

Cambodia/Thailand, Border Conflict around the Temple of Preah Vihear

Case prepared in 2013 by Ms. Danielle Breitenbücher, Master student at the Faculties of Law of the Universities of Geneva and Basel (Switzerland), under the supervision of Professor Marco Sassòli and Ms. Gaetane Cornet, research assistant, at the University of Geneva.

N.B. As per the disclaimer ^[1], 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.

Waging Peace: ASEAN and the Thai-Cambodian Border Conflict

[Source: International Crisis Group, Waging Peace: ASEAN and the Thai-Cambodian Border Conflict, Asia Report N°215, 6 December 2011; footnotes omitted; numbering of the paragraphs added by us; report available on <http://www.crisisgroup.org> ^[2]]

EXECUTIVE SUMMARY

[...]

[1] The resurgence of a largely forgotten 50-year dispute into an active armed conflict was related to two events: the colour-coded struggle in Thailand between the pro-establishment “Yellow Shirts” and the pro-Thaksin “Red Shirts” sparked after Thaksin’s ouster in the September 2006 coup; and the decision of Cambodia to register Preah Vihear as a World Heritage Site, which UNESCO accepted in July 2008. In Cambodia, the listing was occasion for national joy and Khmer pride. In Thailand, the ultra-nationalist Yellow Shirts used it to argue that Thaksin’s proxy administration led by Prime Minister Samak Sundaravej had sold out their motherland and committed treason. It became a powerful weapon to further their agenda, forcing the foreign minister to resign and destabilising the government. They successfully portrayed backing for the listing as a move to further Thaksin’s business interests, despite this policy having been supported by the previous military-installed administration. Until the Yellow Shirts’ attacks, bureaucrats on both sides had seen the listing as a mutual tourism bonanza.

[2] The frontier became increasingly militarised and tense. Border survey and demarcation ground to a halt, as it became too dangerous to field joint teams. [...]

II. THE ORIGINS OF A SMALL WAR

A. OWNERSHIP AND RESENTMENT OVER PREAH VIHEAR

[3] Like many South East Asian countries, Thailand and Cambodia still share a colonial

legacy of an ambiguous border. In 1954, Thai troops occupied and claimed Preah Vihear, located about 400km north of Phnom Penh. Five years later, Cambodia took Thailand to the ICJ on the basis of colonial-era treaties and other documents in an attempt to regain what it regarded as part of its cultural heritage, arguing that the temple was inextricably linked to its Angkor Wat complex, 140km to the south west. In 1962, the ICJ ruled that the temple was “situated in territory under the sovereignty of Cambodia”, mostly on the basis of a Franco-Siamese 1908 map that clearly showed the temple within the Cambodian border. [...] It has been government policy ever since that the temple complex is in Cambodia.

[...]

[4] Although the ICJ clearly determined the ownership of the Preah Vihear temple, the frontier around the cliff- top site remains in dispute. [...]

III. VIOLENCE AND TENSIONS ON THE BORDER

[...]

A. FROM DIPLOMATIC TO ARMED CONFLICT

[5] Ahead of the listing of Preah Vihear [as World Heritage site] in July 2008, tensions increased. Both armies sent troops to the frontier and occupied other minor temples in the area. Thai soldiers occupied the Keo Sikha Kiri Svava pagoda adjacent to Preah Vihear and within the 4.6 sq km area. Thai nationalist protesters marching to the temple clashed with locals who resented that politicking had closed public access to Preah Vihear, harming their livelihoods. In August, Thai soldiers occupied the Ta Moan complex, about 150km to the west, building a temporary fence around the Hindu ruins. Cambodia responded by occupying the Ta Krabei temple, about thirteen km east of Ta Moan, sending 70 soldiers to the previously non-militarised site. In turn, Thailand dispatched 35 rangers to the area. In the next weeks, there were low-level confrontations between patrols, although troops later withdrew. The Thai army accused Cambodian soldiers of trying to provoke it in order to

elevate the profile of the dispute after Phnom Penh failed in July to have the UN Security Council intervene. At this time, there was no fighting around these temples.

[6] The first clash after the listing occurred on 3 October with an exchange of rifle and rocket fire that wounded one Cambodian and two Thai soldiers. [...]

[7] [...] On 15 October the two armies again exchanged rocket-propelled grenades and mortars as well as machine-gun and other small-arms fire over an apparent misunderstanding about a Thai troop rotation. Border commanders quickly calmed their frontline subordinates and agreed to more joint patrols.

[8] By late October 2008, the Thai military believed that Cambodia had an estimated 2,800 troops around the Preah Vihear temple facing its 600. [...]

