

The Development of German Jurisprudence on Individual Compensation for Victims of Armed Conflicts

The *Kunduz* Case

Elisabeth V. Henn*

Abstract

In December 2013, the Court at first instance in Bonn ruled on whether Germany is required to pay compensation to victims of the International Security Assistance Force airstrike ordered by a German colonel in 2009 in Kunduz. Whereas the traditional approach rejects liability of the government for sovereign acts in armed conflicts, the Court held that the rules of German governmental liability (Amtshaftung) do — in principle — apply to illegal sovereign acts in contemporary armed conflicts. However, the Court did not admit the claim on its merits. This judgment can, nonetheless, be placed within the line of questions regarding international relations to be resolved by law and not politics. This article examines the history of German jurisprudence regarding victims' compensation for harm suffered resulting from violations of international humanitarian law. It summarizes and assesses the Kunduz judgment and explains why applying legal liability to the government for sovereign acts in bello is a logical step in the development of the rule of law.

* Research Associate to the Chair for Public and International Law, European Union Law and European and International Economic Law, Prof. Dr Andreas Zimmermann, at Potsdam University, Germany. The author would like to thank Rieke Arendt, Jelena Bäuml, Denise Cordes, Olaf Seiring, Laura Vittorelli and the anonymous reviewers for their useful comments on earlier drafts and Jeffrey Verhey for language editing. The author especially thanks Nehal Bhuta for his support and valuable remarks. Any errors are the author's own responsibility. [elhenn@uni-potsdam.de]

1. Introduction

In September 2009, a bombing ordered by a German colonel under the auspices of the North Atlantic Treaty Organization (NATO) in Afghanistan caused the death of approximately 142 civilians. This NATO airstrike represents the most contentious modern operation involving the German Federal Armed Forces (GFAF). In spite of various investigative commissions, details on the circumstances surrounding, and motivations behind, the bombing remain contested. Nevertheless the victims claimed compensation for the harm suffered as a result of this bombing before German courts. In December 2013, the Court of First Instance in Bonn ruled on whether — under the German law of governmental liability — Germany is required to pay compensation to victims.¹ Although the Court rejected the claim on its merits, it did not follow the traditional approach denying governmental liability (*Amtshaftung*) for illegal sovereign acts *in bello*. Instead, the Court found that the rules of liability for the government apply to such acts and that thus — in principle — there is an individual right to compensation in these circumstances.

Historically, within German transitional justice, individualized reparation depended largely on political will and external lobbying. As a result, over the years the government has adopted specific compensation laws. Victims' lawsuits, which sought compensation for unlawful harm inflicted by the German National Socialist regime during the Second World War, were generally dismissed on the basis that the international and general domestic law on state liability in force had been interpreted as not providing for such a right. However, should the law on general liability of the government now be applied to sovereign acts in armed conflicts, individual compensation will no longer depend on political will and thus on the enactment of specific laws. Although the *Kunduz* ruling — a decision of first instance — may be overruled by other levels of jurisdiction,² this judgment marks an important step in a shift towards a new individualized approach to reparations during armed conflict. As will be shown, the *Varvarin* judgment, handed down by the German Federal Constitutional Court (FCC) in August 2013, paved the way for this evolution.

From a broader perspective, *Kunduz* can be contextualized within the movement towards legalization and juridification of international politics, as described by Anne-Marie Slaughter and other authors.³ (Inter)national institutions, such as courts and tribunals, international treaties, and diplomats and judges, are at the forefront of this shift from politics to law. With regard to

1 Court of First Instance in Bonn, Judgment, *Kunduz* (1 O 460/11), 11 December 2013, available online at <http://www.justiz.nrw.de/nrwe/lgs/bonn/lgbonn/j2013/1.O.460.11.Urteil.20131211.html> (visited 8 March 2014) (hereinafter '*Kunduz*').

2 It should be noted that the Court of First Instance in Bonn is the only competent court in such cases. This is due to the main office of the Federal Ministry of Defence in Bonn.

3 A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004); J. Goldstein et al., 'Legalization and World Politics', 54 *International Organization* (IO) (2000) 385; A.K.W. Abbott et al., 'The Concept of Legalization', 54 *IO* (2000) 401.

admissible means and methods of warfare, this process of legalization started with the proposals of Henry Dunant in 1862 and cumulated with the two Additional Protocols to the Geneva Conventions in 1977, followed by the Convention on Cluster Munitions in 2008. The application and interpretation of international humanitarian law provisions by domestic courts — either on the basis of their constitutional background, because norms are self-executing or had become customary law — pushes this trend forward. However, as *Kunduz* exemplifies, this trend comes packaged with procedural pitfalls. The struggle in courtrooms to disclose the facts or truth becomes even more evident when the bone of contention falls within a highly politicized case. Using an ideal discourse, given by the force of the better argument, in order to reach consensus on the facts,⁴ is undermined by power relations.⁵ In cases with political elements, power struggles cannot be ignored. In such trials, it will be generally difficult for plaintiffs to give evidence if documents are classified and courts do not reverse the burden of proof.⁶

This article will outline the historical development and the political background of German jurisprudence regarding individual compensation for harm unlawfully caused in the context of an armed conflict. The *Kunduz* judgment will be explained and analysed, and subsequently, why domestic governmental liability law should apply to sovereign acts *in bello* will be explored.

2. German Approaches to Challenges of Transitional Justice: A Historical Overview of Individual Compensation for Harm Suffered as a Result of Violations of Humanitarian Law

A. Individual Compensation for Harm Suffered During the Second World War

Since 1947, Germany has adopted a series of laws relative to the restitution for, and compensation of, victims of the Nazi regime and the Second World War.⁷ The Federal Republic of Germany adopted and amended the Federal Compensation Law (FCL) — the *Bundesentschädigungsgesetz* — to compensate certain categories of victims of the Nazi regime. Those eligible for compensation included individuals living within the Federal Republic of Germany (FCL, 1953); those who lived within the German borders delimited in 1937 (FCL, 1956); or survivors of the Holocaust, their relatives and individuals who had

4 J. Habermas, *Theorie des kommunikativen Handelns* (8th edn., Suhrkamp, 2011).

5 M. Foucault, *Was ist Kritik?* (Merve, 1992).

6 To protect the right to a fair trial, the German FCC touched upon the necessity of a reversal of the burden of proof. See FCC, Decision, *Varvarin* (BvR 2660/06 and 2 BvR 487/07), 13 August 2013, § 18 (hereinafter '*Varvarin*').

7 For examples see 1957 General Law, which regulates Consequences of the War (*Allgemeines Kriegsfolgesgesetz*); 1957 Federal Restitution Law (*Bundesrückerstattungsgesetz*) on the procedure of restitution.

been prosecuted on grounds of nationality or non-German ethnicity (FCL, 1965). The final amendment, which was passed in 1965, required that the individual had refugee status on 1 October 1953.⁸ Notwithstanding these efforts towards providing reparations, some categories of victims of the Nazi regime fell outside the scope of individual or collective compensation programmes. Such groups included forced labourers living abroad, homosexuals, Sinti and Roma, mentally ill, forcibly sterilized persons or victims of cruel acts of war. On account of the FCL's restrictive terms, German courts dismissed claims brought by non-German nationals. Furthermore, claims not based on the FCL, and which had been filed before 1991,⁹ were generally unsuccessful. This is due to the moratorium under Article 5 of the 1953 Agreement on German External Debts, which deferred all claims arising out of the Second World War 'until the final settlement of the problem of reparation'.¹⁰ The 1991 Two-Plus-Four Treaty sought to finally settle questions with respect to Germany. Even if the contracting parties did not refer to reparations, any cause of action, claimed by nationals of the contracting parties,¹¹ was rendered groundless.¹² Due to moral and political pressure, the German parliament enacted a law in August 2000, the *Gesetz zur Errichtung einer Stiftung 'Erinnerung, Verantwortung und Zukunft'* (StiftG),¹³ providing for a right to compensation for forced labourers, internees of concentration camps, those having suffered financial losses¹⁴ and relatives of recently deceased beneficiaries.¹⁵ One effect of this law was to exclude individuals who had held prisoner of war (POW) status unless they had been internees of concentration camps or fell within other specified categories,

8 For a comprehensive report and analysis of compensation programmes since 1945, see C. Goschler, *Schuld und Schulden — Die Politik der Wiedergutmachung für NS-Verfolgte seit 1945* (Wallstein, 2005).

