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*Cases – Mens rea required for the war crime of conducting disproportionate attacks and the jurisdiction of the federal Prosecutor for general crimes under the German Criminal Code committed in the context of an armed conflict*

☛ 2 BvR 987/11 (Constitutional Court, 19 May 2015)

On 4 September 2009, Colonel Klein, the military commander of the German provincial reconstruction team of the International Security Assistance Force ('ISAF') coalition in Kunduz, Afghanistan, authorised an air strike against two fuel tankers that were captured by Taliban fighters. The air strike resulted in many deaths, among them several civilians who had arrived to bottle some of the fuel in the tankers.

In October 2010, the federal Prosecutor decided against a continuation of the criminal proceeding, then underway against Colonel Klein, for war crimes under the German Code of Crimes against International Law ('CCAIL'), as well as the general German Criminal Code. He found that the tankers were military objectives because they were captured by Taliban fighters, who presumably wanted to use them as 'driving' bombs against the German troops deployed nearby, which was a common practice of the Taliban. The Prosecutor concluded that the accused did not commit the war crime of directly targeting civilians according to CCAIL Article 11 (1) no 1.

With regard to the war crime of conducting disproportionate attacks, the Prosecutor held that the *mens rea* element was not met. According to CCAIL Article 11 (1) no 3, it is prohibited to carry out attacks when it can be *definitely anticipated* that they will cause death or injury to civilians or damage to civilian objects on a scale disproportionate to the concrete and direct overall military advantage anticipated. Hence, the accused must have been aware of the inevitable consequences (*dolus directus* of the second degree). This requirement was not met in the present case, because the accused had no knowledge of the presence of civilians in the area. The information that he had at hand, obtained through air surveillance and an informant, suggested that only armed insurgents had been close to the target and there had been no reason to doubt the credibility of those sources. Furthermore, Colonel Klein verified the information available to him several times.

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The Prosecutor also concluded that CCAIL Article 8 (1) no 1, which prohibits the killing of persons who are protected under international humanitarian law, was not violated. Article 8 (6) no 2 provides that, in non-international armed conflict, only civilians who are in the power of the adversary are considered protected persons. However, the civilians present at the scene had not been captured by the Taliban fighters and thus did not enjoy special protection status. Finally, the Prosecutor also rejected charges under the German Criminal Code due to a lack of sufficient evidence.

A father of two children who were killed during the incident requested a court review of the Prosecutor's decision not to continue the proceeding. On 16 February 2011, the Higher Regional Court in Düsseldorf rejected the complainant's motion. In the Court's opinion, the application lacked adequate substantiation regarding: the complainant's claims that his 'right to be heard before a court' was violated because he was denied access to certain evidentiary documents; that the Prosecutor's consideration of evidence was defective; and that a reasonable suspicion existed that crimes were committed. On 31 March 2011, the Higher Regional Court in Düsseldorf equally rejected the complainant's subsequent motion against the latter decision.

The Constitutional Court's decision of 19 May 2015 dealt with the complainant's constitutional appeal, which claimed violations of the right of access to judicial proceedings, the right to a fair trial, the right to be heard before a court and the right to effective prosecution<sup>2</sup>. In the Constitutional Court's view, the constitutional rights of the complainant had not been violated.

With regard to the Prosecutor's decision not to pursue criminal charges, the Court found that the Prosecutor had fully complied with the particular requirements for an effective prosecution in homicide cases, as he had fulfilled his investigatory duties adequately and justified his decision comprehensively. The Court decided that the Prosecutor's finding regarding the defendant's lack of the required *mens rea* was not arbitrary and therefore not constitutionally objectionable. In addition, the Court stated that the federal Prosecutor's justification for exercising jurisdiction over general crimes under the German Criminal Code when they were committed in the context of an armed conflict is *prima facie* acceptable and therefore not arbitrary. While the federal Prosecutor's jurisdiction over war crimes under the CCAIL is clearly established by law, his competence under the general Criminal Code has been subject to discussion in German scholarship.<sup>3</sup> With regard to the two decisions of the Higher Regional Court in Düsseldorf, the Constitutional Court concluded that no violation of the rights invoked was given.

*Cases – Individual right to reparations for war damages under international law and German State liability law*

### ☛ Appeal 7 U 4/14 (Higher Regional Court in Cologne, 30 April 2015)

The Higher Regional Court in Cologne ('the Court') passed judgment on an appeal of a decision of the Regional Court in Bonn, which had rejected a claim for reparations by a father who lost two sons and a woman who lost her husband during the above-mentioned air strike by German armed forces in Kunduz on 4 September 2009. The decision confirms the findings of the Regional Court. In accordance with the established jurisprudence of the German Constitutional Court as well as the German Federal Court, the present decision emphasizes that under international law individuals do not have a right to reparations for war damages.

