Criminal Responsibility for the 2009 "Kunduz Airstrike.2" The German Code of Crimes Against International Law and International (Humanitarian) Law

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Table of Contents

1. Introduction

On 4 September 2009 a German Colonel, Georg Klein, ordered the airstrike of two fuel tankers that had been hijacked by the Taliban near Kunduz and later got stuck in the mud of a dry riverbed. The airstrike killed up to 142 people, most of them civilians siphoning the fuel of the tankers. The incident caused public outrage in not only in Afghanistan but also in Germany and had a number of political repercussions. Even today, several years later, the incident and its legal handling still raises a controversial debate. This article discusses the criminal investigations that were initiated in Germany against Colonel Klein for war crimes after the 2009 Kunduz airstrike.2

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1. This paper is a revised and expanded version of a presentation given at the 3. Afghan Legal Studies Conference held in Kabul, October 3-5, 2016. The style of the presentation has been maintained.

2. To be precise, the criminal investigations were not only directed against Colonel Klein, but also against Staff Sergeant Wilhelm, who was on duty in the Tactical Operations Centre, inter alia, monitoring aerial image. However, for simplicity's sake I will focus on Colonel Klein's case only. For a thorough legal analysis

Besides the criminal law case there are also two civil proceedings ongoing, since two victims' families sued Germany for damages. So far these proceedings have been unsuccessful.[3] Currently they are pending before the German Federal High Court (*Bundesgerichtshof*, BGH).[4]

2. The Facts

Before discussing the legal issues, the facts of the 2009 Kunduz airstrike shall briefly be recalled.[5] On September 3, 2009 two fuel tankers, which belonged to an Afghan private

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of the Kunduz incident, see Constantin von der Groeben, Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein, German Law Journal 11 (2010), pp. 469-491; Wolfgang Kaleck, Andreas Schüller and Dominik Steiger, Tarnen und Täuschen – Die deutschen Strafverfolgungsbehörden und der Fall des Luftangriffs bei Kundus, Kritische Justiz 2010, pp. 270-286; for a short comment, see also David Diehl, Zur Einstellung des Ermittlungsverfahrens gegen Oberst Klein und Hauptfeldwebel Wilhelm durch die Bundesanwaltschaft, BOFAXE No. 343D of 11 May 2010, available online at <www.ifhv.de/documents/bofaxe/bofaxe2010/343d.pdf> (in German; last visited 13 October 2016); for an indirect legal analysis of the Kunduz incident, see Jelena Bäumler and Dominik Steiger, Die Strafrechtliche Verantwortlichkeit deutscher Soldaten bei Auslandseinsätzen, Archiv desVölkerrechts 48 (2010), pp. 189-225.

3. First instance: Regional Court (Landgericht, LG) Bonn, judgment of 11 December 2013 (1 O 460/11), available online at <www.justiz.nrw.de/nrwe/lgs/bonn/lg_bonn/j2013/1_O_460_11_Urteil_20131211.html> (in German; last visited 13 October 2016); second instance: Higher Regional Court (Oberlandesgericht, OLG) Köln, judgment of 30 April 2015 (7 U 4/14), available online at <www.justiz.nrw.de/nrwe/olgs/koeln/j2015/7_U_4_14_Urteil_20150430.html> (in German; last visited 13 October 2016). On the civil proceedings, see, e.g, Elisabeth V. Henn, The Development of German Jurisprudence on Individual Compensation for Victims of Armed Conflicts – The Kunduz Case, Journal of International Criminal Justice 12 (2014), pp. 615-637; Thomas Ruttig, The Incident at Coordinate 42S VF 8934 5219: German Court Rejects Claim from Kunduz Air Strike Victims, blog entry of 15 December 2013, available online at <www.afghanistan-analysts.org/the-incident-at-coordinate-42s-vf-8934-5219-german-court-rejects-claim-from-kunduz-air-strike-victims> (in English; last visited 13 October 2016).