9 For examples, see Federal Court of Justice (*Bundesgerichtshof*), in *Neue Juristische Wochenschrift* (NJW) (1955) 631, referring to Art. 5(4) 1953 Agreement on German External Debts; Federal Court of Justice, in NJW (1973) 1549, at 1552.

10 Art. 5(2) 1953 Agreement on German External Debts, states: 'Consideration of claims arising out of the second world war by countries which were at war with or were occupied by Germany during the war, and by nationals of such countries, against the Reich ad agencies of the Reich, including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the Reichskreditkassen shall be deferred until the final settlement of the settlement of the problem of reparation.'

11 Yet, with regard to claims by nationals of states which did not sign any treaty the legal situation can differ. For Greek victims, see J. Kämmerer, 'Kriegsrepressalie oder Kriegsverbrechen?', 37 *Archiv für Völkerrecht* (AfV) (1999) 283.

12 Federal Court of Justice, *Distomo*, in NJW (2003) 3488, at 3490; R. Dolzer, 'Reparationen ohne Ende?' NJW (2000) 2480; H. Hahn, 'Individualansprüche auf Wiedergutmachung von Zwangsarbeit im Zweiten Weltkrieg — Das Entschädigungsgesetz vom 2.8. 2000', NJW (2000) 3521.

13 See *Gesetz zur Errichtung einer Stiftung, 'Erinnerung, Verantwortung und Zukunft'*, available online at <http://www.stiftung-evz.de/stiftung/gesetz-der-stiftung-evz.html> (visited 29 January 2014) (hereinafter 'StiftG').

14 For details see Section 11 StiftG.

15 Pursuant to Art. 13 StiftG, certain relatives of beneficiaries are eligible to compensation if the detainee died after 15 February 1999.

as customary law did permit states to carry out forced labour with POWs.¹⁶ The Foundation of Remembrance, Responsibility and Future was authorized to carry out the management of individual compensation procedures in cooperation with other organizations. Until the end of 2006, 1,665,000 former forced labourers received a total sum of 4.4 billion euros.¹⁷

Against this background, the most significant cases after 1991 decided by the FCC were *Forced Labour I* in 1996, *Forced Labour II* in 2004 and *Distomo* in 2006. In *Forced Labour I*, former Auschwitz internees claimed remuneration for the labour they had carried out while in custody.¹⁸ In *Forced Labour II*,¹⁹ former Italian military internees challenged the constitutionality of the StiftG, which denies benefits to *de jure* POWs, even when they had been *de facto* treated as 'civilian labourers' (*Zivilarbeiter*) by the Nazi regime.²⁰ In *Distomo*, surviving victims claimed compensation for the loss of life and property suffered as a result of a massacre by Nazis, launched as an act of reprisal on the civilian population of the Greek village of Distomo in 1944.²¹ Without going into the constitutional details of the proceedings and claims brought on these federal laws, the development of the FCC jurisprudence followed three lines of reasoning.

First, during the Second World War international law did not establish an individual right to compensation.²² While acknowledging the applicants' immeasurable suffering, the FCC rejected individual claims, holding that Article 3 of the Hague Convention IV on Laws and Customs of War on Land

16 Under certain conditions the labour of POWs can be used, see Art. 27(1) Convention Relative to the Treatment of Prisoners of War.

17 Zahlen und Fakten zur Fördertätigkeit (Facts and figures on the activities of the foundation) available online at <http://www.stiftung-evz.de/stiftung/zahlen-und-fakten.html> (lasted visited 29 January 2014).

18 FCC, *Forced Labour I*, in NJW (1996) 2717 (hereinafter '*Forced Labour I*').

19 FCC, Order of the First Senate of 7 December 2004, *Forced Labour II* (1 BvR 1804/03) (hereinafter '*Forced Labour II*').

20 According to the 2001 Guidelines concerning the Entitlement of Benefits of Former Prisoners of War (*Leitlinie zur Leistungsberechtigung und zum Leistungsausschluss ehemaliger Kriegsgefangener nach dem Stiftungsgesetz*) interpreting Art. 11(3) StiftG, POWs *de facto* who had been forced to do 'civil labour' are not entitled to benefits if *de jure* their status as POWs persisted. If their status had not been formally transformed into a civil one, they are not entitled under the StiftG. On a historical analysis of Nazi violations of provisions allowing belligerent states to employ their own or the enemy's POWs see M. Spoere, *Zwangsarbeit unter dem Hakenkreuz. Ausländische Zivilarbeiter, Kriegsgefangene und Häftlinge im Deutschen Reich und im besetzten Europa 1938–1945* (Deutsche Verlags-Anstalt, 2001).

21 FCC, *Distomo*, in NJW (2006) 2542 (hereinafter '*Distomo*'). For a commentary, see M. Rau, 'State Liability for Violations of International Humanitarian Law — The *Distomo* Case Before the German Federal Constitutional Court', 7 *German Law Journal* (2006) 701. The same claimants succeeded in front of Greek and Italian courts, but the execution of their title against Germany ultimately failed and has been declared unlawful by the ICJ, see *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment of 2 February 2012 (hereinafter '*Jurisdictional Immunities*').

22 *Forced Labour I*, at 2719: 'Der Einzelne konnte grundsätzlich weder die Feststellung des Unrechts noch einen Unrechtsausgleich verlangen'.

of 1907²³ did not provide for a right to compensation.²⁴ International law in force at this time merely established the right to reparation on the interstate level and entitled states to enforce their own and their subjects' rights against the perpetrator state. In other words, individuals were not endowed with legal personality. Post-war reparation was organized in so-called 'lump sum agreements' on the interstate level. Allied governments had agreed upon the terms of reparation to be made by Germany at the Potsdam Conference in 1945. Furthermore, Germany concluded a series of treaties with Western and former Soviet states.

Second, the FCC ruled that the international legal right of the victim's home state could co-exist (*Anspruchsparallelität*) with a claim under domestic law by the individual.²⁵ This apparently self-evident statement was ground breaking by rejecting the long defended idea held by German scholars.²⁶ That is, peace-time law would be replaced by *jus in bello* and, therefore, lump sum agreements would replace claims derived from state liability, so that individuals could not claim compensation.²⁷ The FCC clarified that this so-called 'theory of exclusivity' was based on a confusion of international and domestic law.²⁸ The demand made by diplomatic protection for the exhaustion of remedies by the individual was overlooked by this theory. As a consequence, international law could not prohibit domestic law from providing individual reparation.²⁹ The FCC further ruled, however, that the abstract possibility of providing for individual rights on a domestic level would not automatically force states to allow for such an individual cause of action.³⁰

Ultimately, even if international law permits domestic law to grant individual rights to victims, the German law of governmental liability in force during the Third Reich, under Section 839 of the Civil Code and Article 131 of the

23 Art. 3 Hague Convention IV on Laws and Customs of War on Land, states: 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

24 *Forced Labour I*, at 2719; *Forced Labour II*, § 38; *Distomo*, §§ 20–21. The applicants failed to succeed before the European Court of Human Rights (ECtHR), see Decision, *Sfountouris and Others v. Germany*, Appl. No. 24120/06, 31 May 2011.

25 *Forced Labour I*, at 2719.

26 E. Féaux de la Croix, 'Schadensersatzansprüche ausländischer Zwangsarbeiter im Lichte des Londoner Schuldenabkommens', NJW (1960) 2268; B. Eichhorn, *Reparation als völkerrechtliche Deliktshaftung* (Nomos, 1992), at 78 *et seq.*

27 *Forced Labour I*, at 2719.

28 *Ibid.*, at 2719.

29 *Ibid.* By stating that, it referred to ICJ, *Interhandel* (Switzerland v. United States), ICJ Reports (1959), at 27.