<sup>2</sup> Constitution, arts 1(1)2, 2(1), 3(1), 19(4), 20(3); 103(1).

<sup>3</sup> C Safferling, *Internationales Strafrecht* (Springer, 2011), 327-329.

Particularly, such a right cannot be derived from Article 3 of the *Hague Convention (IV) Respecting the Laws and Custom of War on Land* or from Article 91 of Additional Protocol I<sup>4</sup>. The Court explained that only States enjoy the secondary right to reparations for violations of international law, including international humanitarian law.

With regard to domestic law, the Court confirmed its decision of 28 July 2005, in which it held that an individual generally has the right to seek compensation based on State liability according to § 839 German Civil Code in conjunction with Article 34 of the Constitution for illegal actions of the State during armed conflict. In 2005, the Court justified its opinion by explaining that under modern international law, rights which are generally granted in peace-time are not suspended in time of armed conflict *per se*. While acknowledging that international humanitarian law might modify or partially suspend certain rights under the peace-time regime, the Constitution implicitly stipulates that the German legal system must provide for defensive claims against illegal acts of the State at all times. Therefore, the claim according to § 839 German Civil Code in conjunction with Article 34 of the Constitution is generally applicable to acts during armed conflict. The confirmation of its jurisprudence of 2005 in the present decision is particularly interesting, considering that the Constitutional Court and the Federal Court left this question open in subsequent decisions and the German government explicitly rejects such a claim<sup>5</sup>.

The Court went on to consider whether the requirements of a claim for compensation based on State liability were fulfilled in the given case. Regarding the argument of the respondent that Germany cannot be held liable because the operation was conducted under the ISAF mandate and therefore under the authority of NATO, the Court pointed out that Germany still exercised authority and command to a certain degree. In the end, however, it abstained from deciding on the matter, highlighting that the claim for reparation must be rejected, because other requirements were not met in the present case.

The Court focused on common Article 3 of the Geneva Conventions, to which Afghanistan became a party in 1957, circumventing the need to decide on the questions of whether reference may be made to the provisions of Additional Protocol I (as the conflict in Afghanistan was of a non-international character) and whether the rules of the Additional Protocol II may be taken into account because it was ratified by Afghanistan after the incident. In the Court's opinion, common Article 3 implicitly reflects more specific targeting rules aimed at the protection of civilians, such as the principle of precaution and proportionality as well as the prohibition of indiscriminate attacks. However, the Court found that the claim of compensation must be dismissed, because German State liability law requires that the State's obligations under international humanitarian law must have been violated intentionally or negligently. With regard to the prohibition of directing attacks against civilians, the Court was persuaded that Colonel Klein was not aware of the presence of civilians at the scene. The Court emphasized that the tankers were military objectives due to the fact that the fuel had provided logistical support to the Taliban as a party to the conflict. Furthermore, the Taliban fighters, as members of an organised armed group, were legitimate targets. The Court then focused on the alleged violation of the due diligence obligation to take precautions in attacks. The Court emphasized several times that compliance with the precaution principle must be evaluated from an *ex-ante* perspective and highlighted that the due diligence standard is that of a 'reasonable commander' but varies according to

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<sup>4</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978); *Convention (IV) respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907 (entered into force 26 January 1910).

<sup>5</sup> See below for further discussion.

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the factual circumstances prevailing at the time of the attack. Among other factors, the Court took into account that the target was not situated close to a village and was conducted at night. More generally, it pointed out that with respect to an air strike, a commander cannot verify information in person due to the geographical distance. It concluded that Colonel Klein had done everything feasible when he relied on air surveillance images and the affirmation of an informant with whom he had spoken seven times in order to verify that no civilians were present at the scene. Furthermore, the Court found that he could not have known that civilians were in the vicinity of the target. The claimant's argument that Colonel Klein should have ordered the reconnaissance aircrafts to fly at a lower altitude to gather more precise information was rejected by the Court. In scenarios such as the present one, where the monitored targets are equipped with small arms as well as air defence missiles, flying at a lower altitude was not common military practice due to danger to the aircraft crew. Moreover, the Court held that the fact that the activities were conducted on the ground in an uncoordinated manner did not indicate the presence of civilians, as Taliban fighters generally were not militarily trained.

*Cases – Aiding and abetting war crimes in the Democratic Republic of Congo by exercising high-ranked political functions of a rebel group in Germany*

☛ 5 – 3 StE 6/10 Higher Regional Court in Stuttgart, 28 September 2015

The Higher Regional Court in Stuttgart sentenced the former president of the rebel group Forces Démocratiques de Libération du Rwanda ('FDLR') to 13 years' imprisonment for being a ringleader in a foreign terrorist organization and aiding and abetting war crimes in the Democratic Republic of Congo. The Court found that the accused aided and abetted the commission of war crimes through exercising his political function as president of the FDLR in Germany. Unfortunately, the full judgment has not been delivered in written form at the time of writing.

