YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 19, 2016
CORRESPONDENTS' REPORTS

GERMANY[1]

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The Higher Regional Court of Frankfurt sentenced a German national to 2 years' imprisonment for war crimes he committed in Syria between March and April 2014. As a member of an armed group, the accused participated in an attack against a Syrian Army checkpoint, which led to the deaths of at least two Syrian soldiers. The soldiers were beheaded and their heads were speared on metal poles. Photos of the accused posing in front of them were uploaded onto Facebook. The Court found the accused guilty of treating a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner contrary to Art 8 (1) no 9 of the German Code of Crimes against International Law ('CCAIL'). In the Court's opinion, the prohibition on humiliating and degrading treatment aims to protect the dignity of a person, which prevails beyond death. Therefore, acts of humiliating and degrading treatment towards dead persons are also covered by Art 8 (1) no 9 CCAIL. The Court held that this was in accordance with customary international law and set out the following arguments. Firstly, the Court found that the literal meaning of the term 'person' encompasses living as well as dead persons. Secondly, the Court found that 124 states had declared that degrading treatment of dead persons is a crime in international and non-international armed conflict. The Court pointed to the inclusion of a footnote in the Elements of Crimes of the ICC Statute, which states that the meaning of 'person' in the context of the war crime of committing outrages upon personal dignity includes dead persons. Moreover, according to the Court, international humanitarian law aims to protect the dead to a certain extent, which can be derived from Art 8 of the Second Additional Protocol. This rule stipulates that the parties to the conflict shall take measures to search for the dead, prevent their being despoiled, and dispose of them decently. Citing Rule 113 of the ICRC customary law study which repeats the aforementioned obligation, the Court goes on to examine the jurisprudence of the ICTY and the ICTR, which it found reflected that degrading treatment of the dead is criminally prohibited under international law. According to the Court, the Trial Chamber of the ICTY decided in the *Brđanin* case that the treatment with disrespect, mutilating or burying of corpses in mass graves or reburying them constitutes

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humiliating treatment. Furthermore, the ICTR in an interim decision in the *Bagosora* case decided that burying corpses in latrine pits constitutes humiliating treatment.

Considering the specific fact of the case the Court found that 'treatment' does not require physical interference. Rather, (orally) insulting a person might suffice, as the ICTY found in the *Kvočka* and the *Brđanin* case. The findings of the ICTY in the *Kunarac* case and the findings of the ICTR in the *Akayesu* case also support the view that degrading or humiliating treatment does not require physical interference with the victim. However, the Court emphasised that international and domestic law only prohibits degrading treatment that reaches a certain level of gravity. Whether this threshold is reached must be judged from the objective perspective of a reasonable person. Nevertheless, the cultural background of the victim can be taken into account. In conclusion, the Court found that posing with speared heads generally and transculturally is considered severe humiliating treatment.

The Court itself as well as the Federal Court of Germany confirmed this interpretation of the crime of degrading treatment of protected persons in the context of a different case also decided in 2016. Those decisions dealt with the case of a 30-year-old German national who travelled to Syria in September 2013, joined the Islamic State and directly participated in hostilities in the east of Aleppo. During an operation in November 2013, the accused and four other fighters found the corpse of a Syrian soldier. While filming, they cut of the soldier's nose and ears and kicked and shot his face until brain mass leaked out of his head. In the video one can hear the accused screaming: 'cut him off his ears!', 'off his nose!', 'go to hell, go to hell…Allahu Akbar…Allahu Akbar.' Laughing scornfully he screamed: 'go to hell you son of a bitch!' and kicked the soldiers face. Then the video shows the accused speaking the Muslim creed. The video was published online.

When the accused returned to Germany he was charged with membership in a terrorist organisation, violation of the law concerning the control of war weapons and war crimes pursuant to Art 8 (1) no 9 CCAIL. He was taken into pre-trial detention. On 8 September 2016, the Federal Court had to decide on a complaint filed against the arrest warrant by the accused. The Federal Court, like the Court in the aforementioned decision, found that Art. 8 (1) no 9 CCAIL aims to protect the dignity of a person, which prevails beyond death.

On the 8 November 2016 the Court sentenced the accused for membership in a terrorist organisation, violations of the law concerning the control of war weapons and grave degrading and humiliating treatment to eight years and six months' imprisonment.

Cases – Individual right to reparations for war damages under international law and German state liability law; ex-ante perspective of the commander and violations of international humanitarian law

☛ Appeal III ZR 140/15 (German Federal Court, 6 October 2016)

The Federal Court ('the Court') decided on an appeal of a decision of the Higher Regional Court of Cologne from 30 April 2015, which rejected a claim for reparations of a father who lost two sons, and a women who lost her husband during an air strike by German armed forces in Kunduz, Afghanistan on 4 September 2009.[2]

In regards to international law, the Court confirmed the long-standing jurisprudence of German Courts that a right to reparations of individuals for war damages cannot be derived neither from Art 3 of the *Hague Convention (IV) Respecting the Laws and Custom of War on Land* nor from Art 91 of the *First Additional Protocol to the Geneva Conventions*. In the

[2] Correspondents Report – Germany (2015) 18 *YIHL*, 2.