30 *Forced Labour I*, at 2719. However, there is a trend to assume that the right to an effective remedy would oblige states to do so. See e.g. Art. 2(3) International Covenant on Civil and Political Rights; Art. 6 International Convention on the Elimination of all Forms of Racial Discrimination; Art. 14 Convention against Torture; Art. 13 European Convention on Human Rights. Distinguishing the substantial and procedural aspect of the right to an effective remedy, see D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2006); F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press, 2007).

Constitution of Weimar, had not been interpreted at that time as applying to sovereign acts carried out in the context of an armed conflict.³¹ Additionally, with regard to Greek victims, governmental liability would not apply *ratione personae* because such liability towards foreigners was contingent on a reciprocal commitment on behalf of the victim's home state.³² Yet, citing the *Varvarin* decision of the Court of Appeal in Cologne, which was at that time pending at the Federal Court of Justice in Karlsruhe (*Bundesgerichtshof*), the FCC asked in *Distomo* whether, nowadays, the suspension of governmental liability would meet the necessity of ensuring compliance with the rules of war.³³

B. Jurisdiction Concerning Compensation for Harm Suffered in Wars Waged after the Reunification

The *Varvarin* case was the first proceeding concerning individual claims for violations of international humanitarian law following the Second World War. After the German Reunification — and a long period of strictly limited engagements of German soldiers abroad — the GFAF participated in external military operations within the framework of the United Nations or under the auspices of NATO. In Kosovo, Germany also took part in one internationally contentious armed conflict. In May 1999, a NATO airstrike fired four missiles at a bridge in the centre of the Serbian village *Varvarin*, killing 10 and injuring 30 civilians. German forces were neither on site nor directly involved in the attack. Nevertheless, victims sued Germany for having accepted the bridge to be among the targets listed by NATO for the operation. At all levels of jurisdiction the claims were dismissed. The Court of First Instance in Bonn held that governmental liability did not apply.³⁴ The Court in Cologne, referring to the 'co-existence' doctrine established by the FCC in *Forced Labour I*, accepted in principle — for the first time in German jurisprudence — governmental liability for sovereign acts carried out in the context of an armed conflict.³⁵ However, as the bombing was not attributable to German forces, the Court in Cologne rejected the claim on its merits. Based on the same legal reasoning, the Federal Court of Justice ultimately stated that it would not have to rule on governmental liability.

Eventually, in absence of sufficient prospects of success, the constitutional complaint filed by the surviving victims at the FCC was dismissed. Confirming the perpetual paradox of customary law, the FCC held that there

31 *Forced Labour II*, § 39: 'Nach dem Verständnis und Gesamtzusammenhang des zur Tatzeit (1944) geltenden deutschen Rechts waren die dem Deutschen Reich völkerrechtlich zurechenbaren militärischen Handlungen während des Kriegs im Ausland von dem — eine innerstaatliche Verantwortlichkeit des Staats auslösenden - Amtshaftungstatbestand des § 839 BGB i.V. mit Art. 131 WRV ausgenommen.'

32 *Distomo*, §§ 23 *et seq.*, which refers to former Section 7, *Reichsbeamtenhaftungsgesetz*, which has since been amended.

33 *Forced Labour II*, § 24.

34 Court of First Instance in Bonn, *Varvarin*, in NJW (2004) 525, at 526.

35 Court of Appeal in Cologne, *Varvarin*, in NJW (2005) 2860.

was no individual right to compensation based on customary humanitarian law for harm suffered in modern conflicts.³⁶ Cases in which other jurisdictions had admitted such a right³⁷ had not led — so the Court held — to the consolidation (*Verdichtung*) of a new rule of customary law.³⁸ To strengthen its argument, the FCC referred to the decision of the International Court of Justice (ICJ) in *Jurisdictional Immunities of a State*, where the question was explicitly left open.³⁹ The Court further suggested that Article 33(2) of the 2001 International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, meant to exclude the existence of individual rights.⁴⁰

In addition, following the traditional line of reasoning, the FCC held that treaty law only entitled the claimant's home state to post-war reparation. In the Court's view, neither Article 3 of the Fourth Hague Convention of 1907, nor Article 91 of Additional Protocol I,⁴¹ provided for an individual right.

36 Varvarin, §§ 44–51. However, the opposite is assumed by many scholars arguing in favour of the (emerging) existence of such a right by referring to decisions of the ICJ, the Permanent Court of Justice and domestic courts recognizing a right to compensation based on international humanitarian law. See e.g. G. Pinzauti, 'Good Time to Change: Recognizing Individual's Right under the Rules of International Humanitarian Law on the Conduct of Hostilities', in A. Cassese (ed.), *Realizing Utopia* (Oxford University Press, 2012) 571; N. Matthiesen, *Wiedergutmachung für Opfer internationaler bewaffneter Konflikte: Die Rechtsposition des Individuums bei Verletzungen des Humanitären Völkerrechts* (LIT, 2012).

37 See L. Doswald-Beck and J.-M. Henckaerts (eds), *Customary International Humanitarian Law: Vol. I: Rules* (Cambridge University Press, 2005), at 541 *et seq.*

38 Hereby the Court referred inter alia to W. Heintschel von Heinegg, 'Entschädigung für Verletzungen des Humanitären Völkerrechts', in W. Heintschel von Heinegg et al. (eds), *Entschädigung nach bewaffneten Konflikten* (C.F. Müller, 2003) 1, at 25; N. von Woedtke, *Die Verantwortlichkeit Deutschlands für seine Streitkräfte im Auslandseinsatz und die sich daraus ergebenden Schadensersatzansprüche von Einzelpersonen als Opfer deutscher Militärhandlungen* (Duncker & Humblot, 2010), at 290 *et seq.* Yet, the opposite is assumed by an increasing number of scholars, see e.g. C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, 2012).

39 *Jurisdictional Immunities*, § 108 holding: 'The Court need not to rule on whether, as Italy contends, International law confers upon the individual victim of a violation of the law of armed conflict a directly enforceable right to claim compensation.'

40 Varvarin, § 43: 'Zudem hat die Völkerrechtskommission der Vereinten Nationen in Art. 33 Abs. 2 ihres Entwurfs zur Verantwortlichkeit der Staaten für völkerrechtswidrige Handlungen ... in dem sie in der Staatenpraxis bereits geltende Regeln kodifiziert hat, unmittelbar gegen Staaten gerichtete individuelle Ansprüche aus der völkerrechtlichen Verantwortlichkeit der Staaten ausdrücklich ausgeklammert'. Yet, the International Law Commission did not want to claim that individual rights do not exist. To the contrary, the wording of the provision is clear. It specifies that: 'This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'. Art. 33(2) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts does not affect the possibility that individuals or other entities may be entitled to invoke responsibility on their own account. See J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2005), at Art. 33 §§ 3–4.

41 Art. 91 Additional Protocol I, states: 'A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

The FCC did not decide whether, at present, due to the Basic Law and its inner tendency towards humanization, the rules of German governmental liability should be interpreted as applying to sovereign acts in armed conflicts. The conditions for liability were not met on the facts, and accordingly, the Court left the general question of law open.⁴² Instead, the Court referred to the on-going German debate, bearing in mind the increased relevance of the rule of law, which criticizes the traditional approach excluding governmental liability for sovereign acts in times of war.⁴³ This hint was the gateway for a possible shift in the interpretation of German governmental liability law in favour of victims of armed conflict. From a political viewpoint, this move was wise. In doing so, the FCC did not settle the debate once and for all by rejecting liability, but rather opened the door for further developments. In *Kunduz*, the Court in Bonn walked through this door.

3. The ‘Kunduz Affair’ — Facets, Contentions and Reactions

A series of commissions investigated the Kunduz bombing on behalf of the United Nations Assistance Mission in Afghanistan (UNAMA), International Security Assistance Force (ISAF), the German Parliament and the International Committee of the Red Cross (ICRC). Nevertheless, it remains unclear what exactly happened before the bombing, what the commander’s motivations for the airstrike were and how many of the victims were civilians. The German Parliamentary Investigation Commission of the Bundestag (PIC) did not reach consensus on the facts. The liberal and conservative parties in power published a majority voting, which was strongly criticized even within their own ranks,⁴⁴ while the opposition published three dissenting opinions. The data was collected and published (if not classified as secret) in

⁴² Varvarin, § 52.