4. On 6 October 2016 the Federal High Court upheld the appeal, i.e. dismissed the claim for damages and decided that Germany is not liable for overseas military operations, Federal High Court (Bundesgerichtshof, BGH), judgment of 6 October 2016 (III ZR 140/15) (not yet published); see press release No. 176/2016 of 6 October 2016, Deutsches Amtshaftungsrecht ist auf bewaffnete Auslandseinsätze der Bundeswehr nicht anwendbar („Fall Kunduz"), available online at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2016&nr=76130&linked=pm&Blank=1> (in German; last visited 13 October 2013), as well as the press report Deutsche Welle, German state not liable to pay compensation to victims of 2009 Kunduz airstrike, 6 October 2016, available online at <www.dw.com/en/german-state-not-liable-to-pay-compensation-to-victims-of-2009-kunduz-airstrike/a-35978028> (last visited 13. October 2016).

5. The following remarks can be no more than a simplified version of the events. Some facts of the Kunduz incident are still disputed. For example, the exact number of civilian casualties remains unclear, it is not clear on which information and means of intelligence Colonel Klein based his decision to order the airstrike, nor are his motives for ordering the airstrike. One reason for this ambiguity is that some of the documents relating to the incident are still classified and not avilable to the general public. For a thorough reconstruction of the incident, see, e.g., the Report of the German Parliamentary Investigation Committee, German Bundestag, 17. Election Period, Bundestag-Drucksache (BT-Drs.) 17/7400 of 25 October 2011, pp. 39-87, available online at <http://dip21.bundestag.de/dip21/btd/17/074/1707400.pdf> (in German; last visited 13 October 2016), as well as the detailed press report Ulrike Demmer, Markus Feldenkirchen, Ullrich Fichtner, Matthias Gebauer,

company and were on the way to Kabul to deliver fuel to a logistics partner of ISAF forces, were hijacked by Taliban insurgents near Kunduz. Around 6.30 p.m. the tankers got stuck on a sandbank of the Kunduz river, about seven kilometres from the German Bundeswehr Provincial Reconstruction Team (PRT) camp. In order to get the tankers going again, the Taliban called upon the inhabitants of nearby villages and allowed them to siphon the fuel of the tankers. Within the next hours up to 200 individuals gathered at the scene. While ISAF forces soon learned about the hijacking the exact location of the tankers was identified by a US military aircraft only around midnight. German Bundeswehr Colonel Klein, who had the command over the Provincial Reconstruction Team Kunduz at the time, was informed about the discovery.

The hijacking of the tankers came at a time where the security situation in the Kunduz region had worsened significantly. In the months before the Kunduz incident, in particular before and during the 2009 election period, ISAF forces had been exposed to severe attacks by Taliban insurgents and German soldiers had encountered more frequent ambushes and roadside bombings. Several soldiers, including Germans, died or were severely wounded. On April 29, 2009 the first German Bundeswehr soldier since World War II lost his life during combat. A day before the Kunduz airstrike, on September 3, 2009, there had been serious fighting between ISAF forces and insurgents north of Kunduz during which three German Bundeswehr soldiers were wounded. Also there had been a few recent attacks, in Kabul and Kandahar, where Taliban insurgents had used hijacked fuel tankers, causing a high number of civilian casualties. In late summer 2009 there had been warnings that Taliban insurgents were planning a large attack on the German Bundeswehr RPT Kunduz camp. Therefore, when informed about the situation, Colonel Klein was concerned that the Taliban could use the tankers for a suicide attack against the Bundeswehr camp or ISAF forces.

After an analysis of two sources available, i.e. the aerial footage from the first US military aircraft that had located the tankers and later two US fighters that were called to the scene and information given by a local informant over the phone, who said that only insurgents were present, who however was not himself at the scene but was passing on second–hand information, Colonel Klein ordered two US fighter jet pilots to carry out an airstrike on the two tankers in the early morning hours of September 4. Before that, the two US jet fighter pilots proposed several times to conduct a "show of force", i.e. to

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John Goetz, Hauke Goos, Jochen-Martin Gutsch, Susanne Koelbl, Shoib Najafizada, Christoph Schwennicke and Holger Stark, Bundeswehr – Ein deutsches Verbrechen, Der Spiegel 5/2010 of 1 February 2010, pp. 34-57. See also Christoph Reuter and Marcel Mettelsiefen, Kunduz, 4. September 2009, Rogner & Bernhard (2010), a book with portrait photography of family members of the victims killed in the airstrike.

fly at a very low altitude over the scene in order to disperse the crowd. This proposal, however, was rejected by Colonel Klein. The airstrike killed up to 142 people, most of them civilians siphoning the fuel of the tankers.

