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CURRENT DEVELOPMENTS

Individual compensation reloaded: German governmental liability for unlawful acts in bello

ELISABETH V. HENN — 30 April, 2015

On 30 April, the Appeals Court of Cologne will rule on whether Germany has to pay compensation to victims of an airstrike in Afghanistan. Its judgment is likely to consolidate the new German approach to questions of compensation for armed activities which – given the increasing relevance of litigation about armed conflicts – merits a brief treatment.

Background

In 2009, a German colonel ordered an airstrike against two fuel trucks that were stuck on a sandbank near the NATO camp in Kunduz/Afghanistan. Due to the tense situation in Kunduz, he assumed that the fuel or the trucks could be used for a bomb against ISAF units and thus represented an imminent threat. The airstrike caused the death of 142 individuals. Because many among the victims were civilians, it has become the most controversial modern operation involving the German Armed Forces (leading, amongst other things, to the resignation of a minister of government, criminal investigations and the establishment of a parliamentary investigation).

Seeking compensation for damages on the basis of domestic rules of governmental liability (*Amtshaftung*), victims filed a claim against the Federal Republic of Germany. In 2013, the Court of First Instance in Bonn rejected the claim (for details see my article in the JICJ). Although it held that governmental liability in principle applies to acts *in bello*, the Court concluded that the colonel did not breach his official duty to comply with international humanitarian law. A press release, summarizing the oral proceedings and the taking of evidence issued in March, indicates that the Cologne Appeals Court intends to uphold the result of the Court of First Instance.

As I have argued elsewhere (see JICJ article, at p 631-633), the legal assessment made by the Court of First Instance is questionable in several respects. Most importantly, it seems that the colonel did not comply with the customary rule encompassed in Art. 57 (2), a (i) AP I. He failed to do everything feasible to verify that the objectives of the attack were neither civilians nor civilian objects. Certainly, the level of precaution necessary depends on the specific circumstances of the attack. However, in this case the fact that trucks had

been stuck for seven hours and thus did not represent an imminent threat leading to time pressure, was not sufficiently taken into account. The adoption of the first instance court's assessment by the Court of Appeals would therefore be problematic.

While the two courts' interpretation and application of rules of international humanitarian law is highly fact-dependent, a preliminary aspect is of more general relevance, and highlights the particular approach obtaining under German law: on what basis can Germany be held responsible, before domestic courts, for alleged violations of international humanitarian law?

Governmental liability in context

Under Section 839(2) of the Civil Code in conjunction with Article 34 of the German Basic Law German public authorities can be sued for damages caused by the violation of an official duty. However, only recently have German courts accepted that state conduct during armed conflicts can form the basis of claims for governmental liability under domestic German law. Matters are not entirely clear, though and much depends on the law applicable at the time of the alleged violation. For that reason, claims of Second World War victims have failed before German courts, while claims of war victims who suffered harm after the Reunification are more likely to succeed.

Germany has passed a number of domestic laws relating to the compensation of victims of the Nazi regime. However, claims of Auschwitz internees, former Italian military internees, and survivors of a massacre by a SS-unit in Distomo (Greece) who were not eligible for compensation under these laws, always failed. Neither the rules under international humanitarian law, nor the German law of governmental liability in force during the Third Reich were interpreted at the time of the violation (§ 56-69) as providing for an individual right against unlawful sovereign acts *in bello*. In its *Distomo* ruling of 2006, the Federal Constitutional Court did not decide definitely whether such a reading could be reconciled with the need for effective compliance with IHL. It left this question open because, in its assessment, the Greek victims that had brought proceedings could not invoke rules of governmental liability against Germany. At the time of the violation, liability was contingent on a reciprocal commitment on behalf of the victim's home state which Greece had not made. From a victim's perspective, attempts to obtain compensation for Nazi injustice thus can hardly be said to have been successful.

