

PREAH VIHEAR, KINGDOM OF CAMBODIA - LEGAL ANALYSIS OF THE EVENTS OF 3 APRIL 2009 THAT RESULTED IN THE DESTRUCTION OF A VILLAGE AND DAMAGE TO THE PREAH VIHEAR TEMPLE

By



I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The purpose of this Cambodian Center for Human Rights (CCHR) short report (the “Report”) is to analyze the international legal implications of the recent events of 3 April 2009 (the “Recent Events”) at the Temple of Preah Vihear (the “Preah Vihear Temple”), Preah Vihear Province, in the Kingdom of Cambodia (“Cambodia”). The Recent Events saw the village known as *Psar Cheung Prasat* (*Market at the Foot of the Mountain*) (the “Village”)¹ completely destroyed and the Preah Vihear Temple damaged by the armed forces of the Kingdom of Thailand (“Thailand”). We submit this Report to the Royal Government of Cambodia (the “RGC”) for its urgent consideration. This Report is a starting point for further investigations into and legal analysis of the Recent Events: it is not intended to be an authoritative and conclusive account of what happened. The Report is not confidential and we will make it available to the public.²
2. The Recent Events should be considered in the context of the historical dispute between Thailand and Cambodia regarding the ownership of the Preah Vihear Temple and adjacent territory; and rising tensions in the second half of 2008 that began after Cambodia requested the United Nations Educational Scientific and Cultural Organization (UNESCO) to register the Preah Vihear Temple as a World Heritage Site. The Recent Events resulted in the complete destruction of the Village and damage to the Preah Vihear Temple. Further to our investigations and consideration of the relevant international law including the Geneva Conventions and the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict, this Report finds that it is probable that Thailand has breached international law and that its military and/or government personnel responsible for destroying the Village and damaging the Preah Vihear Temple have committed war crimes. The Report recognizes the restraint of the RGC in reacting to the Recent Events, and makes a series of recommendations which include: offering further humanitarian assistance to the displaced residents of the Village; requesting the Association of Southeast Asian Nations (ASEAN), the United Nations (UN) or another neutral body to carry out further and detailed investigations into the Recent Events; and – should the findings of this Report be corroborated – formally informing Thailand of its

¹ See paragraph 3 of this Report for more information on the Village.

² The Report will be available on the CCHR website (www.cchrcambodia.org) and the new Cambodia Human Rights Portal for Cambodia (www.sithi.org).

breach of international law and requesting fair compensation. The Report sets out also the possible option of initiating proceedings against Thailand at the International Court of Justice (ICJ), and requesting the International Criminal Court (ICC) to investigate the actions of the Thai military and/or government personnel involved in the Recent Events.

II. METHODOLOGY

3. This Report is based on facts ascertained by on-the-ground investigations into the Recent Events by the CCHR, between 18 to 19 April 2009. The CCHR carried out background factual and legal research from 15 April to 4 May 2009, and has received legal advice from the international humanitarian and criminal law expert and CCHR Counsellor Wayne Jordash.³

III. BACKGROUND

4. Recent Events should be considered in the context of the historical dispute between Thailand and Cambodia regarding the ownership of the Preah Vihear Temple and adjacent territory. Further to Thailand's occupation of the temple from 1954, on 6 October 1959 Cambodia instituted proceedings against Thailand at the ICJ.⁴ On 15 June 1962, the Court found that the Preah Vihear Temple was situated in territory under the sovereignty of Cambodia and, in consequence, that Thailand was under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Preah Vihear Temple, or in its vicinity on Cambodian territory. Thailand complied with this ruling.
5. From the late 1960s to the late 1990s, the Preah Vihear Temple and adjacent territory were occupied by Khmer Rouge military forces, heavily land-mined and considered inaccessible. In 1998, the Preah Vihear Temple was reopened to tourists. Aside from tension during 2001 and 2002, which saw Thai troops block access to Cambodian visitors in a dispute over polluted water, the decade remained peaceful for Preah Vihear until 2008.
6. Rising tensions in the second half of 2008 began after Cambodia requested UNESCO to register the Preah Vihear Temple as a World Heritage Site. Whilst Thailand initially protested this request, negotiations followed and Thailand agreed to the registration. However, on 22 June, the anti-Thaksin People's Alliance for Democracy in Thailand championed protests at the disputed border area against the registration, claiming that the governing Thaksin-allied People's Power Party had gained business concessions in Cambodia in exchange for ceding 'Thai territory' to Cambodia. The influence of internal Thai politics on the Preah Vihear dispute should be noted. In response to these protests, Cambodia closed the border crossing to Preah Vihear. On 8 July, the Preah Vihear Temple was listed as a UNESCO World Heritage Site. Thailand and Cambodia moved troops to the disputed border area. Whilst Phnom Penh residents marched through the streets in celebration, Thai Foreign Minister Nappadon Pattama resigned