[9] In late March and early April 2009, UNESCO officials conducted a “reinforced monitoring mission” to the Preah Vihear temple as part of regular supervision of the World Heritage site. It found damage to the temple from the 15 October 2008 fire to be relatively minor but that “the continuous presence of troops around the property entails a risk of possible further incidents”. On 3 April, immediately after the team left, fighting broke out in the Field of Eagles, the same location as the October clashes, after apparent disagreements between troops over access to the disputed area. Higher-calibre weapons were used, including exchanges of artillery, mortar and grenade fire, and the casualties proportionally increased, with at least one Thai and two Cambodian soldiers killed.

[10] Despite the clashes, the armies kept talking to each other. [...]

B. FRUSTRATING NEGOTIATIONS; STALLED PROGRESS

[11] Between the listing and the fighting in February 2011 there were many occasions for the two sides to talk. The prime ministers met either in each other’s capital or on the sidelines of regional forums. Foreign ministers had the same opportunities, as well as an annual set piece Thailand-Cambodia Joint Commission for Bilateral Cooperation (JC) session.

[...]

VI. CONFRONTATION AND ASEAN INTERVENTION IN 2011

[12] While the pattern of behaviour of the two sides remained familiar, the conflict escalated to an unprecedented level of violence in 2011. [...]

A. OUTBREAK OF HOSTILITIES

[13] Tensions began to rise on the border soon after Thai troops left the Kao Sikha Kiri Svava pagoda near Preah Vihear on 1 December 2010, following negotiation of troop readjustment with Cambodia. Thai military had been occupying the site since July 2008. [...]

[14] Since 2009, civilian contractors had been building access roads to the temple through the contested 4.6 sq km as part of Cambodia's plan to link the site with Angkor Wat in Siem Reap. In late January 2011, the Thai military began using heavy equipment to build a spur towards the Kao Sikha Kiri Svava pagoda from Highway 221, which runs from the provincial capital Si Sa Ket to a border check-point west of the temple. Cambodia protested and asked for construction to stop, but to heed to such a request would have been de facto recognition that the 4.6 sq km was Cambodian territory. Ros Borath, president of the official Cambodian National Committee for World Heritage, said the Thai project violated the World Heritage Convention, the 2000 border demarcation memorandum of understanding and even Thailand's national park regulations. Cambodia later released a video showing Thai tanks positioned behind the construction crew, with their gun barrels pointed at Preah Vihear, and said this violated the 1954 Hague Convention on the protection of cultural heritage in wartime. [...]

[15] On the morning of 4 February, only 150km from Preah Vihear, Hor Namhong and Kasit held a ministerial-level Joint Commission meeting in Siem Reap without mentioning the growing troubles at Preah Vihear. [...] Cambodian Defence Minister Tea Banh was said to have called Defence Minister Prawit that day asking him to halt construction. Prawit

responded that if the Thais were to stop, Cambodia would likewise need to cease construction of its access road. After years of brinkmanship, it was difficult for either side to step back. During the phone conversation, Prawit received a report from the Thai military that its bulldozer was being fired upon with rifles and rocket-propelled grenades. The skirmish quickly escalated after heavy weapons began to be used.

[16] Cambodia later told the Security Council that at around three pm approximately 300 Thai troops attacked its soldiers in the vicinity of Khmum, 500 metres from the Preah Vihear temple staircase, and at the nearby Field of Eagles area and Phnom Trap hill. Shortly afterwards, Thailand reported that Cambodian troops opened fire on a Thai military post at Phu Ma Khua with mortars, rocket-propelled grenades, recoilless rifles, long-range artillery and multi-launcher rockets. They reportedly also used the temple grounds as a fire base to later attack another military post at Pha Mor I Dang. Between the incidents, several artillery shells were fired by Cambodian troops into Phum Saron village in Si Sa Ket Province of Thailand, located about five km from the border. [...]

[17] Neither side has good statistics on the number and types of munitions used in these incidents that lasted for three days. The toll on civilians was slight only because the area is sparsely populated. While the shots may have been intended for military targets, they were sometimes poorly aimed or went astray. The Preah Vihear temple itself was slightly damaged, which if intentional violated international humanitarian law. A nearby blue and white distinctive emblem marking culture property was punctured by shrapnel. The Cambodian government said four soldiers and one police officer were killed, 13,000 people were temporarily displaced and six houses were damaged.

