Israel, Military Prosecutor v. Kassem and Others

[**Source**: Lauterpacht, E. (ed.), *International Law Reports*, Cambridge, Grotius Publications Limited, vol. 42, 1971, pp. 470-483]

MILITARY PROSECUTOR v. OMAR MAHMUD KASSEM AND OTHERS
Israel, Military Court sitting in Ramallah
April 13, 1969

The following is the judgement of the Court:

[...] [T]he first of the accused pleaded that he was a prisoner of war, and similar pleas were made by the remaining defendants.

[...] [T]he defendants were asked by the Court whether they were prepared to testify so that it could be ascertained whether the conditions entitled them to be regarded as prisoners of war were fulfilled [...].

The second defendant [...] was prepared to testify on oath. [...] [H]e claimed that he belonged to the 'Organization of the Popular Front for the Liberation of Palestine' and when captured was wearing military dress and had in his possession a military pass issued to him on behalf of the Popular Front, bearing "the letters J.T.F. [Popular Front for the

Liberation of Palestine], my name and my serial number." [...]

[...]

[W]e hold that we are competent to examine and consider whether the defendants are entitled to prisoner-of-war status, and if we so decide, we shall then cease to deal with the charge. [...]

[W]e shall now inquire into the kinds of combatants to whom the status of prisoners of war is accorded upon capture by enemy forces. [...]

[...]

The principles of the subject were finally formulated in the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949. Whether we regard this Convention as an agreement between the Contracting Parties or whether we regard it as expressive of the position under customary International Law relating to the treatment of prisoners of war, we proceed on the assumption that it applies to the State of Israel and its armed forces; Israel in fact acceded to the Convention on 6 July 1951, Jordan did so on 29 May 1951.

Article 4A of this Convention defines all those categories of persons who, having fallen into enemy hands, are regarded as prisoners of war within the meaning of the Convention. For the purpose of deciding the status of the defendants before us, we shall consider paragraphs (1), (2), (3) and (6) of Article 4A.

Without a shadow of doubt, the defendants are not, in the words of paragraph (1), 'Members of the armed forces of a Party to the conflict' or 'members of militias or volunteer corps forming part of such armed forces'.

Article 2, which prescribes the scope of its application, states that it applies to ‘all cases of declared war or 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’.

To comprehend the true intent of the Convention, let us quote Leland Harrison, representative of the U.S.A:

> ‘The Convention would, therefore, be applicable to all cases of declared or undeclared war between States to the Convention, and to certain armed conflicts within the territory of a State party to the Convention’ (Final Report, IIB, p. 12).

This makes it clear that the Convention applies to relations between States and not between a State and bodies which are not States and do not represent States. It is therefore the Kingdom of Jordan that is a party to the armed conflict that exists between us and not the Organization that calls itself the Front for the Liberation of Palestine, which is neither a State nor a Government and does not bear allegiance to the regime which existed in the West Bank before the occupation and which exists now within the borders of the Kingdom of Jordan. In so saying, we have in fact excluded the said Organization from the application of the provisions of paragraph (3) of Article 4. [...]

Paragraph (6) of Article 4 is also not pertinent, since the defendants are not inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units.

We can be brief. The Organization to which the defendants belong does not answer even the most elementary criteria of a *levée en masse*. We have not to do with the population of an area which an enemy is approaching or invading. In October 1969 we were not

approaching an area whose population was not yet under our effective control and we were certainly not invading new areas, and there cannot be the least doubt that, in the period from 5 June 1967 to October 1968, that ‘population’ had time to ‘form itself’ into regular armed units.

Another category of persons mentioned in the Convention are irregular forces, i.e., militia and volunteer forces not forming part of the regular national army, but set up for the duration of the war or only for a particular assignment and including resistance movements belonging to a party to the armed conflict, which operate within or outside their own country, even if it is occupied. To be recognized as lawful combatants, such irregulars must, however, fulfil the following four conditions: (a) they must be under the command of a person responsible for his subordinates; (b) they must wear a fixed distinctive badge recognizable at a distance, (c) they must carry arms openly; (d) they must conduct their operations in accordance with the laws and customs of war.

Let us now examine whether these provisions of Article 4A, paragraph (2), are applicable to the defendants and their Organization.

First, it must be said that, to be entitled to treatment as a prisoner of war, a member of an underground organization on capture by enemy forces must clearly fulfil all the four above-mentioned conditions and that the absence of any of them is sufficient to attach to him the character of a combatant not entitled to be regarded as a prisoner of war. [...]