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Court's view, only states enjoy the secondary right to reparations for violations of international (humanitarian) law.

In terms of domestic law, the decision is particularly interesting because the Court answers the question whether an individual has the right to seek compensation based on state liability according to § 839 of the German Civil Code in conjunction with Art 34 of the German Constitution for illegal actions by German soldiers during armed conflict. In the past, this question has always been left open by the Court, as one of the highest Courts in Germany, as well as by the German Constitutional Court. Though in 2005 the Higher Regional Court of Cologne had found that the claim according to § 839 of the German Civil Code in conjunction with Art 34 of the German Constitution is generally applicable to actions during armed conflict, the Court now explicitly rejected such a claim.

The Court justified its view with the historical background of the right to reparation under German state liability law as well as its subsequent development. According to the Court § 839 of the German Civil Code in conjunction Art 34 of the German Constitution was never intended to apply to actions by German soldiers in armed conflict abroad, as at the time of their enactment, the legislators could not foresee that Germany would be engaging in combat actions in foreign states. While highlighting the principle of the separation of powers, the Court, by citing specific laws, showed that the development of the German law of state liability up to today does not show the intention of the legislators to expand its applicability to war damages. Even though the Court holds the opinion that the literal wording of § 839 of the German Civil Code and Art 34 of the German Constitution does not exclude such an interpretation, it concluded that it lacked jurisdiction to declare their applicability to actions of German forces abroad against the presumed will of the legislature.

The Court went on to consider systematic aspects of German law as well as international law and the relationship between them. According to the Court, the regime for reparations of illegal action by states under international humanitarian law, as a law specifically dealing with the exceptional situation of armed conflict, is *lex specialis* with respect to domestic laws of state liability. The Court emphasised again that international humanitarian law does not provide a right of the individual to seek reparations for war damages and therefore saw no imperative reason to provide such a claim under German law. In its opinion, a right to reparation as an additional national mechanism to enforce international humanitarian law is not needed, because modern human rights law as well as international and domestic criminal law provide a sufficient level of protection and enforcement.

Considering systematic aspects of national law, the Court found that the rejection of a right to reparations of the individual for war damages is in accordance with the principle of human dignity and the principle of international cooperation enshrined in the German Constitution. The latter does not stipulates a principle according to which every violation of human rights must trigger a right to reparation.

Lastly, the Court rejected the applicability of the German state liability law to war damages because of the risk of an unlimited liability. § 830 of the Civil Code provides a joint liability for actions of adding, abetting and accessory. Therefore, in the Court's view a claim under § 839 of the German Civil Code in conjunction with Art 34 of the German Constitution for war damages bears the risk that violations committed by other states with which Germany is executing joint operations might be attributable to Germany. Domestic courts would have to evaluate the lawfulness of an act of organs of another state, which would be a transgression of their competence. Furthermore, the Court underlines the risk of an unlimited liability, as the dimension of liability for future operations abroad cannot be estimated. The possible impact on the public budget is unpredictable in the Court's opinion. Emphasising again the principle of separation of powers, the Court closed its argument stating that in the German

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legal system and pursuant to the jurisprudence of the Constitutional Court the parliament – not organs of the judicial power – has to decide over question that might have an extreme and unpredictable impact on the public budget.

It is highly unlikely that the German legislature will take action, because the German government has always rejected a right of the individual for war damages under German state liability law.[3]

Even though the Court rejected the applicability of the claim under § 839 of the German Civil Code in conjunction with Art 34 of the German Constitution, it went on to examine whether its requirements would have been met, that is whether the airstrike in question violated international humanitarian law. The Court confirmed the view of the Higher Court of Cologne that the aerial attack was in accordance with the laws of war. It highlighted that the question whether a commander acted in accordance with his/her obligations under Art 51 and Art 57 of the First Additional Protocol cannot be evaluated from an *ex-post* perspective. Rather the ex-ante view of the commander in charge is the decisive factor.

Having decided that the claim under state liability law is inapplicable and its requirements are not met, the Court unfortunately explicitly left open the question whether the Republic of Germany is responsible and liable for war damages that were caused in context of an operation under NATO leadership.

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

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

The Higher Regional Court of Stuttgart sentenced the former president of the rebel group 'Forces Démocratiques de Libération du Rwanda (FDLR)', who had lived in Germany for 20 years, to 13 years of imprisonment for being a ring leader in a foreign terrorist organisation and aiding and abetting war crimes in the Democratic Republic of Congo. Specifically, the accused was found guilty of aiding and abetting the killing and hostage-taking of persons who are to be protected under international humanitarian law (Art 8 (1) and (2) CCAIL) and extensively destroying property of the adverse party, which is in the perpetrator's power, without being justified by military necessity (Art 9 (1) CCAIL).

