

Belgium, Public Prosecutor v. G.W

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.

[Source: Brussels War Council 18 May 1966, partially reported in *Revue Juridique du Congo*, 1970, p. 236 and in *Revue de Droit Pénal et de Criminologie*, “Chronique annuelle de Droit pénal militaire”, 1970, p. 806; original in French, unofficial translation.]

BRUSSELS, CONSEIL DE GUERRE

in re Public Prosecutor v. G.W., May 18, 1966

[...]

JUDGMENT

[...]

II. Facts

On 5 October 1965 the accused, G.W., a senior member of the Belgian staff providing assistance to the Democratic Republic of the Congo, was driving in a jeep in the company of M. and M., soldiers belonging to the Congolese national army, coming from a checkpoint set up on Opala road and going towards Lubunga, an outlying district of Stanleyville [...].

The jeep had just left an area out of bounds to civilians and entered a non-forbidden zone, when the vehicle's occupants saw [...] two Congolese crossing the road, carrying “Beretta” submachine-guns [...].

A Congolese woman, Z.S., appeared on the threshold of the hut from which, according to W., the second

rebel had come out; the accused interrogated her, with the help of his driver, N., but got no intelligible reply [...].

The accused – as he himself stated – then started to push the woman; he knocked her over, she fell on her side; he lifted her head with his foot because she persisted in turning her head to face the ground; he did not actually kick her, but he put his foot on her head and pressed down.

The accused declares that he then ordered her to accompany him to the camp; the woman rolled on the ground without obeying him. He ordered the two soldiers, as he himself said, to put her in the jeep, which they did not manage to do; as soon as he heard the engine start – the jeep being out of sight – he fired a revolver shot into the head of the victim, who was lying at his feet. The accused then went back to the camp and informed the Congolese and Belgian authorities of what had happened and asked that a patrol be sent out to look for the rebels.

The autopsy showed that the victim had two bullet wounds, one of them [...] in the head. [...]

The material facts of the case against the accused have been established beyond doubt. It has also been established that the accused fired the shot into the victim's head with intent to kill.

III. On grounds for justification [...]

(a) Order from higher authority

The accused invokes the order issued by Major O. to “shoot all suspect elements on sight” in the area forbidden to civilians.

Elements of the file show, and this is not disputed by the accused, that the victim was not in the forbidden zone; the order invoked by the accused was therefore not applicable in the case in point.

The accused maintains however that there being no clear demarcation of the zone in question, he was convinced that he was inside the forbidden zone [...].

Moreover, the order [invoked by the accused] certainly does not have the scope attributed to it by the accused, namely “the order to take no prisoners and to ‘kill’ everything we come across in there”.

The file and the investigation carried out during the hearing show that in fact it was an “authorization” to shoot suspect elements on sight, without warning, but definitely not an order to take no prisoners or to kill prisoners.

As interpreted by the accused in practice – viz. the right or even the obligation to kill an unarmed person in his power – the order was patently illegal. Executing or causing to be executed without prior due trial a

suspect person or even a rebel fallen into the hands of the members of his battalion was obviously outside the competence of Major O., and such an execution was a manifest example of voluntary manslaughter. The illegal nature of the order thus interpreted was not in doubt and the accused had to refuse to carry it out. [...]

The act perpetrated by the accused constitutes not only murder within the meaning of Articles 43 and 44 of the Congolese Criminal Code and Articles 392 and 393 of the Belgian Criminal Code, but is also a flagrant violation of the laws and customs of war and of the laws of humanity.

From the legal, military and human standpoint such an act was inadmissible and unjustifiable.

ON THESE GROUNDS

The Court-martial, ruling after due hearing of both parties, [...]

finds G.W. guilty of the charges brought against him,

sentences him to five years' imprisonment. [...]

Discussion

1. Did the acts of the defendant violate IHL independently of whether the Belgian operations in Congo were subject to the laws of international or non-international armed conflict? (GC I-IV, Art. 3; GC IV, Arts 27 and 32)
2. Is it lawful to prohibit a zone to civilians? What might the defendant lawfully have done with a civilian found in such a zone? Was the order as interpreted by the Court, giving permission to fire within the prohibited zone at "all suspect elements on sight", lawful according to international humanitarian law if we retroactively apply Protocols I and II? (P I, Arts 50(1) and 51(2); P II, Art. 4(1)) If we do not apply those instruments? (HR, Art. 23(d)) Is it lawful to fire at combatants on sight? Would the defendant's conduct have been lawful within the "prohibited zone" with regard to a person positively identified as a combatant? (P I, Arts 40 and 41)
3. When may a superior order provide a defence against charges of a violation of IHL? When does a superior order prevent punishment for such a violation? When does it reduce punishment for such a violation?