[18] This round of fighting saw Thailand condemned internationally for the first known use of cluster munitions since a 2008 convention came into force in August 2010. Neither Thailand nor Cambodia is a party to it, but Indonesia, though only a signatory, has committed to encouraging others to join the treaty. Thailand denied the allegation and said it used “dual purpose improved conventional munitions”, not “cluster munitions”. The physical evidence contradicted its diplomatic wordplay. [...] When fighting spread in April

to the Ta Krebei temple 150km to the west of the February incidents, there was no record of use of cluster munitions, which some regard as a small victory for the convention and the pressure applied on Thailand.

[19] While it defended its own military response as “restrained and proportional”, Thailand decried Cambodia’s use of Russian-designed BM-21 122mm rockets that “struck at targets indiscriminately”. Some of these fell on the village of Phum Saron late on 4 February, sending residents scrambling for ill-maintained bunkers built by the army after past skirmishes. When they emerged, villagers found houses, schools and Buddhist monasteries damaged and a neighbour decapitated by shrapnel. The areas hit were all near or adjacent to former or occupied army bases or weapons positions. Students at the Phum Saron Wittaya high school taking part in a sports competition on the football pitch when the shooting began were evacuated, but two hours later three shells fell on the empty field, library, classrooms and infirmary. Since 2010, this school was part of the “ASEAN buffer schools program”, meant to increase regional awareness and, inter alia, give students the opportunity to learn Khmer.

[20] [...] On the Thai side, this round of skirmishes left two soldiers and two civilians dead and temporarily displaced approximately 20,000 villagers.

E. THE CONFLICT SPREADS

[21] At dawn on 22 April, fighting broke out in the area of the Ta Moan and Ta Krabei temples. [...] Sporadic clashes continued for more than a week.

[22] [...] Despite the lesser historical significance of the area, thousands of civilians on the border were affected [...]. Cambodia said more than 50,000 Thai artillery shells were fired up to twenty km inside its border between 22 April and 5 May. Another eight Cambodian and three Thai soldiers were killed, while dozens of troops and civilians were injured on both sides. [...]

[23] In the war of words after each incident, both sides tried to take the moral high ground. Frontline troops gave accounts of a disconcerting lack of fire control. Officers alleged their opponents violated international humanitarian law, such as by targeting civilians or basing

forces in places of religious or cultural significance, sometimes while they themselves were standing in a temporary base in a Buddhist temple.

[24] Some Cambodian homes adjacent to military bases were destroyed by inaccurate artillery fire. Poorly guided Cambodian weapons such as the BM-21 hit homes, and shrapnel maimed children and destroyed livelihoods. When one Cambodian tank crewman was asked what he fired at, he casually waved his hand to the west and said, “just Thailand”. Thai artillery is said to have been more accurate and to have scored direct hits on some key roads, as it fired on pre-calibrated targets and used aerial surveillance. The better-equipped and provisioned Thai army, however, was sometimes excessive in its response. A Cambodian officer recorded on the wall of his bunker 820 artillery shells, mortars, and grenades fired over his borderline post on 24 April. Asked to respond to this claim, a Thai on the other side said, “if they shoot five times, then maybe we would give them five back or maybe eleven”. Fortunately, most Cambodian civilians in the area had gone to evacuation centres, thus minimising casualties.

Discussion

I. Classification of the situation

1. (Paras [1]-[12])
 - a. How would you classify the situation between Thailand and Cambodia? Does the intensity of the fighting matter for the classification? (GC I-IV, Art. 2 ^[31])
 - b. Does it matter for IHL whether the temples mentioned in para. [5] are located in Cambodia or in Thailand?
 - c. When did this conflict start? When Thai soldiers took control of a pagoda and the temple complexes? With the first exchange of fire on 3 October 2008? Later?

II. Conduct of hostilities

2. Is Protocol I applicable to the conduct of hostilities in this case?
3. (Para. [14]-[15]) Are the bulldozer and the construction site where the Thai military

built an access road towards the Kao Sikha Kiri Svava pagoda legitimate military objectives? Would your answer change if the road was being built by private contractors? (P I, Art. 52(2) ^[4]; CIHL, Rule 8 ^[5])

