

A. Korad Kalid v. Paracommando Soldier

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: Available under No. 7 A.R. 1995 at the Auditorat Général près la Cour Militaire, Brussels; not published, original in Dutch, unofficial translation.]

THE MILITARY COURT,

Permanent Dutch-Language Chamber, in Session in Brussels, has Issued the Judgment Below

IN THE MATTER OF:

THE PUBLIC PROSECUTOR'S DEPARTMENT and 104 Korad Kalid Omar, resident in Kismayo, Somalia, [...] v. 105 V[...] J[...] F[...] J[...], [...], 3rd Para Battalion in Tielen, standing accused that

As a soldier on active service in Kismayo, Somalia, he did, on August 21, 1993, deliberately wound or strike Ayan Ahmed Farah; [...]

* * *

Notice of appeal having been given [...] against the judgment after trial handed down by the Court Martial in Brussels, [...]

states that the Court Martial, having considered *inter alia*: [...]

That the accused's conduct should be tested against the rules of engagement which served as a guide for

the Belgian troops in Somalia;

That, as a soldier, the accused formed part of a Belgian contingent dispatched to protect a humanitarian operation; that the deployment of military forces presupposes that the humanitarian operation could be threatened by force and that the international community considered that legitimate force could be used to curb or neutralize unlawful force;

That despite the peaceable intentions of the Belgian and other troops, they had to deal both in Somalia and elsewhere with hostile armed elements;

That in those circumstances the Belgian officers were compelled to take security measures in order to perform their mission and ensure their own safety and that of their men;

That the facts took place at check-point Beach, where the base was protected by a wall; that guard posts were set up in front of the wall and that barbed wire fencing was put up in front of those guard posts;

That on the night of August 20 to 21, 1993, the accused was on guard duty between two and three o'clock in Post 3, with orders to prevent anyone from penetrating into the safety area, i.e., through the barbed wire fencing;

That he suddenly spotted a shadow which he identified as a child; that he carried out his instructions; that it was subsequently found that Liebrand, who was manning Post 4 and had a night-glass, reacted in exactly the same manner, i.e., he fired a warning shot followed by a shot aimed at the legs;

That the accused and Liebrand interpreted and carried out the same orders and followed the same rules of engagement, in the same circumstances and in the same way; that it may thus be stated that the reaction and assessment of both soldiers were correct;

That the intruder was indeed a child; that it is nevertheless an unfortunate and regrettable fact that, in certain cultures and certain circumstances, despite the International Convention on the Rights of the Child, children are wrongfully used in war situations or in the use of force;

That the accused's duties at the time of the facts were difficult and dangerous; that he had to take a decision in a fraction of a second; that his safety and that of his unit could depend on his decision; that it would be unfair to judge his conduct during that night from a comfortable situation far in time and space from where it was exercised; that the fact that his colleague Liebrand reacted in the same way must be given more weight than theoretical speculations;

That it must rather be emphasized that, by aiming at the legs, he limited the necessary damage to such an

extent that the Court Martial noted with satisfaction that Doctor Pierson was able to conclude that “she got away with a scar on her buttock”; [...]

III. WITH REGARD TO THE CASE ITSELF

1. Introduction

Whereas the facts of the charge lie within the context of the duties which the accused was performing on August 21, 1993, as a member of UNOSOM, the UN humanitarian operation in Somalia;

Whereas, in the performance of these duties, the accused saw it as his duty at a given moment, as night guard, to fire an aimed rifle shot at the legs of the child, then aged twelve, of the claimant in the civil action; that in so doing he wounded the victim;

2. With regard to the argument of the defence

[...]

Whereas, according to the provisions of Article 70 of the penal code, no offence has been committed if the act is prescribed by law and ordered by the competent authority;

Whereas in Article 417 of the penal code the law as a general rule presumes the momentary need for self-defence when it is a question of preventing, by night, the climbing or breakage of the fences, walls or accesses to an inhabited house or flat or its dependencies;

3. With regard to the requirements for citing a superior's order as grounds for justification

Whereas, in accordance with domestic and international law, it is necessary to check the legitimacy of every order given;

Whereas, in other words, to be able to claim a superior's order as grounds for justification:

- a. the cited order must be given beforehand, and its implementation must correspond to the purpose of that order,
- b. the cited order must be issued by a legitimate superior acting within the limits of his authority,
- c. the order issued must be legitimate, i.e., in conformity with the law and regulations;