*Government Policy – Individual right to reparations for war damages*

☛ Government Response to a Parliamentary Question concerning the reparation of individual victims in Afghanistan, 9 March 2015

The government answered several questions concerning reparation paid to individuals who suffered losses in relation to the German military engagement in Afghanistan. In the introductory part of the document, to which reference is made several times in response to specific questions, the government states that in neither international humanitarian law nor German State liability law does a right of the individual to compensation for war damages exist.

*Government Policy – Obligation of combatants to distinguish themselves from civilians in cyber space*

- ☛ Government Response to a Parliamentary Question concerning the obligation of combatants to distinguish themselves from civilians in cyber space
- ☛ Academic Office of the German Parliament (Wissenschaftlicher Dienst des Deutschen Bundestag) Report on the Applicability of international humanitarian law to computer

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network operations and digital warfare (Cyber Warfare), WD 2-300 – 038/15, 24 February 2015

The government responded to a wide range of questions from Parliament concerning the cyber strategy of the Ministry of Foreign Affairs. The government stated several times that international humanitarian law is applicable to cyber activities during armed conflict. Regarding the question of how and to what extent the obligations of combatants to distinguish themselves applies in cyber space, the government explained that in international armed conflict, the armed forces of the German *Bundeswehr* are obligated to wear uniforms. However, it cannot be derived from the obligation of distinction that States must disclose their involvement in or responsibility for cyber activities or the use of cyber infrastructure.

This position is also reflected in a report of the Academic Office of the Parliament on the application of certain rules of international humanitarian law to cyber warfare. Affirming the general application of international humanitarian law, the report firstly focuses on the obligation of combatants to distinguish themselves from the civilian population in international armed conflict. The report states that, according to the government, this obligation fully applies to members of armed forces engaging in cyber operations, but highlights that this position is disputed in scholarship. With regard to objects and war materiel, it concludes that whereas warships and aircraft must fly the flag of their State and indicate their military character, current international law does not stipulate such an obligation for means of warfare such as weapons. Therefore, it is not required that cyber infrastructure as well as malware disclose the responsible party.

### *Government Policy – Prohibition of perfidy in cyber war*

- Academic office of the German Parliament (Wissenschaftlicher Dienst des Deutschen Bundestag) Report on the Applicability of international humanitarian law to computer network operations and digital warfare (Cyber Warfare), WD 2-300 – 038/15, 24 February 2015

The above-mentioned report of the Academic Office of the Parliament on the application of certain rules of international humanitarian law to cyber warfare also focuses on the prohibition of perfidy. It raises the question of whether an email address generally qualifies as a unique identifier, in the sense that the person who receives the email can legitimately conclude that the indicated and actual author correspond. The report concludes that such an understanding should be rejected because of the wide range of possibilities for manipulation and deception in cyber space. Thus, the scope of application of the prohibition of perfidy seems limited in regards to email spoofing. However, the report identifies the following acts as possible violations of the prohibition of perfidy:

- The manipulation of websites of protected entities, such as the Red Cross or the United Nations as well as the misuse of their symbols.
- The manipulation of reconnaissance software of the adversary with the result that it indicates civilian objects as military objectives.
- If a hacker disguises his identity by using technical data indicating a civilian status (eg the use of civil networks).

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*Government Policy – Air and naval blockade as prohibited measures of collective punishment*

- ☛ Government Response to a Parliamentary Question concerning the qualification of the air and naval blockade combined with the air strikes by the Saudi-led coalition as prohibited measures of collective punishment against the Yemeni civilian population, 26 November 2015

The government responded to a wide range of questions from Parliament concerning the military intervention in Yemen by the Saudi-led coalition. In response to the question of whether the air and naval blockade, combined with the ongoing air strikes, constitute prohibited measures of collective punishment against the Yemeni civilian population as a whole, the government explained that only measures intended to exert pressure indiscriminately against a civilian population which is in the hands of a party to the conflict are considered collective punishment under international humanitarian law. Therefore, the measures of the Saudi-led coalition cannot be qualified as collective punishment.

*Government Policy – Endorsement of Safe Schools Declaration*

- ☛ Request by the Parliament to endorse the Safe School Declaration, 20 May 2015

A parliamentary group requested the German government to endorse the Safe School Declaration at the Conference in Oslo on 29 May 2015 and to implement the corresponding Guidelines for Protecting Schools and University from Military Use during Armed Conflict. The German government has not, at the time of writing, taken action in relation to this request.

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