In this article three issues will be raised: First, the legal basis for the criminal proceedings against Colonel Klein, namely the German Code of Crimes Against International Law of 2002 will be presented. This is a specific criminal code that encompasses international crimes - that is genocide, crimes against humanity and war crimes - only. Second, the German prosecutor's decision and legal argument that led to the termination of the proceedings will be discussed. And finally it will be explained why an argument can be made that Colonel Klein could have been held responsible not for war crimes, but for the "ordinary" crime of negligent manslaughter under the German Penal Code.[6]

Before discussing these legal issues the political repercussions of the Kunduz incident in Germany should briefly be mentioned. Germany's military engagement in Afghanistan marks the first time since World War II that German military forces were deployed outside Europe. The mission therefore triggered a highly controversial debate about German foreign policy, in particular since reunified Germany's self-perception up to then has been that of a "civilian power", which would inhibit the offensive use of force. The Kunduz incident marks the first time since World War II that a German soldier was responsible for the death of a high number of civilians during an armed conflict, followed by the first criminal investigation of a Bundeswehr soldier for war crimes. Therefore - and because of the generally critical position towards the deployment of the German Bundeswehr - the Kunduz case attracted a great deal of media attention and triggered a controversial debate. In the end the German Minister of Defence and several generals had to resign.

3. The Law

At the outset it is important to explain in some detail the legal basis for the criminal proceedings against Colonel Klein, namely the German Code of Crimes Against International Law (*Völkerstrafgesetzbuch*, VStGB).[7] This Code, which went into effect

6. In this article the term "ordinary crimes" will be used to distinguish between crimes contained in the regular German Penal Code and international crimes – genocide, crimes against humanity and war crimes – included in the Code of Crimes Against International Law.

7. The German Code of Crimes Against International Law is not to be confused with the German ICC Statute Implementation Act (Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes, IStGHG), which contains the necessary regulations for cooperation with the ICC and came into effect on July 1 2002. See Bundesgesetzblatt 2002 I, 2144.

on June 30, 2002, implements the international core crimes that can also be found in the Statute of the International Criminal Court (ICC-Statute) - that is genocide, crimes against humanity and war crimes - into the domestic legal order.[8] It is a stand-alone code, that is the German legislator decided not to include the international crimes into the "ordinary" German Penal Code (*Strafgesetzbuch*, StGB).

Already when the so-called Rome Statute for the establishment of the ICC was adopted in 1998 Germany decided that it wanted to implement international criminal law into its own legal system.[9] With this decision the German legislator wanted to achieve several goals:[10] First of all, the legislator wanted to enhance the visibility of international crimes and (domestic) international criminal law in general. In addition, the legislator wanted to emphasize and capture the "specific wrong" of international crimes. Also the German legislator wanted to contribute to the progressive development of international criminal law and international humanitarian law. And, finally, with regard to the principle of complementarity enshrined in the ICC-Statute, the German legislator wanted to make sure that Germany would always be in a position to prosecute its own citizens for international crimes and protect them from the risk of extradition to the International Criminal Court.[11]

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8. Bundesgesetzblatt 2002 I, 2254. Translations of the Code of Crimes Against International Law in, inter alia, Arabic, English, French, or Spanish are available on the website of the Max Planck Institute (MPI) for Foreign and International Criminal Law at <www.mpicc.de/de/forschung/publikationen/onlinepub.html> (last visited 13 October 2016). For a detailed assessment of the Code, see, e.g., Gerhard Werle and Florian Jeßberger, International Criminal Justice is Coming Home, Criminal Law Forum 13 (2002), pp. 191-223. However, it is important to note that there is no specific code of criminal procedure for international crimes. Instead the "ordinary" rules contained in the German Code of Criminal Procedure apply. As it has turned out, in particular in the first full trial based on the Code of Crimes Against International Law, that was completed just a few months ago, this creates difficult frictions, because the general procedural norms (e.g., standardized methods of arrest, investigation (e.g. collection of evidence), detention, and adjudication (e.g. interrogations by the judge using video links, interpreters) are not fully compatible with the form of massive criminality that embody international crimes.

9. Cf. Gerhard Werle and Florian Jeßberger, Principles of International Criminal Law, Oxford University Press (2014), marginal no. 402.