Whereas, in connection with this last point, it may generally be assumed that a soldier of the lowest rank may base his actions on the assumption that the order was legitimate;

Whereas a careful investigation must be made to establish whether the force dictated by the senior officer did not exceed that which was absolutely necessary to bring about the intended action;

Whereas the conduct of which the defendant stands accused will be more closely examined hereafter in the

light of the above;

4. With regard to the order given to the accused on August 21, 1993

Whereas, according to the defence, the order given to the accused during his duties as a night guard at the time of the facts was “to defend and prevent anyone from penetrating into” the cantonment of various Belgian military units [...];

5. With regard to the rules of engagement and their legal nature

Whereas this order, cited by the accused in the context of Article 70 of the penal code, must also be viewed in conjunction with the other, more general and earlier permanent instructions given him in the form of the rules of engagement;

Whereas the said rules of engagement are to be understood as meaning the general directives issued by the competent authority in the matter (in this instance, the UN as the international political authority);

Whereas these rules of engagement are intended to give as precise instructions as possible to the armed forces under the direct or indirect command of the aforementioned competent (political or military) authority on the circumstances in which they may use all forms of force in the performance of their duties in an existing or possibly impending armed conflict;

Whereas these rules of engagement initially took the form of a mandate under international administrative law;

Whereas they have this nature with respect to both the Member States called upon by international bodies to take part in certain operations and the commanders that a Member State makes directly available to the international organization concerned;

Whereas the Member States, on the other hand, also “*translate*” the rules of engagement *in the form of an order*, relating to the use of armed force, for the troops *they deploy*;

Whereas, if this (oral or written) order to Belgian military personnel is to translate into an obligation of obedience and thus be admissible in a prosecution for insubordination under the terms of Articles 28 et seq. of the military penal code, it must, on the one hand, be issued by a hierarchical or operational superior of the same nationality, within the meaning of said Article 28 of the military penal code; and whereas it may, on the other hand, be disobeyed if its implementation can clearly involve the commission of a crime or offence (see Article 11, para. 2, subpara. 2, of the *Tuchtwet* (Code of Military Discipline [Law of 14 January 1975, available in French on <http://www.just.fgov.be>]]));

Whereas, in the actual drafting of the rules of engagement, account must be and was taken of the other relevant legal provisions issued, and as a rule only the legislator can repeal or suspend a legal provision;

Whereas, regardless of the form in which they are set out, rules of engagement are not to be regarded as orders similar to legislation;

Whereas the Court can further agree with the theoretical views put forward by the Public Prosecutor's Department in its submission regarding the rules of engagement; whereas, more specifically, the Public Prosecutor's Department correctly points out that the actual content of the rules of engagement discussed here is influenced by a number of rather incidental factors, legal standards and factual items, such as:

- the identity of the political authority involved,
- the nature of the ongoing operation,
- international law, including the law of armed conflicts and the relevant treaties,
- the "host nation's" legislation,
- the domestic legal provisions of the Member States placing their armed forces at the disposal of the international organization concerned,
- and, obviously, not least the existing operational requirements and the national or international aims involved;

Whereas, while all these factors must undoubtedly be and were taken into account in the establishment and definition of rules of engagement by the Member State, the criminal judge must, in assessing the grounds for justification as specified, for the purposes of the case before him, in Article 70 of the penal code, primarily test the conduct of the accused soldier who implemented the rules of engagement against the order as actually issued by the hierarchical superior from the Member State concerned to the soldier of his own nationality;

Whereas for the accused soldier the rules of engagement thus took the form of an order, both *de jure* and *de facto*;

6. With regard to the rules of engagement as they were to be implemented by the accused on August 21, 1993 [...]

Whereas even though the prosecution file contains no information on the name and rank of the Belgian superior who laid down the rules of engagement as an order and line of conduct for the accused, there is not the slightest doubt that those rules of engagement were issued to the accused by a Belgian superior; [...]

Whereas, in essence, at the time of the facts attention had to be paid first and foremost to the pertinent factors below:

1. the accused was given defensive orders;
2. in implementing these *defensive* orders, the accused was authorized to use deadly force in response to hostile acts or clear signs of imminent hostilities;
3. in the event of an attack or threat by *unarmed* individuals, the accused was entitled to use reasonable

minimal force to repel the attack or threat after a verbal warning, a show of strength and the firing of warning shots;

4. the accused was entitled to regard *armed* individuals as a threat;
5. only minimum force was ever to be used.