⁴³ For details on that debate, see E. Henn, ‘Amtshaftung am Scheideweg?’ 26 *Journal of International Law of Peace and Armed Conflict (ILPAC)* (2013) 83; C. Raap, ‘Staatshaftungsansprüche im Auslandseinsatz der Bundeswehr?’, *NJW* (2013) 552, at 554; A. Dutta, ‘Amtshaftung wegen Völkerrechtsverstößen bei bewaffneten Auslandseinsätzen deutscher Streitkräfte’, 133 *Archiv des öffentlichen Rechts* (2008), 191, at 209; A. Huhn, *Amtshaftung im bewaffneten Auslandseinsatz: Anwendbarkeit und Leistungsfähigkeit des Amtshaftungsrecht bei Verletzungen des ius in bello* (Lang, 2010); P. Stammeler, *Der Anspruch von Kriegsopfern auf Schadensersatz: Eine Darstellung der völkerrechtlichen Grundlagen sowie der Praxis internationaler Organisationen und verschiedener Staaten zur Anerkennung individueller Wiedergutmachungsansprüche bei Verstößen gegen humanitäres Völkerrecht* (Duncker & Humblot, 2008), at 98 *et seq.*; S. Schmahl, ‘Amtshaftung für Kriegsschäden’, 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2006) 699, at 705.

⁴⁴ It should be noted that even the former Minister of Defence, Volker Rühe, a member of the ruling conservative party, called the majority voting ‘incorrect’ and ‘dirty’ (*unanständig*). See *Frankfurter Allgemeine Zeitung*, 4 July 2011.

October 2011.⁴⁵ For the civil *Kunduz* proceedings, the Court mainly relied on the facts alleged by the parties, which were undisputed between them. The Court also relied on the assessment made by an expert witness and the videos taken from the airplanes. It should be noted that, in order to provide a broader picture, the following description and the assessment of the decision additionally relies on the hearings and other material published in the PIC report.

In the Kunduz region of Afghanistan, early in the evening of 3 September 2009, two NATO fuel trucks previously hijacked by Taliban fighters got stuck on a sandbank of the Kunduz river. Within the next hours, up to 200 individuals appeared on the bank. Inhabitants of surrounding villages summoned by the Taliban started to discharge the petrol into cans.⁴⁶ Meanwhile, an ISAF B1-bomber had localized the immobilized trucks. Due to recent Taliban attacks and the general situation in Kunduz, the military leader of the ISAF Provincial Reconstruction Team (PRT) in that region, the German Colonel Klein assessed that the trucks or the fuel could soon be used against Afghan security personal or ISAF units and thus represented an imminent threat.⁴⁷ Based on that assumption, he requested at 1:00 a.m. that two armed bombers covertly⁴⁸ observe the events on the sandbank.⁴⁹ At 1:30 a.m. the trucks were still stuck. An Afghan human intelligence source, HUMINT,⁵⁰ stated that four Taliban leaders were on site. The informant was, in fact, not on the sandbank.⁵¹ Nevertheless, as the plaintiffs did not contradict this, his presence was taken as undisputed in the Bonn proceedings.⁵² The videos made by the bombers showed approximately 50 to 70 individuals on the sandbank.⁵³ The informant confirmed that they were 'guilty' and/or 'involved'.⁵⁴ The evidence before the Court in Bonn proved that, due to the flying altitude of 4.35 miles/7 kms,⁵⁵ and the motion of the airplane, the videos were blurred and individuals on the ground were portrayed as black spots.⁵⁶ In order to get further information on the operational picture and to alert potential civilians, the pilots suggested several times to Colonel Klein that they reduce their flying altitude and make a 'show of force'. According to his own testimony before the PIC,

45 Report of the German Parliamentary Investigation Committee: Deutscher Bundestag, 17. Wahlperiode, Drucksache 17/7400 (hereinafter 'PIC Report'), available online at <http://dipbt.bundestag.de/extrakt/ba/WP17/394/39492.html> (visited 29 January 2014).

46 This fact is undisputed, *ibid.*, at 176, 216 *passim*. The majority voting from the liberal conservative government claims that the fuel might have been used for the village but could have been foreseen to be reloaded on the truck, see *ibid.*, at 177. The voting of the Social Democrat Party contests the latter, claiming that there was no evidence at all for the fuel to be put back into the trucks once freed, see *ibid.*, at 216.

47 According to his own witness before the PIC see, *ibid.*, at 45.

48 *Ibid.*, at 346.

49 *Ibid.*, at 242.

50 Human intelligence source: informant.

51 PIC Report, at 51, 179, 209.

52 *Kunduz*, § 64.

53 *Ibid.*, § 72.

54 PIC Report, at 56.

55 *Ibid.*, at 230.

56 See also photographs contained within the report, *ibid.*, at 230.

Colonel Klein considered the circumstances a good opportunity to take out the leaders, their 'sympathizers' and 'backers' (*Unterstützer*).⁵⁷ According to his testimony, he acted on the assumption that the individuals standing next to the trucks were part of the operation of the Taliban and that those moving in the area of the sandbank were uninvolved (*Unbeteiligte*) — in his words, what 'others may call civilian'. At 1:40 a.m. he ordered to drop small 500 lb bombs. When the pilots asked whether they should take out the vehicles or the pax (persons), the command centre indicated the pax.⁵⁸

Neither the NATO investigations in the aftermath of the attack nor the PIC identified how many of the approximately 142 (mainly male) victims were civilians.⁵⁹ At any rate, plausible information has been provided by local schools as well as by the UNAMA that 25 to 33 of those killed were children under 15 years.⁶⁰ As a result of an extrajudicial understanding, the Federal Government transferred in August 2010 — labelled as 'humanitarian aid' — 5,000 USD to the 86 families of the victims to personalized Afghan bank accounts set up for this purpose.⁶¹ In case of civilian losses, such ex-gratia payments, aimed at lowering tension in the population, have become a common practice of Western states. Previously, during former incidents Germany had paid from 20,000 to 33,000 USD per victim.⁶² As most families lost their breadwinner in the bombing, 5,000 USD was hardly adequate compensation. Furthermore, Afghan law does not allow women to have independent bank access. As this gender aspect had been ignored, it is most likely that the payments failed to reach the widows.

Regarding the criminal responsibility of Colonel Klein, the investigation undertaken by the German Federal Public Prosecutor (*Generalbundesanwalt*) was terminated in April 2010 with the decision not to indict for want of sufficient grounds to believe that a crime had been committed.⁶³ In the Prosecutor's view, the Colonel had no intention (*dolus directus*) to target civilians.⁶⁴ Although the conduct satisfied the conditions of the *actus reus* of the crime of murder under the German Criminal Code, the prosecutor held that

57 Colonel Klein in his hearing at the PIC, see *ibid.*, at 243, 338 *passim*.

58 *Ibid.*, at 243.

59 The highest number of victims is based on UNAMA figures see *ibid.*, at 384. The dissenting voting of the Social Democrat Party convincingly comes to the conclusion that 23 to 113 of those killed were civilians, see *ibid.*, at 223.

60 *Ibid.*, at 222, 384, *passim*.

61 *Ibid.*, at 296.

62 *Ibid.*

63 The open version of the inquiry, Der Generalbundesanwalt beim Bundesgerichtshof: Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W. wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte, 16 April 2010, is available online at <http://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf> (visited 29 January 2014). For comments, see D. Steiger, W. Kaleck and A. Schüller, 'Tarnen und Täuschen: Die deutschen Strafverfolgungsbehörden und der Fall des Luftangriffs bei Kundus', 43 *Kritische Justiz* (2010) 270; C. von der Groeben, 'Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein', 11 *German Law Journal* (2010) 469.