4. (Paras [16]-[17], [19], [22], [24])
 - a. Are Cambodian troops allowed to target Thai military posts? (P I, Art. 52(2) ^[6]; CIHL, Rule 8 ^[7])
 - b. Is it a violation of IHL if shots intended for military targets are poorly aimed or go astray, damaging houses or killing people? If the rockets used do not make it possible to aim at specific targets? If the response to an attack is excessive? Which principles have to be observed? What is the relevance of the fact that the areas hit were all near or adjacent to former or occupied army bases or weapons positions? Is a former army base a legitimate target? What impact does the fact that it is not a current base have on the application of the principle of proportionality? (P I, Arts 51, 52 and 57; CIHL, Rules 7-17)
5. (Para. [24]) May Cambodia be held responsible for violations of IHL if its armed forces are not as well equipped as the Thai armed forces and therefore cannot fire on pre-calibrated targets or use aerial surveillance? May these differences of means be taken into account when applying the principle of proportionality? When applying the principle of precaution? How would you interpret the term “all feasible precautions” in Art. 57(2)(a)(ii) of Protocol I? To what extent does it allow badly equipped armies to use methods of attack that cannot precisely aim at a specific target? (P I, Art. 57 ^[8]; CIHL, Rules 14 ^[9]-21 ^[10])
6. (Para. [24])
 - a. Did the Cambodian tank crewman violate IHL by targeting “just Thailand”? (P I, Arts 48 ^[11], 51 ^[12], 52 ^[6], 57 ^[13], 85(3) ^[14]; CIHL, Rules 1 ^[15], 7 ^[16], 11 ^[17]-21 ^[18])
 - b. Did Cambodia or its commanders violate IHL? What were Cambodia’s and the military commanders’ obligations before they sent the tank crewman to the battlefield? After the latter violated IHL? Do these obligations refer only to grave breaches or to all breaches of IHL? (GC I, Art. 49 ^[19]; GC II, Art. 50 ^[20]; GC III, Art. 129 ^[21]; GC IV, Art. 146 ^[22]; P I, Arts 5 ^[12] 1 ^[12], 52 ^[6], 57 ^[13], 85(3)(b) ^[14] and 87 ^[23]; CIHL, Rules 1 ^[15], 7 ^[16], 11 ^[17]-21 ^[18], 139 ^[24], 141 ^[25], 142 ^[26])
7. Do the violations of IHL by the Cambodian and Thai armed forces amount to grave

breaches? If yes, which ones? For the others, why are they not grave breaches? (GC I, Art. 50 [27]; GC II, Art. 51 [28]; GC III, Art. 130 [29]; GC IV, Art. 147 [30]; P I, Art. 85 [31]; CIHL, Rule 156 [32])

III. Methods of warfare

8. (Para. [18])
 - a. What was the reasoning behind the ban of cluster munitions by the Convention on Cluster Munitions of 30 May 2008? (See Convention on Cluster Munitions [33])
 - b. Why does Thailand deny having used cluster munitions although it is not a state party to this convention? What can you conclude from denial about the effect of the public opinion and the efforts to ban certain weapons?
 - c. Which provisions of IHL could Thailand have violated by using cluster munitions? Which general principles govern the use of all weapons? (P I, Arts 35 [34], 51 [12] and 57 [13]; CIHL, Rules 70 [35] and 71 [36])

IV. Protection of a World Heritage site

9. (Paras [9] and [14]-[17]) How is protected cultural property defined in IHL? What is the purpose of its protection? How can it be marked during an armed conflict? Does the fact that the Preah Vihear temple is listed as World Heritage in the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage have an impact on its protection in times of armed conflict? (See Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention), Preamble [37] and Arts 1 [38], 10 [39], 16 [40] and 17 [41])
10. (Paras [9] and [14]-[17])
 - a. Did the Thai army violate IHL by positioning tanks near the World Heritage listed Preah Vihear temple? Is it a violation of IHL to attack cultural property? Would your answer change if the temple was not marked with the distinctive emblem for cultural property? (P I, Art. 53 [42]; Hague Convention, Art 4 [43]; CIHL, Rules 38 [44] and 40 [45])

- b. Under which conditions would an attack on cultural property be allowed under IHL? Does the principle of proportionality still apply? Are these conditions fulfilled in the present case? If your answer differs under Protocol I and under the Hague Convention, which prevails in this case taking into account that both states are parties to the Hague Convention, but only Cambodia is a party to Protocol I? Which would prevail if both states were parties to both treaties? ((P I, Art. 53 ^[42]; Hague Convention, Art 4 ^[43]; CIHL, Rules 38 ^[44] and 40 ^[45])
- c. Is it lawful under IHL to base military forces in places of religious or cultural significance or to conduct hostilities in the vicinity of protected cultural property? According to Article 53 of Protocol I? According to Article 4 of the Hague Convention? (see also CIHL, Rule 39 ^[46])

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Links

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[5] https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule8

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[10] https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule21

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- [23] <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=C203555D5F233D81C12563CD005>
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- [34] <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=0DF4B935977689E8C12563CD005>
- [35] https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70
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