

Afghanistan, Bombing of a Civilian Truck

INTRODUCTORY TEXT: *Germany's highest civil law court rejects a claim for compensation made by Afghan victims of an aerial bombardment requested by a German colonel. The court considers that IHL does not give individuals a right to compensation; that this regime prevails over German legislation as regards the liability of the State and that IHL was not violated in this attack because it was exclusively directed at members of an armed group and all feasible precautionary measures were taken.*

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.

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[Source:Karlsruhe, Federal Court of Justice, Judgement of the 3rd Civil Panel of 6.10.2016, III ZR 140/15. Available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=071de1999c01f5114ea9e467f0e843dd&nr=76401&pos=1&anz=2>, unofficial translation]

[...]

Statement of Facts

1. The plaintiffs are Afghan nationals. They are claiming remedies and reparation payments from the Federal Republic of Germany in connection with an aerial bombardment conducted on the orders of a member of the German Federal Armed Forces (*Bundeswehr*), as part of the International Security Assistance Force (ISAF) mission, led by the North Atlantic Treaty Organization (NATO), in Afghanistan.

2. After the U.S. military campaign toppled the Taliban regime in Afghanistan, the United Nations Security Council set up the NATO-led ISAF by Resolution 1386 on 20 December 2001. Its task was to support the elected government of Afghanistan in establishing and maintaining a secure environment. ISAF troops were authorized to take all necessary measures, including the use of armed force, in the fulfilment of their mission. The lower house of the German federal parliament (*Bundestag*) approved participation in the mission by the German armed forces on 22 December 2001. The German ISAF contingent was assigned the operational areas of Kabul and North Afghanistan, by decision of the *Bundestag* on 28 September 2005.

3. In April 2009, K., then colonel (*Oberst*) in the General Staff, took command of the Provincial Reconstruction Team (PRT) in Kunduz. Operationally, he was subordinate to the ISAF commander and, ultimately, the NATO commander-in-chief (Supreme Allied Commander Europe, SACEUR). Administratively, he was under the *Bundeswehr* Joint Operations Command and, ultimately, the Federal Minister of Defence.

4. On the afternoon of 3 September 2009, a group of Taliban fighters captured two fuel tankers some 15 kilometres south of the town of Kunduz and around eight kilometres south-southwest of the PRT Kunduz camp. As they sought to drive the trucks across the Kunduz River to its western shore, at around 18:15 hours the vehicles got mired in the mud and remained immobilized on a sandbank in the middle of the river, some seven kilometres as the crow flies from the PRT Kunduz camp.

5. At around 20:30 hours, Colonel K. received notification of the capture of the two fuel tankers. A reconnaissance aircraft was deployed and tracked down the vehicles by around midnight. After the aircraft had left the airspace above the sandbank at 0:48 hours as fuel was running low, Colonel K. requested air support from ISAF headquarters at around 1:00 hours. Shortly after, two U.S. F-15 fighter aircraft arrived and, from 1:17 hours, transmitted infrared aerial photographs of the situation on the sandbank in real time to the operations centre in Kunduz camp, where Colonel K. was located. On the instructions of the flight control centre, the aircraft initially stayed on the sidelines, but maintained constant radio contact with the forward air controller (Joint Terminal Attack Controller, JTAC). In parallel, the PRT commander received repeated confirmation from a military informant – via a liaison officer – that only insurgents and no civilians were present on the sandbank. At around 1:40 hours, Colonel K. gave the order to deploy weapons. Thereupon, the fighter aircraft dropped two 500-pound bombs. The two trucks were destroyed and numerous people who were in the vicinity of the vehicles were killed or injured. Among them were civilians.

6. The plaintiffs claimed that the bombardment was carried out in breach of international humanitarian law, as the presence of civilians was recognizable to the PRT commander. Plaintiff 1, an Afghan farmer, asserted that he lost two sons in the air strike. He is seeking remedies and reparation payments in the amount of 40,000 Euros. Plaintiff 2, who lives in a village near Kunduz, is demanding 50,000 Euros in maintenance payments, as her husband and the father of their six children was killed in the raid.

7. The Regional Court dismissed the case. The plaintiffs' first appeal was unsuccessful. After the Higher

Regional Court allowed them to appeal (on questions of law only), they pursued their cause of action.

Reasons for the Decision

[...]

I.