64 'Generalbundesanwalt: Tötung von Zivilpersonen bei militärischem Angriff', *Neue Zeitschrift für Strafrecht* (2010) 581.

this conduct was justified by the law of non-international armed conflict.⁶⁵ Yet, this assessment was criticized for not having applied the *ex-ante* perspective of a reasonable commander, but instead the subjective perspective of Colonel Klein.⁶⁶ Furthermore, it has been argued that criminal liability for negligent homicide should have been considered.⁶⁷

4. The *Kunduz* Ruling

Afghan civilians filed the first claim in autumn 2011 at the Court in Bonn. The hearings started in March 2013. In December 2013, the Court dismissed the claim. With respect to potential claims under contemporary international law, the Court referred to the previous findings of the FCC. It declared that the claimants could not rely on general customary international law.⁶⁸ It held that, although the development of human rights had led to the acknowledgement of a partial subjectivity of individuals in international law, neither Article 3 of the Hague Convention IV of 1907 nor Article 91 of Additional Protocol I could be interpreted to provide for an individual right to damages.⁶⁹ The major part of the decision then addressed the merits of the claim under German law of governmental liability.⁷⁰

A. Governmental Liability

The plaintiffs claimed a right to compensation under Section 839(2) of the Civil Code and Article 34 of the Basic Law. Under the former, the official, violating an official duty incumbent upon him as against a third party, must compensate the damage caused. It states:

If an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom. If only negligence is imputable to the official, he may be held liable only if the injured party is unable to obtain compensation elsewhere.⁷¹

65 For an indirect analysis, see J. Bäumler and D. Steiger, 'Die Strafrechtliche Verantwortlichkeit deutscher Soldaten bei Auslandseinsätzen', 48 *Archiv des Völkerrechts* (2010) 189.

66 K. Ambos, 'Afghanistan-Einsatz der Bundeswehr und Völkerstrafrecht', *NJW* (2010) 1725, at 1727.

67 Bäumler and Steiger, *supra* note 65, at 221.

68 *Kunduz*, § 45. Without going into the details of German constitutional law, it should be mentioned that the Court also dismissed an individual right based on Art. 25, sentence 2, Basic Law. See *ibid.*, § 44. This constitutional provision declares that general rules of international law constitute rights and duties for the inhabitants of Germany. It therefore cannot apply to Afghan claimants living abroad.

69 *Ibid.*, §§ 40–43.

70 The plaintiffs had not based their claim on other grounds such as the customary claim 'sacrificial encroachment' (*Aufopferungsanspruch*). In *Distomo*, § 28, the FCC had ascertained its non-applicability to acts of German soldiers.

71 Translation by Rau, *supra* note 21, at 710.

However, in order to promote the official's willingness to act for the government, liability principally rests with the public body. Article 34 of the Basic Law reads:

If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.⁷²

Thus, for the plaintiffs in *Kunduz* to succeed, the rules of governmental liability need to apply to acts *in bello*. Furthermore, the German Colonel would need to have — at least — negligently violated an official duty protecting their interests, thereby causing damages.

The Court did not set out the reasons why, in its view, governmental liability applies to sovereign acts *in bello*,⁷³ and did not decide whether the fact that the Colonel acted within the framework of a NATO operation entailed that his conduct was to be attributed to this international organization and not to Germany, as the German government had argued during the proceedings.⁷⁴ A decision of this legal issue was unnecessary, as the Court held that Colonel Klein had not breached his official duty to comply with the pertinent international humanitarian norms,⁷⁵ which, besides protecting public interests, were held by the Court to protect the interests of the individuals concerned (*drittschützende Amtspflicht*).⁷⁶

B. No Breach of an Official Duty — No Violation of International Humanitarian Law

The Court held that the airstrike was carried out within the context of a non-international armed conflict, in which the fighting parties were the Taliban, on the one hand, and the Afghan government assisted by NATO led ISAF forces, on the other hand. Accordingly, the rules of international humanitarian law applied.⁷⁷

⁷² *Ibid.*, at 711.

⁷³ *Kunduz*, § 49.

⁷⁴ *Ibid.*, § 93. However, there are convincing arguments for the prohibition of the state to avoid liability. See Huhn, *supra* note 43, at 32–37. The courts in the Netherlands addressed the problem of attribution in a case ruling on Dutch responsibility for the massacre in Srebrenica. See Gerechtshof's-Gravenhage, Judgment, *Srebrenica* (ECLI:NL:GHSGR:2011:BR 5388), 5 July 2011, §§ 3.7 *et seq.*, available online at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2011:BR 5388> (visited 29 January 2014); on this subject, see also, at the ECtHR, Judgment, *Bosphorus Hava Yollari Turizm v. Ireland*, Appl. No. 45036/98, 30 June 2005; Decision, *Decision as to the Admissibility of Behrami v. France*, Appl. No. 71412/01, 2 May 2007.

⁷⁵ *Kunduz*, §§ 55–92.

⁷⁶ *Ibid.*, §§ 57–59.

⁷⁷ *Ibid.*, § 50 *et seq.*

Regarding the specific requirements for the Taliban to be considered an armed group under Article 1(1) of Additional Protocol II,⁷⁸ the Court made two brief comments. First, the Court explained that a hierarchical organization structure would be unnecessary. It would be rather sufficient that the Taliban were capable of conducting sustained military operations. Second, contrary to the wording of the norm, the requirement of the group's control over a specific territory would be irrelevant within the context of an asymmetric conflict. Due to the employment of modern remote techniques of combat and weapon systems — territorial control would not be a condition *sine qua non* to conduct sustained and concerted military operations.⁷⁹

The Court further held that Germany was bound by the rules regarding the conduct of hostilities and the protection of civilians.⁸⁰ Both Germany and Afghanistan are parties to the Geneva Conventions, which, additionally, encompass customary law. With regard to the Additional Protocols, the Court somewhat surprisingly found that there was no need to decide on the extent to which the Additional Protocols would be binding on state parties, in this case Germany, acting on the territory of a non-member state, Afghanistan, at the material time. Referring to the 1999 United Nations Secretary-General's Bulletin, regarding the observance by United Nations forces of international humanitarian law,⁸¹ and the image (*Selbstverständnis*) of the United Nations, the Court held that Germany, as part of the ISAF mission, was obliged to observe humanitarian law.⁸² Moreover, according to the Court, even if the wording of Additional Protocol I applies only to international conflicts, its rules protecting civilians would also apply to non-international armed conflicts

78 The decision mentions Art. 1(2) Additional Protocol II. It is assumed that this is a typographical error and instead the Court was referring to § 1.

79 Kunduz, § 55: 'Bei den Taliban handelt es sich auch um eine organisierte bewaffnete Gruppe im Sinne von Art. 1 Abs. 2 ZP II. Hierzu bedarf es keiner den Streitkräften ähnlichen hierarchischen Organisationsstruktur. Es genügt vielmehr, dass die Organisation in der Lage ist, anhaltende militärische Operationen zu planen und durchzuführen (vgl. Safferling/Kirsch JA 201081 [82]). Auf das Erfordernis territorialer Kontrolle gemäß Art. 1 Abs. 2 ZP II kommt es hingegen entgegen des Wortlauts nicht an, da in sogenannten asymmetrischen Konflikten die territoriale Besetzung eines bestimmten Gebietes angesichts moderner beweglicher Kampftechniken und Waffensysteme keine notwendige Bedingung für die Fähigkeit zur Durchführung anhaltender, koordinierter Kampfhandlungen darstellt Die Aufständischen Taliban haben anhaltend Anschläge — in den Monaten vor dem streitgegenständlichen Geschehen insbesondere mittels Autobomben — gegen die afghanischen Truppen und die sie unterstützenden ISAF-Verbände verübt.'

80 *Ibid.*, § 52.

81 'Observance by United Nations Forces of International Humanitarian Law', United Nations Secretary-General's Bulletin, UN Doc. ST/SGB/1999/13, 6 August 1999.