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⁴ *Temple of Preah Vihear (Cambodia v. Thailand)*.

following a judgment by the Thai Constitutional Court that he had violated the Thai Constitution by agreeing to the UNESCO listing. On 15 July, cross-border tensions flared again after Cambodian authorities arrested three Thai nationals who had crossed the closed border to plant the Thai flag on the Preah Vihear Temple grounds. Several dozen Thai soldiers were reported to have subsequently crossed the border. The total number of troops at the temple increased to over 1,000, with some of the 400 Thai troops in the area occupying a Buddhist pagoda within Cambodian territory. Bilateral talks failed to cool the situation. On 22 July, Thailand rejected the assistance of ASEAN in resolving the border dispute.⁵ Meanwhile, Cambodia requested UN assistance.⁶ As tension continued, Thailand also occupied and then pulled back from Ta Moan Thom temple complex in Cambodian territory.

7. On 13 October, Cambodian Prime Minister Hun Sen issued an ultimatum to Thailand to withdraw troops from the disputed border area by noon on the following day. As Thai troops remained, both sides exchanged rockets and gunfire. The Cambodian government accused Thailand of trying to provoke "full-scale armed hostilities".⁷ Reportedly, two Cambodian soldiers were killed and five Thais and two Cambodians were injured, although estimates varied. The Preah Vihear Temple itself was damaged. Tensions were raised again on 26 March 2009, when 100 Thai soldiers entered the disputed area.

IV. RECENT EVENTS - THE FACTS

8. The Recent Events began at 7.15 a.m. on 3 April 2009. Thai forces shot rockets over the Village and, fearing for their lives, the majority of villagers evacuated. At 2 p.m., Thai soldiers moved towards the Village and, after shooting machine gun fire into the village for five minutes, fired three B60 rockets all of which hit the Village. Whilst Cambodian forces were near the Village, the important strategic position under Cambodian control and known as *Veal Entree (Eagle Field)* was far away from and in a different direction to the Village. When the remaining villagers attempted to put out the fire started by the rockets, the Thais sprayed the market with automatic gunfire. According to the villagers, Thai forces killed at least one of their own soldiers. Thai forces then directed their attacks on Cambodian troop positions. Estimations of deaths and injuries of soldiers on both sides vary. RGC spokesman Minister of Information H.E. Khieu Kanharith said that four Thai soldiers were killed and 10 captured during the two clashes. Thailand's Foreign Ministry insisted that only one Thai soldier was killed, seven injured and none taken prisoner.

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⁵ 'Thai-Cambodia Temple Feud: Thailand rejects ASEAN role in border row', ASEAN Affairs, 23 July 2008.

⁶ 'UN help sought over temple row', BBC News, Tuesday, 22 July 2008.

⁷ 'Cambodia warns Thailand of full-scale hostilities', The Associated Press, Phnom Penh, October 2008.

9. Thai actions resulted in the complete destruction of the Village. The Village is registered as a 'village' at the Ministry of the Interior, included 260 family homes with almost 1,000 residents, a guesthouse, shops and a variety of eateries. All of the premises were burnt down and personal possessions destroyed. Thankfully, as most of the villagers had evacuated that morning, the Recent Events resulted in no civilian fatalities. All the internally displaced villagers now live in a camp of plastic tents with poor sanitation, a one-hour drive away from the Village. The Khmer Civilization Foundation (KCF) has calculated that the villagers have suffered losses in excess of US\$9 million, with the destruction of their premises and property, loss of business revenue and damage to physical and mental health. Some 260-property owners have thumb-printed a document requesting compensation from the Thai government. The RGC has now started to provide money and materials to enable the affected civilians to rebuild their homes on a different plot about 10 km away from the Village.