9. The court of first appeal [...] essentially explained its reasoning as follows:

10. International law provides no direct right of individuals to bring a claim for compensation. It remains the practice under this body of law that only the State of nationality of the aggrieved person can make secondary reparation claims for acts committed by a State against foreign nationals in breach of international law. There is, in particular, no basis for individual claims for reparation under Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 [...] or Article 91 of Protocol I additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (P I) [...]. Individual claims can also not be based on customary international law or Article 25 (2)(2) of the German Basic Law.

[...]

12. [...] The plaintiffs' claim fails in any case because the PRT commander committed no culpable breach of duty. On the basis of the findings of the Regional Court, bindingly made pursuant to Section 529 (1)(1) of the German Code of Civil Procedure, Colonel K. neither culpably violated the prohibition of attacks against civilians (in particular Article 13 (2)(1) of Protocol II additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (P II) - [...]) nor acted in breach of the international law obligation to verify the military nature of the objective (Article 57(2)(a) (i) P I). The two captured fuel tankers and the Taliban fighters present nearby represented legitimate military targets. The PRT commander took all feasible verification measures in the specific planning and decision-making situation. From the decisive *ex ante* perspective of the commander, it was objectively not recognizable that civilians in addition to the Taliban fighters were present in the target area. The rules of engagement issued by the ISAF commander are immaterial in determining any claims for compensation by the plaintiffs. These and other rules of engagement issued by ISAF, NATO or the German armed forces establish no official duty intended to protect third parties. Since the presence of civilians in the target area was not to be expected from the point of view of a commander in the position of Colonel K. who was objectively acting according to his duty, there was also no (culpable) breach of the obligation to spare civilians (Article 57(1),(2)(a)(ii) P I), the principle of proportionality (Article 57(2)(a)(iii) P I), the obligation to give warning (Article 57(2)(c) P I) or the prohibition of indiscriminate attacks (Article 51(4),(5) P I).

II.

[...]

15. 1. The lower courts rightly proceeded on the assumption that the plaintiffs could make no direct claim for remedies or reparation payments against the defendant under international law.

16. (a) There is still no general rule of international law entitling individuals to claim damages or redress for violations of international humanitarian law. Despite steady advances in the field of human rights protection, leading to the recognition of a partial subjectivity of individuals under international law and the establishment of agreement-based procedures for individual complaints, there has been no comparable development with regard to secondary claims. Compensation claims for acts committed against foreign nationals by States in violation of international law can essentially still only be made by the State of nationality [...]. In the case of agreements under international law, the liability obligation is confined to the international law relationship between the States involved. It exists only between the contracting parties and differs from the primary right of the persons concerned to compliance with the prohibitions of international humanitarian law [...]. According to this still valid conception of international law as an interstate law, the aggrieved individual is accorded international protection by the State of nationality asserting its own right to compliance with international law with regard to its nationals by means of diplomatic protection [...].

17. b) In accordance with these principles, the plaintiffs can also not base any claims for remedies or reparation payments on Article 3 of the Fourth Hague Convention [...] or Article 91 of Additional Protocol I of 8 June 1977 [...]. Although these treaties establish a special liability regime under international law for violations of international humanitarian law, they do not justify individual claims for remedies or reparation. The general international law principle that a liability obligation exists only between the contracting parties is thus reinforced [...].

[...]

19. 3. The court of first appeal also rightly rejected the plaintiffs' claim for damages under [national law].

20. (a) The national (German) Statute on liability of the State is not applicable to damage caused to foreign citizens by the armed foreign deployment of German forces.

21. aa) The "exclusive nature" of claims settlements under international law does not, however, preclude any individual ("civil") demands for redress by the aggrieved persons under national law. The basic principle of diplomatic protection by the State of nationality does not rule out claims granted to the aggrieved party under the national legislation of the violating State outside its international law obligations, and which exist alongside the claims of the State of nationality under international law ("parallelism of claims" rather than "exclusivity of international law"). Thus, the State in breach of international law remains at liberty to grant the

injured person's claims under its own national law [...]. There is also no rule of customary international law that compensation arrangements related to the consequences of war can only be made in the context of international agreements, in particular peace treaties, or that existing agreements on such compensation are exhaustive [...]. However, German national legislation gives no right to individuals to compensation for damage resulting from combat operations by German soldiers abroad.

[...]

24. (2) The [...] opinion that the German Statute on liability of the State can essentially not be applied to damage caused by fighting views [...] the liability regime under international law as a *lex specialis* with respect to national law [...]. International humanitarian law thus prevails over the national Statute. Armed hostilities constitute a state of exception under international law, which largely suspends the legal framework valid in time of peace [...]. The (globally unprecedented) awarding of public liability claims in the context of an armed conflict would unduly restrict the Federal Republic of Germany's freedom to act in the field of foreign policy and, ultimately, its capacity to form alliances [...]. The national courts have no power to close a (supposed) loophole in the Statute on liability through the interpretation of ordinary legislation. Only the parliamentary legislator can extend the scope of application of the rules of State liability [...].

