

Poland, Supreme Court, Nangar Khel Incident, the Judgment of the Supreme Court of Poland of 17 February 2016

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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.

A. Factual Background

[SOURCE: Milena Serio, 'Polish Soldiers Acquitted of War Crimes for Nangar Khel Incident', *JURIST – Academic Commentary*, 20 APRIL, 2015, available at: <https://www.jurist.org/commentary/2015/04/milena-serio-war-crimes/>]

[1] On August 16, 2007, a Polish subdivision was sent to a site in eastern Afghanistan where an ISAF vehicle was struck by a landmine.

[2] Upon arriving to the location, the soldiers fired mortar shells into the Nangar Khel village, killing six civilians and severely wounding another three.

[3] The issue of applicable law turned on the classification of the conflict in Afghanistan. Most scholars agree that the conflict between the International Security Assistance Force and the Taliban amounted to a non-international armed conflict to which relevant principles of international humanitarian law apply.

[4] In 2009, four officers and three privates were charged in the Warsaw Military District Court with war crimes over the incident. The public prosecutor accused the seven soldiers of having violated:

- Art. 23(b) and 25 of the Hague Convention on the Laws and Customs of War on Land (Hague IV) of

October 18, 1907;

- Art. 3(1)(a) of the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War;

- Art. 4(2)(a) & Art. 13(1) & Art. 13(2) of the Additional Protocol II to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts.

[5] The decision by the prosecutor to invoke Hague IV can be seen as controversial, as the convention applies to international armed conflicts. On the other hand, Art. 3(1)(a) of the Fourth Geneva Convention and the Additional Protocol II to the Geneva Conventions both apply in times of non-international armed conflicts.

[6] Another issue arises with regard to the question whether violations of the principle of distinction enshrined in Art. 13(2) of the Additional Protocol II amount to war crimes within the paradigm of a non-international armed conflict. Additional Protocol II lacks specific provisions which would render the violation of the principle of distinction a war crime. However, the *Galic* case of the ICTY held that an attack against civilians can constitute a war crime by virtue of customary law applicable to non-international armed conflicts. Thus, the question whether Polish soldiers committed war crimes by violating the principle of distinction turns on the accuracy of the differing factual accounts of the incident as well as on the interpretation of applicable international humanitarian law.

[7] The defendants pleaded innocent, blaming the attack on faulty weaponry as well as portraying the attack as a response to enemy fire. All seven defendants were acquitted by the Military District Court in 2011 for the lack of evidence of deliberate killing.

[8] In 2012, the case was examined by the Supreme Court of Poland for the first time. It resulted in the acquittal of the Captain O. C., the highest of rank among the defendants who issued the original military order. The Supreme Court also upheld the acquittals of two Privates involved in the incident.

[9] The case of remaining four soldiers was reopened by the Warsaw Military District Court. In 2015, the Court acquitted four Polish soldiers of the charges of war crimes. The soldiers were found guilty of failing to correctly carry out a military order, which is an offense under Polish law.

[10] The ruling was appealed both by the defense and the prosecution and the case of four soldiers was reexamined by the Supreme Court of Poland.

B. The Judgment of the Supreme Court of Poland of 17 February 2016

[SOURCE: Nangar Khel Incident, Excerpts from the Judgment of the Supreme Court of Poland of 17 February 2016]

[...]

[1] The key issue in this case concerns the wording of the order given to the defendants, namely Second Lieutenant ŁB, Warrant Officer AO and Master Sergeant TB, by their commanding officer. The Military Circuit Court established that, apart from the defendants themselves, no other persons – in particular none of the other soldiers present when the order was issued – were able to definitively affirm that an order had been given to open fire on the village of Nangar Khel. Witnesses had no doubts that the task of the platoon led by Second Lieutenant ŁB had been to: go to the site where a Polish military vehicle had been damaged in an attack (another unit was supposed to retrieve the vehicle and bring it back to base), provide reinforcement to the Polish and United States army soldiers stationed close to the village of Nangar Khel, search the hills to the west of V road in the direction of K, towards which the attackers were thought to have fled, and – in the event of danger – to engage them in combat and demonstrate military strength by using mortar M98 – although that was a task for a different unit, led by Second Lieutenant AP. To establish these facts, the Circuit Court examined statements from a dozen or so witnesses and concluded that their testimonies not only corroborated the statements provided by Major OC but were also consistent and featured no significant discrepancies.