82 Kunduz, § 52: 'Nach Überzeugung der Kammer kann jedoch offen bleiben, inwieweit sich auch aus den Regelungen der Zusatzprotokolle eine völkervertragliche oder völkergewohnheitsrechtliche Bindung der Beklagten bei Einsätzen auf dem Gebiet von Staaten ergibt, welche die Zusatzprotokolle noch nicht ratifiziert haben. Die Bindung der Beklagten an die Zusatzprotokolle folgt jedenfalls aus dem Umstand, dass die deutschen Streitkräfte im Rahmen des NATO-geführten ISAF-Einsatzes vor Ort waren. Denn es gehört zum Selbstverständnis der Vereinten Nationen, dass die vom Sicherheitsrat beschlossenen bewaffneten Einsätze von staatlichen Truppenkontingenten — wie der dem Streitgegenstand zugrunde liegenden ISAF-Einsatz in Afghanistan — dem humanitären Völkerrecht unterworfen sind.'

because the protection of the civilian population should not be less in non-international armed conflicts.⁸³ As a result, Germany was bound both by Article 13 of Additional Protocol II and Articles 51 and 57 of Additional Protocol I.⁸⁴ As the intended purpose of these rules is to protect the life of civilians, their observance was an official duty within the meaning of German governmental liability.⁸⁵

The Court held that the Colonel did not breach Article 13(2) of Additional Protocol II. As the plaintiffs did not refute the defendant's allegation that the attack intended to take out the trucks and the insurgents, the Court concluded that the attack could only be intended to take out the trucks and the insurgents.⁸⁶ Colonel Klein was not aware of the presence of civilians on site. Civilians were not the intentional objects of attack. Instead, according to the plaintiffs' pleading, the Colonel sought to attack the trucks and the alleged 'insurgents', who were a legitimate target.

Furthermore, the Court found that Colonel Klein complied with the provisions of Articles 57(1) and (2)(a)(i) of Additional Protocol I.⁸⁷ While conducting the military operation, the Colonel sufficiently observed the necessary caution to spare civilians when clarifying and identifying the target. He did everything feasible to verify if the individuals on the sandbank were not civilians but military targets. The fighters observed the sandbank for 20 minutes. The videos made were transmitted to the command centre and analysed by Colonel Klein and an official trained in the analysis of such records. As the claimants did not refute the defendant's allegation that Colonel Klein asked the HUMINT source seven times to confirm individuals on site were 'insurgents' and not civilians, the Court needed to take this as a fact. Moreover, the video did not give a reason to assume that the information provided by the informant was wrong.⁸⁸ It was impossible to recognize weapons, or the size or the age of the individuals portrayed. Neither the fact that during Ramadan people tend to go out at night, nor the continual, unmilitary coming and going on the sandbank allowed the conclusion that the information provided by the informant had been wrong: an expert witness confirmed that Taliban do not move like a typical army.

Ruling on the assumption that the Colonel did everything feasible to clarify and identify the target and had no reason to expect the individuals on site to be civilians, the Court in Bonn held in a surprisingly short manner that there was no duty for the commander of the PRT to take all feasible precautions in the choice of means and methods to spare civilians as far as possible under

83 *Ibid.*, § 56.

84 *Ibid.*

85 *Ibid.*, §§ 57–59.

86 *Ibid.*, § 60.

87 *Ibid.*, §§ 62–78.

88 *Ibid.*, §§ 65–71.

Articles 57(1) and (2)(a)(ii) of Additional Protocol I.⁸⁹ The Court did not challenge the motives for Colonel Klein choosing smaller bombs, which might have been interpreted to reflect some doubts whether or not civilians may have been present. Instead, the Court held that Colonel Klein had no obligation to do so. Furthermore, in the Court's view the commander did not have a duty to evaluate the proportionality of the attack under Articles 57(1) and (2)(a)(iii) of Additional Protocol I,⁹⁰ or to warn the civilians in the terms of Article 57(2)(c) Additional Protocol I.⁹¹ Accordingly, the pilot's suggestion to visibly fly over the sandbank for a show of force offered no sufficient grounds for the assumption that the individuals on the sandbank were civilians. The fact that many civilians were killed would not be a negligent breach as such, because the legal evaluation needed to be done from an *ex-ante* perspective.⁹² Colonel Klein thus did not breach any rule of international humanitarian law.

C. The Assessment

Concerns may be raised with regard to the applicability and the binding force on Germany of the rules of international humanitarian law applied by the Court. At the material time, the conflict certainly had a non-international character. Yet, Additional Protocol II was not binding upon Germany. Even if the United Nations Bulletin referred to by the Court may allegedly be obligatory for forces of the United Nations,⁹³ the question is Germany's separate liability for acts committed by its armed forces, which are arguably not under the effective control of the United Nations.⁹⁴ A stronger foundation for the Court's — correct — conclusion that German forces are bound by the rules contained in Article 13 of Additional Protocol II and Articles 51 and 57 Additional Protocol I, is that these rules are customary law obligations in

89 Ibid., § 80: 'Der PRT-Kommandeur hat nach dem Sach- und Streitstand zum Zeitpunkt der Angriffsentscheidung einen Lufteinsatz befohlen, bei dem auf der Grundlage ihm vorliegender Informationen nicht von einer Verletzung von Zivilpersonen auszugehen war. Wie dargelegt konnte der PRT Kommandeur nach den ihm vorliegenden Informationen davon ausgehen, dass es sich bei den um die Tanklastwagen versammelten Personen nicht um Zivilbevölkerung handelte. Es bestand daher kein Anlass, bei der Wahl des Angriffsmittels oder der Angriffsmethode eine die Zivilbevölkerung besonders schützende Wahl zu treffen.'

90 Ibid., § 84: 'Nach dem oben Ausgeführten ist der Kommandeur des PRT Kunduz unter Anwendung der erforderlichen Sorgfalt unter Auswertung der ihm vorliegenden Informationen davon ausgegangen, dass keine Zivilpersonen vor Ort sind, so dass mit Verlusten unter der Zivilbevölkerung nicht zu rechnen war. Einer Verhältnismäßigkeitsabwägung zwischen dem zu erwartenden militärischen Erfolg und Verlusten unter der Zivilbevölkerung bedurfte es somit nicht.'

91 Ibid., §§ 86–87: '(a) Gem. Art. 57 Abs. 2 c) ZP I muss Angriffen, durch welche die Zivilbevölkerung in Mitleidenschaft gezogen werden kann, eine wirksame Warnung vorausgehen. (b) Hier musste der PRT-Kommandeur jedoch nach Durchführung der gebotenen Aufklärung nicht von der Anwesenheit von Zivilpersonen am Angriffsziel ausgehen, so dass er eine Warnung der Zivilbevölkerung jedenfalls nicht schuldhaft unterlassen hat.'

92 Ibid., § 81.

93 E. David, *Principes de droit des conflits armés* (Bruylant, 2012), §§ 1.199 et seq.

94 M. Bothe, 'Peacekeeping Forces', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of International Law* (Oxford University Press, 2011), §§ 19–21.

both non-international and international armed conflicts. To this end, the Court could have relied upon the findings of the ICRC's study on customary international humanitarian law.⁹⁵

However, the crucial point of the conclusions of the Court in Bonn is the assumption that Colonel Klein had no reason to expect the individuals to be civilians, given that he had reasonably appraised himself of the circumstances on site. To verify whether Colonel Klein complied with the humanitarian provisions in question, the *ex-ante* perspective of a reasonably well-informed commander in the same circumstances, making reasonable use of the information available, must be applied.⁹⁶ Article 57(2)(a)(i) Additional Protocol I requires that those who plan or decide upon an attack must do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects. Certainly, the level of precaution necessary depends on the specific circumstances of the attack. However, in this case, it has not been sufficiently taken into account that the trucks were stuck and thus were not an imminent threat. It is questionable whether Colonel Klein reasonably apprised himself of the circumstances before ordering the bombing.

First, the informant had been asked about the presence of civilians in a way not meeting the due diligence standards of Articles 51, 57(1) and (2)(a)(i) of Additional Protocol I to spare civilians. The communication with the HUMINT source was limited to the repetitive question whether the persons were all insurgents.⁹⁷ The term 'insurgents', used by NATO, is misleading and blurred. Legitimate targets in non-international armed conflicts are members of sufficiently organized armed groups, who have a continuous combat function.⁹⁸ Assisting in discharging fuel does not imply civilians have changed their status.⁹⁹ As long as the 'continuous combat function' is not ascertained, civilians are not legitimate targets, 'unless and for such time as they directly participate in hostilities'.¹⁰⁰ The events on the sandbank were not hostilities. Due to the factual confusion concerning civilians and insurgents in the region of Kunduz, a reasonable colonel would have asked whether there were children on site and whether adults were armed.¹⁰¹

Second, if Taliban and civilians move in a similar way, there was no reason to conclude that the individuals on site were fighters and not civilians. The pattern of motion was useless to provide any certainty on the characteristics of

95 Doswald-Beck and Henckaerts, *supra* note 37. See also S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012).

96 The standard of a reasonable *ex-ante* observant is used in various norms of international humanitarian law, e.g. Art. 51(5)(b), Art. 57(2)(a)(iii) Additional Protocol I. See also Judgment, *Galić* (IT-98-29-T), Trial Chamber, 5 December 2003, § 58; Ambos, *supra* note 66, at 1727.