29. (a) [...] According to the traditional understanding of State liability and international law, there was legally speaking no doubt, until the end of the Second World War, that military operations abroad were exempt from the State liability rules of the time [...] and that the consequences of armed conflicts were to be compensated within the "State to State relationship" [...].

[...]

30. (c) There has been no subsequent legislation extending the application of State liability to military combat missions abroad. [...]

[...]

34. (3) A number of systematic considerations inherent to the liability regime under international law also speak against the applicability of the German (national) State liability Statute with respect to combat operations by the German armed forces abroad. In particular, the two additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 on the protection of victims of international (P I) and non-international (P II) armed conflicts lay down a detailed body of rules. At the level of primary norms, these comprehensively guarantee the protection of the civilian population (in particular Article 48 et seq. P I, Article 13 et seq. P II) and, in terms of secondary norms, they regulate the liability consequences as follows, namely that the conflict party is responsible for all acts committed by the members of its armed forces and, in the case of violations of international law, is liable to pay compensation to the victim's State of nationality (cf.

Article 91 P I and Article 3 of the Fourth Hague Convention of 18 October 1907), which in turn grants diplomatic protection to its injured nationals. The Federal Republic of Germany accepted this liability when it agreed to the Additional Protocols to the Geneva Conventions [...]. When one further considers that the specific situation prevailing in the context of armed foreign deployments differs significantly from the purely national constellations for which the institution of State liability was originally created, then there is a very strong argument for viewing the liability regime under international law as a more specific regulation compared to the general State liability law [...].

[...]

37. In light of the development and codification of international human rights protection since the Second World War, there is currently no compelling need to 'parallel safeguard' compliance with the rules of international humanitarian law by granting individuals a right to State liability claims. International law now contains numerous primary rules for the protection of the civilian population and "flanking" provisions for the punishment of violations by criminal prosecution and compensation for damage at the intergovernmental level (in particular Article 48 et seq., Article 85 to 91 P I, Article 13 et seq. P II). [...]

38. (b) [...] In this connection, it should also not be overlooked that the risk of a hardly assessable liability could lead to a reduction in or even a complete end to humanitarian armed deployments by the German armed forces [...]. In the eyes, for example, of NATO partners whose national legal systems do not provide for individual claims to compensation for violations of international humanitarian law by their armed forces [...], the German armed forces would be limited in their ability to form alliances and take part in combat missions, because of the Damocles sword of – joint and several – public liability hanging over them [...].

[...]

46. bb) On the basis of the legally flawless findings of the lower courts, the PRT commander committed no breach of official duty in the sense of a specific (culpable) violation of the rules of international humanitarian law protecting the civilian population. The fuel tankers destroyed in the air strike and the Taliban fighters killed in the process represented legitimate military targets (see Article 50 (1)(1) P I in conjunction with Article 4 (A)(1),(2),(3) and (6) of the Third Geneva Convention [...] and Article 52 (2)(2) P I). The PRT commander, Colonel K., took all feasible verification measures in the concrete planning and decision-making situation. He therefore had no (objective) reason to suppose that, in addition to (armed) combatants, civilians protected under international humanitarian law were present in the immediate vicinity of the seized trucks. There was thus no breach of official duty. If for practical reasons a soldier is unable to foresee or avoid a violation of international law, he commits no breach of duty [...].

47. (1) The complaint made in the second appeal is unsustainable, namely that the court of first appeal applied the wrong standard in examining the means deployed on the basis of international humanitarian law

(in particular Article 13 (2) P II), as it failed to recognize that, according to the defendant's own account, the destruction of the fuel trucks was the sole aim of the bombardment, and not combating the Taliban.

48. The fact that the armed Taliban present in the immediate vicinity of the trucks they had captured were members of an organized armed group that was party to the armed conflict is obvious and also not called into question by the second appeal. It is clear from the Federal Public Prosecutor's order for withdrawal of prosecution, included by the defendant into its statement of defence, that the PRT commander intended the two fuel tankers to be destroyed by the bombardment, and that he expected that the Taliban present nearby would be hit as well. He expected in particular that the leaders among them would be hit. By eliminating them, he anticipated a tangible weakening of the insurgent organization in Kunduz province. The radio communication between the flight control centre and the pilots of the fighter aircraft, as extensively reproduced by the plaintiffs, backs this up. Under Timecode 20:48:01, the air operations officer confirmed that the people present near the trucks were also targets ("vehicles and the several individuals around are our target"). Moreover, the defendant rightly pointed out in its response to the second appeal that the plaintiffs themselves stated at first instance that the use of firepower was directed at the insurgent Taliban and the trucks captured by them. The court of first appeal thus correctly assumed that the PRT commander considered and selected both the captured trucks and the Taliban present nearby as a legitimate military target.