Contrary to the defendants' claims, the Circuit Court did acknowledge and address the (small number of) alternative witness statements submitted and the explanatory statements from the defendants themselves indicating that, on the day in question, they had followed orders given by their commanding officer. The Circuit Court rejected these claims, referring not only to credible witness statements but also, and most importantly, the multiple substantive changes made (in response to new circumstances) to the explanations provided by Second Lieutenant ŁB, Warrant Officer AO and Master Sergeant TB, and drawing attention to their conflicting and inconsistent statements. A good example of such inconsistencies was the fact that, in the immediate aftermath of the incident at Nangar Khel, the defendants gave an entirely different reason for their use of weapons: they had opened fire in response to an enemy attack. When clear evidence to the contrary, including statements from numerous witnesses, revealed this story as less than credible, the defendants then adapted their statements to claim that they had followed orders given by Major OC.

[...]

[2] Having considered the defendants' allegations, the Supreme Court is of the opinion that the Circuit Court applied the correct legal reasoning and that the arguments put forward by the defence are merely polemical;

[...]

[3] Furthermore, locations (i.e. buildings) to be avoided when opening fire were marked on the map in red. The fact that the No Fire Areas had not been explicitly plotted onto the map is completely irrelevant to the actions of the defendants, as they were not supposed to use the mortar (or only under very specific conditions, which did not arise in this case), and the mortar that was supposed to be used belonged to the platoon led by Second Lieutenant AP, who did not order his men to open fire.

[...]

[4] Alleging an infringement of article 7 of the Code of Criminal Procedure by the Circuit Court, the defence counsel for Second Lieutenant LB and Warrant Officer AO accused the Circuit Court of failing to take into consideration the fact that both mortar LM60 and the corresponding ammunition were faulty, primarily because the shells fired had too broad a range of impact. The defence counsel for Second Lieutenant LB based this claim on the opinion of experts (without providing more specific details) and accused the court of “filling in gaps” in the evidence available with “its own ideas and conclusions”. Meanwhile, the defence counsel for Warrant Officer AO referred to witness statements from PK and MB, who had allegedly indicated that shells from the first round fired from the mortar fell on the hills behind the village, while one shell fell on buildings.

The Circuit Court analysed in detail the circumstances under which the mortar had been fired and established, based on the opinions of experts and the testimonies of numerous witnesses, that mortar shells had been fired at the village deliberately, rather than by accident. The experts excluded faulty weaponry or ammunition that could significantly disrupt the trajectory of the mortar shells. It should be noted that during the trial neither side commented on or raised objections to the expert opinions submitted or moved to call other expert witnesses.

Witnesses called by the defence were unable to provide any conclusive proof that either the mortar or the ammunition had been faulty. Indeed, the witnesses did not comment on that issue at all, as there is no way they would have known about it; they only stated that they saw shells fall on the hillside and that one shell may have fallen on the village. The defendants' claim that the shells fired from the mortar had dispersed over a large area because both the weapon and the ammunition were faulty (no information was provided on the type of fault involved) failed to take into account the fact that, after a few rounds were fired, whereby the shells landed on the hillsides, the range of the mortar was recalibrated on the instructions of Master Sergeant TB to 1100 metres, after which the shells began to land on village buildings. This was established by ballistics experts on the basis of their own calculations and documentation prepared at the site of the incident in the form of sketches and inspections, by testing weapons and ammunition, and by firing of test shots.

[...]

[5] The Supreme Court is unconvinced by the defence counsel's claim that Captain OC's order to the platoon

to “sweep the hills with mortars” indicated that, as a display of military force, two mortars were to be used. However one might interpret the statements made, this much can be said with certainty: Major OC did not mention shelling the village.

[...]

[6] All three defendants were indicted for violating military discipline by failing to properly carry out an order, further aggravated by the fact that they had acted together to commit a crime under Article 343(2) of the Criminal Code. Moreover, Master Sergeant TB was also indicted under Article 354(2) of the Criminal Code for the negligent handling of army weapons and, as a consequence, causing unintentional harm.