97 For details, see PIC Report, at 234.

98 For details, see N. Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law of the ICRC', 872 *International Review of the Red Cross* (2008) 991.

99 See also Steiger et al., *supra* note 63, at 273.

100 See Melzer, *supra* note 98, at 1039.

101 As the plaintiffs did not indicate which facts should be proven by the Colonel, the Court refused to take evidence from the witness. See *Kunduz*, § 95.

those on site. In case of doubt, individuals must be presumed protected against direct attacks.¹⁰² This rule aims at a good faith assessment of all available information.¹⁰³ The fact that the Colonel sought to avoid killing bystanders by choosing smaller bombs also indicates that even Colonel Klein had remaining doubts and thus should have tried to gather further information. Furthermore, it seems that a reasonably well-informed commander, knowing the region of his operation, could have expected that, due to the extreme economic poverty, Ramadan¹⁰⁴ and the ambivalent relationship to the Taliban, villagers were either forced or willing to obtain petrol for private use. According to plausible testimonies this was the case.¹⁰⁵

It is questionable, therefore, whether the Colonel observed the necessary precautions in determining whether or not there may be civilians at the location. The Court should have assessed the observance of the obligations under Articles 57(1), (2)(a)(ii), (a)(iii) and (2)(c) of Additional Protocol I.

It may be added that, independently of *Kunduz*, the problem lies in the standard applied to examine the observance of humanitarian law provisions, that is, whether sovereign acts need to be examined from the officer's subjective perspective, a reasonable *ex-ante* or an objective (*ex-post*) perspective. Certainly, to cope with the necessity of effective warfare, norms of international humanitarian law regulating the conduct of hostilities commonly refer to the *ex-ante* standard of a reasonable commander and the information available to him or her at the time.¹⁰⁶ In an assessment of criminal responsibility under domestic law for crimes committed during an armed conflict, a subjective standard can apply on the *mens rea* level.¹⁰⁷ However, within proceedings on governmental liability, it is arguably necessary to rethink the standard to be applied. In German police law, it is controversial whether the evaluation of the existence of a danger to public safety and order should be made from the subjective perspective of the police officer acting in the moment, from the perspective of the reasonable police officer facing those circumstances (thus, still *ex-ante*) or on the objective (*ex-post*) basis of all information available.¹⁰⁸ In order to address the need to respond to urgent threats to the public safety and order, the general doctrine within police law applies an *ex-ante* perspective on the first level. That is, the level of evaluation of the existence of danger. In order to avoid that individuals — instead of the public — bear the costs for an effective defence against dangers to the public safety, it uses an objective (*ex-post*)

102 Art. 50, § 1, sentence 2, Additional Protocol I; Melzer, *supra* note 98, at 1037 *et seq.* Reluctant on that point see M. Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements', 42 *NYU Journal of International Law and Politics* (2010) 697, at 736.

103 M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers, 1982), at 296.

104 The expert confirmed night activities during Ramadan to be common, see *Kunduz*, § 70.

105 PIC Report, at 85, 336.

106 See *supra* note 96.

107 See e.g. Bäumlér and Steiger, *supra* note 65, at 221.

108 For details, see R. Poscher, *Gefahrenabwehr — Eine dogmatische Rekonstruktion* (Dunker & Humblot, 1999).

perspective on the secondary level. This difference in standards may be justified on the basis that in the first situation, what is at stake is the personal liability of the individual officer and thus public interest in an effective defence against threats to the public safety. While, in the second, what is in question is whether the individual or rather the state should bear the costs of that effective defence when the conduct can be shown, in light of all the known circumstances, to have resulted from an error (whether negligence or not) and giving rise to harm in need of compensation. It would be interesting to draw a similar analogy by adopting an objective standard when resolving compensation cases for acts in armed conflicts.

C. Why Does the Law of Governmental Liability Apply to Sovereign Acts *in bello*?

As the Court in Bonn did not account for the reasons why governmental liability applies to sovereign acts *in bello*, this debate will be further explored at this point. Scholars arguing for the applicability of governmental liability law are led by the rule of law paradigm.¹⁰⁹ In *Varvarin*, the Court in Cologne upheld this approach. The Court observed that the law of war remains useless without sanctions ensuring its enforcement.¹¹⁰ Furthermore, international legal obligations binding upon Germany permeate the domestic legal order through the constitutional openness towards the international legal order (*Völkerrechtsfreundlichkeit des Grundgesetz*).¹¹¹ Hence, developments cannot be ignored, including the increasing protection of the individual through the 1977 Additional Protocols, the (international) prosecution of human rights crimes, as well as the extraterritorial applicability of European Convention on Human Rights.¹¹² The Basic Law, understood as an 'anti-thesis' (*Gegenentwurf*) to the legal perversions of the Nazi regime, places human dignity and fundamental rights at the centre of its order of values. The Basic Law is extraterritorially binding upon German forces and, even if to a modified extent, upon German soldiers of NATO and the United Nations.¹¹³ Ultimately, the Court ruled that, as long as the parliament does not adopt a specific war compensation law,

109 See e.g. Henn, *supra* note 43; Huhn, *supra* note 43; von Woedtke, *supra* note 38.

110 Court of Appeal in Cologne, *Varvarin*, in NJW (2005) 2860, at 2862 (hereinafter 'Court in Cologne, *Varvarin*'): 'Das "ius in bello" zu beachten, ist staatliche Verpflichtung, denn es dient gerade dem Zweck, an Stelle der eigentlich geltenden staatlichen und zwischenstaatlichen Rechtsordnungen seine Wirkungen zu entfalten und beansprucht eben zu diesem Zweck Geltung. Soweit in Kriegszeiten diese Regelungen Geltung beanspruchen, bedürfen sie aber auch der Sanktion, um ihre Wirksamkeit zu entfalten, denn ansonsten würden sie die Gefahr in sich tragen, leer zu laufen.'

111 *Ibid.*, at 2863.

112 Judgment, *Bancović and Others v. Belgium and Others*, Appl. No. 52207/99, 12 December 2001; Judgment, *Al-Skeini v. the United Kingdom*, Appl. No. 55721/07, 7 July 2011; Decision, *Al-Jedda v. the United Kingdom*, Appl. No. 27021/08, 7 July 2011.

113 V. Epping, 'Art. 87a GG', in V. Epping and C. Hillgruber (eds), *Beck'scher Online-Kommentar GG* (19th edn., Beck, 2013), at § 36; Huhn, *supra* note 43, at 71–79.

there is no reason to limit governmental liability to normal cases and to exclude damages illicitly and culpably caused in states of emergency during which damages are more likely to occur.¹¹⁴

In Germany, certain scholars,¹¹⁵ reject these arguments on the basis of the so-called ‘political questions doctrine’,¹¹⁶ according to which courts must restrain their jurisdiction with regard to political acts of states. Upholding the theory of exclusivity, this line of reasoning holds that international law exclusively regulates war reparations on the interstate level, so that an individual right to compensation cannot exist in domestic law.¹¹⁷ Furthermore, individual judicial proceedings and compensation overstretch the capacity of domestic courts,¹¹⁸ and hinder the resumption of normal relations between states.¹¹⁹

Yet, with regard to Germany, and indeed the majority of industrialized and wealthy states, these arguments are misleading and seem to be based on, and applicable to, armed conflicts during which states aim(ed) to inflict maximum violence, such as the Second World War.¹²⁰ First, the FCC dismissed the theory of exclusivity in 1996. The reason behind the long-standing acceptance of this theory by the majority of scholars — albeit without legal grounds —¹²¹ was the fear of a financial overload of the post-war German economy. However, in present times, industrialized states generally wage wars outside their borders. Their economy profits rather than suffers from war; damages are limited to singular terrorist acts, if at all. Even in cases involving mass violence, the compensation paid by Germany to 1,665,000 forced labourers amounting to 4.45 billion euros, was feasible. In addition, if the perpetrator state has suffered massive damage, it is — if the state is (re)constructed *post-bellum* — merely a question of time for compensation to be feasible.