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10. The Preah Vihear Temple itself was damaged and is now scarred with bullet holes. Thai forces had already damaged the temple in 120 places with M79 grenades in October 2008. According to the Cambodian Heritage Police, Thai machine-gun fire during the Recent Events damaged 66 of the temple's stones. As yet, no estimation of the cost of repairing this damage has been made. We note also that continued fighting has prevented tourists from visiting the Preah Vihear Temple, meaning that tourist revenue has been lost.

V. INTERNATIONAL LAW

11. During armed conflict, states are obliged to follow the humanitarian conventions to which they are a party, and relevant customary International Humanitarian Law ("IHL").⁸ Similarly, those individuals involved in armed conflict must also act in accordance with IHL. Most authorities indicate that in the case of state-to-state conflict, any resort to force involving military forces would amount to armed conflict.⁹ States that do not comply with their obligations breach international law, and those individuals who act in violation of IHL may be guilty of war crimes.

⁸ . The ICRC states that unlike treaty law, customary international law is not written. The ICRC has also stated that customary international law, the body of international law that reflects state practice to such an extent that such practice is required as a matter of law, includes similar rules insofar as international and non-international armed conflict is concerned.

⁹ The International Committee of the Red Cross (ICRC), the body entrusted by the State Parties to the Geneva Conventions "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflict" (Statute of the International Red Cross art. 5, para. 2(g)), observes that an international armed conflict exists "when one or more states have recourse to armed force against another State, regardless of the reasons or the intensity of the confrontation". See ICRC Opinion Paper March 2008 entitled *How is the Term "Armed Conflict" Defined in International Humanitarian Law*, available at [www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf). The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a general definition of international armed conflict which has since been adopted by other international bodies such that "an armed conflict exists whenever there is a resort to armed force between States". See ICTY, *The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-A, 2 October 1995, para. 70.

12. Further to customary IHL, the Rome Statute of the ICC (the “ICC Statute”) provides for individual criminal responsibility in respect of violations of IHL, namely grave breaches of the Geneva Conventions (see paragraph 12 below) and other serious violations of the laws and customs in international armed conflict. Article 12, ICC Statute provides that the ICC may exercise its jurisdiction if the State in which the crime was allegedly committed is a State party to the ICC Statute. Cambodia has signed and ratified the ICC Statute¹⁰ and the Recent Events occurred on Cambodian territory. Additionally, in order to invoke jurisdiction of the ICC, the ICC Statute requires that the relevant state party is “unwilling” or “unable” to investigate an alleged crime and pursue a prosecution¹¹. In this case, as Cambodia has not incorporated the relevant international law into its domestic law it may be deemed to be “unable”.¹²

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13. The Geneva Conventions are the core of IHL. Additional Protocol I, Article 52 provides for the protection of civilian objects:

- 1. Civilian objects shall not be the objects of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.*
- 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.*
- 3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.*

14. Article 52 details the principle of ‘distinction’, whereby states and individuals involved in armed conflict must avoid targeting civilian objects. Additional Protocol I, Article 85(3)(b) details the principle of ‘proportionality’, whereby if states or individuals attack military objects, they must ensure that there is not a disproportionate risk of civilian injury and/or damage to civilian objects when compared to the military advantage gained. Cambodia ratified the Geneva Conventions in 1958 and Thailand in 1954. Although Thailand has not ratified Additional Protocol I, the principles of distinction and proportionality form part of IHL. Thailand and its government and/or military personnel involved in armed conflict are therefore obliged to act in accordance with these principles.

¹⁰ Signed October 2000, Ratified 11 April 2002.

¹¹ Article 17(a), ICC Statute.

¹² Cryer, Friman, Robinson & Wilmschurt have stated that the absence of the necessary legislation to enable prosecution of the Statute crimes may give rise to “inability” insofar as envisaged by Article 17(3), Cryer, R., Friman, H., Robinson, D., & Wilmschurt, E., *An Introduction to International Criminal Law and Procedure*, Cambridge 2007, 129.