For some reason, however, the literature on the subject overlooks the most basic condition of the right of combatants to be considered upon capture as prisoners of war, namely, the condition that the irregular forces must belong to a belligerent party. If they do not belong to the Government or State for which they fight, then it seems to us that, from the outset, under current International Law they do not possess the right to enjoy the status of

prisoners of war upon capture.

It is natural that, in international armed conflicts, the Government which previously possessed an occupied area should encourage and take under its wing the irregular forces which continue fighting within the borders of the country, give them protection and material assistance, and that therefore a ‘command relationship’ should exist between such Government and the fighting forces, with the result that a continuing responsibility exists of the Government and the commanders of its army for those who fight in its name and on its behalf.

[...] If International Law indeed renders the conduct of war subject to binding rules, then infringements of these rules are offences, the most serious of which are war crimes. It is the implementation of the rules of war that confers both rights and duties, and consequently an opposite party must exist to bear responsibility for the acts of its forces, regular and irregular. We agree that the Convention applies to military forces (in the wide sense of the term) which, as regards responsibility under International Law, belong to a State engaged in armed conflict with another State, but it excludes those forces – even regular armed units – which do not yield to the authority of the State and its organs of government. The Convention does not apply to these at all. They are to be regarded as combatants not protected by the International Law dealing with prisoners of war, and the occupying Power may consider them as criminals for all purposes.

The importance of the allegiance of irregular troops to a central Government made it necessary during the Second World War for States and Governments-in-exile to issue declarations as to the relationship between them and popular resistance forces (see, e.g., the Dutch Royal Emergency Decree of September 1944). In fact, the matter of the allegiance of irregular combatants first arose in connection with the Geneva Convention. The Hague Convention of 18 October 1907 did not mention such allegiance, perhaps because of the

unimportance of the matter, little use being made of combat units known as irregular forces, guerrillas, etc., at the beginning of the century. In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.

In the present case, the picture is otherwise. No governments with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The organization itself, so far as we know, is not prepared to take orders from the Jordan Government, witness the fact that it is illegal in Jordan and has been repeatedly harassed by the Jordan authorities. The measures that Jordan has adopted against it have included the use of arms. This type of underground activity is unknown in the international community, and for this reason, as has been pointed out, we have found no direct reference in the relevant available literature to irregular forces being treated as illegal by the authorities to whom by the nature of things they should be subject. If these authorities look upon a body such as the Popular Front for the Liberation of Palestine as an illegal organization, why must we have to regard it as a body to which international rules relating to lawful bodies are applicable?

Despite all, let us nevertheless be extremely liberal and endeavour to proceed on the assumption that each member, even of such an illegal body, is entitled upon capture to be treated as a prisoner of war, if that body fulfils the four basic conditions mentioned in the first article of the rules concerning the laws and customs of war on land, which form an annex to the Hague Convention of 18 October 1907. [...]

Not every combatant is entitled to the treatment which, by a succession of increasingly humane conventions, have ameliorated the position of wounded members of armed forces.

Civilians who do not comply with the rules governing "*levée en masse*" and have taken an active part in fighting are in the same position as spies. Similarly, combatants who are members of the armed forces, but do not comply with the minimum qualifications of belligerents or are proved to have broken other rules of warfare, are war criminals and as such are liable to any treatment and punishment that is compatible with the claim of a captor State to be civilized.

By the introduction of additional distinctions between lawful and unlawful combatants, and combined application of the test of combatant and non-combatant character and of civilian and military status, it becomes possible to give far-reaching protection to the overwhelming majority of the civilian population of occupied territories and captured members of the armed forces.

Within narrower limits even those categories of prisoners who are excluded from such privileged treatment enjoy the benefits of the standard of civilization. At least they are entitled to have the decisive facts relating to their character as non-privileged prisoners established in... judicial proceedings. Moreover, any punishment inflicted on them must keep within the bounds of the standard of civilization.

From all the foregoing, it is not difficult to answer the submission of counsel for the defence that a handful of persons operating alone and themselves fulfilling the conditions of Article 4A (2) of the Convention may also be accorded the status of prisoners of war. Our answer does not follow the line of reasoning of learned counsel.

[...] [I]t may be said that a person or body of persons not fulfilling the conditions of Article 4 A(2) of the Convention can never be regarded as lawful combatants even if they proclaim their readiness to fight in accordance with its terms. He who adorns himself with peacock's feathers does not thereby become a peacock.

What is the legal status of these unlawful combatants under international law? The reply may be found in von Glahn, [*The Occupation of Ennemy Territories*, p. 52].

If an armed band operates against the forces of an occupant in disregard of the accepted laws of war ... then common sense and logic should counsel the retention of its illegal status. If an armed band operates in search of loot rather than on behalf of the legitimate sovereign of the occupied territory, then no combatant or prisoner-of-war rights can be or should be claimed by its members. [...]