7. With regard to the manner in which the accused carried out the orders given to him on August 21, 1993 [...]

Whereas the accused acted with the necessary care and in accordance with the law in the given circumstances;

Whereas, on observing the child creep through the concertina and thus arrive in the immediate vicinity of the bunker, he first gave the necessary verbal warnings in both Somali and English;

Whereas he then fired two warning shots into the ground about 50 cm away from the child, who still showed no reaction;

Whereas he finally decided to fire an aimed shot;

Whereas he fired this aimed shot at non-vital organs, viz. the legs;

Whereas the infiltration detected terminated only with this aimed shot;

Whereas the procedure followed by the accused was the only possible one to fulfil his defensive duty;

Whereas the accused had to regard the threat as real and, in order to ward off this threat, used minimum force after giving the required warnings;

Whereas the accused was physically incapable of catching the intruder (in view of the special position of the bunker, which was accessible only from the rear along an aperture in the cantonment wall);

Whereas it was unrealistic to call upon other reserve facilities, e.g., the picket;

Whereas in view of the possible imminent attack, the reaction had to be prompt and this reaction was also commensurate;

Whereas, all being considered, there was no other action suitable in the circumstances which could be taken to prevent further penetration;

Whereas the orders had been given beforehand, and their implementation corresponded to their intention;

Whereas the order was legitimate and was issued by a legitimate superior acting within his authority;

Whereas the force used was unmistakably proportional to the nature and extent of the threat;

Whereas, furthermore, it may be remarked that another guard acted in almost the same manner as the accused;

Whereas in this connection, and to conclude, it may also be remarked that, contrary to what the defence claims, one must reasonably accept that the victim was hit by a shot from the accused and not by the shot from the aforementioned other guard; whereas here attention must be paid primarily to the short distance from which it was fired; [...]

ON THESE GROUNDS, THE COURT,

[...]

Declares the accused not guilty of the charges brought against him; [...]

B. Osman Somow v. Paracommando Soldier

[Source: Available at the Auditorat Général près la Cour Militaire, Brussels; not published, original in Dutch, unofficial translation.]

PRO JUSTITIA No. 51 of the Judgment Nos. 102 and 103 of the session record

THE MILITARY COURT, permanent Dutch-language chamber, in session in Brussels, has issued the judgment below

IN THE MATTER OF:

THE PUBLIC PROSECUTOR'S DEPARTMENT and 102 Osman Somow Mohamed, resident in Jilib-Gombay-Village, Somalia, [...] v. 103 D[...] A[...] Maria Pierre [...], R/69016, Paracommando Battery in Braaschaat, standing accused that

As a soldier on active service in Kismayo, Somalia, he did, on April 14, 1993, accidentally cause the death of Hassan Osman Soomon through a lack of foresight or care, but without the intention to assault another person; [...]

* * *

Notice of appeal having been given [...] against the judgment after trial handed down by the Court Martial in

Brussels, [...]

states that the Court Martial, having considered *inter alia*: [...]

That Belgium, along with many other countries, dispatches soldiers to protect humanitarian operations; that the dispatch of military troops is justifiable only insofar as humanitarian operations are threatened by force and the international community considers that it has the right to neutralize or curb such force by means of another, legitimate, force;

That events over the past few years have shown that such operations are dangerous not only for the populations whom they are intended to help, but also for those who are given the unenviable task of using the force authorized by the international community;

That the first question to be put is whether the use of a weapon which caused the death of Hassan Osman Soomon was justified and whether, in the use of this weapon, an error was made which would not have been committed by a regular, cautious, highly trained soldier; [...]

That the accused was assigned on July 14, 1993, between 7.00 and 9.00 a.m., to an observation post on the Kismayo beach with orders to guard a shooting sector between barbed wire fences on his left and an imaginary line on his right within which were at least two wrecked ships, with the instruction that no-one was to enter that sector and that no-one should have the opportunity to "install" himself in the wrecks;

That the investigation has established that there was a person to the right of the largest ship; that the accused, after issuing all the specified warnings, aimed at the port side of the hull as a warning and in order not to hit the person on the starboard side of the hull, that the bullet (probably, for nothing is certain) ricocheted and struck the victim who was also in the forbidden area;

That it has not been established from the overall investigation that the accused formally exceeded the rules of engagement, and that no fault, or even carelessness, has been proven to the satisfaction of the law; [...]

