

Kenya, Civilian Carnage

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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.

A. Kenya attack: 147 dead in Garissa University assault

[Source: 'Kenya attack: 147 dead in Garissa University assault', in BBC News Africa, 3 April 2015, available at <http://www.bbc.com/news/world-africa-32169080>]

At least 147 people, mostly students, have been killed in an assault by al-Shabab militants on a university in north-eastern Kenya.

[1] Heavily armed attackers stormed Garissa University early on Thursday, killing two security guards then firing indiscriminately on students.

[2] Four of the gunman were eventually surrounded in a dormitory, and died when their suicide vests detonated.

[3] It is the deadliest attack yet by al-Shabab.

[4] The militants singled out Christians and shot them, witnesses said.

[5] More than 500 students managed to escape, 79 of whom were injured. A fifth gunman has reportedly

been arrested.

[6] Eric Wekesa, a student at Garissa, told Reuters he locked himself in his room before eventually fleeing.

[7] "What I managed to hear from them is 'We came to kill or finally be killed.' That's what they said."

[8] "It was horrible, there was shooting everywhere," another student, Augustine Alanga told the BBC's Newsday programme

[9] He said it was "pathetic" that the university was only guarded by two police officers.

[10] Nine critically injured students were airlifted to the capital Nairobi for treatment, disaster management officials said.

[11] But each student had been accounted for by the end of the evacuation.

[12] An overnight curfew has been implemented in Garissa and three other counties in Kenya.

[...]

[13] UN Secretary-General Ban Ki-moon condemned what he called a "terrorist attack" and said the UN was ready to help Kenya "prevent and counter terrorism and violent extremism".

[...]

[14] The Kenyan government has named Mohamed Kuno, a high-ranking al-Shabab official, as the mastermind of the attack.

[...]

[15] Al-Shabab says it attacked the university because it is at war with Kenya, BBC Africa analyst Mary Harper reports.

[16] Kenyan troops entered Somalia in October 2011 in an effort to stop the Islamists from crossing the long, porous border between the two countries and kidnapping people - but their presence achieved the opposite effect, provoking al-Shabab to increase its activity in Kenya, our correspondent adds.

[17] The group was behind the Westgate shopping mall attack, when 67 people were killed.

B. The terror attacks committed by Al-Shabaab in the Republic of Kenya

[Source: African Commission on Human and Peoples' Rights, 'Press Release on the terror attacks committed by Al-Shabaab in the Republic of Kenya, 10 April 2015, available at: <http://www.achpr.org/press/2015/04/d255/>]

[1] The African Commission on Human and Peoples' Rights (the Commission) is closely monitoring the human rights situation in Kenya and Somalia, which is afflicted by repeated and violent attacks by the terrorist group Al-Shabaab.

[2] The Commission expresses its indignation and is deeply concerned by the escalating human rights calamities in the region created by deliberate and ruthless mass killings of civilians, including children, women and university students.

[3] The Commission is particularly appalled by the recent attack on Garissa University College in Northeastern Kenya, which targeted young students and allegedly killed 147 innocent civilians, including University staff and students.

[4] The Commission wishes to extend its condolences to the families of the victims and the people of Kenya and wishes to reassure its solidarity with the Government and the People of Kenya at this difficult time.

[5] The Commission recognizes the role played by Kenya in the fight against Al-Shabaab as part of the African Union Mission in Somalia (AMISOM), and urges that military operations conducted by the Government of Kenya, in response to these attacks also be in a manner that upholds respect for human rights and full observance of applicable international humanitarian law principles, with a view to bringing perpetrators to justice and stability to the region.

[6] The Commission urges the Government of Kenya to take the necessary measures to put an end to such human rights violations by the terrorist group and to ensure security throughout the country, in particular public places prone to attacks.

[7] The Commission welcomes the commitment of Member States who have shown their support to the Republic of Kenya by contributing troops and police forces to assist the AMISOM in the fight against the terrorist group Al-Shabaab.