10. See Explanatory Memorandum of the Code of Crimes Against International Law, Bundestag-Drucksache (BT-Drs.) 14/8524, p. 12. Translations of the Explanatory Memorandum in, inter alia, Arabic, English, French, or Spanish are available on the website of the Max Planck Institute (MPI) for Foreign and International Criminal Law at <www.mpicc.de/de/forschung/publikationen/onlinepub.html> (last visited 13 October 2016). See also Gerhard Werle and Florian Jeßberger, Principles of International Criminal Law, Oxford University Press (2014), marginal nos. 403-405.

11. Under the principle of complementarity, implemented in Paragraph 10 of the Preamble, Articles 1 and 17 ICC-Statute, the International Criminal Court is only competent if a state is either completely inactive or unable or unwilling to genuinely investigate and prosecute the international crimes committed on its territory or by its citizens. Thus, by adapting their legislation to the ICC-Statute, states are better positioned to take advantage of the shielding function of the complementarity principle. On the principle of complementarity,

As regards its contents, the Code is comprised of only 14 provisions. First and foremost it contains definitions of the three international core crimes. Regarding the definition of the crimes, the Code is almost identical to the ones that can be found in the ICC-Statute, with only a few discrepancies due to the more stricter adherence to the principle of legality (or specificity) in German law compared to international criminal law.[12] The Code also contains some specific provisions regarding general principles of criminal law, for example a provision on command responsibility, a form of criminal responsibility that is very important in international criminal law.[13] However, the one provision that makes the Code unique is its scope of application, namely the regulation of unconditional universal jurisdiction in Section 1:

Scope of application

> This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.

This means that the crimes included in the Code can be prosecuted in Germany regardless of where in the world and by whom they have been committed.[14] At least theoretically this makes it a powerful legal tool in the fight against impunity for international crimes.[15] For example the Code is used now to investigate crimes that were

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see only Markus Benzing, The Complementarity Regime of the International Criminal Court, Max Planck Journal of United Nations Law 7 (2003), pp. 591-632; Jann Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions, Oxford University Press (2009); Jo Stigen, The Relationship between the International Criminal Court and National Jurisdictions – The Principle of Complementarity, Brill (2008).

12. On the distinctions, see Gerhard Werle and Florian Jeßberger, Principles of International Criminal Law, Oxford University Press (2014), marginal no. 411.

13. Cf. Ronen Steinke, The Politics of International Criminal Justice: German Perspectives from Nuremberg to The Hague, Hart Publishing (2012), p. 114 fn. 93: "To leave no room for doubt, the VStGB not only adds the definitions of the international core crimes to the long list of statutory offences in domestic law, Rather, it constitutes a separate body of law besides 'regular' domestic criminal law, with its own set of general principles for individual responsibility and defences, which are also mirrored from the Rome Statute."

14. This is very different for "ordinary" crimes: Here German criminal law is generally applicable only if there is a connection between the crime and Germany, on particular regarding the place of commission or the persons involved; see Sections 3-7, 9 German Penal Code. It must be emphasized, however, that in contrast to ordinary crimes where, as a rule, German criminal procedural law determines mandatory prosecution (Section 152 German Code of Criminal Procedure), the competent Federal Prosecutor has broad discretion regarding the decision whether he or she wants to investigate international crimes that have no connection to Germany; see Section 153f German Code of Criminal Procedure.

15. On the importance of the principle of universal jurisdiction for the prosecution of international crimes, see only Julia Geneuss, Fostering a Better Understanding of Universal Jurisdiction, Journal of International Criminal Justice 7 (2009), pp. 945-962; Wolfgang Kaleck, From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008, Michigan Journal of International Law 30 (2009), pp. 927-980. In practice, however, the prosecution of international crimes in Germany so far has been has been proven to be rather difficult.

committed in the conflict in Syria or by members of so-called ISIS (or ISIL or Daesh).[16] The prosecutor systematically interrogates Syrian refugees and asylum seekers whether they have witnessed any international crimes. The evidence that is gathered this way may be used in future cases that will be opened either in Germany or by any other international or domestic criminal court.

The Kunduz case was one of the first instances where criminal proceedings were initiated, based on the Code of Crimes against International Law.