III. WITH REGARD TO THE CASE ITSELF

1. Introduction

Whereas the facts of the charge lie within the context of the duties which the accused was performing on July 14, 1993 [...] as a member of UNOSOM, the UN humanitarian operation in Somalia; [...]

Whereas, in the performance of these duties, the accused unintentionally killed the victim;

2. With regard to the argument of the defence

Whereas the defence, moving for acquittal, claims that not the slightest fault can be attributed to the accused;

[...]

Whereas, according to the provisions of Article 70 of the penal code [available in French on <http://www.just.fgov.be>], no offence has been committed if the act is prescribed by law and ordered by the competent authority;

Whereas Article 260 of the penal code provides grounds for justification in favour of an official who has carried out an unlawful order issued to him by a superior in matters falling under the latter's authority; [...]

Whereas the objective ground for justifying the application of the law and the admissibility of the lawful order issued by the competent authority cannot justify any subjective lack of precaution;

Whereas a defendant who has carried out a lawful order in an imprudent manner may not invoke the provisions of Article 70; whereas this also applies to persons belonging to the forces of law and order;

Whereas a person belonging to such forces who incorrectly carries out an order from his superior may not invoke Article 260 of the penal code either; [...]

3. With regard to the order given to the accused on July 14, 1993

Whereas the accused, in his statement drawn up on the date of the facts, claims that his instructions were to drive out any person found in a certain area of the beach at KISMAYO, SOMALIA, using all possible means of intimidation;

Whereas this statement is not contradicted by any other information in the file;

Whereas, *in fine* of the undated report [...], deputy prosecutor FRANSKIN emphasizes the military importance of the order, to wit that the shipwreck lying in the forbidden area could be used by a sniper;

Whereas the order, as described above, to be obeyed by the accused must be viewed also in conjunction with the other, more general instructions issued to him, whether in the form of regulations or in the form of rules of engagement and codes of conduct;

Whereas if a judgment is to be based on the compulsory nature of rules of engagement, it is not enough purely and simply to assume beforehand the binding character of those rules; whereas their precise legal nature must first be determined; whereas, for the accused, the rules of engagement in question also took the form of an order, both *de jure* and *de facto*;

Whereas, in connection with the said rules of engagement, account must indeed be taken of the instructions as actually given to the accused;

Whereas, according to the Public Prosecutor's Department, the rules of engagement [...], were applicable to Operation UNOSOM II starting from May 4, 1993;

Whereas the defence does not dispute this fact;

Whereas, therefore, the order given to the accused at the time of the facts allowed him to make considered use of the weapon as the very last means of subduing an unarmed person who constituted a threat to the discharge of his mission in the controlled area; whereas, in firing any shot, he had to take considerable care to avoid any collateral harm;

Whereas even the law of armed conflicts contains obligations regarding the precautions to be taken in order to spare the population during attacks (Article 57 of Protocol I of May 8, [sic] 1977 additional to the Geneva Conventions of August 12, 1949);

4. With regard to the manner in which the accused carried out the orders given to him on July 14, 1993

Whereas the Court, after examining the documents on file and the case presented in court, reaches the conclusion that the accused correctly carried out the order given to him in that, in the given circumstances, he behaved with the care required of a regular, cautious, highly trained soldier and in accordance with the law;

Whereas the Public Prosecutor's Department rightfully does not dispute "that the accused was authorized in the given circumstances to fire a warning shot";

Whereas the "force" inherent in the firing of that warning shot was proportional to the extent of the established threat, and it can be recalled that it was never the accused's intention to harm anyone's bodily integrity;

Whereas it must be remembered that that warning shot was necessary to intimidate a person, never identified, who was entering the forbidden area and also that that person was, from the accused's position, to the right of the wreck;

Whereas the Public Prosecutor's Department and the claimant in the civil action blame the accused for having selected the curved steel bow of the wreck as his aiming point and not, for example, the flat surface of its pilothouse;

Whereas it may also be concluded from the account of the facts that:

- the accused did indeed choose the port side of the curved steel bow of the wreck as his aiming point;
- the victim was fatally wounded as a result of the ricochet of the warning shot fired by the accused, and

that it must be noted that the victim entered the area monitored by the accused from behind the wreck;