[...]

50. (2) (a) International humanitarian law prohibits attacks against the civilian population as such or individual civilians (Article 51 (2)(1) P I, Article 13 (2)(1) P II). In addition, attacks against a military objective are prohibited if the civilian damage to be expected at the time of the order to attack is disproportionate to the concrete and direct military advantage anticipated (Article 51 (5)(b), Article 57 (2)(a)(iii) P I). This obligation to avoid excessive civilian damage is a specific military proportionality clause, according to which collateral damage such as the death of civilians should not be out of all proportion if the military advantage (e.g. weakening of enemy troops or their weapons), applicable even when the advantage is only short-term and not conflict-determining [...]. In addition to the obligation to maintain military proportionality comes the requirement to use the most moderate means, thus weapons that can also affect civilians must be used as sparingly as possible and after taking all feasible precautions (Article 57 (2)(a)(ii) P I). According to Article 57 (2)(c) P I, effective advance warning must be given of attacks which may affect the civilian population. This obligation is, however, subject to the condition that the prevailing "circumstances" do not prevent it. International humanitarian law thereby acknowledges the legitimacy and military necessity of surprise attacks [...].

51. The general obligation to take precautionary measures (see Article 57 P I) requires, above all, a thorough verification of the (military) situation and battlefield. The authorities planning and commanding the operation must endeavour to exhaust all available means of reconnaissance and communication in order to provide

certainty of the military nature of the objective (see Article 57 (2)(a) (i) P I [...]).

52. These principles, laid down in particular in Articles 51 and 57 P I, apply not only to international armed conflicts. They are also part of international humanitarian law in non-international armed conflicts (see also common Article 3 (1)(1)(a) of the Geneva Conventions of 12 August 1949 [...]).

53. (b) In determining whether a (culpable) violation of international humanitarian law has occurred, the duty to exercise care is measured not against the *ex post* point of view. Instead, it depends on the – facts-based – expectations at the time of the military operation [...]. That military decisions in a battle situation are to be judged from the commander's *ex ante* perspective ensues from the wording of the provisions protecting the civilian population in Protocol I additional to the Geneva Conventions. It thus depends whether, during the planning and execution of an attack, losses among the civilian population are “to be expected” (cf. Article 51 (5)(b), Article 57 (2)(a)[iii], (b) PI). A military commander can only make the assessment required under Article 57 PI (Precautions in attack) based on the knowledge available to him during the planning and execution of the attack. The commander can not be blamed for circumstances which he neither knew nor could know, but which came to light only subsequently [...]. The German federal government (with the agreement of the legislature) issued a corresponding declaration of interpretation upon ratification of the Additional Protocols to the Geneva Conventions [...].

54. (c) Contrary to the opinion of the second appeal, the court of first appeal was legally correct in assuming that PRT commander Colonel K. took all feasible verification measures in the concrete planning and decision-making situation. According to the findings of the lower courts, which were not questioned by the second appeal, the two fighter aircraft observed the situation on the sandbank non-stop for at least 20 minutes, and the infrared images produced by the on-board cameras were transmitted in real time to the flight control centre and analysed there. In addition, the PRT commander checked by telephone seven times with a military informant reporting on the situation on the ground that the people visible on the infrared images were insurgents and not civilians. The PRT commander also had the assessment of the fighter pilots at his disposal as a further source of information. All of the above gave no evidence of the presence of civilians in the target area. There was also no indication that the civilian drivers of the captured trucks might still be in the vicinity. Further precautionary measures to protect the civilian population within the meaning of Articles 51, 57 P I therefore did not need to be considered.

55. (aa) The complaint made by the second appeal is not upheld, namely that the court of first appeal did not take into account that the fighter pilots, because of serious doubts about the combatant status of the people present around the fuel tankers, (five times) strongly recommended a “show of force” (low flight in warning). However, the transcript of radio communications between the aircraft control centre and the pilots, referred to by the plaintiffs, does not show that the pilots had any doubts about the message from the control centre, based on information provided by the intelligence informant, that the people near the trucks were Taliban. Since according to all available sources of information the presence of civilians was not to be expected, there

was no need for Colonel K. to react to the proposal to warn the people present near the trucks with a "show of force". What is more, the concrete circumstances argued against such a warning, as it would have thwarted the legitimate military objective of combating the Taliban members present (see Article 57 (2)(c)(2) P I).