15. The question of individual criminal responsibility under the ICC Statute necessarily arises also. Article 8 (2) provides that the following war crimes fall within the jurisdiction of the ICC:

(a) (iv) *Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*

(b) (i) *Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;*

(ii) *Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;*

(...)

(iv) *Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;*

(v) *Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; ...*

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16. IHL also prohibits intentional attacks against cultural property providing it is not a military objective.¹³ The 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict “prohibits the pillage, destruction or damage of cultural property.” Article 4 of that Convention provides that:

The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

17. Thailand and Cambodia have both ratified the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict, and have ratified also the UNESCO World Heritage Convention. Article 6(3) of that Convention stipulates that parties to the Convention must “not take any deliberate

¹³ Under the 1954 Hague Convention general protection to cultural property can be waived where ‘military necessity imperatively requires such waiver’ (Art. 4.2.). The doctrine of military necessity involves the customary legal principle of proportionality and requires the weighing of the damage against the anticipated military advantage. Although not yet ratified by either Cambodia or Thailand the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999) offers some clarity in Article 6(a) such that “a waiver on the basis of imperative military necessity pursuant to Article 4 Paragraph 2 of the (Hague) Convention may only be invoked to direct an act of hostility against cultural property when and for as long as: (i) that cultural property has, by its function, been made into a military objective; and (ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective”.

measures that directly or indirectly damage their heritage or that of another State Party to the Convention.”¹⁴The 1954 Hague Convention has become part of customary IHL, with which individuals involved in armed conflict must also comply.

18. Insofar as individual criminal responsibility for these acts before the ICC is concerned, the ICC Statute provides for the war crimes of:

... intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”¹⁵and “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”¹⁶

VI. APPLYING THE LAW

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19. In applying the principle of distinction to the attack by Thai forces on the Village, we must consider whether or not the Village was a military object. Our investigations suggest that it was not. It played no military role, there were no soldiers stationed there, no weapons or military hardware. The Village was a civilian object. We were told that Thai forces targeted the Village with rockets and machine gun fire. As such, Thailand breached IHL and its military and/or government personnel involved in the Recent Events may have committed war crimes. Members of the Thai government and/or military fall within the jurisdiction of the ICC whether and insofar as they, acting alone or as part of a joint criminal enterprise, planned, instigated, ordered, committed or otherwise aided and abetted the planning of the acts in question. Further, even if it could be shown that the Village had some military use or that the Thai forces were aiming at a military object nearby, in applying the principle of proportionality we must consider whether there was a disproportionate risk of civilian injury and/or damage to civilian objects when compared to the military advantage to be gained. The lack of any clear military advantage and the complete destruction of the Village would strongly suggest, at the very least, that the risk was disproportionate. In this case, Thailand would have still breached IHL and its armed forces and/or government personnel may have committed war crimes.

¹⁴Moreover, Article 16 of the 1977 Protocol II to Geneva Convention 1949, states, “it is prohibited to commit any acts of hostility against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and use them in support of the military effort”. Furthermore the laws and customs regulating land warfare (the Hague Regulations Respecting the Laws and Customs of War on Land 1907, Article 27) provide that belligerents are ordained to take all necessary steps to spare, as far as possible, buildings dedicated to public worship, art, science or charitable purposes, historic monuments and hospitals.

¹⁵ Article 8(2)(a)(iv).

¹⁶ Article 8(2)(b)(ix).

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20. In order to determine whether Thailand has contravened IHL by inflicting damage to the Preah Vihear Temple, it is necessary to consider the acts through the prism of military necessity. Although Cambodia may be said to have waived the protection owed to the cultural installations in Preah Vihear by stationing troops in and around the area surrounding the temple, the Second Protocol to the 1954 Hague Convention determines that such a waiver may only be said to arise in instances in which there are no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.¹⁷ In the current context it is difficult to accept any suggestion that the attack on the Preah Vihear Temple provided an advantage to the Thai military that could not have been obtained through alternative means. Further, we again ask the question: what, if any, military advantage was to be obtained? It would therefore appear to be apparent that the Thai military, through its attack on the Preah Vihear Temple, has violated IHL, namely the 1954 Hague Convention.¹⁸ Again, this conclusion necessarily gives rise to the question of individual responsibility under the ICC Statute for those members of the Thai military and/or government who, whether acting alone or as part of a joint criminal enterprise, planned, instigated, ordered, committed or otherwise aided and abetted the planning of the acts in question.¹⁹

