

The Netherlands, Public Prosecutor v. Folkerts

[Source: Lauterpacht, E (ed.), International Law Reports, Cambridge, Grotius Publication Limited, vol. 74, 1987, pp. 695-698; footnotes omitted.]

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.

PUBLIC PROSECUTOR v. FOLKERTS

The Netherlands, District Court of Utrecht December 20, 1977

SUMMARY

The facts: On September 22, 1977 the accused, a West German national, was approached by the police at the premises of a car-hire firm in Utrecht. Shots were exchanged, and two policemen were wounded, one of whom died from his injuries shortly afterwards. The accused was charged with murder, attempted murder and the unlawful possession of weapons.

Held: The accused was found guilty on all charges and was sentenced to a term of imprisonment of twenty years. [...]

The following is the text of the relevant part of the judgment of the Court:

... The accused's counsel has claimed that the Court has no jurisdiction to hear the case. He based his view on the following proposition: the accused is a member of the Rote Armee Fraction ("Red Army Faction"). The Faction is engaged in a class war, not only with its homeland, the German Federal Republic, but with any State in the world in which such a class war is going on.

Therefore, he contends that members of the Red Army Faction enjoy the protection of the four Geneva Conventions of August 12, 1949, having regard to the Additional Protocol to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

Such a claim must fail on the ground that Protocol I, as appears from the Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, was not opened for signature by the States participating in the Conference, which included the Netherlands, until December 12, 1977 and, as appears from Article 95, was to enter into force “six months after two instruments of ratification or accession have been deposited”, whilst “for each party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such party of its instrument of ratification or accession”. Thus it is clear that this Protocol had not, and actually could not, have entered into force on September 22, 1977, nor is it valid as yet.

The District court additionally made the following observations:

The Protocol additional to the Geneva Conventions of August 12, 1949 will be applicable to the situations referred to in Article 2. This Article is common to the four Conventions and provides, in paragraph (1):

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The above Protocol provides for the following extension (Article 1, paragraph 4):

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Thus the Protocol brings members of liberation movements under the protection of the Geneva Conventions to the extent that such movements act in the exercise of their right of self-determination and are fighting against “colonial domination and alien occupation and against racist regimes”.

The Red Army Faction, according to its objectives as set out by Folkerts’ counsel, in no way fulfils these conditions. Nor has it in any way been proved or even been made to appear likely that, at the time of his arrest in Utrecht on September 22, 1977, the accused was involved in a struggle against the Netherlands State within the meaning of the above Protocol.

Folkerts' counsel also argued that his client should be discharged from prosecution because the offences with which he is charged are not criminal offences within the meaning of the law of war. This argument must fail on the same grounds.

On the basis of these established facts, the accused is liable to punishment. [...]

The accused and his counsel went in great detail into the political background which they said had led to his acts which, if they could not be regarded as formal acts of war, in any case should be regarded... (at least that is how the Court understands the plea) as acts of resistance, which make Folkerts' conduct understandable and possibly even justifiable.

The Court dismisses this plea categorically, irrespective of the question of whether or not the Red Army Faction's objections to the policies of the USA and the FRG contain a core of truth.

It is totally unacceptable in democratic countries such as those just mentioned, and also in the Netherlands, for individuals who disagree with their country's policy, for that reason to resort to acts of violence such as those which took place here. Such acts attack the most fundamental principles of the constitutional State.

The Court is not concerned with any offences which the accused may possibly have committed abroad. His acts in the present case, however, cannot and may not ever be justified or extenuated on the basis of membership of the Red Army Faction, as contended by his counsel...

[Report: 9 Netherlands Yearbook of International Law (1978), p. 348 (English translation).]

Discussion

1. When did the Conventions and Protocols enter into force? When are they applicable to a given case? Could they apply to events that took place even before they entered into force? (GC I-IV, Arts 58/57/138/153 respectively; P I, Art. 95)
2. Do you agree with the Court that this situation does not constitute an international armed conflict to which Protocol I applies? (P I, Art. 1(4))
3. a. What are the twofold requirements for the applicability of Art. 1(4) of Protocol I? b. What does the right of self-determination mean? Who is entitled to exercise the right of self-determination? (UN Charter, Art. 1(2); Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), October 24, 1970 [available at <http://www.un.org/>]:
 - i. all peoples have the right freely to determine their political status;
 - ii. every State has the duty to respect this right and to promote its realization;
 - iii. every State has the duty to refrain from any forcible action which deprives peoples of this right;
 - iv. in their actions against, and resistance to, such forcible action, peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter;

- v. under the Charter, the territory of a colony or other non-self-governing territory has a status separate and distinct from that of the State administering it.)
 - 4. c. Is the Red Army Faction a group entitled to exercise the right of self-determination? If not, is it possible for the twofold requirements of Art. 1(4) of Protocol I to apply here? Or is the list set out in Art. 1(4) perhaps not exhaustive? d. Supposing that the accused represented the German people or the working class in its right of self-determination, would Protocol I have been applicable? e. Supposing the accused was genuinely fighting for a group's self-determination, could one consequently argue that there was an armed conflict such that Protocol I would apply?
4. If the accused had been a combatant in an international armed conflict, would the Netherlands have had jurisdiction over this case? Would Protocol I have barred the Netherlands from punishing him for those acts? (GC III, Arts 82 and 85; P I, Arts 43 and 44)