4. The Prosecutor's Decision

In Arpil 2010 the competent German Federal Prosecutor General decided to terminate the criminal proceedings against Colonel Klein, because in the prosecutor's opinion there was no proof of the required mental element.[17]

The most relevant provision which could have subjected Colonel Klein to criminal liability for war crimes is Section 11 Para. 1 No. 3 of the Code of Crimes against International Law. This provision regulates the war crimes of deliberately causing disproportionate harm to civilians during armed conflicts ("excessive civilian collateral damage"):

> "War crimes consisting in the use of prohibited methods of warfare
> (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
> [...]
> (No. 3) carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military

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Only in September 2015, more than 13 years after its entry-into-force, the first judgment was handed down under the of the Code of Crimes Against International Law. In this case the Higher Regional Court (Oberlandesgericht, OLG) Stuttgart convicted one member of the leadership of the Forces Démocratiques de Libération du Rwanda (FDLR), a militia operating in the provinces of North and South Kivu in what is now the Democratic Republic of the Congo, for aiding and abetting war crimes. The case is now on appeal before the Federal High Court (Bundesgerichtshof, BGH). Nevertheless, more recently more and more criminal investigations for international crimes have been initiated by the Federal Prosecutor General.

16. On the prosecution of international crimes committed in Syria by German authorities and the cases that have been initiated so far, see Patrick Kroker and Alexandra Kather, Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany, blog entry of 12 August 2016, available online at <www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany> (last visited 13 October 2016).

17. Federal Prosecutor General (Generalbundesanwalt, GBA), decision of 16 April 2010 (3 BJs 6/10-4), a public version of the decision is available online at <www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf> (in German; last visited 13 October 2016); English translation of the unclassified version of the Federal Prosecutor General's decision on file with the author.

advantage anticipated,

[...]

shall be punished with imprisonment for not less than three years. [...]"

The provision is based on the corresponding rule of international humanitarian law and can also be found in the Statute of the International Criminal Court - albeit there only for international armed conflicts.[18]

However, the Federal Prosecutor General argued that Colonel Klein did not possess the required mental element. According to the provision it is necessary that the perpetrator launched the attack knowing that excessive incidental civilian damage will occur (*dolus directus*). Thus, the perpetrator must intend to attack a military target with the "certain expectation" that this attack will cause "excessive collateral damage", that is civilian damage that is disproportionate to the attack's intended military advantage. The prosecutor, however, could not find any proof contrary to Colonel Klein's testimony that, based on the analysis of the information available to him when ordering the attack, he was not aware that civilians were among the crowd. Therefore Colonel Klein did not expect any damage to occur to civilians. As a result, no war crime charge could be upheld.

5. The Criticism

The investigation, however, did not end here. A second question was whether Colonel Klein could be held responsible for "ordinary" crimes, in particular negligent manslaughter according to Section 222 of the German Penal Code.

"**Negligent Manslaughter**"

Whosoever through negligence causes the death of a person shall be liable to imprisonment not exceeding five years or a fine."

In this regard, it must first be emphasized that the German Penal Code is applicable side-by-side with the German Code of Crimes Against International Law.[19] Nothing in the legislator's materials suggests that the Code of Crimes Against International

18. See Section 8 Para. 2 b) (iv) ICC-Statute and Article 85 Para. 3 b) and c) Additional Protocol I to the Geneva Conventions, which is applicable as customary international law in non-international armed conflicts.

19. On the relationship between the Code of Crimes Against International Law and the ordinary Penal Code see Florian Hertel, Soldaten als Mörder? – Das Verhältnis von VStGB und StGB anhand des Kundus-Bombardements, Höchstrichterliche Rechtsprechung zum Strafrecht 2010, pp. 339-343; Denis Basak, Luftangriffe und Strafrechtsdogmatik – zum systematischen Verhältnis von VStGB und StGB – eine Gegenrede, Höchstrichterliche Rechtsprechung zum Strafrecht 2010, pp. 513-520. On the Federal Prosecutor General's competence to also decide over "ordinary" crimes see also Florian Jeßberger, Bundesstrafgerichtsbarkeit und Völkerstrafgesetzbuch, Höchstrichterliche Rechtsprechung zum Strafrecht 2013, pp. 119-126.