The Court found that the civilians in the different villages that were attacked were protected persons under international humanitarian law. The requirement of being in the power of the adverse party must be interpreted in a broad sense and aims to distinguish between the crimes concerning the use of prohibited methods of warfare, like wilfully directing attacks against the civilian population on the one hand, and crimes against protected persons on the other hand. When the killings took place the members of the FDLR entered the villages and houses of the victims, who therefore had no possibility to flee or defend themselves and thus, were in the power of the FDLR.

According to the Court, the war crimes committed cannot be justified on the basis that soldiers of the adverse party stayed together with civilians in the villages that were attacked. It was common practice that the soldiers lived with their families and the Court found no indications that the civilians were used as human shields. Even if they were used to shield the adverse fighters, the members of FDLR would have violated international humanitarian law in the Court's view, as they did not distinguish between soldiers or persons directly participating in hostilities and civilians. The Court rejected the justification of some witnesses that the ammunition could not distinguish between civilians and combatants with the

[3] Correspondents Report – Germany (2015) 18 *YIHL*, 4.

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argument that it is the obligation of the person firing the shots and not the ammunition to act in accordance with the principle of distinction. In addition, the Court found that the members of the FDLR knew that civilians were present in the villages they attacked, because of their observation missions beforehand. But they did not take any precautionary measures to protect the civilian population and therefore, violated international humanitarian law.

The Court went on considering the fact that some inhabitants of the village Busurungi and Mianga might have participated in attacks against member of the FDLR or Rwandan refugees, which took place days before the fighting in question. In the Court´s opinion the inhabitants were no legitimate military targets as they were not participating in hostilities in the moment the FDLR attacked and were not members of an organised armed group. Thus, they enjoyed the protection of civilians. Furthermore, the Court found that civilians who (sporadically) provide food and shelter for adverse soldiers do not lose their protection under international humanitarian law. Moreover, the Court rejected the qualification of the civilians killed as lawful collateral damage. In the Court's view, the members of the FDLR directed attacks wilfully against them and considered them enemies. The rules of international humanitarian law concerning collateral damage were not applicable in those circumstances.

With regard to the question whether the crimes committed constitute crimes against humanity according to Art 7 CCAIL, the Court found that it was not the primary aim of the operations of the FDLR to attack civilians. Moreover, the crimes were not committed in furtherance of a state or organisational policy. Therefore, there was no widespread or systematic attack directed against any civilian population.

The Court went on to assess the mode of responsibility of the accused. It rejected his responsibility as a military commander or superior according to Art 4 CCAIL, because as a political figure in the FDLR he was not in charge of its military forces. He was not exercising command and control in a way that permitted him to prevent the commission of crimes. Furthermore, the Court found that the accused could not be considered an indirect perpetrator who is responsible for the crimes because he controlled the organisation and did not take action to prevent the commission of the crimes (Sec 25 (1) 1 of the German Criminal Code). At the times of the attacks in question there were no meetings of the *Comité Directeur*, which was the political organ leading the FDLR and which the accused was a member of, because their members were fleeing the Democratic Republic of the Congo Thus, the accused had no possibility to influence the actions of the military forces of the FDLR and prevent the crimes committed. In addition, the accused could neither be held accountable for mistakenly thinking he was the military commander (ineffectual attempt to commit a crime). The latter is a special mode of criminal responsibility under German criminal law. The Court found no evidence that the accused mistakenly thought he commanded the FDLR military forces.

In the Court's view, the accused aided and abetted the commission of war crimes through providing the military forces of the FDLR with telephone cards and other communication accessories, and by his propaganda efforts. Particularly, the fact that the accused publically denied the commissions of war crimes by FDLR forces decreased the possibility of an intervention of the international community and therefore, increased the likelihood that more crimes were committed.

Government Policy – Building a rail line in occupied territory and revocation of the right of residence as violations of the Fourth Geneva Convention

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☛ Government Response to Parliamentary Questions concerning the situation in Israel and Palestine, 22 March 2016

The Government answered several questions concerning the wave of violence which erupted in Israel and Palestine in 2015. By stating that it does not deal with hypothetical questions, the Government avoided answering the question of whether it shares the opinion that the construction of a rail line by Israel which is partly situated on the occupied territories and is only accessible to Israeli nationals constituted a violation of the Fourth Geneva Convention. Regarding the question of whether the plans of the Israeli Government to set aside the residence status of Palestinians in East Jerusalem is in accordance with the Fourth Geneva Convention, the Government answered that under international law of occupation the resident population generally has and keeps its right of residence in the occupied territory. However, depending on the circumstance of the case in question the occupying power might legally withdraw a residence status in order to fulfil its duty to maintain public order and safety.

Government Policy – Use of armed drones or strike-enabled unmanned aerial vehicles

☛ Government Response to Parliamentary Questions concerning the government's policy with regard to armed drones, 21 November 2016

In October 2016, the Government signed the Joint Declaration for the Export and Subsequent Use of Armed or Strike-Enabled Unmanned Aerial Vehicles. The Government emphasised that the use of armed force by unmanned aerial vehicles is subjected to international humanitarian law like any other use of weapons. In the Government's opinion the use of armed drones cannot be used for ordinary criminal prosecution.

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