[8] The Commission calls upon the Interim South West Administration in Somalia, the Inter-Governmental Authority on Development, the African Union, the United Nations and the international community to work together to put an end to the serious and massive human rights violations committed by the terrorist group Al-Shabaab.

[9] The Commission further calls upon the Kenyan authorities and the international community to provide

assistance to the populations devastated by the Al-Shabaab massacre and destruction, especially the women and children, vulnerable under such circumstances.

Banjul, 09 April 2015

Discussion

I. Classification of the situation and Applicable Law

1. (*Document A, paras. [1], [3] [14] [15], and Document B para.[5]*), How do you classify the situation between Kenya and Al-Shabaab? Is Kenya, which contributed troops to AMISOM, a party to the armed conflict in Somalia with Al-Shabaab? What is the geographical scope of the armed conflict? Is Kenya engaged in an extra-territorial NIAC with Al-Shabaab? Is IHL applicable to all acts of hostilities between parties to the conflict wherever they occur? (GC I-IV, Art.3)
2. (*Document A, Para. [15]*) Does the claim by Al-Shabaab that it is in war with Kenya trigger the application of IHL? What about the sporadic attacks directed against Kenya by Al-Shabaab? Does IHL apply to an attack linked to an armed conflict geographically removed from the actual site of combat? Even if the persons targeted are not linked to the conflict? Is there a nexus with the conflict sufficient to make IHL applicable to the attack on Garissa University?
3. (*Document B, paras [5] and [6]*) According to the Commission, were the military operations conducted by the Government of Kenya, in response to these attacks a law enforcement operation or engagement in armed conflict? What is the implication of the Commission's statement that the Government of Kenya respect both IHL and IHRL for the classification of the situation? In your opinion, does the application of one or the other body of law depend on the territory in which Kenyan security forces act? How does the Commission view the interaction between international human rights and IHL?
4. (*Document B, para. [7]*) In the Commission's view, is there a link between AMISOM's fight against the 'terrorist' group Al-Shabaab and the latter's attacks against Kenya? Does it matter for the determination of the law applicable to the situation?
5. In determining whether IHRL or IHL applies to this situation, should we consider factors such as remoteness of the incidents from the heart of the battle field? Do you accept the view that the further we move away from the active conflict zone, the stronger the role that human rights law would play? Is the Kenyan government's operation covered by the law enforcement paradigm on the use of force? By IHL?
6. (*Document B, para. [8]*) Why do you think the Commission restricts itself in calling different stakeholders to work together to put an end to the serious and massive human rights violations committed by Al-Shabaab? Was it because IHL was not deemed to be applicable or were there no IHL violations? Given the evolving interplay between human rights and IHL, and considering Articles 60 and 61 of the African Charter on Human and Peoples Rights, shouldn't the Commission address violations of IHL? Can armed non-state actors such as Al-Shabaab commit violations of international human rights law?
7. Assuming the existence of a NIAC, is AP II applicable between Kenya and Al-Shabaab? (P II, Art.1)

II. Conduct of hostilities

8. Does the killing of Al-Shabaab militants who attacked Garissa University violate IHL of non-international law? International human rights law? Could the attackers have been considered legitimate targets? Only if a

nexus existed with the conflict in Somalia? (GC I-IV, Art.3)

9. Under IHL, is it always lawful to kill a person who is a legitimate target? Should less harmful measures be taken? If so, when/under what circumstances? (P II, Art.13; CIHL, Rule 1; ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)

10. Does IHL of non-international armed conflict prohibit attacks aimed at spreading terror against civilian population? If so, do you think that rule was violated in the present case? (P II, Art.13; CIHL, Rule 2)

11. (*Para.3*) Does the attack against the Garissa University College in Northeastern Kenya, which targeted civilians, violate IHL of non-international armed conflict? Is a University protected by the rules on civilian objects? Does it benefit from any special protection under IHL? IHL of NIAC? If so, what are the implications of this special protection? Are there situations which could justify attacks against a University? (GC I-IV, Art.3; CIHL, Rules 1, 8 and 10)