Law was meant to be a final and exhaustive body of law that precludes the applicability of "ordinary" criminal law. On the contrary, in the explanatory memorandum for the enactment of the Code the national legislator expressly states that acts of war resulting in death may be criminally sanctioned under the "ordinary" crimes of murder, homicide or negligent homicide according to Sections 211 ff. of the regular Penal Code.[20] However, whenever the killings are consistent with the law of armed conflict, the so-called principle of the unity of the legal order (in German: *Prinzip der Einheit der Rechtsordnung*) demands that the regulations of international humanitarian law serve as justifications and exclude criminal responsibility.[21]

In the Kunduz case, however, an argument can be made that the ordering of the airstrike that caused the death of the civilians was not consistent with international humanitarian law. Thus, the reason for making the accusation of negligent behaviour, that is a lack of caution when ordering the attack, can be found in Article 57 of the Additional Protocol I (AP I) to the Geneva Conventions, which is applicable as customary international law in non-international armed conflicts.[22]

"**Precautions in attack**

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection

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20. See Explanatory Memorandum of the Code of Crimes Against International Law, Bundestag-Drucksache (BT-Drs.) 14/8524, p. 33. Translations of the Explanatory Memorandum in, inter alia, Arabic, English, French, or Spanish are available on the website of the Max Planck Institute (MPI) for Foreign and International Criminal Law at <www.mpicc.de/de/forschung/publikationen/onlinepub.html> (last visited 13 October 2016).

21. On this, see e.g. Constantin von der Groeben, Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein, German Law Journal 11 (2010), pp. 469-491, at 486 ff.; Jelena Bäumler and Dominik Steiger, Die Strafrechtliche Verantwortlichkeit deutscher Soldaten bei Auslandseinsätzen, Archiv desVölkerrechts 48 (2010), pp. 189-225, at 209 ff.

22. On this, see e.g. Constantin von der Groeben, Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein, German Law Journal 11 (2010), pp. 469-491 and Constantin von der Groeben, German Federal Prosecutor Terminates Investigation Against German Soldiers With Respect to NATO Air Strike in Afghanistan, blog entry of 29 April 2010, available online at <www.ejiltalk.org/german-federal-prosecutor-terminates-investigation-against-german-soldiers-with-respect-to-nato-air-strike-in-afghanistan>(last visited 13 October 2016). See also David Diehl, Zur Einstellung des Ermittlungsverfahrens gegen Oberst Klein und Hauptfeldwebel Wilhelm durch die Bundesanwaltschaft, BOFAXE No. 343D of 11 May 2010, available online at <www.ifhv.de/documents/bofaxe/bofaxe2010/343d.pdf> (in German; last visited 13 October 2016).

but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects."

This article requires to take certain measures of protection before launching an attack in order to avoid civilian casualties as much as possible. In particular, the provision formulates the obligations to "do everything feasible to verify that the objectives to be attacked are [not] civilians" and that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit".

According to international humanitarian law, a breach of these obligations is not considered a war crime - only some violations of international humanitarian law, the so-called grave breaches, constitute war crimes.[23] However, Article 57 AP I can be used

23. See Articles 50, 51, 130, and 147 respectively of the four Geneva Conventions, as well as Article 85

to argue that by omitting the precautionary measures prescribed by this norm Colonel Klein breached the formal requirements created by international humanitarian law before launching an attack and therefore acted carelessly with regard to the civilians on the scene.[24] The Federal Prosecutor, however, did not follow this argument. He argued that Colonel Klein firmly believed that there were no civilians present and that therefore he had no reason to take any precautionary means of further clarifying the scene or give warnings. This line of argument was harshly criticized by some academic commentators.[25] In particular, some argued that the situation was not as clear-cut since there were a number of indicators that civilians must have been among the crowd, which is relevant given that international humanitarian law establishes a presumption that in doubt a person must be considered a civilian rather than a combatant.[26] In addition, the informational basis on which Colonel Klein based his decision was rather unsatisfactory. This seems to be true in particular regarding the lack of specific inquiry regarding the informants statement that only insurgents were present at the scene. And finally, at the time of ordering the attack there was no immediate threat to ISAF forces, German Bundeswehr soldiers or civilians since the fuel tankers were still stuck at the sand bank. Therefore there would have been time to take precautionary measures, in particular the "show of force" as suggested by the two US jet fighter pilots. It is in particular in such cases of doubt that Article 57 AP I formulates an obligation to give advance warnings in order to protect the civilian population in times of armed conflict.[27]

6. Conclusion

To sum up: The Afghanistan deployment of the German Bundeswehr and the 2009 Kunduz airstrike in particular triggered a highly controversial debate about German

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Additional Protocol I.