VII. RECOMMENDATIONS TO THE ROYAL GOVERNMENT OF CAMBODIA

21. The RGC should be commended for the restraint it has shown in reacting to the Recent Events at Preah Vihear, and for its emergency provision of money and materials to enable the villagers to try to rebuild their community. In the interests of the villagers and the preservation and restoration of the Preah Vihear Temple, we make the following recommendations to the RGC:

Humanitarian assistance

22. Continue with measures to alleviate the conditions of the villagers. Request assistance from ASEAN, the UN and other neutral bodies if required.

Investigations

23. Call for ASEAN, the UN or another neutral body to commence an impartial investigation into the Recent Events and to consider their international legal implications. Request that Thailand consents to this investigation. The neutral body could request assistance from bodies including the UN International Humanitarian Fact-Finding Commission, the UN Committee for the Protection of Cultural Property in the event of Armed Conflict, and UNESCO.

¹⁷ See Article 6(a).

¹⁸ This proposition mirrors that made by Cambodia's Prime Minister Hun Sen in his letter to the Director General of UNESCO, dated 21 July 2008.

¹⁹ See ICC Statute Articles 25, 27 & 28.

Request for compensation

24. Should investigations by the chosen neutral body corroborate this Report, inform the government of Thailand that Thailand has breached IHL and that its military and/or government personnel involved in the Recent Events may be guilty of committing war crimes. Request compensation for the destruction of the Village and damage to the Preah Vihear Temple. Between states, the principle that every violation of international obligation gives rise to a duty to make reparation is well established in law²⁰. This principle is enshrined in the guidelines drafted by the International Law Commission at its fifty-third session (2001), known as the 'Responsibility of States for Internationally Wrongful Acts'. Furthermore, Article 75 of the ICC Statute empowers the ICC to make an order of compensation to be paid by an individual convicted by the ICC to the victims of those crimes.

International lobbying

25. Request friendly countries, ASEAN and the UN to encourage Thailand to reach agreement with Cambodia to compensate civilians for the destruction of the Village and Cambodia for the damage to the Preah Vihear Temple.

Legal Proceedings

26. Should the neutral investigation corroborate this Report but Thailand refuses to pay compensation, consider initiating proceedings against Thailand at the ICJ. We do note that authorities are split as to whether the ICJ has jurisdiction over IHL, but most of its case law suggests that it does.²¹ Further, consider requesting the ICC to commence investigations of and to hold accountable those individuals within the Thai government and/or military responsible for the crimes alleged in this Report. Alternatively, consider requesting friendly countries to initiate fair proceedings in their own national courts against Thai military and/or government personnel believed to be responsible for the crimes alleged herein. Those friendly countries can rely on the 'universal jurisdiction' associated with the authority of national courts to prosecute certain categories of war crimes.

Cambodian Center for Human Rights (CCHR)
Phnom Penh, Kingdom of Cambodia, 6 May 2009

²⁰ *Reparation for violations of international humanitarian law*, Emanuela-Chiara Gillard). For example, we can look to Iraq's payment of compensation to Kuwait following the First Gulf War.

²¹ In the exercise of its jurisdiction in contentious cases, the ICJ has to decide, in accordance with international law, disputes of a legal nature that are submitted to it by States. Given the universality of ratification enjoyed by the Geneva Conventions (191 ratifications) it is generally agreed that their content is part of customary international law. Indeed the very first case to come before the ICJ - the Corfu Case (United Kingdom of Britain and Northern Ireland v. Albania) - had to consider a question of IHL. In the 1986 case of Nicaragua v. United States of America: Military and Paramilitary Activities in and against Nicaragua, the Court decided directly on matters of IHL and Article 3 of the Geneva Conventions (paras. 215-220).