- before that time the accused had not noticed the victim's presence at all and that, moreover, in view of his position, he had not been able to notice it before, especially as he was observing the state of the area through his binoculars;

Whereas the legal question to be answered is also whether the accused failed to exercise foresight and care when firing his warning shot;

Whereas this question must be answered in the negative since, in view of the curvature of the steel bow of the wreck, the bullet could only have ricocheted towards the area which no-one was allowed to enter;

Whereas it may be assumed that the accused selected this aiming point precisely in order that the person with regard to whom he was required to take intimidation measures should not be injured or killed by a ricocheting bullet;

Whereas it is very clear from the report of the investigation conducted by deputy prosecutor FRANSKIN on the spot that the victim was fatally wounded at only some five metres from the port side of the wreck;

Whereas this relatively short distance supports the accused's claim that he had never seen the victim and could not therefore take account of his presence;

Whereas the accident may be ascribed solely to a set of unfortunate circumstances which could not be foreseen by the accused; [...]

ON THESE GROUNDS, THE COURT,

[...]

Declares the accused not guilty of the charges brought against him, taking into account the change in the date of the facts and the identity of the victim; [...]

Discussion

1.

- a. Does the applicability of IHL depend on whether the accused, as part of a Belgian contingent of UNOSOM, are considered to be under Belgian authority? Or that of the UN?
- b. Does IHL apply in these circumstances to these UN forces? What do you think of the argument that IHL cannot formally apply to UN operations, because they are not armed conflicts between equal partners but law enforcement actions by the international community authorized by the Security Council representing international legality, and their aim is not to make war but to enforce peace?
- c. Can the accused be considered for purposes of the applicability of IHL as members of the armed

forces of Belgium (which is party to the Geneva Conventions), and can any hostilities they engage in be considered an armed conflict between Belgium and Somalia?

2.

- a. Assuming that IHL applies to the accused, although they are on a UN mission, does IHL apply to the situation in Somalia? Is there an armed conflict? Is it an international or non-international armed conflict? Could the IHL of international armed conflicts apply even if there were no hostilities between UN forces and regular Somali armed forces? If only events like those described in either of the cases occurred, could the situation be qualified as an armed conflict? (GC IV, Art. 2)
- b. If the IHL of international armed conflict applied, were the acts of either of the accused to be judged under the law governing the conduct of hostilities? (P I, Art. 51(2)) Or under the provisions on the treatment of protected civilians? (GC IV, Arts 27 and 32) Were those provisions violated?
- c. Did the acts of the accused violate IHL independently of whether the Belgian operations in Somalia were subject to the laws of international or of non-international armed conflicts? (GC I-IV, Art. 3)
- d. If IHL does not apply, is the accused's shooting of the child, in Case A., prohibited by international law? If IHL applies, does it provide special protection for children? Are the rules on this special protection relevant in this case? (GC IV, Art. 50; P I, Art. 77; P II, Art. 4(3))

3.

- a. If IHL applies, were the shootings in these cases governed by IHL, by international human rights law, or by both? Which of the two branches of law contains sufficiently detailed rules to enable the accused's behaviour to be prosecuted?
- b. Does international human rights law apply during an armed conflict? Even to hostile acts committed by combatants? If these acts don't necessarily violate the right to life?
- c. Did the accused's acts conform to Art. 57 of Protocol I? Particularly in Case B., did the Court correctly conclude that the accused exercised the appropriate level of foresight and care? Assuming that the IHL of international armed conflicts is applicable, is Art. 57 at all applicable to such uses of force as those of the accused?
- d. Were the accused's acts in conformity with UN standards for law enforcement officials, e.g., the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990?

[Principle 9 reads: Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.]

Are those principles applicable to the accused's acts even in an international armed conflict? Did the threats in either case constitute a situation as described in Principle 9 warranting such action by the accused? Is factor 3) mentioned in Case A., section III. 6., consistent with Principle 9 of the *Basic Principles*? Were the orders given to the accused in Case B. consistent with Principle 9?

1.

1. a. 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? (ICC Statute, Art. 33) [**See The International Criminal Court**]
- b. In the first case, could the accused, as a mere rank-and-file soldier, know if the order received was legal?
- c. Are Arts 70 and 260 of the Belgian Criminal Code compatible with IHL as regards an order to commit a war crime?

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