The Circuit Court’s verdict, which is the Supreme Court fully upholds, was that the defendants were not only guilty of insubordination by failing to carry out a direct order given in person by their commander, Major OC, but were also in breach of general military regulations governing the actions of all soldiers in the Polish NATO contingent in Afghanistan. These regulations were presented and discussed in detail in the explanation for the judgement handed down by the Circuit Court. The order, which was issued orally to the defendants at the tactical operations centre, was clear and in no way mentioned either the place or the circumstances in which the weapons were subsequently used. Equally clear are the regulations concerning the Polish military contingent, stemming from the orders of its commander.

The Circuit Court indicated in the reason for its verdict was that the defendants, after arriving at the site of the incident, had acted arbitrarily and contrary to both the order given by Major OC and the applicable rules of conduct, particularly with regard to the use of weapons. Most significantly, they failed to carry out reconnaissance of the area in the direction indicated by their commander. Moreover, they decided to order the use of a mortar in a situation where their platoon faced no real threat. These facts, pivotal to the case, are indisputable in the light of existing evidence.

The defence for Second Lieutenant ŁB claimed that Major OC had “given him freedom of action” in carrying out his duties. However, it was clear that such decision-making applied only under specific circumstances, namely in the event of an immediate threat to his platoon and that such circumstances never arose in this case – as is indisputably clear from the available evidence.

[...]

[7] The Supreme Court fully upholds the ruling of the Military Circuit Court and does not consider the penalties imposed to be excessively severe. Indeed, they are commensurate with the seriousness of the acts committed and take full account of both aggravating and mitigating circumstances. The latter included, first and foremost, the defendants’ substantially reduced degree of accountability for their conduct (with the exception of Warrant Officer AO) owing to the conditions and circumstances under which they were serving and the events that had occurred immediately prior to the incident in question, namely two attacks on Polish

soldiers, one of whom had died, as well as the impeccable conduct of the defendants to date, both in and outside of the army. The Circuit Court considered these circumstances as extremely important with regard to sentencing. However, a number of significant aggravating circumstances prevented the Circuit Court from handing down a more lenient sentence. The Circuit Court noted that the defendants had grossly violated military discipline by failing to properly carry out an order given by the company commander.

[...]

[8] Given the significantly conflicting descriptions of what was said by Warrant Officer AO, the Circuit Court was correct to reject the claims made during the appeal regarding the alleged direct or potential intentions behind the order given, as the evidence – consisting of witnesses' testimonies – presented by the prosecution during the appeal, was ambiguous. Neither is there any convincing evidence that such intentions are revealed by the fact that geographic coordinates, which the prosecution presumes were made up, were communicated to another platoon. The case presented by the prosecution in the appeal must therefore be treated as an “author’s version” of events put forward by the prosecutor; while this version cannot be entirely excluded, neither can it be definitively confirmed on the basis of available evidence. Thus, the Military Circuit Court acted in accordance with the principle expressed in Article 5(2) of the Code of Criminal Procedure, particularly in view of the opinion expressed by the ballistics expert that if the target of the mortar fire had indeed been the aforementioned bridgehead, 16–20 out of the 24 mortar shells fired would have fallen onto it, instead of only a few.

Discussion

I. Classification of the Conflict and Applicable Law

1. (Document A, paras [1]-[6])

a. What type of armed conflict did the situation in Afghanistan represent? Which rules of IHL applied?

b. Given the classification of the armed conflict, do you agree with the prosecutor’s decision to press charges under articles listed in para. [4]? Are violations of those provisions necessarily war crimes?

II. Conduct of Hostilities

2. (Document A, paras [3]-[6] ; Document B, paras [6]-[8])

- a. What are the applicable IHL provisions which protect civilians and civilian buildings from being target of attacks? (GC I-V, Art. 3; P II, Art. 13; CIHL, Rules 6-10)
- b. What are the principles of IHL applicable to the conduct of hostilities? How can they be applied in the current case? (GC I-V, Art. 3; P II, Art. 13; CIHL, Rules 1-21)

III. Defenses

3. (Document B, paras [1]-[6])

- a. Would superior orders constitute an absolute defence under the Rome Statute? (See: Art. 33 of the Rome Statute)
- b. Can mistake of fact or malfunction of weaponry be invoked as ground of defence under the Rome Statute? (See: Art. 32 of the Rome Statute)

IV. Mens Rea

4. (Document B, para. [8]) What is the mental element necessary to convict a person of war crimes? How can you establish *mens rea* in a situation like this? (See for example: Art. 25 of the Rome Statute)