24. Cf. David Diehl, Zur Einstellung des Ermittlungsverfahrens gegen Oberst Klein und Hauptfeldwebel Wilhelm durch die Bundesanwaltschaft, BOFAXE No. 343D of 11 May 2010, available online at <www.ifhv.de/documents/bofaxe/bofaxe2010/343d.pdf> (in German; last visited 13 October 2016).

25. See Constantin von der Groeben, German Federal Prosecutor Terminates Investigation against German Soldiers with Respect to NATO Air Strike in Afghanistan, blog entry of 29 April 2010, available online at <www.ejiltalk.org/german-federal-prosecutor-terminates-investigation-against-german-soldiers-with-respect-to-nato-air-strike-in-afghanistan> (last visited 13 October 2016); Wolfgang Kaleck, Andreas Schüller and Dominik Steiger, Tarnen und Täuschen – Die deutschen Strafverfolgungsbehörden und der Fall des Luftangriffs bei Kundus, Kritische Justiz 2010, pp. 270-286.

26 .See Article 50 Para. 2 Sentence 2 Additional Protocol I.

27. See Constantin von der Groeben, German Federal Prosecutor Terminates Investigation Against German Soldiers With Respect to NATO Air Strike in Afghanistan, blog entry of 29 April 2010, available online at <www.ejiltalk.org/german-federal-prosecutor-terminates-investigation-against-german-soldiers-with-respect-to-nato-air-strike-in-afghanistan> (last visited 13 October 2016);

foreign policy. The criminal proceedings against Colonel Klein for the Kunduz incident was the first time since World War II that a German soldier was investigated for war crimes.

The legal basis for the criminal proceedings against Colonel Klein was the German Code of Crimes against International Law, which implements the international core crimes - genocide, crimes against humanity and war crimes - into the domestic legal order.

The competent German Federal Prosecutor General terminated the criminal proceedings against Colonel Klein, arguing that the required mental element, i.e. *dolus directus*, for the war crime of deliberately causing disproportionate harm to civilians during armed conflicts pursuant to Section 11 Para. 1 No. 3 could not be proven. In addition, the Prosecutor argued that Colonel Klein was under no obligation to take certain precautionary measures laid down in Article 57 AP I, and therefore could also not be held responsible for the crime of negligent manslaughter under the regular German Penal Code. The Higher Regional Court (*Oberlandesgericht*, OLG) Dü sseldorf and the German Constitutional Court (*Bundesverfassungsgericht*, BVerfG) confirmed the Prosecutor's decision.[28]

Some scholars, however, disagree with the Prosecutor's decision arguing that Colonel Klein was indeed obligated to follow Article 57 AP I and that this omission makes him criminally responsible for negligent manslaughter according to the "ordinary" German Penal Code.

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28. See Higher Regional Court (Oberlandesgericht, OLG) Düsseldorf, decision of 16 February 2011 (III-5 StS 6/10), press release No. 06/2011 of 18 February 2011 available online at <www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemitteilungen_aus_2011/2011-02-18_pm_kundus_/index.php> (in German; last visited 13 October 2016); German Constitutional Court (Bundesverfassungsgericht, BVerfG), decision of 19 May 2015 (2 BvR 987/11), available online at <www.bverfg.de/e/rk20150519_2bvr098711.html> (in German; last visited 13 October 2016), see also press release No. 45/2015 of 19 June 2015, 'Not prosecuting a Colonel and a Master Sergeant of the Bundeswehr Following an Air Strike in Kunduz (Afghanistan) Does Not Violate the Basic Law', available online at <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2015/bvg15-045.html> (in English; last visited 13 October 2016). After the Federal Prosecutor General terminated the criminal proceedings, disciplinary proceedings were initiated against Colonel Klein by the competent Bundeswehr authorities, in order to inquire whether he violated his official duties, i.e. the national and international rules of engagement valid at the time of the airstrike. In mid-August 2010 these proceedings were also terminated, because no evidence for a breach of duty could be found. See Presse- und Informationszentrums des Heeres, press release No. 13/2010 of 19. August 2010, Kein Dienstvergehen von Oberst i.G. Georg Klein festgestellt, available online at <www.deutschesheer.de/resource/resource/