Second, in the context of ‘new wars’, there is no longer the risk that the capacity of courts will be overstretched.¹²² *Kunduz* is a good example of this.

114 Court in Cologne, *Varavrin*, at 2862: ‘[Es spricht nichts dafür] die allgemeine Staatshaftung dem Individuum gegenüber auf den “Normalfall” staatlichen Handelns zu beschränken und bei gleichzeitigem Fehlen spezialgesetzlicher Regelungen rechtswidriges und schuldhaftes Handeln des Staates in staatlichen Katastrophenfällen, die besonders schadensgeneigt sein können, grundsätzlich auszuschließen.’ See also Huhn, *supra* note 43, at 45.

115 Raap, *supra* note 43; Féaux de la Croix, *supra* note 26; H. Krieger, ‘Die gerichtliche Kontrolle von militärischen Operationen’, in D. Fleck (ed.), *Rechtsfragen der Terrorismusbekämpfung durch Streitkräfte* (Nomos, 2004) 223. For a comprehensive overview on that discussion, see Stammler, *supra* note 43, with further references.

116 In Germany, the FCC has rejected a wide application of this doctrine. See *Mittelstreckenraketen*, in NJW (1983) 2126. On the other hand, this doctrine has been upheld in the United States. See United States Supreme Court, Judgment, *Baker v. Carr*, 369 U.S. 189, 217 (1992).

117 Raap, *supra* note 43, at 552, with further references.

118 Féaux de la Croix, *supra* note 26; Krieger, *supra* note 115, at 245.

119 Stammler, *supra* note 43, at 143–146.

120 These conflicts are commonly called ‘old wars’. See M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (3rd edn., Cambridge University Press, 2012). The question whether this type of war is indeed new, does not add to the present discussion.

121 Stammler, *supra* note 43, at 96.

122 Henn, *supra* note 43, at 85.

The bombing, with several dozen civilian victims, is the most disastrous modern one involving the GFAF. The first *Kunduz* claim was filed in autumn 2011. The hearings before the Court in Bonn commenced in March 2013 and were completed in December 2013. Furthermore, a factual overload of courts after mass violence such as in civil wars is not an argument against individual compensation. Nowadays war ravaged and low income states launch administrative reparation programmes or set up special tribunals. These transitional justice measures have become a useful tool to avoid a potential overwork of ordinary courts.¹²³

Third, as the *Civitella* case between Germany and Italy has shown, international relations have generally changed. Due to the evolution of human rights, individuals have their own legal position. It is hard to imagine individual proceedings in front of a forum of the perpetrator state to reasonably provoke serious disagreement on the interstate level.¹²⁴ One may even reverse this argument and claim that peace between states, or indeed any other entity, can only exist if individuals, incorporated into the theoretical construct, feel that justice has been done for past wrongs.¹²⁵

Ultimately, if leeway is given to political considerations, it could be argued that providing an individual right to compensation for harm suffered as a result of illegal combat operations creates an asymmetry in systems of mutual collective security, such as NATO,¹²⁶ if other partner states do not provide for such a right. However, this concern is unfounded. Other domestic legal orders, which take a monistic approach to international law, apply international human rights provisions directly, so that Germany will not be the only state providing individual compensation.¹²⁷ As to the extraterritorial application of human rights conventions, limiting war reparations to the political interstate level has become old fashioned.

5. Concluding Remarks

Through the extensive individual compensation measures progressively provided to victims of the Second World War era, Germany has shown that — even in cases of large-scale violations — individualized reparation paid to

123 For practice, pitfalls and further references see K. de Feyter et al. (eds), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Intersentia, 2005); P. Greif, *Handbook of Reparation* (Oxford University Press, 2006).

124 Stämmeler, *supra* note 43, at 145.

125 *Ibid.*, referring to G. Ulrich, 'The Moral Case for Reparations: Three Theses about Reparations for Past Wrongs', 9 *Human Rights in Development Yearbook* (2003) 369.

126 Raap, *supra* note 43, at 552.

127 See e.g. the approach taken in the Netherlands: Gerechtshof's Gravenhage, *The State of the Netherlands v. Hasan Nuhanović* (ECLI:NL:GHSGR:2011:BR 5388), 5 July 2011, available online at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2011:BR 5388> (visited 29 January 2014). This decision was affirmed by the Supreme Court of the Netherlands on 13 September 2013, see, for further information, online at <http://www.internationalcriminedatabase.org/Case/1005/The-Netherlands-v-Nuhanovi%C4%87/> (visited 8 May 2014).

wartime victims is financially feasible. Aside from mandatory considerations under human rights and constitutional law, political fears are exaggerated. Despite that German jurisprudence reaches the conclusion that self-executing norms of international law do not provide for an individual right to compensation, it paved the way for applying general law of governmental liability to violations of international humanitarian law. Accordingly, the *Kunduz* case represents a step forward to a depoliticized and individualized approach to illicit damages caused during armed conflict. Even if the claim of the plaintiffs was not upheld *in concreto* at first instance, the ruling may set a precedent for applying general law on governmental liability to sovereign acts *in bello*, in circumstances of denial of responsibility by the government.

Traditionally, it was domestic law that had a positive overflow onto international law. *Kunduz* exemplifies that there is a — albeit parallel — counter movement in which international law influences domestic law.¹²⁸ The interaction of international humanitarian law and human rights may influence domestic legal orders leading to states providing for compensation on the basis of domestic law. With regard to compensation for war victims and due to the recent developments towards an extraterritorial application of human rights conventions, member states of the European Court of Human Rights and the Inter-American Court of Human Rights may ultimately be held responsible by the competent treaty bodies to award damages.¹²⁹ From a democratic perspective, this trend of courts assuming both a power limiting and legislative function has been harshly criticized by Wendy Brown.¹³⁰ According to Brown, this is close to ‘governance by courts’, which subverts democracy. However, when applied to the compensation of victims of war, this critique may be inadequate. The ruling majority in power will not protect the interests of minorities and those who, although being outside of the democratic process, are affected by sovereign acts. Democratic power must be counter balanced by guardians of the rule of law. The traditional discourse on refusing governmental liability to acts *in bello*, reasoning that war compensations pertain to the realm of politics and not to the realm of law, sophisticates law and politics. Whether the approach taken in *Kunduz* to reparations for damages caused during armed conflict will cross-fertilize other jurisdictions remains to be seen.¹³¹ At any rate,

128 For a new perspective on the authority of international law within domestic legal systems, see M. Moran, ‘Shifting Boundaries: The Authority of International Law’, in J.E. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007) 134, at 163–190.

129 Judgment, *Al-Skeini*, *supra* note 112; Judgment, *Al-Jedda*, *supra* note 112; D. Cassel, ‘The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights’, in De Feyter et al., *supra* note 123, 191.

130 W. Brown, ‘We are All Democrats Now...’, in G. Agamben et al. (eds), *Democracy in What State?* (Columbia University Press, 2011) 44, at 50.

131 Cross-fertilization seems unlikely in the on-going debate in the United Kingdom on the extent to which the ECtHR should be able to influence national politics. For an example within that debate, see M. O’Boyle, ‘Electoral Disputes and the ECHR: An Overview’, 30 *Human Rights Law Journal* (2009–2010) 1. For the theoretical problem of a potential irreconcilability of the British political constitutionalism, the Human Rights Act and the ECHR, see R. Bellamy,

Kunduz has jolted the political question doctrine. As the legal assessment made by the Bonn Court allows room for critique, the decision of the Cologne Court is eagerly awaited.

'Political constitutionalism and the Human Rights Act', 9 *International Journal of Constitutional Law* (2011) 86.