is support for the view that this position has now become part of customary international law, part of the common law of international law. In my judgment this argument is premature, in that Protocol 1 has not yet received that support to argue that it is a part of international law, binding upon States that have not ratified the convention.

Yes, I have already expressed the view that in my judgment a South African Court has no option but to exercise criminal jurisdiction over SWAPO; that a Court cannot simply direct that members of SWAPO be treated as prisoners of war. Nevertheless, it is my view, having regard to new developments in international humanitarian law as reflected in Protocol 1 of the 1977 Geneva Convention and having regard to the special status of a Namibian, that such factors should be taken into account when it comes to the imposition of a sentence and, in particular, it is my view that a Court might have regard to these developments when it comes to the question of the death penalty because the Convention on Prisoners of War of 1949 makes it clear that a prisoner of war may not be executed by the detaining power for military activities prior to his arrest unless they amounted to war crimes.

Mr *O'Linn* has argued that, in the light of the extent of the armed conflict, a heavy sentence would not have any deterrent effect. I cannot agree with this assertion. It may be the case that people who have already decided to participate in the armed conflict would not, perhaps, be deterred by the sentences which this Court imposes, but the provisions of the Law also apply to any other citizen of this country who may possibly consider committing an act of terrorism (as defined by the Law). Such persons would certainly, in my opinion, take heed of the penalties which this Court imposes. [...]

Mr *Hiemstra* has argued that it is in the interests of the community that a very heavy sentence be imposed. However, it appears from the undisputed evidence that a large part of the population of this country, as well as of the international community, would view the accused actions in a less serious light. In addition, it is probable that the accused were exploited by others for political gain. It is not unusual for people who are not themselves prepared to run the risks of armed conflict to influence young people to commit actions such as this.

All three of the accused are very young, and have no previous convictions. I accept that, after they left South Africa, they were trapped in a web of events over which they had little or no control. It seems, judging from the statement that Accused No. 3 made to the police, that he was disillusioned when he found out precisely what the promised training which he would undergo outside South Africa consisted of. After their military training began, it was certainly extremely difficult, and even life-threatening, for them to leave. This situation, which to a certain extent was of their own making, is not in itself a justification for their actions, but it is nonetheless an important factor which must be weighed when deciding their punishment. On the other hand, the accused must have foreseen that the actions (such as the laying of land mines and the damaging of railway tracks), which they and the group of infiltrators certainly did perform, could injure or kill innocent people. While I am of the opinion that this is not a case in which the death penalty must be imposed, I am

satisfied that a long term of imprisonment is justified. [...]

In the light of the indications by the defence that a heavy sentence will not deter members of SWAPO, it will not serve any purpose to suspend any part of the sentence.

Accordingly, the following sentences are imposed:

Accused Nos 1 and 2: 9 years imprisonment.

Accused No. 3: 11 years imprisonment.

Discussion

1. Under IHL, is this “war situation” an international or a non-international armed conflict? Does it matter that the accused have infiltrated from Angola? Whether the South African presence in Namibia was lawful or unlawful? Whether the South African government could be qualified as a “racist regime”? (GC I-IV, Art. 2; P I, Arts 1(4) and 96; P II, Art. 1)
2. a. Is SWAPO a national liberation movement? If so, because of the international status of Namibia? Because of recognition by the international community? Of what relevance is it whether SWAPO is deemed a national liberation movement? Must SWAPO represent the South African people to be a national liberation movement fighting against South Africa? Or is it sufficient that it represents the South West African people? Is its national liberation war here directed against the South African government as “colonial domination,” “alien occupation,” or “racist regime”? (P I, Art. 1(4))
   b. If SWAPO formally declared its intention to respect and apply the Geneva Conventions and the Protocols, would they then apply to this conflict? (P I, Art. 96)
3. a. As fewer States were party to Protocol I (compared with the States party to the four Conventions), does this indicate that its Article 1(4) had little or no practical effect or value? Particularly because Israel and South Africa were not States Parties? Why?
   b. Are none of the principles reflected in the Protocols customary law and thus binding on South Africa? Did the law of international armed conflicts under the customary law of 1982 apply to national liberation wars? Under today’s customary law, taking into account that South Africa became a State party to Protocol I in 1995? How could a rule like Art. 1(4) of Protocol I become customary?
   c. Although the Court rejects the Protocols as a reflection of customary law, what remains the significance of the Court’s consideration and use of the Protocols? What do you think of Professor John Dugard’s assessment of the status of the Protocols?
4. If the law of international armed conflicts applies, do the accused have prisoner-of-war status? Could they be sentenced, as in this judgement, if they were prisoners of war?
5. What impact would it have if the accused had not been wearing distinctive uniforms during their military engagement: Under the law of international armed conflict? According to the Court’s approach? (P I, Arts 43-44; CIHL, Rule 106)
6. Is Professor Dugard correct in stating that Convention III “makes it clear that a prisoner of war may not be executed by the detaining power for military activities prior to his arrest unless they amounted to war

crimes”? (GC III, Arts 85 and 100)

7. Under IHL, are the accused criminally responsible if they “had foreseen that the actions (such as the laying of land mines and the damaging of railway tracks), which they and the group of infiltrators certainly did perform, could injure or kill innocent people”? (P I, Arts 51, 57 and 85(3); CIHL, Rules 11-12, 15 and 17-21)
8. If the law of international armed conflict did not apply, was the law of non-international armed conflict necessarily applicable? Is the judgement compatible with that law?