Dutch cases on torture committed in Afghanistan - The relevance of the distinction between internal and international armed conflict

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The Relevance of the Distinction between Internal and International Armed Conflict

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Abstract

On 14 October 2005, The Hague District Court sentenced two Afghan asylum seekers for their role in torture in Afghanistan in the 1980s. The Court determined that the conflict in Afghanistan between 1978 and 1992 had been non-international in character. In a previous issue of this Journal, Mettraux questioned the need to distinguish between internal and international armed conflict. This comment argues that the preoccupation of the court with the nature of the conflict was understandable and necessary.

In a previous issue of this *Journal*, Guénaël Mettraux commented on two judgments of The Hague District Court of 14 October 2005, sentencing two Afghan asylum seekers for their role in torture committed in Afghanistan in the 1980s. Some of Mettraux's arguments are not convincing and may give rise to a misunderstanding of the court's reasoning.

Mettraux argues that the court's characterization of the armed conflict in Afghanistan between 1978 and 1992 as internal was unnecessary, since Common Article 3 of the Geneva Conventions of 1949 applies to all armed conflicts. This is true as far as the substantive norms, in particular the prohibition of torture, contained in Common Article 3 are concerned; they apply in all armed conflicts. This was the point made by the International Court of Justice in the *Nicaragua* case.[1] But the distinction between internal and international conflicts remains relevant in answering several

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1 Judgment of 27 June 1986, in ICJ Reports 1986, at 114, § 218. See also Special Court for Sierra Leone, Decision on Preliminary Motion on Lack of Jurisdiction Ratione Materiae: Nature of the Armed Conflict, *Fofana* (SCSL-2004-14-AR 72 (E)), 25 May 2004, §§ 21–27.

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other legal questions: the question of Dutch jurisdiction over torture, the criminality of torture and the question of protected persons.

Mettraux rightly criticizes the court's finding that it had universal jurisdiction over the acts concerned. The court came to that conclusion on the basis of paragraph 3 common to Articles 49/50/129/146 of the 1949 Geneva Conventions, stipulating that states shall also 'take measures necessary for the suppression of all acts contrary to the provisions of the present convention other than the grave breaches'. Indeed, these paragraphs may be read as a basis for criminalization of violations of Common Article 3, but they do not provide for jurisdiction, let alone universal jurisdiction. Arguably, Dutch law provides for such universal jurisdiction over violations of Common Article 3, but it is highly questionable whether a national rule alone is a sufficient basis for *universal* jurisdiction, in the absence of an international rule obliging or at least entitling states to exercise such jurisdiction.[2]

In contrast, if the conflict had been qualified as international, the grave breaches provisions (paragraph 1 common to Articles 49/50/129/146) would have provided the court with a sound basis for universal jurisdiction.[3]

The question whether torture was criminalized in Afghanistan in the 1980s may be answered differently, depending on whether the legal regime for internal or international conflicts applies. Common Article 3 merely prohibits certain acts, and stops short of criminalizing them. As stated above, the Geneva Conventions, in the aforementioned articles, oblige states to take measures to suppress acts contrary to the Geneva Conventions other than grave breaches. Article 8 of the Dutch Criminal Law in Wartime Act, in turn, provides for criminal liability for violations of the laws and customs of war. However, leaving aside the question whether the Dutch Act was also intended to include violations of Common Article 3 committed in the 1980s, as such — as a domestic law — it is clearly a deficient basis for the criminalization under Dutch law of acts committed in Afghanistan. In the absence of a written international rule criminalizing torture committed in the 1980s in internal conflict, the prosecution suggested that the court should rely on customary international law, complementing Dutch domestic law. Instead, the court simply applied the Dutch Criminal Law in Wartime Act. In so doing, the court arguably violated the Dutch and international *nullum crimen sine lege* principle,

2 See P.H. Kooijmans, *Internationaal Publiekrecht in Vogelvlucht* (8th edn., Deventer: Kluwer, 2000), at 56; see also A. Nollkaemper, *Kern van het Internationaal Publiekrecht*, (2nd edn., The Hague: Boom Jurdische Studieboeken, 2005), §§ 258, 259.

3 See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, §§ 79–80 ('[I]t is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts'). Afghanistan has been a party to the 1949 Geneva Conventions since 1956.

requiring that the act underlying the charge was punishable at the time when and the place where it was committed.[4]

Had the conflict been qualified as international, on the other hand, the criminality of torture might have been derived from the grave breaches provisions in the Geneva Conventions.

Finally, the question of protected persons could have been solved differently by the court if it had characterized the Afghan conflict as international. Mettraux argues that under Common Article 3 protected persons must be either civilians or someone who was 'taking no active part in the hostilities'. Yet, in addition, Common Article 3 was intended to apply only to *enemy* persons. As Cassese wrote:

> In time of war or internal armed conflict a serviceman may incur criminal liability for a war crime if he engages in torture against an enemy military or enemy civilian.[5]

The court recognized that only persons belonging to the 'other' party are protected under Common Article 3.[6] Yet, the test it applied to determine whether the alleged victims actually fell within this category would have been different, had the court characterized the conflict as international, rather than internal. In that case, for torture to qualify as a war crime, it must have been committed against a member of the enemy belligerent army (or other lawful combatants), or against a protected person who either has the nationality or ethnicity of the enemy or is otherwise objectively distinctive. In the case of internal armed conflict, on the other hand, torture must either have been committed against a member of the adversary who has laid down his weapons or has been placed *hors de combat*, or against a protected person who is under the control of the adversary.

For these reasons the preoccupation of the court with the nature of the conflict was understandable and necessary. Unlike Mettraux, I would say that its finding that the conflict was internal has had a considerable impact on the verdict, touching on the jurisdiction of the Dutch district court, the criminality of torture, and the protected status of the alleged victims.

4 Article 1 of the Dutch Criminal Code and Art. 7 of the European Convention of Human Rights (see judgment no. 73/2005, with reference to ECHR 25 May 1993, *Kokkinakis v. Greece*, A260-A, 25 May 1993, § 52).

5 A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), at 117.

6 Verdict, at 33.