If we now consider the facts we have found on the evidence of the witness for the prosecution, Moshe, as above, we see that the body which calls itself the Popular Front for the Liberation of Palestine acts in complete disregard of customary International Law accepted by civilized nations.

The attack upon civilian objectives and the murder of civilians in Mahne Yehuda Market, Jerusalem, the Night of the Grenades in Jerusalem, the placing of grenades and destructive charges in Tel Aviv Central Bus Station, etc., were all wanton acts of terrorism aimed at men, women and children who were certainly no lawful military objectives. [...] Immunity of non-combatants from direct attack is one of the basic rules of the international law of war.

The presence of civilian clothes among the effects of the defendants is, in the absence of any reasonable explanation, indicative of their intent to switch from the role of unprotected combatants to that of common criminals. Acts involving the murder of innocent people, such as the attack on the aircraft at Athens and Zurich airports, are abundant testimony of this.

International Law is not designed to protect and grant rights to saboteurs and criminals. The

defendants have no right except to stand trial in court and to be tried in accordance with the law and with the facts established by the evidence, in proceedings consonant with the requirements of ethics and International Law.

We therefore reject the plea of the defendants as to their right to be treated as prisoners of war and hold that we are competent to hear the case in accordance with the charge-sheet. [...]

[Report: *Law and Courts in the Israel held Areas* (Jerusalem, 1970), p. 17.]

Discussion

1. a. Was there an international armed conflict that made IHL applicable? If so, between which States? When does Convention III apply? Who is a belligerent party? Does the Court contend that Convention III does not apply in this case? For which reasons? (GC I-IV, common Art. 2)
   b. Is the Court's decision based on the same arguments used to establish the inapplicability of Convention IV to the West Bank and Gaza Strip? [**See** Israel, Applicability of the Fourth Convention to Occupied Territories] Is Convention III applicable before Israeli courts, but not Convention IV? When the Court states in its judgment that the Popular Front for the Liberation of Palestine (PFLP) "operates in search of loot rather than on behalf of the legitimate sovereign of the occupied territory" does it consider, contrary to Israel, Applicability of the Fourth Convention to Occupied Territories, that Jordan is the legitimate sovereign, or would it deny prisoner-of-war (POW) status to Jordanian soldiers?
   c. According to the Court's reasoning, does Convention III protect Palestinians residing in the occupied territory who rise up against occupation? Would it have applied to Palestinians fighting in that same territory prior to occupation? What would your answer, according to IHL, be to those questions?
   d. Is an individual who fights for a State not recognized by the Detaining Power

entitled to POW status under Convention III? What if it is simply the government that is not recognized by the Detaining Power? Has the State or the government to recognize that the individual is fighting for them or is it sufficient that the individual, in fact, fights for them? Are your answers different under Protocol I? Or is it sufficient to belong to a party to the conflict? Was the defendant not fighting for a Palestinian State? Does the PFLP represent that State? (GC III, Arts 2 and 4; P I, Arts 1 and 43)

e. Does such an interpretation of Art. 2 of Convention III explain why Protocol I includes Art. 1(4)? Could this Court's judgement have been rendered if Protocol I had applied? Would the result have been different? Which part of the Court's reasoning would have been different? Which additional factors would the Court have had to consider? Would the Conventions have been automatically inapplicable because the PFLP was not a State Party? (P I, Arts 1(4) and 96(3))

2. According to IHL, who is considered a combatant? Of what relevance is that determination to this case? In addition to Art. 4(A) of Convention III, does not Art. 1 of the Hague Regulations provide a definition?

3. a. Is the Court right in stating that to benefit from POW status, a person has to belong to a party to the conflict? Or is it sufficient to comply with the requirements listed under Art. 4(A)(2)(a)-(d)? Would the answer be different if Protocol I had been applicable?

   b. Are the requirements listed under Art. 4(A)(2)(a)-(d) cumulative? Do they have to be fulfilled by the whole group or only by the member claiming POW status? Is it sufficient if the group only aims at fulfilling the requirements?

4. If the accused had been granted POW status, would the Court have had to cease dealing with charges of "murder of civilians, [...] placing of grenades in Tel Aviv Central Bus Station, [...] wanton acts of terrorism"? If Protocol I had applied, would the accused have been immune from prosecution for such acts? Or would IHL on the contrary have prescribed such prosecution? (GC III, Arts 4 [1] and 85 [2]; P I, Arts 43 [3], 44 [4], 51 [5] and 85(3)(a) [6])

Links

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