[...]

58. (cc) The NATO rules of engagement for the deployment of ISAF forces, also cited by the second appeal, lead to no different assessment. The appeal does not elucidate, and it is otherwise not evident, how the rules of engagement, aimed above all at ensuring the expediency of military action and regulating decision-making powers, went beyond the requirements of international humanitarian law and opposed the air strike. Rules of engagement serve only – like the Federal Defence Ministry's Central Service Regulation 15/2 – to ensure compliance with the rules of international humanitarian law in armed military operations.

[...]

Discussion

I. Classification of the Conflict and Applicable Law

1. (Paras 1-7)

- a. How would you classify the situation in Afghanistan in 2009? Which rules of IHL apply? (GC I-IV, Art. 3; P II, Art. 1)
- b. Does Germany's involvement in Afghanistan influence the classification of the conflict? What rules of IHL apply to Germany in Afghanistan?
- c. Does the classification of the conflict as international or non-international matter in determining whether IHL was violated in this case? Why/Why not?
- d. (Para. 46) Does the reference to Art. 4 of GC III and Art. 50 of P I imply that the IHL of IACs applies? Is the substance of those provisions equally applicable in NIACs? Were members of the Taliban combatants? Would they have benefited from POW status if captured by German forces?

II. Conduct of Hostilities

2. (Paras 4-5) Who and/or what was targeted in this incident?

3. (Para. 50) Were the Taliban fighters civilians? Under what circumstances do civilians lose protection from attack in armed conflicts? (P I, Arts 50 (1) and (2), 51(2) (1) and (3); P II, Art. 13 (2)(1) and (3); CIHL Rules 5 and 6.)

4. (Paras 46, 48) Does the fuel truck qualify as a military objective? Why/Why not? (P I, Art. 52 (2); CIHL, Rule 8)

5. (Paras 46, 53) According to the Court, did the commander respect the rules of proportionality? Does it depend on the number of civilians dead/injured? From what perspective must the proportionality evaluation be made? *Ex ante* or *ex post*? Which is the criteria that the German Court applies? According to the Court,

did the commander have to make any proportionality evaluation? (P I, Arts 51 (5) (b) and 57 (2) (a) (iii); CIHL Rule 14)

6. (*Paras 51, 55*) According to the Court, did the commander take all feasible precautionary measures? From what perspective should this be judged? Which precautionary measures did the commander take? Which other measures could he have taken? Should a “show of force” have been performed as a precautionary measure? Why/Why not? (P I, Art. 57 (2) (a) (i); CIHL, Rules 15, 16 and 20)

III. Implementation and Enforcement of IHL

7. (*Paras 10, 16-17*) Under IHL, who has the legal duty of reparation? Can an individual claim remedies for violations of IHL or receive reparation payments for IHL violations? Can individuals base their claims on Art. 3 of the Hague Convention? What arguments does the Court make? (P I, Art. 91; Hague Regulations, Art. 3; Second Protocol to the Hague Convention on Cultural Property, Art. 38; Rome Statute, Art. 75; ILC Draft Articles on State Responsibility, Art. 33(2); CIHL, Rule 150)

8. (*Para. 16*) According to the Court, only States can make claims for IHL violations. Does such a rule exist in IHL? What is the reason for this rule? Do you believe this rule is outdated? Could Afghanistan claim compensation from Germany in this particular case? (P I, Art. 91; Hague Regulations, Art. 3; Second Protocol to the Hague Convention on Cultural Property, Art. 38; ILC Draft Articles on State Responsibility, Art. 31; CIHL, Rule 150)

9. (*Paras 21-24, 36*) If there is no claim for direct compensation under IHL, can a claim still be based on the violating State's national law? Why can the victims in this case not ask for compensation under the normal German Statute on liability of the State? Because its conditions were not fulfilled or because it did not apply? Does IHL exclude the applicability of such a statute? Does German law exclude its applicability? Is the reasoning of the Court convincing?

10. Why did the victims not invoke their right to life combined with their right to a remedy under Art. 13 of the European Convention on Human Rights?

11. (*Paras 12 and 58*) Can claims for remedies be based on the ISAF Rules of Engagement? Why not?

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