In adjudging on damages claims based on conduct during more recent armed conflicts, German courts have taken a different approach. Victims of a NATO airstrike on a bridge in Varvarin (Kosovo) sued Germany for simply accepting that the bridge was a valid military target for NATO, even though no member of the German Armed Forces participated in the actual airstrike. At all levels of jurisdiction these claims were dismissed. However, in 2005, the Appeals Court in Cologne accepted in principle that state conduct during armed conflicts could form the basis of claims for governmental liability (§ 107-122). The court held that, in order to be effective, the law of war needs to be backed up by an enforcement mechanism that sanctions breaches. In reaching this result (which for German courts was a decisive watershed) the Appeals Court in the *Varvarin case* drew on general considerations about the interaction between international law and the German legal order. It noted that the provisions of the German Basic law, which places human dignity and fundamental rights at its centre, govern the conduct of state agents abroad. International legal obligations binding upon Germany – including those deriving from international humanitarian law – permeate the domestic legal order. Under Art. 25 of the Basic Law international customary law is directly

applicable within the German legal order. The increasing protection of the individual through the 1977 Additional Protocols, the (international) prosecution of human rights crimes, as well as the extraterritorial application of European Convention on Human Rights cannot be ignored. All this meant that, in principle, domestic law principles governing governmental liability could apply. None of this eventually was of help for the claimants in the *Varvarin case*. According to the Appeals Court of Cologne, the Varvarin bombing was not attributable to Germany, hence the Court rejected the claim on its merits. Based on the same legal reasoning, both the Federal Court of Justice and the Federal Constitutional Court ultimately stated that they would not need to rule on the applicability of governmental liability. Instead, the Federal Constitutional Court referred to the on-going debate (§ 59) among German legal scholars regarding the application of governmental liability to acts *in bello*. By referring to this discussion, the Court allowed for a possible shift in the interpretation of governmental liability law in favour of victims of armed conflicts. This new approach was then taken in the Kunduz proceedings.

Consequences

The current litigation about the airstrikes in Kunduz has to be seen against this background. These airstrikes provide German courts with an opportunity to clarify their approach. In its 2013 judgment in the *Kunduz case*, the Court of First Instance adopted a modern approach by applying governmental liability to acts of state *in bello*. As is clear from the press release, it is most likely that the upcoming decision of the Appeals Court will further consolidate this trend even if it rejects the claim on its merits. This would indeed complete the opening up of German domestic rules on governmental liability to acts of war.

This state practice certainly involves restrictions on the conduct of the German Armed Forces abroad and the margin of foreign policy. One thus may argue that by taking such an approach, German courts do not act in the interest of Germany if we think of NATO operations and other constellations of shared responsibility. However, other NATO member states like the Netherlands take the same approach. Ultimately, if – such as in *Varvarin* – German troops do not participate in the concrete organization and execution of an operation, attribution of (mis)conduct is most unlikely. This is because liability requires misconduct of a German state agent (see also Federal Court of Justice in the *Varvarin case*, § 38-39). It remains to be seen whether the Constitutional Court will ultimately have to rule on the *Kunduz case*. It then will need to address the question whether the application of governmental liability to acts *in bello* contravenes the state's interest in handling foreign affairs.

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1 Comment

DR. CHRISTIAN RICHTER
4 May, 2015 at 14:55 (Edit) — Reply

Dear Mrs. Henn,

Thank you for your writing about this important case. Unfortunately your post is partly based on wrong assumptions in regard to the facts and the legal situation. Hence your blogpost cannot remain uncommented.

Facts:

First, the number of 142 casualties is implausibly. According to the German Federal Public Prosecutor (Generalbundesanwalt) a maximum number of 50 dead people are reasonable. German Federal Public Prosecutor's number is based on different reports and the F 15's video tapes.

Second, Colonel (GS) Klein's window of opportunity was shorter than seven hours. He had no ground forces and was about to lose his only assets, the F15's who were about to leave the area. Maybe the tankers were stuck for seven hours, but Colonel (GS) Klein was not aware of the situation the full seven hours. He entered the Operational Command Center later.

Law:

First, the armed conflict in Afghanistan is and was in 2009 a noninternational armed conflict. Hence AP I does not apply (directly). Only the customary humanitarian law does apply.
Second, due to Colonel (GS) Klein's human resource no non-participating civilians were present to the area surrounding the tankers. So he could order the destruction of the tankers in accordance to the law.

Third, the question of imminence is irrelevant in the legal assessment of Colonel (GS) Klein's performance. Only in regard to the question, if Colonel (GS) Klein acted in accordance with the ROE imminence could play a role. But ROE are an exclusively internal matter and are not part of the LOAC.

Dr. Christian Richter

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